



REPUBLIC OF KENYA

IN THE COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 213 OF 2019

EXOBI (FINANCE HOUSE) LIMITED.....PLAINTIFF

-VERSUS-

ZAHID A. A. NANJI.....1ST DEFENDANT

FIROZ AKBARALI G. NANJI.....2ND DEFENDANT

UNITED HOUSING ESTATE LIMITED.....3RD DEFENDANT

RULING

By Certificate of Urgency Application dated 27th August 2019, filed with Chamber Summons and Notice of Motion on 28th August 2019, where the Plaintiff urged the court to hear their matter on priority basis on grounds;

a. That the 3rd Defendant Company is being run exclusively by the two surviving directors i.e 1st and 2nd Defendants herein, to the exclusion of the Plaintiff Company and the Estate of Amiralali Akbarali G. Nanji (“Amiralali”) who died on 13th May 2017. In effect, the Company is run by two directors, one a non-shareholder and the other holding 7,500 shares (25%) while the Plaintiff who holds 15,000 shares (50%) has been completely shut out.

b. That the Plaintiff has established that the 1st and 2nd Defendants have embarked on a calculated scheme aimed at the diminution of the shares of the Plaintiff and thus seize complete control of the Company.

c. That there is reasonable apprehension that since the death of Amiralali, 1st and 2nd Defendants have disposed of the assets of Company at a gross under value as evidenced by the disposal of shares in Adams Brown & Company Limited at **Ksh 596,838.15** in 2018 without prior valuation and which is not in the Company’s interest.

d. That the Plaintiff has since established that the 1st and 2nd Defendants have illegally purported to transmit, issue and/or allot the ordinary shares of the Company to themselves and for their sole benefit. The transfer/transmission of shares is with a clear intention to increase the issued shares in the 3rd Defendant Company to themselves so as to illegally increase the 2nd Defendant’s shareholding to make him become the largest shareholder. Also, while introducing the 1st Defendant as a shareholder and director in the 3rd Defendant.

e. The Plaintiff is apprehensive that unless this Court urgently intervenes and issues the orders sought in the Application filed herewith forthwith, the 1st and 2nd Defendants will continue to breach their fiduciary duties owed to the Company and its shareholders in general and thereby cause irreparable harm to the Plaintiff.

In the Chamber Summons, brought **under Rule 3(2)** of the **High Court (Practice and Procedure) Rules**; the Plaintiff/Applicant sought orders;

a. That the annexed Application seeking injunction relief against the 1st and 2nd Defendants as well as an order appointing a Receiver

to manage and preserve all the assets of the 3rd Defendant, be certified as urgent and heard during the August 2019 Vacation of the Court.

The Chamber Summons was based on grounds;

a. The Plaintiff was the largest shareholder in the 3rd Defendant Company, holding some 15,000 (**50%**) ordinary shares while the late Amirali Akbarali G. Nanji (“Amirali”) who died on 13th May 2017 held 7,000 shares (**25%**). However, since Amirali’s death, the 3rd Defendant Company has been run exclusively by the two surviving directors i.e the 1st and 2nd Defendants herein, to the exclusion of the Plaintiff and Amirali’s estate.

b. That in effect the 3rd Defendant Company was run by two directors, one a non-shareholder and the other holding 7,500 shares (25%). The Plaintiff who holds 15,000 shares (50%) had been completely shut out. The Plaintiff had not received any communication of any nature from the Respondents in relation to the operations and management of the Company. The Company’s auditor, Ernst & Young, also ignored requests for audited financial statements by the Plaintiff. The 2017 Audited Financial Statements were sent to the Plaintiff’s agent, James Cowper, Kreston Reading Bridge House, George Street Reading RG1 8LS United Kingdom who then shared the information with the Applicant.

c. That dissatisfied with the state of affairs, the Plaintiff instituted proceedings before this Court i.e Commercial Misc. Civil Application ***No. E 215 of 2019 Exobi (Finance House) Limited vs Zahid Nanji & Firoz Akbaralji Nanji*** (“the 1st Proceedings”), for a Special General Meeting of the Company to be held as more particularly set out therein

d. That the contents of the Replying Affidavit of the 1st and 2nd Defendants belatedly filed in the 1st Proceedings on both his behalf as well as on behalf of the 2nd Defendant herein, confirmed the Plaintiff’s worst fears that following the demise of the said Amirali Akbarali G. Nanji, **the 1st and 2nd Defendants embarked on a calculated scheme aimed at the diminution of the shares of the Plaintiff to enable them seize complete control of the 3rd Defendant.**

e. That since the death of Amirali, the 1st and 2nd Defendants have disposed of the assets of Company at a gross under value as evidenced by the disposal of shares in Adam Brown & Company Limited at Ksh 596,838.15 in 2018 without prior valuation and which is inimical to the Company’s interest.

f. That the Plaintiff has further established, glaring irregularities in the minutes of the annual general meetings (“AGM”) of the 3rd Defendant as presented by the 1st and 2nd Defendants in the 1st proceedings **including the fact that the late Amirali Akbarali G. Nanji could not have attended the AGM allegedly held on 16th December 2016 as he was out of the country in India Between 6th December and 24th December 2016.**

g. That the Plaintiff has further established that, at a meeting of the 3rd Defendant’s **Board of Directors held on 12th July, 2018**, the 1st and 2nd Defendants illegally purported to transmit, issue and/or allot the ordinary shares of the Company to themselves and for their sole benefit with **a clear intention to increase the issued shares in the 3rd Defendant to themselves so as to illegally increase the 2nd Defendant’s shareholding to make him become the largest shareholder** while introducing the 1st Defendant as a shareholder and director in the 3rd Defendant in violation of both the Companies Act and the 3rd Defendant’s Memorandum and Articles of Association thereby breaching their fiduciary duty as directors owed to the Company and the shareholders in general.

In the Notice of Motion brought under the provisions of **Section 1A, 1B, and 3A of the Civil Procedure Act, Order 40 Rule 1, Order 41 Rule 1 and 2, order 51 Rule 1 of the Civil Procedure Rules** and All other enabling provisions of the law, the Applicant/Plaintiff sought orders;

a. That pending hearing and determination of this Application and /or suit *inter partes*:-

i. A temporary injunction be issued to restrain the 1st and 2nd Defendants, through themselves or through their agents, servants and/or employees from proceedings with and/or effecting the transmission, allotments, issuance, registration and/or in any other manner whatsoever dealing with the unallotted shares of United Estate Limited.

ii. A *mareva* (freezing) injunction restraining and/or barring the 1st, 2nd and 3rd Defendant either by each one of them or jointly, or whether by themselves, their employees, servants, agents or nominees or any other person claiming through them from disposing, assigning, diminishing, transferring, alienating or otherwise dealing in any manner whatsoever with any of the 3rd Defendant’s bank accounts or assets in Kenya save for the conduct of the 3rd Defendant’s ordinary course of business.

b. That pending hearing and determination of this suit, an Order be issued appointing Mr. Poanangipalli Ventata Ramana Rao T/A Tact Consultancy Services, as a Receiver to manage and preserve all the assets of the 3rd Defendant and do hereby confer upon the Receiver all such powers as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the 3rd Defendant’s assets, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents.

The Application was based on the grounds;

a. The Plaintiff was the largest shareholder in the 3rd Defendant Company, holding some 15,000 (50%) ordinary shares while the late Amirali Akbarali G. Nanji (“Amirali”) who died on 13th May 2017 held 7,000 shares (25%). However, since Amirali’s death, the 3rd Defendant Company has been run exclusively by the two surviving directors i.e the 1st and 2nd Defendants herein, to the exclusion of the Plaintiff and Amirali’s estate.

b. The Company’s auditor, Ernst & Young, also ignored requests for audited financial statements by the Plaintiff. The 2017 Audited Financial Statements were sent to the Plaintiff’s agent, James Cowper, Kreston Reading Bridge House, George Street Reading RG1 8LS United Kingdom who then shared the information with the Applicant.

REPLYING AFFIDAVIT

The Application is opposed vide an Affidavit dated 8th November 2019, sworn by Firoz Akbarali Gulamhussien Nanji the 2nd Defendant/Respondent herein who is Director and shareholder of the 3rd Respondent Company. He affirmed that he had authority of his co-director in the Company who is also his co-Respondent in this instant suit – the 1st Respondent herein (**Zahid A. A. Nanji**) to swear this affidavit on his behalf in opposition to the Application.

He stated that the Company had been in existence for more than fifty (50) years having been incorporated in Kenya on 14th June 1967. A copy of the Company’s Certificate of incorporation is marked as “FN2”.

He averred that the promoters of the Company (and later, after incorporation, the first directors of the Company) were the 2nd Respondent’s father, Akbarali Gulamhussein Nanji and his Late uncle Sultanali Gulamhussein Nanji (**“the Promoters”**).

That the 2nd Respondent became Director of the Company on 25th February 1972 and the 1st Respondent become director on 7th January 2000 and prior to becoming Directors they were working for the Company as its employees. The 2nd Respondent stated working for the Company in 1970 whereas the 1st Respondent started working for the Company in the year 1997.

That he was aware that the Applicant through the application, sought, on the main and pending the hearing of the main suit herein, to have this Court;

- a. Restrain the 2nd Respondent and his co-director- the 1st Respondent herein, from proceeding with the transmission, allotment, issuance and/or registration of alleged unallotted shares of the Company;
- b. Issue a *mareva* (freezing) injunction as against the bank accounts of the Company in respect of all operations thereof save for the conduct of the 3rd Defendant’s ordinary course of business; and
- c. Issue an order appointing one Ponangipalli Venkata Ramana Rao T/A Tact Consultancy Services as a Receiver to manage and preserve all the assets of the Company as well as have said Receiver authorized to institute and defend suits, realize, manage, protect, preserve and improve the Company’s assets, to collect and apply rent due to the Company and execution of documents on behalf of the Company.

That on a preliminary basis and on the advice from the Respondent’s advocates on record the 2nd Respondent was aware that at this stage of the proceedings, to wit; the stage where prayers for interlocutory prohibitory injunctive orders, interlocutory mandatory injunctive orders and a *mareva* injunction were sought, the duty of this Court is not to engage in a minute and protracted interrogation of the merits and demerits of the case.

That the 2nd Respondent believed that the merits of the issues in this instant suit were best adjudicated upon at the hearing of the main suit where witnesses would be called to support and/or rebut the allegations by the Plaintiff/Applicant.

That the Applicant had not met the criteria necessary to merit the grant of the said orders as expounded on below. Therefore, the instant application is liable to be dismissed or struck out *in limine* for the reason that the deponent of the Supporting Affidavit failed to demonstrate that it had the authority of the Applicant Company to swear the said supporting affidavit.

Similarly, that this instant suit should be struck out or dismissed for being *sub judice* as another suit was filed before this Court, to wit, **HC Misc. No. E215 of 2019 Exobi (Finance House) Limited –Vs– Zahid A. A. Nanji & Firoz Akbarali G. Nanji** (“the E215 suit”)

The 2nd Respondent asserted that the impugned approach by the Applicant Company was contrary to express provisions of its Articles of Association as read together with the relevant applicable laws.

That the apparent failure to demonstrate the said authority the Applicant Company was made more pertinent to the issues at hand when it was realized that the 2nd Respondent was a 50% shareholder in the Applicant Company. A true copy of the Applicant Company’s Articles of Association as well as its certificate of incorporation is marked as “FN4”

That the Company’s audited account for the year 2018, showed that the Company’s assets totalled to Kenya Shillings Two Billion Twenty-Three Million Three Hundred and Forty Thousand One Hundred and Eighteen (Ksh 2,023,340,118/-); which amount was also the Company’s total net equity as at the year 2018.

That the 2nd Respondent made a table setting out the rise in profits and equity of the Company over a span of thirty (30) years as shown below;

YEAR	NET PROFIT (Kshs.)	Equity (Kshs.)
1978	830,195	6,532,153
1979	2,436,278	8,570,236
2014		954,877,846
2015	293,791,934	1,257,376,297
2016	46,764,987	1,306,759,190
2017	111,772,544	1,424,122,285
2018	528,555,901	2,023,340,118

The above figures were drawn from the Company's own audited accounts. A copy of the Applicant Company's audited accounts for the years 1979, 2016, 2017 and 2018 is marked as "FN5".

That according to the averments of the 2nd Defendant, it was manifestly clear that the Company which was worth Ksh 50,000 in the year 1967 was now in excess of Kenya Shillings Two Billion (**Ksh 2,000,000,000**).

He stated that the Applicant itself had been a direct beneficiary of the growth by the Company and was receiving dividends of substantial amounts *vis- a-vis* its investment of Kshs 300,000 (for the purchase of 15,000 shares) in 1970.

He stated that it was worthy to note that the following years in which dividends were paid to the Applicant (years have been picked at random and are not exhaustive in so far as when divided were paid):

- a. In the year 1975, the Applicant received a net dividend of Ksh 12,991.55 and which dividend was sent to the Applicant through their agent and then Accountants/Auditors – Cook, Sutton & Company; a copy of a letter from Cook, Sutton & Company dated 5th September 1975 confirming the foregoing is marked "FN6"
- b. In the year 1984, the Applicant received a net dividend of £ 591.56 and which dividend was sent to the Applicant through their agent and then Accountants/Auditors – Cook, Sutton & Company; a copy of a letter from Cook, Sutton & Company dated 24th October 1984 confirming the foregoing is marked "FN7"
- c. In the year 1986, the Applicant received a net dividend of £ 447.54 and which dividend was sent to the Applicant through their agent and then Accountants/Auditors - Cook, Sutton & Company; a copy of a letter from Cook, Sutton & Company dated 29th July 1986 confirming the foregoing is marked "FN8"
- d. In the year 1998, the Applicant received a net dividend of £ 15,494.97 (Kshs. 1,619,999) and which dividend was sent to the Applicant through their agent and then Accountants/Auditors- James & Cowper; a copy of a letter to James & Cowper dated 27th May 1998, a bank draft of £15,494.97, and other documentation confirming the foregoing marked as "FN9".
- e. In the year 1999, the Applicant received a net dividend of £ 14,304.63 (**Kshs.1,619,999.35**) and which dividends was sent to the Applicant through their agent and then Accountants/Auditors – James & Cowper; a bundle marked as "FN10" is copy of a letter of James & Cowper dated 25th May 1999, a bank draft of £ 14,304.63, a dividend notice in the amount of Kshs. 1,620,000 and other documentation confirming the foregoing.
- f. In the year 2001, the Applicant received a net dividend of £ 69,527.89 (Kshs. 8,100,000) and which dividend was sent to the Applicant through their agent and then accountants/Auditors – James & Cowper; a bundle marked as "FN11" is a copy of a letter to James & Cowper dated 3rd January 2001, a dividend notice in the amount of Ksh 8,100,000 and other documentation confirming the foregoing.
- g. In the year 2003, the Applicant received a net dividend of £ 61,926.60 (Kshs.8,100,000) and which dividend was sent to the Applicant through their agent and then accountants/auditors – James & Cowper; a bundle marked as "FN12" is a copy of letter to James & Cowper dated 3rd December 2003, a copy dividend notice in the amount of Ksh 8,100,000 and other documentation confirming the foregoing. Also a letter from James & Cowper dated 16th December 2003 wherein they acknowledged receiving the documents mention above is marked "FN13".
- h. In 2004, the Applicant received a net dividend of £ 166,495.37 (Kshs. 24,300,000) and which dividend was sent to the Applicant

through their agent and then accountants/Auditors – James & Cowper; Marked **“FN14”** is a copy of a letter to James & Cowper dated 27th August 2004, a dividend notice in the amount of Ksh 24,300,000 and other documentation confirming the foregoing. Also marked **“FN15”** is a copy of a letter from James & Cowper dated 2nd September 2004 wherein they acknowledged receiving the documents mentioned above.

i. Also in the year 2004, the Applicant received a net of £154,230.13 (Ksh 24,300,000) and which dividend was sent to the Applicant through their agent and then accountants/Auditors – James & Cowper; marked as **“FN16”** is a copy of a letter to James & Cowper dated 9th December 2004, a dividend notice in the amount of Ksh 24,300,00 and other documentation confirming the foregoing. Also marked as **“FN17”** is a copy of a letter from James & Cowper dated 22nd December 2004 wherein they acknowledge receiving the documents mentioned above.

j. In the year 2010, the Applicant received a net dividend of £ 143,109.54 (Kshs 18,225,000) and which dividend was sent to the Applicant through their agent and then accountants/Auditors – James & Cowper; marked as **“FN18”** is a copy of a letter to Joh Armitage of James & Cowper dated 6th December 2010, a dividend notice in the amount of Ksh 18,225,000 and other documentation confirming the foregoing.

That after 2nd Respondent and the 1st Respondent filed their response in the **E215 of 2019** suit and exhibited minutes demonstrating that General Meetings had indeed been held, the Applicant effectively abandoned the prosecution of said suit.

That from a reading of the minutes exhibited herein the notices for the convening of the general meeting the Plaintiff had consistently waived attendance/representation by the requisite members of the Company (including the Applicant Company herein) for a period in excess of twenty (20) years.

That it was also exhibited from the minutes that for a period in excess of thirty –five (35) years the Applicant had always been represented by the Chairman of the General Meeting of the Company.

That it was also manifestly clear that at no point since it became a member of the Company did the Applicant Company expressly and as required under the law and the Company’s Memorandum and Articles of Association appoint his late brother Amirali Akbarali G. Nanji as its proxy or otherwise communicate that he would be representing the Applicant Company’s interests.

That it was clear that the Applicants assertions that the directors of the Company/the Company had not procedurally or legally convened General Meetings as required under the law and the Company’s Articles of Association and that it was not represented in meetings by the Chairman of said meetings goes contrary to what the Applicant had acquiesced to over the years.

That the shareholding of ABC Limited immediately prior to the said 5th July 2018 was as follows;

NAME	DESCRIPTION	ADDRESS	COUNTRY	SHARES
Zahid A. Nanji	Director	P.O Box 40971 GPO Nairobi	Kenya	Ordinary 0
Amirali Akbarali G. Nanji	Shareholder	P.O. Box 40971 GPO Nairobi	Kenya	Ordinary 610
Firoz Akbarali G. Nanji	Shareholder	P.O. Box 40971 GPO Nairobi	Kenya	Ordinary 600
Estate of Gulbanu A. Nanji	Shareholder	P.O. Box 40971 GPO Nairobi		Ordinary 600
United Housing Estate Limited	Shareholder	P.O. Box 40971 GPO Nairobi		Ordinary 600

A copy of the **CR12** Form of **ABC Limited** prior to 5th July 2018 is marked as **“FN28”**

That on 5th July 2018 the Company resolved to sell all the shares it held in ABC Limited, marked as **“FN29”** are copies of minutes of the Board Meeting of the Company held on 5th July 2018.

He averred that prior to the sale of the shares, a valuation of ABC Limited’s shares was conducted by PKF Kenya.

That the 2nd Defendant was aware that the six hundred (600) shares as above mentioned were sold to the following individuals at market value as shown in the table below;

NAME	SHARES	PURCHASE PRICE (KSHS.)
Firoz Akbarali G. Nanji	Ordinary 398	395,902,640

Zahid A. A. Nanji	Ordinary 2	1,989,460
Alijoe Development Limited	Ordinary 100	99,473,025
Supermarket Limited	Ordinary 100	99,473,025

A bundle marked as “FN34” are copies of the statutory Form Ds to the collector of stamp duties in respect of the transfer of shares to the persons listed in the table above.

He contended that prior to 12th July 2018 the shareholding and directorship of the 3rd Defendant Company - United Housing Estate Limited was as follows:

NAME	DESCRIPTION	ADDRESS	COUNTRY	SHARES
Zahid A. A. Nanji (the 1 st Respondent)	Director	P. O. Box 40971 GPO Nairobi	Kenya	Ordinary 0
Amirali Akbarali G. Nanji	Director/ shareholder	P. O. Box 40971 GPO Nairobi	Kenya	Ordinary 7,499
Firoz Akbarali G. Nanji	Director/ shareholder	P. O. Box 40971 GPO Nairobi	Kenya	Ordinary 7,500
Estate of Gulbanu A. Nanji	Shareholder	P. O. Box 40971 GPO Nairobi		Ordinary 1
Exobi (Finance House) Limited (the Applicant.	Shareholder	P. O. Box Royex House, Aldermanbury Square, London E.C. 2 U.K.		Ordinary 15,000

He stated that on 12th July 2018 at a Board Meeting of the Company it was resolved that the Twenty Thousand (20,000) shares that were yet to be issued would be issued to the 1st Respondent herein as well as 2nd Respondent. A copy of the minutes of the Meeting of the Company held on 12th July 2018 is marked as “FN36”. Also a copy of the Company’s secretary (Acres Registrars) letter attesting to the foregoing marked as “FN37” and annexed to it is her practicing certificate.

That the Eighteen Thousand (18,000) ordinary shares were issued to 2nd Respondent and Two Thousand (2,000) ordinary shares to the 1st Respondent herein. Marked “FN38” is a copy of the share certificates issued to the 1st Respondent and 2nd Respondent in respect of the above said 18,000 and 2,000 ordinary shares.

That presently and as from 12th July 2018 the shareholding and directorship of the company is as follows;

NAME	DESCRIPTION	ADDRESS	COUNTRY	SHARES
Zahid A. A. Nanji	Director/ shareholder	P.O.Box 40971 GPO Nairobi	Kenya	Ordinary 2,000
Estate of Amirali Akbarali G. Nanji	Director/ shareholder	P.O.Box 40971 GPO Nairobi	Kenya	Ordinary 7,499
Firoz Akbarali G. Nanji	Director/ Shareholder	P.O.Box 40971 GPO Nairobi	Kenya	Ordinary 25,501
Estate of Gulbanu A. Nanji	Shareholder	P.O.Box 40971 GPO Nairobi	Kenya	Ordinary 0
Exobi (finance House) Limited	Shareholder	P. O. Box Royex House, Aldermanbury Square, London E.C. 2 U.K	U.K	Ordinary 15,000

Supermarket Ltd	Director	P.O.Box 40971 GPO Nairobi	Kenya	
Alijoe Development Ltd	Director	P.O.Box 40971 GPO Nairobi	Kenya	

That the change in directorship and in shareholding had not been captured at the Companies Registry owing to the new Business Registration Service (“BRS”) which the Companies Registry is in the process of implementing.

PLAINTIFF/APPLICANT’S SUBMISSIONS

It was the Plaintiff’s submission that 2nd Defendant believes that provided he invokes the power of Directors under the Articles, both him and the 1st Defendant are entitled to do whatever they please. He was very much mistaken, both by statute as well as cardinal principles of the common law, as fiduciaries, the powers of directors are circumscribed. They must be exercised in promoting the interests of the Company.

The Plaintiff relied on the **Companies Act, 2015**, where those duties have been reinforced now receiving statutory backing as provided in **Section 142(a)** of the Act as follows;

“A Director of a company shall:-

- a. Act in accordance with the constitution of the Company;**
- b. Only exercise powers for the purposes for which they are conferred”**

In the case of *Nyandarua Progressive Agencies Limited vs Cyrus Wahome Nduhiu & Another [2017] eKLR*; the court had this to say in respect to the foregoing provision;

“In the case of “the Companies Act Chapter 486 Laws of Kenya was repealed by the Companies Act 2015. The repealed Act had provisions prohibiting directors from dealing with assets of a company without full disclosure to the company and a resolution by the Company. The new Act is more robust and has expanded the scope thereof but has not changed the substance of the provision of the repealed Act in as far as duties of directors is concerned. Section 142 of the 2015 Act codifies the equitable rule that a director must act in accordance with the Company’s constitution and must only exercise his powers for their proper purpose for the company. The liability is strict. If the director’s substantial purpose was not the purpose for which the power was conferred, it will not matter if he exercised the power in good faith or in the belief that it would promote the success of the company for the benefit of the members as a whole.”

He submitted that as Lord Sumption has recently held in interpreting and applying **Section 170 of the English Companies Act, equivalent to our Section 142 Companies Act**; the same is not restricted by literal terms of the Articles but broader consideration as follows;

“...I do not doubt that a term limiting the exercise of powers conferred on the directors to their proper purpose may sometimes be implied on the ordinary principles of the law of contract governing the implication of terms. But that is not the basis of the proper purpose rule. The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose rule is a principle by which equity controls the exercise of a fiduciary’s powers in respects which are not, or not necessarily, determined by the instrument. Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provisions conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court’s understanding of the business context.”

Further that, **section 146 of the Companies Act** provides for the duty of directors to avoid a situation in which the director has or can have a direct or indirect interest that conflicts, or may conflict, with the interests of the company. This applies to the exploitation of, inter alia, any property, the director’s position in the company or opportunities in or for the company. The 1st and 2nd Defendants’ running of the 3rd Defendant since Amirali’s death had most certainly not been for the benefit of the members as a whole and, in particular, not for the benefit of the Plaintiff.

It was the Plaintiff’s submission that to use the power of a director for the purpose of personal gain and undermine the rights of the majority shareholder could not be an exercise in the faithful discharge of the 1st and 2nd Defendants powers as directors. The 1st and 2nd Defendants attempts to justify their actions by reference to the literal terms of the Articles of Association fall flat and should be rejected. Given the plain self-interest of the 1st and 2nd Defendants in the allotment of shares, the defiant violation of **Section 338 of the Companies Act** and the selling of the 3rd Defendant’s shares in ABC to what was in effect of their company without a valuation. In Lord Wilberforce’s words, their pleas that either actions were in the 3rd Defendant’s interest, must, as has been, the invariable case, be rejected by this Court.

Further impropriety by the 1st and 2nd Defendants can be gleaned from the fact that despite **Section 45 of the Law of Succession Act** proscribing intermeddling with the property of a deceased person and prescribes penal sanctions, the 1st and 2nd Defendants have, in advancing their personal interests of acquiring shares in the 3rd Defendant, intermeddled with the estate of one of its shareholders. In doing

so, they committed a criminal offence by purporting to transmit the shares of the estate of Mrs Gulbanu Akbarali Nanji – over 20 years after the said shareholder's death – to the 2nd Defendant without her Will ever having been presented before any court. This is a clear breach of a director's fiduciary duty to the members of the company.

He submitted that the 1st and 2nd Defendants had acted illegally and unlawfully. They were in breach of their fiduciary duty not only to the 3rd Defendant but also to its shareholders and the Plaintiff in particular. Thus, an injunction ought to be issued as a matter of course.

In respect to the appointment of the receivers, it is a serious step for the Court to take and the court does so on the clearest cases and for compelling reasons. When, as here, it is presented with a case where the two directors have conspired to immunize themselves from the 3rd Defendant's shareholders and are exploiting this for their benefit, assets stripping etc, the only means of securing the integrity of the 3rd Defendant is the appointment of a Receiver while the trial of this action takes place. It cannot be gainsaid that this Court has the power and duty to appoint a Receiver pending the determination of a suit – see generally Rattan Lai, Advocate vs Jagadhri Light Railway Company Limited A.I.R. 1946 vol.33 page 193 -198; where the court held that:-

“It is wrong to say that the appointment of a receiver is unheard of to conduct the business of company except in a debenture-holders' action. Several cases can be visualized when a company judge may exercise such a power under the provisions of Order 40 Rule 1 as read with section 141, Civil P.C; or ex debi to justitiae. It is possible in suitable cases under the Companies Act to appoint a receiver who may take up the business of the company and the management of its property and its affairs pending the decision of the court in a litigation (125) 12 A.I.R. 1925 Cal 817. This was cited with approval and applied in Nasir Ibrahim Ali & 2 Others vs Kamlesh Mansukhlal Damji Pattni & Another [1998]eKLR; with Shah JA Holding;

“As I see it, the appointment of a receiver under section 63 (d) of the Civil Procedure Act and Order 40 of the Civil Procedure Rules as reinforced by the inherent powers of the High Court and also ex-debito justitiae, if the circumstances of the case so warrant, can be made when just and convenient.”

DEFENDANTS/RESPONDENTS SUBMISSIONS

The Respondent submitted that contrary to the Applicants allegation, there was no basis for the claim that the 1st and 2nd Respondents managed the Company to the exclusion of the Applicant as shown in the paragraph 52 to 60 of the Replying Affidavit.

- a. The management of the Company was and is as per the Companies Act and the company's own Memorandum and Articles of Association vested solely upon its directors, to wit: the 1st and 2nd Respondents and their co-directors.
- b. The above notwithstanding, the Applicant has not provided evidence of how it wants to be included in the management of the Company. It has also not demonstrated that it has attempted to approach the Respondents and has had its entreaties rejected.
- c. The Applicant has also never sought to remove the 1st & 2nd Respondents as directors of the Company as provided for under applicable law and the Company's own Memorandum and Articles of Association if it was indeed disgruntled with the manner in which they were running the Company. It is therefore estopped from asserting a position to the contrary at this stage.

The Respondent relied on the case of Sita Steel Rolling Mills Ltd VS Jubilee Insurance Co. Limited [2007] eKLR; Maraga J. (as he then was) explained it in this way:-

“The doctrines of waiver and estoppel need to be clearly understood. While they may have a common base they are essentially different. See the judgment of Lord Goff in Motor Oil Hellas (Corinth) Refineries SA vs Shipping Corp. of India, the Kanchenjunga (1990) 1 Lloyd's Re. 391.

“waiver can be expressed or implied. Disputes hardly arise where it is express. They however do where it is implied. An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intention that to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right...”

In Sita Steel Rolling Mills Ltd vs Jubilee Insurance Co. Limited [2007]eKLR, Maraga J (as he then was) held;

“ Estoppel on the other hand requires a representation by words or conduct to the insured that the insurer will not rely upon a breach of condition, which representation the insured relies and acts upon to his detriment. It does not depend upon the knowledge of the person estopped and is a doctrine of much wider consideration.

‘though the distinction between them is important, waiver and estoppel often arise from and can obtain in the same case. Expounding on the doctrine of equitable estoppel which he has developed in the famous case of Central London Property Trust vs High Trees House Ltd [1947] KB 130 this is how Lord Denning put in his book, “the Discipline of Law” at page 206

“If the Defendant led the Plaintiff to believe that he would not insist on the stipulation as to time and that if they carried out the work he would accept it, and they did it, he would not afterwards set up the stipulation as to time, against them. Whether it be called waiver or performance on his part, it is a kind of estoppel. By his conduct he evinced an intention to

affect their legal relations.”

“And at P.217 he further stated:-

‘where a man has led another to believe in a particular state of affairs he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.’

DETERMINATION

After consideration of the pleadings and extensive oral and written submissions by parties through their respective Counsel the issues that emerge for determination at this stage are;

- a. Whether the Plaintiff has established a *prima facie* to warrant grant of Interlocutory/Temporary injunction.
- b. Whether the Plaintiff proved that it will suffer irreparable damage, loss or injury which would not be adequately compensated by damages.
- c. Whether a *mareva* (freezing) injunction restraining and/or barring the Defendants either one of them or jointly, or whether by themselves or agents, servants, nominees or officers in interfering in any way with 3rd Defendant’s assets and bank accounts
- d. Whether the Court may appoint Receiver Tact Consultancy Services to manage and preserve all assets of the 3rd Defendant and confer upon the Receiver all such powers of bringing and defending suits for realization, management, protection, preservation and improvement of 3rd Defendant’s assets.

The Plaintiff’s claim is as elaborated by Supporting Affidavit sworn by Tashir Gulam that the Advocates on record carried out a search at the Company’s Registry that at 8th August 2018 the names of shareholders and Directors of the Company were intact as per the Copy of Search marked **TG-2** prior to the meeting of 12th July 2018.

Mr Amirali Akbarali G.Nanji (Amirali) died on 13th May 2017. He represented the Plaintiff in the Company. Since his death, the Company has been run exclusively by 2 surviving Directors Mr Zahid A.A.Nanji 1st Defendant and Mr. Firoz Akbarali A. Nanji 2nd Defendant herein, to the exclusion of the Plaintiff Company and Amirali’s estate. The 1st Defendant frustrated efforts of Executors of the estate of Amirali Akbarali Gulamhussein to effectively administer the estate including allowing appointment of one as representing and offering effective participation in any of the 3rd Defendant Company **AGM**. The transmission of shares from Gulbanu’s Estate & Amirali’s Estate have not been in compliance of **Section 55 & 71 of Law of Succession Act**.

The 1st Defendant refused access to any information or full accounts for the 3rd Defendant Company. The 1st Defendant filed objection proceedings in **Succession Cause 205 of 2018 In the matter of the estate of Amirali Akbarali GulamHussein also known as Amirali A.G.Nanji (Deceased)**. The 1st Defendant frustrated and interfered with beneficial interests of the deceased’s estate by refusing to handover the deceased’s death certificate, resisting, objecting and delaying probate proceedings while raiding the Company in allotment of shares and disposal of assets.

The Plaintiff complained of the following commissions/omissions by the 1st & 2nd Defendants in the 3rd Defendant Company;

- a. The 1st & 2nd Defendants embarked on a calculated scheme aimed at, the diminution of shares of the Plaintiff as majority shareholder of the 3rd Defendant Company and thus seize control of the Company.
- b. Notification and attendance of AGM, the Plaintiff was not given notice of any AGM in 2017 & 2018. The AGM held in 2016 whose minutes were signed on 30th December 2016 were not signed by the late Amirali who also represented the Plaintiff on the Board of Directors as he was in India as confirmed by copy of his passport marked **TG-6**.
- c. The Defendants disposed assets of the Company 600 shares of Adams Brown & Company Ltd (**ABC Co Ltd**) without valuation at a gross undervalue of Ksh 596,838.15 in 2018. The Plaintiff believes these shares were purchased by the Defendants and/or their Associates or affiliated Companies. In Exhibit marked C attached to Plaintiff’s Supplementary Affidavit confirms the 2nd Defendant’s handwriting assessed the ABC shares at 1billion in 2013 and had loss of value at 40%
- d. The Company’s liabilities have been on a steady rise from modest amount of Ksh 6,636,551 in 2016 to Ksh 47,476,916 in 2018 without corresponding rise in equity.
- e. The Defendants during the meeting held on 12th July 2018 passed a resolution on transmission of 1 share from the estate of Mrs Gulbanu Akbarali Nanji’s estate as per the Will to be transmitted to 2nd Defendant Firoz Nanji sole Executor of her estate without grant of Probate/confirmed grant of Probate.
- f. The Defendants resolved by **Article 5 of Articles of Association** that the remaining 18,000 shares of Ksh 20 each were allotted to Firoz Nanji at cash at par plus premium of Ksh 1980 per share payable in 7 days. The remaining 2000 shares were allotted to Zahid Nanji on similar terms.

g. It was resolved that the Register of Members/Shareholders be updated accordingly and a new share certificate to issue to each Defendant to be attested by any 2 Directors or any 1 Director and Company Secretary.

h. It was resolved that the following legal persons, Alijoe Development Limited and Supermarket Limited were appointed as Directors in 3rd Defendant Company. These are Companies that the Defendants own majority shares, 66% and 78.7% respectively as shown in CR12 of 8th August 2019 annexed to Plaintiff's Supplementary Affidavit filed on 19th February 2020.

i. It was resolved that Zahid Nanji is appointed as Company's Corporate Representative of the Defendants interest in ABC Co. Ltd until such time the appointment is rescinded.

j. It was resolved that the Company Secretary to do all that is necessary to effect the resolutions at the Company Registry. As at 1st May 2019, the 3rd Defendant's shareholding changed by increasing to 50,000 allotted shares, with Firoz Akbarali G Nanji as now majority shareholder with 25501 shares, the Plaintiff remained with 15,000 shares, Zahid A. A. Nanji 2000 shares, and the Estate of Amirali Akbarali Nanji remained with 7,499 shares.

k. The Defendants illegally transmitted/issued and allotted shares of the Company to themselves and for their sole benefit and the Minutes of 12th July 2018 had not been signed by the Company Secretary. The new arrangement introduced new shareholder Zahid Nanji who was not a shareholder.

l. The Defendants fraudulently, and in breach of their fiduciary duties owed to the 3rd Defendant Company and shareholders in general dissipated Company assets, sale of share of ABC Limited that belonged to the 3rd Defendant without consultation, information & approval of Plaintiff a majority shareholder.

m. The Defendants paid themselves Ksh 11,000,000/- as Directors remuneration while declining to declare dividends.

The Defendant's as outlined in the Replying Affidavit,

The 2nd Defendant became Director and shareholder of the Company on 25th February 1972 and 1st Defendant became Director on 7th January 2001 prior they worked as employees of the Company. They are Kenyan residents.

At the Preliminary stage he was advised that the Court would not engage in minute and protracted interrogation of the merits and demerits of the case and will only consider whether interlocutory orders have merit to be granted pending Hearing of the suit *inter partes*.

The 2nd Preliminary issue was/is that the Plaintiff failed to demonstrate authority to institute the instant suit and swear the Affidavit. The Plaintiff lacks authority of the Board of Directors as required by the Articles of Association. The 2nd Defendant annexed authorization from 1st Defendant to swear the Replying Affidavit and contents thereof on his behalf marked FN1. He also annexed authorization of the Company on its letterhead to defend the suit herein.

ANALYSIS

PRELIMINARY ISSUES

Section 238 Companies Act provides for an applicant member to seek leave from Court to proceed with an action against the Company for protection of members against unfair prejudice; where the persons complained of, control the Company and their action amounts to a fraud on the minority. The matter complained of must be in relation to an act or omission involving negligence, default, breach of duty or breach of trust by a director (including former Director) of the company as provided for by Section 238(3) of Companies Act.

The instant matter falls squarely within the parameters of Section 238 Companies Act and is a derivative suit. Section 239 of Companies Act grants an Applicant who is a member of the Company to seek leave of Court to sue in a derivative suit and/or continue with the suit already filed. There is therefore, in the absence of timelines the opportunity for the Plaintiff to join the Company as a party. The Plaintiff/Applicant as Shareholder/Member of the Company to seek leave from Court to pursue the derivative claim during these proceedings is open and the Plaintiff may/can regularize the position. **Order 51 CPR 2010** applies.

Section 239 & 240 of Companies Act provide for application for permission to continue with the derivative claim and/or permission to continue claim as a derivative claim.

The Plaintiff may regularize proceedings under the Act as a derivative suit.

In **Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarai & Another [2017]eKLR**, the Court stated;

“Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against tall wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation.”

TEMPORARY INJUNCTION

The settled law on standards required to grant Interlocutory or temporary injunctions to set out in the following cases;

Giella -vs- Cassman [1973] EA 358, it was stated that the grant of injunctive reliefs can only be made where the Applicant shows the following;

- i. There is a prima facie case with a possibility of success.
- ii. Occurrence of an irreparable loss if the order is not granted.
- iii. The Court shall decide the application on the balance of convenience.

That the Court of Appeal (**Kwach, Bosire & O’Kubasu JJ A**) determined the test of what is a *prima facie* case is in **Mrao Limited -vs- First American Bank Limited & 2 Others [2003] eKLR**. Bosire J.A expressed his mind as follows;

“So what is a prima facie case” I would say that in civil cases it is a case which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” [emphasis added]

In **Mureithi vs City Council of Nairobi [1976-1985] EA 331 Madan JJA referred to L Diplock in American Cynamid Co vs Ethicon Ltd [1975] 1All ER 504** as follows;

“The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the Trial.....”

PRIMA FACIE CASE

The Defendants denied that they mismanaged the 3rd Defendant Company, instead they compared the Company’s performance since 1967 to 2018 where the Company’s asset value rose to Ksh 2 billion. The performance, liquidity, asset base or equity of the Company can only be confirmed at formal and full hearing of the matter where financial/Audit Reports shall be produced as evidence and veracity of contents determined and/or contested.

These are some/relevant statutory legal obligations that Directors shall comply with.

Section 140 (b) of the Companies Act 2015 provides;

The general duties of directors are based on common law rules and equitable principles that apply in relation to directors and have effect in place of those rules and principles with respect to the duties owed to a company by a director.

Section 142 of Companies Act 2015 provides that Directors shall act in accordance with the Company’s Constitution and for the purpose they were conferred.

Section 143. Duty of director to promote the success of the company

Section 144. Duty of director to exercise independent judgement

Section 145. Duty of director to exercise reasonable care, skill and diligence

Section 146. Duty of director to avoid conflicts of interest

Section 150. Consent, approval or authorisation by members

(1) If—

(a) section 146 is complied with by authorisation by the directors; or

(b) section 151 is complied with, the transaction or arrangement is not liable to be set aside because of any Common Law rule or equitable principle requiring the consent or approval of the members of the company.

151. Duty to declare interest in proposed or existing transaction or Arrangement.

With regard to the allegation that the Plaintiff was not paid dividends, the Defendants picked years at random and confirmed dividends were paid in 1975- Ksh 12,991/-, 1984-\$591.56, 1986- \$447.54, 1998- \$ 15,494.97 (Ksh 1,619,999/-) 1999-\$ 14,304.63,(Ksh 1,619,999.35) 2001-

\$69527.89 (Ksh 8,100,000) 2003-\$ 61,926,60 (Ksh 8100,00), 2004 \$ 166,495.37(Ksh 24,300,00) again 2004- \$154,230.13 (Ksh 24,300,000) and 2010 \$143,109.54 (18,225,000)

The Defendants submitted mismanagement of the Company would not facilitate generation of increasing dividends and it is not true the Plaintiff was not paid dividends.

This Court observed that dividends may have been regularly paid upto 2016 when Amirali Akrabali G. Manji who was then alive and but sick. He died in 2017 and matters took a dramatic turn, after his demise as represented the Plaintiff in the 3rd Defendant Company. The Defendants did not provide any dividends paid to the Plaintiff thereafter 2016-2017. That is one of the Plaintiff's claims, it is also alleged that hefty payments were made by defendants to themselves and they failed to declare dividends. In the absence of evidence of payment of dividends, the subsequent years after Amirali's demise todate, the inference is that the Plaintiff has legitimate claim to the dividends and/or reasonable explanation from Managing Director (s).

On alleged mismanagement of the Company to the exclusion of the Plaintiff, the Defendants submitted that they complied with the law and Memorandum & Articles of the Company. Since the Plaintiff/Applicant became a member/shareholder of the company in 1970, the Applicant has never registered prosecuted to conclusion any protest or objection whatsoever. The Applicant never sought removal of any of the Directors.

The Company held meetings for 51 years and minutes of the meeting are available.

Section 92 & 114 of Companies Act confirm members as those who register Memorandum and Articles of the Company. The Plaintiff is a member/shareholder of the 3rd Defendant Company and is entitled to;

Section 92 of the Companies Act,

How persons become members of company

- 1. The subscribers to the memorandum and articles become members of the company on the registration of the company.**
- 2. As soon as practicable after the registration of the company, it shall enter in its register of members the names and addresses of persons who subscribed to its memorandum and the date on which they became members of the company.**
- 3. Any other person who later agrees to become a member of a company becomes a member of the company when the person's name is entered into the register of members.**

Section 114 of the Companies Act,

Effect of provisions of articles relating to enjoyment or exercise of rights of members.

This section applies to the following rights

- a. The right to be sent a proposed written resolution;**
- b. The right to require circulation of a written resolution;**
- c. The right to require directors to call a general meeting;**
- d. The right to receive notices of general meetings;**
- e. The right to require circulation of a statement;**
- f. The right to appoint a proxy to act at a meeting;**
- g. The right to be sent a copy of the company's annual financial statement and reports; and**
- h. If the company is a public company, the right to require the circulation of a resolution for the annual general meeting of the company.**

Prior to 2016, the late Amirali Akbarali G.Nanji represented the Plaintiff in the 3rd Defendant Company. Thereafter, the Defendants did not consult, inform or involve the Plaintiff and did not request the Plaintiff to appoint a representative to attend general meetings and represent the Plaintiff and its interests in the 3rd Defendant Company. The Plaintiff had not transferred its shares to the late Amirali, he only represented the Applicant's interest, therefore the Plaintiff held its interest in the 3rd Defendant Company directly as owner of 15,000 shares and ought to have appointed another representative. The Defendants claim that the requirement to notify all members shareholders of the AGM or GM was waived over the years is not true from the facts pleaded. Previously, the Plaintiff was not served notices because the Plaintiff authorized Amirali Akbarali as Chairman of 3rd Defendant Company to represent its interests. Such an arrangement was not discussed or agreed with the present remaining Directors. They did not consult or contact the 3rd Defendant on the matter. The Defendants

submitted the Applicant consistently waived receipt of notices and to have anyone else other than Chairman of 3rd Defendant to represent it in said meetings. There cannot be waiver, estoppel consent or acquiescence to statutory obligation/requirement and one cannot successfully plead any of the above to justify noncompliance of mandatory statutory requirements.

Refer ***Republic vs Public Procurement Complaints Review & Appeals Board & Anor Ex parte KAA/2005/1KLR 628***. It was held that;

“There can be no estoppel against a statute, for estoppel cannot supersede the law of the land. Conversely, as an admission on a point of law cannot found an estoppel, representations of law, not fact cannot be found as an estoppel.

With regard to failure to share Audited Accounts with the Plaintiff, the Defendant illustrated that the Audited Accounts were sent to the Plaintiff through its Accountants/Auditors, Messrs James Cowper via DHL Courier in 1998,1999,2004,2010 & 2018 and the Plaintiff did not demonstrate that they sought these Accounts from the 3rd Defendant Company. The Defendant demonstrates sharing of Accounts in some years but not 2016, 2017 except in 2018.

On the issue of irregular sale of ABC shares owned by the 3rd Defendant Company, the Defendants stated that on 5th August 2018, the Company resolved to sell the shares of ABC Company. The Company made the decision pursuant to a decision by Directors of the Company. If the Plaintiff was not represented in the said meeting and Mr Amirali was deceased in 2017, serving notice of the meeting in 2018 by the Defendants to Mr. Amirali was futile effort. Ultimately, the decision to sell ABC shares was by 1st & 2nd Defendants without the Plaintiff's involvement, knowledge or consent. They did not send the Plaintiff a notice of the meetings(s). They decided to sell shares of the 3rd Defendant in ABC Co. Ltd, they valued the shares and bought them clearly contrary to **Section 146 & 150 of the Companies Act 2015**.

Refer ***Michael Kyambati vs PM Milimani Commercial Court [2016]eKLR***;

“...The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents, usually the Board of Directors. In other words, the corporation's brain is the Board of Directors who make decisions on behalf of the company. A company may in many ways be likened to a human body; it also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does.....

It is confirmed that the Defendants decided to sell shares of ABC Company Limited;

The Defendants confirmed PKF did valuation of shares and they were sold at Ksh 596,838,150/- The Directors were not all served with Notices to attend the meeting that resolved sale of shares of ABC and all directors were not involved to discuss why the shares were sold at the time. The Plaintiff was not represented as Mr Amirali was deceased. So serving the deceased notice was a coverup. What happened to the proceeds of sale of shares was/is not disclosed? Also, since the shares belonged to the 3rd Defendant Company what became of the proceeds which ought to have been disclosed, were the proceeds of the sale of ABC Ltd shares that belonged to the 3rd Defendant Company paid into the 3rd Defendant Company, or to all members/shareholders on prorata basis or ploughed back to running the Company or increasing investments of the Company.

The Defendants averment that Company shares were sold at market value as valuation was conducted by a reputable firm maybe true; but that the proceeds were shared by the Company and its members; is not sufficient information what of the Plaintiff's share in the proceeds of the sale?

The Defendants referred to **Article 5 of the Articles of Association** which reads as follows;

“The shares shall be under the control of the Directors who may allot and dispose of or grant options over the same to such persons, on such terms and in such a manner they think fit.

On 12th July 2018, the 2 defendants were the only ones and according to the Articles any meeting quorum of 2 directors was allowed. However, the Defendants failed to notify the Plaintiff to attend or appoint or nominate proxy or nominee to represent its interest in the Company. They also failed to enquire from late Amirali Akbarali's family also to nominate or appoint proxy or nominee as the grant of Probate was/is not confirmed with regard to his Will and/or estate.

Therefore, the defendants deliberately circumvented the requirement of notifying members vide serving notices of meetings. They also failed to inform consult of involve the Plaintiff and Amirali's family to appoint representative to the meeting.

Of concern the Defendants in relying on **Article 5 of the Articles of Association** acted contrary to **Section 147 & 151 of Companies Act**. They failed to inform the excluded/members/ shareholders/directors of their interest in existing transaction and declare conflict of interest of deciding in the absence of other shareholders who were not served notices to meetings to agree on sale of ABC Company shares held by 3rd Defendant and acquire the remaining unallotted shares in 3rd Defendant by allocating them to themselves. The proceeds of sale or funds the Defendants paid for shares though disclosed in the pleadings it is not clear whether the payments were actually made and where the funds are nor how they determined the value of the shares.

The Court has a duty to stop any abuse of mandatory statutory legal requirements. The Companies Act outlined Directors Duties under Common Law and Statute. These duties entail fiduciary duty to the Company and members/shareholders. Refer ***Howard Smith Ltd vs Ampol Petroleum Ltd & Others All England Law Reports [1974] 1 All ER***.

“(ii) just as directors, within their management power, were entitled to make decisions against the wishes of the majority of shareholder, so it was unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist; furthermore the exercise by the directors of their fiduciary power solely for the purpose of shifting the power to decide to whom and at what price shares were to be sold could not be related to any purpose for which the power over the share capital had been conferred on them”

There is a duty for a Director to apply independent judgment, reasonable care, skill and diligence in running the Company and use the Memorandum & Articles for the use assigned. The director should avoid conflict of interest and where it exists declare it and seek consent approval or authorization from members. Refer *Nyandarua Progressive Agencies Ltd vs Cyrus Wahome Nduhiu & Anor [2017](supra)*

From the totality of pleadings and evidence compiled by parties, the Plaintiff has established a *prima facie* case. The Applicant has presented an arguable case to be heard and conclusively determined at a full hearing. There are instances with regard to the management and/or operations of 3rd Defendant Company that depict infringement of the Plaintiff's rights that would not be adequately compensated by damages. These rights require the opposite party to explain or rebut these claims at trial. The Plaintiff's rights must be protected pending hearing of the suit.

The main dispute is not of the 3rd Defendant as a going concern, a viable, healthy trading Company but inter and intra Company disputes. The main dispute being shareholder/shareholding dispute between members, shareholders and directors of the 3rd Defendant Company. These can only be subjected to a full hearing *inter partes*.

In the meantime, with the current scenario, the Plaintiff Company that has been majority shareholder in 3rd Defendant Company with 15,000 shares is now relegated to a minority shareholder by the Defendants' acquiring unallotted share of the 3rd Defendant's Company. The Plaintiff is ousted and eclipsed in the management and operations of the 3rd Defendant Company as it is not represented. It lacks access to information, it does not participate in decision-making, attendance and voting in meetings, and recently it has not been paid dividends.

The Plaintiff has and will continue to suffer irreparable damage; in form of diminution of value of its shares and disposition of assets that will also adversely affect value of the Company.

The Court finds that it would be just and equitable to grant Interlocutory injunction for interim measures of protection and to preserve the assets of the Company and suspend irregular actions.

The Injunction is extended as granted in terms of court orders of 4th September 2019, by Hon. L.J M. Kasango, that the Registrar General is restrained from making changes to the shareholding of the 3rd Defendant Company, United Housing Estates Limited. Any transmission of shares shall be from valid regular and legal orders from Family Court; from deceaseds' estates to the beneficiaries. All other shares sold or bought or held by the 3rd Defendant Company through its Directors shall await the decision of the Trial Court after full hearing of the matter. The shareholding remains as registered with Registrar of Companies and search conducted on prior to 5th July 2018 and 12th July 2018 meetings.

MAREVA INJUNCTION

The Plaintiff/Applicant sought a *mareva* (freezing) injunction restraining and/or barring the 1st, 2nd and 3rd Defendant by each of them or jointly, their employees, servants, agents or nominees or any other person claiming through them from disposing, assigning, diminishing, transferring, alienating or otherwise dealing in any manner whatsoever with any of the 3rd Defendant's bank accounts or assets in Kenya save for the conduct of the 3rd Defendant's ordinary course of business.

In the case of *Mc dougla Kagwa vs Weekly Review C.A. 39 of 1989* outlines when and why the *mareva* injunction is granted,

“If you read the facts in *Mareva Compania Niera SA v International Bulcarriers Ltd [1975]2 Lloyd's Rep 509*, you will see how desirable and important it is that the courts should have jurisdiction to issue such an injunction.....

...where the court grants a “Mareva” injunction, it should also order a speedy trial of the action in order to avoid any possible injustice that may be caused to the defendant by delay.

In the instant case, the Plaintiff Company is in UK, the deponent resides in Switzerland. The Plaintiff's claim is with regard to 3rd Defendant Company. The Plaintiff owns 15,000 shares as a foreign investor and majority shareholder. The Plaintiff is apprehensive that recent events since the demise of its representative, it is no longer represented, lacks access, participation, information with regard to the 3rd Defendant Company or safeguard of its interest and right in the Company. The Defendants continue to run the Company for their benefit to the exclusion of the Plaintiff, they are alleged to have concealed information, made misrepresentations to the Court, their record keeping is suspicious and the Plaintiff submits that if no intervention is made and relief granted then by the time of hearing of the suit, the substratum of the suit will be gone. The Company will be an empty shell stripped for the benefit of and by the 1st & 2nd Defendants.

The Defendants submitted that grant of mandatory injunction/*mareva* injunction at interlocutory stage is to summarily determine the matter at the interlocutory stage. Refer to *Lucy Wangui Gachara vs Minudi Okemba Lore [2015] eKLR*,

“It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the

interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after bearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage.”

The Court considered that the Plaintiff is not resident in Kenya, it is not represented in 3rd Defendant Company. It has not waived its right to be represented in the Company. Already, it was shut out and kept in the dark when 2 meetings were held in 2018. The defendants decided to sell Company assets and the proceeds have not been disclosed except the sale price, shares have been allotted by the 2 directors without consultation approval or consent of the Plaintiff and Amirali's estate, new directors have been added again without Plaintiff's knowledge and/or consent. To allow *status quo* is to grant an opportunity for interested parties to cart away Company assets and funds and leave an empty shell the 3rd Defendant Company and thus adversely affecting the Plaintiff's right as majority shareholder in the 3rd Defendant Company. There shall be nothing to be heard and determined after the *inter partes* hearing.

The case of *Mucuha vs Ripples Ltd (Civil App no 186 of 1992) Nairobi (unreported)* held;

“A mandatory injunction need not be given at the Interlocutory stage. It could be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it would not normally be granted. However, it would be granted if the case was; (a) clear and one which the Court [determined] to be decided at once, or (b) if the act done was a simple and summary one which could easily [be] remedied or (c) if the Defendant attempted to steal a match on the Plaintiff.”

I find compelling evidence to grant the *mareva* injunction to safeguard assets of the Company and regulate the operations of all Company Accounts in the following terms;

That the Signatories/Directors shall not transfer funds from the Company Accounts but only operate the Accounts to settle Company's debts and expenses for goods and services proved to be supplied to the Company. Also to settle, statutory payments and Company's officials/staff and employees' salaries and remuneration. The 3rd Defendant's Company Bank statements shall be considered at the Trial.

APPOINTMENT OF RECIEVER MANAGER

The Plaintiff/Applicant submitted that 2 Directors of the 3rd Defendant Company are exploiting the Company for their benefit by asset stripping and exclusion of the Plaintiff/Applicant a majority shareholder/member of its statutory legal rights. The Plaintiff asserted that the suit is predicated on the unlawful prejudicial actions by the Defendants to the detriment of the Plaintiff as majority shareholder and have relegated it to minority shareholder. The plaintiff submitted that in a case where the Defendants have conspired to immunize themselves from 3rd Defendant's shareholders it is a clear and serious case that merits appointment of a Receiver while the Trial of the action takes place. The Plaintiff cited the case of *Rattan Lai, Advocate vs Jagadhari Light Railway Company Limited* supra which outlined instances that warrant appointment of the Receiver.

The Defendants submitted given clear evidence that the Company is operating profitably and for the benefit of all members, granting mandatory order of appointment of a Receiver over the Company especially at an interlocutory stage would amount to granting a permanent order before the main suit is heard. The Defendants submitted that such an order where no special circumstances have been demonstrated let alone pleaded would be draconian and to the detriment of all members including the Applicant.

Order 41 (1) CPR 2010 grants Court jurisdiction to appoint Receiver where it appears just and convenient to do so. The Receiver may be appointed over any property before or after decree or to remove any person from possession, custody or management and exercise powers under **Order 41(1) (d) CPR 2010**.

The Court gleaned through the Defendants Annexures to their Replying Affidavit. The 3rd Defendant's Annual Reports & Financial Statements w.e.f. 2016, 2017 & 2018 from Pg 44 are Statement of Financial position, Profit & Loss & Other Comprehensive Income, Statement of changes in Equity, Cash flows and Notes on Financial Statements. These documents disclose steady financial growth of a robust trading going concern. From the parties pleadings and evidence it is not contested that the 3rd Defendant originated in 1960's mainly as a family business. The Plaintiff joined in 1970. The Company thrived 50 years later making profit and distributing dividends to shareholders.

The instant dispute(s) is/are with regard to shareholder/shareholding position of the Plaintiff as majority shareholder and now seemingly irregularly relegated to a minority shareholder by contested allotted, transmitted and allegedly bought shares of the 3rd Defendant Company and dissipation of Company assets. This is distinct and separate from the Company's ability to carry out its objects, trading and making profit.

Since the demise of one of the founders of the Company in 2017, who also represented the Plaintiff's interest in the Company, family wrangles ensued and have an adverse impact on the running of the Company. This Court will say no more on this issue as it is the province of the Family Court.

With regard to the Commercial aspect of the dispute, this Court is persuaded at this Interlocutory stage to protect the 3rd Defendant Company's wheels of commerce and trade to continue as a going concern.

If the Receiver is appointed, not because of the Company's performance or liquidity but to resolve shareholders' disputes the Company as is today shall grind to a halt; ruin and paralyze the 3rd Defendant's business and possibly adversely affect employees. There shall be new management, suppliers, contractors, service providers and an avalanche of claims against the Company from 3rd Parties.

On the other hand, the Plaintiff's Company's interests in the 3rd Defendant must be protected, it is a Company that is not resident in Kenya but UK, it therefore cannot be informed or involved in day to day management of the 3rd Defendant to safeguard its interests. Its representative was former Chairman of the Company, late Amirali Akbarali G. Nanji. It is not contested that the Plaintiff is a shareholder of the Company and therefore its interests should be protected.

Therefore, it is not just and convenient to appoint Receiver at this stage; it is draconian and a drastic measure before full hearing and determination of the suit.

The order that commends itself to grant is to suspend the appointment of the Receiver for 90 days from date of delivery of Ruling and by virtue of **Section 3A CPA** grant the following orders;

a. The Plaintiff/Applicant shall appoint its representative of its interests in the 3rd Defendant Company forthwith to attend and participate in Board of Directors meetings of the Company, be granted access to statutory, legal and relevant reports and documents of the 3rd Defendant Company. The representative shall be allowed entry and access to the 3rd Defendant's offices and shall be added as a signatory to 3rd Defendant's Bank Accounts pending hearing and determination of the suit *inter partes*.

b. The proof of Appointment of Plaintiff's representative's appointment and facilitation into the management of 3rd Defendant Company shall be confirmed in writing by the Defendants filing report with Court through the DR Commercial & Tax Division and brought to the attention of this Court before 90 days elapse.

DISPOSITION

1. The Applicant's application of 28th August 2019 is partly granted and partly dismissed on the following orders;

2. The temporary injunction and *mareva* injunction are granted in terms of Notice of Motion Prayer 2 A & B as follows pending hearing and determination of the suit;

a. The Injunction is extended as granted in terms of court orders of 4th September 2019, by Hon. L.J M. Kasango, that the Registrar General is restrained from making changes to the shareholding of the 3rd Defendant Company, United Housing Estates Limited. Any transmission of shares shall be from valid regular and legal orders from Family Court; from deceaseds' estates to the beneficiaries. All other shares sold or bought or held by the 3rd Defendant Company through its Directors shall await the decision of the Trial Court after full hearing of the matter. The shareholding remains as registered with Registrar of Companies and search conducted on.

b. I find compelling evidence to grant the *mareva* injunction to safeguard assets of the Company and regulate the operations of all Company Accounts that the Signatories/Directors shall not transfer funds from the Company Accounts but only operate the Accounts to settle Company's debts and expenses for goods and services proved to be supplied to the Company. Also to settle, statutory payments and Company's officials/staff and employees' salaries and remuneration. The 3rd Defendant's Company Bank statements shall be considered at the Trial.

3. The shareholding of United Housing Limited shall remain as registered with the Registrar of Companies and as per the Plaintiff's search on 8th August 2018 as per copy of search "TG2" until hearing and determination of the suit.

4. The Appointment of Receiver is suspended for 90 days on compliance of the conditions under section 3 CPA (a) &(b) above.

5. In default, the Court shall be moved to reconsider appointment of Receiver and/or hearing and determination of the suit *inter partes*.

6. The funds /proceeds of sale of ABC Company shares shall be retained in an escrow Account by the 3rd Defendant Company until hearing and determination the suit or further orders of the Court.

7. Each Party to bear own Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND JULY 2020 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. OKOTH & MR. RABUT FOR THE PLAINTIFF/APPLICANT

DALY & INAMDAR ADVOCATES- DEFENDANTS/RESPONDENT- N/A

COURT ASSISTANT- TUPET