



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO.194 OF 2018**

**NJAMA WAMBUGU.....PLAINTIFF**

**VERSUS**

**SPACE AND STYLE LIMITED.....1<sup>ST</sup> DEFENDANT**

**WINFRIDA WANJIKU NGUMI.....2<sup>ND</sup> DEFENDANT**

**CECILIA NJOKI MUHOHO (Sued as proxy for**

**DECAMIS LIMITED.....3<sup>RD</sup> DEFENDANT**

**LUCY MUMBI KIMANI.....4<sup>TH</sup> DEFENDANT**

**EDWARD MULEWA MWACHINGWA.....5<sup>TH</sup> DEFENDANT**

**DAVID OTIENO OPIYO.....6<sup>TH</sup> DEFENDANT**

**RULING NO.2**

1. Before me is a chamber summons dated 16<sup>th</sup> May 2018 brought pursuant to section 7 of the Arbitration Act, Rule 1 and 11 of the Arbitration Rules 1997, section 1A, 1B, 3, 3A of the Civil Procedure Act Cap 21 Law of Kenya. The Plaintiff/Applicant now seeks prayers 5, 6, 7 and 8 of the application. The Plaintiff/Applicant seeks to restrain the 2<sup>nd</sup> Defendant/Respondent from holding herself out as the majority shareholder of the Defendant/Respondent on the basis of 4,197 ordinary shares transferred from the Plaintiff/Applicant to herself; further restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents from changing the bank operation mandates of the 1<sup>st</sup> Defendant/Respondent, accounts and also to restrain the 4<sup>th</sup> to 6<sup>th</sup> Defendants/Respondents from holding themselves out and acting as directors of the 1<sup>st</sup> Defendant/Respondent. The orders sought are sought to last pending determination of the dispute between the defendants and plaintiff in arbitration.
2. The chamber summons is premised on the grounds on the face of the application running from nos.9 – 16 and is further supported by plaintiff's affidavits dated 16<sup>th</sup> May 2018, 28<sup>th</sup> June 2018 and 19<sup>th</sup> November 2018.
3. The Defendants/Respondents have in response filed several affidavits in opposition to the application. The 1<sup>st</sup> Defendant/Respondent filed a Replying affidavit dated 3<sup>rd</sup> December 2018 to which it has annexed annexures **WWN-1-WWN-3**; the 2<sup>nd</sup> Defendant/Respondent filed Replying affidavit dated 3<sup>rd</sup> December 2018; the 3<sup>rd</sup> Defendant/Respondent filed a Replying affidavit dated 20<sup>th</sup> November, 2018; the 5<sup>th</sup> Defendant/Respondent filed a Replying affidavit dated 3<sup>rd</sup> December 2018 and annexures **EMM-1**; whereas 6<sup>th</sup> Defendant/Respondent filed a Replying affidavit dated 3<sup>rd</sup> December 2018.
4. For the purposes of the application, the relevant facts leading to the filing of the motion are detailed in the affidavit of Njama Wambugu dated 16<sup>th</sup> May 2018 at paragraph 3 to 22 and further affidavit dated 19<sup>th</sup> November 2018 at paragraphs 12 to 27.
5. The facts of the Respondents case are contained in their Replying affidavits and more specifically in the affidavit of Winfrida Wanjiku Ngumi dated 3<sup>rd</sup> December 2018 from paragraphs 4 to 22.
6. I have very carefully perused the application, affidavits in support, Replying affidavits, parties respective written opposing submissions and oral submissions and the issues arising thereto for considering are as follows:-

a) Whether or not Decamis Limited, the 3<sup>rd</sup> Defendant herein is a legally registered company and a shareholder of the 1<sup>st</sup> Defendant?

b) Whether the plaintiff's suit and the application is competent?

c) Whether or not a dispute as contemplated by Article 32 of the 1<sup>st</sup> defendant's Articles of Association exists?

d) Whether or not the plaintiff has met the threshold for granting orders of injunction?

e) Whether the plaintiff has made a case for granting prayer 7 of the Chamber Summons dated 16<sup>th</sup> May 2018?

A) Whether or not Decamis Limited, the 3<sup>rd</sup> Defendant herein is a legally registered company and a shareholder of the 1<sup>st</sup> Defendant?

7. In the instant suit, there is a dispute whether Decamis Limited, the 3<sup>rd</sup> Defendant/Respondent herein is a legally registered company and it is a shareholder of the 1<sup>st</sup> Defendant/Respondent. It is contended in the affidavit of Njama Wambugu dated 16<sup>th</sup> May 2018 at paragraph 16 as follows:

**"I have since learnt that Decamis Limited for which the 3<sup>rd</sup> Defendant is the proxy and local representative in Kenya, was deregistered on the 1<sup>st</sup> day of December, 2017 and is no longer a shareholder of the 1<sup>st</sup> Defendant. The company search dated 9<sup>th</sup> May, 2018 as proof thereof is exhibited at pages 49 to 50 of the list and Bundle of Documents."**

8. The position as regards the 3<sup>rd</sup> Defendant/Respondent is that the 3<sup>rd</sup> Defendant/Respondent had been temporarily removed from the companies register in Hong Kong. The 3<sup>rd</sup> defendant herein subsequently applied for reinstatement, which reinstatement was subsequently effected, leading to 3<sup>rd</sup> defendant being restored on the Hong Kong Companies register on 19<sup>th</sup> September 2018 as evidenced by annexure marked "LMK-3" in the affidavit of Lucy Mumbi Kimani dated 20<sup>th</sup> November 2011 in which she has deponed as follows:-

**"THAT whereas Decamis Limited had been temporarily removed from the companies register in Hong Kong for failure to file its annual returns on time, the company did subsequently apply for reinstatement, which reinstatement was approved and Decamis Limited restored on the Hong Kong companies register on 19<sup>th</sup> September, 2018. [Annexed hereto and marked LMK-3 is a cop of the restoration certificate from the Hong Kong Companies Registry]."**

9. According to section 764(1) of the Hong Kong Companies ordinance and section 915(1) of the Companies Act, 2015 Kenya, the effect of the restoration of the 3<sup>rd</sup> Defendant on Hong Kong Companies register is that the actions of the 3<sup>rd</sup> Defendant would be valid from 1<sup>st</sup> December 2017. The relevant Section of Hong Company Ordinance confirming that position is attached as "LMK-4". The exact words of the section reads as follows:-

**"If a company is restored to the Companies Register under this Subdivision, it is to be regarded as having continued in existence as if it had not been dissolved."**

10. Similar position prevails in Kenya under section 915(1) of the Companies Act, 2015, which provides as follows:

**"The effect of the restoration of a company to the Register is that the company is taken to have continued in existence as if it had not been dissolved or struck off the Register."**

11. I find as per section 915(1) of the Companies Act, wording that the restoration of the 3<sup>rd</sup> defendant to the register, upon being effected by the companies registry in Hong Kong, the 3<sup>rd</sup> Respondent continued to be in existence as if it had not been dissolved or struck off the register from 1<sup>st</sup> December 2017 and as such I find the 3<sup>rd</sup> defendant remains a shareholder of the 1<sup>st</sup> defendant and was entitled and lawfully participated in extra ordinary general meeting held on 9<sup>th</sup> May 2018. This is clearly so, considering that the restoration of the 3<sup>rd</sup> Defendant/Applicant has not been challenged or contested by the Applicant nor has the affidavit of Lucy Wambui Kimani annexures "LMK-3" and "LMK-4" attached thereto have been controverted by the Plaintiff/Applicant.

12. As regards the issue of shareholding, there is no evidence to the effect that the 3<sup>rd</sup> Defendant ever ceasing being a shareholder of the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant has produced annexure "LMK-1" a copy of the record with the Registrar of Companies as at 14<sup>th</sup> May 2018, confirming the 3<sup>rd</sup> defendant is a shareholder of the 1<sup>st</sup> defendant. This evidence has not been rebutted by the Plaintiff/Applicant.

13. In the case of China Young Engineering Company –vs- L.G. Mwacharo T/A Mwacharo Associates & Another [2012] eKLR, the Honourable Justice Mabeya expressed himself as follows regarding the records of the Registrar of Companies: -

**"My view is, when there is a dispute as to directorship and shareholding of a company, the best evidence to be relied on is the updated records from the Registrar of Companies. That registry is meant to keep the records of all Companies and for the purposes of the public to rely on the same as reflecting the true record of any particular company."**

14. In view of the evidence adduced by the 3<sup>rd</sup> defendant, I find that where the dispute as to the directorship and shareholding of a company

arises, the prima facie evidence as to directorship and shareholding is a copy of the record from the Registrar of Companies as the companies record are in the custody of the Registrar of Companies and the said evidence is reliable and ascertainable. It is in actual fact that the best evidence that a party can produce in support of its contention that it is a director or a shareholder. I therefore find the 3<sup>rd</sup> defendant has on balance of probability demonstrated that at all material times it has been a shareholder of the 1<sup>st</sup> defendant and that it was lawfully involved in passing of the resolutions of the 1<sup>st</sup> defendant. The appointment of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants as directors of the 1<sup>st</sup> defendant are contested and urged are yet to be ratified by the shareholders at an extra ordinary general meeting and bearing in mind these are some of the pending issues before this court; I would decline to making a finding at this stage as the issue is for internal management which can best be addressed in a general meeting of the 1<sup>st</sup> Defendant/Respondent.

15. The number of appointment of directors of the 1<sup>st</sup> defendant is provided for in clause 13 of the Articles of Association where it is provided as follows:-

**"Until otherwise determined the number of Directors shall not be less than two and not more than seven. The names of the first Directors shall be determined in writing by the subscribers of the Memorandum of Association or a majority of them and until such determination the signatories to the Memorandum of Association shall be the first Directors, and the directors must be shareholders."**

16. In the English case of **Burland –vs- Earle [1902] 71 LJPC**, the Privy Council held as follows: -

**"It is an elementary principle of law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so."**

17. In **Re "K" Boat Service [1998] eKLR**, the High Court in expounding on the **"domestic forum rule"** that obligates a shareholder to seek redress internally before seeking the court's assistance held as follows: -

**"Courts will interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company."**

18. Further, in the case of **East African Safari Air Limited –vs- Anthony Ambaka Kegode & another [2011]**, the Court of Appeal in affirming that ratification is a powerful tool to cure an irregularity and should be utilized where possible held as follow: -

**"Furthermore, if the initial act of giving authority was defective, the principal can also ratify the same, and upon ratification it is deemed to have been properly given. The doctrine of ratification is a powerful tool, in the relationship of a principal and agent, to "cure" an irregularity."**

19. Having considered clause 13 of the Articles of Association of the 1<sup>st</sup> defendant, I find the 3<sup>rd</sup> defendant participation in the extra ordinary meeting of the 1<sup>st</sup> defendant held on 9<sup>th</sup> May 2018, was lawful. I however find that the act complained of by the plaintiff was contrary to clause 13 of the Articles of Association of the 1<sup>st</sup> defendant hence ultra vires and not rectifiable by ordinary resolution and as such this gives the court power to interfere with the established management of the affairs of the company.

#### **B) Whether the plaintiff's suit and application is competent?**

20. In paragraphs, 22 and 23 of the Plaint dated 16<sup>th</sup> May, 2018 the Plaintiff avers as follows:-

**"22. I seek to pursue the resolution of the dispute in arbitration in terms of Article 32 of the 1<sup>st</sup> Defendant's Articles of Association.**

**23. In the meantime, it is only just and fair that an interim measure of protection be issued by the Court to restrain the 2<sup>nd</sup> Defendant from holding herself out as a majority shareholder and the 4<sup>th</sup> to 6<sup>th</sup> Defendants from holding themselves out as directors of the 1<sup>st</sup>**

**Defendant and taking any action in that capacity."**

21. Basically the crux of the Plaintiff's case is that the current shareholding and directorship of the Company contained in the aforementioned CR 12 dated 3<sup>rd</sup> July, 2018 is either illegal and/or fraudulent. Accordingly, the 2<sup>nd</sup> Defendant should be restrained from exercising her duties to the Company as the majority shareholder whilst the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants should be restrained from serving as the non-executive directors of the Company.

22. In **Amin Akberali Manji & 2 others vs Altaf Abdulrasul Dadani & another [2015] eKLR** the Court of Appeal expressed itself in paragraphs 25 and 26 of its judgment as follows:-

"25. In essence the rule established principles. The first is the **"proper plaintiff principle"** and the second is "the majority

principle". Through the former, a wrong done to the company may be vindicated by the company alone. On the second principle, if the alleged wrong can be confirmed or ratified by a simple majority then a shareholder is barred from bringing an action. The principal effect in the rule is to bar actions by minority shareholders.

26. This Court and others in this country have indeed cited and followed the Foss case and others which came after it, as good law. The case of Rai and Others vs. Rai and Others [2002] 2 EA 537 and Grace Wanjiru Munyinyi and Another vs Gedion Waweru Githunguri & 5 others [2011] eKRL were cited before us to confirm that the rule in Foss case still stands in Kenya. In a recent case, Arthi Highway Developers Ltd vs Westend Butchery Ltd & 6 Others Civil Appeal No.246 of 2013 this Court followed the summing up of the rule by Lord Denning M.R in Moir vs Wallerstainer [1975] 1 ALL ER 849 at pg 857, thus:-

"It is a fundamental principle of our law that a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sur for the damage. Such is the rule in Foss vs Harbottle (1843) 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can use."

23. It should be acknowledged that there are exceptions to the Rule in Foss vs Harbottle. The Court of Appeal in **Grace Wanjiru Munyinyi & Another vs Gedion Waweru Githunguri & 5 Others (2011) eKLR** referred to the case of Rai and Others vs Rai and Others (2002) 2 EA 537 which summarized the principle of Company Law established in Foss vs Harbottle (1843) 2 Hares 461, 67 ER 189 as follows:-

**"The classic definition of the rule in Foss vs Harbottle is stated in the judgment of Jenkin LJ in Edwards vs Halliwell [1950] 2 ALL ER 1064 at 1066 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation (2) where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter, because, if the majority confirms the transaction, caditquaetstio; or, if the simple majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority shareholders cannot confirm the transaction (4). There is also no room for the operation of the rule if the transaction complained of could be validly sanctioned only by a special resolution or the like because a simple majority cannot confront a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to being a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."**

**The rule in Foss vs Harbottle still stands in Kenya. The exception to the rule referred to above may be taken advantage of by minority shareholders if they can show fraud but they cannot do so by way of a petition. They can only do so as plaintiffs in a derivative action."**

24. I have perused the plaint and more specifically the prayers sought as well as the application now before me and I find that in this suit and the application there is exception to the classic definition of the rule in **Foss vs Harbottle** in that what is alleged to have been done amounts to fraud and the wrongdoers are themselves said to be control of the company. I therefore find the rule should be relaxed in favour of the aggrieved plaintiff who is the minority, who has brought up the matter on his behalf. An aggrieved party should be allowed to ventilate his claim before a court of law, as by denying him such a right, his grievance would never be before court as the wrongdoers being in control themselves, would not allow the company to sue. I agree the rule in **Foss vs Harbottle** is applicable in Kenya.

Having considered the submissions and the pleadings I find that the plaintiff's suit and the application is competent and cannot be struck out.

#### **C) Whether or not a dispute as contemplated by Article 32 of the 1<sup>st</sup> defendant's Articles of Association exists?**

25. Under Article 32 of the 1<sup>st</sup> defendant's Articles of Association it is provided thus:-

**"Whenever any differences arise between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles or of the....., or touching anything then or thereafter done, executed, committed or suffered in pursuance of these Articles, or any claim or account of any such breach, or alleged breach or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company or to any of the affairs of the Company, every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two arbitrators, or whom one shall be appointed by each of the parties in difference."**

26. The Defendants/Respondents contention is that clause 32 of the Articles of Association of the 1<sup>st</sup> Defendant/Respondent can only be invoked or contemplates a dispute between the company on one hand and its members, their members, their executives, administrators and/or assigns on the other hand. They contend that therefore Article 32 is only applicable where a dispute is between the company and a shareholder or their legal representative, urging that the present dispute is between two shareholders and therefore does not fall within the ambit of Article 32 of the Articles of Association of the 1<sup>st</sup> Defendant/Respondent.

27. It is further contended by the Defendants/Respondents that in paragraph 18 of Njama's affidavit he confirms that the present alleged dispute is between two shareholders and not the company and any shareholders, this according to the Respondents is an acknowledgment the dispute does not fall within the content of Article 32 of the Articles of the Association of the 1<sup>st</sup> Defendant/Respondent.

28. In paragraphs 18 and 19 of the Affidavit sworn by plaintiff on 16<sup>th</sup> May 2018 he has deponed thus:-

**"A dispute has arisen between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on one hand and on the other hand in respect to the 2<sup>nd</sup> Defendant's breach of the exit agreement and the unlawful appointment of the 4<sup>th</sup> to 6<sup>th</sup> Defendants as directors of the 1<sup>st</sup> Defendant. The letters from my Advocates, Havi & Company to Registrar of Companies, the 2<sup>nd</sup> Defendant, Decamis Limited and to various Banks are exhibited at pages 61 to 71 of the List and Bundle of Documents.**

**I have notified the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants of the dispute and proposed the resolution of the same by negotiation, mediation or arbitration but the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have refused to indicate their concurrence in the declaration of the dispute and request for arbitration. The letters from the 2<sup>nd</sup> Defendant to Registrar of Companies and NIC Bank Limited and letters from Waweru Gatonye & Co. Advocates in that regard are exhibited at pages 72 to 80 of the List and Bundle of Documents."**

29. The Plaintiff/Applicant contention is that a dispute exists as contemplated by Article 32 of the Articles of Association of the 1<sup>st</sup> Defendant/Applicant. Article 32 of the Association cannot in my view be restricted to a dispute between a company on one hand and a shareholder or legal representative on the other hand. The nature of the dispute relates to matters which were done, executed, omitted or suffered in provisions of the Articles of the company and in particular under clause 9, 10 and 13 of the Memorandum and Articles of Association of the company dealing with nomination of directors. Transfer of shares is also a matter of Articles of Association under clause 9 and 10 respectively. In accordance to clause 32 of Articles of Association of 1<sup>st</sup> Defendant/Respondent any difference shall be referred to the decision of an arbitrator. The Articles of Association constitute a contract not only arising between every member and the company, but also amongst the members, of the company. The plaintiff claim as per plaint is against a co-director in a matter of nomination of directors; being an issue, between the 2 directors, the company can be sued or sue arising out of an act done by one of the directors. Clause 32 is clear that a suit can be commenced where a difference arise between the company on one hand and any member or members on the other hand. A dispute between a member and another for it to be referred to arbitration need not be the one in which a member has a claim as against the company but a claim in which it touches the true intent and constitution or consequences of the articles. In view of the above I am satisfied a dispute exists as contemplated under Articles of Association of the 1<sup>st</sup> Defendant/Respondent.

30. In case of **Abdirahman Affi Abdalla vs Osupuko Service Station Limited & Another [2012] eKLR** the court while interpreting a clause similar to clause 32 stated:

**"With respect, Mr. Chelang's contention overlooks one fundamental principle of company law. That principle ordains that a company's articles of Association give rise to a contract not only between every member and the company, but also among the members of the company inter se. the logical conclusion to be drawn from that principle is that the members of the 1<sup>st</sup> plaintiff company are bound by that Company's Articles among themselves, and therefore Article 31 becomes an arbitration agreement among all the members."**

31. Further in the decision of the Court of Appeal in the case of **UAP Provincial Insurance Company Limited vs Michael John Beckett (2014) eKLR** it was held thus:-

**"It is clear from this provision that the inquiry that the court undertakes and is required to undertake under Section 6(1) (b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters to be referred to arbitration...."**

32. The Arbitration Act provides a mechanism for a party who wishes to compel an initiator of legal proceedings with respect to a matter that is subject of an arbitration agreement to refer the dispute to arbitration. **Section 6(1) of the Arbitration Act** provides:-

**"(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—**

**(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or**

**(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."**

33. It is clear from **section 6(1) of the Arbitration Act** the enquiry that the court has to undertake and is required to undertake is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. That if as a result of that inquiry the court comes to the conclusion that there is indeed a dispute and that such a dispute is one that is within the scope of the arbitration agreement, the court has to refer the dispute to arbitration before the agreed forum for resolution of the dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, the correct forum for resolution of the dispute is the court.

34. In **Elizabeth Chebet Orchardson vs China Sichuan Corporation for International Techno-Economic Corporation & another [2013] eKLR**, the Court set out the core principle for consideration of the grant of an interim measure of protection, thus:-

**"The question of whether or not there was any breach of contract by whichever party or whether there is a dispute capable of being arbitrated upon...should rightly be resolved by the arbitrator."**

35. In **Lagoon Development Ltd vs Industrial Designing & Researching Institute [2014]** the court stated as follows:-

**"Perusal of section 7 of the Arbitration Act clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order of interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral reference."**

36. I have considered the parties submissions and relevant authorities and more specifically the Respondents submissions that the dispute to be referred to arbitration is not arbitrable, however the question, whether or not the plaintiff has a dispute with the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant and others contemplated under Article 32 of the 1<sup>st</sup> defendant is a dispute capable of being dealt with by the arbitrator and come with his resolution. The parties intention as per the Articles of Association was to have any dispute arising out of their operation resolved through arbitration and not through the court.

**D) Whether or not the plaintiff has met the threshold for granting orders of injunction?**

37. In **Giella vs Cassman Brown (1973) E.A 358** the principles for consideration before granting an order of injunction are well settled. For a successful party has to demonstrate the following before an interlocutory application is granted:-

**a) Prima facie case with probability of success;**

**b) The Applicant might suffer irreparable loss which would not be adequately compensated by an award of damages, and;**

**c) The court will decide applications of this nature on a balance of convenience if (a) and (b) above are in doubt.**

38. **Section 7(1) of the Arbitration Act** provides:-

**"(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."**

39. The High Court in considering an application for interim measures of protection pending arbitration, the court is restrained from delving into merits or demerits of the parties' case. I find that it is not proper for court to deal with the merits of the case when that is not a function of the court in matter that is likely to proceed on arbitration at the stage of seeking prayers under section 7(1) of the Arbitration Act.

40. In **Telewa Road Construction Limited vs Kenya National Highways Authority [2014] eKL** the court rendered itself thus:-

**"The injunction herein was granted on a balance of convenience as granting it on the grounds that the Plaintiff has established a prima facie case with a probability of success could be misinterpreted to mean that the court has considered the merits or demerits of the dispute between it and the Defendant and which this court found it has no power or jurisdiction to do."**

41. The restraining orders which the plaintiff is seeking here are in the nature of interim measure of protection pending arbitration as provided for under section 7(1) of the Arbitration Act. I am satisfied that the Applicant has demonstrated on balance of convenience restraining orders should be granted and not that it has established a prima facie case with probability of success nor has it established it has a case on merit .

**E) Whether the plaintiff has made a case for granting prayer 7 of the Chamber Summons dated 16<sup>th</sup> May 2018?**

42. In the instant matter, the Plaintiff/Applicant urges that it is the plaintiff and the 2<sup>nd</sup> defendant who are authorized to operate the various bank accounts of the 1<sup>st</sup> defendant, who exercises the mandate in their capacity as directors of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> to 6<sup>th</sup> defendants resist the grant of the injunction against the change of Bank mandate on claim that the 4<sup>th</sup> to 6<sup>th</sup> defendants are non-executive directors. The plaintiff urges the said directors nos. 4 to 6 were not properly appointed urging that in itself is sufficient ground to restrain them from holding themselves out as directors or from acting as such, amongst many other reasons.

43. The 2<sup>nd</sup> defendant urges that through its Board of directors is empowered to authorize the opening and changing of Bank Accounts and in running those accounts it can confer mandate to the company's directors and/or officer.

44. It is 2<sup>nd</sup> defendant's contention that from the onset, it is important to note that although there were no orders stopping the 1<sup>st</sup> defendant's Board from changing the company's mandate it has not done so. The applicant in his sworn affidavits dated 16/5/2018 he has not made any allegation nor gave any reason for his apprehension that the Bank mandate of the 1<sup>st</sup> defendant were about to be changed to his prejudice or disadvantage. In view of the above I find that there is no threat as regards Bank mandate of the 1<sup>st</sup> defendant and that there would be no prejudice if status quo remains as an interim measure of protection as provided for under section 7 of the Arbitration Act.

45. The upshot is that the Plaintiff/Applicant's application is granted as follows:-

**a) In terms of Article 32 of the 1<sup>st</sup> Defendant's/Respondent Articles of Association the dispute herein between the plaintiff and the defendants is referred to arbitration in terms of the aforesaid Article.**

b) Pending the determination of the dispute between the Defendants and the Plaintiff in arbitration, the 2<sup>nd</sup> Defendant be and is hereby restrained from holding herself out as the majority shareholder of the 1<sup>st</sup> Defendant on the basis of the 4,197 ordinary shares transferred from the Plaintiff to herself, pursuant to the power of attorney dated the 9<sup>th</sup> day of February, 2018.

c) Pending the determination of the dispute between the Defendants and the Plaintiff in arbitration, the 4<sup>th</sup> to 6<sup>th</sup> Defendants be and are hereby restrained from holding themselves out and acting as directors of the 1<sup>st</sup> Defendant.

d) Pending the determination of the dispute between the defendants and plaintiff in arbitration, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are ordered to maintain status quo as of 9<sup>th</sup> May 2018 as a measure of interim protection and not change the bank operations mandate of the 1<sup>st</sup> Defendant's account operated with Equity Bank Ltd – 0240201443382, KCB Bank Ltd – 007200001000012; Nic Bank Ltd – 1005010264; Spine Bank Ltd – 068000003991; Stanbic Bank Kenya Limited – 0100004574561 and 0100004574588 and Family Bank Limited - 068000003991.

e) Costs of the application to abide by the outcome of the arbitration.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of January, 2019.

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J .A. MAKAU

JUDGE