



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 213 OF 2014**

**JAMES MBERA MACHARIA.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**BI-MACH ENGINEERS LTD.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**-VERSUS-**

**SAMUEL MWANGI MACHARIA.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**BI-MACH ENTERPRISES LTD.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 19<sup>th</sup> October, 2018 brought by the respondents/applicants and supported by the grounds set out on the face of the motion and the facts deponed in the affidavit of the 1<sup>st</sup> respondent. The following orders are being sought therein:

- i. THAT this Honourable Court be pleased to re-open the case and issue directions as necessary.***
- ii. THAT this Honourable Court be pleased to make orders as may be just and expedient in the circumstances.***
- iii. THAT costs be provided for and be borne by the appellants/respondents in any event.***

2. The Motion stands opposed by way of Grounds of Opposition dated 23<sup>rd</sup> November, 2018 filed by the appellants.

3. At the hearing of the Motion, the parties opted to rely on their respective documents as filed. This court has considered the grounds presented on the face of the Motion, the facts deponed in the affidavits filed in support and the opposing Grounds.

4. The background of the matter is that the 1<sup>st</sup> appellant instituted the suit against the 2<sup>nd</sup> appellant, 1<sup>st</sup> and 2<sup>nd</sup> respondents vide CMCC No. 571 OF 2013 on the basis of a dispute in the directorship and management of the 2<sup>nd</sup> appellant. The 1<sup>st</sup> respondent then filed an application seeking an injunction to enable him participate in the running of the 2<sup>nd</sup> appellant company pending the hearing and determination of the suit and a further order that the 1<sup>st</sup> appellant be barred from denying him access to the 2<sup>nd</sup> appellant's premises.

5. Upon hearing the said application, the subordinate court granted the 1<sup>st</sup> respondent's application authorizing the 1<sup>st</sup> respondent to participate in the affairs of the 2<sup>nd</sup> appellant.

6. As a result, the appellants lodged the appeal against the said order and also filed an application seeking for an order for stay of execution of the same pending the hearing and determination of the appeal.

7. The aforementioned application was heard by the Honourable Lady Justice Aburili, who by way of her ruling delivered on 12<sup>th</sup> February, 2015 opined that the 2<sup>nd</sup> appellant, being a company, was the proper party to have lodged the suit before the subordinate court as opposed to the 1<sup>st</sup> appellant and that there was nothing to show that the 1<sup>st</sup> appellant; having previously been ousted from directorship in the 2<sup>nd</sup> appellant; had the authority to institute the suit.

8. The learned judge further stated that the 1<sup>st</sup> appellant who was a minority shareholder at the 2<sup>nd</sup> appellant company, instituted the suit without seeking and obtaining leave of the High Court to commence a derivative action on its behalf. Consequently, the judge rendered the appeal and the application for stay of execution, incompetent since neither was based on a competent suit to begin with. The appeal was therefore struck out.

9. Moreover, the learned judge ordered that there be a stay of further proceedings in CMCC NO. 571 OF 2013 and that the court file be submitted to the High Court for appropriate directions.

10. When the lower court file was availed to the High Court, a preliminary objection was raised to the effect that the High Court is *functus officio* and or lacks jurisdiction to handle any further proceedings in respect to the matter, having previously made orders in respect to the appeal. The Court thereafter made its ruling that by virtue of the fact that it had acted *suo motu* in the matter, it would not entertain any preliminary issues or submissions raised by either of the parties.

11. The foremost issue for determination concerns whether this court can and ought to re-open the appeal. On the one hand, the 1<sup>st</sup> respondent states in his affidavit that this court had previously ordered that the appeal be struck out and the file be closed. Further to this, the 1<sup>st</sup> respondent asserts that prior to that, this court had equally ordered that the lower court file be submitted before it for the making of appropriate orders and directions but that the appellants opposed the making of such orders, thereby leading to the closure of the appeal.

12. It is also the 1<sup>st</sup> respondent's averment that he had consequently filed an application seeking to have the suit (CMCC No. 571 OF 2013) struck out for being incompetent but which application was equally opposed by the appellants on the basis of lack of jurisdiction. That ultimately, the trial court agreed with the reasoning taken by the appellants and declined to make any orders in view of the earlier directions of this court, the impact of which is that the suit is currently in limbo and ought to be closed.

13. On the other hand, the appellants have taken the view that this court is *functus officio* over the application by virtue of the fact that it had already dealt with the appeal and a previous application for a stay of execution and stayed any further proceedings in the suit on 12<sup>th</sup> February, 2015 and that on 29<sup>th</sup> May, 2015 this court in the presence of the counsels for the parties declined to accept further representations in the appeal and went ahead to close both the appeal and suit.

14. It is also argued by the appellants that in any event, the respondents have not offered any basis on which to re-open the case.

15. I have taken into account the rival arguments. It is clear from the record that Lady Justice Aburili, in striking out the appeal, determined the same to be incompetent for the reasons set out hereinabove and also found that the suit was incompetent *ab initio* on the basis of lack of jurisdiction of the subordinate court. Having determined so, she moved to close the matter.

16. It is clear to this court that this court is *functus officio* over the matter. The learned judge in her ruling of 29<sup>th</sup> May, 2015 essentially closed both the appeal and suit files in exercise of her supervisory jurisdiction.

17. It therefore follows that there is really no basis for re-opening the matter.

18. In the end, I find no merit in the application and do not hesitate to dismiss the same with no order as to costs.

**Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of September, 2019.**

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**J. K. SERGON**

**JUDGE**

**In the presence of:**

..... for the Appellants/Applicants

..... for the Respondents