



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISC CAUSE NO. 197 OF 2015**

**IN THE MATTER OF: THE COMPANIES ACT,CAP 486**  
**OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF : AN APPLICATION FOR APPOINTMENT OF INSPECTORS BY COURT  
UNDER S.165 AND 166 OF THE COMPANIES ACT**

**AND**

**IN THE MATTER OF: KEY INVESTMENTS LIMITED, C52386**

**AND**

**IN THE MATTER OF: PLASTIC PRODUCTS CO. LIMITED, C.94770**

**AND**

**IN THE MATTER OF: MULTI PACKAGING LIMITED, C.13776**

**BETWEEN**

**JITU TRIBHOVANBHAI SAVANI .....APPLICANT/SHARELHOLDER**

**AND**

**PARAG BHAGWANJIGHAI SAVANI.....1<sup>ST</sup> RESPONDENT**

**P.V.R RAO .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. For determination are 2 applications, one by the Applicant/share holder dated 30.4.2015 and another by the Respondents dated 2.11.2015.

2. The 2 applications were canvassed together by way of written submissions and oral submissions.

## **MOTION DATED 30.4.2015**

3. On the above motion, the Applicant cites the provisions of S.165,166,396 companies Act, and Rules 3 & 8 (c ) of the Companies (High Court) Rules 53A, 63( e) and Order 40 Rule 1 & 2 CPR and Articles 27,28,35, and 40 Constitution of Kenya 2010.

4. The application sought 7 reliefs and the Applicant abandoned prayers 1-2 and canvassed prayer 3,4 and 5.

- Prayer No.3, seeks injunctive relief to stop Respondent from Changing, altering or whatsoever interfering with the shareholding and directorship of – KEY INVESTMENT COMPANY LTD (KIC), PLASTIC PRODUCTS COMPANY LTD (PPC) AND MULTI PACKAGING COMPANY LTD (MPC).
- Prayer(4) seeks an Order for appointment of an Inspector to inspect the affairs of the companies and to report to the Court thereof on the all affairs of the Company as itemized in paragraph 4 a – j in the application.
- Prayer (5) seeks an Order for inspector to file report of inspection within 21 days of the date of the Court Order.
- (6) Plus costs.

5. The application is opposed by first Respondent via an affidavit sworn on 13.5.2015 and 2nd Respondent affidavit sworn on 13.4.2015 and filed on 15.5.2015.

### **The Applicant case**

6. The Applicant case is that he is a share holder of the 3 above named companies which have offices in Nairobi.

7. In particular he holds 200 shares in (KIC) company and 1<sup>st</sup> Respondent holds also 200 shares whereas the widow of BT Patel holds 600 shares. He laments that he has never been invited to any annual general meeting and no such meetings has ever been held. The above KIC affairs are being conducted in an oppressive manner in that the Applicant has not been given audience by the Respondents (who are director and company secretary respectively) nor has he been allowed access to companies records. The Respondents meet and make decisions secretly in his exclusion on affairs of the companies named.

8. In the year 2014 the 2<sup>nd</sup> Respondent filed returns which showed that Jitendra Trikemda and Sarju Parag Savani were appointed as directors of the Company without his knowledge, consent or approval. The shares of KIC owned by BT Patel (deceased) were transferred to his wife in breach of clause 7 of the Articles of the association of KIC despite Applicant objection of the same.

9. The files of KIC and MPC at the registry shows alterations were done without Applicant knowledge or approval; while at the same time the PPC file was and is still missing at the registry. The Applicant laments that the Respondents have opened private account secretly. The Companies are not paying KRA dues.

10. The relationship of the Directors has irretrievably broken down and thus the applicant's investment in the company are being compromised. The Applicant also doubts the validity of the appointment of the Company Secretary (the 2<sup>nd</sup> Respondent).

11. The Applicant challenges the validity of the Replying affidavit sworn by the 2<sup>nd</sup> Respondent on 13.4.2015 as that was before the lodging of the instant application.

12. He avers that he has met the threshold for grant of Orders of inspection under S.165 and 390 of Cap 486 Laws of Kenya. He particularizes under paragraph 4 a- f the facts warranting the inspection orders sought. He also submits that there is no legal bar to making the application for inspection of 3 companies

rather than a multiplicity of applications per company. This is because the issue involves the only two surviving share holders and Directors of the Companies.

13. He further avers that the issues in HCC 130/2014 are different from ones in the instant suit. He further avers that under the cited provisions of the law, the court has jurisdiction to entertain the matter.

14. There is also an issue of the sharing 3 companies as earlier shown by the ratio of 200:200 and 600 (Applicant, 1<sup>st</sup> Respondent and BT) respectively to be straightened via the inspection report. The companies are not being ran in a transparent manner thus need for inspection orders sought. The applicant avers that he is the Managing Director of the companies yet he has been excluded from running and managing the same.

15. Since 2014 when the Applicant was a signatory to minutes and Annual Accounts, he has been excluded from such exercise. He has lamented also for the failure of 2<sup>nd</sup> Respondent to respond to his protest letter on the holding of the Extra Ordinary General Meeting. The Company Secretary has not shown any documents appointing him legally in the office. The Applicant further complains of the 1<sup>st</sup> Respondent transfer of his shares to joint names of himself and that of his wife contrary to the Articles of the Association of the Company.

16. The Applicant concludes by averring that there is no prejudice to be suffered by the Respondent by conduct of the inspection of the companies' affairs unless they are conceding that they are concealing something illegal.

17. The first Respondent via his Affidavit opposed the application. He avers that the application is incompetent as under section 165, 160 and 396, the inspection can only be conducted for a single company not multiple companies. The affected companies should be the Respondents. In any case some issues were raised in HCC 130/2014.

18. Further only Registrar of Companies or Attorney General who can invoke the provisions. The Court thus lacks jurisdiction to grant reliefs sought.

19. The 1<sup>st</sup> Respondent, Bt and J.T participated in running of the company's business though he acknowledges that wrangles developed precipitating the filing of HCC 130/2014 Nairobi.

20. The 1<sup>st</sup> Respondent father held shares of the companies with his mother and thus upon his death they vested in her solely. He denies that the affairs of the companies are run oppressively nor has Applicant been denied information and access to the same. The 1<sup>st</sup> Respondent avers that the Applicant is the Managing Director of MPC and continues to participate in management of the companies however in 2014 he was excluded from certain matters of the company since March 2014 as he became recalcitrant in refusing to sign audit report of 2014.

21. He avers that director Swaly and Ms. Savani were not imposed but mere appointed in Extra Ordinary Meeting of the companies held on 31.3.2014, which the applicant boycotted despite service with a notice.

22. He denies the various allegations against him including denying Applicant access to the company information or of his intention to siphon companies funds. Applicant being a shareholder and Director and also a signatory of accounts of the 3 companies has never been denied any information requested.

23. The 1<sup>st</sup> Respondent concludes that the complaint by the Applicant can only be addressed under Section 219 of Cap 456 but not via application like the instant one in court.

24. On his part, the 2<sup>nd</sup> Respondent avers via Affidavit he swore on 13.4.2015 that he and 1<sup>st</sup> Respondent have never conducted affairs of the companies in an oppressive manner by denying Applicant audience and timely records. He avers that he is not involved in day to day running of the companies as they are private entities and his duties are just formal filing of returns, effecting company changes at the registry

and ensuring statutory requirements as to the AGM are met, which duties he has discharged for over 20 years.

25. He cannot answer to the alleged oppression or denial of audience or records of the companies. He, Applicant has received all requisite documents he sought from the 2<sup>nd</sup> Respondent such as Annual Returns of Companies of 2000-2014. Applicant has had knowledge and participated in all meetings and companies' decision making. He has signed all accounts and minutes of prior to 2014 period. The 2<sup>nd</sup> Respondent reiterates that the Applicant was invited to attend meeting of 31.3.2014 but declined and instead protested in writing. Same meeting appointed 2 directors the Applicant is complaining about.

26. The transfer of shares of BT to his wife was legal and undertaken by the advocates. He denies the allegation made against him by the Applicant in totality and avers that there is no illegality in the manner the company is being run. There are no bank accounts opened as alleged neither nor is there tax evasion evidence as alleged.

27. The appointment of the auditors is legal and is always renewed. The 2<sup>nd</sup> Respondent prays for dismissal of the application.

28. After going through the application, the Affidavits and the parties submissions, I find the following issues emerge;

***(1) Whether the court has jurisdiction to entertain and grant order sought in the matter?***

***(2) If above in affirmative, has the Applicant met the thresh hold for the grant of the orders sought?***

***- For injunction?***

***- For inspection?***

29. The companies High Court Rules; under Rule 3 ***“Any proceedings brought under the rules shall be deemed to be a suit within the meaning of Cap 21 and the CPR and general practice of the court including the course of procedure and practice in Chambers shall apply so far as the act or the rules otherwise provide”.***

30. **Under S. 165** the court may appoint one or more competent inspectors to investigate the affairs of the company and report thereof in such a manner as the court directs; *‘in case of a company having a share capital, on application of ----member(s) holding not less than 1/10 (10%) of the shares issued’.* S. 165(2) ***“the application shall be supported by such evidence showing the Applicants have good reason requiring the investigation, and the court may before appointing an inspector require the Applicant to give security to amount not exceeding Kshs.10,000 for payment of the costs of the investigations”***

31. The Respondent submits that the application is incompetent and an abuse of the court process. Same ought to have been filed for each of the companies. There is a HCC No.130/2014 pending on same allegations and that the court lacks jurisdiction to grant reliefs sought.

32. The provisions of S.165 (1) Cap 486 requires a share holder(s) of at least 10% to move the court for inspection of companies' affairs if he has a good reason.

33. The threshold is evidential but the locus is determined by the share holding. The Applicant holds 20% of each of the 3 companies. This share holding enables him to move court with a good reason for an inspection of the company affairs. The 3 companies are under the directorship of the Applicant and the 1<sup>st</sup> Respondent save for the disputed appointment of Swaly and Ms. Savani in 2014.

34. The affairs of the same have been under the hands of the 2 mentioned directors (Applicant and the 1<sup>st</sup>

Respondent) save for the exclusion of Applicant in certain matters of the companies as admitted by the 2<sup>nd</sup> Respondent as from 2014 due to the wrangles. Essentially on prima facie basis the Respondent have been running and managing the affairs of the 3 companies and even did engineer the appointment of the new directors in the 3 companies in an extra ordinary meeting of 31.3.2014 which Applicant boycotted.

35. All the activities of the 3 companies seem to be under the stewardship of the Respondents. There are no distinctions in share holding and management of the 3 companies and by the Respondent. Thus the application to inspect them which in effect is to interrogate Respondents activities in running the companies seems to be justified on the prima facie basis.

36. There is no law or authority cited which bars making a joint application to inspect the affairs of the 3 companies in the circumstances of the case. The HCC 130/2014 is a suit seeking various declaratory reliefs and not an inspection of the companies' affairs. In the premises the court finds that it has jurisdiction to entertain the application.

37. As to the non-joinder of the 3 companies, the provisions of the Civil procedure rules order 1 Rule 3 CPR declares that non-joinder or misjoinder of the party is not a ground to defeat suit. The Respondent who runs the affair of the same can also seek to join the same if he finds it necessary. Under Section 165 Cap 486, the nature of the proceedings contemplated are not derivative suit to warrant seeking of the leave to file or continue with the suit. The only requirement is the shareholding of at least 10% inter alia and grounds to seek orders for inspection. The suit does not fall within the realm of the Rule of **FOSS Vs. HARBOTTLE**.

38. On the issue No.2, whether the thresh hold for grant of the injunctive and inspection orders has been met, the court makes the following findings.

39. Various allegations have been raised by the Applicant on the oppressive manner in which the companies are run by the Respondents. This range from excluding him from the management of the same despite him being the Managing Director of the same companies. This has been confirmed by the 2<sup>nd</sup> Respondent that in 2014, they excluded him from certain companies' matters. The 2<sup>nd</sup> Respondent (company secretary for 20 years) has also said he cannot confirm oppression, omissions and denials alleged by the Applicant as he is not included in companies' day to day management.

40. It is evident that there are wrangles in management, funds, running of accounts, holding of meetings and filing of returns and content thereof.

41. The Respondent response is denials and suggestion that the Applicant should invoke the provision of Section 219 of Cap 486 on Winding Up the companies.

42. The information sought by the Applicant is for his good and the good of the future running of the companies for the benefit of the shareholders. No prejudice is being demonstrated by the Respondents that they are likely to suffer from such inspection if orders are granted.

43. There is need to establish the actual status on the affairs of the 3 companies as they stand. Already the court takes judicial notice of the attempt to siphon of the funds from the companies account legally or otherwise. Same also need to be included in investigation to establish the circumstances and the validity of the intended payment of the bonuses.

44. Meanwhile the court has to issue some protective measures as to the financial and shareholding status pending investigation and filing of the report to safeguard the interest of all members of the companies.

#### **MOTION DATED 12.11.2015**

45. The application dated 12.11.2015 is by the Respondents whereby they complain over the violation of status quo ordered in the matter by the Applicant. The Applicant procured orders of status quo in the instant suit. The Applicant called a meeting of the directors to the exclusion of the 2 new directors and a

resolution was passed and bonuses of Kshs.23,339,533/- was transferred to company account for payment to the directors.

46. The Respondent avers that the act was illegal. The Respondents submits that the companies belong to the shareholders and directors are agents and thus cannot pay themselves. Refer to **SHEPHARDS INVESTMENT LTD Vs. CASE PAGE 203** – highlighted part. Also **BERRY BOOKS LTD Vs. BOOKS & OTHERS** page 722 paragraph 22.

47. The Directors are supposed to act for the best interest of the company. The payment is for directors personal interest not for the company interest thus the court can intervene. The money should be returned as it was awarded and transferred illegally.

48. The Applicants oppose the application by Respondent and rely on affidavit of S.J SAVANI and JT SAVANI filed on 1.12.2015. They submit that there is no justification for orders sought. The Applicant cannot purport to act for the companies as he is not so authorized. The decision to award bonuses was made by the directors in course of their duties as directors.

49. It is also submitted that only the aggrieved person can sue, that person is the company. The application is branded to be made in bad faith. It is further argued that the case and cause for action lies elsewhere not in the instant case.

50. The Applicant insists that the companies have only 3 directors and same fact is reflected at the registry. The 3<sup>rd</sup> Respondent got credited shares of funds of bonus as credited to other 2 directors.

51. The Respondents dispute the registry documents showing the directors. He alleges that the documents are manipulated. The reason for filing application herein is because the orders for status quo were in the instant matter and the same were violated.

52. The freezing order is holding money where it had been transferred but not paid out. The Respondent submits that the problems of directorship shall be solved by the members.

53. After going through the application and the affidavits and the parties advocates submissions, I find on prima facie basis that the court will not rule on the application at this stage but after investigation report is filed. This is because the issues of shareholding and directorships is intertwined with the funds and management and thus need to have a full report.

54. Meanwhile, the court makes the following orders on application dated 30.4.2015;

**1. Prayers 3,4 and 5 are granted save that the parties to agree within 7 days on –**

**(i) The inspector**

**(ii) Amount for investigation**

**(iii) Duration of investigation**

**2. With respect to application dated 2.11.2015, the court orders that;**

**(1) The freezing order issued herein to remain in force until the inspection and report is filed in court when court will make further orders.**

**3. The inspection and report to include the circumstances leading to transfer of Kshs.23,339,533/=.**

**4. The costs in both applications to be in the cause.**

**Dated, Signed and Delivered in Court at Nairobi this 29<sup>th</sup> day of January, 2016.**

.....

**C. KARIUKI**

**JUDGE**