



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Case 51 of 2011**

**CHANDRESH KUMAR BABARIYA & ANOTHER.....PLAINTIFF**

**VERSUS**

**FLAMINGO TILES (K) LTD.....DEFENDANT**

**RULING**

The applicants in the Notice of Motion dated 5<sup>th</sup> April 2011 have moved this court under Orders 40 (Rules 1,2 and 3) 41 (Rules 1(1) (a) (b) (c) and (d) 51 (Rule 1) of the Civil Procedure Rules, seeking inter alia the following orders:

1. That the court be pleased to grant an order of injunction restraining the respondent from holding any meeting whether to remove the applicants as directors or otherwise pending the hearing of the application interparties.
2. That this Honourable Court be pleased to appoint Ponagipalli V. R Rao as a receiver for the respondent company pending the hearing and determination of the main suit.
3. That this Honourable court be pleased to remove Mukesh M. Patel, Shreedhar V.V. and Paresh Patel from possession or custody of the respondents property.
4. That this honourable court be pleased to commit the same property to the possession custody or management of the receiver.
5. That this honourable court be pleased to confer upon the receivers all such powers as to bringing and defending suits and for the realization management, protection, preservation, and improvement of the property, the collection of the rents and profits and the execution of such documents as the owner himself has or such of those powers as the court thinks fit.
6. That this court be pleased to issue such further orders or directions as it deems fit in the circumstances.

The application is founded on 15 grounds set out therein which are hereby summarized as follows:

1. That dispute has arisen between the applicants and some directors and/or shareholders of the respondent.

2. That the respondent's Managing Director, Financial Controller and Company Secretary are guilty of mismanagement of the company and are plundering the same thereby putting the respondent assets and business in jeopardy and ought to be removed and a receiver appointed in their place.
3. That the applicant's have been denied access to the company premises with the result that the manufacturing plant is at risk of being destroyed.
4. That the respondent has neglected the repayment of loans taken up by the company and secured by the applicants personal guarantees thereby exposing them to possible legal consequences.
5. That the respondent has, without good cause, withheld the applicant's dues as directors and otherwise thus exposing them to the risk of incurring financial loss.
6. That the respondent has neglected its performance of its core business of tile production yet its expenditure has been recorded as having escalated, a fact which in the applicants opinion could be interpreted either as mismanagement or falsification of records.
7. That as a result of the applicants complaints, the respondent decided to call a meeting of 14<sup>th</sup> April 2011 with the specific aim of removing them from directorship contrary to the provisions of the Companies Act (Cap 486 of the Laws of Kenya).
8. That the applicants fear that if the orders are not granted as prayed herein, the finances and other assets of the respondents may be mismanaged and misappropriated to their detriment. The application is supported by an affidavit of 20 paragraphs sworn by the 1<sup>st</sup> applicants on 5<sup>th</sup> April 2011 to which following documents are annexed:-

1. A copy of the plaint initiating the suit (Annexure "CKB 1").
2. A copy of a letter dated 23<sup>rd</sup> December 2010 from M/s. Galano Enterprises, the security agents guarding the respondent's premises written to an undisclosed recipient allegedly explaining a refusal to allow the applicants access to the factory premises(annexure (KB2')).
3. A copy of an Agenda for a directors' meeting of 26 in February 2011 (annexure "CKB 3") more specifically sub-titled "Agenda items and notes for the meeting of directors on 26<sup>th</sup> of February 2011.
4. A copy of a demand letter dated 8<sup>th</sup> March 2011 written to the respondents by M/s. Exotic Wood Products Ltd demanding a sum of Kshs.118,788.45 allegedly due on account of timber supplied to the respondents.

To defend the application, the respondent filed a replying affidavit of 37 paragraphs refuting each and every claim made by the applicants herein. The same was sworn by one Mukesh Manubhai Patel, a director of the respondent and a majority shareholder holding 45% of its issued share capital.

Written submissions were filed in the application followed by brief oral highlights by counsel.

The meeting sought to be restrained by an injunction having taken place as scheduled, the order for injunction to stop the same cannot issue. The same was sought under prayer 2 of the application which is expressed as follows:

"2 THAT this Honourable court be pleased to grant an order of injunction restraining the respondent from holding any meeting whether to remove the applicants as Directors of the respondent or otherwise pending the hearing and determination of the application interparties".

The above read together with ground 12 of the application which cited the meeting of 14<sup>th</sup> April 2011 which the applicants stated was specifically intended for their removal, I accept the respondent's

submission that the prayer for an order to stop the said meeting has been overtaken by events. I do not consider it necessary therefore to consider whether the same was illegal or unprocedural in view of the fact that the application was never amended, nor was any affidavit filed to show what objection, if any the applicants raised at the said meeting, if any, and in view of this court's finding on 12<sup>th</sup> April 2011 when an interim injunction to stop the meeting was denied. For these reasons, I find that the court has nothing upon which to decide on the issue of the applicant's removal from directorship position.

It follows therefore that the real issue remaining for determination are whether the named directors and/or officers of the company ought to be removed and replaced with a receiver to manage the affairs of the respondent pending the hearing and determination of the suit. In other words, are there grounds or do special circumstances exist for the granting of a mandatory injunction to that effect?

The submissions filed and highlighted by counsel for the applicants did not go beyond reiterating the averments made in the supporting affidavit which, as I has been submitted by counsel for the respondent has been exhaustively responded to by the replying affidavit of Mukesh Manubhai Patel (and the annexures thereto) to which no further or supplementary affidavit has been filed in reply. In their submissions, the applicants admit that theirs is a minority interest but state that, although their claim is in the nature of a derivative action, which strictly under the rule in FOSS –VS- HARBOTTLE (1843 2 Ha.461, can only be brought by the Company itself, their claim falls under the exceptions to that rule in that the actions of the named directors are not only oppressive to them as minority shareholders but also against the interests of the company's core business and assets which according to the applicants are under threat of dissipation and waste through mismanagement and plundering.

Claiming that their right to complain arises out of their having heavily invested in the company and being guarantors of the company in regard to colossal credit facilities obtained, the applicants justify their bringing the action and seeking orders on behalf of the company (despite having not joined the named directors as defendants) basing reliance on the following authorities which they say do support their cause:-

1. KALO DIPCARIMA –VS- BORNU HOLDING CO. LTD 1969 3ALR COMM 112.
2. ALI & OTHERS –VS- PATTNI & ANOTHER (1999)2 E.A. 720 (CAK)
3. NIGERIAN STORES WORKERS UNION –VS- UZOR ALR COMM 412

Relying as aforesaid, on the above authorities the applicants have submitted that the court ought to interfere with the internal affairs of the respondent as prayed, on the "just and equitable principle" as provided for under section 211 of the Companies Act, which they say applies to this case, alongside 41(1) of the Civil Procedure Act, which states as follows:-

"1. (i) Where it appears to be just and convenient, the court may by order-

- (a) Appoint a receiver of any property, whether before or after decree;
- (b) Remove any person from the possession or custody of the property;
- (c) Commit the same to the possession, custody or management of the receiver; and
- (d) Confer upon the receiver all such powers as to bringing and defending suits and for the realizations, management, and improvement of the property, collection of rents and profits, and the execution of such documents as the owner himself has or such of those powers as the court thinks fit".

The respondent has through the replying affidavit and the submissions filed sought to demonstrate that the applicants Notice of Motion is not meritorious in that the actions and/or undertakings the company and its present directors and/or officers were legal, regular and beneficial to the respondent and that contrary to what is deponed in the supporting affidavit, the deponent himself is culpable of having run down the

affairs of the Company, committed acts bordering on fraud against the company, siphoning company finances and applying the same to words own interest and incurring debts on behalf of the company but applying the money to grow his own business and also using the respondents property known as L.R. NO.Kajiado/Kitengela/15440 to secure personal loans and those of his own company Jiku Builders Ltd and also set up a business in Mauritius to compete with the respondent.

Among the complaints raised by the Company against the 1<sup>st</sup> applicant in particular is that he secured his 20% shareholding to obtain personal financial assistance from P.V.R. Rao, the same person he proposes to be appointed as receiver, which debt led to the said Rao suing the respondent vide H.C.C.C. NO. 117 of 2000 which the respondent has since settled.

The respondent has submitted therefore the proposal that the said Rao be appointed receiver is ill motivated and would not be in the company's interests.

The respondents has also cited mismanagement of the company by the 1<sup>st</sup> applicant and has cited the withdrawal of Kshs.51,166,306 for personal use, failure of account, as well as inflation of the costs of substandard machinery imported through the 1<sup>st</sup> applicant's company in Mauritius Millennium Ceramics which machinery is also blamed for the slackening of the manufacturing by the respondent. The respondent has demonstrated that it has, since the taking over of the day to day running of its affairs from the two applicants the bulk of indebtedness incurred while the 1<sup>st</sup> applicant was in charge has been cleared and business restored.

The respondent has submitted therefore that on grounds exist for removal of its three named directors and/or officers or the appointment of a receiver, submitting further that in view of the depositions made in the Repling Affidavit, the applicants have come to court with dirty hands and are therefore not entitled to the orders sought in any event.

After considering the application and the document action furnished to court by way of affidavits and annexures thereto, I am not satisfied that the applicants have made out a case either for the removal of the named directors and/or officers or the appointment of a receiver. There is nothing produced before court to show that the respondents property is in any danger of waste or to confirm the allegations that the named directors/officers are mismanaging the respondent or plundering its assets.

The contents of replying affidavit and the annexures thereto having not been rebutted by the filing of a further or supplementary affidavit, I find that the majority position cannot be upset and the application is adequately defended to the extent that it must be dismissed. The applicants have neither established a prima facie case, nor have they proved special circumstances to justify the granting of the interlocutory mandatory orders sought.

Accordingly the application fails and is hereby dismissed with costs to the respondents.

Dated signed and delivered at Nairobi this 26<sup>th</sup> day of January 2012.

**M.G. MUGO**  
**JUDGE**

In the presence of:

for applicants

for respondents.