



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 5 OF 2012

**EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED.....
PLAINTIFF**

Vs.

**THE PERMANENT SECRETARY, MINISTRY OF INDUSTRIALISATION..... 1ST
DEFENDANT**

**THE ACTING MINISTER, MINISTRY OF INDUSTRIALISATION..... 2ND
DEFENDANT**

**PETER KORIR.....3RD
DEFENDANT**

RULING

1. On 9/1/2012, the Plaintiff company East Africa Portland Cement Company Limited (hereinafter called "EAPCC" filed the present suit being HCCC No. 5 of 2012 seeking order to restrain the 1st & 2nd defendants from implementing a decision made under a letter dated 22nd December 2011 to suspend the entire Board of EAPCC and to restrain the 3rd defendant from assuming office through a purported appointment as the Managing Director of EAPCC.
2. The application was brought under certificate of urgency premised on the grounds that the plaintiff is a public company listed at the NSE but that the 1st and 2nd Defendants purportedly suspended the Board of Directors on 22nd December 2011 without any basis in law but out of sheer impunity. They also purportedly appointed the 3rd defendant to assume the position of acting Managing Director. The certificate further termed the suspension as unlawful as well as causing confusion, upheavals, serious harm and mischief to the internal management of the plaintiff hence the need for the plaintiff to seek redress to obviate irreparable financial and reputational loss. It further claimed that the matter was of sufficient public interest as shareholders and other investors cannot deal in the shares of the company. The action of the Minister was undertaken in total disregard to the interests of the majority of the shareholders and was done without adhering to the articles of association of the plaintiff company.
3. Upon evaluation of the grounds in support of certification of the application as urgent, this court was satisfied that the applicant had demonstrated great urgency in the matter in view of the confusion that had emerged on the management structure of the company following the decision of the 1st & 2nd Defendants aforesaid. The court therefore certified the matter urgent and admitted it for hearing during this Christmas

vacation.

4. The main Notice of Motion which this court admitted for hearing was framed under Order 40 and sections 1A, 1B and 3A of the Civil Procedure Act and essentially sought orders for temporary injunction to be granted restraining the 1st and 2nd Defendants, from enforcing and continuing to enforce the suspension of the Board of Directors as well as the Managing Director or in any manner reconstituting the Board of Directors or otherwise in any other way interfering with the management of the plaintiff in breach of its articles of association.

5. The grounds upon which this court was urged to grant the said temporary orders can be summarized as follows:

1) The 1st & 2nd defendants as agents of the government which is a shareholder to EAPCC were bound by the articles of the plaintiff.

2) The 1st & 2nd Defendants were in breach of the articles of association of the plaintiff.

3) The overall decision of the 1st & 2nd defendants to remove the board of directors was invalid and of no effect in company law. It was necessary for this court to declare the 1st & 2nd defendants decision a nullity in law so as to restore sanity in the internal management of EAPCC.

4) The suspension of the Board had resulted in uncertainty in the internal management of the plaintiff and was poised to cause irreparable harm to its shares, value and quality.

6. The application was supported by the affidavit of Kephart Tande sworn on 9th January 2012. This was buttressed by detailed submissions made by learned counsel for the applicant Mr. Adan. From the supporting evidence and submissions by counsel for the applicant, the court deduced the following factual and legal positions:

1) The GOK is a 25.3% shareholder in EAPCC. The other 75% shareholding is held by NSSF, private companies and individual shareholders.

2) NSSF is not a state corporation, having been exempted from such status vide Legal Notice No. 368 of 30th September 1994 duly signed by the then president of Kenya.

3) In any event, the current aggregated shareholding of GOK and NSSF stands at 48.3% hence the GOK has no controlling stake in the company.

4) EAPCC itself is not a state corporation in view of the GOK's said minority shareholding and indeed in view of Gazette Notice No.177 dated 1st September 1997.

5) EAPCC is governed by articles of association which provide the legal framework for the appointment, remuneration and removal of Board of Directors.

6) The action of the Minister to suspend the Board was unauthorized under the constitution of the company and under company or other law.

7) The effect of the Ministerial decision to suspend the Board had caused confusion and a state of disunity in the internal management of the company to the extent that the shares of the company had been suspended at the NSE and indeed the operations of the company were guiding to a halt.

8) The letter of the minister dated 22nd December 2011 (which was read to the court and which I perused) did not indicate the legal or other basis upon which the purported suspension of the Board was premised.

7. With regard to whether this court had jurisdiction to issue the orders sought, the court was referred to the decisions of Visram J and Ojwang J (as they then were) in the cases of **Royal Media Vs Telkom Kenya Ltd and B Vs Attorney General** both of which enunciated the position that in a proper case, injunction relief could be granted against an officer of the government who acted in disregard of the law and outside the scope of his authority notwithstanding Section 16 of the Government Proceedings Act.

8. With the above legal and factual position so laid, this court found this case a proper case for grant of interim injunction reliefs as prayed by the applicant company and proceeded to grant the same as framed in prayers (a), (b), (c) and (d) of the Notice of Motion dated 9th January 2012. The court further directed that the motion be served and scheduled the *inter partes* hearing for 19th January 2012.

9. As this court awaited to hear the parties on the appointed date a fresh application was filed by the 1st and 2nd defendants framed under order 40 rule 7 of the Civil Procedure Rules, and through which the applicants sought orders that the ex parte orders of 9th January 2012 be discharged.

10. When the parties appeared before me on 10th January 2012, Mr. Ngatia learned counsel for the applicant's in the new application told the court that the parties were pursuing possible settlement of the matter but that pending such settlement, the application should be certified urgent. He also requested the court to allocate a hearing date in case the parties failed to agree. The matter was therefore fixed for hearing on 11th January 2012 at 11.00 am.

11. Come 11th January 2012 at 11.00 am, the parties appeared before this court and none of the parties addressed the court on what had transpired with regard to the out of court settlement initiative intimated to the court earlier. Hearing of the application by the 1st & 2nd defendants therefore commenced.

12. For the record, Mr. Adan appeared for the plaintiff (EAPCC), Mr. Ngatia for the 1st & 2nd defendant, Mr. Ochieng Oduol, Mr. Muindi and Mr. Masika for the 3rd defendant and Mr. Evans Monari for the four suspended directors of EAPCC in the Judicial Review Matter.

13. Mr. Ngatia for the 1st & 2nd defendant/applicants told the court that the necessity for the application was that the *ex-parte* orders procured by the plaintiff on 9/1/2012 were so procured through concealment of material facts which if revealed this court would not have been persuaded to grant the orders. He argued that the plaintiff did reveal the existence of a similar application before the Judicial Review court of concurrent jurisdiction being case No. 337 of 2011 (hereinafter called the "JR proceedings") and which was pending for hearing. In essence, he argued that there were two different suits pursuing essentially the same orders. In support of this application, an affidavit by the Acting Minister for Industrialization sworn on 10th January 2012 in which the Minister averred that he had made a completed answer to stay orders sought in the JR suit.

14. Coming back to Mr. Ngatia's submissions, this court was told that the appointments of Mr. Tande, (as Managing Director), Mr. Mark Karbolo (as Chairman) and Mr. Daniel Koros as a member of the EAPCC Board were all done by the Government of Kenya ("GoK") through Gazette Notices and pursuant to the State Corporations Act. He referred the court to the said Gazette Notices in the applicant's annexure. In this manner, the appointment of the Board was done in exercise of the minister's powers under that Act and on the basis that EAPCC was a state corporation. Mr. Ngatia also referred the court to a GoK organization structure dated May 2008 that placed the company under the superintendence of the Ministry of Industrialization. In addition in view of the combined shareholding of GOK and NSSF in the company, the company was a State Corporation. He however admitted that following sale of 4% shares of NSSF to its pension fund, the combined shareholding of the GOK and NSSF now stood at 48.3%, which is below the majority threshold that would render EAPCC a state corporation. Mr. Ngatia then told the court that the injunction orders granted ex-parte were similar to the orders of certiorari sought in the JR matter and that the supporting affidavits in both matters were sworn by Mr. Tande. This alone, he submitted, showed that the company was an active participant in the JR case hence the substantial civil

suit, being this suit, amounted to stealing a match on the JR proceedings.

15. Mr. Ngatia referred the court to the case of **WEA Records Limited Vs. Visions Channel 4 Limited [1983] 2 All ER** where the court held that ex-parte orders were provisional in nature and could be discharged by the court. He further relied on the case of **Pickwick International Limited vs. Multiple Sound Distributors Limited [1972] 3 All ER** where it was held that a party could go ex-parte to discharge ex-parte orders. He also relied on the case of **Mwalimu Nzeru Mwaligo** where the court held that an injunction obtained through concealment of facts stood to be discharged in exercise of the court's inherent powers. He therefore urged the court to stay and suspend the ex-parte orders as the existence of the two suits would put this court and the JR court to ridicule.

16. In his submissions in reply, learned counsel for the plaintiff Mr. Adan told the court that EAPCC was not a state corporation and was a limited liability company listed at the Nairobi stock Exchange. He explained that the company was wholly governed by its constitution and not through political pronouncements. The letter from the Minister purporting to suspend the Board and to appoint Mr. Korir as Acting Managing Director was therefore devoid of the law and lacked a basis under the company's constitution. He further submitted that the JR suit was founded on public law and was brought in the public interest. EAPCC was not a party to that suit and was participating in the suit merely as any other person as allowed under Order 53 of the Civil Procedure Rules.

17. Mr. Adan clarified that there was no multiplicity of suits because the JR matter was brought by four suspended directors in their individual capacities and the present suit was brought by the company to safeguard its interests. In any event, Mr. Adan submitted that the proper party to challenge the similarity in the suits was the party that filed either of the suits complained of. In this regard, the defendant/applicant's had no basis to challenge the existence of the two suits. He urged the defendant's to raise the point during the *inter partes* hearing of the plaintiff's application. In further submissions Mr. Adan told the court that the Minister was a stranger to the company and had no right to meddle with its affairs. He argued that GoK's representation in the Board by virtue of its 25.3% shareholding in the company sufficed but that the other 75% shareholders also had their say and sway in the affairs of the company. He urged the court to maintain the ex-parte orders as the Minister stood to suffer no prejudice in view of his lack of legal basis to the affairs of the company.

18. Mr. Adan further told the court that a company was a distinct legal entity from its shareholders and could not be run at the whim of a minority shareholder. He also clarified that NSSF was not a state corporation though a statutory body. Mr. Adan relied on the replying affidavit of Kephah Tande sworn on 11th January 2012.

19. For the 3rd defendant, Mr. Oduol submitted that the court had intrinsic powers to administer justice and that non-disclosure of the pending JR matter was an abuse of the court process. He referred the court to the case of **Mitchell Vs DPP** where it was held that the court had jurisdiction to put a summary end to a process where it was shown that the motive of the plaintiff was to embarrass his opponent. He also referred the court to the case of **Republic Vs, A.G – ex-parte Kenya Seed Company Ltd** where a state corporation was defined by the court of appeal.

20. Appearing for the applicants in the JR suit learned counsel Mr. Monari submitted that the ex-parte orders issued against the Minister were necessary to preserve the assets of the company and that the orders had been issued upon due consideration of the facts and the law. To enable the court to consider the substantive issues in an orderly atmosphere, it was only fair that the orders remain in force. He submitted further that it had previously been shown that this court had teeth to deal with unlawful decisions of errant state officials. It would also not be in the interest of the constitution if this court here to reverse its orders.

21. I have carefully considered the application, affidavits and supporting documents filed by the contestants and the useful submissions made by counsel for the respective parties. The application before me requires me to suspend or stay implementation of the ex-parte orders I granted on 9th January 2011, restraining the acting Minister for industrialization and the PS in that Ministry for continuing to

suspend the Board of EAPCC or interfering with the affairs of the company until hearing of the application inter parties. These orders effectively restored full Board to office and it is expected that as I deliver this ruling the orders have been effected and the Board reinstated accordingly.

22. On the outset, I note with consternation that the application dated 9th January 2012 pursuant to which the ex-parte orders were issued has not been responded to as the court record has no indication in that regard. I do not know whether the application was served upon the respondents. A response from the defendants to that application would have immensely assisted this court in determining the present application as the court would have benefited from the answers to that application. Unfortunately, I am now required to suspend and effectively rescind my said ex-parte orders on the basis of another ex-parte application and which completely focuses on matters that do not directly or otherwise attack the basis upon which the said ex-parte orders were granted. This is an absurd situation but which I must strive to emerge out of in a manner that serves justice not only to the applicants in the present application but also to the applicants in the application dated 9/1/2012.

23. Let me restate for the record that the application dated 9/1/2012 was brought under certificate of urgency and was upon evaluation certified as urgent and admitted for hearing during the Christmas vacation. The certification of the application as urgent was not a routine exercise but was guided by the compelling circumstances under which the application was brought. A dire situation was painted of the state of EAPCC in the aftermath of the decision by the Minister to suspend the entire Board of the company. I was told that the company's affairs have been thrown to a state of confusion and its operations had been adversely affected as a result, so much so that the shares of the company had been suspended from trading at the Nairobi Stock Exchange. This alone was a compelling ground for this court to interfere as the effect of suspension of the shares from trading was poised to drastically diminish shareholder value in the company and to dislodge it from its market positioning at a time when competition in the cement industry in this country is at fever pitch.

24. I was then told that the above sorry state had been caused by the unauthorized action of the Acting Minister for Industrialization that bore no basis both in company law and in the constitution of the company. This position was buttressed by the factual position that the GoK is merely a 25.3% shareholder and had no controlling interest in the company. Not even the addition of the shares of NSSF standing to GOK a controlling quality in the company. The supposition that the NSSF shareholding could be equated to the shareholding of the GOK was itself disputed and so was the status of the company as a state corporation. It was therefore shown to my satisfaction that the interim injunction orders were merited to check the excesses of the Minister and restore order to a company that is of immense public interest and which serves not only Kenya but the region as a whole.

25. I am now required to swallow the bullet and retract these orders essentially because there is another suit pending at the Judicial Review Bench. However, it has not been demonstrated that the state of affairs which obtained prior to the issuance of the ex-parte orders is capable of being remedied during the pendency of the JR proceedings without any interim measures to restore normalcy in EAPCCC. This is more so because in the Judicial Review Proceedings, there have been no interim orders to preserve the assets and operations of the company as parties litigate the legitimacy or otherwise of the Minister's decision. It is trite law that when a party comes to court seeking a remedy, the party expects the court to evaluate the request and decide one way or another. The court's directives are then not given in vain. EAPCC came to court exasperated and in desperation arising from the adverse impact of the Minister's decision to suspend the Board of Directors. The Company could not watch in vain as its affairs and operations progressively dwindled. Before the 9th January 2012, the company had never come to court for similar orders. The JR proceedings were not instituted by the company and neither did the company seek to be enjoined as a party thereafter. The limited participation implied by the affidavit sworn by Mr. Kephah Tande in the Judicial Review proceedings did not render the company a party either as no reliefs sought in those proceedings purport to directly inhere in the company. The reliefs sought in the said proceedings are individual in nature and not corporate. They relate to the rights of the suspended directors as infringed by the decision of the Minister. This has absolutely no relationship with the positioning of the company which is a distinct legal person from the directors. The legal existence of the company cannot be affected or in any other way adversely impacted by the suspension or removal of a director. Directors

come and go but the life of the company subsists until it is wound up. However, the action of the Minister of abruptly overhauling the Board of the company has, in this case, caused a ripple effect that has impacted negatively upon its affairs and operations and the company in a manner that has compelled the company to distinctly approach the court for reliefs geared at remedying the ensuing damage.

26. With deep respect to the Judicial Review Bench, the attention of this court was not drawn to the considerations that the JR court took into account in withholding any temporary reliefs against the Minister's decision to suspend the Board, if any such were applied for by the Applicants in that case. This court will not seek to speculate on the grounds upon which temporary stay orders were denied, if indeed an application for stay orders was made. Suffice it to state that the reasons why no temporary stay was issued in the JR proceedings and why injunctive reliefs were issued in this case demonstrate the depth in the nature and distinction between the two suits. Perhaps the applicants in the JR case, being individuals pursuing reliefs of a personal nature had no compelling grounds to merit stay which is not exactly the same considerations that this court took into account in granting the *ex parte* injunctive reliefs.

27. It may as well be the case that the end result of the two suits is that the Board of the EAPCC may or not eventually be reinstated. This is a result neither this court nor the Judicial Review bench can predict for now. The application by the Plaintiff dated 9th January 2012 has not been heard *inter partes* yet while the JR proceedings are barely underway. As the prosecution of the two applications progresses, it would become apparent whether or not the cases are similar and whether the convergence is so striking that it would be open for any party to move this court to stay the present suit under Section 6 and 7 of the Civil Procedure Act. Until that time comes, it would be premature to treat the cases as similar and to take action whose effect would be to dissipate this suit prematurely and without cushioning the Plaintiff on the concerns that led to the institution of the suit. This is an eventuality that this court is unwilling to countenance in the light of the gravity of the grounds upon which the *ex parte* orders were issued.

28. Learned counsel for the parties exchanged arguments on the issue of whether EAPCC is a state corporation. Happily, all parties agreed that this is a live matter in both suits and cannot be canvassed fully within the context of the present application. I am hesitant to pre-empt the legal contest on the issue at this juncture save to state that in considering the plaintiff's application dated 9th January 2012 for purposes of the *ex parte* orders, it was produced before me a Legal Notice No. 368 of 30th September 1994 through which EAPCC was exempted from the State Corporations Act. Similarly, it was produced before me Gazette Notice No. 177 dated 1st September 1997 exemption the National Social Security Fund (NSSF) from the provisions of the said Act. Prima facie therefore, and based on the material placed before this court, I found it merited to make the finding that EAPCC is not a State Corporation and therefore that it was unlikely the Minister had any factual or legal grounds to suspend its Board of Directors. Although the Defendants in their present application did exhibit Gazette Notices showing appointments of the Chairman, Managing Director and a Board member by the Government, I am still convinced that this practice alone would not overthrow the legal status of the company and it may as well be that time has come for the practice to cease and for appointments to henceforth be made within the ambit of the company's constitution. But that is a matter for the *inter partes* hearing.

29. With regard to the contention that there was material non-disclosure of the JR proceedings by the plaintiff, I think the distinction of the two suits as now stand has rendered moot the importance of the contention. In any case, I still hold the view that the factual and legal bases upon which the *ex parte* orders were issued would not have materially been influenced by the full disclosure of the existence of the JR proceedings. That is because the facts obtaining on the ground at the company at the moment and which compelled the company to come to court for the injunctive orders would still be prevalent and the negative impact of the Ministerial decision complained about would indeed have exacerbated further. For this reason, I do not find it necessary to trigger the courts intrinsic powers as was vehemently urged by Mr. Ochieng' Oduol, learned counsel for the 3rd Defendant. The very useful authorities on the court's powers in that regard are nonetheless lauded and will serve this court usefully when deserving cases arise, as are bound to.

30. The jurisdiction of this court to vary or discharge the *ex parte* orders was ably argued by Mr.

Ngatia, learned counsel for the 1st and 2nd defendant. I have considered the authorities cited being the cases of **WEA Records Limited Vs. Visions Channel 4 Limited [1983] 2 All ER** and **Pickwick International Limited vs. Multiple Sound Distributors Limited [1972] 3 All ER**. The court concurs with the positions enunciated in the two cases save that the facts of every particular case must be taken on their own merits. There must be compelling factual and legal grounds for exercise are demonstrated justifying the courts variation or suspension of its own orders. This is because court orders, even at *ex parte* stage are legal sanctions impregnated with legal authority and calling for strict obedience. The grant of such orders is not a tossing of the dice as would render them amenable to disfiguring and abandonment at the whim of the judge. The judge must take responsibility for any orders made. Any casual subsequent orders suspending earlier orders can only expose the court to ridicule and doubts as to its analytical capability and objectivity.

31. The upshot of the foregoing is that in this matter, in spite of very spirited efforts by the applicants and by the parties associating themselves with its position, the basis upon which the *ex parte* orders were granted has not been shaken and neither has the court's findings in the ruling of 9th January 2012 been traversed in any manner as would render the continued pendency of the orders inimical to the ends of justice. The application given rise to the *ex parte* orders has also not been scathed in any material way and is still intact pending the *inter partes* hearing. The most the *ex parte* orders may do is to negate the inertia the parties had gathered on the JR proceedings. This is a small sacrifice in view of the purpose that the *ex parte* orders will serve in shaping the destiny of EAPCC and in safeguarding its reputation, market positioning and shareholder value. Attempting to interfere with these orders would, I dare say, also plunge the shareholders, employees, suppliers and the country into another void of uncertainty.

32. For these reasons, the order that compels itself to me is that the 1st and 2nd defendant's Notice of Motion dated 10th January 2012 is hereby dismissed with costs.

33. I further direct that the hearing of the Notice of Motion dated 19th January 2012 do proceed on 19th January 2012 as scheduled.

It is so ordered.

DATED, SIGNED and DELIVERED in NAIROBI this 12th day of January 2012.

J.M. MUTAVA
JUDGE
12.01.2012

In the presence ofFor plaintiff
In the presence ofFor defendant