REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISCELLANEOUS CAUSE NUMBER 462 OF 2011

IN THE MATTER OF KIKAS INVESTMENTS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT CAP 486 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 165(1) (a) OF

CAP 486 FOR THE APPOINTMENT OF AN INSPECTOR TO INVESTIGATE THE

AFFAIRS OF KIAS INVESTMENTS LIMITED

BETWEEN

SALAMA MAHMOUD SAAD. .....APPLICANT

VERSUS

KIKAS INVESTMENTS LIMITED. .....1ST RESPONDENT

ABDILLAHI ABDI. .....2ND RESPONDENT

R U L I N G

This is a ruling in respect of two (2) notices of motion dated 9th May 2011. The first application seeks orders to the effect that:-

" 4. A declaration that the unilateral decision by one ABDILLAHI ABDI, to freeze the Respondent Company's bank account number 0310013101 at Gulf African Bank, Eastleigh Branch and Bank Account Number 0999171403 at First Community Bank Eastleigh Branch is null and void.

5. A temporary injunction barring the sale and/or transfer of the Company's movable and/or immovable assets pending the hearing and determination of this cause."

I will hereafter refer to this application as the "***injunction application***".

The second notice of motion is brought under the Companies Act seeking an order that an inspector be appointed to investigate the affairs of the company. Since the facts and documents relied on for both applications are the same I will consider both applications simultaneously. In both applications, the Applicant contended that she is a 50% shareholder in the 1st Respondent, that the 2nd Respondent is her co-director and co-shareholder in the 1st Respondent also holding 50% shareholding; that the 1st Respondent had been running profitably, that an audit report dated 11th March 2010 had disclosed gross mismanagement of the 1st Respondent by the 2nd Respondent in that he had misused the funds of the 1st Respondent by, transferring the same to his own entity known as Northern Aid, advancing cash to his family members and misapplying funds, that he had sold the assets of the 1st Respondent without authority and had not accounted for the proceeds, he had failed to account for a sum of Ksh.10,035,931/60 belonging to the company and had embarked in actions meant to paralyse and cripple the company. That the 2nd Respondent's actions were detrimental to the company and the Applicants interests.

Mr. Ogola learned counsel for the Applicant submitted that the Applicant was only seeking prayer 4 in the injunction application, that the actions of the 2nd Respondent as proved by the exhibits produced had established that the 2nd Respondent was acting in a manner oppressive of the Applicant that the 2nd Respondent had not denied the Applicant's allegations of fact, that the facts in support of the applications are to opposed, that the Applicants allegations are, therefore, deemed to be admitted. Counsel urged the court to allow the applications.

The 1st Respondent did not respond to the Applications. On his part, the 2nd Respondent filed a replying affidavit sworn on 21st September, 2011 and submissions dated 14th November, 2011. In his Replying Affidavit, the 2nd Respondent did not deny any of the matters sworn to by the Applicant in her affidavits but contended that the application dated 9th May, 2011 was incurably defective and bad in law, that the Applicant had failed to establish any right in law that had been violated that warrants a remedy, that if the Applicant was a director and shareholder of the 1st Respondent then she should take full personal responsibility for any form of mismanagement of the company, that the audit report exhibited by the Applicant had not been authorized by the company and that he had been wrongly sued.

Mr. Ali Haji learned Counsel for the 2nd Respondent relied on the written submissions and submitted that the Applicant had not established any cause of action against the 2nd Respondent, that there was no evidence that the Applicant was a 50% shareholder or director for the 1st Respondent, that it was not clear under what provision of the Civil Procedure the suit had been brought, that it was wrong for the 2nd Respondent to have been sued in his personal capacity yet he is different from the company. Relying on Section 107 of the Evidence Act Counsel submitted that there was no proof of existence of the company, that under S147(4), the Applicant having alleged that she is a director of the 1st Respondent she is a guilty in the mismanagement of the company, that the suit was an abuse of the process of the Court and urged the court on the authority of **Mitchell & others Vs Director of Public Prosecution (1987) L.R.C 127** to dismiss the suit as being frivolous and vexatious. Counsel urged that the applications to be dismissed with costs.

I have carefully considered the applications, the Affidavits on record, the written submissions, the highlights thereon by counsels and the authorities relied on.

Section 165 of the Companies Act provides: -

"***165. (1) The court may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court directs.***

(a) In the case of a company having a share capital, on the application either of not less than two hundred members or of members holding not less than one-tenth of the shares issued.

(b) In the case of a company not having a share capital on the application of not less than one-fifth in number of the persons on the company's register of members.

2. The application shall be supported by such evidence as the court may require for the purpose of showing that the Applicants have good reason for requiring the investigation, and the court may, before appointing an inspector, require the Applicants to give security, to an amount not exceeding ten thousand shillings for payment of the costs of the investigation."

That section together with section 166 of the Companies Act gives the court the jurisdiction to appoint an inspector. The sections also spell out the circumstances under which an inspector may be appointed to investigate the affairs of a company.

Rule 8 of the Companies (High Court) rules provides: -

"***8. The following applications shall be made by notice of motion***

a) .....

b) .....

c) The applications for the appointment of inspectors under section 165 and 166 of the Act."

The foregoing being the case, I am satisfied that the proceedings before me are regular in that the Notice of Motion application dated 9th May 2011 for the appointment of an inspector is the pleading that commenced the miscellaneous cause herein as per the law provided. Accordingly, I reject the 2nd Respondents contention that the application is bad in law on the basis that there is no suit in terms of the Civil Procedure Act and Rules. Indeed rule 3 of the Companies (High Court) Rules provide that any proceedings brought under the said rules **shall be deemed to be a suit within the meaning of the Civil Procedure Act and Rules** made thereunder.

As regards the 2nd Respondent's contention that there is no cause of action disclosed against him and that he had been wrongly sued, the Applicant swore in paragraphs 7, 8 and 9 of the supporting affidavit to both applications thus: -

"***7. That an external audit report dated 11th March 2010 of the company's accounts revealed that my said co-director, ABDILLAHI ABDI, had misused the Company funds in that: -***

a. he had illegally and irregularly transferred company funds to his NGO i.e. Northern Aid.

b. he had irregularly made cash advances and/or loans to his family members including his sons.

c. he had generally mismanaged and/or misapplied the Company's resources to detriment of the shareholders and members of the Company.

8. That ABDILLAHI ABDI has sold company assets without authority to do so and failed to account for the proceeds of the irregular sales.

9. That as at April 2011 the said Director (ABDILLAHI ABDI) has misapplied, misappropriated, lost and or generally failed to account for Ksh.10,035,931.60 belonging to the Company."

The Applicant further swore that when questioned about the foregoing actions, the 2nd Respondent resulted to actions that were meant to cripple the operations of the 1st Respondent by locking up the company offices and denying his co-director access thereto, cancelling the company's business deal with the Energy Regulatory Commission and freezing the companies Bank Accounts with Gulf African Bank and First Community Bank.

Although these allegations were made on oath in both affidavits, the 2nd Respondent swore a Replying Affidavit and never denied or controvert any of them. That being the case, he is taken in law to have admitted the same and they remain the truth having not been challenged.

Order 2 Rule 11 of the Civil Procedure Rules provide: -

"11. ***(1) Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.***

2. A traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication."

I hold that, since rule 3 of the Companies (High Court) Rules import the application of the Civil Procedure Act and Rules to matters brought under the Companies (High Court) Rules, the Notice of Motion and the affidavit in support thereof under rule 8 of the Companies (High Court) Rules are a pleading and since the allegations therein have not been properly traversed and/or denied, they are admitted and are correct.

Accordingly, the allegations of fact made by the Applicant are unchallenged and are deemed to be admitted by the Respondent in these proceedings.

That being the case, the allegations set out in paragraphs 7, 8, 9 and 10 of the affidavits in support of the Motions were directed at the 2nd Respondent's personal actions. They were not allegations against the 1st Respondent Cua Company. They were individual, personal and directed against the 2nd Respondent. Accordingly, my view is that the 2nd Respondent was properly sued in these proceedings. Further, from the case cited and relied on by the Applicant, it is clear that if an allegation is made directly on the conduct of a director is his own capacity, he can be charged for the same. In the said case of **National Social Security Fund Board Of Trustee vs Ankhan Holding Limited & 2 Others (2006) EKLR**the court adopted the finding in the case of **Standard Chartered Bank Vs Pakistan National Shipping Corporation (2002) UKHL 43**, where Lord Hoffman stated: -

"6. And just as an agent can contract on behalf of another without incurring persona liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility. Their lordships decided that on the facts of the case, the agent had not assumed any personal responsibility.

This reasoning cannot be my opinions apply to liability for fraud. No one can escape liability for his fraud by saying: I wish to make it clear that I am committing this fraud on behalf of someone else, and I am not to be personally liable: Sir Antony Evans framed the question (2000) 1Lloyd's Rep. 218, 230) as being "whether the Director may be held liable for the company's tort." But Mr. Mehta was not being sued for the company's tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the same way he did, Sir, Antony answered it by saying that the fact that Mr. Mehra was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud."

On the contention that there was no cause of action known in law disclosed by the Applicant, my view is that the allegations set out in paragraphs 7 to 10 of the Affidavits are so serious that they invite a remedy in law. Indeed, I do subscribe to the old saying that there is no wrong without a remedy."

Accordingly, the liability of the 2nd Respondent was personal and directed on his conduct and not that of the 1st Respondent. He is a proper party in these proceedings. On the contention that there was no cause of action known in law disclosed by the Applicant, my view is that the allegations set out in paragraphs 7 to 10 of the Affidavits are so serious that they invite a remedy in law. Indeed I do subscribe to the old saying that there is no wrong without a remedy.

On the contention that there was no evidence on record to show that the Applicant was a director or shareholder of or that the 1st Respondent does exist, I have already found that all the averments by the Applicants as to her being a 50% shareholder and director in the 1st Respondent were not challenged by the 2nd Respondent and they therefore stand. Accordingly, section 107 of the Evidence Act does not apply as there is no need to prove that which is admitted.

As regards the contention that the Applicant was equally to blame for the mismanagement of the 1st Respondent by virtual of the provisions of Section 147 of the Companies Act, my view, is that that section applies where a director has participated or is involved in the management of a company. However, in the case before me, there is evidence that the Applicant has been excluded from the management of the 1st Respondent, and that is why she has brought the present proceedings.

Having found as aforesaid, are the orders sought grantable? In the injunction application, Mr. Ogola indicated that the Applicant was only seeking prayer No. 4 thereof. I did set out that prayer at the beginning of this ruling. It seeks a declaratory order. It is not a prayer for injunction and it is for that reason that I did not see any reason of having to subject the application to the well known principles of granting an interlocutory injunction enunciated in the **Giella Vs Cassman Brown Case**. On the material before me, had that prayer been in the form of an injunction directing the unfreezing of the accounts in question, I would not have hesitated to grant the same without much ado. However, being a declaratory prayer, I am not clear whether a declaration can be made in an interlocutory application such as the one before me. Had that prayer been in the main pleading, i.e. the motion seeking the appointment of an inspector, I again would not have hesitated to grant the same in view of the uncontroverted evidence before me.

The foregoing, being the case, I am not convinced that an order of declaration in the nature and form sought in prayer No. 4 of the injunction application can be granted in an interlocutory application. I therefore, decline to grant the declaration sought and I do dismiss the same with costs. All the other prayers having been abandoned they do not fall for consideration.

As regards the application for appointment of an inspector, I have perused the evidence produced. I am satisfied that the Applicant is a 50% shareholder in the 1st Respondent, I am satisfied that the evidence tendered is sufficient to order the appointment of an inspector.

Accordingly, I do grant the application dated 9th May, 2011 and direct that an inspector be appointed to investigate the affairs of the 1st Respondent Company. Since no name(s) of such inspector was suggested by the Applicant and in order to promote the spirit of alternative dispute resolution envisaged in Article 159(2) (C) of our Constitution, I direct as follows: -

1) The Applicant and the 2nd Respondent do within 14 days of the date of this ruling agree on a suitable person or firm to act as an inspector for the purposes of this order, in default the court shall appoint one.

2) Such person or firm to be appointed inspector shall be qualified on matters of company law and in particular should be a professional auditor or audit firm of repute with experience in company secretarial duties.

3) The matter be mentioned on 4th May, 2012 for further directions.

4) The 2nd Respondent shall bear the costs of the application dated 9th May, 2012.

5) The inspector shall investigate the affairs of the company and the parties shall give him all the necessary co-operation as he shall require to be able to carry out his duties and he shall file his report in court within 60 days of such appointment and in any case not later than 13th of July, 2012.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of April, 2012.

.....

A. MABEYA

JUDGE