REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS CIVIL APPLICATION 487 OF 2011

IN THE MATTER OF THE ARBITRATOR ACT, 1995

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 486

AND

IN THE MATTER OF ASHARI APARTMENTS LIMITED

RITA MARIA HURLIMANN …….....……. PLAINTIFF/APPLICANT

VERSUS

ROGERS MWABONJE KADOSHO ……..……. 1ST DEFENDANT

ASHARI APARTMENTS LIMITED …….…… 2ND DEFENDANT

RULING

On 18th January, 2012 the plaintiff's advocates took a hearing date for the plaintiff's application dated 13th January, 2012. The application was brought under **Sections 146 to 149, 155 to 159, 162, 165-169 and 197 to 198 of the Companies Act** as well as **Rules 3 and 5** of the **Companies (High Court) Rules, and Section 3A** of the **Civil Procedure Act** and seeks the following orders:

"1. That the defendants be compelled to permit and/or allow the plaintiff to fully participate in the running, management and/or operations of the 2nd defendant and to exercise all her rights and powers as a shareholder and director of the 2nd defendant.

2. That the defendants be restrained, stopped or barred through themselves or their agents, servants or employees from interfering, curtailing or limiting the plaintiff's participation in the running, management and/or operations of the 2nd defendant and/or the exercise of all the plaintiff's rights and powers as a shareholder and director of the 2nd defendant.

3. That as an alternative to prayers 1 and 2 above there be an order allowing and/or permitting the plaintiff to retire or resign from the 2nd defendant on the condition that she be permitted to sell her 50% shareholding in the 2nd defendant company either to the 1st defendant or to any other person or third party at market price including goodwill and as provided in the Company's Articles of Association.

4. That the defendants be compelled to disclose to the plaintiff all the 2nd defendant's company's bank accounts and/or any other similar financial deposit or savings arrangement or undertaking in which the 2nd defendant's funds or moneys are held or deposited and the amounts of money held or deposited therein by or on behalf of the 2nd defendant.

5. That the defendants be compelled to give an account of the income and profits of the business of the 2nd defendant company since the incorporation of the 2nd defendant in September 2001.

6. That the defendants be compelled to supply to the defendants (plaintiff) all the annual statements of account of all the years the 2nd defendant has been in existence including full disclosures on assets, expenses, liabilities, profits and income of the 2nd defendant.

7. That there be an order that a forensic audit be conducted at the 2nd defendant's expense, on the management, operations and affairs of the 2nd defendant company since the date of its incorporation to establish the conduct, operation, affairs and management of his business including the financial performance and worth of the 2nd defendant.

8. That as an alternative to prayer 7 above, the court do invoke sections 165-169 of the Companies Act and appoint an Inspector to investigate the affairs of the 2nd defendant since the date of its incorporation to establish the conduct, operation and management of its business including the financial performance and worth of the 2nd defendant.

9. That there be an order that a valuation of the 2nd defendant company be conducted to establish the worth of the 2nd defendant company.

10. That there be an order that a valuation of the 2nd defendant company be conducted to establish the market price of the value of the plaintiff's said 50% shareholding in the 2nd defendant company.

11. That the defendants be compelled to pay to the plaintiff 50% of all the profits made by the 2nd defendant for all the years the 2nd defendant has been in existence including dividends.

12. That the plaintiff be awarded the costs of this application and of the entire suit."

The application was supported by an affidavit sworn by the plaintiff.

The plaintiff had earlier filed an Originating Notice of Motion under **Section 7** of the **Arbitration Act, 1995**, seeking to have the dispute between her and the 1st defendant referred to arbitration for determination in line with Articles of Association of the 2nd defendant, hereinafter referred to as "**the Company**". The plaintiff sought various interlocutory orders pending commencement of the arbitration proceedings for purposes of preservation of the substratum of the suit pending reference of the suit to arbitration. Almost all the prayers in the Originating Notice of Motion were replicated in the application dated 13th January, 2012. However, it now appears that the parties do not intend to refer the dispute or any part thereof to arbitration at all.

On 8th December, 2011 the advocates for the parties appeared before the Hon. Lady Justice Rawal and recorded a consent as follows:

"By consent of both parties, this matter shall be heard by this court. Parties have finalized their pleadings. Parties are further directed to file submissions within 21 days hereof and the registry thereafter to give a hearing date for the Originating Notice of Motion on priority. By consent status quo be maintained."

In paragraph 7 of the plaintiff's affidavit she states:

"7. That I am advised by my advocate that however by the consent orders recorded in court on 8th December, 2011 the parties agreed that to expedite the resolution of the matter, the same be heard by the High Court sitting at Nairobi instead of by arbitration."

I do not think that is the correct import of the aforesaid consent and if it is, its propriety is doubtful. At page 8 of the Company's Articles of Association it is expressly stated that:

"…every such differences shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference."

In view of the clear arbitration clause in the Company's Articles of Association it is doubtful whether the parties can by consent confer jurisdiction upon the court to determine all the disputes that have arisen between them and thereby oust the jurisdiction of the intended arbitrator. That may amount to violation of mandatory provisions of the Company's Articles of Association. In **KENINDIA ASSURANCE CO. LTD. v OTIENDE [1991] KLR 38**, the Court of Appeal held that parties cannot confer on the court jurisdiction where none exists. The jurisdiction of the court under **Section 7** of the **Arbitration Act, 1995** is very limited. The section states that:

"7. (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."

I would like the issue of jurisdiction to be addressed by counsel before I can proceed any further. This court was not handling this matter as it was recently transferred from the Civil Division to this Division and the parties filed their written submissions and did not address the court at all, having agreed to proceed by way of the submissions. I therefore direct counsel to agree on a date when they shall address the court on the issue of jurisdiction.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY, 2012.

D. MUSINGA
JUDGE

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In the presence of:
Muriithi – Court Clerk
Mr. Wananda for the Applicant
No appearance for the Respondent