REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 189 OF 98

SULTAN HASHAM LALJI & 3 OTHERS .....PLAINTIFFS

VERSUS

AHMED HASHAM LALJI & 4 OTHERS .....DEFENDANTS

R U L I N G

This suit was brought by the four plaintiffs (1) **Sultan Hasham Lalji, (2) Bahadurali Hasham Lalji, (3) Esmail Hasham Lalji and (4) Atta (1974) Limited** against five defendants **(1) Ahmed Hasham Lalji, (2) Diamond Hasham Lalji, (3) Atta (Kenya) Limited, (4) Diamond Jamal and (5) Azim Virjee . W**hile the other parties are individuals, the 4th plaintiff and 3rd defendant are limited liability companies incorporated in Kenya under the **Companies Act (Cap. 486, Laws of Kenya) .** Another important aspect of the suit to be noted is that the 1st, 2nd, 3rd plaintiffs, 1st defendant and 2nd defendants are all brothers. Hence this is a dispute in which five brothers are involved with three brothers in one camp and two brothers in the other.

Paragraph 6 of the plaint states:

> "6.The 1st, 2nd and 3rd Plaintiffs together with the 1st Defendant were at all material times shareholders in the 4th Plaintiff company, holding 14,789 shares each in the said company. The 2nd Defendant was at all material times a non shareholding director in the company. The 1st, 2nd and 3rd Plaintiffs were therefore at all material times holding a total of 44,367 shares in the company out of 60,000 shares on equivalent of 73.9% of the total shares of the company."

The above clearly shows that the 1st, 2nd and 3rd plaintiffs were the majority shareholders in the 4th plaintiff company [Atta (1974) Limited]. The plaint then enumerates certain events that culminated into the plaintiffs being

defrauded and particulars of fraud are then set out. In the end this plaintiffs pray for judgment against the defendants and each of them jointly and severally for:

> "A.A declaration that the transfer of the assets of Atta (1974) Limited the 4th Plaintiff to the 1st Defendant and subsequently to the 3rd Defendant was fraudulent against the Plaintiffs and was therefore void and of no effect and that Atta (Kenya) Limited - the 3rd Defendant was incorporated for this sole purpose of defrauding the Plaintiffs and that the 4th and 5th

Defendants actively participated in the perpetrating the fraud.

B.An order for injunction restraining the Defendants whether by themselves individually or jointly and severally or by their servants and/or agents from in any way howsoever alienating the assets of the 3rd Defendants by way of sale or otherwise pending the hearing and final determination of this suit. C.An order that account into the affairs of the 3rd Defendant be rendered from the date the assets of the 4th Plaintiff were fraudulently acquired by the 1st Defendant and thereafter by the 3rd Defendant until such date that the order is given.

D.That a receiver be appointed for the 3rd Defendant and that during the receivership the 1st, 2nd and 3rd Plaintiffs be allowed access and/or active participation on the receivership exercise and more specifically on the assets of the 3rd Defendant. E.That after the accounts are taken, the assets of the 4th Plaintiff fraudulently transferred as aforesaid be restituted to the 4th Plaintiff and further that any amount of money found to be due and payable to be paid to the 4th Plaintiff. F.Damages.

G.Such other and further order as the Honourable Court may deem fit to grant in the interest of justice. H.Costs of the suit." The plaint was filed in court on 29th January, 1998 and on that same day an ex-parte Chamber Summons application was filed by the plaintiffs seeking the following orders:

"1.That due to the urgency of the matter the same be heard ex-parte in the first instance.

2.That the Defendant be restrained by way of injunction whether by themselves individually or jointly and severally or by their servants and/or agents from in any way howsoever alienating the assets of the 3rd Defendant by way of sale or otherwise pending the hearing and final determination of this suit or until further orders of the court.

3.That the Defendants be restrained by way of injunction whether by themselves individually or jointly and severally or by their servants and/or agents from refusing preventing or interfering in any manner whatsoever with the access by the Plaintiffs, their respective agents or nominees to the premises, factory, stocks, stores, property, record, bank accounts, statutory books and all other documents of or relating to Atta (1974) Limited as they are currently in the hands and control of the Defendants and/or Atta (Kenya) Limited until the determination of this suit.

4.That a receiver he appointed for the 3rd Defendant Atta (Kenya) Limited with powers to manage protect, preserve, collect rents and profits, apply and dispose of such rents and profits, and execute such documents as required, execution by or on behalf of the 3rd Defendant and such other and further powers as the court may deem fit to grant to the receiver pending the hearing and final determination of the suit.

5.That a date be set for the hearing of the application inter-partes.

6.That the costs of this application be provided for."

The ex-parte application was certified urgent and heard on that same day (29th January, 1998) when prayers 1, 2 and 3 of the Chamber Summons application were granted. That situation was however reversed when the orders were set aside on 11th February, 1998 as the provisions of Order XXIX r. 3 (2) of the Civil Procedure Rules had not been complied with when the exparte orders were granted. The Chamber Summons application by the plaintiffs was then to be set down for inter partes hearing. Before the inter partes hearing could take place the defendants filed applications seeking to strike out the plaint. These applications were filed on 10th February, 2000. On behalf of 1st and 2nd Defendants a Notice of Motion was brought under the inherent jurisdiction of the Court and under Order VI r.13 (1) (c) of the Civil Procedure Rules . This Notice of Motion sought the following orders: "(i)That the plaint herein so far as it related to the claims of the First, Second and Third Plaintiffs against the Defendants be struck out and the action in their names against the Defendants be dismissed; and (ii)that the First, Second and Third Plaintiffs be jointly and severally condemned to the costs of their suit as against the Defendants including

the costs of this application."

That application by the 1st and 2nd defendants was made on the following grounds:

> (a)That on the allegations made in the plaint the First, Second and Third Plaintiffs have no or no reasonable cause of action against the Defendants or any of them in that the Defendants are not alleged to have done any actionable wrong to them or any of them; and
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> (b)That the First, Second and Third Plaintiffs' claims as against the Defendants as formulated in the plaint - are misconceived in law and amount to an abuse of the process of the court.

There was yet another Notice of Motion filed on the same day by 1st and 2nd defendants seeking orders against the 4th plaintiff but that application is yet to be argued.

On behalf of 3rd defendant another Notice of Motion under Order VI r. 13 (1) of the Civil Procedure Rules was filed which sought the striking out and dismissal of the suit as filed by 1st, 2nd and 3rd plaintiffs on the grounds that it was only Atta (1974) Ltd (4th plaintiff) which could have a cause of action for alleged wrongs done to it by the defendants. The other grounds were more or less similar to those stated in the Notice of Motion by 1st and 2nd Defendants. There was yet another application by the 3rd defendant seeking the striking out of the plaint as it relates to the 4th plaintiff. That application is yet to be argued.

From the foregoing it will be noted that the court was faced with a number of applications and hence we had to decide the best way of dealing with these applications. As already indicated this is a dispute involving five brothers and their different companies. The battle lines have been drawn. The plaintiffs are claiming that they were defrauded. But before the battle commences there are procedural matters to be cleared. As there were two sets of applications seeking the striking out of the plaint it was agreed that we deal with the first set. This first set deals with striking out of the plaint as it relates to 1st, 2nd and 3rd plaintiffs. This is the set that came up for arguments and so this ruling relates only to the two applications by 1st, 2nd and 3rd defendants.

For avoidance of doubt it should be stated that the two applications seeking striking out of the plaint as it relates to the 4th plaintiff are yet to be argued.

Let us now come to the matter before the court as regards the two applications which are seeking the striking out of the plaint or dismissal of the suit as it relates to 1st, 2nd and 3rd plaintiffs. These three brothers were majority shareholders in the 4th plaintiff's company - Atta (1974) Ltd. As can be observed from the detailed plaint filed herein the plaintiffs are complaining about the fraudulent transfer of assets of the 4th plaintiff.

The applications by the 1st, 2nd and 3rd defendants seeking striking out of the plaint as it relates to 1st, 2nd and 3rd plaintiffs are based on the ground that these three plaintiffs have no cause of action.

Mr Inamdar for the 1st and 2nd defendants argued that the 1st, 2nd and 3rd plaintiffs were majority shareholders in the 4th plaintiff company and as all the plaintiffs are complaining about the fraudulent transfer of assets of the 4th plaintiff, the issue is whether the first three plaintiffs are entitled in law to bring this suit. It was Mr Inamdar's contention that it was the company (4th plaintiff) which could bring this suit. Mr Inamdar pointed out that the 1st, 2nd and 3rd plaintiffs sued in their personal capacity and yet the party alleged to have been injured was the 4th plaintiff. In conclusion, Mr Inamdar emphasized that 1st, 2nd and 3rd plaintiffs have no cause of action for wrongs committed to the 4th plaintiff as these three plaintiffs have suffered no individual loss and so the action by the three plaintiffs should be struck out and dismissed with costs.

On his part, Mr Esmail for the 3rd defendant associated himself with the submissions made by Mr Inamdar for 1st and 2nd defendants. Mr Esmail stated that there was no law which allows majority shareholders to jointly sue with the company for a wrong which is confined to the company. He

contended that if the assets of the company are wrongly dealt with it is only the company which can complain and in this case no personal loss was alleged by the first three plaintiffs. And for that reason it was Mr Esmail's view that these three plaintiffs have no business being the plaintiffs. He asked the court to strike out the suit with costs together with costs of the application.

Mr Oraro for the plaintiffs argued that there were two issues here; the property of the 4th plaintiff was fraudulently taken and secondly, 1st, 2nd and 3rd plaintiffs were denied the right to participate in the purchase agreement. He pointed out that these plaintiffs were claiming on behalf of the 4th plaintiff and also for themselves. Mr Oraro went on to submit that in this suit the shareholders are exercising their rights as they want accounts to be produced since there is allegation of fraud.

As regards the cases cited by Mr Inamdar it was Mr Oraro's view that these did not apply to the facts of their case. He relied on ***Section 128 of the Companies Act*** on the issue of accounts. He was of the view that a suit cannot be defeated by misjoinder of parties. Mr Oraro asked the court to dismiss these applications for striking out as there was no basis for them.

Having heard the learned submissions by counsel appearing, we can now consider the merits and demerits of these applications for striking out the plaint as it relates to 1st, 2nd and 3rd plaintiffs. The gist of these applications is that the first three plaintiffs have no cause of action. Striking out the plaint as it relates to the first three plaintiffs is a drastic procedure which must be sparingly exercised as it amounts to shutting out a party without giving it the opportunity to state its case. In my view, this is a procedure to be resorted to in plain and obvious cases. In ***D.T. DOBIE & COMPANY (K) LTD V JOSEPH MBARIA MUCHIRA & ANOTHER, Civil Appeal No. 37 of 1978 ,*** the late Madan JA (as he then was) reviewed a number of authorities on this subject of striking out pleadings and went on to state:

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

The applications before me which relate to the status of 1st, 2nd and 3rd plaintiffs refer to the procedure adopted by these plaintiffs. Looking at the lengthy plaint herein, filed we immediately notice that there is allegation of fraud and particulars of fraud are clearly set out in the plaint. The main allegation in the plaint is that there was fraudulent

transfer of the assets of the 4th plaintiff [Atta (1974) Ltd]. It has now been argued that since the 1st, 2nd and 3rd plaintiffs were majority shareholders in the 4th plaintiff company and as all the four plaintiffs are complaining about this fraudulent transfer of assets of the 4th plaintiff company it follows that it is only the company (4th plaintiff) which can bring this suit against the defendants. From the plaint, it would appear that the party alleged to be injured was 4th plaintiff.

We already know that the 1st, 2nd and 3rd plaintiffs were majority shareholders in the 4th plaintiff company. These four have brought this suit against the defendants. There is now this objection based on the two notices of motion filed by the defendants. While the plaintiffs contend that they have a cause of action which should proceed to hearing the defendants are of the view that 1st, 2nd and 3rd plaintiffs have no cause of action. The main issue is whether these three plaintiffs being majority shareholders of the 4th plaintiff company can bring this suit jointly with the 4th plaintiff. What is the law on this matter?

In Burland v. Earle (1902) 71 LJPC 1 it was stated:-

> *"It is an elementary principle of law relating to joint - stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again it is clear law th at in order to redress a wrong done to the company, or to recover moneys or damages alleged to be due to the company the action should prima facie be brought by the company itself".*

The above supports the defendants' contention to the effect that this suit ought to have been brought not by the 1st, 2nd and 3rd plaintiffs but by the company which is the 4th plaintiff. Hence, as Mr. Esmail put it these three plaintiffs had no business in bringing this suit. The holding in Burland v. Earl (Supra) was to the effect that a court had no jurisdiction to interfere with the internal management of a company acting within its powers and actions to redress a wrong done, or to recover money or damages due to a company must be brought by the company itself except where a minority of shareholders complain of a conduct on the part of the majority which is either fraudulent or beyond the company's powers. In the present suit, the first three plaintiffs were not minority shareholders and hence this action ought to have been brought by the company which is the 4th plaintiff.

Then in Stein V. Blake and others (1998) 1 All ER 724 it was held that:-

"(1) The loss sustained by a shareholder by a diminution in the value of his share by reason of the misappropriation of the company's assets was a loss recoverable only by the company and not by the shareholders, who had suffered no loss distinct from that suffered by the company. Accordingly in the instant case only the companies concerned and not the plaintiff could bring an action for recovery of the loss. It followed that any appeal would be hopeless and that leave to appeal ought not to have been granted".

And in his judgment Millett LJ (at P.726) said:

> "The plaintiff alleges that he has thereby suffered loss and claims damages and an account and payment (presumably to himself) together somewhat confusingly, with a declaration that the misappropriated assets are held in trust for the old companies. None of the old companies is a party to the action. With only one excep tion, they are all in insolvent liquidation. The only cause of action pleaded is a personal cause of action of the plaintiff for loss suffered by him personally. It is not a minority shareholder's action (or as it is sometimes called a derivative action) in which a shareholder brings proceedings on behalf of the company, asserts a cause of action vested in the company and recovers damages for or obtains restitution to the company".

Both Mr. Inamdar and Mr. Esmail relied on the authorities cited above to show that the 1st, 2nd and 3rd plaintiffs had no cause of action. Mr. Oraro on his part argued that a similar objection as the one raised by the defendant in their application was dismissed in Sultan Hashin Lalji V. Diamond Hasham & 3 others -High Court Civil Case No. 240 of 1996.

But in answer to the above it was pointed out that in the above cited case Sultan Hasham Lalji the suit was brought by a minority shareholder hence it was a derivative action as opposed to the present suit which has been brought by majority shareholders.

In Prudential vs. Newman Industries 91982) 1 All ER 354 it was stated:-

> *"(1)The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is prima facie, the corporation.*
>
> *(2) Where the alleged wr ong is a transaction which might be made binding on the corporation and all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirm s the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because th e majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in*

control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoe rs themselves, being in control, would not allow the company to sue".

In view of the foregoing it is now clear that the 1st, 2nd and 3rd plaintiffs being majority shareholders in the plaintiff company (4th plaintiff) could not bring this suit. I should hasten to state that by upholding the preliminary objection that does not mean that the suit had no merit. The three plaintiffs may have genuine complaints against the defendants but they have not come in the proper way since the law clearly states that as they are complaining of the injury to the company (4th plaintiff) then it is the company which should bring this suit. Hence preliminary objection is well founded. It is a pity that the first three plaintiffs are shut out but that does not mean that their complaints cannot be entertained since the company has the right to ventilate their grievances in a proper suit. The first three plaintiffs and their legal advisers should go back to the drawing board and see where they went wrong on the issue of procedure. They may come up with a different strategy on how to ventilate their grievances. But as the matters stand now the preliminary objections raised in the two applications cannot be resisted.

For the foregoing reasons, this Court has no alternative but to order that this plaint as it relates to 1st, 2nd and 3rd plaintiffs is struck out with costs to the defendants

Delivered at Nairobi this 21st day of July, 2000.

E. O. O'KUBASU

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JUDGE OF APPEAL