



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E 364 OF 2019

MOHAMMED JELLE OMAR.....1ST PLAINTIFF/RESPONDENT

ABDIWELI ADAN KALICHA.....2ND PLAINTIFF/RESPONDENT

VERSUS

ALI SALAH.....1ST APPLICANT/DEFENDANT

SALEM NAJEM MUBARAK.....2ND APPLICANT/DEFENDANT

RULING(2)

NOTICE OF MOTION

1. The Applicant filed a Notice of Motion application dated 27th July 2020 for orders that; -

a. The Court reviews and sets aside its orders dated 12th June 2020.

b. The Court grants interim orders to the Applicants restraining the Respondents from denying the Applicants access to the company account numbers 001xxxxxxx and 001xxxxxxx held in First Community, Eastleigh Garage Branch operated by Total Quality Halal Correct Limited.

2. Which application is supported by the affidavit of Salem Najem Mubarak on grounds that;

a. The court issued orders dated 12th June 2020 and in arriving at these orders the Court ignored the fact that it was not clothed with jurisdiction to canvass the matters at hand as Paragraph 41 of the Articles of Association had/has an arbitration clause in which all issues arising were to be referred to an arbitrator.

b. The said orders further reinstated the 1st Plaintiff as the director of Total Quality Halal Correct limited ignoring the fact that the said Plaintiff had willingly resigned from his position of directorship on **30th September 2019** and forfeited his shares.

c. The court erred in law and fact when it reappointed the 1st Plaintiff/Respondent as a director of the company after his resignation.

d. Further to said orders stated that the removal of the 1st Plaintiff was contrary to Section 139 of the Companies Act and Memorandum and Articles of Association of the Company while the said section of the law relates to the removal of directors by way of resolution, and the 1st Plaintiff resigned willingly.

e. The 1st and 2nd Applicants on the basis of the said orders, have been barred, on orders of the 1st and 2nd Respondents, from accessing their company accounts by misrepresenting the orders of the court to mean that they cannot operate the said accounts without permission of the 1st Plaintiff.

f. The court orders issued are based on the Affidavit of the 2nd Plaintiff, who is a stranger to the company and has no right to file such a suit against the company and/or its directors.

g. As a result of the foregoing, the 1st and 2nd Applicants remain unable to access the said company accounts and thus causing them

immense losses to their business which in turn has endangered the company and its operations in Kenya.

h. From the foregoing, it is in the interest of justice that the orders that were given by this Court dated 12th June 2020 be set aside.

REPLYING AFFIDAVIT

3. The Application is opposed vide a Replying Affidavit of Mohammed Jelle Omar dated 14th September 2020 as follows; -

a. On 17th June 2020, the Defendants were served the Court Order issued by this Court on 12th June 2020 and the First Community Bank Limited for execution.

b. The Defendants have deliberately and in bad faith refused to comply with the court order issued on 12th June 2020 despite several requests but have instead resulted to filing the Defendant's application herein seeking injunctive/equitable orders.

c. The Defendants' belated claim for want of jurisdiction of this court in granting the court order is an afterthought which is without any legal or factual basis since the claim is caught up in laches and offends **Section 6 (1) of the Arbitration Act**.

d. An arbitration clause does not necessarily take away a party's right to action in court to enforce his claim, and the Applicants' allegation that this Court ignored the arbitration clause is an afterthought without any legal or factual basis.

e. The Applicants application is *res judicata* since the Applicants plead similar issues of law and facts which were previously pleaded, considered and conclusively determined by this court pursuant to its Ruling dated 15th April 2020.

f. The Applicants application falls short of the requisite conditions for seeking a review of the court order contrary to the law.

g. The Applicants allegation that this court ignored and overlooked the evidence produced by parties, or erred in law and in fact in granting the court order herein is also misconceived, an afterthought which is without legal or factual basis; and an attempt to irregularly file an appeal disguised as an application to set aside the court order herein.

h. The Application is brought in bad faith and is only aimed at delaying the Respondents fruits of the court order and further the failure to pay the Respondents accrued dividends and extending exclusion from company affairs.

i. The application is frivolous, vexatious, and bad in law, an abuse of the court process and should be dismissed.

GROUND OF OPPOSITION

4. The Respondents filed Grounds of Opposition (**dated 14th September 2020**) to the Applicants' Notice of Motion Application dated **27th July 2020** as follows; -

a. The Applicants have no audience before this court in view of their deliberate failure to oblige and obey the court order issued on 12th June 2020 and decreeing inter alia payment of all accrued dividends to the 1st Respondent by the Applicants and participation of the 1st Respondent in the meetings, management and operations of the company.

b. The Applicant's application for review is misconceived, bad in law, and an afterthought, since the Applicants belated claim for want of jurisdiction of this court in issuing the court order is impugned for reasons that; -

i. The Applicant's claim offends **Section 6 of the Arbitration Act No. 4 of 1995** since the Applicants did not file any application for stay of proceedings in this Court and referral of the of the dispute to arbitration for determination.

ii. The Applicants have since acknowledged the Respondents' claim and subjected themselves to the jurisdiction of this Court by participating in defending the Respondent's Application dated 16th October 2019 and subsequently filing and prosecuting their Notice of Motion Application dated 24th October 2019 pursuant to which they obtained two court orders in their favour against the Respondents for access of company funds amounting to USD.40, 000 on 6th and 7th November 2019.

iii. The Applicants' claim is caught up by the doctrine of laches.

iv. The Applicants application is *res judicata* since the Applicants plead similar issues of law and facts which were previously pleaded, considered and conclusively determined by this court pursuant to its Ruling dated 15th April 2020, including the issue of directorship of the Respondents in the company.

v. The Applicants application falls short of the requisite conditions for seeking a review of the court order and is only aimed at delaying the 1st Respondents enjoyment of the fruits of the said Court Order and furtherance of the Defendants' oppressive conduct against the 1st Respondent who is the minority shareholder.

vi. The application is bad in law, since it is an attempt to irregularly file an appeal against the ruling dated 15th April 2019

but disguised as an application to set aside the Court order by the Applicants' allegations that this Court overlooked the evidence produced by parties; or erred in law and fact in granting the Court order herein.

vii. The application breaches the principle of law on finality to litigation and is tantamount to an attempt for litigation in instalment by the Applicants.

viii. In the circumstances, the Application is frivolous, vexatious and bad in law, incompetent, is an abuse of the court process and is for dismissal.

APPLICANTS' SUBMISSIONS

a. Whether the Applicants conceded to the jurisdiction of this court.

5. The applicant submits that there is an arbitration agreement between the parties and hence it follows that the court should yield to the intention of the parties to refer any dispute to arbitration. The basis of this arbitration clause is to oust the preliminary jurisdiction of the court to determine this matter and vest the said jurisdiction in an arbitral tribunal as provided in Section 6 of the Arbitration Act.

b. Whether the orders given by the court to reinstate the 1st Plaintiff as a co-director in Total Quality Halal were lawful.

6. The court in its order stated that the removal of the 1st Plaintiff was contrary to **Section 139 of the Companies Act and Memorandum and Articles of Association** of the company. The said section of the law relates to the removal of Directors by way of resolution.

Section 139 (1) states as follows

“A company may, by ordinary resolution at a meeting, remove a director before the end of the director's period of office, despite anything to the contrary in any agreement between the company and the director.”

c. Whether the court has a mandate to review its own decision and whether the application is *res judicata*.

7. The case of ***Francis Njoroge –versus- Stephen Maina Kamore [2018] eKLR*** listed the prerequisites for court to review its orders and or set them aside. These are provided for under **Order 45 of Civil Procedure Rules** and **Section 80 of the Civil Procedure Act**.

8. The matter herein is not *res judicata* as stipulated by the Civil Procedure Act under **Section 7**. *Res Judicata* strictly applies to a matter which has finally been decided by the court. This matter has not been finalized, as the ruling dated 15th April 2020 only gave directions on how to proceed. In this application for review, it is the only matter on record.

d. Whether the applicant is barred by the doctrine of laches.

9. The Applicants in this matter do not fall in the category of unreasonable or excused delay, as it has not met the threshold for laches. There has been no unreasonable or inexcusable delay in this matter. The Applicants have a right to pursue a legal remedy and the application is properly before the court as held in the case of ***Joan Akinyi Kabasellah & 2 Others -versus- Attorney General***, there is no limitation as to how long a matter can proceed as long as it is in the pursuit of justice.

RESPONDENTS' SUBMISSIONS

Whether the Applicants submitted to the Court's jurisdiction.

10. The Applicant's belated claim for want of jurisdiction of this Court in issuing the orders of 12th June 2020 is an afterthought, which is intended to deny the 1st Respondent the fruits of the court orders and to further perpetuate Applicant's oppressive conduct against the Respondent.

11. The Applicants have not filed the requisite application under **Section 6(1) of the Arbitration Act** for a stay of proceedings in this court and referral of the dispute to arbitration, contrary to the Applicant's claim. It is their submission that this Court was and is vested with proper jurisdiction to issue the Court orders herein owing to the fact that the Applicants subjected themselves to its jurisdiction by filing the cited pleadings and taking other steps in the pleadings, including participation in the hearing of the Respondent's previous applications culminating in this Court's ruling and court orders.

Whether the Application should be dismissed.

12. The applicants are guilty of deliberate disobedience of the court orders and violation of the law and this court should deny them audience.

13. It is their submission that the threshold for review of the Court Orders of 12th June 2020 has not been met as set out under **Order 45 of the Civil Procedure Rules**. No new evidence that was not within the knowledge of the Applicants has been found or pleaded.

14. The court is clothed with proper jurisdiction to issue the Court orders since the Applicants submitted to its jurisdiction. The Application

does not meet the threshold for varying or setting aside a court order as sought by the Applicants. The Application should be dismissed.

DETERMINATION

15. The parties' pleadings and submissions raise the following issues for determination;

REVIEW

On the issue of review **Section 80** of the Civil Procedure Act provides as follows;

80. Any person who considers himself aggrieved-

“(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the **Civil Procedure Rules, 2010** provides as follows:-

“Order 45 Rule 1 (1) Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

Section 80 grants the power of review while **Order 45** sets out the rules, that restrict the grounds for review.

16. The Parties through Counsel raised the following issues for review;

JURISDICTION

The Applicant submitted that the parties contracted and executed the **Memorandum and Articles of Association** on the manner of dispute resolution would lie in Arbitration.

17. The Applicant submitted that the Court cannot rewrite the terms of parties' contract and the Defendant/Applicants did not concede to the jurisdiction of this Court as the Advocate who pursued the matter was not the Advocate on record, further **Order 9 Rule 5 of CPR** was not complied with.

18. The Applicants relied on the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd** to buttress the point that an objection to the Court's jurisdiction goes to the heart of the matter and can be raised at any stage of the proceedings without undue delay.

19. **Article 41** of (MeMarts) provides;

“All differences arising between the Company on the one hand and any of members, their executors, administrators or assigns on the other hand, touching on the true intent or construction, or the incidents or consequences of these Articles, or of statutes, or touching on anything then, or thereafter done.....every difference shall be referred to the decision of a single Arbitrator, to be appointed by the parties in the difference, or if they cannot agree on a single Arbitrator, to the decision of 2 Arbitrators, of whom one shall be appointed by each of the parties in the difference.”

The *locus classicus* on jurisdiction is **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. The import of the above case, is that the issue of jurisdiction ought to have been raised at the earliest opportunity. **Section 6 of the Arbitration Act Cap 4 of 1995** provides that:

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-

a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or

b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

21. A party shall apply not later than entry of appearance for stay of proceedings and for the dispute to be heard and determined through Arbitration. The Applicants did not comply with conditions set out in **Section 6 of Arbitration Act**. The Applicants did not raise the issue of jurisdiction prior to filing pleadings, hearing of the application(s) and/or any time before Ruling of this Court of 15th April 2020 and the issuance of the court orders of **12th June 2020** pursuant to the Plaintiff’s Certificate of Urgency, Notice of Motion Application dated **16th October 2019**.

22. The said Application was opposed vide a Replying Affidavit by the 2nd Defendant dated **22nd October 2019**. Further, the Defendants filed a Notice of Motion Application dated **24th October 2019** and paragraph h, deposed that this Court has jurisdiction to grant orders sought. In the pleadings and oral submissions as per the Court record, the Defendants did not raise the issue of jurisdiction of the Court or Pursue Arbitration. By filing pleadings, the Defendants submitted and acquiesced to the Court’s jurisdiction in spite of the Arbitration Clause espoused in the (MeMarts)of the Company. Application(s) heard and determined are all with full participation of Defendants and at no stage during the proceedings was the issue of jurisdiction raised to this Court.

23. The issue of jurisdiction now raised after the Court heard and determined the matter *inter partes* by the Respondents that the court did not have jurisdiction to issue after the said orders is clearly an afterthought.

See; **Peter Mwema Kahorovs Benson Maina Githethuki [2006] eKLR & Kenya Seed Co. Ltd vs Kenya Farmers Association [2007] eKLR**

Whereas the issue of jurisdiction maybe raised at the earliest opportunity and it terms of procedure set out by **Section 6 of Arbitration Act**, the Applicant raised the issue of jurisdiction after hearing of the Application and after those proceedings culminated with the Court’s Ruling of 15th April 2020 and cannot successfully raise it at this stage as the Applicants submitted to the Court by filing pleadings and participating during these proceedings.

24. The Applicants submitted that the Counsel on record was not the one instructed as per the Memorandum of Appearance filed in Court. How would the Court know and deal with such allegation if not raised by the party? Parties are represented by Counsel as indicated by firm of Advocates and any Counsel/Associate or Holding Brief Counsel may represent the Counsel on record.

25. This Court cannot venture into representation of a party by Counsel unless raised before the Court at the opportune time and not after the fact and having been represented during proceedings without any objection raised by the Applicants.

RES JUDICATA

26. The issue(s) for determination have been heard at the Interlocutory stage as moved by parties’ and determined. These issues are not open for hearing and determination again by this Court at this stage save for hearing of the Plaint filed on 16th October 2019 and relevant pleadings filed. The same maybe set down for case management and then pursue hearing and determination of the suit.

27. The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under **Section 7** of the **Civil Procedure Act**. In **Civil Appeal No. 105 of 2017 Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, Makhandia, Ouko, Kiage, M’inoti & Murgor, JJ. A while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

28. The dispute cannot legally be relitigated before the Arbitral Tribunal for reasons outlined above and it would amount to the Arbitral Tribunal exercising Appellate Powers which are not prescribed by law.

29. Secondly, the Applicant submitted that the Court granted orders not sought by parties. The Application of 16th October 2019, Notice of Motion at paragraph 9, the Applicant sought from the Court to issue any other orders that the Court may deem just and fit.

See; Court of Appeal in Kenya Power & Lighting Co Ltd vs Benzene Holdings Lts T/A Wyco Paints [2016] confirms the extent of inherent powers of the Court which the Court may resort to put right that which would be an injustice.

REMOVAL OF DIRECTOR

30. The Applicant submitted that this Court's finding on the 1st Plaintiff's removal was not proper and is wrong in view of **Section 139 of the Companies Act**. The Applicant argued that no meeting of Directors was held and resolution passed. The Applicant submitted that the Plaintiff resigned pursuant to **Article 29(b) of the Articles of Association** and there was no coercion as deposed in **Paragraph 17 of Further Affidavit of 19th November 2019**.

31. This is an opportunity sought/created to reargue the matter again which jurisdiction this Court lacks. Suffice is to quote verbatim this Court's Position as outlined in the Ruling of 15th April 2020 Pg 17-18 thus;

“From the above observations, the Defendants lacked legal basis to unilaterally determine and demand USD 40,000 contrary to the Company's Constitution and Companies Act 2015. It was the wrong basis to oust the 1st Plaintiff from membership, shareholding and /or directorship of the Company. The 1st Plaintiff ought to have remained Director of the Company. Instead, due to pressure from the other directors who ousted him from management of the company, he resigned as Director and signed transfer form and transferred 333 shares to the 2nd Plaintiff. The 2nd Plaintiff was declared a stranger to the Company by the 1st and 2nd Defendants, yet he came on board as the 2nd Defendant joined the Company.

From the facts deposed by parties and documents relied upon, the Court finds that the entry of 2nd Defendant as Director was/is irregular just as the entry of the 2nd Plaintiff's entry as Director of the Company.

.....

Secondly, the removal of the 1st plaintiff was not in terms of Section 139 of Companies Act 2015. There was no resolution shown to this Court nor the prescribed special notice issued pursuant to the meeting held on 20th September 2018.”

GROUND FOR REVIEW:

32. The Defendant/Applicant has not presented discovery of a new and important matter, which was not within their knowledge' the issue of jurisdiction was known by contracting parties and was not raised at the opportune time; during proceedings. This Court has not found a or any mistake or error apparent on the face of the record or any sufficient reason for review.

See Court of Appeal in National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR & Pancras T.Swai vs Kenya Breweries Ltd [2014]

“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that the Court proceeded on an incorrect exposition of the law and reached erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. [but for appeal]

It seems clear to us that the Appellant, in basing his review application on failure by the Court to apply the law correctly faulted the decision on a point of law. That is a good ground for application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law.....

A dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in Courts in which they were made in the guise of review when such Courts are functus officio and have no appellate jurisdiction.”

33. I have set out the position as elucidated by the above cases on what is applicable in a review and what is for the parties to exercise the right of appeal. I shall say no more on this point.

DISPOSITION

34. The upshot of the above is that the Grounds of Opposition are upheld while the Notice of Motion Application dated 27th July 2020 is dismissed.

35. The Defendants have not demonstrated to this Court that they have satisfied any of the above grounds to warrant a review of the Court Orders issued on 12th June 2020 from Ruling of 15th April 2020.

DELIVERED SIGNED & DATED IN OPEN COURT ON 14TH JUNE 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

BEGI'S LAW OFFICES & CHAMBERS ADVOCATES FOR APPLICANTS – N/A

MOCHU KAHURA & CO. ADVOCATES FOR RESPONDENT – N/A

COURT ASSISTANT - TUPET