Seruji Limited v Savannah Cement Limited; Savannah Heights Ltd (Interested Party) (Miscellaneous Application E445 of 2021) [2021] KEHC 26 (KLR) (Commercial and Tax) (10 September 2021) (Judgment)

Neutral citation: [2021] KEHC 26 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E445 OF 2021

A MABEYA, J

SEPTEMBER 10, 2021

BETWEEN

SERUJI LIMITED .... APPLICANT

AND

SAVANNAH CEMENT LIMITED .... RESPONDENT

AND

SAVANNAH HEIGHTS LTD .... INTERESTED PARTY

JUDGMENT

1. By an Originating Summons dated 10/6/2021, the applicant sought leave for the respondent to hold an Extra Ordinary General Meeting within 7 days of the order. The application was heard ex-parte orally and orders granted on 21/6/2021.

2. However, on the application of the interested party, the Court set aside those orders on 13/8/2021 and ordered that the application be heard afresh with the interested party participating. The parties filed their respective submissions which the Court has carefully considered.

3. The applicant's case was that, at the time of incorporation, the respondent had four shareholders whereby, vide article 17 of the Memorandum of Articles and Association ("the Articles"), the respondent could only transact business at a General Meeting where a quorum of three shareholders is met.

4. That currently, the respondent only has two shareholders and was incapable of holding any General Meeting. That unless the respondent was granted the leave sought, it will be in breach of the law with the attendant sanctions and its operations may ground to a halt leading to loss of jobs. It was

further contended that the approval of the restructuring of the respondent's facilities with the Kenya Commercial Bank (KCB) depended on board resolutions which cannot be met as a result of the quorum hitch.

5. The application was opposed vide a replying and further affidavits of Donald Kiboro Mwaura sworn on 20/8/2021 and 23/8/2021, respectively. He deposed that the applicant had no locus in bringing the application because its shareholding in the respondent was disputed. That the applicant was the cause of its own misfortune as it had irregularly acquired the shareholding of the other previous two shareholders bringing the shareholding below the threshold before the Articles could be amended.

6. It was further contended that if the application was allowed, the applicant might end up with a majority membership in the board of the respondent yet its shareholding was in dispute. That the actions of those directors would be held to be valid even if it is later found that their appointment was vitiated by the applicant's wrongful acquisition of shareholding in the respondent.

7. The interested party therefore contended that as the undisputed shareholder, it should be the one that should be authorized to call for and conduct a General Meeting. That there was very bad blood between the current directors of the respondent as evidenced by recent acts of its Managing Director failing to supply the deponent and his co-director with crucial information sought by them regarding the respondent.

8. The deponent concluded that the banking facilities alluded to by the applicant were not in any danger as the restructuring required the shareholding dispute to be sorted out first. That the Court could order the settlement of the dispute shareholding within a specified period.

9. The parties filed their respective submissions which the Court has carefully considered. The starting point is to reiterate the holding in the old English case of *Foss v Harbottle* [1843] 2 Hare 261 wherein it was held: -

> " ... an elementary principle is that a court does not interfere with the internal management of companies acting within their powers".

10. Closer home, in *Re K Boat Service* , the court held that: -

> " Courts will interfere only where the act complained of is ultra vires or is fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of the company. Accordingly, acts by or on behalf which require the authority of a resolution of the company and are done without it, or are otherwise irregular, but which can be regularized by the company at a general meeting and without a special resolution and are neither ultra vires nor of a fraudulent character, are not a ground for a court's interference upon a winding-up petition ...., or a petition to remove a director by a minority shareholder ... under the 'just and equitable' rule".

11. It is clear from the foregoing that the jurisdiction of the court to interfere in internal affairs of a company are limited. This is for good reason. Companies are legal persons that are operated using their constitutive documents. The law, under the *Companies Act, 2015*, carefully set out instances where the court can interfere for the public good and proper running of the economy of the country in general.

12. In the present case, there is no dispute that the respondent has been unable to hold a General Meeting due to quorate issues. Failure to hold such meeting is in itself irregular and unlawful. The interested party contends that the respondent's difficult situation was brought about by the applicant's irregular acquisition of 60% shareholding in the respondent. That dispute is yet to be resolved. It is the subject matter of HCCC No. 170 of 2016 *Savannah Heights Ltd v Savannah Cement Ltd & 3 Others*.

13. This Court's view is that, it cannot comment or purport to address the issue of whether the shareholding of the applicant in the respondent is regular or otherwise. That is a preserve of the court that will ultimately determine that suit. It is only unfortunate that such an important dispute to the respondent has dragged in our courts for such a long time.

14. The issue this Court has to resolve is whether in the circumstances the respondent finds itself, it is just to grant the orders sought. Further, is it just to grant such orders at the instance of the applicant?

15. The applicant has invoked the jurisdiction of this Court under section 280 of the *Companies Act, 2015*. That section provides: -

"

" (1) This section applies if for any reason it is impracticable-

a) To convene a meeting of the company in any manner in which meetings of that company may be convened; or

b) to conduct the meeting in the manner required by the articles of the company or this Act.

(2) The Court may, either on its own initiative or on the application-

a) of a director of the company; or

b) of a member of the company who would be entitled to vote at the meeting,

make an order requiring a meeting to be convened, held and conducted in any manner the Court considers appropriate.

(3) If an order is made under subsection (2), the Court may give such ancillary or consequential directions as it considers appropriate.

(4) Directions given by the Court under subsection (3) may include a direction that one member of the company present at the meeting be regarded as constituting a quorum.

(5) A meeting convened, held and conducted in accordance with an order under this section is taken for all purposes to be a meeting of the company properly convened, held and conducted".

16. It is clear that the purpose and spirit of the said provision is to enable companies which would otherwise find themselves imperiled by difficulties in holding a meeting due to an impossibility overcome such difficulties. Sometimes such difficulties arise out of the provisions of the constitutive documents of the company or the conduct of a member, be it the minority or the majority as the case may be, to defeat the possibility of holding a meeting.

17. In *Radio Frequency Systems (EA) & Anor v. Simon Horner & 2 Others [2020] Eklr* Tuiyot J, as he then was, held of this provision thus: -

> " The substance of this provision is similar to section 371 of the English *Companies Act, 2015* 1985. In a Jersy case of *In the Matter of Inter-Channel Pharmaceuticals Ltd* [2002] JRC 116A (10 June 2002), the Court observed as follows, regarding the Courts power under that provision.
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> 'We have been referred to three English Authorities namely, *In Re El Sombrero Limited [1958] 3 WLR 900*, *In Re H.R. Paul & Son Limited [1974] 118SJ 166*, and *In Re Opera Photographic Ltd*. *In Re El Sombrero* made it clear that the question raised by the word "impracticable" in the statutory provision is merely whether, in the particular circumstances of the case, the desired meeting of the company could as a practical matter be conducted. The case went on to hold that, if it is impracticable, a discretion then arose in the court as to whether it should make an order as sought. In the *El Sombrero* case the applicant held 90% of the shares and the two respondents the remaining 10%. They were also the only directors. By absenting themselves from any meeting they were effectively preventing the majority shareholder from exercising the rights attaching to his 90% shareholding to change the board of directors. The court made an appropriate order to convene a meeting and allow it to proceed in the absence of the quorum required by the articles.
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> In all the three English decisions to which we have been referred the court in effect made it clear that the quorum provisions should not be regarded as a right vested in the minority to frustrate the wishes of the majority. The facts in *In Re Opera Photograph Limited* were very similar to those in the present case. The majority shareholder wished to dismiss a director, but was prevented from doing so because the director, who was also the other member, declined to attend the meeting of members so that the meeting was without quorum.
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> It would seem that the overarching purpose of section 280 is to provide an inexpensive and speedy procedural remedy to overcome technical difficulties in a company convening, holding or conducting a meeting. It aids in the proper management of a company in the face of technical obstacles. ..."

18. I do reiterate the foregoing here and add that, the provision was intended to enable company business which needs to be conducted at a general meeting of the company to be so conducted notwithstanding the impediment that might be there. The intention of the Legislature was that a company should be allowed to get on with managing its own affairs, and should not be frustrated by the impracticability of convening, calling and/or conducting a general meeting in the manner prescribed by the Articles or the Act.

19. In the present case, article 17 of the Articles of the respondent provides that the quorum of the General Meeting is at least three members. It was common ground that as it stands currently, there are only two shareholders in the respondent. According to Form CR12 dated 8/6/2021. That was produced in evidence, there are only 2 shareholders of the respondent, Savannah Heights Ltd and Seruji Ltd. Surely, those cannot form a quorum for any meeting of the respondent to be transacted.

20. It was contended by the interested party that the shareholding of the applicant is disputed, that the quorum problem was brought about by the applicant's wrongful acquisition of the majority shareholding and that it should not be allowed to bring the application and sanitize its wrongdoing.

21. The answer to that is that, the issue of the alleged wrongful acquisition of shares in the respondent by the applicant cannot be litigated before this Court. That is the preserve of the court that will determine the pending suit in respect of that issue. Further, the Court is bound by the prima facie evidence produced and as contained in Form CR12 dated 8/6/2021 notwithstanding the challenge to that shareholding.

22. In *China Young Engineering Company vs. L. Mwacharo T/A Mwacharo Associates & Anor* the court held: -

> " My view is, where there is a dispute as to directorship and shareholding of a company, the best evidence to be relied on is the updated records from the Registrar of Companies. That registry is meant to keep the records of all Companies and for the purposes of the public to rely on the same as reflecting the true record of any particular company. If there is a fighting amongst directors and shareholders of a company, that is none of the business of third parties and/or the public. This is why there is penalty in late filing of change of particulars so that companies do file their returns in time so as to warn and/or inform the public as to who is the authorized officer or owner of a particular company".

23. In this regard, to the extent that there is no injunction, order or caveat restraining the applicant from presenting itself or acting as a shareholder in the respondent, and to the extent that the entries in Form CR12 have not been set aside or expunged, the applicant remains as such and is entitled to exercise the rights inuring to it as a shareholder under section 280 of the Act. Nothing prevented the interested party to bring such an application if it had so wished.

24. It has not been denied that as the articles of the respondent stand presently, it is impractical for the respondent to hold a General Meeting. Whilst the articles decree for a quorum of three members, there are currently only two members in the respondent. The decreed quorum cannot be met and no meeting can in the circumstances be held.

25. At the moment, the Court has seen bank documents relating to restructuring of the bank facilities afforded to the respondent. The facilities are in excess of Kshs. 6 billion. That is no doubt a substantial amount. Unless a General Meeting is held and appropriate resolution made, there may never be restructuring of the facilities whereby the respondent risks insolvency proceedings. That will be catastrophic to the respondent, its employees (who are completely innocent of the boardroom wars between the applicant and the interested party) and the country in general as the taxman will lose the income he receives in form of taxes from the operation of the respondent.

26. In view of the foregoing, this Court's jurisdiction has been properly invoked to enable the respondent continue to operate its business unhindered by the impracticability brought about by the imperatives of its Articles as to quorum.

27. Accordingly, the application is merited and is hereby allowed as follows: -

    a) Leave is granted to the respondent to hold an Extra-Ordinary General meeting within Seven (7) days of the grant of this order as per the agenda annexed as BSN2 notwithstanding the provisions of Article 17 of the Memorandum and Articles of Association of the respondent.

    b) Pursuant to section 280 (3) and (4) of the Act, upon service of notice of the meeting of not less than 3 days upon the interested party in any manner provided for by law, the applicant to constitute quorum.

    c) The costs of the Summons are awarded to the applicant against the interested party.

It is so decreed.

DATED and **DELIVERED** at Nairobi this 10th day of September, 2021.

A. MABEYA, FCI Arb

JUDGE