



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**COMMERCIAL DIVISION**

**MISCELLANEOUS CIVIL SUIT NO. 84 OF 2020 (O.S)**

**IN THE MATTER OF:**

**DHANJAL BROTHERS LIMITED**

**-AND-**

**IN THE MATTER OF:**

**ARTICLE 5(a) & (c) ARTICLES OF ASSOCIATION**

**-AND-**

**IN THE MATTER OF:**

**SECTION 506(5) COMPANIES ACT**

**-AND-**

**IN THE MATTER OF:**

**SECTION 85 COMPANIES (GENERAL REGULATIONS) RULES**

**-BETWEEN-**

**DHANJAL BROTHERS LIMITED.....APPLICANT**

**-VERSUS-**

**JOGINDER SINGH DHANJAL**

**SUKHWAT KAUR KUNDI (both sued as the Administrators**

**of the estate of JASWANT SINGH DHANJAL).....DEFENDANT**

**RULING**

1. The applicant herein on 30<sup>th</sup> April, 2020 filed an Originating Summons dated 22<sup>nd</sup> April, 2020 brought under the provisions of Order 37(a), (e), (f) and (g) of the Civil Procedure Rules, Section 506(5) of the Companies Act No. 17 of 2015, Rule 85 of the Companies (General Regulation) Rules, Rule 7 of the Company (High Court) Rules, Sections 3A and 63(e) of the Civil Procedure Act and other enabling provisions of the law. The applicant seeks the following orders-

(i) That the Honourable Court be pleased to grant orders that the applicant having acquired from Dalip Singh Dhanjal, Baldev Singh Dhanjal and Narinder Singh Dhanjal their  $\frac{3}{4}$  interest in Plot No. Mombasa/Block XIII/134 (and consequent to the nullification of the settlement agreement dated 9<sup>th</sup> March, 2006 by the Family Court in Succession Cause No. 20 of 2006) and the estate of Jaswant Singh Dhanjal's  $\frac{1}{4}$  interest of the said property having been declared, the applicant does deposit into Court the sum of KShs. 25,000,000/= (Kenya Shillings Twenty-Five Million Only) for the account of the respondents being the amount due to the estate as

value determined, of the said ¼ interest;

(ii) That the Honorable Court be pleased to declare that the applicant by invoking the provisions of Article 5(a) and (c) of its Articles of Association and by operation of the law, is entitled to decline to admit all the beneficiaries of the respondent (sic), into its membership;

(iii) That consequent to grant of prayer 2 above, the Honourable Court be pleased to grant orders that the applicant does deposit into Court the sum of Kshs. 15,725,250.00 (Kenya Shillings Fifteen Million, Seven Hundred and Twenty-Five Thousand, Two Hundred and Fifty Only) for the account of the respondent (sic) being the amount due to the estate as value determined of the 1125 shares held by the estate in the applicant;

(iv) That the Honourable Court be pleased to grant orders permanently restraining the respondents whether by themselves or through their servants, agents, or representatives from any way interfering with the operations and business activities of the applicant; and

(v) That the costs of this application be provided for.

2. The Originating Summons was premised on the grounds on the face of it and the affidavit of by Daljit Singh Dhanjal, the applicant's shareholder and director, sworn on 22<sup>nd</sup> April, 2020.

3. The Originating Summons was shortly followed by a Chamber Summons application filed on 8<sup>th</sup> May, 2020 brought under the provisions of Order 37(e) of the Civil Procedure Rules, 2010, Sections 3A and 63(c) & (e) of the Civil Procedure Act and other enabling provisions of the law. The applicant seeks the following orders: -

(i) Spent.

(ii) Spent.

(iii) Spent.

(iv) Spent.

(v) That pending the hearing and determination of the Originating Summons, the Honourable Court be pleased to grant orders of injunction restraining the respondents whether by themselves or through their servants, agents or representatives, from entering into, attempting to take possession of, seizing control of, and access to the business premises of the applicant and all other assets the property of the applicant;

(vi) That pending the hearing and determination of the Originating Summons, the Honourable Court do grant orders by way of injunction protecting the applicant from acts such as demands for statements of accounts, financial records, financial transactions, and third party contracts by the respondents while acting, purporting to act or holding themselves out or otherwise as members of the applicant herein;

(vii) That pending the hearing and determination of the Originating Summons, the Honourable Court be pleased to grant orders of an injunction restraining the respondents whether by themselves or through their servants, agents or representatives, from contacting business relations of the applicant and/or in any way transacting or purporting to transact on behalf of the applicant; and

(viii) That the costs of the application be in the cause.

4. The Chambers Summons was brought on the grounds on the face of it and the supporting affidavit sworn on 5<sup>th</sup> May, 2020 by Daljit Singh Dhanjal, the applicant's director.

5. In response thereto, the 2<sup>nd</sup> respondent filed an undated replying affidavit on 18<sup>th</sup> May, 2020 sworn by Sukhwant Kaur Dhanjal Kundi. She also filed a Notice of Preliminary Objection dated 15<sup>th</sup> May, 2020 based on the following grounds-

(i) That the Originating Summons dated 22<sup>nd</sup> April, 2020 and Chamber Summons dated 5<sup>th</sup> May, 2020 by the applicant were filed without due authority from the applicant company;

(ii) That there is no resolution or valid resolution of the applicant company approving the institution of the Originating Summons dated 22<sup>nd</sup> April, 2020 and Chamber Summons dated 5<sup>th</sup> May, 2020;

(iii) That there is no resolution or valid resolution of the applicant company appointing and authorizing the law firm of Wanjiku & Wanjiku Associates Advocates to institute the Originating Summons dated 2<sup>nd</sup> April, 2020 and Chamber Summons application dated 5<sup>th</sup> May, 2020 for and on behalf of the applicant company;

(iv) That the applicant company did not authorize Daljit Singh Dhanjal to sign any resolution and/or affidavits at all;

(v) That the Honourable Court lacks jurisdiction to entertain this Originating Summons dated 22<sup>nd</sup> April, 2020 and Chamber Summons dated 5<sup>th</sup> May, 2020 by the applicant as the subject matter is being concurrently handled by the High Court Mombasa in Succession Cause No. 20 of 2006 thus *sub-judice* and contrary to Section 6 of the Civil Procedure Rules;

(vi) That the entire suit is a non-starter and an abuse of the Court Process;

(vii) That Daljit Singh Dhanjal is not a shareholder or director of the applicant company and has no authority to represent and/or swear all pleadings on behalf of the applicant company;

(viii) That there is no suit properly before the Court for determination;

(ix) That the suit has been commenced through un-procedural means and thus fatally defective;

(x) That the suit is frivolous scandalous and vexatious;

(xi) That the suit is bad in law and the application is based on non-starter suit;

(xii) That the documents relied on by the applicant contravene mandatory provisions of the Companies Act, Cap 486 Laws of Kenya and in the alternative they are a forgery;

(xiii) That the settlement agreement of 9<sup>th</sup> March, 2006 has been declared *void ab initio* thus the matter is *res judicata*; and

(xiv) That the law firm of Wanjiku & Wanjiku Associates Advocates to personally bear the costs of this Preliminary Objection.

6. The 1<sup>st</sup> respondent filed a Notice of Preliminary Objection dated 19<sup>th</sup> May, 2020 in opposition to the Originating Summons dated 22<sup>nd</sup> April, 2020 and the Chamber Summons filed on 8<sup>th</sup> May, 2020 on the following grounds-

(i) That this Honourable Court lacks jurisdiction to hear and determine this suit as the issues raised in the claim are similar to issues currently being litigated upon in High Court Succession Cause No. 20 of 2006 (In the matter of the estate of the late Jaswant Singh Dhanjal) where the parties in the matter herein are also parties in the succession Cause and as such, this cause is *sub judice*;

(ii) That the issues raised in this cause are essentially distribution of the Estate of the Deceased in respect of the shares held in the company and in respect of the shares the deceased held in land reference No. Mombasa/Block XIII/134 which are the subject of consideration in Succession Cause No. 20 of 2006 currently pending before Honourable Justice M. Thande;

(iii) That the institution of this suit by the applicant, through Daljit Singh Dhanjal, the former administrator is an attempt to escape from the proceedings in Succession Cause No. 20 of 2006 in order to forum shop with an intention to deceiving the Court in granting him favorable orders, orders which might contradict the orders that might be issued in High Court Succession Cause No. 20 of 2006;

(iv) That the institution of this suit against the respondents (as administrators of the Estate of the Deceased) for orders pertaining to the Estate, is contrary to the orders issued by Lady Justice Thande in Mombasa Succession Cause No. 20 of 2006: Estate of Jaswant Singh Dhanjal on 9<sup>th</sup> March, 2020 wherein the Grant of Letters of Administration issued to the respondents were temporarily stayed;

(v) That should this Court proceed to hear the application, there is a real likelihood that this Honourable Court will usurp the powers of the High Court, Family division and confer on itself jurisdiction which it lacks and further there is a real likelihood that the orders likely to be issued in respect of the application will be adverse and contradict orders issued in the Succession Cause;

(vi) That the motion is a blatant abuse of the process of the Court and a fishing expedition by the applicant, who is very well aware of the existence of the Succession Cause No. 20 of 2006 and a participant therein, but has deliberately and willfully failed to disclose the said material and fundamental fact to this Honourable Court;

(vii) That this Court therefore lacks the jurisdiction to entertain this application and the same ought to be struck out with costs to the respondent;

(viii) That the entire suit herein is incompetent, fatally and incurably defective for being *sub judice* and further that the application is misconceived, bad in law, and an abuse of the Court process; and

(ix) That the motion (sic) ought to be dismissed with costs to the above named respondents.

7. On 18<sup>th</sup> December, 2020, directions were given that the Notice of Preliminary Objection would be heard first and canvassed by way of written submissions. The 1<sup>st</sup> respondent's submissions were filed on 16<sup>th</sup> March, 2021 by the law firm of Khalid Salim & Company Advocates. The applicant never filed any submissions to the Notices of Preliminary Objection dated 5<sup>th</sup> May, 2020 and 18<sup>th</sup> May, 2020.

8. Mr. Khalid Salim, learned Counsel for the 1<sup>st</sup> respondent submitted that the respondents as well as the applicant herein are beneficiaries of the Estate of the late Jaswant Singh Dhanjal (deceased). That prior to his death, the deceased and his three brothers were co-owners of plot

No. Mombasa/ Block XIII/134 and that he also held 1125 shares in the applicant company. He submitted that on 30<sup>th</sup> January, 2006, Daljit Singh Dhanjal filed a succession petition dated 23<sup>rd</sup> December, 2005, being Mombasa Succession Petition No. 20 of 2006, seeking to be appointed the administrator of the estate of his late father, Jaswant Singh Dhanjal.

9. It was submitted by Mr. Khalid that before the letters of administration were issued to the petitioner in the succession cause, he entered into a settlement agreement dated 9<sup>th</sup> March, 2006 between the deceased's brothers and himself, wherein the assets of the deceased were disposed of, among those assets are 1125 shares that the deceased held in the applicant company. Counsel further submitted that the grant of letters of administration were ultimately issued to the applicant herein, Daljit Singh Dhanjal, on 10<sup>th</sup> August, 2006 and the same were confirmed on 26<sup>th</sup> April, 2007. The respondents' Counsel indicated that upon discovery of the settlement agreement of 9<sup>th</sup> March, 2006, the 1<sup>st</sup> respondent filed summons for revocation of grant together with a Chamber Summons both dated 10<sup>th</sup> March, 2015.

10. He stated that the Chamber Summons sought to annul the settlement agreement dated 9<sup>th</sup> March, 2006 and Hon. Lady Justice M. Thande annulled the said settlement agreement and the transfer of 1125 shares that the deceased held in the applicant company, thereby reverting the estate of the deceased to its original status. Mr. Khalid further stated that Mombasa High Court Succession Cause No. 20 of 2006 is still pending hearing and that the estate of the deceased is yet to be completely distributed amongst the surviving beneficiaries.

11. The 1<sup>st</sup> respondent's Counsel argued that the suit herein is *sub judice* of Mombasa High Court Succession Cause No. 20 of 2006. He submitted that the doctrine of *sub judice* entails an instance where the party has filed similar suits in different Courts of similar jurisdiction seeking similar relief in both suits. He relied on the provisions of Section 7 of the Civil Procedure Act. He submitted that while the applicant company is not a party to the succession cause, it does form the subject of succession in that suit. He also submitted that Mombasa/Block XIII/134 is also a subject matter in that suit as it forms part of the estate of the deceased, while the applicant and the respondents are beneficiaries to the deceased's estate. He urged that if this Court grants the orders sought, there is a likelihood of the Courts rendering conflicting decisions since the Family Court is yet to render a final determination in the succession cause.

12. He held the view that the issues raised in this suit are capable of being litigated on and determined in the succession cause, and in the event that the applicant was aggrieved by the respondents' actions, he could raise any issues he has before the Family Court which is capable of issuing any necessary orders. He relied on the case of **Thiba Min. Hydro Co. Ltd vs Josphat Karu Ndwiga** [2013] eKLR, where the Court while upholding the plea of *sub judice* held that it is not the form in which the suit is framed that determines whether it is *sub judice* but rather, it is by looking at the substance of the suit and the pleadings in both cases and there could be no justification in having the two cases being heard parallel to each other.

13. Mrs Kipsang for the 2<sup>nd</sup> respondent supported the submissions made by Mr. Khalid Salim for the 1<sup>st</sup> respondent.

#### **ANALYSIS AND DETERMINATION.**

14. This Court has considered the application, the supporting and replying affidavits, the Notices of Preliminary Objection and the written submissions on record. Two issues arise for determination-

**(i) Whether there was a valid resolution by the applicant Company to instruct the law firm of Wanjiku & Wanjiku Associates Advocates to institute the suit herein, and authorize Daljit Singh Dhanjal to sign any resolution and/or affidavits for the applicant company; and**

**(ii) Whether the suit herein is *sub judice*.**

15. The definition of what constitutes a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd** [1969] EA 696, where the Court stated thus-

*"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."*

***Whether there was a valid resolution by the applicant Company to instruct the law firm of Wanjiku & Wanjiku Associates Advocates to institute the suit herein, and authorize Daljit Singh Dhanjal to sign any resolution and/or affidavits for the applicant company***

16. Commencement of a suit or an action by a company is initiated by *a board resolution sanctioning the commencement of the said action. In the present case, the applicant in his affidavit in support of the Originating Summons dated 22<sup>nd</sup> April, 2020 annexed a special resolution dated 4<sup>th</sup> March, 2020. A close look at the said resolution reveals that a special meeting of the board of the applicant company was held on 4<sup>th</sup> March, 2020 and the company resolved-*

*(a) to invoke its Articles of Association and decline to admit all the beneficiaries of the estate of Jaswant Singh Dhanjal to its membership;*

*(b) compensate the estate for the value of its share which has been determined;*

*(c) compensate the estate, the value of its ¼ interest in Mombasa/Block XIII/134; and*

*(d) to retain the firm of Wanjiku & Wanjiku Associates to act as above.*

17. Article 8 of the applicant company's Articles of Association provides for a resolution in writing signed by all the members of the Company when it comes to general meetings. The special resolution herein exhibited as annexure DSD8 was signed by a director and secretary whose names have not been indicated on the body of the said resolution. In addition, the special resolution that the applicant relies on was not signed by all the members of the company as provided in its Articles of Association.

18. In the case of *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014] eKLR, Justice Mumbi Ngugi concurred with the reasoning held in *Affordable Homes Africa Limited v Ian Henderson & 2 Others HCCC No 524 of 2004* as follows-

***“that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers...The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff.”***

19. The applicant did not offer any explanation as to why the special resolution dated 4<sup>th</sup> March, 2020 was not signed by all the members of the company and/or by all the members who attended the said meeting. Under the circumstances, the respondents have proved that there was no valid board resolution arrived at by the company to institute and/or file the present suit.

20. Having made the said finding, this Court makes a similar finding as concerns the appointment of the firm of Wanjiku & Wanjiku Associates who are currently on record for the applicant. It is also noteworthy that from the special resolution dated 4<sup>th</sup> March, 2020, the said firm of Advocates was not expressly instructed to institute the suit herein. I therefore find that the firm of Wanjiku & Wanjiku Associates had no basis or authority to come on record for the plaintiff in the absence of a company resolution.

21. In *East African Portland Cement Ltd* (supra) Mumbi. J held that-

***“...as an Advocate and an officer of the Court, the Counsel responsible for the filing of this petition was fully aware, or should have been aware, of the requirements of the law with regard to the filing of suits by companies, and had a duty to advise his client(s) not to file proceedings if there was no or no clear authority to do so...”***

22. In this case, the law firm of Wanjiku & Wanjiku Associates should not have gone ahead to file the suit herein without first ascertaining that a valid meeting of the board of directors was held and that arising therefrom, she was expressly instructed to file the present suit.

23. As to whether Daljit Singh Dhanjal was duly authorized through a valid resolution to sign any resolutions, affidavits or witness statements on behalf of the applicant company, the applicant relied on a letter annexed to its supporting affidavit and marked as DSD1, which allegedly authorized him to sign affidavits and witness statements on behalf of the applicant company. The said letter though undated, contains the company's seal and is alleged to have been signed by the Company Secretary. The name of the Company Secretary who signed the said letter has not been indicated thereon. It only bears the name Equatorial Secretaries and Registrars, thus it is impossible to verify if indeed the current Company Secretary signed the said letter of authority.

24. This Court holds that there was no resolution, valid or otherwise, to the effect that Daljit Singh Dhanjal was authorized to sign any resolutions, affidavits and witness statements on behalf of the applicant company in regard to this suit, since what was availed by the applicant to this Court is an undated letter of authority. Order 9 Rule 2(c) of the Civil Procedure Rules, 2010 provides as follows-

***“The recognized agents of parties by whom such appearances, applications and acts may be made or done are—***

***(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.”*** (emphasis added).

25. It is therefore this Court's finding that a letter of authority in the absence of a valid resolution does not amount to sufficient authorization to swear affidavits on behalf of the applicant company.

**Whether the suit herein is *sub judice*.**

26. Section 6 of the Civil Procedure Act provides as hereunder on the doctrine of *sub-judice*-

***“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*** (emphasis added).

27. It is not disputed that there exists Mombasa Succession Cause No. 20 of 2006 (The Estate of Jaswant Singh Dhanjal (deceased)), where the parties herein are listed as beneficiaries of the said estate. It is also not disputed that the settlement agreement dated 9<sup>th</sup> March, 2006 which purported to dispose of some of the assets belonging to the estate of Jaswant Singh Dhanjal (deceased) was annulled by Honourable Lady Justice M. Thande and that she also annulled the transfer of 1125 shares that the deceased held in the applicant company. Consequently, the estate of the deceased reverted to its original position.

28. The respondents' submissions were that the grant of letters of administration issued to Daljit Singh Dhanjal on 10<sup>th</sup> August, 2006 were

confirmed on 26<sup>th</sup> April, 2007 but the 1<sup>st</sup> respondent filed summons for revocation of grant dated 10<sup>th</sup> March, 2015, which matter is still pending hearing and determination before the Family Court in Mombasa.

29. It is notable that the orders sought by the applicant in the Originating Summons dated 22<sup>nd</sup> April, 2020, are framed in such a way that if this Court was to allow the said application, it will have dealt with a part of the estate of the deceased, thus usurping the powers of the Family Court.

30. It is also not lost to this Court that having annulled the settlement agreement dated 9<sup>th</sup> March, 2006, Lady Justice M. Thande directed her mind on the issues raised therein and opted not to uphold it. The effect of filing the Originating Summons dated 22<sup>nd</sup> April, 2020 would be to resuscitate the settlement agreement dated 9<sup>th</sup> March, 2006. It is worth noting that an appeal was filed against the decision of Lady Justice M. Thande in the Court of Appeal at Mombasa in Civil Appeal No.17 of 2017 and the appeal was dismissed.

31. It is evident that through the present application, the applicant is trying to shrewdly appeal against the decision of Lady Justice M. Thande to a Court of concurrent jurisdiction, which is against the law.

32. On the issue of whether the suit herein is *sub judice*, in **Republic v Registrar of Societies - Kenya & 2 others Ex-Parte Moses Kirima & 2 others** [2017], the Court held as follows on what constitutes *sub judice*-

***“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”***

33. Similarly, in **Barclays Bank of Kenya Ltd vs. Elizabeth Agidza & 2 others** [2012] eKLR the Court held that-

***“...if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties...”***

34. When Considering if a matter is *sub judice*, Courts look at the subject matter of the respective suits. This Court finds that the subject matter in the Originating Summons dated 22<sup>nd</sup> April, 2020 forms part of the estate of Jaswant Singh Dhanjal (deceased) as has been submitted by Counsel for the respondents, and as such, Section 6 of the Civil Procedure Act applies.

35. There is every likelihood that if the suit herein proceeds simultaneously with Mombasa Succession Cause No. 20 of 2006, the Courts stand the risk of issuing two conflicting decisions with the parties being unable to enforce their respective decrees.

36. Bearing in mind that there was no valid resolution by the applicant company to institute the suit herein and for the other reasons stated above, I uphold the Notices of Preliminary Objection dated 15<sup>th</sup> May, 2020 and 18<sup>th</sup> May, 2020. Consequently, the Originating Summons dated 22<sup>nd</sup> April, 2020 and the Chamber Summons dated 5<sup>th</sup> April, 2020 are hereby dismissed for lack of merit and for being an abuse of the court process.

37. Costs are awarded to the respondents. The said costs shall be borne personally by Daljit Singh Dhanjal as he had not been authorized by the board of directors of the plaintiff company to file the Originating Summons and the Chamber Summons on its behalf.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 8TH DAY OF OCTOBER, 2021.**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued**

**by his Lordship, the Chief Justice on the 17<sup>th</sup> April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

**No appearance for the parties**

**Mr. Oliver Musundi – Court Assistant.**