



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E197 OF 2019

YOUTH DYNAMIX KENYA LIMITED.....1ST PLAINTIFF

DAVID NAGARUIYA.....2ND PLAINTIFF

ADAM ANTHONY NYAKUNDI.....3RD PLAINTIFF

-VERSUS-

ANN WANJIRU NGIGI.....1ST DEFENDANT

YDX AGENCY LIMITED.....2ND DEFENDANT

REGISTRAR OF COMPANIES.....3RD DEFENDANT

JUDGMENT

Introduction

This ruling is in respect to two applications, namely;

- a) The application dated 27th June 2019 wherein the plaintiffs seek orders of injunction and;
- b) The application dated 30th October 2019 wherein the defendants seeks orders to set aside the interlocutory orders issued on 16th July 2019.

Background.

1. On the 23rd June 2006, the 2nd plaintiff, the 3rd plaintiff and the 1st defendant herein incorporated a limited liability company, **Youth Dynamix Kenya Limited**, the 1st plaintiff herein. The 2nd and 3rd plaintiffs, and the 1st defendant are the shareholders/directors of the 1st plaintiff company.
2. A dispute thereafter arose between the 1st plaintiff's said the directors/shareholders thus prompting the filing of the instant suit and the application dated 27th June 2019.
3. The 1st and 2nd defendants entered appearance and filed their Statement of Defence in response to the plaint.
4. In response to the plaintiff's application dated 27th June 2019 the 1st and 2nd defendants filed their replying affidavit dated 30th October 2019. They also filed a Notice of Motion dated 30th October 2019 seeking, *inter alia*, orders to strike out the names of the 2nd and 3rd plaintiffs from the suit.
5. The 3rd defendant, the Honourable Attorney General, entered appearance and filed a Notice of Preliminary Objection dated 7th November 2019 wherein he seeks to object, *in limine*, to the entire suit on the grounds that the court lacks the jurisdiction to preside over it.

The Plaintiffs' Case

6. The plaintiffs' plaint dated 27th June 2019 seeks, *inter alia*, a statutory penalty of Kshs 1,000,000.00 pursuant to Section 51 of the Companies Act, 2015, special damages in the sum of Kshs 3,913,504.42, loss of reputation in the sum of Kshs 22,208,225.00 and deregistration of the 2nd defendant by the 3rd defendant.

7. Contemporaneously with the plaint, the plaintiff's also filed an application seeking orders to restrain the 1st and 2nd defendants herein from making any decisions or representing themselves as representatives of the 1st plaintiff and from engaging with clients, employees, properties that belong to the 1st plaintiff. My take is that at the center of this case is the issue of the company directors' elections. This is an internal affair of the company which courts have held that they should not interfere with. My view is supported by the decision in the case of **Foss vs Harbottle (1843) 2 Hare 261** where it was stated that courts will interfere only where acts complained of is ultra vires, or is fraudulent or not rectifiable by an ordinary resolution. In the instant case, I find that the matters complained of do not border on fraud or ultra vires but are such that can be resolved by the company itself. My humble view is that the orders sought by the plaintiff in this case, to declare who is or who is not a duly elected director of the company or who should call for meetings are clearly the company's internal affairs in which this court should not interfere.

8. The application is based on the grounds that the 1st plaintiff lost numerous clients due to the uncertainty caused by the presence of the two companies (itself and the 2nd defendant) as well as the cancellation of the affiliation agreement between the 1st plaintiff and Youth Dynamix (Proprietary) Limited of South Africa, by the South African Company.

9. Through the ex-parte orders issued on 16th July 2019, this court restrained the 1st and 2nd defendants from making any decisions or representing themselves as representatives of the 1st plaintiff and from engaging with the 1st plaintiff's clients and employees.

10. On their part, the 1st and 2nd defendants' state that the orders of 16th July 2019 were obtained through material non-disclosure of the fact that by an agreement dated 16th May 2019 between the 2nd and 3rd plaintiffs, and the 1st defendant herein, it was agreed that the entire Safaricom Business which had been awarded to the 1st plaintiff would be transferred to the 2nd defendant and the 1st plaintiff relinquished all its interests in the Safaricom business.

Plaintiff's application dated 27th June 2019.

11. The application is brought under Sections 1A, 1B and 3A of the Civil Procedure Rules. It seeks the following orders: -

i. Spent

ii. Spent

iii. Spent

iv. That pending the hearing and determination of the main suit, a temporary injunction be issued directed at the 1st defendant whether by (sic) themselves, agents, servants or otherwise however be is hereby issued restraining her from accessing and operating any accounts operated by the 1st plaintiff/applicant.

v. That pending the hearing and determination of the main suit, the court issues an order directing the 1st defendant whether by (sic) themselves, agents, servants or otherwise however be and is hereby to surrender; the original documents of the plaintiff such as the incorporation certificates as well as any other documents held by the 1st defendant in her official capacity.

vi. That pending the hearing and determination of the main suit, the court issues an order directing the 1st defendant whether by (sic) themselves, agents, servants or otherwise however be and is hereby to surrender the accessibility and control of the 1st plaintiff's website and Microsoft database.

vii. That pending the hearing and determination of the main suit, the court issues an order directing the 1st defendant and 2nd defendant whether by themselves, agents, servants or otherwise however be and is hereby to suspend using of the domain name ydxagency.co.ke

viii. That pending the hearing and determination of the main suit, the court issues an order directing the 1st defendant and 2nd defendant whether by themselves, agents, servants or otherwise however be and is hereby to suspend all operations that are in conflict with the business and operations of the 1st plaintiff.

ix. That pending the hearing and determination of the main suit, a temporary injunction be issued ordering the 3rd defendant to suspend the registration and operations of the 2nd defendant.

x. That the costs be borne by the defendants/respondents.

12. The application is supported by the affidavits of the 2nd plaintiff, and is premised in the grounds that:

a) That the defendant using her position as the Managing Director of the 1st plaintiff had proceeded to out rightly lie/represent to

both clients and general public that the 1st plaintiff was “rebranding” to the 2nd defendant without any tinge of responsibility as a director nor remorse.

b) That since 2015 when issues arose as the financial management of the 1st plaintiff in terms of diminishing of the profits margin despite the continuous growing of the company, handling of dividends and emoluments, the directors resolved that the company does hire Chief Financial Officer who would work independently and ease the pressure from the Managing Director, the 1st defendant, who at times was of the opinion that the financial questions being raised by the co-directors, the 2nd and 3rd plaintiffs, were personal attack on her character.

c) That due to the hard handedness of the 1st defendant and failure to control and manage the company’s financials properly, the 1st plaintiff in 2018 lost one of its biggest clients.

d) That the 1st defendant also proceeded to micromanage the hired Chief Financial Officers and instead their roles were reduced to mere assistants instead of dealing with the financial aspect of the company which the managing director failed to relinquish.

e) That in 2019, the 2nd and 3rd plaintiff’s discovered that the 1st defendant has incorporated in 2013, a separate company with similar if not identical attributes of the 1st plaintiff, in the name of YDX Agency Limited where the 1st defendant had ninety-nine percentage shareholding in the company.

f) That the plaintiff, through its advocates on record TripleOKLaw, wrote to the Registrar of Companies notifying them of the registration and existence of YDX Agency Limited, a company resembling Youth Dynamix Kenya Limited, the 1st plaintiff and owned and controlled in majority by 1st defendant one of the directors of Youth Dynamix Kenya Limited, yet no permission had been granted to the Managing Director to incorporate a similar company.

g) That in the face of this discovery as well as the mismanagement of the company’s funds, the 1st plaintiff’s board resolved to suspend the managing director, 1st defendant, as well as removing her as a signatory to the company’s accounts pending the final determination of the impugned financial and operational issues.

h) That on the 16th April, 2019, the 1st plaintiff received a letter of cancellation of affiliation status with its South African counterpart Youth Dynamix Limited. This was further bolstered by a letter dated 10th May 2019 from Tabacks Attorney, advocates for the South African Company reaffirming the cancellation of the affiliation position.

i) That ironically, the 1st plaintiff received a letter from the South African company dated 17th April 2019 indicating that the 1st defendant and her company the 2nd defendant was to take up the official and exclusive legal affiliation in the East Africa region, a territory which was previously being controlled by the 1st plaintiff.

j) That the 1st defendant’s actions have led to the 1st plaintiff losing numerous clients due to the uncertainty caused by the presence of the two companies as well as the cancellation of the affiliation agreement by the South African Company.

k) That the 1st defendant has also proceeded to acquire the universal rights of the 1st plaintiff’s Microsoft account and its database which holds the Company’s essential information affecting its day to day running yet the 1st plaintiff has continuously paid for the services of the same to the website operator.

l) That the 1st defendant at all times had not tendered her resignation from the Company yet her actions have continued to negatively affect the 1st plaintiff to whom the 1st defendant is still a director/shareholder.

m) That it is therefore in the interest of justice that the reliefs sought in the instant application are granted under urgency to protect the interests of the applicants.

13. The 1st and 2nd defendants opposed the application through the 1st defendant’s replying affidavit sworn 30th October 2019 wherein she avers that in law, the 2nd and 3rd plaintiff’s have no cause of action against the defendants. She explains, in detail, the circumstances under which the 1st plaintiff company was incorporated in 2006 its relationship with the other media companies including Youth Dynamix (proprietary) Limited of South Africa through an Affiliation Agreement signed in February 2006.

14. She further explains the genesis of the differences that arose between the 1st plaintiff’s Directors over the management of the company which differences culminated in the filing of the instant suit. She avers that this case is intended to intimidate her from pursuing other claims against the plaintiffs and to frustrate the affiliation agreement between her, the 2nd defendant and the principal company in South Africa. Contemporaneously with the replying affidavit, the 1st and 2nd defendants also filed the application dated 30th October 2019.

15. In response to the defendants’ replying affidavit, the 2nd plaintiff swore a further affidavit dated 20th November 2019 wherein he vehemently denies the allegations made by the 1st defendant and accuses her of fundamentally breaching her fiduciary obligations as a Managing Director of the company.

The 1st and 2nd defendants' application dated 30th October 2019.

16. The application seeks orders that: -

i. Spent

ii. Spent

iii. That this honourable court be pleased to strike out the names of the 2nd and 3rd plaintiffs from the suit.

iv. That this honourable court be pleased to set aside, discharge or vary the orders issued on 16th July 2019.

v. That this honourable court be pleased to dismiss the Notice of Motion application dated 27th June 2019.

vi. That costs of this application be in the cause.

17. The application is supported by the 1st defendant's affidavit is premised on the grounds inter alia, that: -

1. That by ex-parte orders issued on 16th July 2019, this Honourable court restrained the 1st and 2nd defendants herein from making any decisions or representing themselves as representatives of the 1st plaintiff and from engaging with clients, employees, properties that belong to the 1st plaintiff.

2. That the orders of 16th July 2019 were obtained through material non-disclosure as the plaintiffs neglected to disclose to this Honourable court that by an agreement dated 16th May 2019 signed by the 2nd and 3rd plaintiffs and the 1st defendant herein as directors of the 1st plaintiff, it was agreed that the entire Safaricom business which had been awarded to the 1st plaintiff would be transferred to the 2nd defendant and the 1st plaintiff relinquished all its interests in the Safaricom business.

3. That the application dated 27th June 2019 is an abuse of the court process and is calculated to cripple the 2nd defendant's business and ought to be dismissed forthwith.

4. That the 2nd and 3rd plaintiffs and the 1st defendant are directors and shareholders of the company, each holding 333 shares of the company.

5. That as can be gleaned from the plaint, the claim alleges wrongs done to the company by the defendants.

6. That pursuant to the rule of Foss vs Harbottel [1843] 67 ER 189 and restated in the case of Edwards vs. Halliwell (1950) ER 1064, the proper plaintiff in an action in respect of a wrong alleged to be done to a company is the company itself.

7. That in the circumstances, the 2nd and 3rd plaintiffs are non-suited against the 1st and 2nd defendants in this suit and their names ought to be struck out for otherwise being an abuse of the court process.

18. The plaintiffs opposed the application through the 2nd plaintiff's replying affidavit sworn on 20th December 2019 wherein he avers that the plaintiffs sued the defendants for breach of fiduciary duties and misrepresentation. He avers that the application dated 27th June 2019 was necessitated by the 1st and 2nd defendants' actions which continued to negatively affect the plaintiffs thus necessitating legal redress.

19. He further states that the 2nd and 3rd plaintiffs are properly enjoined in this suit in their individual capacities as Shareholders and Directors who would have instituted similar suits arising from the same questions of law/facts.

The 3rd defendant's case.

20. The 3rd defendant opposed the plaintiffs' entire suit through the Notice of Preliminary Objection dated 7th November 2019 wherein he states that: -

1. That this Honourable Court does not have jurisdiction to preside over this matter in the first instance.

2. That the 1st, 2nd and 3rd plaintiffs have not exhausted all the avenues for dispute resolutions between themselves and the 1st defendant namely by way of Arbitration as provided under paragraph 31 of the 1st plaintiffs Articles of Association to which the 2nd, 3rd plaintiff and the 1st defendant have subscribed to and are bound to uphold.

21. Parties canvassed both applications together by way of written submissions which I have carefully considered. I find that the main issues for determination are as follows: -

a) Whether this court has the jurisdiction to hear this case and depending on the finding of jurisdiction

b) Whether the ex parte orders issued on 16th July 2019 should be set aside.

c) Whether the names of the 2nd and 3rd plaintiffs should be struck out from the suit.

d) Whether the plaintiffs are entitled to the injunctive orders sought in the application dated 27th June 2019.

Jurisdiction

22. It is a trite principle of law that the issue of jurisdiction is a pure point of law and that jurisdiction is everything without which a court must down its tools. The *locus classicus* on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1* where Justice Nyarangi of the Court of Appeal (as he then was) 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."

23. The above holding is supported by the works of John Beecroft Saunders in a treatise entitled: *Words and Phrases Legally defined – Volume 3: I – N* at page 113, as follows: -

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".

24. The issue of jurisdiction may be raised on the ground that a particular court or tribunal lacks the power hear the case, and the same may be in regard to either territory (the court chosen by the plaintiff has no authority to try a case in the place where the cause of action arose or pecuniary where the court chosen by the claimant/plaintiff does not have the authority to try the case because the value of the case in monetary terms is higher than the upper limit that can be tried by the Court).

25. In the instant case, the 3rd defendant objected to the jurisdiction of this court to entertain the suit on the basis that there exists an arbitration clause contained in the 1st Plaintiff's Articles of Association which the 2nd, 3rd plaintiff and 1st defendant subscribed to.

26. I have perused the 1st Plaintiff's said Articles of Association and I note that the same was duly signed by the 1st defendant and the 2nd and 3rd plaintiffs in their capacities as shareholders and subscribers of the 1st plaintiff company. I note that paragraph 31 of the said Articles stipulates as follows: -

"Whether any difference arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statute, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching any breach, or alleged breach, of these Articles, or any claim in account of any such breach or alleged breach, or otherwise relating to the premises, or to these Articles or to any statutes affecting the company, or shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or 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. Arbitrators shall be subject to the Arbitration Act."

27. In considering whether this court has jurisdiction to hear this matter, I wish to point out that the main disputants in this matter are the plaintiffs and the 1st defendant as the case pits the directors and shareholders of the 1st plaintiff company. I find that the 2nd and 3rd defendants herein can be said to be collateral parties to the suit since their involvement is secondary to the issues at hand and mainly arising as a consequence to the differences between the directors of the 1st plaintiff.

28. I have also considered the prayers in the Complaint which are mainly for a statutory penalty of Kshs 1,000,000.00 pursuant to Section 51 of the Companies Act, 2015, special damages in the sum of Kshs 3,913,504.42, loss of reputation in the sum of Kshs 22,208,225.00 and deregistration of the 2nd defendant by the 3rd defendant among other prayers. It is worthy to note that the registration of the 2nd defendant is challenged on the basis that it resembles the 1st plaintiff and was allegedly registered by the 1st defendant in order to take over the 1st plaintiff's business. In a nutshell, the genesis of the instant suit is the differences between the directors/shareholders of the 1st plaintiff company.

29. From the prayers sought in the complaint, it is clear that they mainly emanate from the relationship between the plaintiffs and the 1st defendant which relationship is governed by the Articles and Memorandum of Association of the 1st Plaintiff. As I have already noted in this

ruling, paragraph 31 of the said Articles provides for arbitration in the event of any dispute between the company and any of its members.

30. The question still remains as to whether the court can hear and determine the matter herein. It suffices to note that, the provisions of Article 159 (1) of the Constitution of Kenya, clearly stipulates that, *Judicial authority is derived from the people and vested in, and shall be exercised by the courts and tribunals established by or under the Constitution. That, in exercising the judicial authority, the courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism.*

31. **Section 10** of the Arbitration Act No. 4 of 1995, limits the court's intervention in arbitral process and states as follows:

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

32. Under Section 6 and 7 of the Arbitration Act (hereinafter “the Act”) the court can only intervene in Arbitral matters before commencement of proceedings. Section 6 (1) of the Act states 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”.

33. In the instant case, the main disputants did not seek to refer their dispute to arbitration despite the existence of the arbitral clause in their Articles of Association. The 1st and 2nd defendant instead entered appearance and filed a defence thus acknowledging the jurisdiction of this court. In ***Eunice Soko Mlagui v Suresh Parmar & 4 others*** [2017] eKLR, the court held that, the filing of a defence constitutes acknowledgment of a claim, within the meaning of the provisions of section 6(1) of the Arbitration Act. The 3rd defendant has however not filed a defence in this matter. It is trite principle of law that, Arbitration proceedings are dependent on the existence of an agreement between the disputant parties. This is a reflection of the role of consent as the basis of arbitration.

34. In ***Eunice Soko Mlagui (supra)*** the court held that an arbitral clause in the subject contract applied in the event of disputes between members and the company and between members per se. As I have already stated in this ruling, the dispute herein mainly revolves around the 1st plaintiff's directors. My finding is that the dispute herein falls within the arbitration clause contained in the 1st Plaintiff's Article of Association to which the directors bound themselves and cannot be seen to run away from.

35. I note that at the center of this case is the issue of the running of the 1st plaintiff company. I find that this is an internal affair of the company which courts have held that they should not interfere. I am guided by the decision in the case of ***Foss vs Harbottle*** (1843) 2 Hare 261 where it was stated that courts will interfere only where acts complained of is ultra vires, or is fraudulent or not rectifiable by an ordinary resolution. In the instant case, I find that the matters complained of do not border on fraud or ultra vires but are such that can be resolved by the company itself. My humble view is that the complaints that the plaintiffs have against the 1st Defendant, who is the 1st plaintiff's Managing Director, border on the company's internal affairs in which this court should not interfere.

36. In the circumstances of this case, I uphold the 3rd defendant's preliminary objection and find that this court lacks the jurisdiction to entertain this case in the first instance and direct that it be referred to arbitration as was envisaged by the parties in their company's Articles of Association. Consequently, I strike out the suit with costs to the 3rd defendant.

37. My decision on the issue of jurisdiction would have been sufficient to determine this matter but assuming that I am wrong on the said finding, I am still minded to determine the rest of the issues that were listed for determination.

Setting aside of Exparte orders.

38. In determining whether or not this court should set aside the exparte orders issued on 16th July 2019, I find it necessary to highlight the said orders in this ruling. The impugned orders were as follows: -

i. That the application be certified urgent and service be dispensed with in the first instance.

ii. That pending the hearing of the application interpartes, a temporary injunction be issued directed at the 1st defendant and 2nd defendant whether by themselves, agents, servants or otherwise howsoever be and are hereby restrained from making any decisions or representing themselves as representatives of the 1st plaintiff.

iii. That pending the hearing of the application interpartes, a temporary injunction be issued directed at the 1st defendant and 2nd defendant whether by themselves, agents, servants or otherwise howsoever be and are hereby restrained from engaging with

clients, employees, properties and belong to the 1st plaintiff.

39. From the wording of the impugned orders, it is clear that their lifespan was limited to the period of the interpartes hearing and determination of the application dated 27th June 2019. Considering that this is the determination of the subject application one can say that the application to set aside the ex parte orders will be overtaken by events and thus not necessary once this ruling is delivered. Needless to say and as rightly pointed out by the plaintiffs, this court is vested with the discretion, if satisfied with the reasons set out in an application, to grant temporary orders pending the substantive hearing and determination of an application.

Striking out the names of 2nd and 3rd plaintiffs from suit.

40. The 2nd and 3rd plaintiff's standing in the suit was challenged on the basis that as directors of the company, they do not have the locus standi to sue on behalf of the company which is a separate entity capable of suing in its own name. *Locus standi* is defined in **Black's Law Dictionary, 9th Edition at page 1026** as-

"The right to bring an action or to be heard in a given forum".

41. In **Alfred Njau & 5 others v City Council of Nairobi [1983] eKLR** put it in the following terms: -

"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

42. Whether or not the 2nd and 3rd plaintiffs have the requisite standing turns on the nature of the claim before the court. The 1st and 2nd defendants' position is that they filed the suit on behalf of the 1st plaintiff for the alleged wrongs committed against it. It was argued that by dint of **Foss v Harbottle (1843) 67 ER 189** popularly referred to in company law as "*the rule in Foss vs. Harbottle*", there is no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to a company is the company itself. This is based on the principle that a company is a legal personality distinct from its directors and shareholders. This court however notes that there are exceptions to the rule which allow a person to sue on behalf of the company. In **Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri & 5 Others [2011] eKLR**, the Court of Appeal, while discussing the said exceptions expressed itself as follows: -

"There is also another remedy arising from the leading English legal precedent on Corporate Law which continues to apply in Kenya more than 160 years since it was decided: Foss v Harbottle (supra). As stated earlier, in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. This is the rule in Foss v Harbottle. But there are four exceptions to that rule which appear in the leading case itself but also in subsequent decisions on the subject. Firstly, where the directors or a shareholding majority use their control of the company to paper over actions which would be ultra vires the company or illegal. Secondly, if some special voting procedure would be necessary under the Company's constitution or under the companies Act, it would defeat both if they could be sidestepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed (Edwards v Halliwell [1950] 2 ALL ER 1064. Thirdly, where there is invasion of individual rights, such as voting rights (Pender v Lushington (1877) 6 Ch D 70. Fourthly, where a fraud on the minority is being committed. In all those cases, a "derivative action" could be brought before the court on behalf of the company where the wrongdoer is in control of the company or by the individual shareholder where his personal right is violated." [Emphasis mine].

43. Restating the prerequisites of filing suit on behalf of a company this Court in **Amin Akberali Manji & 2 Others v Altaf Abdulrasul Dadani & Another [2015] eKLR** observed: -

"It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such action, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in Foss vs. Harbottle.

...

Secondly, on the question whether the suit was a derivative one, we find it was. The company was in the peculiar and unique position of having only two members who were equal in power and glory in relation to the company. There was no majority or minority shareholder. The two shareholders/directors had reached a stalemate until one left the directorship as the other migrated to Canada while the company was sinking into extinction. Proof of a stalemate in the boardroom was that there are no resolutions of the Board exhibited in the record on the matters complained of. On the face of it, the property of the company was disappearing or being taken over by a third party but the company was doing nothing about it. Did any of all this fit anywhere in the exceptions to the rule in Foss vs. Harbottle? The trial court found it did and we think it was right."

44. In the present case, I note that not only was the 1st plaintiff company included in the suit but that the 2nd and 3rd defendants appear in the suit not only as directors but also in their capacities as shareholders thus falling under the fourth exception to the rule in **Foss v Harbottle**. It is therefore my finding the 2nd and 3rd plaintiffs are proper parties to the suit and that striking their names out of the suit would be tantamount to denying them access to justice as enshrined under the Constitution.

Injunction

45. The plaintiffs also sought orders of injunction to restrain the 1st defendant from accessing and operating any accounts operated by the 1st

plaintiff/applicant pending the hearing and determination of the main suit. The plaintiffs also sought orders as follows: to compel the 1st defendant to surrender the original documents of the plaintiff such as the incorporation certificates as well as any other documents held by the 1st defendant in her official capacity; to compel the 1st defendant to surrender the accessibility and control of the 1st plaintiff's website and Microsoft database and to suspend the use of the domain name ydxagency.co.ke; to direct the 1st and 2nd defendants to suspend all operations that are in conflict with the business and operations of the 1st plaintiff and to direct the 3rd defendant to suspend the registration and operations of the 2nd defendant.

46. The orders sought by the plaintiffs were both prohibitory and mandatory orders of injunction. The principles to be considered in granting an injunction were settled in the case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

47. The above principles were captured in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR as follows:

"i) Is there a serious issue to be tried?

ii) Will the applicant suffer irreparable harm if the injunction is not granted?

iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")

48. The test for granting of an interlocutory injunction was considered in the American *Cyanamid Co. v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely:

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

49. The conditions for consideration before granting a temporary injunction under **order 40 Rule 1 of the Civil Procedure Rules** requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situation enjoined to grant a temporary injunction to restrain such acts.

50. In the instant case, there is no doubt that the 1st defendant is the Managing Director of the 1st plaintiff company and that all the acts that the plaintiffs are asking this court to restrain her from doing are the functions that fall under her docket as a Managing Director. I am therefore not persuaded that the prayer for prohibitory injunction meets the threshold of the conditions set for the granting of the orders sought.

51. Turning to the prayers for mandatory injunction, it is instructive to note that a mandatory injunction is not the same as a prohibitory injunction and considerations for granting the two injunctions are slightly different. Whereas in the case of prohibitory injunction an applicant must establish a *prima facie* case with a probability of success, that the applicant will suffer irreparable damage which cannot be adequately compensated by an award of damages if an injunction is not granted or further still, that the balance of convenience tilts in the applicant's favour. In the case of mandatory injunction, the applicant must in addition establish special circumstances and the standard for its grant is usually higher than that of prohibitory injunctions.

52. The considerations for granting interlocutory mandatory injunctions were well stated in the case of *Kenya Breweries Ltd & Another v Washington O. Okeyo* [2002] eKLR where the Court of Appeal said: -

"The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read: -

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application."

53. The Court of Appeal quoted with approval an English decision in the case of *Locabail International Finance Ltd v Agroexport and others* (1986) 1 ALLER 901 where it was stated: -

"A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on

the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”

54. In the recent case of *Nation Media Group & 2 others v John Harun Mwau* [2014] eKLR the Court of Appeal said: -

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

55. The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. As I have already stated in this ruling, they seek orders to compel the 1st defendant to surrender the 1st plaintiff’s original documents, to surrender control of the 1st plaintiff’s website, and to suspend the operations of the 2nd defendant. Considering that the 1st defendant is the MD of the 1st plaintiff, this court is at a loss as to how it can compel her to surrender documents that she holds in such capacity. Needless to say, courts have taken the position that they will not interfere with the internal affairs of a company. In sum, I am not satisfied that the plaintiffs have made out a case for the granting of the orders of temporary mandatory injunction.

56. In conclusion, having found that this court lacks the jurisdiction to entertain the instant suit, I further find that both the applications dated 27th June 2019 and 30th October 2019 are not merited and I therefore dismiss them with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 1st of October 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of

Mrs Ahomo for Issa for 1st & 2nd defendants and Respondents

Mr. Njuguna for Kivindyo for the applicants in the application dated 27th June 2019

Court Assistant: Sylvia