REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERICIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CASE NO. 245 OF 2018

NILKUNJ RATILAL DODHIA.....APPLICANT

VERSUS

SHASHIKANT MEPA SHAH.....1ST RESPONDENT

SHANTILAL K. SHAH.....2ND RESPONDENT

MANOJ SHAH ….....3RD RESPONDENT

PIYUSH MEPA SHAH ……..... 4TH RESPONDENT

ASHOK KUMAR MEPA SHAH ……..... 5TH RESPONDENT

BUDHICHAND MEPA SHAH ……..... 6TH RESPONDENT

RULING

1. Before his death on 29th January 1977, Ratilal Kachira Shah (the Deceased) held 16.37% shares in Kenmac Limited (the Company). Nilkunj Ratilal Dodhia (Nilkunj) is a beneficiary of the Estate of the Deceased and brings these proceedings for permission to commence a Derivative Suit on behalf of the Company.

The Leave is sought through the Notice of Motion dated 14th May 2018 and is said to be anchored under the provisions of Section 239(1) of the Companies Act 2015.

2. Shashikant Mepa Shah (the 1st Respondent), Manoj Shah (the 3rd Respondent), Ashok Kumar Mepa Shah (the 5th Respondent), Budhichand Mepa Shah (the 6th Respondent) and one other unnamed Director of the Company are said to hold a significant proportion of the shares in the Company. When their shares are aggregated, they hold a controlling interest in the Company. Shantilal K. Shah (the 2nd Respondent) is the Secretary to the Company.

3. The Company is a shareholder in Apollo Insurance Limited (AIL) and by virtue of the strength of its Shares is entitled to nominate three Directors to the Board of AIL. Nilkunj is unhappy about the nomination of Piyush Shah to represent the Company in the Board of AIL and asserts that it was done ultra vires Article 99 of the Memorandum of Association of the Company.

4. Nilkunj is also displeased about the manner in which the 3rd Respondent was appointed as a Director of the Company. In paragraph 8 of his Affidavit in support of the Application he depones:-

> "8. THAT on the 29th of April 2016 when, as a Board we had our first Board Meeting following the Extra-ordinary general meeting held on the 6th of February 2016, I raised the issue of the need to deliberate on the succession planning agenda item. However, the 1st, 2nd, 3rd, 5th and 6th Respondents herein declined to heed my proposals and proceeded to agree on directors without the said criteria terming the said agreement an election. As a result, the 3rd Respondent was appointed a director at Kenmac Limited to replace a retired director ZR Shah. Indeed, from the wording at paragraph 5 of the minutes marked NRD 8, it is apparent that the Respondents departed from their duty in law to exercise independent judgement in their decision making. The minutes at the said paragraph state in part that a retired director ZR Shah had indicated his wish to have the 3rd Respondent appointed as a director and that the directors were acceding to the said wish regardless of the need for proper succession planning".

5. There are further grievances. The majority shareholders have declined to prepare a criteria by which persons will be elected to represent the Company in AIL. That the 1st and 2nd Respondent have conspired to trample on the rights of Shareholders and have thwarted an effort by Nilkunj to raise certain deficiencies on the succession planning of the Company. In addition, the 2nd Respondent has defaulted in his recordkeeping duties and fails to prepare and circulate Notices convening Meetings in a timely fashion. Nilkunj also points out that the Company has failed to convene Statutory Meetings such as its Annual General Meeting for 2017.

6. These drive Nilkunj to file a Derivative Suit on behalf of the Company, but his effort is met with a Preliminary Objection that he is not a Shareholder of the Kenmac and cannot seek to commence or continue a Derivative action on behalf of the Company.

7. From the evidence available, Nilkunj alongside Shankul Ratilal Shah and Amritben Ratilal Shah (Amritben) were granted Interim Letters of Administration to the Estate of the Deceased on 28th September 1989 in Succession Cause No. 63 of 1989. Letters were confirmed on 4th July 1990 but the Certificate of Confirmation of Grant was issued only to Amritben. The names of Nilkunj and Shankul are excluded. Noteworthy, nevertheless, is that in the distribution of the Estate, all the three are entitled to equal shares of the Deceased shares in the Company.

8. A Search dated 16th April 2018 of the Names of Directors and Shareholders of the Company shows that the Estate of the Late Ratilal Kachira holds 8938 of the Shares of The Company. That information is on the basis of the records held by the Companies Registry as at 23rd December 1993. This Court is not told of any changes in respect to that position. Of significance is that Nilkunj is not named as a shareholder. And on his part, Nilkunj does not insist that he is a registered Shareholder.

9. A Derivative claim is a proceeding by a member of a Company in respect of a Cause of action vested in the Company and seeking relief on behalf of the Company. Those are the express provisions of Section 238(1) of The Companies Act which read:-

> "(1) In this Part, "derivative claim" means proceedings by a member of a company—
>
> (a) in respect of a cause of action vested in the company; and
>
> (b) seeking relief on behalf of the company".

Under the various provisions of Part XI of The Companies Act which is on Derivative actions, it crystal clear that a Derivative Action is the preserve of a Member of the Company.

10. This Court agrees with Counsel for Respondents that part VII of The Companies Act sets out how a person becomes a member of a Company. Section 92 provides:-

> "(1) The subscribers to the memorandum and articles become members of the company on the registration of the company.
>
> (2) As soon as practicable after the registration of the company, it shall enter in its register of members the names and addresses of persons who subscribed to its memorandum and the date on which they became members of the company.
>
> (3) Any other person who later agrees to become a member of a company becomes a member of the company when the person's name is entered into the register of members".

Since Nilkunj would not be a subscriber of the Company he would perhaps fall in the category provided in subsection (3). However, he faces a difficulty because his name has not been entered into the Register of Members.

11. The argument above however ignores the provisions of Section 238(6) which are specifically in respect to Directorship and Membership in the context of Derivative Actions. Subsection 6 reads:-

> "For the purpose of this part:-
>
> a) "Director" includes a former director
>
> b) a reference to a member of a Company includes a person who is not a member but to whom shares in the Company have been transferred or transmitted by operation of law. (*my emphasis)*

I suppose that the Law is relaxed in this manner so that a person who is entitled to be a member is not deprived of his right to bring a Derivative Action simply because his membership status has not been formalized by entry of his name into the Register of members.

12. In a Supplementary Affidavit sworn on 8th June 2018, Nilkunj sets up the argument that a third of the shares held by the Estate have been transmitted to him by operation of law. Is this so?

13. What is Transmission? Blacks' Law Dictionary (10th Edition) defines it as follows:-

> '*Transmission (civil law) The passing of an inheritance to an heir'.*

Now in respect to Transmission of Shares, Articles 36 and 37 of The Articles of Association of Kenmac Limited are helpful as they make the following provisions:-

> "36. In the case of the death of a Member, the survivors or survivor, where the deceased was a joint holder, and the executors or administrators of the deceased where he was a sole or only surviving holder, shall be the only persons recognized by the Company as having any title to his shares provided that nothing contained in these Articles shall release the estate of a deceased Member from any liability in respect of any share solely or jointly held by him.
>
> 37. Any person becoming entitled to a share in consequence of the death or bankruptcy of a Member shall, upon such evidence being produced as may from time to time be required by the Board, have the right either to be registered as a Member in respect of the share or instead of being registered himself to make such transfer of the share as the deceased or bankrupt person could have made but the Board shall in either case have the same right to refuse or suspend registration as it would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy (as the case may be)".

14. Where, like here, a Deceased was the sole holder of certain shares, Article 36 explicitly provides that the Executor or Administrator of the Estate of the Deceased member shall be the only person recognized by the Company as having title to his shares. Secondly, the person becoming entitled to a share in consequence of the death shall have the right to be registered as a member in respect of the share or to make such transfer of the share as the Deceased could. The procedure for the passing of the shares is however not set out and one would have to turn to Sections 499, 500 and 501 of The Companies Act. These reads,

> "499.
>
> (1) On the application of the transferor of any share or interest in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.
>
> (2) A company that, without lawful justification, fails to comply with subsection (1) is liable to pay damages to the applicant.
>
> 500.
>
> A document of transfer of the share or other interest of a deceased member of a company—
>
> (a) can be made by the deceased member's executor or administrator even though the executor or administrator is not a member of the company; and
>
> (b) is as effective as if the executor or administrator had been such a member at the time of the execution of the document.
>
> 501.
>
> (1) If a document produced to a company is by law sufficient evidence of the grant of—
>
> (a) probate of the will of a deceased person;
>
> (b) letters of administration, of the estate of a deceased person; or
>
> (c) confirmation as executor of a deceased person, the company is obliged to accept the document as sufficient evidence of the grant.
>
> (2) A company that refuses to comply with subsection (1) is liable to pay damages to any person who sustains loss in consequence of the refusal".

My reading of these Provisions is that the procedure for transmitting the ownership of the Deceased's shares is by the Deceased member's Executor or Administrator executing a Document of Transfer of the shares of the Deceased and submitting the Document to the Company.

15. The procedure would not be dissimilar if the applicable law was the Repealed Companies Act. Section 77 and 78 of the Retired Statute provided:-

> **"77.** Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company:
>
> Provided that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.
>
> **78.** A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer".

16. Now returning back to the provisions of subsection (6) of Section 238 of the current Companies Act and relating it to the matter at hand, a person for purposes of a Derivative Action, is considered to be a member if shares have been transferred or transmitted to him by operation of law notwithstanding that he is not yet a registered member. In terms of shares of the Deceased member, those shares are deemed as transferred or transmitted to a person once the Document of Transfer of the Shares has been executed by the Deceased member's Executor or Administrator in favour of the Transferee and presented to the Company. At that point the Transferee is deemed to a member and is capable of bringing a Derivative Action even before the formal step of entering the person's name into the Register of members has been completed. In other words the Transfer need not have been perfected by the entry of the Transferee's name into the Register of Members.

17. Now, no doubt there is a grant of letters of administration issued in favour of Nilkunj and 2 others in regard to the Estate of the Deceased. And although Nilkunj's name is not included as one of the Administrators in the confirmed letters (the exclusion has not been explained) he is identified as the beneficiary of 1/3 share of the Deceased's shares of the Company. Nevertheless the Grant, without more, would not ipso facto, transmit the shares to him. Only upon execution of a Transfer of shares in his favour by the Administrators would Nilkunj be deemed to be a Member for purposes of urging a Derivative Claim. No such Transfer is shown to Court and this Court must reach a conclusion that Nilkunj ,in the general sense, is not a Member of the Company because his name has not been entered into the register of members and ,specifically for purposes of a Derivative Claim, because the important step of having the shares transferred to him by execution of a Transfer in his favour by the Administrators has not happened.

18. The Court would uphold the Preliminary Objection and it would otherwise be profitless to consider the matter any further. Yet my appreciation of the Law in this respect may be faulty and so I will consider the merit of the application.

19. Part XI of the Companies Act is dedicated to provisions on Derivative Actions. It mainstreams the concept of a Derivative Claim into Statute. An enduring feature of a Derivative Claim is that it can only be commenced or continued with the express sanction of the Court. In this matter the Applicant seeks permission to commence, not to continue, the Action.

20. As this is an Application for a member to commence a Claim, the provisions of Sections 239 and 241 are relevant. These are:-

> "239. (1) In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.
>
> (2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—
>
> (a) shall dismiss the application; and
>
> (b) may make any consequential order it considers appropriate.
>
> (3) If the application is not dismissed under subsection (2), the Court—
>
> (a) may give directions as to the evidence to be provided by the company; and
>
> (b) may adjourn the proceedings to enable the evidence to be obtained.
>
> (4) On hearing the application, the Court may—
>
> (a) give permission to continue the claim on such terms as it considers appropriate;
>
> (b) refuse permission and dismiss the claim; or
>
> (c) adjourn the proceedings on the application and give such directions as it considers appropriate.
>
> 241. (1) If a member of a company applies for permission under section 239 or 240, the Court shall refuse permission if satisfied—
>
> (a) that a person acting in accordance with section 144 would not seek to continue the claim;
>
> (b) if the cause of action arises from an act or omission that is yet to occur–that the act or omission has been authorised by the company; or
>
> (c) if the cause of action arises from an act or omission that has already occurred — that the act or omission—
>
> (i) was authorised by the company before it occurred; or
>
> (ii) has been ratified by the company since it occurred".

21. A Suitor for permission must give particular regard to the provisions of Section 241. Section 241 (1) is explicit on the circumstances under which permission will not be granted. If the Application falls within the grounds for refusal, then it must fail without further ado.

22. If however the Application gets past the provisions of Section 241(1), the request will nevertheless be considered within the context of

the factors disclosed by sections 241(2) above. To be noted, however, is that those factors do not represent a complete and exhaustive list and other factors applicable in Common Law jurisdiction with similar statutory requirements can be a further guide to Court. See the view of Onguto J. in Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwarlal & Another[2017] eKLR where he said,

> "47. *I must point out that the exercise of discretion in the circumstances would be more than adjudication, in view of the rather clear provisions of Part XI of the Act. I also observe that it is not feasible for the legislature to draw an exhaustive list of factors to be considered in the exercise of judicial discretion. In these respects, there must be something new through statute, something old through factors which guided common law exceptions to the rule in* ***Foss v Harbottle*** *and something borrowed from various decisions in the United Kingdom which have interpreted and applied the Companies Act 2006 (UK) especially ss. 260-264 which are pari materia ss. 238-242 of the Act, 2015*".

23. On the threshold to be attained, Section 239(2) (which I again reproduce) says as follows,

> "2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—
>
> (a) shall dismiss the application; and
>
> (b) may make any consequential order it considers appropriate".

The Courts have interpreted this to mean that the application must demonstrate, through evidence, that the Applicant has made out a prima facie case that:-

> a) It does not fall within the grounds for refusal under Section 241 (1) and;
>
> b) That it satisfies the considerations set out in Section 241(2) or others that the Court, borrowing from jurisdictions with *pari materia* statutes, may think to be relevant. (See Ghelani *(Supra*) and Hcc. No. 130 of 2018 – Lucy Kawira Mbuba vs. Mrs. Mercy Muthoni Mbuba & others).

However, the Applicant need not show that the Claim would necessarily succeed if Leave were to be granted. It is for this reason, that at this Interlocutory stage, it does not behoove on the Court to carry out a mini trial by examining evidence in detail. Evidence which is yet to be tested by way of cross-examination. Important, as well, is that the Court should not draw any firm conclusions.

24. The chief and substantial concern of the Applicant is the manner in which some appointments of Directors to the Board of the Company and that to AIL have been made. He posits that these have been done contrary to the Articles of Association of the Company and the Companies Act 2015.

25. As a starting point the Applicant points to a meeting of 6th February 2016 which he asserts was an Extra-ordinary General Meeting of the Shareholders of Kenmac Limited. That meeting agreed as follows in regard to the controversy herein:-

> AIL, KENMAC and MK Shah Family meeting.
>
> It was further noted that:
>
> - The articles do not give any shareholder an automatic right to nominate a director to the Board of Kenmac and therefore the Directors would have to be voted for and appointed at a meeting of the Shareholders of Kenmac and
>
> - There is no requirement that a Director appointed by Kenmac to the Board of AIL be a family member or a shareholder of Kenmac. However, it is important to ensure that the family has an effective representation on the AIL board and such voice is expressed at AIL board meeting by the Directors appointed to represent Kenma.
>
> It was proposed that at the next shareholders' meeting, the shareholders of Kenmac would vote in and appoint a new board.
>
> It was further proposed that the directors of Kenmac should draw up a proposed criteria through which the shareholders of Kenmac will elect Kenmac's representative to AIL's board. The directors would therefore submit the proposed criteria to the shareholders of Kenmac at the next general meeting for approval".

26. A complaint by the Applicant is that contrary to the expectations of that meeting, a selection criteria for the appointment of a Board Member to AIL has never been agreed yet the Defendants proceeded to make an appointment in a Board meeting of 29th April 2016.

27. As regards the appointment of the 3rd Respondent as a Director of Kenmac, the Applicant depones,

> "8. THAT on the 29th of April 2016 when, as a Board we had our first meeting following the Extra-ordinary general meeting held on the 6th February 2016, I raised the issue of the need to deliberate on the succession planning agenda item. However, the 1st, 2nd, 3rd, 5th and 6th Respondents herein declined to heed my proposals and proceeded to agree on directors without the said criteria terming the said agreement an election. As a result, the 3rd Respondent was appointed a director at Kenmac Limited to replace a retired

director ZR Shah. Indeed, from the wording at paragraph 5 of the minutes marked NRD 8, it is apparent that the Respondents departed from their duty in law to exercise independent judgement in their decision making. The minutes at the said paragraph state in part that a retired director ZR Shah had indicated this wish to have the 3rd Respondent appointed as a director and that the directors were acceding to the said wish regardless of the need for proper succession planning".

28. Pivotal to the Claim by the Applicant is that the Respondents have proceeded contrary to the resolution of the meeting held on 6th February 2016. In answer to this, the Respondents assert that the meeting of 6th February 2010 was not a Shareholders meeting.

29. The title for the Minutes of the Meeting reads,

"AIL, KENMAC and M.K Shah Family Meeting".

The body of the minutes itself seems to suggest that this was a family meeting and not a meeting of Shareholders of the Company. Indeed the Applicant acknowledges that the meeting was informal. This is what he says in his email of 25th February 2016 (about 19 days after the meeting):-

25th February 2016

Dear all,

Thank you for your responses and apologies for not responding sooner.

After careful consideration, I do not wish to compromise my position in the spirit of an open and constructive 'family' meeting. Therefore, I want it to be noted that I do not believe the minutes are a true copy of the day's discussion and actions. This was an 'informal' meeting, where I am unclear on the urgent basis for it, and the intended outcome.

Kind regards

Nilkunj Dodhia

07733 124455

30. It seems to me that the Company could not be bound by "resolutions" made in an informal meeting. To fault the appointment of the Directors to the Company and/or to AIL on the basis that it did not comply with a "resolution" passed in an unlawful meeting would be to proceed on somewhat shaky ground.

31. Of course, the Applicant does not stop there and argues that the Law has been flouted in respect to the appointments. The Applicant states that the election of the 4th Respondent as a Director of AIL was purportedly done in a Board meeting of 29th April 2016 in which the election was not part of the agenda item for the day. In addition, that contrary to the provisions of Article 99 of the Articles of Association of Kenmac, the nomination of the 4th Respondent by the Company in the Board of AIL was not sanctioned by a General Meeting of the Shareholders of the Company.

32. In its submissions to Court, the Applicant appears to expand the Claim by stating that the appointment of the 3rd Respondent to the Board of the Company breached Regulations 22 and 23 of The Model Articles of Private Companies Act 2015. This is not a permissible expansion as this specific issue was not raised in the application itself and the Court will not deal with it.

33. From the minutes of the meeting held on 29th April 2016, the appointment of the 4th Respondent to the Board of AIL was done as part of any other business and the Applicant is right when he asserts that it was not on the Agenda for the day. In regard to procedure for appointment to the Board of AIL, the Applicant points to Article 99 which reads:-

"99. The business of the Company shall be managed by the Directors who may exercise all such powers of the Company as are not by the Act or by these Articles required to be exercised by the Company in general meeting and the exercise of the said powers shall be subject also to the control and regulation of any general meeting of the Company but no resolution of the Company in general meeting shall invalidate any prior act of the Directors which would have been valid if such resolution had not been passed. The general powers given under this Article 99 shall not be limited or restricted by any special authority or power to the Board by any other Article of these Articles".

The response by the Respondents is a concession the power of the Company to appoint its Director to AIL is granted by Article 99. The power to appoint is vested in the Board but subject to ratification by a General Meeting of the Company. The Respondents case is that the appointment was ratified in a General meeting held on 9th August 2010.

34. The Applicant is emphatic that this is false as he deposes that although he attended the meeting of 9th August 2010, the issue did not feature for discussion. In his affidavit of 10th May, 2018, the Applicant complains that the 2nd Respondent has declined to avail the minutes of that Annual General Meeting. This notwithstanding, the Respondents when responding to the Application, do not deem it necessary to attach the minutes of the AGM and I must take it that the allegation by the Applicant that the appointment of the 4th Respondent was not ratified in the meeting of 9th August 2016 is not trivial. The question now to be answered is whether this possible infraction is good enough

reason for this Court to grant the permission sought.

35. The Suit intended is by a large measure a challenge of the appointment PM Shah as a Director representing the Company in the Board of AIL.And this Court has observed that the questions raised by the Applicant about the said appointment are not a trifle. Yet this something is troubling about the timing of these proceedings. The appointment was supposedly made on 29th April 2016 and allegedly ratified on 9th August 2016. The Applicant was aware of the said appointment by at least 13th December 2016 when he demanded its revocation (See annexture NRD4). What is not clear is why the Applicant did not seek to move Court immediately so as to protect the interests of the Company. It has taken the Applicant 18 months to move Court. This delay, in conjunction with what I say hereafter may influence the outcome hereof.

36. In considering whether to give permission, the Court will also consider whether the Act of which the Claim is brought gives rise to a cause of action that the member could pursue in the members own right rather than on behalf of the Company. In the Demand Letter of 10th November 2017 the Lawyer for the Applicant writes as follows:-

> 10.11.2017
>
> The Chairman
>
> Kenmac Limited
>
> NAIROBI
>
> Dear Sir/Madam
>
> RE: COMPLIANCE WITH THE PROVISIONS OF THE ARTICLES OF ASSOCIATION AND THE KENYAN COMPANIES ACT, 2015 IN THE APPOINTMENT OF DIRECTORS AT KENMAC LIMITED AND APOLLO INVESTMENT LIMITED (AIL)
>
> We have been retained by our Client, Mr. Nilkunj Dodhia, a Director of Kenmac Limited who has instructed us to write to you as hereunder:-
>
> Our Client wishes to point out his concern that recent appointments of directors to the Board of Kenmac Limited and that of Apollo Investment Limited (AIL) have not been conducted in compliance with the Articles of Association of the Companies and the Kenyan Companies Act 2015. In this regard, our Client takes issue with the appointment of Mr. Piyush Shah to represent Kenmac Limited in the Board of Directors of AIL. The said appointment contravenes the provisions of the Articles of Association of AIL which provides that Standards set out in the principles and guidelines of good governance issued by the Capital Markets Authority in Kenya are to be adhered to by persons appointed as Directors of the Company.
>
> The manner in which casual vacancies of Directors are filled at Kenmac Limited is also of concern to our Client who takes issue with the recent appointment of Mr. Manoj Shah to the board of directors of the Company. This again is due to the absence of criteria by which such casual vacancy was filled as a result of default on the part of a Section of Directors who appear bent on entrenching a process of appointment of directors that solely panders to the interests of majority shareholders. Our client wishes to point out that such a practice not only stifles the promotion of good governance but also gives rise to a situation where the affairs of a Company are conducted in a manner that is clearly oppressive and unfairly prejudicial to the interests of a part of the Company Member. For this reason, Article 21 in the Model Articles for a private company Limited by share provides company Directors with the discretion to make rules that they consider appropriate in governing how they take decisions on the appointment of directors. This allows the Company Board of Directors to establish Standards or criteria to be met by a person to be appointed as a Director.
>
> Our Client is perturbed by the fact that his inquiries on these matters with outright hostility and threats of dire consequences. However, it is his considered opinion that the matters he is raising are of utmost importance to the long term success of the two companies. As a result, our client demands that the two appointments mentioned hereinabove be reversed immediately and proper criterial are established for the appointment of directors to the two companies as provided in the Articles of Association of the Companies and Kenyan Companies Act, 2015.
>
> TAKE NOTICE that should we fail to receive a response to the matters raised herein within the next 14 days our Client shall proceed to commence a derivative action citing default and/or breach of duty on the part of officials of the Companies. Be advised accordingly.
>
> Yours faithfully,
>
> FOR: AMELI INYANGU AND PARTNERS
>
> *Signed*
>
> GEOFREY E. ODONGO

37. The Applicants complaint is really that the majority Shareholders are conducting the Business of the Company in a manner that is oppressive and unfairly unprejudicial to the interest of a Member of the Company. By his own Lawyer's characterization, the Applicant sees

the conduct afflicting him as a conduct that is oppressive or is unfairly prejudicial to the interest of some part of membership of the Company. For this such affliction a member may seek relief by way of Proceedings brought under the provisions of Section 780 of The Companies Act which read:-

> "1) A member of a company may apply to the Court by application for an order under section 782 on the ground—
>
> (a) that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.
>
> (2) In this section, "member", in relation to a company, includes a person who is not a member of the company but is a person to whom shares of the company—
>
> (a) have been transferred; or
>
> (b) have been transmitted by operation of law".

The Applicant is therefore not without an alternative remedy.

38. No explanation has been made by the Applicant as to why the current proceedings were not brought promptly. While the Applicant maintains that the appointment of Piyush Shah has not been formalized as his name does not appear as a Director of AIL at the Records held at the Company Registry, the Respondents blame this on the failure of Registry to update its Records. But this is no doubt, given the tone of the letter of 15th November 2016 (NRD10), that AIL recognizes that appointment. Because of the unexplained delay, the Court takes a view that the Company should not be made to take up the responsibility for this dispute. While the Court must never shy from approving a Derivative Action so as to strike a blow for good Corporate Governance, it is not clear to me why, if the intended action is truly for the benefit of the Company, the Applicant failed to act with greater agility. This Court has to find that the unexplained delay downgrades the suitability of the grievance raised to be taken up as a Derivative Claim. Let the Applicant pursue the matter in his personal capacity qua Member where the only concern in respect to the delay could possibly be whether the delay infracts on the provisions of the Statute of Limitation.

39. I must add that because of the delay the Court would not have granted any of the Orders of Injunction that the Applicant had sought even if it had been minded to grant permission for the commencement of a Derivative Action.

40. The entire Application of 14th May, 2018 is dismissed with Costs.

Dated, delivered and signed in open Court at Nairobi this 7thday of December, 2018.

F. TUIYOTT

JUDGE

Present;

Ondati for Mailu for Respondent

Miss Migiro for Odongo for Applicant

Nixon-Court Assistant