



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL CASE NO. 213 OF 2014**

**JAMES MBERA MACHARIA.....1<sup>ST</sup> APPELLANT**

**BI-MACH ENGINEERS LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SAMUEL MWANGI MACHARIA.....1<sup>ST</sup> RESPONDENT**

**BI-MACH ENTERPRISES LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

Before this court is the an application by way of Notice of Motion dated 28<sup>th</sup> May 2014 brought by the 1<sup>st</sup> appellant/applicant James Mbera Macharia which application is brought pursuant to the provisions of Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya, Order 43 Rules 6 & 7 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

The application was filed under certificate of urgency seeking orders that

1. Spent
2. Spent
3. Pending the hearing and determination of the appeal herein filed, there be a stay of execution of the Ruling and Order dated 7<sup>th</sup> May 2014 in Nairobi CMCC No. 571 of 2014 Milimani Commercial Division.
4. That costs of the application be provided for.

The application is premised on the grounds that:-

1. The impugned order authorized the 1<sup>st</sup> Respondent Samuel Mwangi Macharia to participate in the management of the 2<sup>nd</sup> applicant company despite not being a director.
2. The order is therefore unlawful and without legal fact and ought to be stayed ex debito justitiae
3. Unless the orders of stay of execution are granted, the applicants shall suffer irreparable harm as they stand to have a non director act for the company without the protection of accountability offered by law, to the detriment of the company and its shareholders.
4. The applicant shall suffer substantial loss unless the orders sought are granted.

5. The applicants have lodged an appeal which has merit.
6. The applicants are ready to furnish security as directed by the court.
7. The applicants have exhibited sufficient cause to warrant the orders sought.

The notice of motion is further supported by the annexed sworn affidavit of James Mbera Macharia, a director of the 2<sup>nd</sup> applicant Bi- Mach Engineers Ltd.

The Supporting affidavit outlines that on 7<sup>th</sup> May 2014, the subordinate court in Nairobi CMCC 571/2014 made an order authorizing the 1<sup>st</sup> Respondent Samuel Mwangi Macharia to participate in the affairs of the 2<sup>nd</sup> applicant company BI-MACH Engineers Ltd yet the said 1<sup>st</sup> Respondent has never been a director of the said company.

The affidavit annexes a copy of CR. 12 list of directors and shareholders of the 2<sup>nd</sup> applicant company showing that as at 19<sup>th</sup> July 2013 the 1<sup>st</sup> Respondent was a non-director shareholder of the 2<sup>nd</sup> applicant and not a director of the 2<sup>nd</sup> appellant/applicant company.

That after the 1<sup>st</sup> applicant herein had filed suit no. CMCC 571/2013 against the Respondents Samuel Mwangi Macharia, Bimach Engineers Ltd and Bimach Enterprises Ltd, the 1<sup>st</sup> Respondent herein, before even filing his defence or counter claim filed an application dated 14/8/2013 in which he sought a mandatory injunction directing that he participates in the affairs of the 2<sup>nd</sup> applicant/appellant company and despite opposition to the said application, the trial magistrate granted the orders as annexed to the affidavit and marked JMM I to the effect that

**“That all the parties be granted equal access to the running and managing of the said company pending hearing and determination of the suit”.**

Being aggrieved by the said order, he has appealed for a reversal and now seeks for stay of enforcement of that order pending hearing and determination of this appeal.

The Notice of Motion by the applicants/ appellants is opposed by the 1<sup>st</sup> Respondent Samuel Mwangi Macharia who swore a replying affidavit on 16<sup>th</sup> June 2014 contending that the appellant’s application and purported appeal are incompetent, bad in law and an abuse of the court process.

It is further deposed that the 1<sup>st</sup> applicant has not come to court with clean hands as he has abused his position in the management of the 2<sup>nd</sup> applicant company where he has unlawfully removed the 1<sup>st</sup> Respondent from directorship and blocked/ denied him access into the business premises of the 2<sup>nd</sup> applicant. He is a shareholder and co-owner of the land on which the company operates as shown by annexure SMM 1 (b) copy of letter of allotment dated 17/9/93 from Commissioner of Lands.

That there is litigation pending in court between the parties hereto over the ownership of the said land on which the company operates its business and that the 1<sup>st</sup> applicant has also denied the 1<sup>st</sup> Respondent all benefits that accrue from the company; that the proceedings herein are not brought in good faith and are intended to keep the 1<sup>st</sup> Respondent out of the premises and the running of the 2<sup>nd</sup> applicant company affairs.

The 1<sup>st</sup> Respondent further contends that no loss has been demonstrated in the event that the orders sought are not granted as the appeal has no merits and that the appellant is in contempt of court.

Further, that the 2<sup>nd</sup> appellant is wrongly and irregularly enjoined hereto thereby rendering the proceedings herein incompetent and an abuse of the court process.

In a supplementary affidavit filed on 19/6/2014, the 1<sup>st</sup> appellant/ applicant refutes all the contentions by the 1<sup>st</sup> Respondent in his depositions adding that the 1<sup>st</sup> applicant has never challenged his ouster from

directorship of the 2<sup>nd</sup> applicant which was by a resolution of a general meeting and its convening was well within his knowledge, and that he has never been barred from attending meetings as a shareholder but that the applicants are only opposed to his involvement as if he was a director, which he is not.

The parties agreed to dispose of the application by way of written submissions with brief highlights.

The applicant's submissions were filed on 24/9/2014 emphasizing what is contained in the application, supporting affidavit as well as the supplementary affidavit.

He maintained that the lower court had no jurisdiction to direct the manner in which shareholders or directors of a company relate with one another as that arrangement is an internal management matter governed by the company's Articles of Association and by which, the 1<sup>st</sup> Respondent had ceased being a director of the 2<sup>nd</sup> appellant before 19<sup>th</sup>/7/2013

Further, that the order as granted was not merited as the beneficiary thereof did not demonstrate that he had a prima facie case with probability of success or that he would suffer irreparable harm unless the orders sought were granted.

In addition, that the 2<sup>nd</sup> Respondent is also neither a director nor a shareholder of the 2<sup>nd</sup> appellant hence, it could not be ordered to participate in the running and management of the 2<sup>nd</sup> appellant and that therefore the order thereof offends the company's Memorandum and Articles of Association and the company law which binds directors to run and manage affairs of the company. That the inclusion of strangers in the management of the company places the company at risk of incurring liability caused by the strangers/ Respondents since Section 181 of the Companies Act Cap 486 provides that the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification; and that such liability shall visit upon the appellant's substantial loss which can only be cured by a stay of execution of the order aggrieved of.

That the application has been filed without delay and the appellants are amenable to any order for security.

In opposition to the Notice of Motion, and besides the replying affidavit, the 1<sup>st</sup> Respondent filed his written submissions on 23/10/2014 contending principally that the applicant had come to court with unclean hands and that he had filed an application which was earlier dismissed and without seeking to have it reviewed, filed this application.

Further, that there are pending contempt proceedings against the 1<sup>st</sup> appellant for failing to honour court orders in the material suit.

That being a brother, co-director, shareholder and co-owner of the land on which the 2<sup>nd</sup> appellant carries on business, he cannot be excluded from managing the affairs of the 2<sup>nd</sup> appellant company.

On the merits of the appeal, it is submitted that it is an abuse of the court process as the 2<sup>nd</sup> appellant has been dragged into this appeal as an appellant yet it was sued as the 2<sup>nd</sup> Defendant in the lower court matter which renders this appeal irregular and incompetent and that there was no Notifications of filing of this appeal.

In addition, that no proceedings have been applied for hence the appeal is a waste of time. Finally, that the appellant failed to appeal against the earlier orders of the lower court which he had also refused to comply with.

On the Law, the Respondent submits that the applicant must first purge the contempt before being afforded a hearing; that the appeal is incompetently filed as the 2<sup>nd</sup> appellant is fancifully and conveniently made a party to these proceedings and that the appellant has not met the conditions set in

Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending appeal. That it matters not that the 1<sup>st</sup> Respondent had not filed any defence or counterclaim to the suit in the court below to warrant the injunctive reliefs granted.

The Respondent relied on **Carter & Sons Ltd Vs Deposit Protection Fund Board and Others CA 291 /97** to show that without satisfying all the conditions for stay of execution pending appeal as espoused in Order 42 rule 6 (2) of the Civil Procedure Rules, the court's discretion is fettered to grant stay.

When the parties advocates appeared before me on 24/4/2014 for highlighting of their submissions, Mr. Ombwayo reiterated in brief what was contained in his filed written submissions and application while Mr. Omolo for Mr. Nduati for the 2<sup>nd</sup> Respondent simply relied on their written submissions and replying affidavits.

In the exercise of my judicial discretion I granted an interim stay of the impugned order of the subordinate court pending delivery of this ruling.

I have carefully considered the application herein, the supporting and supplementary affidavits by the 1<sup>st</sup> applicant, the Replying affidavit and the parties advocates written submissions and the highlights made in the proposition and opposition to the 1<sup>st</sup> applicants Notice of Motion.

The applicable law of stay of execution pending appeal is well spelt out in Order 42 rule 6 (2) of the Civil Procedure Rules albeit the applicant cited order 43 rule 6 of the Civil Procedure Rules which was erroneous and which error I shall ignore as I am deemed to know the applicable law.

The said order and Rule mandate that for an applicant to be granted stay of execution pending appeal, they must satisfy the court that:-

1. They shall suffer substantial loss if stay is denied and that the appeal if successful shall be rendered nugatory.
2. The application is made without unreasonable delay.
3. The applicant's willingness to deposit such security as may be binding upon him for the due performance of decree.

The issue for determination in this application, therefore, is whether the applicant has satisfied the conditions for grant of stay of execution of the subordinate court made on 7/5/2014 pending hearing and determination of this appeal as filed on 28<sup>th</sup> May 2014.

Before I determine that issue, the brief facts of this matter, emanating from the documents filed is that the 1<sup>st</sup> applicant and 1<sup>st</sup> Respondent are brothers who jointly formed and or incorporated the 2<sup>nd</sup> appellant private company Bimach Engineers Ltd in on 3/4/1981. The annexed Memorandum and Articles of Association show that the two had a shareholding of 75 and 25 % shares respectively, with the 1<sup>st</sup> appellant being the Mechanical Engineer and the 1<sup>st</sup> Respondent being the company manager.

The two even went ahead and sourced for land allocation from the Commissioner of Lands, buying plot No. 17 Likoni Road Nairobi on 17/9/93 in their joint names and on which land it is not denied, the 2<sup>nd</sup> appellant company has premises and operates from .

Disagreements arose between the two brothers/ directors/ shareholders of the 2<sup>nd</sup> appellant company on its management and a special general meeting of the shareholders was convened on 12/6/2013 culminating in the removal of the 1<sup>st</sup> Respondent as a director but retaining him as a non director shareholder with his 25 shares. The change filed with Registrar of Companies on 19/7/2013 show that one Brian Macharia Mberia was introduced as a director with 10 shares. Although the 1<sup>st</sup> Respondent complained of having been unlawfully removed as a director, regrettably, there is no evidence that he has

or is in the process of challenging that removal, other than his letter of protest dated 12/8/2013. Following the changes in directorship, the 1<sup>st</sup> Respondent was notified on 3<sup>rd</sup> July 2013 to vacate the office premises of the company with immediate effect and when he declined the 1<sup>st</sup> applicant filed suit against him in the lower court vide Milimani CMCC 57/2013 seeking to bar him from participating in the management of the company affairs of the 2<sup>nd</sup> appellant among other prayers. It is in the same suit where the 1<sup>st</sup> Respondent sought an injunction to allow him participate in the ruling and management of the company pending hearing and determination of the said suit and also restraining the 1<sup>st</sup> appellant from barring him from accessing premise. On 7/5/2014, the Lower court granted him the orders after hearing both parties on an application and which ruling provoked this appeal and hence, the application for stay pending appeal.

However, the record also shows that the dispute herein did not begin in 2013. As far back as 2011, the same parties had a dispute in Civil case no. 702/2011 at Milimani High Court and in that matter, it is the 1<sup>st</sup> Respondent who is the plaintiff suing the 1<sup>st</sup> and 2<sup>nd</sup> appellants herein with Kenya Industrial Estates Ltd; which suit sought an injunction to restrain the 1<sup>st</sup> defendant from interfering or allocating plot No shed no 17 now LR 209/11471/11472 held by KIE and also staying an earlier suit HCC NRB 1719/96 which sought declarations against the KIE that the respondent herein was the lawful owner of shed No 17 now LR 209/1147 & 209/11472 among other prayers.

The applicant argues that the 1<sup>st</sup> Respondent and his company the 2<sup>nd</sup> respondent Bi-Mach Enterprises Ltd not being a director or directors to the 2<sup>nd</sup> appellant company, are therefore strangers and cannot be permitted to participate in the running of the 2<sup>nd</sup> appellant Bi-mach Engineering Company Ltd.

That argument is sound in law, taking into account the notice of change of directorship which took effect on 19/7/2013.

However, this court is a court of Law, justice and equity. It has examined all the annexures in support of the application including the plaint filed in the Subordinate court and established that in the case before the subordinate court, which case has not been determined, the 1<sup>st</sup> appellant herein is the sole plaintiff, suing the 1<sup>st</sup> Respondent herein, the 2<sup>nd</sup> appellant and Bimach Enterprises Ltd the 2<sup>nd</sup> Respondent.

Under company law and principles, and as was espoused in the case of **Salomon Vs Solomon, (1897)AC 22** a company and its owners are different entities.

The company is an artificial legal entity with the capacity to sue and be sued in its own name and no person whether is the sole 'owner' of the incorporated company can purport to sue on behalf of the company, to purport to protect the interests of the company.

In the instant case, it is clear that the 1<sup>st</sup> appellant has contravened that very basic legal principle without seeking to rely on and or prove that he is entitled to the exceptions to the rule. By merely enjoining the company as a co-appellant in this appeal, the defect is not cured.

Under the Rule in **Foss Vs Harbottle (1843) 67 ER 189**, the proper claimant or person to commence proceeding for purposes of remedying any wrong is the company itself and therefore the company itself was the proper plaintiff, which rule reflects the legal principle that only the right holder is entitled to enforce the right. Under the exception in the Rule in **Foss Vs Harbottle ( Supra)**, the minority shareholder can bring a suit on behalf of the company as a derivative action. Such derivative action must, however, be instituted with the leave of court.

In **Spokes Vs the Grosvenor and West End Railway Terminus Hotel Co. Ltd & Others (1897) 2 QB 124 L.A Smith L.J** detailed the position above as follows

**“The proper plaintiff in such an action would obviously be a company; but in the circumstances existing this is not possible for the impeached directors who have a**

**controlling power in the company do not assent to the company being made plaintiffs and without that assent the company cannot be made plaintiffs.....”**

In the instant case, it is clear from the Memorandum of Association and Articles of Association, that it is the 1<sup>st</sup> Appellant herein who is the controlling Director of the Bimach Engineering Company Ltd with a 65% shareholding. In addition, the 1<sup>st</sup> Respondent who previously served as a Director was ousted and has only 25% shares as a non director and therefore there was no difficulty with the 1<sup>st</sup> appellant herein managing the affairs of the company.

Examining the plaint filed on 11/2/2013, as shown by annexure JMM 4, it is clear from paragraphs 5,6,7,8,9,10 that what the plaintiff therein and 1<sup>st</sup> appellant in this appeal seeks in the protection of the interests of the 2<sup>nd</sup> Defendant who is named as 2<sup>nd</sup> appellant herein. It is for that reason that the prayers sought in that suit CMCC 571/2013 seek for

- a. A mandatory injunction against Bimach Enterprises Ltd to cease operation within the premises of the 2<sup>nd</sup> Defendant ( Bimach Engineers Ltd).
- b. An interim injunction to prevent the 1<sup>st</sup> Defendant from actively participating in the day today activities of the 2<sup>nd</sup> Defendant (Bimach Engineers Ltd).
- c. An order for production of all documents held by the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant ( Bimach Engineers Ltd)

Those are the kind of prayers, in my view, that the 2<sup>nd</sup> defendant (and now purported 2<sup>nd</sup> appellant) would have been seeking from the court, as it was not and neither has it been shown to this court that the 2<sup>nd</sup> Defendant Co was in any way incapacitated from bringing the suit.

In addition, the fact that the appellant herein sued the 2<sup>nd</sup> appellant in the lower court and has now made it a complaining party challenging the ruling in the subordinate court begs more answers to the question of whether there was any resolution or authority by the company’s directors to make the company a party to this appeal.

In **Bugerere Coffee Growers Ltd Vs Sebaduka & Another 1970 EA 147**, it was held that when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed by either a company or Board of Directors meeting and recorded in the minutes.

Although the appellant’s verifying affidavit sworn on 1<sup>st</sup> February 2013 deposed that he was the Managing Director of the plaintiff company, there is no plaintiff company in the said pleadings and the only proceedings that have enjoined the Bimach Engineers Ltd, as a complainant are in this appeal.

I am in agreement with Hon. Njagi J’s holding in **Affordable Homes Africa Ltd Vs Henderson & 2 Others (2004) 2 KLR 473** that only a company can sue for injury to itself and that

**“As an artificial person, however, a company can only take decisions through the agency of its organs which are primarily the Board of Directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company’s name in litigation so that the company can properly come to court and enforce a breach of a director’s duty”.**

I emphasise that in the dispute herein, there is no stalemate disclosed as between the two directors Mr. Mbera Macharia, the 1<sup>st</sup> appellant herein, and Mr. Brian Macharia Mbera, who hold 65% and 10% shares respectively. On the other hand, the Respondent herein is no longer a director to the 2<sup>nd</sup> appellant company, after he was ousted by virtue of the powers conferred on the 1<sup>st</sup> appellant director, by Section 17 (b) (i) (ii) of the Articles of Association of the Company, him being a controlling shareholder director. That being the case, this court finds that it was improper for the 1<sup>st</sup> appellant to have filed suit without

authority of the 2<sup>nd</sup> appellant. By citing the latter as the defendant in the Subordinate court without specifying any relief against the said company, and airlifting the company from being a defendant to an appellant in this appeal has not helped the situation either.

Furthermore, besides the 1<sup>st</sup> appellant not being a minority shareholder, the suit was instituted without leave of the court to commence a derivative action on behalf of the 2<sup>nd</sup> Defendant/ 2<sup>nd</sup> appellant company.

In addition, such leave for a derivative action, and hence the derivative suit, could only have been sought, obtained and or instituted in the High Court.

Section 2 of the companies Act Cap 486 Laws of Kenya is crystal clear that “**the Court**” means the High Court. Consequently, any suit or dispute pitting the company and its directors/ shareholders inter se, can only be entertained in the High Court, and any person who is dissatisfied with an order of the High Court would then lodge an appeal in the Court of Appeal. (See also Sections 401, 402 and 403 of the Companies Act).

The current proceedings are before this court at the appellate stage, even when the law is clear that the dispute ought, in the first instance to have been filed before the High Court, which has exclusive original jurisdiction.

Thus, even if this court were to hold that authority or a resolution by the company need not be filed at the commencement of the suit, and that the said authority or resolution could therefore still be filed in the suit, or that the leave to institute a derivative suit could still be sought in the suit, depending on where justice would best be served, regrettably, the proceedings in the Subordinate court are non suited for want of jurisdiction. It has been held, time and again, that jurisdiction is everything, without which a court ought not to do anything more. This court has the power and jurisdiction conferred on it by Article 165 (6) of the Constitution to supervise over subordinate courts and under clause (6) above, call for the record of any subordinate court and may make any order or give any direction it considers appropriate to ensure the fair administration of justice, and to prevent the abuse of the court process.

Further, I find that the Memorandum of Appeal dated 28<sup>th</sup> May 2014 and filed on the same day is incompetent before this court as it is not grounded on any competent suit and therefore the same is struck out. That leaves this court with the application for stay of execution of the ruling and order dated 7/2/2014 delivered in Nairobi CMCC 571 of 2013, which application as I have stated, in the absence of a competent appeal, is groundless.

Accordingly, I strike out the appellant/applicant’s application dated 28<sup>th</sup> May 2014.

I note that the parties to this dispute are blood brothers who have disagreed over the management of a company they jointly formed and own in varying shares. While this court is enjoined by law to hear and determine disputes between parties before it, it is the same law, pursuant to the provisions of article 159 2 ( c) of the Constitution that enjoins this court to be guided by the principles of promoting the use of Alternative disputes resolution mechanisms such as conciliation mediation and arbitration and to encourage the parties to embrace the same.

For those reasons, I shall order that each party bear their own costs of this appeal and application which I have struck out as being incompetent.

**Dated, Signed, and Delivered at Nairobi this 12<sup>th</sup> day of February, 2015.**

**R.E. ABURILI**

**JUDGE**

**12/2/2015**

**12/2/2015**

Coram Aburili J

CC- Kavata

Mr. Ombwayo for appellant/ applicants

N/A for 1<sup>st</sup> Respondent present (clerk from Mr. Nduati's office present Mr. Mathew Njoroge).

**Court-** Ruling Delivered in Open court as scheduled at 2.45 pm

**R.E. ABURILI**

**JUDGE**

**Mr. Ombwayo-** In the matter pending in the Lower Court , a ruling is pending delivery for 18/2/2015. In view of this ruling, we urge that you order for stay of any further proceedings in the Lower Court pending submission of the lower court file to the High Court.

**R.E. ABURILI**

**JUDGE**

**Court-** In view of the ruling above, I direct that there shall be no further proceedings or rulings in CMCC 571/2013 at Milimani Commercial Courts. The file therein to be submitted to the High Court as directed herein forthwith.

Mention on 3/3/2015 to confirm availability of the lower court file.

**E. ABURILI**

**JUDGE**

**12/2/2015**

**3/3/15**

Coram Aburili J

CC- Kavata

Mr. Ochieng for Ombwayo for appellant.

Mr. Nduati for Respondent

**Court:** The lower court file in CMCC 571/2013 has not been availed. I direct that the Deputy Registrar calls for the lower court file to be placed before me on 24/3/2015 when this matter shall be mentioned for further directions.

**R.E. ABURILI**

**JUDGE**

**3/3/2015**

**24/3/15**

Coram: Aburili J

CC- Kavata

Mr. Njagi holding brief for Ombwayo for appellant

Mr Mongeni holding brief for Nduati for 1<sup>st</sup> Respondent.

**Court-** Milimani CMCC 571/2013 is not before court as per the order of 3/3/2015. I direct that the Deputy Registrar reminds the Chief Executive Officer of Milimani Law Courts/ Commercial courts to avail the file as ordered, with or without the typed proceedings as it is not required for preparation of the appeal but for making of appropriate orders to give effect to the ruling of 3/3/2015.

Mention on 16/4/2015

Before the Deputy Registrar to confirm availability of the file.

**R. E. ABURILI**

**JUDGE**

**24/3/2015**

**16/4/2015**

Coram Hon. Wangila DR

CC- Adika

Jaoko holding brief for Nduati for respondent

N/A for the appellant.

**Jaoko:** Mention is to confirm availability of lower court file.

**Court:** The file is available. Mention on 7/5/2015 before J. Aburili.

To serve.

**HON. WANGILA**

**DEPUTY REGISTRAR**

**16/4/15**