REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPEAL 72 OF 1998

NASIR IBRAHIM ALI..... 1ST APPELLANT

DINKY INTERNATIONAL S.A.....2ND APPELLANT

WORLD DUTY FREE COMPANY LIMITED

T/A KENYA DUTY FREE COMPLEX..... 3RD APPELLANT

AND

KAMLESH MANSUKHLAL DAMJI PATTNI.....1ST RESPONDENT

MICHAEL SCANLON..... 2ND RESPONDENT

(Appeal from the Order of the High Court of Kenya at Nairobi (Mr. Justice Kuloba) dated 24th March, 1998

In

H.C.C.C. NO. 418 OF 1998)

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JUDGMENT OF SHAH. J.A

This is an appeal against the whole of the ruling/orders of the superior court (Kuloba, J) dated 24th March, 1998. In order to properly consider all relevant aspects of this appeal, it is necessary to know what was then before the learned judge and what he said.

The application before the learned judge was an application by the appe1lants who are the defendants in the superior court) under Order 6 rule ,13(1) (a) of the Civil Procedure Rules seeking the following orders:-

1. That the plaint filed on the 24th of February, 1998 be struck out as disclosing no cause of action.

2. That the plaintiff's chamber summons . dated and filed on 24th February, 1998 be struck out as disclosing no reasonable cause of action.

3. That the defendant/applicant be at liberty to apply for further orders and/or directions as the Honourable court may deem fit and just to grant.

4. Costs.

The grounds upon which the application was based are:-

1. That the third defendant is improperly joined in this suit.

2. That the third defendant is a separate and distinct entity from the first and second defendant and was not a party to the alleged agreement.

2. That the plaintiff has no interest in the assets of the first and the third defendant.

4. That the alleged sale and purchase agreement on which plaintiff relies is executory and is not enforceable against the third defendant.

5. That the plaintiff is guilty of inordinate delay and is not entitled to interlocutory injunctive relief.

6. That the Honorable court has no jurisdiction to grant the orders sought on the application as filed.

The learned judge dismissed the said application and held that the superior court has the jurisdiction and power to issue a pre-emptive remedy in the form of appointment of an interim receiver on an ex-parte application whenever the justice of the case required and ordered that the ex-parte interim orders made by Owuor J, (as she then was) do remain in force until the inter partes hearing and the determination of the application for appointment of receiver and temporary injunction pending the hearing and determination of suit and directed that the applications be heard on a day to day basis as a matter of urgency.

The brief history of the suit in the superior court is that the respondent (plaintiff) filed on 24th February, 1998 a suit against the three appellants (defendants) seeking (inter alia):-

"An order appointing an interim receiver -manager from the names proposed by the plaintiff/applicant in his affidavit, to solely manage, control and administer all the day to day operations of the 3rd defendant (the company) including the Duty Free complexes in Jomo Kenyatta International Airport., Nairobi, Moi International Airport, Mombasa the warehouses in Nairobi till the final determination of this suit."

There were various other substantial reliefs prayed for which are not relevant at this stage of this judgment. I will revert to the relevant reliefs sought as and when necessary.

Simultaneously with the filing of the plaint the plaintiff filed a chamber summons seeking the appointment ex-parte of an interim receiver (one from amongst several whose names and curriculum vitae were given by the plaintiff) pending inter-partes hearing of the application and the superior court (Owuor, J as she then was), after hearing the plaintiff's counsel at same length ordered that Mr. Michael Scanlon do take over the management and control of the company's operations both at Jomo Kenyatta International Airport, Nairobi, and Moi International Airport, Mombasa as well as the warehouses on plots L.R. Numbers 209/10882/15 and 209/10882/16 along Mombasa-Nairobi road. Those orders were to remain in force until further orders of the court, and the application was directed to be heard inter-partes on 10th March 1998.

All the three defendants appointed Mr. Ochieng Oduol & Company, advocates of Nairobi, to act for them and filed grounds of objection to the application and at the same time filed an application, by a notice of motion, for discharge of the ex-parte orders made by Owuor J, and for removal of the receiver appointed. The application, in the alternative, sought relief to the effect that security be provided by the receiver upon such terms as the court thought fit. This

application has yet not been heard. It becomes important to point out that even the plaintiff's application has not been heard inter-partes as yet.

On 10th March, 1998 or thereabouts the defendants as pointed out earlier, filed the application under Order vi rule 13(I)(a) which was heard by the superior court (Kuloba J) and was dismissed, as, again already pointed out.

Before I go any further it now becomes pertinent to set out the facts upon which the plaintiff's application for appointment of a receiver was based. The plaintiff alleges that he agreed to buy, and the first two respondents who allegedly own 100% of the shareholding in the company, agreed to sell to the plaintiff, the said 100% shareholding at a price or sum of USD13,750,000 .The plaintiff alleged further that the said purchase price reflected, inter-alia, the assets of the company referred to in the letter of confirmation of the said assets, dated 27th March, 1992 from the first defendant (Nassir Ebrahim Ali) to the plaintiff. The sale and purchase agreement executed by the plaintiff and the first two defendants and drawn up Mr. Bernard Kalove, advocate, recites that the first two defendants were desirous of selling 100% of all issued outstanding shares owned by them to the plaintiff; that the company incorporated in the Isle of Man was known as World Duty Free Complex whose operational head office was in Dubai, United Arab Emirates; that the company had been granted exclusive right to operate Duty free Complexes in Kenya, trading as Kenya Duty Free Complex, under the terms of an agreement dated 27th April, 1989 (amended on 11th May, 1990) by the Republic of Kenya for its international airports at Nairobi and Mombasa. After setting out the said recitals, the alleged agreement refers to the price payable by the plaintiff, also to the part-payment made by the plaintiff and the date of payment of the balance of the purchase price. The plaintiff alleged that he had paid all of the agreed purchase price.

In his affidavit in support of the application for appointment of a receiver, the plaintiff has attempted to show how he paid the purchase price of US$13,750,000 to the first two defendants. The plaintiff also attempts to show that the first defendant had through the company, transferred a considerable quantity of furniture, equipment, large sums of money and very substantial quantities of stock from Kenya Duty Free premises and warehouses in Kenya to Zanzibar. The plaintiff alleged that the first defendant has been "milking" the duty free shops in Kenya through weekly transfers of minimum of US$100,000 every Wednesday by courier on Emirate Airlines and that the complexes were in the process of being sold (at stage of advanced negotiations) to third parities; that although the two warehouses on Mombasa Road, known as L.R. NOS.209/10882/15 and 209/10882/16, were stated to be the assets of the company, were fraudulently transferred by the first defendant to himself, instead of to the company; that the first defendant had refused to transfer the shares and assets to him and that he was not in possession of any information as regards the third defendant's operations; that the first defendant suggested that as he (the plaintiff) was facing problems in Kenya with reference to the criminal charges laid against him it would be better to leave the shares in the name of the first defendant; that no dividends were ever paid to the plaintiff. For the purpose of this appeal it is not necessary to set out all the facts relied upon by the plaintiff.

The first defendant in his replying affidavit denied having had any dealings with the plaintiff. He denied selling or even negotiating the sale of such shares to the plaintiff. He stated that the documents relied upon by the plaintiff to show the sale, were forged. He stated that the company seal was forged; that he did not receive the alleged payment of the sum of US$13,975,000. Again, as I have pointed out in relation to facts deponed to by the plaintiff, it is not necessary to set out all facts set out by the first defendant in View of the peculiar nature of an application under 06.rule 13(1) (a) of the Civil Procedure Rules.

The learned judge in the superior court- (Kuloba.J) heard Mr. Oraro for the defendant/applicants and Mr. Bhailal Patel for the plaintiff/respondent and held that the court had the jurisdiction to appoint a receiver ex-parte whenever the justice of the case so requires and extended the ex-parte orders may by Owuor.J (as she then was) until the determination of the application for

appointment of receiver inter-partes. I will quote what the formal order says in its second part:

> "2. That the ex-parte interim orders made by Owuor J, are to remain in force until the inter-partes hearing and determination of the application for appointment of receiver and temporary injunction pending the hearing and determination of the suit."

The learned judge put the matter, in my view, in a proper perspective when he said:

"The third defendant is saying to the plaintiff in effect, "You are not a shareholder in me; you are not a member of me; you have nothing to do with me even if you establish that you bought all the shares owned by the shareholders who hold shares in me". The plaintiff is saying to third defendant in effect that "The shareholders who sold to me all their shares in you and who control you are taking away from you everything to which I shall be entitled as a one hundred percent shareholder, so that by the time the law catches up with them and my shareholding rights are vindicated and I control you, there will be nothing of value in you for me to get; 'you will be an empty shell; and yet you seem to be either co-operating with those shareholders who control you to defeat my claim against them, or you are simply sitting there doing nothing to safeguard your property in which I shall be deeply interested when I take over you, and I cannot let you prejudice my contractual rights against your controllers and managers who are sucking blood out of you to my detriment".

The learned judge considered the impact of the appointment of a receiver as ordered on an ex-parte basis and concluded that Order 40 of the Civil Procedure Rules which is an "offspring" of section 63(d) of the Civi 1 Procedure Act enabled the High Court in its unlimited original civil jurisdiction to make such orders ex-parte and that neither section 63 nor Order 40 require that such appointment must always be made at inter-partes proceedings. He said that the only concern of the court is whether "it appears to the court to be just and convenient" in so appointing a receiver. He held that such a pre-emptive remedy as sought was available in the judicial "armoury". He said that what Owuor, J did was to put the property of the company in custodia legis on the material which was before her at that time and that she exercised judicial discretion which was vested in her as a judge of the High Court. Such jurisdiction, the learned judge said, is not for the benefit of one party but is in the interest of justice, for the protection of the 1 is until a given time, for avoiding prejudice to either party. He said that whoever is appointed as a receiver is placed under the control of the court.

As to the question poised by the defendants challenging the propriety of issuing the orders in the circumstances of this case, the learned judge ruled that that was a matter for convassing at the inter partes hearing of the application for the appointment of interim receiver and for injunction and other interlocutory orders. The learned judge held that the questions of allegations of fraud, concealment of material facts, rendering of accounts by the third defendant, the third defendant as a proper party to the proceedings, whether a cause of action against any of the defendants is disclosed, and others were questions germane at the inter partes hearing of the plaintiff's application.

The learned judge therefore did not rule on whether a cause of action was disclosed as against all or any one of the parties. This non-finding was the main bone of contention raised by Mr. Oraro. He said that the judge was bound to rule whether or not there was a cause of action disclosed against the company or whether the company was properly brought before the court when there was nothing in the plaint to show that the company ought to have made a party to the suit.

1. JURISDICTION

The first issue that I will deal with is whether or not the superior court had the jurisdiction to appoint a receiver in the circumstances of the facts as were before Owuor, J. Mr. Oraro argued that such a relief can only be granted if the provisions in O.40 of the Civil Procedure Rules are

fairly and squarely brought into play, in other words, only if one has claim against a property and then one can ask for such an appointment on "just and convenient" grounds; that there was no claim against the company in the body of the plaint; that the plaintiff was disabled on two grounds, that is to say that if a company enters into a contract for sale of assets then the purchaser is entitled under 0.40 to seek the appointment of a receiver but that a shareholder is not a person entitled to possession of a company's property and that in this particular case none of the said factors were relevant as here there was (if it be *so)* only a contract between the plaintiff and the first two defendants for sale of shares and such being the position the parameters of 0.40 do not apply. Mr. Oraro placed reliance on what the learned author says in the 12th Edition of Mulla's Code on Civil Procedure to argue that a court should not appoint a receiver of property in the possession of the defendant who claims it by legal title unless the plaintiff can show that he has a strong case and a good title to the property, as opposed to right to the property. It would at this stage be appropriate if I set out the relevant portions of 0.40 and section *63* of the Civi1 Procedure Rules and Civil Procedure Act respectively. These read:-

ORDER XL

Appointment of receivers

1. (i) Where it appears to the court to be just andconvenient, the court may by order,

(a) Appoint a receiver of any property, whether before or after decree.

(b (c (d

2. Nothing in this rule shall authorize the court to removefrom the possession or custody of property any personwhom any party to the suit has not at present right so to remove.

SECTION 63

63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed -

(a (b (c

(d) Appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property.

(e) Make sure other interlocutory order as may appear to the court to be just and convenient.

The words "just and convenient" have been taken both in Kenya and India from the Judicature Act 1973 S.25 SS. (8) of England and these words show that the court should appoint a receiver for protection of the rights or for prevention of injury according to the legal principles. The order is discretionary that is to say the discretion must be exercised in accordance with the principles on which judicial discretion is exercised.

In India there appears to be conflict of judicial opinion as whether a receiver can be appointed for a public company under O.40. Calcutta High Court in the case of Kailash Chandra v. Sadar Munsif (1925) 52 Cal.513 had held that such appointment can only be made after recourse to the provisions of the Companies Act but the High Courts of Allahabad, Lahore, Madras and Mysore have dissented from this view and held that a receiver can be appointed for managing the business of a company.

In Lahore case of Rattan Lai, Advocate v. Jagadhri Light Railway Company Limited A.I.R.1946 Vol.33 pages 193-198 the court held that:

"It is wrong to say that the appointment of a receiver is unheard of to conduct the business of company except in a debenture-holders' action. Several cases can be visualized when a company judge may exercise such a power under the provisions of 0.40 R.I. as read with S.141, Civil P.C.; or ex debi to justitiae . It is possible in suitable cases under the Companies Act to appoint a receiver who may take up the business of the company and the management of its property and its affairs pending the decision of the court in a litigation: (125) 12 A.I.R. 1925 Cal.817 dissented.

As I see it, the appointment of a receiver under S.63(d) of the Civil Procedure Act and Order 40 of the Civil Procedure Rules as reinforced by the inherent powers of the High Court and also ex-debito justitiae, if the circumstances of the case so warrant, can be made when just and convenient. I would therefore overrule Mr. Oraro on his preliminary point to the effect that no receiver can properly be appointed when the plaintiff seeks right to property. The superior court in given circumstances may appoint a receiver when just and convenient.

2. Appointment of a Receiver Ex-parte

Mr. Oraro argued that there was no mandate in law enabling the High Court to point such a receiver (under O.40) ex-parte. It must be noted that O.40 R.I. talks of appointment of a receiver before or after decree.

Mr. Nowrojee referred to a precedent in Atkin's Encyclopedia of Court Forms *&* Precedents in Civil Proceedings, vol.xiv - page 648 wherein appears a note to the following effect

> "If it is foreign company, the jurisdiction, which works in personam on the defendant, *is* not affected, but the company though it may be made a party (R.S.C. Order 11 or 1(a)) usually can be served with the notice of motion in time for it to be bound by an interlocutory injunction".

In the Madras case of Mudialiar & another vs. K.M. Samarapuri and others A.I.R 1950 Vol. 37, pages 116-118 it was stated by Horwill & Rao JJ, as follows:

> "We find no provision in the companies Act, which excludes the jurisdiction of a court to appoint a receiver; though since the Companies Act makes provision for dealing with circumstances in which a company is mismanaged, it should not be necessary in the vast majority of cases to appoint a receiver. It might even be improper to do so in certain circumstances. Our attention has been drawn to a number of instances in which Receivers have been appointed; and although the particular case that we are here considering does not fall within one of the categories of cases in which receivers have been appointed by courts, we think this is a case in which, if the allegations are accepted, the appointment of a receiver would be the most satisfactory way of dealing with the temporary difficulty that exists during the pendency of the suit. If the allegations of the respondent 1 be true, he is kept out of possession and management by respondent 3 and seeks in his suit to have it declared that he is entitled to participate equally with respondent 3 in the management of Ramaswami & Co. Ltd."

It is my view that the High Court has power to so appoint a receiver during the pendency of the suit and it has power to order such appointment on an ex-parte application in appropriate circumstances.The learned judge, in my view, applied the principle correctly, to avoid "imminent danger and dissipation of assets" under the quia timet principles. I must bear in mind the fact that the learned judge was not dealing with the merits of such order but only with the question as to whether or not such an appointment, as was made, could be made. In this particular case, the first defendant was not resident in Kenya. He was controlling the company from Dubai and the Plaintiff alleged fear that if the application was fist served the assets could be out of his reach. As the learned Judge has pointed out it was necessary "to cope with the negative employment of the microchip and computer technology, the court may issue what may broadly

be classified as appropriate freezure and seizure orders to preserve assets (including money) for the benefit of the parties whenever there is a serious risk of dissipation or loss..... The appointment of an interim

receiver ex parte is one such nuclear weapon of the law envisaged under the Civil Procedure Rules..." In my view the learned judge correctly concluded that an ex-parte appointment such as was made was within the powers of the court. This position is somewhat reinforced by Cotton L.J. in the case of In re Pountain (1888) 37 Ch. pages 609 & 610. He said with the concurrence of Lindley and Bowen L. JJ.

> "I think the Applicants have made out a prima facie case. We will appoint Mr. Sowter interim Receiver. This appointment will take to be appointed guardian ad litem in the several actions, pending against Mr. J.P. Pountain".

3. Was the discretion to appoint a receiver exercised wrongly?

As regards the issue whether or not Owuor J. exercised her discretion to appoint the receiver wrongly, the learned judge quite properly pointed out as follows:-

"I believe that the answer lies in the first place, in the powers of the High Court to act in situations of emergencies (or alleged and demonstrated emergency). The learned judge was faced with the plaintiff who had raced to the court and panting before the learned judge, gasped as he waved before the judge's face copies of what he said were agreements of sale of all shares of the first two defendants in the third defendant company and that the first two defendants control the third defendant. He waved to the eyes of the judge what he alleged to be copies of many cheques for various millions of Kenya Shillings paid to the first two defendants or on their behalf, as alleged payments of the alleged agreed purchase price. He showed the learned Judge copies of alleged acknowledgements of receipts of the payments, by the first two defendants or on their behalf. He placed before the judge what he said were what the first two defendants were doing to defraud him. And he raised to the judge what he said was the dubious character of the first defendant which should help in persuading the judge that the first defendant was unreliable and that it should be believed that he was doing the wrongs which were overwhelmingly hurting the contractual interest of the plaintiff - in particular he impressed on the judge that the first defendant is outside Kenya, who controls the third defendant from outside the country, and holds a series of passports."

It would in my view be a matter for the trial judge to decide whether or not the allegations of the plaintiff stand scrutiny. It would be improper for this court at this stage, (or even perhaps impossible) to decide whether the plaintiff has forged some 50 documents as stated by the first defendant. This court sitting as a final court of appeal would be better guided by a finding of facts from the superior court and it does not have that advantage at this stage. I must bear in mind at this stage (at the risk of repetition) that the plaintiff's application has yet to be heard on merits inter partes.

4. Does the Plaintiff have a cause of action against the third Defendant?

There was no issue taken up by Mr. Oraro as regards the plaintiff's right to sue the first two defendants subject to the plaintiff's averments being correct. But Mr. Oraro took issue with the propriety of the joinder of the company as the third defendant. He urged that in order to sue the company the purchaser of shares ought to have an executed share transfer agreement which only entitles the purchaser to sue the company for specific performance provided the directors' consent to such transfer has been given. Directors and shareholders are distinct from a company, he urged. In other words the argument was that for specific performance of an agreement for sale of shares, the company is not a necessary party to this suit.

The plaintiff had, allegedly agreed to buy 100% (one hundred percent) shareholding in the third

defendant and all assets of the company. Mr. Nowrojee in response to Mr. Oraro's arguments laid stress on the averment by the plaintiff to the effect that he was purchasing not only 100% shareholding in the company but all its documents as stated by the first defendant. This court sitting as a final court of appeal would be better guided by a finding of facts from the superior court and it does not have that advantage at this stage. I must bear in mind at this stage (at the risk of repetition) that the plaintiff's application has yet to be heard on merits inter partes.

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The plaintiff had, allegedly agreed to buy 100% (one hundred percent) shareholding in the third defendant and all assets of the company. Mr. Nowrojee in response to Mr. Oraro's arguments laid stress on the averment by the plaintiff to the effect that he was purchasing not only 100% shareholding in the company but all its assets as enumerated in the first defendant's letter of 27th March, 1992 addressed to the plaintiff, and that the plaintiff was not suing in the capacity of a registered shareholder but in his capacity as a contracting party. The defendants cannot hide under the cover of companies law, Mr. Nowrojee urged.

Although the plaint in. regard to pleadings affecting the company is not an elaborate one, the important feature of the plaint is that it refers to the alleged agreement to purchase 100% shares owned by the first and second defendant in the third defendant company and all assets of the company. Another important feature of the pleading in the plaint is paragraph 10 thereof which reads:

> "10. It was a further term of the said agreement that the Board of Directors of the 3rd defendant company would resign and transfer the management of the 3rd defendant company to the plaintiff."

It is a matter of substance that a company acts through its directors and when the allegations in the plaint seek a remedy against the directors which affect the company wholly, I see no objection (sustainable) to the joinder of the company as a co-defendant. I take note of the substance of the pleading shown in form No. 16 in Atkin's Enclopaedia of Court Forms and Precedents. That form shows that in a suit for specific performance of an agreement for sale of shares the company could be made a party for it to be bound by an interlocutory injunction. The plaintiff claims to be entitled to dividends which he says have not been paid to him. In these circumstances I do not see how there is a misjoinder: I think the company is properly a defendant. I bear in mind the fact that if the plaintiff succeeds, the company will obviously be an affected party. My view is that in all the circumstances of the case before the court the third defendant has not been improperly joined as a co-defendant.

The situation that now obtains, as a result of the several preliminary issues taken, is that the application itself has not been heard inter-partes and I would echo the words of Sir Charles Newbold P. in the case of Mukisa Biscuit Manufacturing Co. vs Westend Distributors Ltd. (1969) E.A 696 at page 701. HE SAID

> "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection... It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial

discretion".

I would adopt and reiterate what Lord Finlay L.C said in the

case of Frazer V. Balfour (1918) 34 T.L.R 502. He said:

> "The question was still open, at all events in (the House of Lords). It involved constitutional questions of the utmost gravity and a decision upon it should be given when the facts were before the House in a complete and satisfactory form."

The above statement was adopted with approval in the case of Richards vs Naum (1966) 3 All E.R. 812 by Lord Denning M.R., Diplock & Russel L.JJ. I need not belabour the issue of facts not having been adjudicated upon by the trial court.

I have not referred to all the authorities so diligently referred to by both Mr. Oraro and Mr. Nowrojee, who have both most ably argued this appeal.

I would dismiss this appeal with costs, which costs I would certify for two counsel in respect of first respondent. The appellants will pay costs of both the respondents, those of the second respondent being on one counsel basis.

JUDGMENT OF OMOLO, J.A.

I had the advantage of reading in draft form the judgment prepared by my Lord Shah, J.A. I agree with the conclusions reached by him and I only wish to add very few words of my own.

On the issue of jurisdiction, I have no doubt that the High Court has not only the power, but in some cases, the duty to appoint a receiver under and in accordance with the provisions of section 63 of the Civil Procedure At, and Order 40 of the Civil Procedure (Revised) Rules. In issuing such an order, the main consideration for the High Court is whether it is "just and convenient" to do so. Once, the High Court is satisfied that in the circumstances of a particular case, it is just and convenient to appoint a receiver, the Court is entitled to do so and may even do so exparte. However, where a receiver is to be appointed ex parte the court must exercise great care and caution and I would myself add that such a step should be taken only in exceptional circumstances. I think that in the circumstances of this case, Owuor, J. (as she then was) was perfectly entitled to appoint a receiver ex parte. As I understand the position, there is still a pending application before the High Court to discharge the ex parte order made by Owuor, J. It is accordingly not advisable to say more on that point.

On the issue of whether the plaint as drawn disclosed a cause of action against the 3rd defendant, it is alleged in the plaint that the 1st and the 2nd defendants own 100% shares in the third defendant, that the 1st and 2nd defendants contracted with the plaintiff to sell to the plaintiff their 100% share-holding and that they also agreed to sell to the plaintiff all the assets of the 3rd defendant, such assets being separate and distinct from the shares. Whether or not there was an agreement as alleged by the plaintiff, and whether or not the documents upon which the plaintiff relies in proof of the agreement were or were not forged cannot be an issue in this appeal. Those issues remain to be determined by the High Court. But suppose the plaintiff were to succeed in his allegation that the 1st and 2nd defendants sold to him certain assets of the 3rd defendant, how can the High Court decree those assets to the plaintiff in the absence of the 3rd defendant? Obviously the 3rd defendant is a necessary party to these proceedings as otherwise the plaintiff may have to sue it at a later stage if the plaintiff were to succeed in his claim that he also bought the assets, as opposed to shares, of the 3rd defendant. True, the plaint does not specifically allege that the 1st and 2nd defendants were directors of the 3rd defendant but the proceedings are still in early stages and amendments can always be sought, to breathe more life into the plaint. I say "breathe more life" into the plaint deliberately because I do not myself subscribe to the view expressed by Madan, J.A. in D.T. DOBIE & CO. (K) LTD. V JOSEPH MBERIA MUCHINA AND ANOTHER, CIVIL APPEAL NO. 37 OF 1978 (Unreported) that an amendment can always be done at any stage to inject life into any claim

with a semblance of a cause of action. In my view, a claim must at the very beginning have some life in it before an amendment can be granted to breathe more life into it. I would also find and hold that the 3rd defendant is a necessary party to the claims made by the plaintiff. That being my view of ' the matter, I agree that this appeal should be dismissed in the terms proposed by Shah, J.A. in his judgment. 1998.

JUDGMENT OF GICHERU. J.A.

In this appeal, the first, second and third appellants were respectively the first, second and third defendants in the superior court while the first and second respondents were respectively the plaintiff and receiver/manager of the third appellant in that court.

By a plaint dated and filed in the superior court on 24th February, 1998 the first respondent, save in paragraphs 1, 2 and 3 of the said plaint which were merely descriptive of himself, the first appellant and the second appellant averred that:

> "4. The 3rd defendant is a limited liability company incorporated in the Isle of Man, United Kingdom. Service of summons shall be effected through the plaintiff's advocate's chambers.
>
> 15. The 1st and 2nd defendants own 100% shares in the 3rd defendant which carries on business and trades in the name and style of Kenya Duty Free Complex at Jomo Kenyatta International Airport, Nairobi and Moi International Airport, Mombasa and owns warehouses in Nairobi within the Republic of Kenya.
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> 6. On Twenty Seventh of March, 1992 the plaintiff and the 1st defendant on his own behalf and on behalf of the 2nd defendant executed a Memorandum of Understanding (M.O.U.) where it was agreed *inter alia* that the plaintiff shall purchase 100% shares owned by the 1st and 2nd defendants in the 3rd defendant company at an agreed purchase price of U.S. Dollars Thirteen Million Seven Hundred and Fifty Thousand only (U.S.$ 13,750,000) pending formal execution of Sale and Purchase Agreement. The said purchase price reflected *inter alia* those assets of the 3rd defendant which are referred to in a letter of confirmation of the said assets, dated 27th March, 1992 from the 1st defendant to the plaintiff.
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> 7. Pursuant to the said Memorandum of Understanding the plaintiff paid the 1st and 2nd defendants Kenya Shillings Ninety Million only (equivalent to U.S. $ 3,000,000) at an agreed exchange rate of Kenya Shillings Thirty (K.Shs.30/=) to one U.S. Dollar, towards the said purchase price, as a token of good faith.
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> 8. On Third of April, 1992 the plaintiff made a further payment of K.Shs. Sixty Three Million & Seven Hundred and Fifty Thousand only (K.Shs.63,750.000/=) (equivalent to U.S.$ 2,125,000) to the 1st and 2nd defendants towards the said purchase price.
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> 9. On the Tenth of April, 1992 the plaintiff and the1st and 2nd defendants executed the sale andpurchase agreement for the sale of their 100%shares in the 3rd defendant company. It was a termof the said agreement that the plaintiff wouldcomplete the balance of payment on or before tenthof April, 1993 and the 1st and 2nd Defendants wouldtransfer their respective shares in the 3rddefendant to the plaintiff on or before thirtyfirst of December, 1993.
>
> 10. It was a further term of the said agreement thatthe Board of Directors of the 3rd defendant company ould resign and transfer the management of the 3rd defendant company to the plaintiff.
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> 11. The plaintiff avers that he did comply with all his obligations under the sale and

purchase agreement and has paid the purchase price in full.

12. The plaintiff states that the 1st and 2nd defendants, despite the plaintiff having completed his part of the bargain, have refused and neglected to transfer the said shares to the plaintiff and persist in the said refusal in flagrant breach of the said sale and purchase agreement.

13. The plaintiff states that subsequent to the sale of the said shares in the 3rd defendant, the 1st defendant has committed a fraud on the plaintiff."

The first respondent then proceeded to set out the particulars of fraud averred in the preceding paragraph which consisted of the first appellant transferring the warehouses belonging to the third appellant into his own name.He then continued to aver that:

"14. The plaintiff further avers that in January, 1998 he has established that the 1st and 2nd defendants are negotiating to sell and dispose of their shares in the 3rd defendant and unless restrained by this Honourable Court the plaintiff stands to suffer irreparable loss and damage.

15. The plaintiff avers that the defendants have refused and or neglected to provide accounts to the plaintiff in blatant breach of the said sale agreement and have completely shut out the plaintiff from the 3rd defendant's affairs and operations.

16. The plaintiff further avers that the 3rd defendant has never paid the plaintiff any dividend and or profits but instead the defendants have mismanaged and are running down the-operations and business of the 3rd defendant company.

17. The cause of action arose in Narobi within the jurisdiction of this Honourable Court."

The first respondent then prayed for judgment jointly and severally against the appellants for specific performance of the contract of sale and purchase of 100% shares in the third appellant and for an order among several others that an interim receiver/manager be appointed from the names he had proposed in his affidavit annexed to his chamber summons taken out under *Orders XXXIX rules 1,2,3 and 9, Order XL rule 1, , Order 2 Rules 21 & 27 of the Civil Procedure Rules,* hereinafter called the Rules, *Section 3A of the Civil Procedure Act* and all other enabling provisions of the law which was simultaneously filed with the plaint on 24th February, 1998 to solely manage, control and administer all the day to day operations of the third appellant including the Duty Free Complexes, at the Jomo Kenyatta International Airport, Nairobi, Moi International Airport, Mombasa and the warehouses in Nairobi until the final determination of his suit against the appellants. The chamber summons was heard *ex parte on* the same day and the order appointing the second respondent as the receiver/manager of the third appellant was granted by Owuor, J. (as she then was) amongst other orders.

By a Notice of Motion dated and filed in the superior court on 9th March, 1998 the appellants sought to have the orders made by that court on 24th February, 1998 discharged and by a chamber summons dated and filed in the same court on 10th March, 1998 and taken out under *Order VI rule 13(1) (a)* of the Rules, the appellants sought to have the first respondent's plaint struck out as it disclosed no reasonable cause of action against the third appellant which latter was a separate and distinct entity from the first and second appellants and was not a party to the alleged agreement of sale and purchase of its shares between the first respondent and the first and second appellants which agreement was executory and unenforceable against the third appellant. That chamber summons proceeded to hearing on 13th March, 1998 and in his ruling dated 24th March, 1998 Kuloba,. J. after setting out the respective submissions of counsel for the parties to the dispute before him seems to have concluded that whether there was a reasonable cause of action against the third appellant was a matter to be dealt with at the *inter partes* hearing of the 1st respondent's chamber summons dated and filed in the superior court

on 24th February, 1998. This triggered the present appeal with the appellants putting forward 19 grounds of appeal of which grounds 1, 2, 3, 5, 6, 7, 8 and 9 were pertinent to the ruling of the learned superior court Judge in the appellant's application to strike out the first respondent's plaint for non-disclosure of a reasonable cause of action against the third appellant. These grounds were couched in the following terms:

> "1. THAT the learned Judge erred in failing to appreciate the principles of law applicable to an application to strike out pleadings under Order 6 rule 13(1)(a) of the Civil Procedure Rules.
>
> 2. THAT the learned Judge misconceived the applications before him and went on to erroneously frame issues which were neither before him or argued in the application.
>
> 3. THAT the learned Judge erred in failing to decide the application that was before. him and particularly as to whether the suit against the third defendant and any application in connection therewith disclosed a cause of action.
>
> 5. THAT it was not open to the learned Judge to consider the application laid before Lady Justice Owuor and the affidavits filed in support thereof to determine the application that was before him.
>
> 6. THAT the learned Judge erred in taking into account the grounds of opposition and the application to discharge the *ex parte* orders which is still pending and not yet heard before him.
>
> 7. THAT the learned Judge erred in holding that there was sufficient basis and material placed before the Honourable Lady Justice Owuor to warrant the appointment of a receiver.
>
> 8. THAT the learned Judge erred in failing to appreciate that a limited liability company is a separate and distinct person from its shareholders and directors.
>
> 9. THAT the learned Judge erred in failing to appreciate that a contract for sale of shares between a shareholder and a third party was a contract distinct from a contract for the sale of assets of the company."

When this appeal came up for hearing on 13th, 14th, 15th and 16th July, 1998 and on 3rd and 4th August, 1998 Mr. Oraro who appeared with Mr. Ochieng' Oduol for the appellants submitted that in view of the appellants application to strike out the respondent's plaint under *Order VI rule 13(1)(a)* of the Rules for not disclosing a reasonable cause of action, the issue before the superior court was not in the nature of a preliminary objection but whether that court had jurisdiction to appoint a receiver/manager of the third appellant on the pleadings before it. According to Mr. Oraro, any proceedings against- the third appellant was predicated on the existence of a cause of action against it. The first respondent's plaint disclosed no cause of action against the third appellant as it was founded on a contract of sale and purchase of shares in the third appellant between the first respondent and the first and second appellants. Whether or not that contract involved the sale and purchase of 100% of the third appellant's issued shares, the same could not and did not make the third appellant a party to it. Upon registration in and issue of the certificate of incorporation from the Isle of Man on 5th day of December, 1989, the third appellant became a body corporate which in the eyes of the law is a *person* distinct from its members or shareholders with a legal existence of its own. At law therefore, the third appellant was a different person altogether from the subscribers to its memorandum of association and was capable of suing and being sued in its corporate name. In this regard, Mr. Oraro relied on the principle in *Salomon v. Salomon & Co. Ltd.,* [1895-9] All E.R. Rep. 33 and submitted that the third appellant was in law a person with a legal existence distinct from its shareholders, to wit, the first and second appellant theirs status in it notwithstanding. According

to Mr. Oraro therefore, the purchase of shares in the third appellant did confer its ownership to the purchaser. Indeed, the principal rights which a share in a incorporated company may carry are:

> (a) the right to dividend if, while the company is a going concern, a dividend is duly declared;
>
> (b) the right to vote at the meetings of members; and
>
> (c) the right, in the winding up of the company, after the payment of the debts to receive a proportionate part of the capital or otherwise to participate in the distribution of assets of the company. A share is the property of the shareholder. It is not the property of an incorporated company. The third appellant could not therefore have been a party to a suit for specific performance of a contract of sale and purchase of its shares between the first respondent and the first and second appellants in the circumstances averred in the first respondent's plaint which concerned the enforcement of a transfer of shares in the third appellant to the first respondent by the first and second appellants wherein the third appellant had no role at all. To this end, Mr. Oraro concluded, the first respondent's plaint disclosed no reasonable cause of action against the third appellant in terms of *Order VI rule 13(1)(a)* of the Rules and bringing in aid the provisions of *Order 1 rules 3 and 5* of the Rules which presupposes the existence of a cause of action wherefrom other reliefs may be claimed is of no avail. The first respondent's plaint should therefore have been struck out with the result that the superior court would have had no jurisdiction to appoint a receiver/manager of the third appellant under *Order XL rule 1* of the Rules.

Mr. Nowrojee who appeared with Mr. Bhailal Patel for the first respondent, however, submitted that the purchase price paid by the first respondent' to the first and second appellants was inclusive of the purchase of the assets of the third appellant besides its 100% shares. The agreement of sale and purchase in this regard was made between the first respondent and the first appellant on his own behalf and on behalf of the second appellant who were the sole shareholders of the third appellant with the first appellant being both a director and Chairman of the third appellant. The first respondent had therefore to have a way of protecting the value of the shares he had purchased. Hence, the need to preserve the property and the good will of the third appellant as a going concern. The third appellant therefore became a person who came to court because its property was in issue in court. According to Mr. Nowrojee, the function of the superior court was to protect the suit property of the third appellant so as not to render its process nugatory in view of the first appellant being the person controlling the third appellant from outside the jurisdiction of the said court. Hence, the appointment of a receiver/manager of the third appellant under *Order XL rule 1* of the Rules as the assets of the third appellant were part of the contract of sale and purchase of its shares between the first respondent and the first and second appellants. The affairs of the third appellant including its assets were an integral part of the transaction between the first respondent and the first and second appellants. On this account therefore, the first respondent's plaint in the superior court disclosed a cause of action and was not liable to be struck out. Indeed, the price of 13.75 million U.S. dollars must have been inclusive of more than just the purchase of shares in the third appellant and the distinction between an incorporated company and its shareholders should not be permitted to be an engine of fraud, Mr. Nowrojee concluded.

Mr. Kalove who appeared for the second respondent associated himself with the submissions of counsel for the first respondent.

I agree that the distinction between an incorporated company and its shareholders should not be permitted to be an engine of fraud so to speak in a contract of sale and purchase of shares. But if a purchaser of shares wishes to protect himself he must "buy with registration guaranteed" for it is only on registration of the transfer of any share or shares and the issuance of a certificate under the common seal of the company in respect thereof that is *prima facie*

evidence that the title to any such share or shares has passed. It is therefore the absence of diligence on the part of the purchaser in a contract of sale of shares that would be his undoing and not the distinction between an incorporated company and its shareholders.

In *paragraph 34-01 of chapter 34 of Palmer's Company Law, volume 1 at page 332,* it is stated that:

> "A share in a company is the expression of a proprietary relationship: the shareholder is the proportionate owner of the company but does not own the company's assets which belong to the company as a separate and independent legal entity."

Indeed, it is a right to a specified amount of the share capital of a company. *Section 15 of the Companies Act,* Chapter 486 of the Laws of Kenya provides that:

> "75. The shares or other interest of any member in a company shall be movable property transferable in manner provided by the articles of the company."

It would seem therefore that the proportionate ownership of a company by a shareholder expressed as a proprietary relationship in the company and measured by a right to a specified amount of the share capital of a company is movable property and transferable in accordance with the provisions of the articles of the company.

Section 16(2) of the Companies Act, supra, provides that:

> "16. (2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act."

In *Salomon v. Salomon & Co. Ltd.,* [1895-9] All E.R. Rep. 33 at page 48 letters A, B and C Lord Macnaghten had this to say:

> 'When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith" to use the words of the enactments, "of exercising all the functions of an incorporated company" ..... These are strong words. The company attains maturity on its birth. There is no period of minority; no interval of incapacity. I cannot understand how a body corporate thus made "capable" by the statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, the same person are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers or members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment.'

Strong words: and indeed, in *paragraph 715 of Halibury's Laws of England/* Fourth Edition at page 429 where relevant, it is stipulated that':

> "A company, not being a physical person, can only act; either by the resolution of its members in general meeting, or by its agents. It is not the agent of its members, and a member as such is not the agent of the company, the company being a separate entity or legal person apart from its members, who are not even collectively, the company."

From the foregoing, it is evident that on incorporation, a limited liability company's identity is distinct from that of its members or shareholders and can hold property in its own rights.

Indeed, its rights and liabilities are unaffected by changes in its membership. Generally speaking, its property but not that of its members or .shareholders is available to satisfy its liabilities which is a mark of its independent existence altogether from its members or shareholders. Such was the position of the third appellant after its incorporation on 5th day of December, 1989 in the Isle of Man in the United Kingdom *vis-a-vis* the first and second appellants and could not therefore have been a party to the contract of sale and purchase of their shares - their movable property - between them and the first respondent. Hence the application in the superior court under *Order VI rule 13(1) (a)* of the Rules seeking to strike out the first respondent's plaint for not disclosing a reasonable cause of action against the third appellant since that plaint sought to enforce the transfer of - shares to which it had no proprietary interest at all.

Admissibility of evidence is precluded in an application under *Order VI rule 13(1)(a)* of the Rules. A glance at the ruling of the superior court out of which this appeal arises reveal that the learned Judge of the superior court relied heavily on the material in the first respondent's chamber summons dated and filed in the superior court on 24th February, 1998 and in the appellants' Notice of Motion dated and filed in the same court on 9th March, 1998 instead of confining himself to the first respondent's pleadings, that is to say, the plaint dated and filed in the superior court on 24th February, 1998 as he was obliged to do. Had he done so, he probably would have clearly seen the issue before him and adjudicated on it instead of holding that the issue of whether or not there was a reasonable cause of action against the third appellant was a matter to be dealt with at the *inter partes* hearing of the first respondent's chamber summons referred to above which latter had no bearing to the application before him.
In my view, the appellants' eight grounds of appeal which I have set out earlier in this judgment are not without merit. A scrutiny of the first respondent's plaint in the light of what I have attempted to outline above leaves me with no doubt that it discloses no reasonable cause of action against the third appellant and no amendment can improve it. I would allow the appellant's appeal and under *section 3(2) of the Appellate Jurisdiction Act,* chapter 9 of the Laws of Kenya I would strike out the first respondent's plaint as against the third appellant with costs to it and set aside the *ex-parte order* of the superior court dated 24th February, 1998 appointing the second respondent an interim receiver/manager of the third appellant under *Order XL rule 1* of the Rules as it would thereafter have no legs to stand on. For the avoidance of doubt, the first respondent's plaint against the first and second appellants would be unaffected by this decision but I would award the costs of this appeal certified for two counsel to the third appellant against the first respondent only. However, as Omolo and Shah, JJ.A. disagree, there will be a majority judgment of this Court in the terms proposed by Shah, J.A.

Dated and delivered at Nairobi this 11th day of September, 1998.

A.B SHAH

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL