REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO 2836 OF 1990

TRICOR ENTERPRISES LTD & 2 OTHERS..……APPLICANTS

VERSUS

ANNE NYAWACHA MWOK-HANDA …….. RESPONDENTS

RULING

A short history of the matter: On the 11th June, 1990, the plaintiff/ applicants filed a plaint in the registry of the court. The defendant is Anne Nyawacha Mwok-Handa – the respondent in the present application.

The substance of this plaint is this:- On the 27/2/90, the defendant by herself and / or her agents, in breach of the provisions of the Companies Act (Cap 486) gave notice of an extraordinary general meeting of the shareholders of the 1st plaintiff to be held on the 27th March, 1990. The 1st plaintiff is the company and the 2nd and 3rd plaintiffs two of its directors. The notice dated the 27.2.90 was not served on the 2nd and 3rd plaintiffs as lawfully required. The 2nd and 3rd plaintiffs were therefore not aware of that meeting.

Another notice dated 30/3/90 was given by the defendant for a meeting of the 1st plaintiff to be held on the 20/4/90. This as well was not served on the 2nd and 3rd plaintiffs. Thereafter, the defendant minuted a supposed adjourned general meeting of the 30/4/90. Notice again was not given to the two plaintiffs 2nd and 3rd. In the latter meeting the defendant unilaterally appointed herself chairman and continued with the meeting without a quorum. In that meeting, the defendant appointed herself a director of the 1st plaintiff contravening the provisions of the Act.

Another / a further meeting of the directors of the 18.5.90 was minuted by the defendant. There was no quorum but despite that the defendant unlawfully and unilaterally resolved that she be the sole signatory to the 1st plaintiff's bank accounts. She has followed this by a rampant withdrawal of moneys from the 1st plaintiffs accounts thereby subjecting the plaintiffs to irreparable loss.

The prayers sought, among others, are therefore for :-

(a) A declaration that the meeting held on the 30.4.90 is invalid and null and void, and *ultra vires* the 1st plaintiff.

(b) A declaration that the resolution in the meeting of the 18.5.90 is fraudulent, unlawful, invalid and null and void.

(c) An injunction restraining the defendant from acting or enjoying as a director of the 1st plaintiff.

(d) An injunction restraining her from operating the bank accounts of 1st plaintiff.

(e) An injunction restraining the bank from allowing her so to do..."

On same date as of the plaint the plaintiffs also took out a chamber summons application praying for a temporary injunction against the defendant to restrain her from operating the accounts aforementioned, engaging as a director of the 1st plaintiff and to restrain the banks from giving her access, as it were, to the 1st plaintiffs bank accounts.

An *ex-parte* order was given out but it was subject to the application being heard *inter-partes*. This was done and, hence, this ruling.

The application is opposed and very bitterly contested. Miss Mutua argued at length in support of it and cited a lot of authorities. Her arguments were substantially directed at establishing that the actions of the deft / applicant right from the 27th February, 1990 when the notice for the meeting of 27.3.90 was issued up to the 30th April, when she purportedly became a director and through to the 18.5.90 when she became the sole signatory to the companies accounts were illegal, null and void. I have no doubt that in trying to establish that, she intends thereby to show that the applicant has a *prima facie* case with a probability of success.

Mrs Nanjero with equal vigour argued against the granting of the prayers sought also stating substantially that all the actions of the defendant/ respondent which have been condemned by the applicant, were in order, lawful and valid. She argues therefore that the applicants have not established a *prima facie* case with a probability of success. They have also not shown that in the event of the prayers being refused, they stand a chance to suffer such kind of injury that an award of damage may not make good. She invites the court to agree with her and to dismiss forthwith the present application.

The basic law relating to application of this nature is stated in the now celebrated case of *Ceiller vs Cassman Brown & Co Ltd* [1973] EA 355, is this: That before an injunction can be granted:-

The applicant must show a *prima facie* case with a probability of success; An injunction will normally not be granted unless the applicant might otherwise suffer irreparable injury.

The burden is of course, on the applicant to show, on the preponderance of probability the above. When the court is in doubt it will decide the application on the balance of convenience. A short resumé of the facts that give rise to the grief laden souls of the actors in this play maybe be given as follows:-

The 1st plaintiff – an incorporated company, had directors one of whom – and the main one for that – has since died. The dead one seems to have been the major share holder. This may not be relevant nor important and, it may also be wrong, but it appears that the 2nd applicant and the respondent – judging from their names – are the spouses of the dead share holder. As it usually happens, after his death, trouble has cropped up between the survivors. But be that as it may.

A notice dated 27th February, 1990 to a person designated as director and signing for Ratibu Registrars was given for the meeting or holding of the extraordinary general meeting of the shareholders on 27.3.90. The notice purported to be under or in accordance with Section 132 (3) of Cap 486 and the resolution sought to be passed was that Catherine Aloo Mwok –

Handa and Anne Nyawacha Mok-Handa be appointed directors of the company. It was signed on before of the requisitionist Mrs Anne Nyawacha Mwok – Handa said to be the holder of 25% of the paid capital of the company and at her request.

The applicants say that they were not served with this notice. The affidavit of the 1st plaintiff's secretary says that that meeting would not go on because there were only two shareholders present namely the respondent and the plaintiff / applicant No 2.

The next meeting was held on 20.4.90 and the respondent says that notices for this meeting were sent out to all members of the company. The same secretary or rather a director of the 1st plaintiff's secretary by Bernard Wilson states this: On the 20/4/90 only Mrs Anne Handa the respondent appeared. The meeting could not proceed then for lack of quorum and it adjourned to the 30th April, 1990 as the 27th April was a public holiday.

The applicants state that they were not served with any notice for this meeting. We have minutes for the adjourned meeting of 30/4/90. Present were Anne Handa - the respondent and B Wilson from the 1st plaintiff's company secretary. B Wilson says that this meeting went on in accordance with the Companies Act and the respondent was appointed director of plaintiff.

The next meeting was the directors meeting of 18.5.90 which Mr Wilson states the 2nd plaintiff attended and put in the deliberations as a director. He adds that in that meeting she voluntarily signed the bank form issued by Barclays Bank giving the respondent the mandate to operate the bank account.

One of the basic issues that will stand to be decided when the main suit finally comes to hearing is whether the meetings of the 20th and 30th April, 1990 were valid. Related to this will be the issue of the validity of the appointment of the respondent on the 30th April, as a director.

It must be however, be borne in mind that the hearing was not the hearing of the main. What the applicants needed to establish among others being that they have a *prima facie* case with a probability of success. The notice for the meeting on 27.3.90 is stated to have been given in accordance with section 132 (3) of the Companies Act. Presumably the one dated 30.3.90 was given under the same section through not expressly stated so in it.

Section 132 (1) of the Act says:-

"The Directors of a company ...., shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than one tenth of such of the paid up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company, forthwith proceed duly to convene an extraordinary general meeting of the company."

132 (3) states:

"If the directors do not within 21 days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of them representing more than one half of the total voting rights of all of them, may themselves convene a meeting ..."

It is submitted in the application that this notice of the 27.2.90, not having been given by a director of the company is null and void because under S.132, only the directors of a company are empowered to convene an extra-ordinary meeting. The notice is I have, said, however, states it was given under, not s132(1) but s132(3). The problem here is that a notice can only be given under s132 (3) after the directors have failed to give it under s132 (1). There doesn't seem to be evidence that directors failed to comply with provisions of s132 (1), after a request by the requisitionists or that there was such a requisition under that sub-section. I have read the provisions of the Act in this respect in conjunction of course, with counsels arguments. Without purporting to decide on the validity of these notices of 27th February and 30th March, 1990, I have some doubt as to whether the respondent/ defendant is not going to have an uphill task proving that they were valid. The issue is not going to resolve around whether the applicants received notices or not because, if the notice itself is found to have been invalid, that should be the end of the matter. If the notices of the 27th February and 30th March, are found to have been invalidly issued, even considering other factors referred to me herein, the validity of the meetings held on the 20th April and subsequently 30th April, will stand vary much on shaky grounds. It would appear that notices did not

have to be sent out in respect of the adjourned meeting if the 30th April, 1990, but this would depend on whether the notice for the 20th April meeting was valid. If invalid then there would be nothing to validate the 30th April meeting and I do not think I need to say what would be the effect of the subsequent meeting of the 18th May, 1990. It is not disputed that the 2nd and 3rd applicants are directors of the company. It is said that each holds one share. This is also not in dispute as much as it is not disputed that the respondent holds quite a large number of shares amounting to 3,750.

The 2nd applicant states in her affidavit that the defendant being the sole signatory to the banks accounts "will use up and deplete the moneys of the company which is heavily indebted to several creditors in substantial sums." I am afraid that I saw no evidence forthcoming in this respect. In addition, there are incorporated into the Companies Act checks and balances to ensure that this doesn't happen. I could also find no evidence to support the contention by the 2nd applicant that the defendant has -

"approached the banks with a view to getting large sums of moneys released to her from the said accounts without our authority as directors."

The applicant No 2 states further in her affidavit that:

"Without our authority as directors of the 1st plaintiff the defendant instituted High Court Civil Suit Number 2113 of 1990 engaging the 1st plaintiff in expensive and spurious litigation thereby carrying further indebtedness to the same."

My view on this is that the suit was very much in the interest of the company. The premises had virtually gone and in addition it would appear that the company's assets were at a real risk of being auctioned to realize the arrears of rent. There is no evidence that the 2nd and 3rd applicants were taking steps at all to see that this was not done. It is as a result of the respondents quick and courageous action that both the assets and premises of the company were saved – at least for the time being. I would not call the institution of that suit "engaging the 1st plaintiff in expensive and spurious litigation" and I have not been told how this "caused further indebtedness to the same". The respondent had the most to lose being the surviving majority share holder. She had to protect her interest. If this was without authority and *ultra vires* her powers, is another matter. What is true is that she saved the destruction of the goose that brings forth the golden eggs.

If the company stops, the applicants No 2 and 3 would not have as much to lose as will the respondent. Indeed it will not be such injury that an award of damages cannot repair. I almost want to agree with the respondent's lawyer that there were malatides in bringing this application. Or perhaps these were not. What is clear is that I do not find the applicants to have come to this court with completely clean hands. What would be the effect of granting the injunction? The result in my view would be that the activities of the company would must certainly grind to a halt with the company's debtors rushing to realize their indebtedness. The affidavit of the respondent, and the circumstances of the situation since the main shareholder died gathered from bits and pieces here and there, drives me to this conclusion.

And, what would be the effect of the injunction not being granted? No doubt, I believe, that the respondent would exert her force to see that the company is kept alive for the benefit of her vast interest in it, and this will naturally also guard the interest of the other shareholders. There should be no reason to suggest that she should or will run the affairs of the company recklessly in a manner that she alone considers fit. There are other directors who should ensure that this doesn't happen. What I am saying is this: that I have not been shown that there is a possibility or a likelihood that the applicants will suffer irreparable injury if the injunction is not granted. On the contrary, I am of the view that granting the prayers sought would have the effect of killing the 1st plaintiff – the company. If it dies, the person who will suffer most will be the respondent. I cannot use my discretion to grant the prayers sought. Even the balance of convenience militates against it. It may be that at the end of the day, the applicants plaintiff will win. But if they do so, it should be with regard to something which is alive and well rather than that which is dead.

I find as a result of the aforegoing that I must not allow this application. I accordingly dismiss it and

discharge the interim order. I order that the costs of this application be awarded to the respondent / defendant.

Dated and Delivered at Nairobi this 4th Day of July, 1990

J.A. MANGO

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JUDGE