



IN THE LAND AND ENVIROMENT COURT AT MALINDI

MISC. APP. NO.4 OF 2014

TONY KENT.....APPLICANT

=VERSUS=

POLCINO OASIS LIMITED.....RESPONDENT

RULING

Introduction

1. On 4th March, 2014, I granted to the Applicant leave to institute a derivative action suit on behalf of and for the benefit of Polcino Oasis Limited and himself. The Applicant/Applicant subsequently filed the Complaint and the Application dated 7th March, 2014 on 10th March, 2014. In the Application, the Applicant is seeking for the following orders:-
 - a. **This Honourable Court be pleased to compel the Registrar of Companies to immediately revoke the transfer of ninety (90) ordinary shares in the 4th Respondent to 1st and 2nd Respondents procured in September 2010 or thereabout and instead register them in favour of the Estate of Nicola Polcino (deceased).**
 - b. **This Honourable Court be pleased to compel the Registrar of Companies to immediately revoke the appointment of 1st and 3rd Respondents as directors of the 4th Respondent and reinstate the Applicant as a Director of the 4th Respondent.**
 - c. **This Honourable Court be pleased to compel all commercial banks in Kenya holding bank accounts in favour of the Respondents and Polcino Oasis Management Limited to upon service of this Honourable Court's order to cease all transactions over the said account(s) and deliver certified copies of each of the bank account's statements.**
 - d. **The Respondents, whether by themselves, servants and/or agents, be compelled to deliver to the Applicant's Advocates herein, the 4th Respondent's Company Seal, the original Grant registered as Number C.R.No.18273/1 in respect of all that parcel of land known as L.R.No.1862, Silversands Road, Malindi District, within Kilifi County, together with all other material documents and instruments of the 4th Respondent including but not limited to the rubber stamps, receipt books, true copies of the sub-leases, Deeds of surrender and Deeds of Assignment.**
 - e. **This Honourable Court be pleased to compel 3rd Respondent to deliver audited accounts over the affairs of the 4th Respondent from January 2005 to date when he was appointed a Receiver manager of the 4th Respondent, whilst the 1st and 2nd Respondent's deliver the accounts from September 2010 to date.**
 - f. **This Honourable Court be pleased to compel all proprietors as lessees of apartments and shops to produce true copies of their Sub-Leases and receipts and any other evidence of any**

- payments made to the Respondents in respect of the 4th Respondent primary asset, Polcino Oasis Village, erected on the aforementioned property.
- g. **The costs of this application abide the costs of the derivative action suit.**
2. The Application has been opposed by the 1st, 2nd and 3rd Respondents/Respondents.

The Applicant`s case

3. Maurizio Turato, the lawful attorney of the Applicant swore a detailed affidavit in support of the Application.
4. The Applicant's Attorney deponed that Polcino Oasis Limited (The Company) was incorporated as a limited liability company with a share capital of Ksh.40,000 divided into 400 ordinary shares of Ksh.100 each.
5. Initially, it was deponed, the company was incorporated with only two shareholders, namely Nicola Polcino and Cosimo Polcino (the 1st Respondent). However, in April 2002, the shareholding and directorship of the company changed when Nicola Polcino passed on following a fatal accident along Kilifi-Malindi Road. Before the demise of Nicola Polcino, who had 90 shares in the company, the Applicant and the 1st Respondent held five (5) shares each in the company while the Directors of the company were Nicola Polcino, the Applicant and Marafioti Giancarlo.
6. The Applicant`s Attorney has deponed that in January 2005, Thomas Hinzano Ngonyo (the 3rd Respondent) Giovanni Decarlo and Anne Wausi Mutiso were appointed as Receiver Managers of Polcino Oasis Village, the company's primary asset.
7. It is the Applicant's case that in September 2009, Cosimo Polcino, the 1st Respondent and his half-brother, Nicholas Jack Polcino, the 2nd Respondent fraudulently resealed a non-existent grant in respect to the Estate of Nicola Polcino and transferred the 90 ordinary shares belonging to the Estate of Nicola Polcino to themselves. The two also appointed the 1st Respondent and Thomas Hinzano Ngonyo, the 3rd Respondent, as directors of the company.
8. Having appointed themselves as directors of the company, the 1st and 3rd Respondents incorporated a company known as Polcino Oasis Management Limited (the management company) through which they collected service charge payments from the lessees of Apartments and shops at Oasis village as well as rents for all the Apartments belonging to the Company.
9. The Applicant's Attorney deposed that the 1st and 3rd Respondents have since July, 2011 sold off twelve apartments in Oasis village for an undervalued sum of Ksh.40,500,00 which sum was never applied for the benefit of the company nor was any dividend paid out to the bona fide shareholders of the company.
10. The Applicant's Attorney deponed further that when the High court and the Court of Appeal declared that the grant that the 1st and 2nd Respondents had used to effect the changes in the company was fraudulent, the 1st and 2nd Respondents left the country while the 3rd Respondent took off from Oasis village without handing over any documents, keys or assets to the Applicant; that from the foregoing, it is unlikely that the company as currently constituted will pursue any action against the 1st, 2nd and 3rd Respondents for the losses it has incurred due to their fraudulent actions and that this Application should be allowed.

The 1st and 2nd Respondents` case

11. The 1st and 2nd Respondents filed their joint Grounds of Opposition in which they averred that the Application contravenes the mandatory provisions of sections 177,178,179,180,181 and 185 of the Companies Act; that this court should invoke the provisions of section 135 of the Companies Act and that the orders being sought are final in nature.
12. The 1st and 2nd Respondents finally averred that in the absence of Marafioti Giancarlo as a party in this case, then the application is misconceived, mischievous, frivolous and vexatious.

The 3rd Respondent`s case

13. The 3rd Respondent swore a detailed Replying Affidavit and deponed that he was appointed to manage the 4th Respondent's primary asset by the court on 29th December, 2004 and that he was not aware that the 1st and 2nd Respondents had an intention of defrauding the company.
14. According to the 3rd Respondent, the Management Company was incorporated by the 1st Respondent with 1% shareholding together with the 4th Respondent with 99% shareholding and that the company appointed Grant Thornton to handle all the financial aspects relating to the management of the company's primary asset (the Oasis Village) which included collection of service charges.
15. However, the lessees of the apartments and shops persistently failed to pay the service charge. The 3rd Respondent denied that him, together with the 1st Respondent have since 2011 sold off twelve apartments owned by the company.
16. The 3rd Respondent deponed that the company only owned four apartments which were sold for a sum of Ksh.12,500,000 and the proceeds used solely for the benefit of the company in maintaining the company's primary asset – Polcino Oasis Village.
17. It is the 3rd Respondent's position that on 18th February 2011, the Applicant requested him to hand over the keys of the company which he did and thereafter ceased to have any access to the company's office and that the documents being demanded by the Applicant are not in his possession; that for the same reason, he is unable to deliver to the Applicant accounts over the affairs of the company and that the company's auditors have declined to release audited accounts to the company due to non-payment of their fees.
18. The Applicant and the 3rd Respondent filed further affidavits which I have considered.

Submissions

19. The Applicant's advocate submitted that what the Applicant is seeking is for an order of *status quo ante* the demise of his father, the late Polcino Nicola, who was the majority shareholder in the company.
20. The Applicant's counsel submitted that pursuant to the provisions of section 177 of the Companies Act, a private company is allowed to have one director; that the suit does not contravene the provision of sections 178-181 of the Companies Act and that the Applicant was successful in proving fraud as against the 1st and 2nd Respondents in Mombasa High Court Succession Cause No.3 of 2006 which led to the revocation of the non-existent grant that was used to procure the fraudulent changes to the shareholding and directorship of the 4th Respondent.
21. The 1st and 2nd Respondents' advocate submitted that Polcino Oasis Limited (the company) is a private company to which the Regulations of Table "A" Part II in the First Schedule of the Companies Act apply and that pursuant to section 177, the company must have at least two directors.
22. Counsel submitted that at the time of incorporation of the company, there were only two directors and shareholders, namely Polcino Cosimo and Polcino Nicola; that the Applicant has not tendered any evidence to show how Polcino Cosimo's directorship was changed and that the Applicant has not shown how he acquired his shares and how he, together with Marafioti Giancarlo were appointed directors of the company.
23. The 1st and 2nd Respondents' advocate further submitted that the fact that the 2nd Respondent is said to have been a shareholder in the company and not a director, his joinder in the suit amounts to a misjoinder because a derivative action is a suit brought by a shareholder on behalf of a company against other directors.
24. Counsel submitted that the prayers being sought by the Applicant cannot be granted at this stage because they are final in nature; that this matter should go on trial to establish whether or not the Applicant is a bona fide shareholder of the company and that this is neither a clear nor a straight forward case for a mandatory injunction to issue as was held in the case of **Locabail International Finance Ltd vs Agro-Exparte & Another (1986) IALLER 901**.
25. Counsel finally submitted that the Application has been brought in complete disregard of Articles 47 of the Constitution, sections 118 and 142 of the Companies Act, Regulation 96 of the Regulations for Management of a company limited by shares not being a Private Company and

Regulations 3 and 7 of the Companies (High Court) Rules. Counsel relied on the case of **Tasmac Limited=vs=Roberto Macri & 4 Others (2014)e KLR, Thomas=vs=Aisha Mohamed Rahmalthullah & 3 Others(2009)e KLR and Jakoyo Patrick Onyango Airo=vs=Kenani Housing Co.Ltd(2013)e KLR.**

- 26.The 3rd Respondent's advocate submitted that in view of the fact that the late Nicola Polcino had 90% shares in the Company, it is only the administrators of the Estate of the said Polcino Nicola who can bring a claim for the recovery of his shares in view of the provisions of section 82 of the Law of Succession Act.
- 27.The 3rd Respondent's counsel submitted that the Applicant has not proved that the shares of the company were fraudulently transferred to the 1st and 2nd Respondents. Counsel submitted that the appointment and removal of Directors of a company is governed by its Articles and in this case Regulations 96 up to 97 of Table A and section 185 of the Act. According to counsel, the Applicant has not proved that he was not removed as a Director in accordance with the Articles of the company; that the Applicant has not stated the fraudulent acts which were used to effect the appointment of the 1st and 3rd Respondents as directors of the company and that it is not the duty of the court to appoint or remove directors of a private company.

Analysis and findings

- 28.As I stated at the beginning of this Ruling, this suit has been commenced by the Applicant as a derivative action on behalf of and for the benefit of the 4th Respondent (the company) pursuant to the leave that was granted to the Applicant by the court on 4th March, 2014. Before the court can grant leave to a minority shareholder to commence a derivative action, it must be satisfied that the company is entitled to the intended relief and that the action falls within the threshold of the exceptions to the rule in **Foss=vs=Harbottle (1843)Hare 461.**
- 29.The crux of the Applicant's claim is that owing to the actions of the 1st, 2nd and 3rd Respondents, who were directors and or shareholders in the company, the Applicant and the company have suffered loss and damage.
- 30.The particulars of fraud in the Plaintiff include the irregular resealing of a non-existent grant in respect of the Estate of Nicola Polcino, the majority shareholder in the company, in Malindi High Court Succession Cause No.31 of 2006; procuring the filing of company forms at the companies registry so as to effect changes to the companies shareholding and directorship; removing the Applicant from the directorship of the company and appointing the 1st and 3rd Respondents as the company's directors; transferring shares from the Estate of the late Nicola Polcino to the 1st and 2nd Respondents so as to give them majority shareholding in the company; selling apartments belonging to the company's main asset – Oasis village; demanding and collecting service charge from the lessees of shops in the company's asset and converting the proceeds to their own use and failing to maintain the company's apartments and shops.
- 31.The Applicant has prayed in the Plaintiff for special damages to the tune of Ksh.282, 700,000 and in the alternative for Ksh.40, 500,000 as mesne profits for the apartments belonging to the company and for the service charge.
- 32.In the meantime, the Applicant is seeking for orders of mandatory injunctions as particularized in the Application before me.
33. A mandatory injunction is an injunction which orders a party or requires a party to do an affirmative act or mandates a specified course of conduct. A mandatory injunction is an extraordinary remedial process which is granted not as a matter of right, but in the exercise of sound judicial discretion.
- 34.The guidelines that should be adhered to by the courts before a mandatory injunction can issue were spelt out in the case of **Locaball International Finance Ltd. -Vs- Agro Expert and and Others (1986) 1 ALL E.R. 901** where it was held as follows:

“A Mandatory injunction ought not to be granted at an interlocutory stage in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which can be easily remedied or

where the defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance, that at the trial, it would appear that the injunction had rightly been granted"

35. These guidelines have been followed consistently by the courts. In the case of **Mucuha -Vs- Ripples Limited (1990-1994) EA 388**, the Court of Appeal quoted with approval the case of **Canadian Pacific Railway -Vs- Gaud (1949) 2 KB 239** in which it was held as follows:

"The Principles of granting a temporary mandatory injunction are that they will only be granted exceptionally and in the clearest cases."

36. In the case of **Shepherd Homes -Vs- Sandhan (1970) 3 WLR 348**, Megary J, as he was then, drew the distinction between a prohibitory and a mandatory injunction as follows:

"Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps and may require the dismantling and destruction of something already erected or constructed (as in the present case.) This will result in a consequent waste of time, money and materials if it is ultimately established that the Defendant was entitled to retain the erection."

37. The reason as to why a mandatory injunction at an interlocutory stage should only be granted rarely and in exceptional circumstances was stated by Megary J. in the *Shepherd Homes* (supra) as follows:

"If a mandatory injunction is granted on motion there will normally be no question of granting a further mandatory injunction at the trial; what is done is done and the Plaintiff has no motion or destruction that he seeks....."

38. According to the Memorandum and Articles of Association of Polcino Oasis Limited (the company), the company was incorporated with two shareholders, namely, Polcino Cosimo (the 1st Respondent) and Polcino Nicola (deceased). Each one of them held one share in the capital of the company. The nominal share of the company was stated to be Ksh.40,000 divided into 400 ordinary shares of Ksh.100 each. On that basis, the company was incorporated in 1999.

39. The Applicant has annexed on his supporting affidavit a document known as CR 12 from the Registrar of Companies dated 4th March, 2002 showing the change of directorship of the company. The document states that according to the company's resolution, the shareholding of the company had changed. Polcino Nicola (deceased) held 90 shares, Kant (the Applicant) held 5 shares while Polcino Cosimo (the 1st Respondent) held 5 shares. Marafioti Giancarlo is shown to be a director in the company. The actual resolution of the company showing this state of affairs was not attached on the Affidavit.

40. The Applicant also annexed on his Affidavit the annual returns of the company for the period up to the 3rd September, 2010 which indicates that as at that time, the Applicant had 5 shares, while the 1st and 2nd Respondents held 90 and 5 shares in the company respectively. The same document shows that the shares which were held by the Estate of Polcino Nicola were transferred to the 1st and 2nd Respondents in the ratio of 60:30 on 24th August 2010 and on the same day, the 2nd Respondent re-transferred all the shares that he had acquired from the Estate of Polcino Nicola to the 1st Respondent. It is this transfer of the shares of the Estate of Polcino Nicola to the 1st and 2nd Respondents that the Applicant has claimed was done using a falsified grant.

41. In the same document, the directors of the company have been indicated to be the Applicant, the 1st Respondent, the 3rd Respondent and Marafioti Giancarlo.

42. In the letter dated 19th July, 2011 by the Registrar of Companies, the Registrar stated that according to the records the 1st Respondent held 90 shares in the company while the 2nd Respondent and the Applicant held 5 shares each.

43. It is not clear from the annexures how the shares of the Estate of Polcino Nicola were transferred to the 1st and 2nd Respondents, although, as deponed by the Applicant, the 1st and 2nd Respondents may have used the forged grant to effect the changes of the shareholding. However, that can only be left to conjecture because the Applicant did not annex the transfer document in respect to those shares.
44. It is true, as argued by the Applicant, that the grant that the 1st and 2nd Respondents obtained in respect to the Estate of Polcino Nicola was declared null and void by Mureithi J and the said grant cannot therefore confer on the 1st and 2nd Respondents the shares held by the late Polcino Nicola. The effect of that position would then be that the shares of the late Polcino Nicola can only revert to his Estate and the same can only be distributed after the finalization of the succession cause in respect to that Estate.
45. Pursuant to the provisions of section 82 of the Law of Succession Act, it is only the legal representative of the late Nicola Polcino who can move this court and ask for an order compelling the Registrar of Companies to revoke the transfer of 90 shares in the Company to the 1st and 2nd Respondents and have them registered in favour of the Estate of Nicola Polcino and not the Applicant by way of a derivative action.
46. And even if it can be argued that the Applicant has the *locus standi* to move for such an order, then evidence has to be led to show that indeed the said transfer of shares was done pursuant to the impugned grant and not by way of a resolution of the then directors and or shareholders. That is an issue which can only be determined upon full trial and not at an interlocutory stage.
47. The Applicant has also prayed for an order that this court do compel the Registrar of companies to immediately revoke the appointment of the 1st and 3rd Respondents as directors of the company and reinstate the Applicant as a director.
48. The appointment and removal of directors of a company is governed by its Articles of Association and Regulation 96 of Table A, Part 1 of the 1st schedule of the companies Act which was adopted by the company as read together with section 185 of the Companies Act. Section 185 of Companies Act provides that a Director can be removed from office at any time by ordinary resolution of the company. The Applicant has not alleged that his removal as a director, or the appointment of the 1st and 3rd Respondents as directors was not sanctioned by an ordinary resolution of the company or that he was not given a notice before such resolutions were made.
49. The Applicant has filed this suit on the basis of the wrongs alleged to have been committed against the company. However, he has not laid a basis to enable this court to interfere in the internal management of the company in respect of how directors of the company were appointed or removed. The court can only interfere in the internal management of a company if it is shown that the act complained of is *ultra vires* or is of a fraudulent character or not rectifiable by ordinary resolution (**See In the matter of Winding up of “K” Boat service-Nairobi H.C.C.C. No. 35 of 1997**).
50. This court cannot at this stage state that the appointment of the 1st and 3rd Respondents as directors of the company was done fraudulently in view of the fact that even before the 1st and 2nd Respondents purported to share amongst themselves the shares belonging to the Estate of Polcino Nicola, they were shareholders in the company in their own right and could have passed resolutions including the appointment of directors. It is the process of that appointment that the Applicant should or can challenge by showing the *ultra vires* or fraudulent actions of the said shareholders. The Applicant has not offered to this court such proof. In any event, the 3rd Respondent was appointed as a director by the court and not by the 1st and 2nd Respondents.
51. The Applicant has also asked this court to freeze the 1st to 3rd Respondents' bank accounts. Again, no basis was laid for this order, which is a mandatory injunction, to be issued at an interlocutory stage.
52. This court cannot also grant to the Applicant an order compelling the Respondents to deliver to him the original Grant in respect to the company's assets, because, as I have stated above, the Respondents are still shareholders and directors in the company. The issue as to who is entitled to keep and manage the company's assets and documents can only be made by a resolution of the shareholders or directors and not by the court. This position also applies to the other orders that the Applicant is seeking.

53. As was stated by Kuloba J (as he was then) in the case of “**K**” **Boat Service** (*Supra*), it is very important for companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. This court therefore declines to interfere in the management of the affairs of the 4th Respondent at this stage because no basis, *prima facie*, has been laid for such interference.
54. The other intriguing fact about this Application is that the prayers being sought are not in consonance at all with the prayers in the Plaint. It would appear that the Application was to be dealt with in isolation with the prayers in the Plaint which is not acceptable. Even where a party is seeking for a mandatory injunction at an interlocutory stage, a corresponding prayer must be pleaded in the Plaint.
55. The prayers in the Plaint have nothing to do with the mandatory orders of injunction in the current Application and one wonders how the court is supposed to determine whether the Applicant has a *prima facie* case with chances of success not. On that basis alone, I would still have found the Application to be incompetent. I have however given other reasons why I think the Application is unmeritorious.
56. The Application dated 7th March, 2014 is therefore dismissed with costs to the Respondents.

Dated and delivered in Malindi this **11th** day of **July**, 2014.

O. A. Angote

Judge