



Nanji & 2 others v Exobi (Finance House) Limited (Civil Appeal E434 of 2020) [2025] KECA 1119 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1119 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E434 OF 2020
DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA
JUNE 20, 2025**

BETWEEN

ZAHID AA NANJI 1ST APPELLANT

FIROZ AKBARALI G NANJI 2ND APPELLANT

UNITED HOUSING ESTATE LIMITED 3RD APPELLANT

AND

EXOBI (FINANCE HOUSE) LIMITED RESPONDENT

(Being an appeal from the ruling of the High Court at Nairobi, Commercial & Tax Division, (M.W. Muigai, J.) dated 22nd July 2020 in HCCC NO. 213 OF 2019)

JUDGMENT

1. In this interlocutory appeal, the appellants challenge the exercise of discretion by the trial court in granting the respondent Exobi (Finance House) Limited (hereafter ‘Exobi’ or ‘the respondent’), injunctive orders relating to the shareholding and operations of the 3rd appellant, United Housing Estate Limited (hereafter ‘UHE’ or ‘the Company’).
2. Briefly, the background to this appeal is that by a plaint dated 27th August 2019, Exobi lodged a suit against the appellants before the High Court, seeking various declaratory and injunctive orders against the appellants. Simultaneously with the plaint, Exobi filed an application dated 28th August 2019 seeking, as against the 1st and 2nd appellants (the 1st and 2nd defendants before the High Court), the following orders:
 - a. That pending hearing and determination of this Application and /or suit inter parties:-
 - i. A temporary injunction be issued to restrain the 1st and 2nd Defendants, through themselves or through their agents, servants and/or employees from proceedings with



and/or effecting the transmission, allotments, issuance, registration and/or in any other manner whatsoever dealing with the unallotted shares of United Estate Limited.

- ii. A Mareva (freezing) injunction restraining and/or barring the 1st, 2nd and 3rd Defendant either by each one of them or jointly, or whether by themselves, their employees, servants, agents or nominees or any other person claiming through them from disposing, assigning, diminishing, transferring, alienating or otherwise dealing in any manner whatsoever with any of the 3rd Defendant's bank accounts or assets in Kenya save for the conduct of the 3rd Defendant's ordinary course of business.
 - b. That pending hearing and determination of this suit, an Order be issued appointing Mr. Poanangipalli Ventata Ramana Rao T/A Tact Consultancy Services, as a Receiver to manage and preserve all the assets of the 3rd Defendant and do hereby confer upon the Receiver all such powers as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the 3rd Defendant's assets, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents.
3. Exobi's case before the trial court was set out in the affidavit in support and supplementary affidavit, both sworn by Tasheer Gulam, a director of the respondent, on 21st August 2019 and 14th January 2020 respectively. It was averred that Exobi was the largest shareholder in UHE, holding 15,000 or 50% of the ordinary shares of the Company; Amirali Akbarali G. Nanji (deceased, hereafter 'Amirali'), a brother of Firoz Akbarali G. Nanji (Firoz), the 2nd appellant, held 7500 shares in UHE; the 2nd appellant held 7499 shares; the estate of Gulbanu A. Nanji, the mother of Amirali and Firoz, held one share. Zahid A. Nanji, the 1st appellant, a son of Amirali, though a director of UHE, held no shares.
 4. Exobi averred that following the death of Amirali on 13th May 2017, the 1st and 2nd appellants ran UHE for their own personal benefit; that they disposed of its assets at a gross under value as evidenced by the disposal of UHE's shares in Adam Brown & Company Limited (hereafter 'ABC Limited') at Kshs. 596,838.15 in 2018 without prior valuation, which was inimical to the company's interest.
 5. It was averred further that at a meeting purportedly convened by the 1st and 2nd appellants and held on 12th July 2018 following the death of Amirali, and without notice to Exobi, the 1st and 2nd appellants illegally purported to allot the ordinary shares of UHE to themselves and for their sole benefit; that this was done with a clear intention to increase the issued shares in the Company to themselves so as to illegally increase the 2nd appellant's shareholding to make him the largest shareholder while introducing the 1st appellant as a shareholder and director in the Company, in violation of both the [Companies Act](#) and the Company's memorandum and articles of association, thereby breaching their fiduciary duty as directors owed to the Company and the shareholders in general.
 6. Exobi further averred that the 1st and 2nd appellants also, on 12th July 2018, purportedly appointed two corporate directors, Supermarket Limited and Alijoe Development Limited, which they control, holding 66% of Alijoe and 78.7% of Supermarket Limited; and slotted to themselves shares held by the estate of Gulbanu Akerbali Nanji.
 7. The respondent averred that all these improprieties took place after the death of Amirali, and all the value in ABC, which the 2nd appellant had valued at Kshs. 1 billion in 2013 but sold in 2018 at Kshs. 500 million, had been created when Amirali was alive. The respondent therefore prayed for the orders sought in its application pending hearing and determination of the suit.



8. The appellants opposed the application and denied the respondent's allegations, filing in response thereto two affidavits, a replying affidavit and a supplementary affidavit, both sworn by the 2nd appellant on 8th November 2019 and 20th February 2020 respectively. In these affidavits, the appellants confirm: the relationship between the parties set out in the respondent's affidavits; the shareholding in UHE as at the time of Amirali's death; and that Exobi was the majority shareholder then, holding 50% of the shares.
9. While averring that the application was premature and that the respondent had not demonstrated that it was impracticable to hold a general meeting of UHE to warrant the intervention of the court, they asserted that the shareholders of UHE had always waived notice to general meetings, and that throughout the years of existence of the Company, Exobi had been represented at meetings by the Chair of the Board of Directors.
10. With respect to the sale of the shares in ABC, the appellants averred that they had been sold after a decision to sell had been made by the directors of UHE; that the shares had been valued by an accounting firm, PKF; that they had been sold at Kshs. 596,838,150 which could not be described as an undervalue; and the proceeds had been paid into the Company, which was of benefit to all members, including the respondent.
11. While admitting the allocation of the shares in UHE to the 1st and 2nd appellants, the appellants averred that the issuance had been pursuant to a resolution of the company, and that it was done at 10,000% above the nominal share value.
12. Upon hearing the application, the trial court, in the impugned ruling, partly allowed the application and granted the following substantive orders:
 1. ...;
 2. THAT the temporary injunction and mareva injunction are granted in terms of Notice of Motion Prayer 2 A & B as follows pending hearing and determination of the suit;
 - a. The Injunction is extended as granted in terms of court orders of 4th September 2019, by Hon. Lady Justice M. Kasango, that the Registrar General is restrained from making changes to the shareholding of the 3rd Defendant Company, United Housing Estates Limited. Any transmission of shares shall be from valid regular and legal orders from Family Court; from deceaseds' estates to the beneficiaries. All other shares sold or bought or held by the 3rd Defendant Company through its Directors shall await the decision of the Trial Court after full hearing of the matter. The shareholding remains as registered with Registrar of Companies and search conducted on. (Sic)
 - b. A Mareva injunction be and is hereby granted to safeguard assets of the Company and regulate the operations of all Company Accounts that the Signatories/Directors to settle Company's debts and expenses for goods and services proved to be supplied to the Company. Also settle, statutory payments and Company's officials/staff and employees' salaries and remuneration. The 3rd



Defendant's Company Bank Statements shall be considered at the Trial.

3. THAT the shareholding of United Housing Limited shall remain as registered with the Registrar of Companies and as per the Plaintiffs search on 8th August 2018 as per copy of search "TG2" until hearing and determination of the suit.
 4. THAT the Appointment of Receiver is suspended for 90 days on compliance of the conditions under section 3 CPA (a) & (b) above.
 5. THAT in default, the Court shall be moved to reconsider appointment of Receiver and/or hearing and determination of the suit inter partes.
 6. THAT the funds/proceeds of sale of ABC Company shares shall be retained in an escrow Account by the 3rd Defendant Company until hearing and determination of the suit or further orders of the Court.
13. Aggrieved by the ruling and the orders issued, the appellants filed the present appeal in which they raise, in their rather prolix memorandum of appeal dated 6th November 2020, some 30 grounds of appeal. However, in their submissions dated 10th May 2021, the appellants have condensed these grounds into five broad heads, namely:
- a. that the trial court erred in introducing and framing new issues for determination, which had neither been pleaded by the parties nor placed before Court;
 - b. that the trial court erred in finding that the respondent had satisfied the conditions necessary for grant of interim injunctive reliefs and in making final and definitive findings at an interlocutory stage;
 - c. that the trial court misconstrued or misinterpreted the conditions that would warrant the grant of a mareva injunction;
 - d. that the trial court misconstrued or misinterpreted the conditions that would warrant the appointment of a receiver over the Company;
 - e. that the trial court erred by unduly and prematurely interfering with the internal management of the Company.
14. At the hearing of the appeal, Mr. Inamdar and Mr. Muchiri appeared for the appellants, with Mr. Inamdar highlighting their written submissions dated 10th May 2021.
15. In support of their contentions on the first issue, the appellants relied on the case of Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule & 3 others (2014) eKLR to submit that the duty of the court is to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. They asserted that the trial court had therefore erred by introducing and addressing itself to an issue- that the matter before it was a derivative action- which had neither been raised in pleadings nor made the subject of argument by the parties.
16. The appellants submitted that, contrary to the respondent's assertion that the court's words were obiter dictum, the court was emphatic that the matter before it was a derivative action, describing it as falling squarely within the parameters of section 238 of the *Companies Act*, and proceeding to examine all the statutory provisions and principles relating to derivative actions. It was submitted that while the respondent concedes in its submissions that it had not brought a derivative suit, submitting, however,



- that the analysis by the judge was obiter dictum and not determinative of the suit, the appellants' position was that it is plain that the trial Judge regarded the issue as fundamental.
17. The appellants' second main ground of attack against the decision of the trial court is that the court erred in finding that the respondent had met the conditions for grant of interim orders. The appellants cited the case of *Nguruman Ltd vs Jan Bonde Nielsen and 2 Others* (2014) eKLR (The 'Nguruman Limited' case) in which this Court set out the remit of the court in considering whether or not to grant a temporary injunction in favour of an applicant.
 18. The appellants submitted that in making its decision, the trial court made final findings that the ABC shares were sold irregularly and at an under value, and that the shareholders of ABC were not served with notices of the sale. They submitted that the illegality or propriety of the sale of the ABC shares was highly contested, and the court should not have made conclusive findings thereon.
 19. The appellants further submitted that the trial court erred for having arrived at a conclusive finding in relation to the allotment of shares in UHE. The appellants highlighted the trial court's finding that on 12th July 2018, the 1st and 2nd appellants were the only two directors of UHE; that while, according to the company's articles of association, two directors constitute quorum for a meeting, the appellants 'circumvented the requirement of notifying members vide serving notice of meetings', and also failed to inform, consult or involve the respondent 'and Amirali's family to appoint a representative to the meeting.'
 20. The appellants submitted that the trial court found that the respondent had established a prima facie case solely from the conclusive findings that it made at the interlocutory stage. They refer to the definition of a prima facie case set out in the *Nguruman Limited case and Mrao Limited v First American Bank Limited and two others* (2003) eKLR to submit that once the trial court went into examining the substance of the main suit without hearing a rebuttal from the appellants, it was inevitable that it would find the presence of a prima facie case.
 21. They contended, finally, that the court erred in finding that the respondent would suffer irreparable loss not capable of being remedied by an award of damages. They submitted that the balance of convenience lay in declining to grant the injunction sought, noting that UHC had, under the stewardship of the 1st and 2nd appellants, continued to grow, recording profits in millions of shillings, to the benefit of all the shareholders.
 22. The appellants also impugn the grant of the mareva injunction by the trial court, contending that it did not take into account the factors that it should in granting such an order. They submit that from the ruling, it is clear that the factors that the trial court took into consideration when granting the order were the location of the respondent; whether the respondent was represented in UHE; the fact that UHE sold the shares it held in ABC Ltd; that the 1st and 2nd appellants allotted shares in UHE without approval; and that new directors of UHE were added illegally and unlawfully. They submit that the trial court erred in its decision as none of the criteria the trial court took into account is recognized under the law governing grant of mareva injunctions.
 23. The appellants further submit that the trial court used, as it did in granting the interim injunction, final findings which it had reached at an interlocutory stage, without having heard the appellants in rebuttal. They cite the court's findings that the respondent was kept in the dark with respect to meetings held in 2018; the irregular sale of ABC shares; and the allotment of UHE shares, all matters, they contend, that were highly contested.
 24. The appellants cite the case of *Mareva Campania Naviera SA v International Bulkcarriers SA* (1980) 1ALL ER 213 to submit that the overarching purpose of granting a mareva injunction is to prevent



a defendant from dissipating his property, which dissipation will have the effect of defeating the execution of an already existing decree, or a decree that may be passed against such defendant. They further cited the definition of a *mareva* injunction in Halsbury's Laws of England Vol. 3 which provisions and definitions, they submit, have been codified in Order 39 rules 5 and 6 of the Civil Procedure Rules, 2010.

25. The appellants also rely on the case of *Beta Healthcare International Limited v Grace Mumbi Githaiga & 2 others* [2016] eKLR and *International Air Transport Association & another v Akarim Agencies Company Limited & others* [2014] eKLR (the Akarim case) with respect to the conditions to be met before a *mareva* injunction can be granted, namely that the plaintiff has to demonstrate that it has a good arguable case; that the claim is one over which the court has jurisdiction; that the defendant has assets within the jurisdiction; that there is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and that the balance of convenience lies in favour of granting the injunction.
26. The appellants submitted that the trial court had jurisdiction to deal with the matter, and the company has assets within Kenya. They submit that the criteria that the court should have considered are whether the respondent demonstrated the presence of a good arguable case, a risk of the assets of UHE being removed from the jurisdiction or otherwise dissipated with the possible effect of rendering a possible judgment against the appellants ineffective, and in whose favour the balance of convenience tilt.
27. For the definition of an arguable case, the appellants cite the case of *Nimemia Maritime Corporation v Trave Schiffahrtsgesellschaft mnH & Co. KG (The Niedersachsen)* 1 ALL ER 398 in which an arguable case was defined as one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.
28. The appellants submit that in the circumstances of this case, the respondent cannot be said to have demonstrated the presence of a good arguable case, and that it also did not demonstrate a risk of the company's assets being dissipated. They submit that UHE is a company incorporated in Kenya in 1967; that it has a net asset base of Kenya Shillings two billion twenty-three million three hundred and forty thousand one hundred and eighteen (KShs. 2,023,340,118) and that it made an after-tax profit of Kenya Shillings five hundred and twenty-eight million five hundred and fifty-five thousand nine hundred and one shillings (KShs. 528,555,901) as at the end of 2018; that it has not charged any of its properties and cannot therefore, on the evidence before the court, be said to be likely to dissipate its assets.
29. In his oral highlights, Mr. Inamdar submitted that the crux of the matter before the court related to the irregular allotment of shares in UHE and transfer of its shares in ABC to the 1st and 2nd appellants following the passing of Amirali; that as the respondent was not a shareholder in ABC, it had no right to make any complaint about the affairs of ABC; that while the respondent was a shareholder in UHE and UHE is a shareholder in ABC, the two are nonetheless separate legal entities; that with regard to ABC, the complaint is about the directors' failure to notify shareholders of pre-emption rights on the transfer of shares; and that the respondent has no right to receive any such notification as it is not a shareholder in ABC.
30. Mr. Inamdar submitted that the respondent had sought to conflate grievances allegedly suffered by the late Amirali's family with the alleged grievances suffered by the respondent; that neither Amirali's estate nor any member of his family are parties to the suit; that they cannot purport to raise any complaints or seek any relief vicariously through the respondent, a fact which, according to the appellants, the trial court failed to grasp.



31. The appellants also took issue with the trial court invoking, in its orders, the issue of the probate proceeding relating to the estate of Amirali. Mr. Inamdar submitted that the issue should never have been brought in the proceedings, much less an order made involving the Family Court, without either knowing the full content of those proceedings or hearing the parties fully on the position.
32. Mr. Inamdar asserted that under common law, fiduciary duties are owed by directors to the company and not to the shareholders, and that shareholders are not able to pursue personal actions to remedy a breach. In any event, it was submitted, such a matter cannot be conclusively determined at an interlocutory stage, and the trial court should not have arrived at any conclusion on the issue at the interlocutory stage.
33. The appellants further impugned the ruling of the trial court on its finding, as a basis for its orders, that the appellants had carted away the company's assets, based on the respondent's claims that the appellants had stripped the company's assets. The appellants submitted that, aside from the fact that there was no evidence that the company's assets had been carted away, in law, shares do not form any part of a company's assets but belong to a shareholder; and that a shareholder has no legal or equitable interest in a company's assets, relying for this submission on the case of *Maritime Trader* [1981] 2LLR153,
34. According to the appellants, the only issue that the trial court could address with respect to shares was the complaint by the respondent that its shares in UHE had been diluted. The appellants submitted, however, that contrary to the respondent's contentions, there was nothing, to suggest that the 1st and 2nd appellants benefited by way of dividends from such dilution. In any event, according to the appellants, that was not a matter that could be determined at an interlocutory stage, and even if a preservative order was necessary, it could not possibly justify an injunction restraining the operations of the business of UHE or the appointment of a receiver to run its affairs.
35. It was further submitted for the appellants that the respondent had not demonstrated ultra vires and fraud on the part of the 1st and 2nd appellants; that they acted within their powers as directors; that with regard to ABC, so far as was relevant to the case, the 1st and 2nd appellant paid Kshs.596 million for the shares that they purchased following a professional valuation; that the said money was paid into UHE's account; that the trial judge simply failed to appreciate or consider the appellants' argument on this point, bearing in mind that the respondent has no interest in the issue as it is not a shareholder in ABC.
36. With regard to the shares in UHE allotted to the 1st and 2nd appellant, it was submitted that the trial court erred in making an order that proceeds received by UHE be held in escrow; that the funds were for the benefit of all parties, not just the appellants, and there was no basis for the funds to be held in escrow.
37. The appellants impugned the grant of an injunction on the basis that the trial court failed to appreciate that, on the central issue of shareholding in UHE, even if the respondent was able to show that it had a prima facie case, it had manifestly failed to show that if an injunction were not granted, it would suffer irreparable injury, or that it could not be compensated in damages.
38. Regarding the grant of a mareva injunction, Mr. Inamdar submitted that the trial court simply failed to appreciate the principles for grant of a mareva injunction and treated it as if it was akin to a standard interlocutory or mandatory injunction. He reiterated that a party seeking a mareva injunction had to show that it not only had an arguable case that was bound to succeed at trial, but that the refusal of an injunction would involve a real risk that a judgment in its favour would remain unsatisfied, which was not shown in the present case.



39. Further, that the risk of dissipation must be established by solid evidence, and that mere inference or generalized assertions are not sufficient. Mr. Inamdar submitted that the purpose of a *mareva* injunction is not to provide the claimant with security or to restrain the ordinary carrying on of business, which is what the order issued by the trial court had done, and it cannot therefore stand.
40. Regarding the order that, instead of a receiver being appointed as prayed, a representative of the respondent be appointed to *inter alia*, attend board meetings and added as a signatory to UHE accounts, pending hearing of the suit, Mr. Inamdar submitted that this was a prayer not sought by the respondent nor canvassed by any party; that it was determined *suo moto* by the court on the basis of section 3A of the *Civil Procedure Act*, namely, the inherent jurisdiction of the court; that the court had no right to pronounce itself on a relief not asked for, as this contravenes the principle of a fair hearing; that the court had no right to bypass the company's memorandum and articles in imposing representatives to the Board under section 3A, and the order cannot stand either.
41. The appellants submitted, on the authority of *United India Insurance v East African Underwriters* [1985] EA 898, that the trial court exercised its discretion improperly, and urged that their appeal be allowed. In the event, however, that this Court was minded to make any preservative order, the appellants asked that such order should be limited to forbidding any dealings with the shares in question or the making of any decision by use of the majority that would adversely affect the rights of the minority.
42. In opposition to the appeal, the respondent filed submissions dated 27th July 2021 which were highlighted by its learned counsel, Mr. Amoko, at the hearing. Drawing on the five areas into which the appellants condensed their grounds of appeal set out above, the respondent submitted, first, that since this is an interlocutory appeal, the jurisdiction of the Court is circumscribed by the fact that the dispute between the parties is still pending hearing and determination on merit, and this Court should refrain from making any concluded views on the matters in dispute to avoid pre-judging or prejudicing the pending suit. Reliance for this submission was placed on the case of *Eldoret White Castle Motel Limited v Kenya Power and Lighting Company Ltd* [2010] eKLR and *Kenya Breweries Limited & Another.v. Bia Tosha Limited & 5 others* [2020] KECA 522 (KLR).
43. Regarding the complaint by the appellants that the trial court found that the respondent's suit was a derivative suit, the respondent submitted that the observation by the learned judge was not relevant to the determination of the interlocutory application before the court; that after considering the pleadings and submissions of the parties, the court framed four issues for determination; that before delving into the issues, the court made an observation regarding what it termed a preliminary issue and made a reference to a derivative suit, then noted that the plaintiff (now respondent) may regularize the proceedings as a derivative suit.
44. The respondent submitted that the fact that this observation was not relevant to the determination of the issues can be gleaned from the fact that it did not form part of the court's disposition in the ruling or orders. It submitted that an appeal does not lie from a judge's obiter dictum observations, especially where the court went on to determine the merits of the issues falling for determination.
45. The respondent referred to the definition of obiter dictum in *Halsbury's Laws of England*, 4th ed. Vol 26 and to the decision in *Josephat Ndungo Maimbah v Vision Afrika Sacco Society Ltd* [2020] eKLR, in which Joel Ngugi, J. (as he then was), held that the obiter dicta determinations by a Magistrate cannot truly form the basis of an appeal. The respondent submitted, therefore, that the appellants' grounds of appeal in respect to the observation that the suit was a derivative suit cannot form a basis for overturning or setting aside the ruling and orders of the trial court.



46. The respondent acknowledged that the suit before the trial court was not a derivative suit. It submitted that a cursory glance at the plaint dated 26th August 2019 will reveal that the respondent's claim arises from the 1st and 2nd appellants' breach of fiduciary duties as directors to the members of the company through their concerted scheme to alienate the respondent and the beneficiaries of Amirali's estate from the affairs of UHE, to the detriment of the respondent as a member of the company. The respondent further submits that the 1st and 2nd appellants have proceeded to run the affairs of UHE in clear breach of the mandatory provisions of the *Companies Act*, thus aggravating the total disregard of their fiduciary duties as directors of UHE.
47. The respondent submitted, in reliance on the case of *Musa Misango v Eria Musigire and Others* [1966] EA 390, that in case of a personal wrong committed to a member, the complaining member may sue in their own name, but must show that the acts complained of are either fraudulent or ultra vires. The respondent cites the words of Sir Udo Udoma, C.J in the case that:
- “I conclude that I am satisfied that this suit is maintainable in law by the plaintiff in his own right, and that this court has jurisdiction to entertain it as the action is brought for injury done to the plaintiff personally by his co-directors and other members of the company.”
48. The respondent asserted that its claim was predicated on the 1st and 2nd appellants' breach of express provisions of statute and their fiduciary obligations in their capacities as shareholder(s) and directors of UHE, which was only joined as a necessary party to the proceedings; that the trial court correctly framed the issue falling for determination; and that the orders granted were not to preserve the interest of UHE but that of all the stakeholders in the company.
49. The respondent relied on the decision in *United India Insurance Co. Ltd. -vs- East African Underwriters (Kenya) Ltd.* (supra) and *Mbogo and Another vs. Shah* [1968] EA 93 with respect to the circumstances under which this Court will interfere with the exercise of discretion by the trial court. It submitted that the trial court properly found that it would be just and equitable to grant an interlocutory injunction in order to preserve the assets of UHE and suspend irregular actions. It attributed this to the court's finding that from the totality of the evidence, the respondent had established a prima facie case and presented an arguable case to be heard and determined at a full trial, noting the instances regarding the management and operations of UHE which showed infringement of the respondent's rights, that could not be adequately compensated by damages.
50. The respondent submitted that while the appellants are inviting this Court to consider whether it met the conditions for grant of an interlocutory injunction, the 1st and 2nd appellants had admitted their unlawful actions and breach of fiduciary duties under oath in both the Replying Affidavit sworn by the 2nd appellant in opposition to the interlocutory application on 8th November 2019, and the Replying Affidavit sworn by the 2nd appellant on 22nd July 2019 in COMM Misc. Civil Application No. E215 of 2019- *Exobi (Finance House) Limited v. Zahid Nanji & Anor.* The respondent submitted that these admissions by the appellants constituted a prima facie case as there was no longer a dispute between the parties as to the facts.
51. The respondent submitted that in light of the 1st and 2nd appellants' admissions, there was incontrovertible proof of breach of their fiduciary duties as directors under the common law as incorporated into statute under section 140(b) of the *Companies Act*, 2015, which must be exercised in promoting the interests of the company, and further violated section 142(a) of the Act which circumscribes the exercise of powers of a director for the purposes for which they are conferred.



52. The respondent submitted that in light of the statutory breaches by the 1st and 2nd appellant, the trial court cannot be faulted for having arrived at the conclusion that the respondent had established a prima facie case; that the court merely confirmed the appellants' admissions and issued orders accordingly, which cannot amount to final determinations. The respondent cited the case of *Devani vs Bhadresra & Another* (1972) EA 22, submitting that where there is an uncontested breach of a clear statutory covenant, the court must compel the defendant, by interlocutory injunction, to perform his obligation without regard to the balance of convenience; and that in this case, the trial court correctly invoked the duty of the court to stop any abuse of mandatory statutory legal requirements.
53. The respondent further submitted that at the time of determining the interlocutory application, the appellants had neither filed their statement of defence nor witness statements and documents to be relied on at trial but had only filed affidavits in response to the application. It submitted that the appellants could not therefore argue that the trial court engaged in a substantive interrogation of issues. Its submission was that the trial court correctly granted the equitable remedy of temporary injunction solely for the purposes of preventing grave and irreparable injury being occasioned to the respondent by the 1st and 2nd appellants, citing in support the *Nguruman Limited* case.
54. With respect to the grant of a mareva injunction, the respondent submitted that in issuing the injunction, the trial court considered the fact that the respondent is not resident in Kenya; that it was already shut out and kept in the dark when two meetings were held in 2018 in which the 1st and 2nd appellants decided to sell company assets to themselves, and without disclosing the proceeds thereof to the company's shareholders; had allotted all the unallotted shares in UHE to themselves without notice or consent of the respondent, the majority shareholder, and Amirali's estate, and in the process divested the respondent of its majority stake in UHE, resulting to diminution of its shares; and further in adding directors related to them without the respondent's knowledge or concurrence. The respondent submitted that the trial judge properly exercised her discretion and restricted the remit of the mareva injunction to the prejudicial actions and conduct of the 1st and 2nd appellants by only restricting the operation of UHE's accounts while ensuring UHE continued to operate as a going concern.
55. The respondent adopted its arguments that it had established that it had made out a prima facie case warranting the grant of an interlocutory injunction in support of its argument that it had made out a good and arguable case, with respect to admitted breaches of fiduciary duties by the directors of UHE, conflict of interest and appropriation of assets by the 1st and 2nd appellants following Amirali's death, to warrant the grant of a mareva injunction; that these acts were contrary to the 1st and 2nd appellants' fiduciary and statutory obligations; that the appellants' admissions are conclusive as to the true and incontestable facts; and that they effectively discharged the burden of proving a prima facie or a good and arguable case.
56. With regard to possible dissipation of assets, the respondent cited the *Akarim* case in which it was held that proof of dissipation for purposes of freezing orders is normally on a balance of probabilities and is inferred from the evidence offered. It reiterated its submission that the 1st and 2nd appellants have, in breach of the mandatory provisions of the *Companies Act* and in total disregard of their fiduciary duties as directors, embarked on appropriation of the assets of UHE in ABC Limited, being 600 ordinary shares comprising of more than 24% of the issued shares in the said company and valued in excess of Kshs. 2 billion to themselves and to two companies under their control at a gross undervalue, thereby stripping the assets of UHE, to the respondent's prejudice.
57. Further, that the 1st and 2nd appellant resolved to transfer the shares of Amirali's (and the 2nd appellant's) deceased mother (without probate, 22 years after her death) to the 2nd appellant and thereafter allotted 20,000 shares of UHE's unallotted shares in the proportion of 18,000 shares to the 2nd



appellant and 2,000 shares to the 1st appellant, thereby increasing the 2nd appellant's shareholding from approximately 25% to 51 %, while reducing the respondent's shares from 50% to 30%, with the intention to incrementally increase their rights over the retained earnings in UHE, to the detriment of the respondent and Amirali's estate.

58. The respondent further submitted that the appellants stopped declaring dividends but instead paid themselves hefty directors' fees in the sum of Kshs. 11 million annually. It contended that in light of these matters, the trial court cannot be faulted for intervening and granting a circumscribed mareva injunction in the terms set out in the ruling in order to preserve the interests of the respondent and all the stakeholders. Without the temporary and mareva injunctions issued by the trial court restraining the 1st and 2nd appellants from further unlawfully exploiting their control of UHE, the principal purpose of the suit, being the reversal of the unlawful allotments of shares, would be defeated.
59. The respondent further submitted that it had applied for the appointment of a receiver in view of the fiduciary and statutory violations by the 1st and 2nd appellants, who were exploiting their powers as the directors of UHE for their personal benefit. It submitted, however, that this relief was not granted by the trial court, and the appellants' submissions faulting the trial court with respect thereto are premature.
60. It was its submission, however, that contrary to the appellants' arguments before the trial court that a receiver could only be appointed where the company is facing financial difficulties, the power and duty of the trial court to appoint a receiver pending the determination of a suit cannot be gainsaid, as was found in the case of *Nasir Ibrahim Ali & 2 others v Kamlesh Mansukhlal Damji Pattni & another* [1998] eKLR, in which this Court upheld the appointment of a receiver under section 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.
61. The respondent submitted that in this case, the trial court considered the evidence before it demonstrating the 1st and 2nd appellants' misconduct and held that it was not just and convenient to appoint a receiver at that stage. It, however, correctly invoked section 3A of the *Civil Procedure Act* and suspended the consideration of the issue of appointment of a receiver for 90 days, subject to compliance by the 1st and 2nd appellants with other orders of the court, namely, pending hearing and determination of the suit, the appointment of a representative of the respondent to, among other things, attend and participate in Board meetings of UHE, with access to statutory, legal and relevant reports, and as a signatory to UHE'S bank accounts.
62. The respondent submitted therefore that the question whether or not the trial court correctly appreciated the principles for appointment of a receiver at an interlocutory stage does not arise in this appeal as no appointment was made. It submitted, therefore, that the trial court cannot be faulted for directing that a representative of the respondent be appointed to attend Board meetings and be given access to UHE on the basis that such order had not been sought in the interlocutory application, or that it amounted to interference with the management of UHE. The respondent cited the case of *Kenya Power & Lighting Company Ltd. vs. Benzane Holdings Ltd* [2016] eKLR with respect to the inherent jurisdiction, defined as the reserve or residual source of powers which the court may draw upon as necessary whenever it is just or equitable to do so, in order to do justice between the parties and to secure a fair trial between them.
63. In his oral submissions at the hearing, learned counsel, Mr. Amoko, noted that the interim injunction granted by the trial court was, contrary to the appellants' submissions, an extension of its earlier order issued on 4th September 2019 in terms, inter alia, restraining the Registrar General from making



changes to the shareholding of UHE; and that all other shares sold or bought or held by UHE should await the decision of the trial court.

64. Mr. Amoko further submitted that contrary to the submissions by the appellants, the appointment of a receiver had not been 'suspended'; and that the trial court had held that it was only in default of compliance with its order respecting the operations of UHE that the trial court would consider the appointment of a receiver.
65. Mr. Amoko asserted that it was the appellants' acts, admitted in the affidavit in response to the respondent's application, that provoked the suit and persuaded the trial court that a prima facie case had been established, as instances of mismanagement and systematic misappropriation had been established. Mr. Amoko illustrated this contention by citing the fact that after Amirali died, the appellants stopped declaring dividends; that 80% of the administrative expenses now became directors' fees; and in the meantime, they retained the earnings, in excess of Kshs. 1.2 billion, and then manipulated the shares; and that the effect of that manipulation was that the respondent, which owned 50% of the shares before this allocation and manipulation of shares, had now moved to 36%, while the 2nd appellant had moved to majority shareholder. Mr. Amoko submitted that as a result, when the appellants decide to distribute the retained profit, the respondent would get 36% instead of 50%, which is one instance of the immediate actions that required intervention by the court.
66. With regard to the appellants' contention that the 1st and 2nd appellants were not in breach of a fiduciary duty as they did not owe such duty to the respondent, as a shareholder, but only to the company, the respondent submitted that, on the contrary, fiduciary duties are owed, not just to the company, but also to shareholders and, under the new Companies Act, extend even to third parties with whom the company deals. Support for this submission was sought in the case of *Howard Smith Ltd vs AMpol Petroleum Ltd* [1974] 1 All ER 1126.
67. The respondent submitted that the appellants had not shown or attempted to show an abuse of discretion by the trial court that would warrant interference by this Court. Further, that there was no error of law made by the trial court, nor did the court act contrary to the evidence or take into account irrelevant matters or fail to take into account relevant matters. The respondent submits that the learned judge having set out all the appellants' arguments, failing to uphold them does not constitute an abuse of discretion. The respondent asked this Court to dismiss the appeal with costs against the 1st and 2nd appellants only, being the parties who provoked this matter, and who have filed the appeal and joined the company as a necessary party.
68. In his submissions in response, Mr. Inamdar contended that the trial court, having found that the suit was a derivative action, went on to treat it as such; that despite the fact that the respondent submitted that it had brought a personal action, the trial court failed to take into account what it should have considered in a personal action; and that by bringing a personal action, the respondent had removed itself from the ambit of the Companies Act.
69. Mr. Inamdar further submitted that to state that the respondent was a majority shareholder in UHE was a red herring; that while it owns 50% of the shares, that does not make it a majority shareholder; and if it is the majority shareholder with 50%, then that is the reason why it is not a minority and cannot therefore bring a derivative action. He submitted further that in any event, such derivative action had not been properly particularized in the plaint, nor was it proved at the hearing.
70. Mr. Inamdar maintained that the 1st and 2nd appellants had not acted ultra vires in allotting the shares in UHE to themselves; that the shares had not been allotted to third parties but to two of its directors; that it is the prerogative of the board to allot shares, and that Article 5 of UHE's memorandum and articles of association specifically authorizes the directors to allot shares to whomever they may please.



71. Mr. Inamdar submitted that the respondent's contention that there was mismanagement was based on the allegation that the directors' remuneration was worth 11 million in 2018, which is hefty when compared to its administrative expenses. He submitted, however, that 11 million, shared between two directors of a company that had declared profits of over or close to 150 million, was very reasonable.
72. We have considered the record of appeal, the submissions of the parties, both oral and written, and the extensive authorities cited. We believe that four issues, corresponding to the five areas on the basis of which the appellants impugn the ruling of the trial court, arise for determination:
- i. whether: the trial court introduced a new issue for determination, namely, whether the respondent's claim was a derivative suit;
 - ii. whether the trial court properly exercised its discretion in granting an interim and a *mareva* injunction to the respondent;
 - iii. Whether the trial court misconstrued or misinterpreted the conditions and circumstances for the appointment of a receiver at an interlocutory stage;
 - iv. whether the trial court unduly and prematurely interfered with the internal management of UHE.
73. The first issue relates to what the trial court referred to as 'Preliminary Issues', when it posed the question whether the matter before it was a derivative suit. We note, as the appellants submit, that the trial court considered the issue at some length, starting with a consideration of the law set out at section 238 of the *Companies Act*. Thereafter, the court stated that 'The instant matter falls squarely within the parameters of Section 238 *Companies Act* and is a derivative suit.' It then went on to observe that the plaintiff, the respondent before us, could 'regularise' the suit by seeking leave to sue in a derivative suit.
74. We have considered the record and note, as the appellants submit and the respondent concedes, that none of the parties had raised the issue of a derivative suit, or addressed the court on it. While the appellants devote a significant portion of their grounds of appeal and submissions on the issue, we note that other than making, in our view, the unnecessary reference and analysis of whether or not the suit was derivative in nature, the court moved on from there, leaving the matter at its observation that the respondent could regularise the suit. We have carefully considered the ruling and can find nothing in it that supports the appellants' complaint that the court's observation had a bearing on the ultimate decision to grant the interim orders that it issued.
75. We agree with the respondent that the trial court's observation was obiter dictum, defined in Halsbury's Laws of England, 4th ed. Vol 26 as "statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose at hand are generally termed "dicta". We take the view that the trial court's consideration of and conclusion that the respondent's suit was a derivative one did not have a bearing on the decision to grant the interim or *mareva* injunctions. Accordingly, while we find that the trial court did raise and deal with an issue not pleaded or addressed by the parties, we find that this did not in any way impact the ultimate decision that the trial court made.
76. The second issue for consideration, which in our view forms the core of this appeal, is whether the trial court properly exercised its discretion in granting the interlocutory orders, both the interim and *mareva* injunction, to the respondent. In considering both as one issue, we are alive to the fact that in determining whether or not to grant either of the two injunctions, a court is required to take into account different considerations. However, both require the exercise of discretion, and on an appeal from such exercise of discretion, this Court must bear certain considerations in mind. Secondly,



the basis on which the trial court granted the injunctive orders centred around the same, largely uncontested, set of facts.

77. First, the two important considerations. The appellants are challenging the exercise of discretion by the trial court. That being the case, this Court is precluded from interfering with the trial court's exercise of discretion unless, as was held in *Mbogo & Another vs Shah* [1968] EA 93 this Court "is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."
78. In the case of *United India Insurance Co Ltd & 2 Others vs East African Underwriters (Kenya) Ltd* (supra) Madan, JA. expounded on the circumstances under which this Court will interfere with the exercise of discretion by the trial court in the following terms:

"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

79. The onus of satisfying the Court that it should interfere with the exercise of discretion, we should add, always lies with the appellant.
80. The second consideration to bear in mind is that this is an interlocutory appeal from a ruling in which the trial court was considering an application for injunctive relief. Like the trial court, we must remember that the dispute between the parties is yet to be heard and determined on its merits. We should, accordingly, refrain from making any concluded views on the matters in contention, to avoid prejudicing the suit pending before the trial court- see *Eldoret White Castle Motel Limited v Kenya Power and Lighting Company Ltd* (supra) and *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others* (supra).
81. We have set out earlier in this judgment the orders sought before the trial court which can be summarized, primarily, as a restraining and freezing order against the 1st and 2nd appellants with respect to dealing with the shares and bank accounts of UHE, save for the conduct of its ordinary course of business; and an order appointing a receiver to manage and preserve all the assets of UHE. The conditions for grant of interlocutory injunctions have long been settled. In *James Njoro Kibutiri v Kenya Shell Ltd* [1981] KEHC 11 (KLR), the court stated:

"The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also *E.A Industries Vs. Trufoods* (1972) EA 420."



82. With regard to the conditions for grant of a mareva injunction, both parties have referred us to the decision in the Akarim case in which the High Court (F. Gikonyo, J.) cited Goode on Commercial Law, 4th Edition at Page 1287 with respect to the conditions for grant of mareva injunctions as follows:
- “The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions....Before granting a freezing injunction the court will usually require to be satisfied that;
- a. The claimant has ‘a good arguable case’ based on a pre-existing cause of action;
 - b. The claim is one over which the court has jurisdiction;
 - c. The defendant appears to have assets within the jurisdiction;
 - d. There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and
 - e. There is a balance of convenience in favour of granting the injunction; ...
83. For the most part, the facts precipitating the suit and the impugned ruling are not in controversy. UHE and Exobi are family owned entities. Prior to the death of Amirali, the 1st appellant’s father and 2nd appellant’s brother, and whose family, from the averments in the plaint, are the principal shareholders in the respondent, were the directors of UHE. In UHE, the respondent was the largest shareholder, with 50% of the shares. The 1st appellant had no shares, the 2nd had 7499 shares, while Amirali had 7500. In his lifetime, Amirali represented the respondent during meetings of UHE.
84. The situation changed, according to the respondent, following Amirali’s death on 13th May 2017, leaving the 1st and 2nd appellants as the two directors of UHE. A meeting was held on 12th July 2018 in which several resolutions were made. The first was a resolution to allot 20,000 shares of the company to the 1st and 2nd appellants, making the 1st appellant a shareholder with 2,000 shares; the 2nd appellant the majority shareholder with an additional 18000 shares, and thereby, according to the respondent, leading to a diminution of its shares.
85. Secondly, the 1st and 2nd appellants resolved to sell UHE’s shares in ABC, which sale was to themselves. Thirdly, the 1st and 2nd appellants resolved to bring in two additional corporate directors, Supermarket Limited and Alijoe Development Limited which, according to the respondent, they control. The 1st and 2nd appellants then transferred the shares of Gulbanu A. Nanji to the 2nd appellant, and have paid themselves large amounts in directors’ fees. All these acts, according to the respondent, were done without notice to it.
86. The appellants do not deny the above facts, save for their implications. Their response is, in essence, that all the acts by the 1st and 2nd appellant were lawful and not in breach of their fiduciary duty as directors; that UHE has thrived under their management; that the allotment of shares in UHE and sale of shares in ABC was to the benefit of shareholders, including the respondent
87. The question is whether, given the above matters, the trial court exercised its discretion wrongly, first in issuing the interim order, and secondly in issuing the mareva injunction.
88. In granting the interlocutory injunction, the trial court noted the principles set in Giella -vs- Cassman [1973] EA 358 and the decision of this Court in Mrao Limited -vs- First American Bank Limited & Z Others (supra). It further noted the decision in Mureithi v City Council of Nairobi [1979] KECA



1 (KLR) in which Madan, JA. cited the speech of Lord Diplock in *American Cyanamid Co v Ethicon Ltd* (1975) AC 396 at pp 406 that:

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial ... if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.”

89. The trial court considered the facts against the above authorities. It noted the failure of the 1st and 2nd appellants to give notice to the respondent of the meeting held on 12th July 2018 at which the allotment of shares to themselves was made; nor of the intended sale of UHE shares in ABC. It noted the failure of the appellants, following the demise of Amirali, to ask the respondent or Amirali’s estate to appoint a representative to sit in UHE meetings; or to declare dividends, the last such dividends having been declared when Amirali was alive. All these, in the trial court’s view, were in breach of various provisions of the *Companies Act*, including sections 140, 147 and 151. It concluded that:

“From the totality of pleadings and evidence compiled by parties, the Plaintiff has established a prima facie case. The Applicant has presented an arguable case to be heard and conclusively determined at a full hearing. There are instances with regard to the management and/ or operations of 3rd Defendant Company that depict infringement of the Plaintiff’s rights that would not be adequately compensated by damages. These rights require the opposite party to explain or rebut these claims at trial. The Plaintiffs’ rights must be protected pending hearing of the suit.”

90. We take the view that, from the facts before it, the trial court properly exercised its discretion in granting an interim injunction. The actions of the 1st and 2nd appellant in their dealings with the affairs of UHE, including its shares and the shares it held in ABC, and their failure to involve the respondent in the management of UHE, on the face of it provided a prima facie case which the trial court found satisfied the requirements for grant of an interim injunction.

91. While the trial court did not express this directly, it seems to us that it considered the fact that the dispute was between directors and shareholders, as opposed to relating to the viability of the company, as a basis for finding that the respondent would suffer irreparable damage if an interim injunction is not granted. It stated as follows:

“The main dispute is not of the 3rd Defendant as a going concern, a viable, healthy trading Company but inter and intra Company disputes. The main dispute being shareholder/ shareholding dispute between members, shareholders and directors of the 3rd Defendant Company. In the meantime, with the current scenario, the Plaintiff/Company that has been majority shareholder in 3rd Defendant Company with 15,000 shares is now relegated to a minority shareholder by the Defendants’ acquiring unallotted share of the 3rd Defendant’s Company. The Plaintiff is ousted and eclipsed in the management and operations of the 3rd Defendant Company as it is not represented. It lacks access to information, it does not participate in decision-making, attendance and voting in meetings, and recently it has not been paid dividends. The Plaintiff has and will continue to suffer irreparable damage; in form of diminution of value of its shares and disposition of assets that will also adversely affect value of the Company.



The Court finds that it would be just and equitable to grant Interlocutory injunction for interim measures of protection and to preserve the assets of the Company and suspend irregular actions.”

92. Having taken into account the above matters, we are unable to find, as the appellants invite us to do, that the trial court considered matters it should not have considered, or failed to consider matters it should have, or that on the whole its decision is wrong, so as to warrant interference with the exercise of its discretion.
93. The appellants were also aggrieved by the grant of a mareva injunction by the trial court. The trial court found, on the basis of the same facts set out above, that a mareva or freezing injunction was merited. In reaching this conclusion, the court considered the submissions before it and the authorities cited, including *Lucy Wangui Gachara vs Minudi Okemba Lore (supra)* and *Mareva Comgania Naviera SA v International Bulcarriers Ltd (supra)*. It noted that the respondent, a foreign company, had been denied access to information, is no longer represented on the board of directors and does not participate in the affairs of UHE; and the 1st and 2nd appellants continue to run the company for their benefit, to the exclusion of the respondent. In the view of the Court, to leave matters as they were would leave nothing for trial.
94. Given the factors to be considered in relation to a mareva injunction: that the court has jurisdiction, that the applicant has a good arguable case- defined as “ one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50 per cent chance of success”; that the balance of convenience tilts towards grant of the injunction, we are not satisfied that the trial court erred in the exercise of its discretion in regard to the mareva injunction.
95. We say this having noted that in their averments and submissions, the 1st and 2nd appellants have, more or less, admitted all the matters that the respondent complains of: they admit the sale of ABC shares; that they allotted shares in UHE to themselves, thus leading to a diminution of the respondent’s shares; that the expenses of the company relating to directors have risen exponentially since the demise of Amirali; that they sold- to themselves- UHE’s shares in ABC; and that dividends have not been declared, it would appear, since the demise of Amirali in 2017. Given these facts, we are satisfied that the trial court properly exercised its discretion in granting the mareva injunction, and there is no basis for interference by this Court.
96. The final issue for consideration relates to the question of appointment of a receiver, with respect to which the appellants have complained that the trial court failed to properly consider the principles with respect to the appointment of a receiver at an interlocutory stage. Coupled with this is their complaint that the trial court unduly and prematurely interfered with the operations of UHE.
97. We have considered the submissions of the parties and the ruling of the trial court on the issue. We note that the trial court considered the arguments of the parties with respect to the appointment of a receiver and the provisions of Order 41 rule 1 of the Civil Procedure Code 2010. It reiterated its earlier observations that the company was a going concern, and that appointment of a receiver would not be in its best interests. The trial court not having appointed a receiver of the company, leaving the issue for later consideration, it would prejudice the hearing of the issue, should it arise before the trial court, if we were to express an opinion on it at this stage.



98. We further note that having decided against the appointment of a receiver, the order that it found suitable in the circumstances was:

“The Plaintiff/Applicant shall appoint its representative of its interests in the 3rd Defendant Company forthwith to attend and participate in Board of Directors meetings of the Company, be granted access to statutory, legal and relevant reports and documents of the 3rd Defendant Company. The representative shall be allowed entry and access to the 3rd Defendant’s offices and shall be added as a signatory to 3rd Defendant’s Bank Accounts pending hearing and determination of the suit inter partes.”

99. The appellants complain that the orders interfered unduly in the affairs of the company. However, the appellants admitted the relationship between UHE and the respondent; that it was the majority shareholder in UHE until after the demise of Amirali and the substantial changes in shareholding by the 1st and 2nd appellants; that there were other dealings with the funds and shares of UHE in ABC, to the exclusion of the respondent. For the trial court to make an order, in exercise of its inherent jurisdiction, to include a central shareholder in UHE in its management pending the hearing and determination of the suit cannot be said to be premature or an undue interference with the affairs of the company. Accordingly, given the reasoning by the trial court and the facts that were before it, we find the complaint by the appellants to be without merit.

100. Accordingly, we find that this appeal is without merit. It is hereby dismissed with costs to the respondent against the 1st and 2nd appellants.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025

D. K. MUSINGA (PRESIDENT)

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

