Space and Style Limited & another v Wambugu & 4 others (Civil Appeal 139 of 2019) [2023] KECA 412 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 412 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 139 OF 2019

HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA

APRIL 14, 2023

BETWEEN

SPACE AND STYLE LIMITED ..... 1ST APPELLANT

WINFRIDA WANJIKU NGUMI ..... 2ND APPELLANT

AND

NJAMA WAMBUGU ..... 1ST RESPONDENT

CECILIA NJOKI MUHOHO (SUED AS PROXY FOR DECAMIS LIMITED) ..... 2ND RESPONDENT

LUCY MUMBI KIMANI ..... 3RD RESPONDENT

EDWARD MULEWA MWACHINGWA ..... 4TH RESPONDENT

DAVID OTIENO OPIYO ..... 5TH RESPONDENT

(Being an appeal against the Ruling and orders of the High Court of Kenya at Nairobi (Makau, J.) dated 31st January, 2019 in Commercial and Tax Division Civil Case No.194 of 2018)

JUDGMENT

1. This appeal will turn on the correct interpretation of Article 32 of the 1st appellant's Articles of Association and more so, the applicability or otherwise of the said provision to the dispute between the 1st respondent on one hand and the appellants and the 2nd to the 5th respondents on the other hand. Therefore, it is important at the outset to generously set out the gist of the dispute between the parties as disclosed in the 1st respondent's plaint against the above parties filed in the High Court in Nairobi in HCC COM. 198 of 2018.

2. In his plaint dated 16th May, 2018 the 1st respondent claimed, inter alia, that the 1st appellant (the company) was incorporated on 4th April, 2002 with himself and the 2nd appellant as the initial

shareholders and directors; that the 2nd respondent did not pay for his shares in the said company; that in 2017, the 1st respondent entered into a contract to transfer all his 47,500 ordinary shares and 1,560,000 redeemable preferential shares to the 2nd appellant for a consideration of Kshs.250,000,000/= and non-cash considerations subject to valuation of the company; that the transaction was aimed at facilitating his exit from the company; and, Kshs.25,000,000/= was paid to him by or on behalf of the 2nd appellant.

3. Further, the 1st respondent averred that it was agreed between himself and the 2nd appellant that in the event the 2nd appellant was unable to raise the balance of the agreed consideration, the 1st respondent's 4,197 ordinary shares being the equivalent of the said deposit would be transferred to the 2nd appellant. Further, he executed a power of attorney dated 9th February, 2018 in favour of the 2nd appellant in respect of his aforesaid 4,197 ordinary shares as security towards the exit agreement.

4. The 1st respondent also averred that the final exit consideration was to be established after a valuation of the company and his share value. Pursuant thereto, two valuations commissioned by the 1st and 2nd appellants respectively valued the 1st appellant at US $ 12,000,000.00 and Kshs.800,000,000.00 in that order. However, there was no mutually agreed value for his shares, so, the exit agreement was not finalized. Nevertheless, relying on the power of attorney donated to her, the 2nd appellant transferred his 4,197 ordinary shares to herself elevating herself to a majority shareholder, and, in a bid to entrench herself as such, on 9th May, 2018, the 2nd and 3rd respondents appointed the 3rd, 4th and 5th respondents as directors of the company.

5. The 1st respondent averred that a dispute arose between the 2nd appellant and the 3rd respondent on one hand and himself on the other hand concerning the 2nd appellant's breach of the exit agreement and the unlawful appointment of the 3rd to 5th respondents and the 2nd appellant as the directors of the company. He prayed for the following reliefs in his plaint:

    a) The 2nd defendant (now the 2nd appellant) be and is hereby restrained from holding herself out as the majority shareholder of the company on the basis of the 4,197 ordinary shares transferred from the plaintiff (now the 1st respondent) to herself pursuant to the power of attorney dated the 9th February, 2018.

    b) The 4th to 6th defendants (now the 3rd to 5th respondents) be and are hereby restrained from holding themselves out and acting as directors of the company.

    c. The 2nd and 3rd defendants (now the 2nd appellant and 2nd respondent) be and are hereby restrained from changing the bank operation mandates of the 1st defendant's account operated with Equity Bank Ltd- 0240201443382, KCB Ltd- 11833090919, ABC Bank limited-0072000010000012, NIC Bank limited- 10050110264, Spire Bank Limited-068000003991, CFC Stanbic Bank limited-0100004574561, 0100004574588 and Family Bank Limited 068000003991.

    d) The defendants be ordered to pay the plaintiffs (now the 1st respondent) costs of the suit.

    e) Any such other or further relief this court may deem appropriate.

6. Concurrent with the plaint, the 1st respondent filed an application dated 16th May, 2018 under section 7 of the *Arbitration Act*, Rules 1 and 11 of the Arbitration Rules, 1997 and sections 1A, 1B, 3,3A of the

Civil Procedure Act seeking interim measures of protection pending arbitration of the dispute pursuant to Article 32 of the company's Articles of Association. After hearing the parties, in a ruling dated 31st January, 2019 the subject of this appeal, Makau, J. allowed the application and granted interim injunction orders pending arbitration of the dispute.

7. In their memorandum of appeal dated 5th April, 2019 the appellants mounted 17 grounds of appeal which are essentially repetitive and can be abridged into one broad issue, namely, whether the dispute disclosed in the 1st respondent's plaint falls within the ambit of the arbitration clause in Article 32 of the company's memorandum and articles of association.

8. The crux of the appellants' submissions is that the High Court had no jurisdiction to entertain the matter because the dispute related to a term sheet executed on 20th January, 2018, a loan agreement dated 24th January, 2018 and a special power of attorney dated 9th February, 2018; that clause 9 of the aforesaid loan agreement and clause 18 of the term sheet provided for jurisdiction in the Kenyan courts and not arbitration; that the learned judge misconstrued the decision in UAP Provincial Insurance Company Limited v Michael John Beckett [2014] eKLR which held that under Section 6(1) (b) of the *Arbitration Act*, the court is required to ascertain whether there is a dispute between the parties and if so, whether such dispute involves matters for arbitration; that the presence of a dispute does not automatically invoke arbitration; and, that the learned judge failed to take into account the fact that the 1st respondent operated a rival company known as Roser Roofing EA Ltd which was the reason for his exit from the company.

9. Further, the appellants questioned the 1st respondent's locus standi to institute the suit in the High Court arguing that he did not bring himself within the exception to the rule in *Foss v Harbottle* [1843] 2 Hare 461, 67 ER 189 nor did he file an application under Section 6 of the *Arbitration Act* seeking to refer the dispute to arbitration. They questioned the legality of the 1st respondent's shareholding and directorship in the company and cited *Foss v Harbottle* (*supra*) and *Edwards v Halliwell* [1950] ALL ER 1064 in support of the proposition that the proper plaintiff in an action in respect of a wrong alleged to be done to a company is prima facie the company or the association of persons. Also, they faulted the learned judge for holding that there is an exception to the rule in Foss v Harbottle where fraud is involved and cited this Court's decision in *Amin Akberali Manji & 2 Others v Altaf Abdulrasul Dadani & Another* [2015] eKLR to back their argument that the 1st respondent should have obtained leave to institute a derivative action. Further, they cited this Court's decision in *Mt. Kenya University v Step Up Holdfing (K) Ltd* (2018) eKLR which followed *Eunice Soko Mlagui v Sureslt Parmar & 4 Others* (2017) eKLR in support of their argument that the 1st respondent did not invoke Section 6 of the *Arbitration Act*, so the application was incompetent.

10. Also, the appellants argued that the learned judge granted final orders at the interlocutory stage. Citing *Amin Akberali Manji & 2 Others v Alta/Abdulrasul Dadani & Another* [2015] eKLR, they faulted the learned trial judge for failing to strike a balance to ensure that no party suffers prejudice. Also, they faulted the learned judge for issuing what they termed as contradictory orders, by, on one hand finding that the 1st respondent was a shareholder and that he was lawfully involved in passing the resolution and on the other hand by restraining the 3rd to 5th respondents from acting as directors. Lastly, they cited Edwards and Another v Halliwell and Others [1950] 2 All ER 1064 which held that courts should not interfere with the domestic affairs of a company or association because of mere irregularities.

11. On behalf of the 1st respondent, it was submitted that the trial court cannot be faulted for referring the matter to arbitration under section 7 of the *Arbitration Act* and that there were sufficient grounds to warrant the issuance of the orders.

12. The 2nd appellant filed an affidavit dated 26th May, 2021. Properly construed, this affidavit is an attempt to adduce new evidence without seeking this Court's leave. The said affidavit is not properly on record and therefore, we cannot consider it. In any event, allowing the said affidavit would offend Rule 31 (2) of this Court's rules which requires this Court to allow the other party to cross-examine the deponent where additional evidence is introduced.

13. A useful starting point in determining this matter is to underscore that judicial decisions have engraved the extent of court intervention in arbitration, a position best captured by this Court in *Ann Mumbi Hinga v Victoria Njoki Gathara* (2009) eKLR that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Act or as previously agreed in advance by the parties. One of the permitted interventions under the Act therefore, is the High Court's power to grant interim measures of protection before or during the arbitral proceedings under Section 7 of the *Act*. Interim measures of protection are interim reliefs which are granted before the final award, for the purpose of ensuring that once the final award is rendered, the relief on the disputed matter would still be available. (See Moses M, *The Principles and Practice of International Commercial Arbitration*, (Cambridge University Press, 2010). Essentially, these reliefs protect the ability of a party to obtain a final award. Without them, final arbitral awards will be rendered nugatory as they minimize loss, damage, or prejudice during the arbitral process. (See Gary B. Born, *International Commercial Arbitration: Commentary and Materials* (2nd edition, 2001) 920). A party may apply to the High Court for interim measures of protection and in doing so, will not lose their right to arbitrate as it will not be incompatible with the arbitration agreement. Alternatively, if the parties agree, a party may apply to the arbitral tribunal for interim measure of protection.

14. Section 7 of the *Arbitration Act* provides for interim measures. It reads:

> 1. It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

15. Section 7 is silent on types of interim measures, the conditions for granting these measures and the scope of measures that can be granted leaving courts with a wide discretion in determining the tests for allowing applications under the said provision. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR, para 14, this Court laid down the tests to be followed and distinguished interim measures from injunctions and went further to state that the factors that the court must take into account before issuing the interim measures of protection are: - (a) the existence of an arbitration agreement, (b) whether the subject matter of arbitration is under threat, (c) the appropriate measure of protection after an assessment of the merits of the application, and (d) For what period must the measure be given to avoid encroaching on the tribunal's decision- making power as intended by the parties.

16. The court in granting interim measures exercises judicial discretion to further the cause of justice and to prevent the abuse of the court process. (See the Court of Appeal decision in *Scope Telematics International Sales Limited v Stoic Company Limited&another* [2017] eKLR). In doing so, the court is called upon to strike a balance to ensure that the intended arbitration proceedings are not prejudiced either by failing to protect the status quo and or the subject matter of the intended arbitration and

at the same time to ensure or avoid making an order that goes to resolving the dispute between the parties which ought to be left exclusively in the hands of the arbitrator. (See the High Court decision in *Dimension Data Solutions Limited v Kenyatta International Convention Centre* [2016] eKLR, para 11).

17. With the principles discussed in the preceding paragraphs in mind, we now address the question whether there existed an arbitration agreement between the parties so as to satisfy the concept of "arbitrability," a concept which indicates whether a dispute is "arbitrable", i.e. capable of being settled by arbitration. The *Arbitration Act* (the Act) defines an "arbitration agreement" to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Section 4 of the Act provides for the form of arbitration agreement as follows:

> (1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) An arbitration agreement shall be in writing.
>
> (3) An arbitration agreement is in writing if it is contained in—
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> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or
>
> (c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.
>
> (4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

18. None of the parties denied the existence of an arbitration clause.

None of the parties denied the existence of a dispute. The contestation is whether the dispute disclosed in the plaint falls within the ambit of the arbitration clause. Thus, where a valid agreement to refer a dispute to arbitration is in place, our courts generally prefer that parties seek recourse through arbitration first.

19. Once existence of an arbitration clause is established and a dispute is shown to have arisen, an applicant needs to do more and show that he stands to be prejudiced beyond redemption as the entire subject matter of the arbitration would be way beyond restitution or reparation. Once this is shown, the court then assesses the merits of the application to determine whether in the circumstances it would be appropriate to order a measure of protection provided such a determination of the merits should not encroach on the substantive decision-making power of the arbitrators by venturing into the merits of the dispute.

20. Comparatively, the Model Law has created its own conditions which are enumerated under Article 17 A, which states as follows:

> a. The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

i. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

ii. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

21. In determining an application for interim measures, all that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings is in danger of being wasted or dissipated so as to preserve the same. The injunction or interim measure of protection must be of urgent nature to preserve the subject matter of the dispute so that the proceedings before the arbitral tribunal are not rendered nugatory. Another criterion is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings.

22. Undeniably, arbitration is a contract-based form of binding dispute resolution. In other words, a party's right to refer a dispute to arbitration depends on the existence of an agreement (the "arbitration agreement") between them and the other party to the dispute, that the dispute may be referred to arbitration. In entering into an arbitration agreement, the parties agree to refer their dispute to a neutral tribunal to decide their rights and obligations. Our arbitration law also recognizes the principle of pacta sunt servanda (Meaning, agreements must be kept). Thus, where a valid agreement to refer a dispute to arbitration is in place, courts generally prefer that parties seek recourse through arbitration first.

23. The existence or validity of Article 32 of the company's memorandum and articles of association has not been questioned. The said Article reads:

> "Whenever any differences arise between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles or of the....., or touching anything then or thereafter done, executed, committed or suffered in pursuance of these Articles, or any claim or account of any such breach, or alleged breach or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company or to any of the affairs of the Company, every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference."

24. The question that calls for an answer is whether the dispute disclosed in the plaint falls within the ambit of the arbitration clause reproduced above. This question is primarily a question of interpreting the arbitration clause to get its real meaning and the intention of the parties. Contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. In *Arnold v Britton* [2015] UKSC 36 Lord Neuberger explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context,' in light of the following considerations: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and

circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions.

25. In the 2019 case of *Federal Republic of Nigeria v JP Morgan Chase Bank NA*, (2019) EWHC 347 Professor A. Burrows QC, usefully summarized the modern approach to contract interpretation in the following terms: -

> " The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain."

26. In absence of fraud or misrepresentation, parties are bound by their choice. A Court cannot re-write their preferred choice. The articles of association is a contract between the company and its members setting out the rights of members inter se under the contract. In Fili Shipping Co Ltd v Premium Nafta Products and Others (On appeal from *Fiona Trust and Holding Corporation and Others v Primalov and Others*, [2007] UKHL 40; [2007] Bus LR, Lord Hoffmann, delivering the speech with which all their lordships concurred, said:

> " In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction." (Emphasis added).

27. In Fiona Trust (*supra*), (which the House of Lords upheld in Fili Shipping), decided in the English Court of Appeal, Longmore LJ, delivering the court's unanimous judgment, said:

> " As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all."
>
> And
>
> 'One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen.'
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> And
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> "If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not

be the case where there is an overall contract which is said for some reason to be invalid, eg for illegality, misrepresentation or bribery, and the arbitration is merely part of that overall contract. In these circumstances it is not necessary to explore further the various options canvassed by Judge Humphrey Lloyd QC since we do not consider that the judge had the discretion which he thought he had."

28. We are reminded of the House of Lords decision in *Premium Nafta Products Limited (20th defendant) and Others (Respondents) v Fili Shipping Company Limited (14th Claimant) and Others* (appellants) [2007] UKHL 4 that:

> "Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language."
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> In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.
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> If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.
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> A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause...
>
> In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked...: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

29. A reading of Article 32 of the Memorandum & Articles of Association leaves no doubt that it is couched in very broad terms. The article encompasses any differences that may arise between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these articles or of the..., or touching anything then or thereafter done, executed, committed or suffered in pursuance of these articles, or any claim or account of any such breach, or alleged breach or otherwise relating to the premises, or to these articles or to any statutes affecting the company or to any of the affairs of the company, every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two arbitrators, or whom one shall be appointed by each of the parties in difference."

30. A reading of the plaint discloses a dispute between the 1st respondent and 2nd appellant triggered by an alleged breach of an exit agreement signed by the said parties. The exit agreement was to facilitate the 1st respondent's exit from the company upon payment of an agreed consideration. The plaint also discloses a dispute relating to alleged unlawful appointment of the 3rd to 5th respondents and the 2nd appellant as the directors of the company.

31. The reliefs sought in the plaint also give a pointer to the nature of the dispute between the parties. There is a prayer that the 2nd defendant (now the 2nd appellant) be restrained from holding herself out as the majority shareholder of the company on the basis of the 4,197 ordinary shares transferred from the plaintiff (now the 1st respondent) to herself pursuant to the power of attorney dated the 9th February 2018. Also, there is a prayer that the 4th to 6th defendants (now the 3rd to 5th respondents) be restrained from holding themselves out and acting as directors of the company. Also relevant is the other prayer in the plaint that the 2nd and 3rd defendants (now the 2nd appellant and 2nd respondent) restrained from changing the bank operation mandates of the company's bank accounts.

32. A reading of the gist of the dispute as summarized above and the arbitration clause leave us with no doubt that the dispute falls within the ambit of the dispute resolution clause. It follows that the first port of call-in terms of dispute resolution clause is the forum the parties consented to in the said clause.

33. We turn to the appellants' argument that the 1st respondent ought to have instituted a derivative suit. This argument flies in the face of the provisions of section 238(1)(a) and (b) of the *Companies Act* which defines a derivative claim as follows:

> (1) In this Part, "derivative claim" means proceedings by a member of a company—
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> a) in respect of a cause of action vested in the company; and (b) seeking relief on behalf of the company.

34. A derivative action is brought by an applicant (such as a minority shareholder,) on behalf of a company, in order to protect the legal interests of the company. The derivative action is so called because the shareholder 'derives' his right of action from that of the company, to redress a wrong done to the company. (See the English case *Estmanco (Kilner House) v Greater London Council* [1982] 1 WLR 2 QBD. In other words, the shareholder is seeking to protect not his own rights but the company's rights. This is distinct from the situation where shareholders wish to enforce their own personal shareholder rights, in which case they would have personal redress and would thus rely on a personal action rather than a derivative action. Confronted with a situation in which the same wrongful act was both a wrong

to the company and a wrong to each individual shareholder the Ontario Court of Appeal stated in *Goldex Mines Ltd. v Revill* 1974 CanLII 433 (ON CA), 7 O.R. (2d) 216;

> " In one sense every injury to a company is indirectly an injury to its shareholders. On the other hand, if one applies the test:
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> "Is this wrongful act one in respect of which the company could sue?", a shareholder who is personally and directly injured must surely be entitled to say, as a matter of logic, "the company cannot sue for my injury; it can only sue for its own."

35. The corollary must surely be that when both the company and the shareholder have the same standing to sue for the same relief on the basis of the same facts the company must be entitled to say the shareholder has no need in the interests of justice to litigate in the corporation's name when he can do so in his own. In *Goldex Mines Ltd case*, (supra) the court answered in the negative the question 'Where the same acts of directors or of shareholders cause damage to the company and also to shareholders or a class of them, is a shareholder's cause of action for the wrong done to him derivative?'.

36. As was held by the Supreme Court of India in *Needle Industries (India) Limited v Needle Industries Newey (India) Holdings Ltd*. (1982) 1 Comp LJ 1 (SC): AIR 1981 SC 1298, in a situation like this, one had to remember that behind each Corporation, there are individuals. The same position was underscored by the House of Lords in *Ebrahimi v Westbourne Galleries Ltd*. [1973] AC 360 (HL) in the following words:

> " ... a limited company is more than a mere legal entity, with a personality in law of its own; that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure."

37. The 1st respondent's grievances as disclosed in the plaint reveal that the injury complained of is personal as opposed to a wrong committed against the company. As highlighted at paragraphs 30 and 31 above, the dispute between the 1st respondent and 2nd appellant was triggered by an alleged breach of an exit agreement signed by the said parties. The exit agreement was to facilitate the 1st respondent's exit from the company upon payment of an agreed consideration for shares. The plaint also discloses a dispute relating to alleged unlawful appointment of the 3rd to 5th respondents and the 2nd appellant as the directors of the company.

38. A further pointer to the pith and substance of the dispute disclosed in the plaint is discerned from the prayers sought in the plaint. As mentioned in the paragraphs cited above, there is a prayer that the 2nd defendant (now the 2nd appellant) be restrained from holding herself out as the majority shareholder of the company on the basis of the 4,197 ordinary shares transferred from the Plaintiff (now the 1st respondent) to herself pursuant to the power of attorney dated the 9th February 2018. There is also a prayer that the 4th to 6th defendants (now the 3rd to 5th respondents) be restrained from holding themselves out and acting as directors of the company. The other prayer in the plaint seeks to restrain the 2nd and 3rd defendants (now the 2nd appellant and 2nd respondent) from changing the bank operation mandates of the company's bank accounts. The foregoing disputes fall within the ambit of the arbitration clause. Having so concluded, we find and hold that the claim that the 1st respondent lacked the locus standi to bring the action in the High Court collapses.

39. Next, we will address the appellants' argument that the 1st respondent did not file an application under Section 6 of the *Arbitration Act* seeking to refer the dispute to arbitration. We find this argument legally frail and a clear misunderstanding of the provisions of sections 6 (1) & (2) and 7 of the *Arbitration*

Act. Section 6 deals with stay of legal proceedings. It expressly provides that a court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-

a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

40. Under Section 6, it is the party against whom proceedings are brought who is required to apply to stay the proceedings not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought. Upon considering such an application, the court stays the proceedings and refers the matter to arbitration. This is totally different from the provisions of Section 7 under which the application before the High Court was brought. The section empowers the court to grant interim measures and refer the matter to arbitration as happened in the instant case.

41. Next, we will address the appellant's contestation that the learned judge granted final "orders" at the interlocutory stage. This argument is premised on either a clear misrepresentation of the orders issued by the learned judge or a misconception of the definition of a "final order" or both.

42. A reading of orders (b), (c) and (b) shows that the learned judge deployed the following words at the beginning of each order granted: "pending the hearing and determination of the dispute between the defendants and the plaintiff in arbitration..." With such a clear language, we fail to understand why and how it can be argued that such an order(s) is final. Simply put, the clarity with which the learned judge expressed himself extinguishes the applicant's argument that the orders granted are final.

43. The other reason why the appellants' argument collapses is that a final order has the potential of determining the case, which is not the position in this case. On the other hand, a purely interlocutory order is one not having the effect of a final decree. In a wide and general sense, the term "interlocutory" refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper," which do not have a final effect on the main action.

44. We must underscore that a final order has some attributes. The three attributes of a final order were set out by the South African Appellate Division in *Zweni v Minister of Law-and-Order*, 1993

(1) SA 523 (AD) as follows; (i) the decision must be final in effect and not susceptible to alteration by the Court of first instance; (ii) it must be definitive of the rights of the parties, i.e. it must

grant definite and distinct relief; and (iii) it must have the effect of disposing of at least a substantial portion (if not all) of the relief claimed in the main proceedings.

45. Lastly, the other ground of assault mounted by the appellants is that the learned judge issued contradictory orders. The argument here is that, on one hand, the learned judge found that the 1st respondent was a shareholder and that he was lawfully involved in passing the company's resolution and on the other hand the learned judge restrained the 3rd to 5th respondents from acting as directors.

46. We have read the entire ruling and the orders granted. We have followed keenly the learned judge's reasoning and reasons for the decision. We find no contradictions at all in the analysis, reasons and the orders issued. As was held by the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* [2014] LPELR-22555 (CA), contradiction means lack of agreement between two related facts.

47. Flowing from our analysis of the facts presented to us, the law and the authorities and our conclusions arrived at on each and every issue discussed, we find and hold that this appeal is totally devoid of merit. We dismiss it with costs to the 1st respondent. Dated and delivered at Nairobi this 14th day of April, 2023

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

G. W. NGENYE – MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR