Lalji v Diamond Hasham Lalji & 2 others (Civil Appeal 165 of 2017) [2023] KECA 853 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 853 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 165 OF 2017

DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA

JULY 7, 2023

BETWEEN

SULTAN HASHAM LALJI ..... APPELLANT

AND

TRIO HOLDINGS LIMITED ..... 1ST RESPONDENT

DIAMOND HASHAM LALJI ..... 2ND RESPONDENT

PROP INVEST LIMITED ..... 3RD RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (E. K. O. Ogola, J.) dated 19th April 2016 in H.C.C.C No. 330 of 2013)

JUDGMENT

1. By a plaint dated January 30, 1996 and amended on March 8, 1996, the appellant, Sultan Hasham Lalji, sued Diamond Hasham Lalji (the 1st respondent), Samvir Registrars(not party to the proceedings herein), Trio Holdings Limited (the 2nd respondent) and Prop Invest Limited (the 3rd respondent) essentially seeking, inter alia: injunctive relief restraining the 1st 2nd and 3rd respondents from dealing in LR No 37/132 and registered as IR No 9179/1 Nairobi (the suit property); a mandatory injunction to compel the 1st and 3rd respondents to transfer the suit property to the 2nd respondent; a declaration that the appellant was entitled to ownership of 750 ordinary shares in the 2nd respondent; a declaration that the appointment of the 1st respondent as a director of the 2nd respondent was invalid; an order that the 1st and 3rd respondent do provide the annual accounts of the 2nd respondent for the years 1989 to 1995; general damages; an account of the profits made by the 1st and 3rd respondents upon sale of the suit property from the date of transfer; payment of all sums found to be due on account of profits on sale of the suit property and general damages to the 2nd respondents; interest at bank rates; costs of the suit; and any other relief the honourable court might deem just to grant.

2. The appellant's case was that the 2nd respondent had nominal share capital of Kshs 200,000 divided into 2,000 Ordinary Shares of Kshs 100 each, out of which 1,000 Ordinary Shares were sold to the appellant sometime in June 1995; that the appellant offered 750 of those shares to Ken- Wheat Industries Limited (Ken-Wheat), which defaulted in payment of the purchase price; that, consequently, the 750 shares remain in the appellant's name; that the appellant and his brothers, including the 1st respondent, were the only shareholders in Ken-Wheat; that, in 1987, the 1st respondent and the other two brothers were unlawfully appointed as directors of the 2nd respondent; and that the appellant was unlawfully retired from the company's directorship without notice of the general meeting convened for that purpose.

3. According to the appellant, the notification of change in the management of the 2nd respondent was signed by Samvir Registrars, who were appointed as Company Secretaries to the 2nd respondent. He lamented that 2nd respondent had failed to supply him with copies of the balance sheet or auditor's reports for the period between 1986 and the date of filing suit (1996); that the 1st respondent assumed full control of the 2nd respondent, whose sole business was ownership and management of the suit property; and that, on or about March 17, 1992, the 1st respondent and Samvir Registrars fraudulently caused the 2nd respondent to transfer the suit property to the 3rd respondent, which charged it on June 14, 1994 to First American Bank of Kenya and First American Company Limited for a sum not exceeding Kshs 80,000,000 for the benefit of three companies in which the 1st respondent was the director and shareholder.

4. By reason of the matters aforesaid, the appellant claimed to have lost the property and the rental income accruing therefrom. He further contended that the 1st and 3rd respondents, together with Samvir Registrars, were intent on transferring the suit property to a third party unless restrained by an order of the trial court.

5. In his defence dated February 28, 1996, the 1st respondent contended that the appellant had no locus standi to bring the suit; that the suit was an abuse of the court process; and that, in the alternative, the suit was misconceived or incurably bad for misjoinder of causes of action or of the defendants, or for non-joinder of parties. He denied the appellant's claims and prayed that the suit be dismissed with costs.

6. So did the 2nd and 3rd respondents, whose defences dated February 28, 1996 replicated that of the 1st respondent, alleging want of locus standi on the part of the appellant to bring the suit against them. They also denied the appellant's claims and prayed that the suit be dismissed with costs.

7. On their part, Samvir Registrars filed their defence also dated February 28, 1996 denying the appellant's claims. Likewise, they contended that the appellant had no locus standi to institute the proceedings. According to them, the suit was bad in law for misjoinder and should be dismissed with costs.

8. The 2nd and 3rd respondents filed separate, but similar applications dated March 21, 1996 followed by the 1st respondent and Samvir Registrars, who also filed separate but similar applications dated March 22, 1996, all seeking orders that the summons to enter appearance and/or the appellant's plaint as amended be struck out and/or that the suit be dismissed with costs, including costs of the applications. The four applications were made on the grounds that the appellant had not pleaded in the amended plaint facts indicating that he had locus standi to commence the suit for wrongs allegedly done to the 2nd respondent; that Samvir Registrars could not be joined as party to the suit without prior leave of the court; that the suit was incurably bad for misjoinder as the cause of action on the derivative suit could not be brought together with causes of action for personal claims against some of the defendants therein; that the amendments sought to be made on the plaint were mala fide, dishonest and intended to overreach; and that the amended plaint was otherwise an abuse of the process of the court.

9. The four applications having raised a fundamental point of law on the appellant's alleged want of locus standi to institute the proceedings in issue, we consider it unnecessary to address ourselves to details of the factual background which, in any event, can only be gathered from the amended plaint and the above-mentioned defences in the absence from the record of the affidavits filed in support of the Motions. Neither does the record contain the appellant's replying affidavit (if any).

10. The appellant opposed his adversaries' Motions on the grounds set out in his 'Grounds of Opposition' dated March 26, 1996 in which he contended that he had locus standi to bring the suit; that no leave was required for proceedings against Samvir Registrars; that the appellant had the right to bring the action for wrongs done both to himself and to the 2nd respondent; that the applications were an attempt to evade response to the 'very serious issues of fraud' against the 2nd respondent; and that the applications were an abuse of the court process.

11. In its ruling dated September 30, 1996, the High Court (GS Pall, J) dismissed the four applications and ordered that the costs of the applications be in the course. On the issue of joinder of Samvir Registrars without leave of the court, the Judge held that:

> ' The amendment in question is a technical one and it should be allowed without any order for further costs. I therefore refuse to disallow it.
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> In case I am wrong in my judgment that no new party has been substituted or added to the suit, I would have exercised my discretion under O.1 r10(2)in favour of the plaintiff and even without a written application by the plaintiff in the interest of justice and in order to effectually and completely to adjudicate upon and settle all questions involved in the suit added Samvir Registrards as the 2nd defendant to the suit.'

12. Dissatisfied by the ruling and orders of Pall, J, the respondents and Samvir Registrars individually lodged notices of appeal, all dated October 8, 1996, with intent to appeal his ruling and orders aforesaid.

13. When the suit came up for case management on July 30, 2015, the parties recorded consent orders in the following terms: that the appellant's witness statement dated August 12, 2014 be admitted as his evidence in chief; that the appellant's evidential documents filed on April 24, 2007 be admitted with the consent of the parties as his exhibit No 1, subject only to cross-examination and re-examination; that the 1st respondent's witness statement dated July 22, 2015 be admitted as his evidence in chief, subject only to cross- examination and re-examination; that the respondents' and the Samvir's table of contents dated July 27, 2015 be admitted as the respondents' and Samvir's exhibit No 1, subject only to cross-examination and cross-examination; and that the matter be heard on November 11, 2015.

14. In view of the fact that the court did not sit on November 11, 2015, the suit was rescheduled for hearing on January 18, 2016 before Ogola, J By a sharp turn of events, when the suit came up for hearing as rescheduled, learned counsel for the 3rd respondent, Mr Eshmail, raised a preliminary objection, without prior notice to the appellant, contending that the appellant had no locus standi to institute the suit. The preliminary objection was supported by Mr Omuga for the 1st respondent and Mr Wakla for the 2nd respondent. It is noteworthy that, by then, the suit against Samvir Registrars had abated in consequence of Samvir's demise.

15. The appellant's opposition to the preliminary objection was unsuccessful. In his ruling dated April 19, 2016, Ogola, J upheld the respondents' preliminary objection and struck out the appellant's suit with costs to the respondents. In his ruling, the learned Judge observed, in part:

> ' The Defendants have brought the said Preliminary Objection on the allegation that based on the issues and Witness Statements, it is clear that the Plaintiff's suit is a nullity ab initio and is going nowhere hence there is no need to go to full hearing since a determination, for example, of the Plaintiff's issue number one is enough to dispose off(sic) this matter.'

16. Aggrieved by the decision of Ogola, J, the appellant moved to this Court on appeal on six (6) grounds, inter alia, that the learned Judge erred in failing to appreciate that the High Court (Pall, J) had previously considered the issue, which the respondents had advanced as a preliminary objection, and that the issue had been determined against the respondents. To our mind, this is the only relevant ground of appeal that is ripe for our consideration. The others go to the merits of the substantive suit on which we need not pronounce ourselves presently lest we embarrass or influence the trial court that will ultimately address itself to the merits of the main suit.

17. In support of the appeal, learned counsel for the appellant M/s Ngatia & Associates filed written submissions dated June 10, 2019 citing 7 judicial authorities. So did learned counsel for the 1st respondent M/s Otieno-Omuga & Ouma, whose written submissions and list of authorities dated March 21, 2023 cite 3 cases. On their part, learned counsel for the 2nd respondent, M/s Wakla & Company, filed their written submissions, list of authorities and case digest dated March 20, 2023 citing 4 authorities. Finally, learned counsel for the 3rd respondents, M/s Esmail & Esmail, filed their written submissions dated March 23, 2023. We purpose to address ourselves shortly on the respective submissions and the cited judicial authorities in the body of our decision on the issues raised.

18. We need to point out right at the onset that, this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited vs. West End Butchery Limited and 6 others [2015] eKLR* citing the case of *Selle vs Associated Motor Boat Co [1968] EA p.123*.

19. In Selle's case (ibid), the Court held that:

> ' An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.'

20. Having considered the record of appeal, the written and oral submissions of learned counsel for the appellant and learned counsel for the respondent, we are of the considered view that the appeal herein stands or falls on our finding on the issue as to whether the learned Judge's ruling was in error, and whether he had failed to appreciate that the High Court (Pall, J) had previously considered

and determined the issue of the appellant's locus standi, which the respondents had advanced as a preliminary objection. The relevant passage in the impugned ruling reads:

> ' 19. In this respect the Plaintiff refers to an application by the 4th Defendant dated March 22, 1996 for order that the amended plaint filed by the Plaintiff on March 8, 1996 be struck out on the grounds inter-a-lia that the Plaintiff has no locus standi to commence this suit for wrongs allegedly done to 3rd Defendant Company. That application was dismissed by Justice GS Pall who found that the Plaintiff had the locus standi to bring these proceedings and that it was in the best interest of justice that the suit should be allowed to proceed. Since then the suit proceeded and parties complied with pre-trial directions and have filled their Witness Statements and issues which are important in the determination of the suit. It is now after the examination of the issues and the evidence as contained in the Witness Statement, that the Defendants have brought the said Preliminary Objection on the allegation that based on the issues and Witness Statements, it is clear that the Plaintiff's suit is a nullity ab initio and is going nowhere hence there is no need to go to full hearing since a determination, for example, of the Plaintiff's issue number one is enough to dispose off (sic) this matter. In that sense, the Defendants' position is that Preliminary Objection is not res judicata, as its basis it grounded on the evidence contained in the Witness Statements and on the issues as drawn by the parties, which issues and witness statements were not on record in 1996 when the application by the Defendants to strike out the suit was dismissed.
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> 20. The position to be taken by this court is that a lot has taken place since 1996 up to now and that there have been changes in the Civil Proceeding (sic) Act and Rules all geared towards the overriding objective of doing justice. The overriding Objective of S. IA and 1B of the *Civil Procedure Act* empowers the court to use the time and other resources to do justice on matters before the court, and at a cost that is affordable to parties, and to hear matters expeditiously and to ensure just determination of cases. The basic idea in the overriding objective is to minimize the application of unnecessary technicalities in Civil litigation and introduces case management under Order 11, but for this division, we have gazetted Pre-trial Directions and case conferencing which are geared to achieve the same objectives of Order 11. During the case management process, the court is empowered to limit the issues for determination, and if possible to assess the strength of the case before certifying the same as ready for trial. The court is clothed with power to consider the pleadings, witness statements and issues raised, and to provide a way forward. At the case management stage, a court can, and is empowered to strike out pleadings or part thereof, which are frivolous. This means that a Preliminary Objection can perfectly be entertained by a court at the case management stage, and the court is empowered to uphold such a Preliminary Objection if it is merited. In regard to the case at hand, it is clear that Justice GS Pall ordered this case to proceed. And indeed the case proceeded. That is why several years later the case is still in court. As the case proceeded, the parties were caught up with the amendments to the *Civil Procedure Act* as aforesaid and also with the introduction of Order 11, or the gazetted pre-trial directions of this Division. Indeed parties submitted themselves to case management,

and have filed issues and Witness Statements. These processes, that is, case management, has a meaning in the life of a suit. The Witness Statements also are put forth for a purpose. Indeed even the issues put forth by the parties are there so that the same can guide the court on the merit of suit. It is therefore the right of every party, and in this case, the right of the Defendants, having perused and considered the evidence as contained in the witness statements, and having looked at the issues raised by the parties, to raise a Preliminary Objection based purely on those issues or Witness Statements. This stage of Case Management has no conflict with the orders of justice Pall in 1996. The judge allowed the Plaintiff's case to proceed, and indeed it proceeded and in the year 2015 after the Case Management, the Defendants are at liberty to seek to raise a Preliminary Objection based on what the case management process has revealed. In my view, this is a process which was not envisaged by Honourable Justice Pall's order of 1996, and the parties having submitted themselves to the Case Management process, are entitled to raise any Preliminary Objection because at this stage, all the parties know the weaknesses and strengths of their case. Indeed, the Case Management process is aimed at enabling the parties to know the strengths and weaknesses of their cases so that they may explore other alternative dispute Resolution mechanisms or narrow down the areas of dispute. This seems to me to be what the Defendants have done, and it is perfectly in order. It is the finding of this court, therefore, that the issues raised in the said Preliminary Objection are not res judicata. Indeed, the first issue in the statement of issues by the Plaintiff, is whether the Plaintiff has locus standi to commence this suit.'

21. Counsel for the appellant, M/s Ngatia & Associates, made submissions on three pertinent questions commencing with the nature of preliminary objections. He submitted that the preliminary objection in issue was not a pure point of law, which could be considered and determined as such; that the objection was raised on the ground that the appellant had stated in his witness statement that he is the sole shareholder of the 2nd respondent; that the respondents had, by their pleadings and witness statements, disputed that the appellant was the sole shareholder of the 2nd respondent and alleged that Kenwheat was the sole beneficial owner of the entire issued share capital in the 2nd respondent; and that the preliminary objection was thus based upon a contested issue of fact, and that it ought to have been struck out or dismissed.

22. Counsel cited the case of Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd (1969) EA 696, submitting further that a preliminary objection is in the nature of what used to be demurrer; that it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct; and that it cannot be raised if any fact has to be ascertained, or if what is sought is the exercise of judicial discretion.

23. In addition to the foregoing, counsel faulted the learned Judge for failing to appreciate that the issues of fraud raised by the appellant could only be determined upon hearing of the suit on merits, but could not be determined within the scope of a preliminary objection. Citing the cases of Westmont Power Kenya Ltd vs Frederick & Another T/A Continental Traders & Marketing [2003] KLR 357; and *Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1*, counsel submitted that the fraud alleged against the respondents is a matter that can only be ascertained at the trial; and that fraud must be proved, and can only be proved through a hearing; and that it cannot be summarily rejected. In conclusion, counsel urged us to allow the appeal with costs.

24. Learned counsel for the 1st respondent, M/s Otieno- Omuga & Ouma, contended that the preliminary objection before the superior court was a pure point of law as the assumption in the Mukisa Biscuit Manufacturers case (supra) is based on pleadings by a party who is asserting its rights and has nothing to do with the position taken by the respondents in their statements of defence.

25. On the issue of fraud and the standard of proof thereof, counsel submitted that the learned Judge dealt with the issue of fraud allegedly committed against the 2nd respondent and came to the obvious conclusion that it is only the company that could complain against the alleged commissions, if any, and not the individual who claims to own 100% shares in the company.

26. On their part, learned counsel for the 2nd respondent, M/s Wakla & Company, submitted that the preliminary objection was on a single issue, namely, the appellant's legal capacity to institute the High Court proceedings in his name; and that the question of a proper party is a pure point of law, which can be raised by way of a preliminary objection. Counsel cited the case of *George WM Omondi & Another vs National Bank of Kenya Ltd & 2 Others [2001] eKLR* where Ringera, J (as he then was) held that locus standi is a question of law, which can be raised as a preliminary objection.

27. In the opinion of learned counsel for the 3rd respondent, M/s Esmail & Esmail, it is clear from the submissions made on behalf of the 3rd respondent that what the learned Judge was requested to adjudicate on was the 1st issue of locus standi based upon the allegations made in the plaint and the appellant's statement which had been admitted as the appellant's evidence at the case management stage; that the use of the words 'preliminary objection' in the submissions of counsel for the 1st respondent, and in the ruling subject of appeal, is just a misnomer and does not affect the substance of, or the reasons for, the learned Judge's decision; that it is obvious from his ruling that the learned Judge was determining, on admitted evidence before him, issue No 1 as a primary point; that the learned Judge made findings of fact in order to decide issue No 1 as he was requested to do, and that there is no appeal against these findings of fact; and that, in the alternative, if the learned Judge was indeed dealing with the preliminary objection, then it was irrelevant what position was taken by the respondents in their pleadings or witness statements. Counsel identified with the ratio in the case of Mukisa Biscuit Manufacturers (supra) where the Court held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. The three counsel urged us to dismiss the appeal with costs.

28. The question is, was the issue of the appellant's capacity to institute the proceedings in issue the subject of the preliminary objection a pure point of law? Was that objection argued on the assumption that all the facts pleaded by the other side are correct? The record as put to us and considered in light of the rival submissions on what the parties considered to be the primary issue for consideration reveal that what was in contest was an issue whose determination was dependent on the Judge's finding on certain facts relating to, among other things, the disputed shareholding in the 2nd respondent and the other reliefs sought in the plaint. While the appellant claimed to be the sole shareholder, the respondents contended in their statements of defence that Kenwheat was the sole beneficial owner of the entire issued share capital in the 2nd respondent. It defeats reason to conclude that the two competing claims were both correct so as to justify a finding that the preliminary objection was a pure point of law independent of any inquiry that the learned Judge was called upon to undertake at a trial on the merits of the conflicting claims. Only then could the issue of the appellant's capacity to sue be put to test and determined as a pure point of law, but upon adjudication of the facts giving rise to that point.

29. Our scrutiny of the respondents' statements of defence dated 28th February 1996 does not unearth any attempt to depart from their claim that 'Kenwheat was the sole beneficial owner of the entire issued share capital in the 3rd defendant' (the 2nd respondent herein). Neither does the record contain

any formal admission by way of pleadings or a consent order in that regard disclaiming Kenwheat's beneficial ownership and admitting the appellant's claim in the plaint that he was the sole shareholder in the 2nd respondent. All we have is a statement from the bar where counsel for the 3rd respondent submitted that the respondents did not contest the appellant's claim as the sole shareholder in the 2nd respondent. That oral submission, to which we will shortly return, is couched as an admission by counsel that must meet the test so as to bind the parties. Suffice it to observe that it was on the basis of that submission that the learned Judge concluded thus:

> ' 15. Mr Esmail submitted that there is no contention now since the Defendants do not object to the Plaintiff's evidence in his statement since he states he owns 100% of the 3rd Defendant Company.
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> 24. The Plaintiff reiterates this position in his Further Witness Statement filed in court on November 6, 2015. It is important to note that the Defendants have accepted the facts as stated by the Plaintiff that he is the sole shareholder and director of the 3rd Defendant Company. This court has no reason to doubt the Plaintiff on his statement that he is the sole shareholder and director of the 3rd Defendant Company. So, it is the finding of this court that indeed the Plaintiff is the Majority Shareholder of the 3rd Defendant Company.'

30. We consider it necessary to set out what the superior court's proceedings reflect as the oral submissions by Mr Esmail for the 3rd respondent. They read:

> ' The issue is whether the plaintiff has the locus to sue the 4th defendant. The plaintiff in his Plaint alleges that he is still a director of the 3rd defendant and a sole shareholder which is not correct.
>
> The 4th defendant has not put in a statement or even a witness statement because for the prayers of the 1st issue we accept what the plaintiff says on that issue and we accept his document on that issue. Look at the plaintiff's statement paragraph 3, 6, 7, 9, 10, 11 and 24. What he says there repeatedly is that he is the sole owner of the 3rd defendant company. He owns and controls all the shares.
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> If the plaintiff owns the company all by himself, then this means he cannot bring a derivative action. Since he owns the company, he should start the action in the name of the company. The company is the right party to sue not the Plaintiff.
>
> Alternatively, the plaintiffs bundle filed on August 27, 2014. See pg l. There is a letter dated February 2, 1993 addressed to the 3rd defendant. This is a letter from the plaintiff saying he does not own anything, and that anything belongs to the members of the family. I accept this document fully. There is no need to waste the court's time in this matter. There is no need for a trial when the plaintiff's letter states he owns nothing in the company and that the property in the company belongs to the family.'

31. Two statements by Mr Esmail suggest that the issue of the appellant's shareholding in the 2nd respondent company remains contested. In the opening paragraph of his oral submissions set out in the preceding paragraph, Mr Esmail states that 'the plaintiff in his Plaint alleges that he is still a director of the 3rd defendant and a sole shareholder which is not correct'. With regard to the appellant's letter dated 2nd February 1993 in which he states that he owns no shares and that they belong to the family, counsel concludes his submission on this issue by stating: 'I accept this document fully'.

32. It is clear to us that, on the one hand, counsel offers an admission of the appellant's claim of 100% shareholding in the 2nd respondent and, on the other, states that that claim is not correct. In the concluding paragraph of his submissions, learned counsel cites the appellant's letter dated 2nd February 1993 addressed to the 3rd defendant, stating that that 'he does not own anything, and that nothing? belongs to the members of the family'. The foregoing 'admissions' by counsel, as adopted by counsel for the 1st and 2nd respondents, are by no means unequivocal. It might well be that the appellant holds no shares in the 2nd respondent. And maybe he does. To our mind, that is a matter of factual evidence to be established at the hearing of the substantive suit.

33. On the issue of admissions by counsel from the bar, the Supreme Court of India in *Himalayan Co-Operative Group Housing Society vs Balwan Singh (2015) 7 SCC 373* held that:

> ' 33. Generally, admissions of fact made by a counsel is binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the Court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions.'

34. In the same vein, this Court in *Choitram vs Nazari [1984] eKLR*, Madan, JA stated as follows:

> ' For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used.'

35. The question is: are Mr Esmail' admissions, viewed against the contradictions aforesaid, plain and obvious? We think not. The only other questions that beg our determination are whether the trial court was functus officio on account of the decision of Pall, J; and whether the issue of locus standi raised in the preliminary objection in issue was res judicata.

36. On both questions, learned counsel for the appellant submitted that the issue as to whether the appellant had locus standi to file suit in his own name had been heard and determined in 1996. According to counsel, it was neither open to the respondents to argue the issue again, nor to the High Court (Ogola, J) to determine the issue differently from the earlier determination. Counsel cited the case of *Raila Odinga & 2 Others vs Independent Electoral and Boundaries Commission & 3 Others [2013]eKLR* on the proposition that a court is functus officio when it has performed all its duties in a particular case, and that proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected; that the purpose of the doctrine is to provide finality; that once the proceedings are finally concluded, the court cannot review or alter its decision; and that any challenge to its ruling on adjudication must be taken to a higher court if that right is available.

37. On the authority of *Menginya Salim Murgani vs Kenya Revenue Authority [2014] eKLR*, counsel highlighted the principle that a court, after passing judgment, becomes functus officio and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.

38. Citing the case of *Ngugi vs Kinyanjui & 3 Others [1989]eKLR*, counsel drew our attention to the proposition that any decision reached, if not set aside, can only be challenged on appeal, and cannot be challenged in any inferior court, tribunal or in the same court except in case of review. They submitted

that the law will not allow any dispute between the same parties or between those who claim through them to re- open the dispute while the judgment still remains on record.

39. In rebuttal, counsel for the 1st respondent submitted that, at the time the said ruling of Pall, J was delivered on September 30, 1996, sections 1A and 1B of the *Civil Procedure Act*, as well as Order 11 of the *Civil Procedure Rules*, were not in existence. However, due to delay in prosecuting the case, it got caught up by subsequent changes in law, which brought into existence new requirements, such as filing statements of witnesses and documents and taking cases through case management procedures.

40. According to counsel, the appellant, by his own statement of issues, made the question of locus standi the first issue for determination and that, being a preliminary point of law, it was necessary that it be determined first in light of the powers conferred upon the trial superior court by practice directions relating to case management process in the commercial and admiralty division of the High Court. Learned counsel submitted further that, according to rule 15(d) of the Practice Directions Relating to Case Management in the Commercial and Admiralty Division of the High Court at Nairobi, 'any application to strike out pleadings or for judgment on admission shall be made at the case management conference and may not be made after completion of the case management conference'.

41. In conclusion, learned counsel submitted that, in his ruling, Ogola, J discussed the emerging changes in law and the fact that the appellant had made the issue of locus standi the first issue for determination and found that a trial court has powers under the case management process to sieve cases and deal with preliminary issues; and that, if on the other hand the necessary information is not before him, the application would be premature and fail, and that is what Pall, J said as he concluded his ruling.

42. On their part, learned counsel for the 2nd respondent submitted that the appellant framed and drew his issues in October 2008 more than a decade after the ruling of Pall, J which considered the matter; that by framing the question of locus standi as the first issue for determination at the trial, the appellant acknowledged and confirmed that the issue was not spent; that new and special circumstances arose, which brought the situation at hand within the exceptions to the general application of the principle of res judicata; and that changes in the law have taken place, which have caught up with the matter, and which have to be complied with in prosecution of the case. In addition, counsel made reference to sections 1A and 1B of the *Civil Procedure Act* and Order 11 of the Civil Procedure Rules on case management and conferences, of which we have already taken note.

43. In addition, counsel highlighted the findings of the learned Judge, submitting that the new amendments introduced the filing of witness statements and, as at the time the preliminary objection was raised and argued, all parties had complied with the pre-trial requirements and, hence the testimonies of the witnesses were before the court, which should be contrasted with the situation in 1996 when the court only had the amended plaint and the defences, which do not contain evidence other than mere allegations of the respective parties. According to counsel, the aforementioned changes in the law, which caught up with the suit, are special circumstances that negate the application of the doctrine of res judicata in any event (see *Greenfield Investments Limited vs Baber Alibhai Mawji [2000] eKLR* and *Mburu Kinyua vs Gachini Tuti [1976-80] 1 KLR 790*).

44. In the same vein, learned counsel for the 3rd respondent argued that the appellant's submissions militate against the case of Raila Odinga & 2 Others vs the IEBC & 3 Others (supra) where the Supreme Court held that proceedings are only concluded, and the court functus, when its judgment or order has been perfected. Counsel further submitted that, in this case, the order of Pall, J was never drawn, approved, signed by the Registrar and sealed with the seal of the superior court. Hence, the order was not perfected and that, further, the record shows that that ruling was not dated or signed by the learned

Judge. Accordingly, the issue of res judicata or functus officio has no application in the circumstances of this case.

45. According to learned counsel, the appellant is estopped from contending that the issue of locus standi is no longer open for reconsideration as it was the first issue that the appellant asked the superior court to determine. They contend that at no stage before the learned Judge at the case management conferences did the appellant apply to withdraw this issue for the determination by the court; and that, accordingly, the appellant cannot contend that this issue was not a live one that needed to be determined by the superior court.

46. In addition to the foregoing, learned counsel submit that Pall, J's reason for holding that the appellant had locus standi to file the case subject of this appeal was that the appellant could not obtain the resolution of the company (the 2nd respondent) authorising him to sue in its name. Counsel contended that, apart from the material amendment to the *Civil Procedure Act* and Rules, there has also been a change in the law which require that such a resolution be passed authorising the filing of a suit on the company's behalf.

47. Counsel cited the case of Ardhi Highway Developers vs West End Butchery [2015] eKLR for the proposition that it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct counsel to file proceedings on behalf and in the name of the company; and that any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that company. According to counsel, these are special circumstances which also permitted the learned Judge to rule afresh on the issue of locus standi, which had been decided at an interlocutory stage.

48. It is instructive that Pall, J had reached his decision primarily on the ground, inter alia, that the appellant could not obtain the company's resolution authorising him to sue in the name of the 2nd respondent.

49. In the case of Ardhi Highway Developers vs West End Butchery (ibid), this Court held:

> ' 44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147.
>
> The court in that case held:
>
> 'When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.'
>
> 45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is Tatu Naiga& Emporium vs Virjee Brothers Ltd Civil Appeal No 8 of 2000.The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of United

> Assurance Co. Ltd v Attorney General: SCCA No 1 of 1998. The latter case restated the law as follows:
>
> 'It was now settled, as the law, that it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.'

The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR*.

50. The foregoing submissions by learned counsel for the respondents raise three decisive questions. Firstly, if Pall, J disallowed the respondents' preliminary objection on the basis that the appellant was unlikely to secure the 2nd respondent's authority to sue on its behalf, and the law applicable in 1996 required a resolution or authority to do so, was it not obligatory for the respondents to appeal that decision? Secondly, if the law as is in force today does not require such authority, on what basis was the appellant's suit struck out for want of locus standi? Thirdly, did Ogola, J have the jurisdiction to revisit and make a determination against the grain of Pall, J's decision as though he were sitting on appeal against that decision? Finally, is the issue of locus standi in this case a pure issue of law in light of the aforementioned admission by counsel for the 3rd respondent, which is by no means unequivocal?

51. Answers to these and other questions settle the other issues raised as to whether the trial court was functus officio, and whether the issue of the appellant's locus standi to bring the suit in issue was purely a point of law capable of reconsideration by the learned Judge on the basis that the ground had shifted with change in the law of procedure read together with company law under which a body corporate's resolution or authority of a director to sue on its behalf is no longer a pre-requisite to commencement of such proceedings.

52. We have already pronounced ourselves on the issue of the appellant's locus standi to bring the impugned suit and concluded that it was not, strictly speaking, a pure point of law. We reached this conclusion on our finding that the 3rd respondent's admission from the bar was not unequivocal; that, while admitting the appellant's plea that he was the sole shareholder in the 2nd respondent, counsel was quick to add that it was not true; that counsel for the 3rd respondent fully accepted the contents of the letter in which the appellant stated that all shares in the 2nd respondent belonged to his family; that the respondents have not adduced any evidence to persuade this Court that Kenwheat Industries Limited, a stranger to these proceedings, had disclaimed beneficial ownership of the entire shareholding of the 2nd respondent; that these competing claims require determination on evidence beyond pleadings, witness statements and bundles of evidential documents, whose probative value must stand to be tested by, among other things, cross-examination; and that the appellant's allegations of fraud on the 2nd respondent could not be determined in such preliminary proceedings.

53. We also need to point out that, in any event, the learned Judge could not on the one hand strike out the appellant's suit and, on the other hand, considered the issue of fraud. Issues of fraud call for evidence at a trial. Determination of such allegations in pleadings require interrogation beyond a cursory look at the pleadings at a preliminary stage of the proceedings. Only then can the trial court satisfy itself as to the issue of the alleged fraud, and the actual status of the shareholding in the 2nd respondent company. It might as well turn out that the appellant is the sole shareholder, or that Kenwheat Manufacturers Limited are the beneficial owners of the entire shareholding of the 2nd respondent. But that is not for us to judge.

54. It is also instructive that counsel for the 3rd respondent made reference to the appellant's bundle of documents in the following words:

> ' There is a letter dated February 2, 1993 addressed to the 3rd defendant. This is a letter from the plaintiff saying he does not own anything, and that anything(sic) belongs to the members of the family. I accept this document fully There is no need to waste the court's time in this matter. There is no need for a trial when the plaintiff's letter states he owns nothing in the company and that the property in the company belongs to the family.'

55. Whatever the case may be, it appears to us that the impugned ruling was made on a rather narrow view that previously obtained at common law in relation to the application of the doctrine of locus standi with regard to derivative suits. However, that position has long changed. The hitherto common law position as enunciated in Foss vs.Harbottle [1843] 2 Hare 461 was to the effect that 'a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it. Accordingly, derivative actions in Kenya had to fall within the exceptions to the rule in Foss vs Harbottle where there was fraud on a minority caused by majority shareholder(s); and the action to be commenced had to be in the best interest of the company, and without any ulterior motive (see also *Hawes v Oakland 104 U.S 450 [1881]); and Nurcombe vs Nurcombe [1985] 1 All ER 65*.

56. We find it necessary to highlight current judicial decisions on the matter, and do so with profound respect for the learned Judge. We cite with approval the decision of Onguto, J in *Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarlal & another [2017] eKLR* where the learned Judge observed:

> ' 40. With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in Foss v Harbottle was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance.
>
> 45. The court must first satisfy itself that there is a prima facie case on any of the causes of action noted under s.238(3). S.239(2) of the Act provides that the application for permission will be dismissed if the evidence adduced in support 'do not disclose a case' for giving of permission. The essence of judicial approval under the Act is to screen out frivolous claims. The court is only to allow meritorious claims. All that the applicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed.
>
> 48. The statutory provisions to be met include the requirement under s. 238(3) of the *Companies Act* that the derivative action be commenced only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty, breach of trust by a director of the company. It is also necessary to establish that the claimant is a member of the company.'

57. In the same vein, the court in *Isaiah Waweru Njumi & 2 Others vs Muturi Ndungu [2016] eKLR*, aptly captured some of the factors to be considered as follows:

> ' [21]Among other things, the Court considers the following factors:

a. Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors' challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;

b. Whether the Plaintiff has made any efforts to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;

c. Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of Recchion v Kirby 637 F Supp 1309 (WD Pa. 1986), for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;

d. Whether the Plaintiff is acting in good faith;

e. Whether the action taken by the Plaintiff is consistent with one a faithful director acting in adherence to the duty to promote the success of the company would take;

f. The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company is likely to be authorised or ratified by the company in the future; and

g. Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative action.

58. Onguto, J in Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarlal & another (supra) summed up the position thus:

> ' 56. In sum, the broadened statutory procedure for bringing a derivative action now appears exclusive. The causes of action listed under s. 238(3) must be deemed the only ones. A director, including a former director, as well as a third party may be sued by a member, who may himself not have been a member when the cause of action accrued. The factors to be considered are infinite. There will however be compulsory refusal of permission where the suit is not in the interest of or of benefit to the company. Permission will also be denied where the proposed act has been authorized by the company or the impugned act has been ratified by the company. The court, in my view, must however not be reluctant to intervene in the company's decision making process as wrong doing on the part of directors must be checked if only to promote corporate governance.'

59. The emergent question as to whether Pall, J, when exercising his discretion to allow the appellant to maintain the proceedings in issue considered any factors akin to those in application today, or any factors applicable in 1996 for exercise of the court's discretion to grant the appellant leave to bring a derivative suit, is clear from his ruling, which reads in part:

> ' In the instant case the Plaintiff cannot obtain the name of the 3rd Defendant to bring this action. He has also alleged that it is a contentious issue whether the Plaintiff holds 1000 shares according to him or 250 shares only according to the 3rd Defendant's returns. The Defendants go to the extent of alleging that all the issued shares belong to Kenwheat and whatever shares the Plaintiff holds, he holds them for Kenwheat. In a situation like this, the Plaintiff cannot be expected to obtain the resolution of the company authorising him to sue in the name of the 3rd Defendant.'

The general rule as laid down by Sir James Wigham in Foss vs Harbottle (1843) 2 HARE 461 is that if a wrong is done to a company, then it is the company alone who can decide whether or not to sue in respect of that wrong and that decision must be made by the appropriate body, either the directors or the company in a general meeting.

One of the exceptions to the said general rule is 'Fraud on the minority'. In *Daniel vs Daniel (1978) 2 All ER 89* Templton, J at p.96 letters 'e' and 'f' derived the following principle:

> 'A minority shareholder who has no other remedy may sue where the directors use their powers intentionally or unintentionally fraudulently or negligently in a manner which benefits themselves at the expense of the company.'
>
> Mr Oraro also relied on *Halsbury's Law of England 4th Edition* paragraph 1012 which states that, in order to file a derivative action, you should plead the true nature of the facts and the impossibility of getting the resolution of the company. He also relied on FORGO vs (1986) 3 All ER 279 in which the Board of Directors was fully controlled by the Defendants and in view of that it was held that the court should look at the practicability of the situation.
>
> It has been alleged that property worth 45 million has been transferred for a mere 7.6 million only and the transferee did not pay even that. The property was transferred to it for free and the same property after 2 years has been charged for Kshs 80 million.
>
> According to Sir Robert Megarry in Estmanco case (supra) 'fraud on the minority' includes not only fraud at common law but also fraud in the broader sense as in the equitable concept of a fraud on power. The essence of the matter according to him seems to be any abuse or misuse of power.
>
> In the end I am satisfied that the Plaintiff does have a locus standi to bring these proceedings and it is in the interest of justice that the suit should be allowed to proceed.'

60. To our mind, if the respondents were dissatisfied with the decision of Pall, J their right of appeal availed for their assertion. Such an appeal would have been founded on the law as it was in 1996. We do not agree with learned counsel for the respondents that change in the law of civil procedure in relation to pre-trial case management procedures altered the position. Moreover, the contradictory pleadings on the pivotal shareholding in the 2nd respondent calls for interrogation to establish whether the appellant had the right to sue as he did, viewed in light of the law of procedure and company law as applicable today. In view of the foregoing, we can only conclude that the learned Judge had no jurisdiction to put to question and reverse the decision of Pall, J on the ground of the subsequent change in legislation and substantive law. And for good reason.

61. This Court in *Joseph Ndirangu Waweru t/a Mooreland Mercantile Co & another vs City Council of Nairobi [2015] eKLR* held that:

> ' We reiterate this Court's findings in the Stephen Mwaura Njuguna case (supra) that a Judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow Judge of concurrent jurisdiction. If the respondent was aggrieved by the ruling and preliminary decree, its recourse was in appealing against the same.'

62. In the same vein, Kiage, JA in *Bellevue Development Company Ltd vs Francis Gikonyo & 7 others [2018] eKLR* held that:

> ' I have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of the *Constitution* in these terms:
>
> 'The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.'
>
> This position is so well established that it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncements of judges of the same status as himself, a task that is left to courts and judges of higher status in the hierarchy, by way of appeals.'

63. In view of the foregoing, and having carefully considered the record of appeal, the impugned ruling, the rival submissions of counsel for the appellant and for the respondents, the cited statutory and judicial authorities, we reach the inescapable conclusion that the appellant's appeal succeeds. Accordingly, we hereby order and direct that:

    a. 'The ruling and order of the High Court of Kenya, (Commercial and Admiralty Division) at Nairobi (EKO Ogola, J) dated April 19, 2016 be and is hereby set aside and substituted therefor an order dismissing the respondents' preliminary objection; and

    b. The costs of the appeal be borne by the respondents.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR