



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & GATEMBU, J.J.A.)

CIVIL APPEAL NO. 199 "A" OF 2016

BETWEEN

SAVANNAH HEIGHTS LIMITED.....1ST APPELLANT

ISINYA PLAINS LIMITED.....2ND APPELLANT

DONALD KIBORO MWAURA.....3RD APPELLANT

JOHN GACHANGA.....4TH APPELLANT

AND

SAVANNAH CEMENT LIMITED.....1ST RESPONDENT

SERUJI LIMITED.....2ND RESPONDENT

WANHO INTERNATIONAL LIMITED.....3RD RESPONDENT

ACME WANJI INVESTMENTS LTD.....4TH RESPONDENT

(Being an appeal from the Orders of the High Court of Kenya at Nairobi (Farah Amin, J.) delivered on 22nd June 2016

*in*

*H.C.C.C. No. 170 of 2016)*

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**JUDGMENT OF THE COURT**

1. The 1st appellant is a shareholder of the 1st respondent while the 2nd and 3rd appellants are shareholders and directors of the 1st appellant.
2. The dispute between the parties was commenced by way of a Plaintiff that was filed jointly by the appellants at the Commercial and Admiralty Division of the High Court of Kenya on 12th May 2016 viz, ***HCCC COMM No. 170 of 2016***. One of the averments in the Plaintiff was that the 3rd and 4th respondents had fraudulently and illegally transferred part of their shares to the 2nd respondent without the knowledge and consent of the appellants. The suit had been brought against all the respondents and six other defendants.
3. Among the prayers sought by the appellants before the High Court were, a declaration that the sale of shares from the 3rd and 4th respondents to the 2nd respondent vide the share purchase agreement dated 22nd September 2014 is illegal, null and void; a declaration that the 2nd respondent is not a shareholder of the 1st respondent and any shares illegally being held by the 2nd respondent do revert to the 3rd and 4th respondents.
4. It is important to point out that as at the date of hearing of this appeal, the suit filed by the appellants at the High Court was still pending hearing and determination.

5. On the same day the suit was filed, the appellants filed an application seeking, *inter alia*, an order of temporary injunction to stop the 1st respondent, its directors and/or shareholders from holding an extra-ordinary general meeting that was scheduled to take place on 14th May 2016 at the premises of the 1st respondent.

6. According to the appellants, the agenda of the proposed extra-ordinary general meeting included a proposal that the 7th, 8th, 9th, 10th and 11th defendants be approved to be representative directors of the 2nd respondent in the board of the 1st respondent.

7. The argument by the appellants was that the 1st appellant and the 3rd and 4th respondents were the only legitimate and bonafide shareholders of the 1st respondent and that their relationship was governed by a Shareholders Agreement dated 27th July 2010.

8. On 3rd June 2016 as the suit and the application by the appellants was pending hearing, the 2nd respondent together with the 6th, 7th, 8th, 9th 10th and 11th defendants (as they appeared in the suit before the High Court) filed an application seeking the following orders:

**" This application be heard inter-parties at the same time as the Plaintiffs (the Appellants herein) application dated 12th May, 2016 (the Plaintiffs Application);**

**a) Pending the inter-parties hearing of this application and the Plaintiff's Application, this Honourable Court be pleased to issue a mandatory injunction compelling the 1st Defendant (the 1st Respondent herein), Savannah Cement Limited (the company) to constitute an interim board of directors comprising of the 3rd and 4th Plaintiffs (3rd and 4th Appellants here) and the 6th to 11th Defendants to manage the affairs of the Company and to exercise all such rights and powers as are necessary for the proper exercise of the operations of the Company including but not limited to remedying any breaches by the Company under the facility agreement dated 11th November, 2015 (the Facility Agreement) with Kenya commercial Bank (KCB);**

**b) Pending the hearing and determination of the suit herein, this Honourable Court be pleased to issue a mandatory injunction compelling the Company to constitute an interim board of directors comprising of the 3rd and 4th Plaintiffs and the 6th to 11th Defendants to manage the affairs of the Company and to exercise all such rights and powers as are necessary for the proper exercise of the operations of the Company including but not limited to remedying any breaches by the company under the Facility Agreement with KCB."**

9. On 22nd June 2016 when the application was scheduled for mention for purposes of issuance of directions, the learned judge, sitting in her chambers, upon making some observations on the matter before her, issued *suo motu*, the following interim orders:

**"THAT Pending the inter parties hearing of this Application the First Defendant Company will and shall be run by an interim court appointed Board. That Board will comprise:**

**(i) The Third and Fourth Plaintiffs.**

**(ii) And the Sixth to Eleventh Defendants.**

**a) THAT the First and Second Plaintiffs together with their Directors, servants and agents or howsoever be and are forbidden from interfering with the running of the Company by that Board.**

**b) THAT the Third and Fourth Defendants be and are directed to take all steps necessary, including providing documents, information and arranging meetings to enable the Court appointed Board to run the Company in the interim.**

**c) THAT Penal notice be and is hereby attached to paragraphs 2 and 3 above.**

**d) THAT Costs be reserved.**

**e) THAT Parties are to comply with any directions outstanding and obtain a date for Hearing during the third and fourth weeks of August 2016.**

**f) THAT Applicants are to file a cross-undertaking in Damages in the event it is finally decided that an interlocutory injunction should not have been granted."**

10. Aggrieved by the said orders, the appellants preferred this appeal. They faulted the learned judge for: stating that it had been admitted that the 3rd and 4th respondents were solely managing the 1st respondent; holding that the 1st respondent's assets had been sold or disposed of; ordering the respondents to file a cross undertaking as to damages when there was no other undertaking that had been filed; for making *suo motu* orders appointing interim board of directors of the 1st respondent; and for failing to take into consideration that the board resolutions that would be made by the interim board of directors would be binding upon the 1st respondent.

11. It is worth pointing out that the appeal had initially been brought against eleven (11) respondents. However, 1st appellant withdrew its appeal against the 5th to 11th respondents vide a withdrawal notice dated 22nd March 2017 that was adopted as an order by this Court on

12th June 2017. The 2nd, 3rd and 4th appellants also withdrew their entire appeal against all the respondents.

12. Parties to this appeal filed and exchanged written submissions and counsel highlighted them on 10th March 2021.

13. **Mr. Wandati**, learned counsel for the appellants, argued that the trial court did not have jurisdiction to appoint and/or nominate directors to the board of the 1st respondent. Learned counsel submitted that the powers to appoint directors were a preserve of the shareholders of the 1st respondent as provided for in the company's Articles of Association, and that by purporting to appoint the directors, the learned judge usurped the powers of the shareholders of the 1st respondent, rendering her actions *ultra vires*.

14. Learned counsel further submitted that the court appointed directors are capable of making decisions with far reaching consequences, which decisions would be binding upon the directors appointed by the appellants. He cited the provisions of **section 133 1(a)** and **133 (1) (b) (iii)** of the **Companies Act, 2015**.

15. The appellants cited, *inter alia*, **Isaac Kinyanjui Muitherero v Jonathan Craig Buffey & 2 others; Wild Eye East Africa Ltd (Affected Party) [2020] eKLR; David Munene Wamwati v Tea Factory [2018] eKLR; Re K Boat Service [1998] eKLR** and **Radio Frequency Systems (EA) Ltd & another v Simon Horner & 2 others [2020] eKLR** to buttress their arguments.

16. On the other hand, **Mr. Mogere**, learned counsel for the 2nd respondent, argued that the appeal was incompetent for the reason that the appellant had withdrawn the suit against some of the respondents who are defendants in the High Court matter; that the appeal had been overtaken by events; that the appeal had no basis; and that the issues raised in this appeal are the very same ones raise in the High Court matter. Citing, *inter alia*, **Nishit Yogendra Patel v Pascale Mireille Baksh & Others [2009] eKLR** in support those submissions, counsel urged us to dismiss the appeal.

17. The mandate of this Court on a first appeal is as set out in **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** thus:

***“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”***

This is a unique appeal where there are no proceedings emanating from the trial court since the learned judge issued the impugned interim orders *suo motu* in her chambers on a day when the matter was listed for directions.

18. Having perused the memorandum of appeal, the preliminary objection filed by the 2nd respondent as well as the submissions on record, the main issue for determination is whether the learned judge had power and/or jurisdiction to make the impugned orders and/or directions, and more so the appointment of an interim board of directors of the 1st respondent.

19. The immortalized words of **Nyarangi, J.A.** in the celebrated decision, **Owners of the Motor Vessel “Lillians” v Caltex Oil Kenya Limited [1989] KLR** bear repetition:

***“Jurisdiction is everything. Without it a Court has no power to take one more step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

20. The argument by the appellants is that the power to appoint directors is a preserve of the shareholders of a company, as provided for in the Articles of Association of the 1st respondent. In this regard, the appellants referred the Court to clause 23 of the Articles of Association of the 1st respondent which reads as follows:

***“The Board shall consist of seven (7) non-employee directors and they shall be appointed as follows:***

***Two (2) Directors are appointed by shareholder A.***

***One (1) Director is appointed by shareholder B.***

***One (1) Director is appointed by shareholder C.***

***Three (3) Directors are appointed by shareholder D.”***

21. It is evident from that clause the manner in which directors of the 1st respondent are supposed to be appointed. In the old English case of **Foss v Harbottle [1843] 2 Hare 261** the Court held thus:

***“...an elementary principle is that court does not interfere with the internal management of companies acting within their powers.”***

22. In *Re K Boat Service [1998] eKLR*, Kuloba, J. held:

**“Courts will interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really (sic) very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. Accordingly, acts by or on behalf of a company which require the authority of a resolution of the company and are done without it, or are otherwise irregular, but which can be regularized by the company at a general meeting and without a special resolution, and are neither ultra vires nor of a fraudulent character, are not a ground for the court's interference upon a winding-up petition (which is not this case), or a petition to remove a director by a minority shareholder (as in the present case) under the "just and equitable" rule. If the various acts which have been irregularly carried out by the company are not acts which are ultra vires the company, nor are they acts which require special resolutions of the company, or no fraud has been disclosed with regard to those irregularities, those irregularities should be regularized or nullified by the company at a general meeting as established in the rule in *Foss v Harbottle*, (1843) 2 Hare 46...”**

23. In *Paolo Murri v Gian Battista Murri & another [2000] eKLR*, which was an appeal from the ruling and order of Kuloba, J. in *Re K Boat Service* (supra), Lakha, J.A. dismissing the appeal delivered himself thus:

**“With regard to the appointment of directors, this is regulated by the company's Articles of Association and according to the copies of the minutes of the various general meetings for the year 1991 up to 1996 the appointment to the Board of Directors has at all material times been made by the members at the company's Annual General Meetings at which the petitioner has at all material times been invited to attend and has in fact attended all the meetings through proxies and participated in the decision to appoint directors of the company. The petition makes no allegation that the Articles of Association have been breached or any appointment made unlawfully.**

**Upon a careful consideration of the petition it is plain and obvious that basically this is a dispute about the internal management of the company and a court does not interfere with the internal management of the company acting within its powers: see the rule in *Foss v Harbottle* (1843) 2 Hare 261. Facts necessary to support intervention by the court, e.g. ultra vires or fraud have not been pleaded...”**

24. From the decisions we have cited, it is clear that courts will only interfere with the internal management of a company where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by an ordinary resolution.

25. In the case that gave rise to this appeal, the grounds in support of the application that is before the High Court relate to alleged lack of quorum to pass resolutions regarding the 1st respondent's business affairs, which include the renewal of a bank facility.

26. The applicants did not allude in their application to any of the director's acts being *ultra vires* or marred by fraud. Simply put, the grounds cited by the applicants did not call for the court's intervention by appointing interim director of the 1st respondent in the manner it did.

27. The learned judge in the impugned orders indicated that the 3rd and 4th respondents were solely managing the 1st respondent in a way that risked and had caused disposal of its assets without the approval of a full board. We agree with the appellants that this allegation had neither been expressly pleaded nor deposed to in the affidavit in support of the application. In any case, and even assuming that the same had been pleaded, it is an issue that could only have been determined following an inter-parties hearing.

28. We agree with the appellants that the appointment of interim directors by the learned judge amounted to usurping the powers of the shareholders of the 1st respondent. It follows therefore that the learned judge acted *ultra vires*. We do not agree with the 2nd respondent's submission that in making the impugned orders the learned judge did so in exercise of the court's inherent jurisdiction. The issue at hand did not call for exercise of the court's inherent jurisdiction.

29. The extent of inherent powers of a court was eloquently stated by the learned authors of the *Halsbury's Laws of England*, 4th Edn. Vol. 37 Para. 14 as follows:

**“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”**

30. We have said enough, we believe, to demonstrate that this appeal is for allowing, which we hereby do. Consequently, we set aside the

orders that were issued by the High Court on 22nd June 2016. The costs of the appeal are awarded to the appellants.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**