IN THE COURT OF APPEL

AT MALINDI

CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO 22 OF 2016

BETWEEN

RICCARDO FANELI …….....……..….1ST
APPELLANT

NERI CARLO…….....……..…..2ND
APPELLANT

LINE STAFF LIMITED…….....……3RD
APPELLANT

VERSUS

FRIGIERI GRAZIANO…….....……..
…….RESPONDENT

(Being an appeal from the whole judgment of Meoli J., dated the 3rd day of September, 2015

in

Malindi Civil Case No. 54 of 2011)

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JUDGMENT OF THE COURT

[1] The dispute in this appeal revolved around a determination of the shares owned by Frigieri Graziano (respondent) and whether his removal as managing director in a company known as Line Staff Limited (3rd respondent), hereinafter referred to as company, was valid. Some of the undisputed facts are; the company was incorporated on or about 15th May, 2007 as a private company with Granziano, Alessandro and Zeinab Mohamed Yunis as shareholders holding 400, 400 and 200 shares respectively. On 26th April, 2009, the company purchased land described as a portion of Land Reference No 10794/106 with an intention of developing real estate houses for sale. In May, 2017 Alessandro resigned from the company transferring his shares to Granziano. Immediately thereafter the company purchased land and obtained the requisite approvals and consents for development of a housing estate comprising of 10 villas. The two directors floated some of their shares for sale. The respondent transferred 250 and 150 out of his shares to the 1st respondent and 2nd respondent respectively, while Zeinab transferred 100 of her shares to the

2nd respondent. The rest of the facts, regarding subsequent transfer of shares by the respondent to the appellants were disputed.

[2] From the time the company was incorporated until the disagreement over shareholding arose, the respondent was the managing director and promoter of the company. It was in that capacity he invited the 1st and 2nd appellants to invest in the company by each contributing some substantial amount of money variously described by the parties as Ksh 8 million which was to be used in the development of the housing estate. The parties had also agreed once the project was completed, each of the three main shareholders would own one of the villas by paying a discounted price of Ksh 6 million while the other villas would be sold and the profits shared accordingly. The respondent claimed that he financed the drawings of the building plans, conceptualized the project, and obtained all the requisite approvals, he was also in charge of the entire day to day management of the company that developed and completed 3 villas known as Minazini Villas Malindi.

[3] However, the whole project was not completed as disagreements started in the month of April, 2011 when the respondent said he received a call from Ricardo (1st appellant) who alleged that the respondent had no shares in the company as he had transferred all his shares to 1st and 2nd appellants. Surprised by that turn of events, Graziano said he convened an extra ordinary meeting of the company to discuss the issue of share transfer which he denied having transferred to the 1st and 2nd appellants. A meeting was held on the 7th May, 2011. The respondent nonetheless contended the meeting was not properly convened and minutes were irregularly passed with resolutions purporting to remove him as managing director of the company. To justify, the attempt to remove the respondent as the managing director, the appellants relied on some minutes of a meeting purportedly held on 30th September, 2010 in Rome at which the respondent is said to have transferred his entire 300 shares to the 1st and 2nd appellant.

[4] The respondent denied having participated in the said meeting which he claimed was held in his absence and purported to vote and resolve to remove him as the managing director of the company and appointed the 2nd appellant to take over as the managing director of the company. The respondent alleged the said resolutions were done without his knowledge, consent or approval. To solidify his fears, on 11th May, 2011 he received a letter from one Simon Nduku allegedly acting as agent for Grant Thornton, the official company secretaries of the company confirming that he had no role in the company as his shares were transferred to the 1st and 2nd appellants.

[5] On 23rd May, 2011 the respondent filed suit before the High Court in Malindi alleging fraudulent transfer of his shares in the company to the 1st and 2nd appellants. He alleged fraud against the appellants in forging and registering transfer of shares; presenting false minutes and resolutions to the Registrar of Companies which he claimed were never passed; trying to sell the assets of the company so as to disposes him of his rightful shares and threatening to evict him from the company premises where he had invested. The respondent sought mandatory orders of injunction to restrain the appellants or their agents from disposing of shares or effecting any changes in the company's shareholding or in dealing with the company's assets or evicting him from the company premises.

[6] In their defence, the appellants maintained that the respondent did transfer to each of them 150 shares and his removal from office as the managing director of the company was made, pursuant to a valid and binding resolution of a duly convened meeting of the company's Board of Directors. They denied that the respondent was entitled to the reliefs sought in the plaint. After some back and forth proceedings over some interlocutory applications, the main hearing of the suit took place in earnest before Meoli J., with both parties giving evidence and producing documents in support of their respective positions. The respondent called two witnesses, while the appellants relied on the evidence of Ricardo Faneli, the 1st appellant and did not call any other witness. The learned Judge fastidiously went through the evidence and the documents produced in evidence after which she found the respondent had proved his case on a balance of probabilities. It is appropriate to reproduce the pertinent portion of the said judgement:-

"The purported removal of the plaintiff as Managing Director and his replacement with

Carlo Neri appears to have been carried in the self-same casual manner characteristic of the operations of the 3rd defendant. It would seem from the plaintiff's version that all that happened on the 8th was a contention riven gathering of the directors that possibly touched on the agenda but was too acrimonious to reach any credible resolutions. I find that the purported resolution for the replacement of the plaintiff as managing director cannot pass muster the requirements of the law.

In the circumstances, I find that on a balance of probabilities the plaintiff has established his case. It is beyond doubt that the shareholders of the company have fallen out after sinking their money into the Minazini Villas project. The company was seemingly poorly run and at the risk of falling apart. It is not clear whether the company has been operating since 2011. Perhaps the shareholders should get professional help with a view to consider winding it up voluntarily to forestall further losses if they cannot reach an amicable solution to their wrangles.

In light of my findings in this matter prayer (aa), (a1) and (b) appear to me inappropriate and unnecessary. Prayer A2 &3 are spent. Prayer C) if granted would entrench the status quo whereby the company and shareholders cannot transact any business regarding the company's apparent key asset. It is prudent that until the impasse between the directors is resolved none of them individually or jointly should be at liberty to take actions which imperil the said asset of the company.

For the reasons above the orders that commend themselves to me in the circumstances of this case are as follows;-

a) This court declares that the shareholding of the 3rd defendant is and remains as set out in the letter of the Registrar of Companies dated 9th August 2011

b) That pending the amicable resolution of the wrangles between the shareholders or invocation of legal mechanisms under the Companies Act they are jointly and severally restrained from disposing of the assets of the company, in particular the land parcel number 10794/06 Malindi with developments thereon.

For the avoidance of doubt each director is meanwhile entitled to access and use of their assigned respective villa at Minazini Villas as agreed by the parties before the court on 6th September, 2012 and in accordance with the minutes of the meeting held by them on 29th July, 2010. Each party to bear its own costs"

[7] The aforesaid orders provoked the instant appeal that faults the learned Judge for failing to appreciate the evidence by the appellants and for misapprehending the principles governing companies; that the respondent's case was actuated by bad faith and an abuse of the court process; allowing the respondent to use company property which he had not paid for and not taking into account the principles of equity in determining shareholding in the company. During the plenary hearing, Ms Pauline Essau, learned counsel for the appellant relied on their written submissions in their entirety and did not highlight the same.

[8] On the part of the respondent, Ms Aoko, learned counsel for the respondent highlighted her clients written submissions. According to counsel for the respondent, there was no evidence by the appellants to support an agreement of transfer of shares; the appellants did not provide original bank statements to show transfer of money, whereas the respondent was able to show how much money he had pumped into purchase of land and construction of the three villas; the appellants also failed to prove bad faith on the part of the respondent, who managed the company and completed three villas. The Judge also took into account the fact that 1st and 2nd appellants have access of their respective villas which they rent out without any interference on the part of the respondent; there was evidence to show the monetary contribution made by the respondent before flouting the company and before the sale of shares to the appellants, who hurriedly purported to stage a boardroom coup to remove the respondent without due

regard to the provisions of the Companies Act or the memo and articles of association of the company. Ms Aoko urged us to dismiss the appeal as the appellants failed to produce any transfer of shares duly signed by the respondent with a witness or an authenticated minutes of the company with resolutions.

[9] We have taken time to go through the submissions filed by counsel for the appellants. Counsel has raised a litany of issues that she invites us to consider from the scanty evidence that was adduced before the trial court. Some of those issues are the same as the ones raised in the grounds of appeal that *inter alia* challenge the findings by the learned trial Judge in regard to monies pumped into the company by the appellants for the construction of the villas which was not taken into consideration; the fact that the respondent pledged his shares as guarantee for the money paid by the appellants for the construction of the villas in that case he had no shares as he failed to complete the project within the time provided ; ignoring an agreement entered into by the parties in Rome in January 2010, wherein it was stated that if the appellants were not paid back the money they had contributed within a year the respondent was to forfeit the shares he had pledged as collateral and the forfeiture took place when the respondent was removed from office. This was supported by the evidence of Zeinab Yunis who testified as (PW2) and the fact that all the money that was used in the construction of the three villas came from the appellants and finally orders were issued which were not prayed for.

[10] This is a first appeal, that being so, we are conscious of our duty to re- evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. See **Mary Njoki v John Kinyanjui Mutheru** [1985] eKLR:-

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide. Watt v Thomas, [1947] AC 484." Also the case of;- S. M. v E. N. B. [2015] eKLR:-**
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> **"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we, however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions**."

[11] In the premises and having regard to the grounds of appeal, the evidence before the trial court and the submissions made before us, the issues that fall for determination which are germane and cut across are two fold; that is whether the respondent transferred all his shares in the company to the 1st and 2nd appellants and whether he was validly removed from office as managing director of the company. The respondent principally sought injunctive reliefs which are discretionary in nature. When considering whether to grant discretionary orders, the learned Judge was exercising judicial discretion which is unbridled except where it is established such exercise was not judicious; where the court has misdirected itself in some matter and therefore arrived at a wrong decision; or where it is manifest, looking at the whole record of appeal, the decision is wrong. See the words of Sir Charles Newbold P. in **Mbogo –V- Shah** [1968] E.A. 93:

> **"…..A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."**

[12] The thrust of this appeal is a determination of whether the learned Judge, while considering the evidence before her regarding the dispute on the alleged transfer of the shareholding in the company

misdirected herself or misapprehended the material before her and thereby arrived at a wrong decision. The first issue to consider is whether the evidence adduced by the respondent and his two witnesses proved his case on a balance of probabilities that he did not transfer his shares in the company to the 1st and 2nd appellants. Auxiliary to this issue is whether there was justification for granting orders that were not prayed for by the respondent or whether the Judge descended into the arena of dispute, ignored the provisions of the Company's Act, the memo and articles of Line Staff Ltd by directing how the company's affairs shall be run as argued by the appellants.

[13] The learned Judge declared the shareholding of the company shall remain as set out in the letter by the Registrar of Companies dated 9th August, 2011 until the company's affairs were conducted according to the Law. Further, each director was allowed to take possession of their respective villas which *ispo facto* were not prayed for. However, under the provisions of **Order 15 rule 2** of the Civil Procedure Rules, a court has power to frame issues it considers pertinent for the determination of a dispute between the parties. In this case, the aforementioned issue, of how to preserve the assets of the company in the face of serious disagreements among shareholders was a relevant one and it arose from both the pleadings and the evidence before the Judge. We are not persuaded the Judge erred by issuing the said orders which are equitable in the circumstances of the matter and preserved the assets of the company. See also the case of **Odd Jobs V Mubia, 1970 Ea *Page 47*6**, where it held:

> **"(i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;**
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> **ii) On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it."**

[14] On the issue of the transfer of shares in the company, we shall revert to the evidence alluded to earlier in this judgment, especially the testimony of the respondent that after he incorporated the company in 2007 with three initial directors but one of the directors by the name Alessandro resigned in March, 2009 and he transferred his shares to the respondent. In April, 2009 the company acquired a parcel of land at Ksh 4 million being a portion of LR No 10794/106 Malindi. Subsequently, on 12th May, 2009 the respondent transferred 250 shares to the 1st appellant and 100 shares to the 2nd appellant retaining 400 shares for himself while Zeinab Yunis transferred some 100 shares to the 2nd appellant. The company shareholding, according to a letter by the Assistant Registrar of Companies dated 9th August, 2011 indicated the following;-

i) Frigieri Grazaiano 400 shares

ii) Zeinab Mohamoud Yunis 100 shares

iii) Ricardo Faneli 250 shares

iv) Carlo Ner 100 shares

Total 1000 shares

[15] The company embarked on development of 10 villas with the aim of allotting each of the shareholders one villa at a discounted price while the proceeds from the sale of the other villas would be shared. The 1st and 2nd appellants as well as the respondent claimed to have invested substantial sums of money on the project. However, by mid-2011, when the suit was filed in the High Court, a major disagreement occurred and the 1st and 2nd appellants purporting to be majority shareholders called a general meeting and passed a resolution that removed the respondent as managing director and replaced him with the 2nd appellant. The appellants claimed the respondent had transferred to them 300 shares vide share transfer dated 30th September, 2010. This was the gravamen of the matter. Upon evaluation of the evidence the learned trial Judge who saw and heard the witnesses testify agreed with the respondent's

version that the alleged transfer of share instrument was not witnessed unlike the earlier transfers executed by the same parties in May 2009.

[16] On our part, we cannot fault the learned Judge on these findings which are well reasoned as the Judge examined the minutes of 30th September, 2010 which she found vague and lacking material details such as consideration for the sale of the purported transfer of shares. The Judge found while the shares were to be transferred at par value, the minutes stated;-

> **"The company takes full responsibility on matters concerning the above transaction and the consideration (or value) to be paid on the said transfer of shares."**

The Judge found it difficult to identify the amount of consideration paid from the bank statements produced by the appellants. Similarly, the minority shareholder, Zeinab Yunis who stated that she was hoodwinked to append her signature on the said minutes clearly proved that whether the meeting was properly convened and what transpired in that meeting did not meet the threshold on a properly convened meeting. The appellants did not provide evidence of how they purchased 300 shares from the respondent; how the respondent borrowed money from them. If the respondent borrowed money and executed the guarantee in Rome in January, 2010 which was to lapse in January, 2011, there were steps to take such as registration of transfer of shares at the Company Registry which was not done as at August 2011, there was no further change in shareholding that was produced in court.

[17] As stated here before, a first appeal, gives the appellate court room to re-evaluate the evidence and arrive at our independent conclusion based on the available evidence. See the case of;- **Selle and Another V Associated Motor Boat Company Ltd and Others,** [1968] 1 EA 123 (CAZ):

> "**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 demeanour of a witness is inconsistent with the evidence in the case generally.** (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270)."

[18] The above findings by the learned Judge are substantial and in our view they are sufficient to warrant the issuance of an order of injunction restraining both sides from disposing the main asset of the company that is Land Parcel No 10794/06 Malindi until the company followed the laid down procedures set out under the Companies Act to resolve any disagreements or dispose of shares of a minority shareholder or any other shareholder for that matter. There was sufficient evidence which established a *prima facie* case; which remains as was stated by this Court in **Mrao vs First American Bank CA No 39 of 2002** where it was stated;-

> "**What constitutes a prima facie case in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".**

[19] The last issue is whether the removal of the respondent as managing director of the company was done according to the memo and articles of the company and the Companies Act. The trial court accepted the evidence that a proper notice to convene a meeting on 7th May, 2011 was properly issued with an option to any member who was entitled to attend, but was unable to, was at liberty to appoint a proxy. Accordingly, the 2nd appellant sent one Giuseppe Pucacco who was appointed to chair the meeting. The problem with the said voting was that it was done according to the disputed shareholding. Every meeting of the company has to be convened with the proper quorum and voting done according to shareholding. The learned Judge considered the fact that there were serious disagreements on the shareholding of the

directors, the financial situation of the company and the constitution of the board of directors which matters were all suspended and not discussed according to the minutes. The Judge therefore wondered how an appointment of a managing director could take place in the midst of such serious disagreements. Regarding the appointment of the 2nd appellant as the managing director, we find ourselves agreeing with the findings by the trial Judge that the issue of shareholding, was critical in determining who to elect as managing director. The issue of shareholding must be determined first, that way, the eligibility of members, the number of votes according to shares is what determines who can be appointed as managing director of the company.

[20] We think we have said enough to demonstrate this appeal lacks merit. All the parties were advised to follow due process by invoking the legal mechanisms under the Companies Act; that is convening a proper meeting and passing proper resolutions according to their shareholding and how to manage their company according to the law. Accordingly, we order the appeal dismissed and each party to bear their own costs, this being an internal dispute between shareholders of the same company.

Dated and delivered at Mombasa this 21st day of September, 2017

ALNASHIR VISRAM

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JUDGE OF APPEAL

W.KARANJA

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JUDGE OF APPEAL

M.K.KOOME

… ……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR