IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 98 OF 2016

BETWEEN

PARAG BHABWANJIGHAI SAVANI…...……APPELLANT

VERSUS

JITU TRIBHOVANSHAI SAVANI…….. 1ST RESPONDENT

PVRV RAO …….…….... 2ND RESPONDENT

SHIV SAVANI ……. 3RD RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Charles Kariuki, J) dated 29th January, 2016 ***in*** **MISC. CAUSE.** ***NO. 197 OF 2015)***

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JUDGMENT OF THE COURT

This is yet another family feud over the assets, running and management of some three Companies, **Key Investments Ltd**, (key) **Plastic Products Co. Ltd** (Pastic Products) and **Multipackaging Ltd** (multipackaging) that were the brainchild of the late Bhagwanjibhai Tribhovanghai Patel (BT). The protagonists are BT?s offspring or their relatives who are also shareholders and directors of the three companies. They are embroiled in other litigation, specifically **H.C.C.C. No. 130 of 2014** which is still pending before the Commercial and Admiralty Division of the High Court at Milimani, to which we shall return.

On 30th April 2015, **Jitu Tribhovanbhai Savani** (Jitu) moved to the High Court and filed a Miscellaneous Cause under **Sections 165** and **166** of the Companies Act (Cap 486, (now repealed, henceforth „the Act?) and the High Court Rules made thereunder. The miscellaneous cause was expressed as being in the matter of the three companies and was directed at **Parag Bhagwanjibhai Savani** (Parag) and P.V.R. Rao (Rao)as respondents. The cause was founded on a notice of motion under the said statute as well as various rules of the Civil Procedure Rules and **Articles 27, 28, 35** and **40** of the Constitution, 2010. It sought, in the main, two orders namely;

> ***"3. That this honourable court be pleased to issue an injunction against the respondents either by themselves or their agents employees or any persons howsoever working under their direction or instructions from changing, altering or in any way interfering with the shareholding and directorship of Key Investments Company Limited, Plastic Products Co. Limited and***

Multipackaging Limited.

4. That this honourable court be pleased to appoint Abdulahid Aboo, No. 0325 T/a Aac Kenya, a certified public Accountant or suchother competent inspector as the Court may deem fit as an inspector to inspect the affairs of the Companies and to report to the Court thereon in respect to ;

"a. All affairs of the company and not limited to (sic)

b. Position of the members in the register and index thereof

c. Position of books of accounts, bank accounts and signatories thereof

d. Position in respect of appointment of and removal of directors since registration of the said Companies

e. Position in respect of meetings including Annual General Meeting, special meetings and meetings called out or held by the company if at all and resolutions if any and minutes thereof

f. Appointment of and removal of Auditors if at all

g. Appointment of and removal of Company secretaries

h. Transfer of shares and acquisition of membership to the Companies since registration of the said Companies

i. Position in respect to appointment of service providers and contracts entered in to by the said Companies

j. Establish legal and financial standing of the Companies."

Jitu also prayed that the inspector be ordered to file a report within **21 days** and that subsequent thereto the court do "submit and forward a copy of the report to the Director of Public Prosecutor from (sic) proposal of instituting criminal charges …" against such person as may appear to be guilty of any offence or offences.

The motion had some 23 grounds on which it was said to be premised and was supported by Jitu?s affidavit sworn on **30th April 2015** the gist of which was that he was a director and shareholder of Key, holding 200 out of 1000 shares; he had not been invited to any annual general meeting of Key the affairs of which and of other companies were being conducted in an oppressive manner sidelining and excluding him; Rao in 2014 filed annual returns imposing **Jitendra Trikamdas Savaly** (Savaly) and Sarju Parag Savani (Sarju) as directors without Jitu?s knowledge contrary to the Articles of Association and over his protests and legitimate expectations; the companies? affairs were being conducted illegally, thorough suspected connivance with officers at the Registrar of Companies; records were being altered or interfered with and some were missing; Parag and Rao had opened or were intending to open private bank accounts for diversion of the three companies? funds; taxes were not being paid; returns were misrepresented; the relationship among the directors and shareholders had irretrievably broken down; he was being discriminated against and his rights unconstitutionally violated, including the right to access to information and to fair treatment.

He stated the justification for the sought order of inspection as follows, in paragraph 20 of the affidavit;

"20. That the inspection will enable me confirm the status as to the appointment of an auditor and compliance of section 159 of the Companies Act in order to protect the interests of my investments, and to confirm whether there are any conflicts of interest, and the remuneration set for the auditor and how the auditor was appointed, if in compliance with the law. This

information has been kept away from me."

Annexed to the affidavit were a number of letters dated between 2014 and 2015 to the Registrar of Companies and to Tact Corporate Registrars, the three companies? secretaries, to the attention of Rao, in which he raised various complaints.

The application was heard *ex-pate* in the first instance on 4th May 2015 before Gikonyo, J who certified it urgent and injuncted any change of shareholding or directorship of the companies pending hearing on 18th May 2015.

That motion attracted Parag?s replying affidavit sworn on 13th May 2015 in which he first swore, on the basis of legal advice received, that the motion was hopelessly incompetent and an abuse of the process of the court on account of three matters;

a. The seeking of inspection in a joint application instead of separately for each company

b. Failure to make the affected company as parties to the application.

c. It was based on allegations they made and pending determination in Civil Suit No. 130 of 2014 filed by Jitu.

Parag also swore that Jitu had no right to rely on Section 166 and 396 of the Act which could only be invoked by the Registrar of Companies and the Attorney General. The Court had no jurisdiction to grant the injunctive relief it sought to direct the DPP on how to discharge his constitutional functions.

He then dismissed Jitu?s application as being based on a mixture of "misleading half truths, **unjustified conjectures** and speculation as well as outright fabrications and falsehoods." After giving a background of the companies, he swore that he had never refused to meet or discuss anything with Jitu and that they both had full and equal access to the records of all three companies.

Jitu was very much part of the management team of the companies and has in fact been managing director in active management, but he turned recalcitrant and elected not to attend some meetings, though invited, and in particular the extra ordinary General Meeting of 31st March 2014 whereat Swarly and Sarju were appointed as directors. Parag swore further that if Jitu genuinely believed that the companies were being run oppressively towards him, he would have sought relief under **Section 211** of the Act but had not, and denied all allegations of discrimination or denial of rights. He concluded his deposition with an averment that the application for inspection was founded on wild and patently false allegations including on the issue of appointment of auditors who have worked for the companies since 1993 with Jitu signing off the accounts they audited for all those years, and on alleged tax evasion yet the companies were fully tax compliant.

Rao also swore a replying affidavit on **13th April 2015** in which he explained that he was the Company Secretary of the three privately owned companies and denied allegations of oppression against Jitu. He also swore that he had no knowledge of Jitu?s being denied any audience. He swore that for over twenty years he had dutifully filed the companies annual returns and effected any charges on the directorship and shareholding of the companies. He had dutifully and punctually given to Jitu all the documents he ever requested and mentioned specific ones, receipt of which Jitu had concealed from the court.

Jitu had for all times prior to 2014 signed the minutes of Annual General Meetings as well as annual accounts of the companies without reservations or objection. He explained the circumstances surrounding the appointment of the directors on **31st March 2014** at a special AGM about which Jitu was always aware but elected to stay away from. He categorically denied Jitu?s allegation that he filed misleading returns; that he sought to interfere with company records or cause them to disappear; that he opened secret bank accounts and was involved in tax evasion. He also explained as normal the renewal of appointment of the companies? auditors over the years.

Jitu joined issue with Parag and Rao on their replying affidavits through a supplementary affidavit sworn on **10th July 2015** which was a denial on allegations made or in explanatory commentary n them while reinforcing and reiterating the contents of his supporting affidavit.

While all of these filings were being done, the *ex-parte* orders given by Gikonyo, J lapsed and the matter was subsequently mentioned before the Deputy Registrar of the High Court who made an order that the *status quo* be maintained until **6th November 2015** when it would be mentioned before Kariuki J who, in turn, extended the same until **4th November 2015** when the matter was to be heard.

The *status quo* orders notwithstanding, Jitu issued a notice on 6th November 2015 calling for a Board of Directors? meeting of Multi-packaging and Plastic Products to be held on 9th November 2015 but the notice did not issue to Swaly and Sarju who nonetheless attended. During that meeting, an item recommending the payment of **Kshs. 100 million** in directors? bonuses to Jitu, one Shiv J. Savani (shiv) and Parag was rejected by a vote of 3 to 2. Despite that rejection, and on the strength of alleged minutes of that meeting but with Swaly and Sarju omitted, Jitu caused a transfer from Multipackaging of (Printpak)?s account of **Kshs. 23,333,333** to each of the accounts of himself and Shiv held at I & M Bank.

This development provoked an application by Parag dated 12th November 2015 by which he sought an order joining Shiv as a respondent in the proceedings and another for injunction to restrain Jitu and Shiv from removing, disposing of, charging, intermeddling or interfering with their 2 named accounts held at I

- M Bank Industrial Area Branch, and to refund the sums paid them from Multi-Packaging.

That application was placed before Ogolla, J under certificate of urgency on 15th November 2015 and he granted the order enjoining Shiv as the 3rd respondent and also granted a freezing injunction against the accounts of Jitu and Shiv at I & M Bank pending *inter partes* hearing of the application before C. Kariuki, J who was to thence forth deal with the matter. He did so by hearing both that application and the earlier one filed by Jitu, at the end of which he granted Jitu?s application and injuncted the change of directorships of the companies; appointed Abdulahid Aboo to inspect the affairs of the companies in respect of their activities and dealings as well as legal and financial status; and report within ***21 days***. With respect to Parag?s application, the learned Judge maintained the freezing order and directed that the inspection do include the circumstances leading to the transfer of the **Kshs. 23,333,333** to Jitu and Shiv, which sums were not to be drawn from their respective accounts.

Parag was aggrieved by the ruling and order of the learned Judge and, after filing a notice of appeal, lodged the instant appeal in which he complains in memorandum of appeal that the learned Judge erred, in summary, by;

- ***Allowing Jitu's application and declining prayers 5 to 7 of Parag's application.***
- ***Failing to uphold Parag's jurisdictional objections on whether Jitu could invoke section 166 and 396 of the Act.***
- ***Dismissing jurisdictional objections based onJitu's shareholding erroneously said to be 20% when it was below 10% for Multipackaging and Plastic Products.***
- ***Conflating and misapprehending the distinct jurisdictional abuse of process objections to Jitu's application.***
- ***Failing to hold that no joint application could be made in respect of multiple companies.***
- ***Failing to hold that no orders could be issued against the 3 companies until they were joined as parties to the proceedings.***
- ***Failing to find that the grounds in which inspection was sought were demonstrably false and the application should have failed.***
- ***Holding that prima facie Jitu had been locked out of the management of the companies and that Rao admitted it.***

- ***Granting a roving licence for inspection.***
- ***Abdicating adjudication of the application to refund the bonuses improperly paid and delegating it to the inspector.***

The appeal therefore seeks orders reversing the orders of inspection and injunction and substituting them with an order dismissing Jitu?s application while granting prayers 5, 6 and 7 of Parag?s application.

Prior to the hearing of the appeal, counsel for the respective parties filed their written submissions which were orally highlighted before us. **Mr. Amoko** for the appellant Parag started by addressing the jurisdiction-impacting shareholding in the companies. He drew our attention to a letter dated 4th March 2015 from the Registrar of Companies on Multipackaging. In it, the shareholding of both directors and non-directors was indicated as follows**;**

"Names	**Address**	**Shares**
Bhangwanji Tribhavanbhai Patel	**P.O. Box 41438-00100 Nairobi**	**22,125**
Jitu Tribhavanbhai Savani	**P.O. Box 1821, Nairobi**	**87,500**
Parag Bhagwanjibhai Savani	**P.O. Box 41438-00100, Nairobi**	**112,500**
Shiv Jitu Savani	**P.O. Box 18241, Nairobi**	**25,000**
Non directors Shareholders		
Key investments limited	**P.O. Box 41438-00100, Nairobi**	**796,875**
	TOTAL	**1,250,000**

On the basis of that shareholding, counsel contended that Jitu?s 87,500 shares represented only **7.5%** of the total 1,250,000 shares and did not therefore meet the 10% threshold that would have entitled him to the relief sought under **Section 166** of the Act. Mr. Amoko criticized the learned Judge for stating without a basis, that Jitu had met the threshold by holding 20% of the shareholding, which was not the case. He contended that this was a jurisdictional issue and the learned Judge was wrong to assume a jurisdiction he did not have.

Turning to the issue of abuse of process, learned counsel submitted that there were extant prior proceedings filed by Jitu himself which raised the same issues of alleged exclusion from the affairs of the companies, manipulation of shareholding, and the like. The learned Judge was wrong, we were told, to conclude that the matters in the two sets of proceedings were different by merely looking at the respective prayers instead of viewing the pleadings in totality.

Counsel also faulted the learned Judge for making factual errors and failing to find that all allegations of exclusion, lack of information and such like were fully answered, „chapter and verse?, by Parag and Rao. He queried how the learned Judge could accept

Jitu?s complaints yet he had been invited but boycotted the meetings at which decisions were properly made. This was a case of intransigence on Jitu?s part including by giving instructions to scuttle the meetings he passed, and not of exclusion. He then made an alternative argument that even if there were any truth to the allegations of oppression, company law provides for relief under **section 211** of the Act. Moreover, there was the avenue of a derivative action under the rule in ***FOSS vs. HARBOTTLE [1843] 2*** **Hare461**.

Counsel rested by urging us to interfere with the learned

Judge?s exercise of discretion because he had erroneously rejected the valid jurisdictional objections raised. He urged us to apply the cases cited in his list of authorities.

For Rao, the 2nd respondent, learned counsel **Mr. Wandabwa** expressed support for the appeal. He took the view that it was wrong for his client, who was and is the managing director of the companies, to be sued and ordered to allow inspection of the same yet he was a mere agent of the companies which were his disclosed principals, and which were not themselves sued.

On the merits, counsel contended that only the Registrar of Companies and not Jitu or Shiv, could move the court under **Section 166** of the Act. Next, he argued that Jitu did not meet the 10% shareholding threshold and his motion should not have been entertained in the first instance.

Mr. Wandabwa went on to posit that all of the allegations forming the basis of Jitu?s application were sufficiently controverted by Rao to show that all the documents that Jitu ever requested of Rao were furnished and duly acknowledged. Indeed, some of the documents were signed by Jitu as a party thereto and were always within his possession and control. What is more, all of the documents that are required to be examined during the inspection sought and ordered were in fact placed before the learned Judge. Counsel concluded by stating that Rao held back not a single document, before posing "**what then was the inspector to go and inspect**?" to make the point that there was no basis for making the order for inspection.

Rising to oppose the appeal on behalf of Jitu and Shiv the 1st and 3rd respondents, respectively, **Mr. Nkanate** their learned counsel first indicated that he had not filed submissions but had a list of authorities. On whether Jitu met the 10% threshold under **Section 165** of the Act, counsel admitted that Jitu held 10% of Key as has already been set out, but complained that the issue of threshold was being raised for the first time in this appeal not having arisen at the High Court. He then went on to say, somehow, that in so far as Key had some 796,875 shares in Multipackaging and Jitu in turn „owned 30% of Key?, then it followed that he met the threshold to enable him to bring the application.

Still on jurisdiction, counsel argued that **Section 165** of the Act gave the High Court discretion to order inspection so long as the application is supported by such evidence as the court might require and, in his opinion, Jitu had provided a sufficient basis for the order of inspection of the very company he headed as managing director. As to the meeting that Jitu did not attend, it was counsel?s submission that he did write a letter of protest but the company secretary did not respond, which led him to suspect that the secretary and Director "were in a scheme to sideline" him in the running of the companies.

On the question of abuse of process by reason of the preexisting suit that Jitu filed, Mr. Nkanate maintained that this was not so as the orders being sought, the parties and the issues involved in the two sets of proceedings are different, and, moreover, the procedure and form for inspection could not be applied for in the prior suit. Counsel then went on to cast aspersions on the parties questioning the inspection orders with this forceful, if curious, submission;

> ***"The passion, energy and stringency with which the appellant and the 2nd respondent have opposed the inspection is the more reason why an independent inspection ought to be done."***

Counsel completed his submissions by attempting to distinguish the case of ***SHADRACK MUTIA MUIU vs. KIVUTHA KIBWANA & OTHERS*** **[2011] eKLR** which held that if a matter is directly and substantially in issue in previous proceedings, then a suit bearing the same effect or achieving the same end amounts to abuse of the court process, by contending that the ends in the matter before the learned Judge were different from those in the previous suit, which he admitted was still at pre-trial stage. He therefore urged us to dismiss the appeal.

Replying to those last submissions, **Mr. Amoko** invited us to consider the plaint in the prior suit which showed that the parties are the same as herein and are not strangers but rather connected by their shareholding in the three companies. He also contended that the allegations in that prior suit are „pretty much the same? as the ones raised in the motion giving rise to this appeal with the issues being the same,

so that nothing stood in the way of Jitu making an application to be supplied with whatever information he sought in the new proceedings within the extant suit through the process of discovery.

Learned counsel repudiated the contention that by holding shares in Key, Jitu became an owner of its shares in Multi-packaging thus enabling him to reach the 10% threshold as shareholding did not make one an owner of the assets of the company. He criticized the learned Judge for not only failing to seek to be satisfied by Jitu that there was a good reason to order inspection, but going ahead to perversely shift the burden of proof to require that Parag do prove what hardship would be suffered if an order of inspection were made.

Counsel concluded his submissions by beseeching us to uphold the rule pronounced in ***FOSS vs. HARBOTTLE*** (supra) that, as a matter of principle, companies should be allowed to run their own affairs and courts should not be eager to interfere therewith.

Having considered this matter in its totality and given due attention to the rival submissions filed and made before us by counsel as well as the very authorities cited, the beginning point is an acknowledgement that what we are called upon to do is to interfere with the learned Judge?s exercise of discretion. As an appellate Court, we are keenly aware that it is not our business to substitute our discretion for that of the first instance Judge. We are deliberately slow to interfere, even when we would have been inclined to decide otherwise had we been dealing with the matter directly ourselves. That is the nature of discretion that the Judge in whose discretion it lies is allowed a degree of latitude which must be deferred to unless the discretion is exercised in a manner that is perverse or unreasonable, goes against established principles, proceeds on serious misdirection or non-direction on evidence or law or is, on a consideration of the matter as a whole plainly erroneous and resulting in misjustice and therefore calling for reversal. That is essentially what this Court and its predecessor have consistently stated in a long line of cases. It has been the law on this subject for nearly half a century ever since MBOGO vs. SHAH *[1968] EA 93* was decided. Sir Clement De Lestaag, V. P. put it thus at P94;

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view, it has failed to do."***

The President, Sir Charles Newbold agreeing, added his own understanding as, (at p96);

> **"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 his 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 that as a result there has been misjustice."**

These principles have been faithfully followed and applied as they do represent good law. See for instance, ***MATIBA vs. MOI & 2 OTHERS*** **(No.2) [2008] 1KLR (EP) 670**, holding number 4 at P671, which was cited by the respondents opposed to this appeal.

It is contended by Jitu and Shiv in support of the appeal that the learned Judge erred in exercise of discretion in the two critical areas that the learned Judge himself identified as dispositive of the matter, and which we also consider critical to the fate of this appeal, namely;

1. Whether the High court had jurisdiction to entertain and grant the orders sought

2. Whether Jitu met the threshold for grant of;

    a. injunction

b. inspection.

We do propose, howeve, to first deal with them under the general rubric of jurisdiction to grant the order given.

It is trite that a court, no matter how well-intentioned and no matter how vital, critical, compelling even, it may view its intervention in a matter, may not without an impermissible usurpation, embark upon the hearing of a matter or make orders unless it be possessed of jurisdiction to do so. It was famously stated by Nyarangi JA in ***OWNERS OF THE MOTOR VESSEL "LILLIAN S" vs. CALTEX OIL (KENYA) LTD*** **[1989] KLR** at P14;

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other 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."**

In the present matter, it was contended both before the learned Judge and before us that the learned Judge erred to entertain and grant the appointment of an inspector under **sections 166** and **396** of the repealed Act. Whereas quite a bit of time and energy was expended on the question whether the application met the jurisdictional threshold set out in **section 396** of the Act, we are quite-unable to fathom why counsel for Parag addressed us on it. This is because from the application that was before the learned Judge and the judgment thereof, the said section was not engaged at all. We therefore are of the respectful view that the attack on the judgment and proceedings in violation of the jurisdictional markers set out in **section 396** and in particular that an application for inspection thereunder could only be initiated by a person other the Jitu, namely the Attorney-General, was entirely misconceived.

We shall therefore address the jurisdictional question only as to whether it was properly invoked and engaged under **sections 165** and **166** of the Act. Starting with section 165;

> "***165. (1) The court may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court directs –***
>
> ***a. in the case of a company having a share capital, on the application either of not less than two hundred members or of members holding not less than one-tenth of the shares issued;***
>
> ***b. in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members.***
>
> ***(2) The application shall be supported by such evidence as the court may require for the purpose of showing that the applicants have good reason for requiring the investigation, and the court may, before appointing an inspector, require the applicants to give security, to an*** **amount not exceeding ten thousand shillings for payment of the costs of the investigation**."

(Our emphasis)

From a plain reading of that section, the court does have jurisdiction to appoint one or more inspectors to investigate the affairs of a company. That jurisdiction can only be engaged under sub-section (1)(a), relevant to this case, upon application of members holding not less than one-tenth of the shares issued. The contention is that Jitu?s shareholding was 7.5% of the total number of shares in Multipackaging, as we have already indicated from the documentary evidence on record placed before the court below and which figure has not been seriously or at all controverted. There was half-hearted and wholly unconvincing argument that the deficit would be supplied by the shares in Multipackaging held by Key Investment but it is impossible not to agree with **Mr. Amoko** that Jitu?s shareholding in Key did not

make him an owner of its assets including its shares on Multipackaging. We find and hold, on the evidence on record, that Jitu did not prove that he held at least 10% of shares in the companies and in those circumstances, he did not qualify to apply for inspection and the court did not therefore have jurisdiction to entertain his application.

We have searched in vain to find the basis or justification for the learned Judge?s holding that Jitu "holds 30% of each of the **3 companies.**" As no evidence existed that Jitu did in fact have such shareholding, we have no hesitation in holding that the learned Judge fundamentally erred on the question. Jitu did not meet the threshold and his application was to that extent incompetent.

Turning now to **section 166**, its provisions are equally plain.

> ***"166. Without prejudice to its powers under section 165 the court –***
>
> ***a. shall appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court directs, if the company by special resolution declares that its affairs ought to be investigated by an inspector appointed by the court; and***
>
> ***b. may do so, if it appears to the court upon a report from the registrar that there are circumstances suggesting-***
>
> > ***i. that the company's business is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or***
> >
> > **ii. that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or**
> >
> > ***iii. that its members have not been given all the information with respect to its affairs which they might reasonably expect; or***
> >
> > ***iv. that it is desirable so to do."***

(Our emphasis)

It is patent that this is a separate and distinct jurisdiction for the court to appoint an inspector quite unrelated to an application based on the qualifying shareholding of **section 165(1)(a)** or member threshold under **S.165(1)(b).** The jurisdiction hereunder is engaged under specific situations, namely;

> **a. Mandatorily where the company by special resolution declares that its affairs ought to be investigated**
>
> **b. At the Court?s discretion upon receipt of a report from the Registrar of Companies that there is fraud or unlawfulness against creditors or other persons or oppression against members on the running of the business of the company or it was formed for a fraudulent or unlawful purpose or that there is opacity and concealment of information from members, or if it is desirable.**

Under this section an order of inspection cannot issue unless first preceded by and founded on a special resolution by the company or a report from the Registrar of Companies. Needless to state, none of the companies herein passed any special resolution inviting inspection. Nor do we have any report from the Registrar of Companies pointing at fraud, illegality, malfesceance or oppression upon which the learned Judge could then exercise his powers to appoint an inspector. On this section as well, therefore, we find and hold that the court?s jurisdiction was not engaged as the pre-requisites were not met. The

appointment purported to have been founded on **section 166** was therefore null and void *ab initio*.

Our findings on the jurisdictional question ought to dispose of this appeal but it is germane for us to pronounce on a few other matters that we were addressed on. First, as a matter of principle, we think, with respect, that the learned Judge?s approach to the whole question of jurisdiction failed to take into account the need to respect managerial and operational autonomy which requires that courts should be slow to intervene in the running of private companies. This is the whole essence of the rule in ***FOSS vs. HARBOTTLE*** (supra) which the learned Judge, quite inexplicably in our respectful view, and without any attempt to say why not, held to be inapplicable to the case before him with the terse statement. "the suit does not fall within the realm of ***FOSS vs. HARBOTTLE***." We think it does, and it is no more than a restatement of the **„the principle of judicial non-interference?** as Prof Robbert R. Pennington termed it before explaining it further as follows in his **Company Law**, Eighth Edition, (Butterworths) at p 792;

> **"The rule of law known as the rule in Foss v Harbottle is one which has resulted from the refusal of the courts to interfere in the management of a company at the instance of a minority of its members who are dissatisfied with the conduct of the company's affairs by its board of directors, or by or under the direction of members of the company who control a majority of the votes which may be cast at its general meetings. Insofar as it precludes the court from enquiring into the desirability or wisdom of the acts of those who control or manage the company's affairs, the rule is an obvious necessity, because it cannot be the court's function to take management decisions and to substitute its opinions for those of the directors and the holders of a majority of the voting rights. But the rule goes beyond this, and in some cases prevents the court from remedying a wrong which has been done to the company, unless the members who control a majority of the voting rights want it to be remedied."**

See also, ***MAC DOUGALL vs. GARDINER*** **[1875] 1 CL D1 Ch. D 13.**

In discounting and excluding the applicability of the rule, the learned Judge fell into error calling for reversal.

We note also that the learned Judge gave extremely short shrift to Parag?s complaint that in so far as there was a pre-existing suit filed by Jitu dealing with the same issues raised by Jitu in the subsequent proceedings, there was a case of abuse of process. Once again all that the learned Judge stated, tersely, was that;

> ***"HCCC 130 of 2014 is a suit seeking various declaratory reliefs and not an inspection of the companies' affairs. In the premises the court finds that it has jurisdiction to entertain the application."***

With the greatest respect, we think that this amounted to a cursory dismissal of a valid objection with a wave of the judicial hand. It may well be that inspection was not sought in that other suit but the parties were the same or those claiming under them; the companies were the same; the complaints were the same. The difference in the formulation of the reliefs or remedies sought did not cure the affliction or infirmity of abuse of process that the latter proceedings bore. We think that had the learned Judge taken but a little time to consider the objection raised and to peruse the pleadings in the previous and pending suit, he would have come to the direct conclusion that what was being complained of and what was being sought by the applicant before him was a duplicate of, could have, and ought to have been raised in the prior suit that was still pending. We have recently had occasion to decry the tendency of parties to engage in a game of „gambling? and probably forum-shopping by the filing of a duality or multiplicity of suits over the same subject matter in the hope of landing a successful punch somewhere by a process of spreading their suits and hedging their bets. (See ***ALICE NJERU vs. STEPHEN NDWIGA*****, Nyeri Civil Appeal No. 1 of 2016)**. It is an impermissible abuse of process falling in several of the illustrations given of abuse of judicial process in the Nigerian case of ***SARAK vs. KOTOYE*** **[1992] 9 NWLR 9pt 264 156 at 188-189** that we cited;

"a. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

e. Where there is no iota of law supporting a court process or where it is premised on frivolity or recklessness."

See also ***SHADRACK MUIU vs. KIVUTHA KIBWANA*** (supra).

Jitu?s abuse of process was not confined to the filing of the proceedings before the learned Judge but spread to a disobedience of court orders made therein, and it is a puzzle that the learned Judge did not call him to account on that account either. There was clear evidence that during the pendency of court orders maintaining the *status quo*, Jitu took deliberate and fateful actions with far-reaching remifications to not only purport to change the directorships of the company, which was at the kernel of the proceedings he had filed in court, but went as far as to award himself and his son Shiv bonuses running into tens of millions of shillings. This kind to contumacious and impertinent violation of court orders cannot be permitted to thrive and with impunity. We think, with respect, that it behoved the learned Judge to wield the judicial stick with firmness and resolutely to make known to Jitu that such conduct could not be condoned. He ought therefore to have allowed Parag?s application that sought to reverse Jitu?s contemptuous acts. To have failed to do so constituted a reversible error of omission. In so saying, we agree with the sentiments expressed by this Court in; ***COMMERCIAL BANK OF AFRICA LTD vs. ISSAC KAMAU NDIRANGU*** **[1992] eKLR** that the dignity and authority of the court must be upheld by acting firmly and swiftly when its orders are flouted because flagrant disobedience, if allowed to go unchecked, would herald the onset of the erosion of judicial authority. We must not countenance, let alone condone or abet, such an eventuality under our watch.

It is also apparent that on a proper reading of the relevant provisions of the Act it was not open to Jitu to bring a compound application herding together the three companies in seeking the inspection orders. The learned Judge expressed himself that

> **"there is no law or authority cited which bars the making of a joint application to inspect the affairs of the 3 companies …"** but even a cursory reading of the statute itself would have advised against it. Moreover, the record shows that this Court?s decision of ***RAI & OTHERS vs. RAI & OTHERS [2002] 2 E.A. 537(COK)*** was cited. The least the learned Judge should have done is refer to and, if able to, distinguish or otherwise explain the inapplicability of the same to the case before him. For him to have proceeded as he did and to have gone ahead to issue orders against and concerning companies that were not themselves enjoined in the proceedings was also a misdirection on the part of the learned Judge and that, too, invites our interference.

We have said enough to show that this appeal is for allowing and it is so ordered. The ruling of the High Court dated 29th January 2016 is set aside and substituted with an order that;

a. The 1st respondent's notice of motion dated 30th April 2015 be and is hereby dismissed with costs.

b. Prayers 5, 6 and 7 of the appellants notice of motion dated 12th November 2016 be and are hereby granted with costs to the appellant and the 2nd respondent.

The 1st respondent shall pay the costs of this appeal to the appellant and the 2nd respondent.

Dated and delivered at Nairobi this 3rd day of November, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

……...……

JUDGE OF APPEAL

P.O. KIAGE

……...……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR