



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 36 OF 2015

BETWEEN

ACCREDO AG 1ST APPELLANT

SALAMA BEACH HOTEL LIMITED 2ND APPELLANT

HANS JURGEN LANGER 3RD APPELLANT

ZAHRA LANGER 4TH APPELLANT

AND

STEFFANO UCCELLI 1ST RESPONDENT

ISAAC RUDROT 2ND RESPONDENT

(Being an appeal against the order of the High Court of Kenya at Malindi (Chitembwe, J.) dated 30th April, 2015 in H.C.C.C No. 118 of 2009)

JUDGMENT OF THE COURT

1. This appeal impugns an order issued by **Chitembwe J.**, in which *the* learned Judge not only set aside a consent judgment which had been recorded by the parties on 21st January, 2010, but also ordered a change in the shareholding of the 3rd appellant.

2. This protracted dispute finds its roots in Italy, where a company by the name of Adinos A.G (*Adinos*) successfully sued another company namely Viaggi Del Ventaglio (*Viaggi*) and was awarded Euros 825,000 with interest, plus costs of Euros 2,420. However, instead of recovering the sums so awarded, Adinos chose to cede the decree to yet another company, namely Accredo A.G (1st appellant) to whom she owed money. A cession agreement to this effect was drawn up and upon execution, the 1st appellant took over the role of Adinos in so far as the Milan decree was concerned. This meant that the 1st appellant was henceforth at liberty to recover her debt by garnishing the decree issued against Viaggi. However, all was not smooth sailing and as the 1st appellant soon discovered, Viaggi was hurtling towards insolvency, with no attachable assets, save for those held by its Kenyan subsidiary, Salama Beach Hotel Limited (2nd

appellant).

3. Consequently, the 1st appellant set her sights on executing the Milan decree against the 2nd appellant here in Kenya and to this end, filed Malindi **HCCC 118 of 2009** seeking the following orders:

1. An order that the judgment of the court of Milan given on the 14th December, 2001 for Euros 825,000 plus interest and costs of Euros 2470 be enforced against the defendant.

2. A warrant of attachment before judgment do issue against the defendant's plot no. 9890 Grant no. 11576 pending the hearing and determination of suit. (sic)

3. An injunction do issue restraining the defendant by itself, directors, shareholders, attorneys, servants and/ or agents from selling , disposing off, alienating and/ or wasting plot 9890 Grant no. 11576 Watamu or in any other manner howsoever or whatsoever dealing with the said plot and the developments therein standing in a manner prejudicial or likely to defeat the process of execution of the judgment of the court of Milan given on the 14th December, 2001 pending the leaving (sic) and final determination of the suit (sic).

4. An order that the plaintiff be allowed to take over the ownership, management, running, operation and control of the defendant and the business carried on plot known as Grant No. 11576 plot no. 9890 Watamu for such period and time as shall be sufficient to satisfy the judgment and decree of the court of Milan dated 14th December, 2001.

5. Costs of the suit and interest thereon at court rates.'

4. Contemporaneously with that suit, the 1st appellant also filed an application seeking warrants of attachment of the 2nd appellant's land, Plot No. 9890 Watamu Grant No. 11576 as well as orders allowing the 1st appellant to take control of the management of the 2nd appellant, while restraining the 2nd appellant's directors from disposing her assets pending the determination of the suit.

5. During the pendency of those proceedings, the 3rd and 4th appellants who are the 2nd appellant's Managing Director and majority shareholder respectively, were enjoined in the suit as co-defendants. Similarly enjoined were the 1st and 2nd respondents, who were the 2nd appellant's director and chief executive officer respectively.

6. Meanwhile, the 2nd appellant had on her part responded to the suit by filing a statement of admission dated 18th December, 2009. On the heels of that unequivocal admission, a consent dated 18th December, 2009 was later recorded on the application as well, between the law firms of Messrs. Gunga Mwinga & Company Advocates for the 1st appellant and Fadhil Kilonzo Advocates for the 2nd appellant. That consent was later adopted by the court on 21st December, 2009 and a court order in terms of the consent thereby issued. In view of that consent and the statement of admission earlier mentioned, the court also delivered a decree on 22nd January, 2010 allowing all the prayers sought in the claim and granted the following additional orders:

'That the registrar of companies be and is hereby mandated to transfer all the shares held by the defendant shareholders to the directors of the plaintiff company, namely HANS-JUERGEN LANGER & ZAHRA LANGER on equal number (50%50%) basis.

That one STEFANO UCCELLI the current resident director of the defendant company shall continue to be in the board of directors of the defendant company for the purposes of ensuring that the judgment and decree of this court is fully satisfied and for the interest of the defendant company's previous shareholders and directors without being a shareholder'

7. Interestingly, despite being the 2nd appellant's director, the 1st respondent, was unhappy with the

consent and decree and by an application dated 20th November, 2014, he moved the High Court for one substantive order;

‘that this honourable court be pleased to set aside or review the decree on record so that parties can be heard on merit.’

The basis of that application was said to be that though the 1st respondent had executed the consent in question on behalf of the 2nd appellant, his signature was procured through misapprehension of facts on his part, caused by fraud, coercion and deceit perpetrated by the 2nd and 3rd appellants. Further, the 1st respondent asserted that he is not a majority shareholder in the 2nd respondent company, nor does he have any authority to sign such consent on behalf of other shareholders, and as a result, the consent lacked legitimacy. In any event, he continued, the Milan Judgment upon which the orders were based, was nonexistent and a fallacy and that even if such judgment existed, the enforcement thereof was premature as the 1st appellant had not taken out the requisite proceedings under the **Foreign Judgment (Reciprocal enforcement) Act Cap 43**. Consequently, that the court lacked jurisdiction to enforce the Milan Judgment and the proceedings in Malindi **HCCC 118 of 2009** were thus null and void *ab initio*.

8. Further, that the suit property belonged to the 1st respondent and conferring it to the 1st, 3rd and 4th appellants was un-procedural and unlawful.

The application was opposed vide a replying affidavit sworn by the 3rd appellant on 11th December, 2014; in which the respondents implored the court to determine the issue of shareholding while reiterating that the Milan Judgment was valid and well within the knowledge of the 1st respondent at the time the consent was signed. Upon hearing submissions from counsel on record, the learned judge, **Chitembwe J.**, delivered ruling thereon on the 30th April, 2015, in which he allowed the application as prayed. Aside from setting aside the decree, the Judge also issued additional orders as follows:

2. The Registrar of Companies shall remove the names of the 2nd and 3rd respondents, that is to say, Hans Jürgen Langer and Zahra Langer, as directors of Salama Beach Limited and shall ensure that the status of the company in its registry is restored to the position as at 14th December, 2009;

3. The 2nd and 3rd defendants to hand over all the properties belonging to Salama Beach Hotel Ltd within seven (7) days hereof to the 4th and 5th defendants. Counsel for both parties to participate in the transfer process;

4. The 2nd and 3rd respondents’ names to be removed as signatories to all bank accounts of Salama Beach Hotel Limited and to be replaced by the original signatories as at 14th December, 2009;

5. In view of previous disobedience of court orders by the parties herein, the Officer Commanding Watamu Police Station to ensure that the court order is effected as hereinabove;

6. Costs of the application to the applicant.’

Those orders have in turn led to this appeal; in which the appellants impugn the decision on a prolix of 26 grounds of appeal; but which we have endeavored to condense. In a nutshell, the appellants contend that the learned Judge erred; by failing to find that he lacked jurisdiction to grant the review orders; by having a pre-determined mind and considering un-pleaded matters; by ordering the expropriation of private property in a manner contrary to Article 40 of the Constitution and the Companies Act; by failing to appreciate that the consent decree was between the 1st and 2nd appellants, who are both juristic persons capable of suing and being sued in their own names; by finding that the 1st respondents were at liberty to contest the consent and decree yet they were not parties to the same; by holding that the 3rd and 4th

appellants should be removed as shareholders and signatories to the 2nd applicant; in ordering that all the property belonging to Salama Beach Hotel be handed over to the respondents; in finding that there was no judgment issued by the court of Milan on 14th December, 2001; in finding that the plaintiff in Malindi **HCCC 118 of 2009** had no claim against the defendant; by exercising his discretion improperly; in finding that the superior court lacked jurisdiction to adopt and enforce the Milan Judgment for lack of reciprocity while also finding, that Common law was inapplicable in the matter; in finding that the consent judgment was based on mistake and misapprehension of the real facts; in finding that there was discovery of new information and that there was no judgment in Italy; in finding that the consent judgment was procured through fraud and mistake and that the 1st appellant knowingly misrepresented the existence of that judgment; in failing to make a finding as to the real/ actual owners of Salama Beach Hotel were prior to the filing of the suit; by generally transforming an application for review of decree into a substantive judgment on merit and lastly in awarding costs of the application to the 1st respondent.

9. With leave of court, the parties filed their respective submissions, with oral highlights at the hearing of the appeal. Learned Counsel **Mr. Ahmednassir (SC)**, who led **Mr. Ndegwa** in appearing for the appellants, collapsed the 26 grounds of appeal into four main issues:

a. Whether the Learned judge erred in law and in fact by allowing the 1st respondent's application for review as prayed;

b. Whether the learned judge erred in law and in fact by deciding on issues not raised in the pleadings;

c. Whether the learned judge erred in law and in fact by granting final orders at an interlocutory stage;

d. Whether the learned judge erred in law and in fact by setting aside a consent judgment.

10. On the first issue, the appellants contend that the learned Judge erred in granting the review. This, they say is due to three reasons;

Firstly, that under the provisions of **Order 45 rule 1**, of the Civil Procedure Rules, the 1st respondent lacks the *locus standi* to initiate the review application, having been a stranger to the proceedings leading up to the impugned consent and decree. As such, that the 1st respondent should not have been considered 'an aggrieved party' within the meaning of **Order 45 rule 1** aforesaid. In this regard, the appellants cited the decisions made **In the matter of the Estate of Beatrice Nyakio Mathia (deceased) [2013] eKLR** and **Ngure v. Gachoki Gathaga [1976-80] 1 KLR 1269** as being in support of their contestation. Secondly, that in allowing an application commenced by a stranger to the proceedings, the learned Judge failed to apply the proper plaintiff rule as established in the case of **Foss v. Harbottle (1843) 67 ER 189**; which stipulates that a wrong done to a company can only be agitated by the company itself and not by proxy, for the company is a separate legal entity capable of suing and being sued in its own name. In this case, they said, the proper applicant ought to have been the 2nd appellant and not the 1st respondent; whom they termed a stranger or interloper. Consequently, this rendered the grant of review erroneous. The third basis, upon which the grant of review was faulted, was that the application failed to meet the requisites set under **Order 45 rule 1**. According to the appellants, an application for review can only succeed if it is shown that either; there has been discovery of new and important matter which after due diligence, was not within the applicant's knowledge or could not be produced at the time the order was made; or if it is shown that there was some mistake or error apparent on the face of the record; or if there exists some other sufficient reason; provided however, that the application is made without unreasonable delay.

11. To the appellant, the application fell short of either of these requirements and the learned Judge therefore had no basis for granting it. It was also contended that the finding that there was no judgment from Italy was misplaced and did not constitute discovery of new information. To the contrary, the appellants submitted, had the 1st respondent exercised due diligence, he would have established the existence of the Italian judgment in 2009. In any event, they said, the 1st appellant had in his own

affidavit already admitted having been aware of the judgment. As a result, it was contended that the learned Judge misapplied the provisions of **Order 45 rule 1** in granting the application. The appellants also faulted the Judge for not having addressed himself to the issue of delay as the order sought to be reviewed was issued on 22nd January, 2010, yet the application for review came on 21st November, 2014, four years after the event, with no reasons being advanced for the delay. On this point, counsel relied on the decision in the case of ***John Agina v. Abdulswamad Sharif Alwi, civil appeal no. 83 of 1992*** to buttress the submission that review should not have been granted in the face of such inordinate delay.

12. On the second issue, Counsel stated that the Judge erred in making findings on unpleaded issues, to wit the shareholding and ownership of the company. Citing a plethora of authorities, the appellants submitted that the Judge had no jurisdiction to determine the allocation of the company's shares for the application before him never invited him to adjudicate over the issue. Counsel also pointed out that even though the respondents had been duly enjoined in the 1st appellant's suit, they were yet to file any pleadings save for the application in question. Consequently, shareholding of the company was never in issue and the Judge erred in deliberating and making a determination on it.

13. Turning to the third issue for determination, the appellants contended that the impugned orders amounted to a final conclusion of the matter at an interlocutory stage, thus denying the appellants an opportunity to be fully heard. Elaborating further, counsel stated that the mandatory injunction which was issued constituted a major determination of the suit and that in interlocutory applications, mandatory injunctions such as the one issued can only be granted in clear cases, which was not the case herein.

14. Lastly, the appellants contended that the Judge also erred when he set aside the consent judgment, because under the law, a consent judgment has a contractual effect and can only be set aside on such grounds as would obtain in a contract. Calling to aid the decisions in ***Flora Wasike v. Destimo Wamboko [1988] e KLR*** and ***Hirani v. Kassam [1952] EACA 131***, Counsel submitted that any order put in place by consent of Counsel is binding on all the parties and those claiming under them and cannot be varied unless it is shown to have been obtained by fraud or collusion, misapprehension of material facts or if the agreement is contrary to the policy of the court. The appellants contend that no such circumstances obtained herein and the review was thus unjustified. In conclusion, that even where the consent is alleged to be based on fraud, the fraud must not only be pleaded, but specifically proven as well. It was urged that no proof of fraud was furnished and that this is a case that calls for interference by this Court. The appellant urged this Court to allow the appeal, set aside the Ruling of the superior court and uphold the consent judgment.

15. Appearing for both respondents, learned counsel **Mr. Munyithya** identified three issues as due for determination in this appeal. The first issue he said, is the question of jurisdiction; where he submitted that contrary to the appellants' assertions, under the Constitution and statutory law, the superior court had jurisdiction to set aside the illegal consent. He pointed out that under **Section 5** of the Foreign Judgments (Reciprocal Enforcement) Act (*the Act*) an elaborate procedure has been set on how enforcement of foreign judgments is to be done. In his view, the 1st appellant disregarded that procedure and instead sought enforcement of the Milan judgment by simply filing a plaint in **HCCC 118 of 2009**. This he said, rendered the resulting consent and decree incurably defective, since it was founded on an illegality and the learned Judge cannot be faulted for rectifying that illegality by setting aside the consent. Further, according to learned counsel, derogation from the statutory procedure of enforcing foreign judgments renders any resulting decision a nullity and it is for this reason that the consent cannot stand. To support the assertion that there must be strict adherence with Cap 43, counsel cited the case of ***Elizabeth Namutebi v. Threeways Services (K) Ltd [2014] eKLR***

In addition, counsel submitted that under the Act, Kenya recognizes specific countries with which she has a reciprocal arrangement for purposes of enforcement of judgments and Italy is not such a country. This in turn meant that the High court had no jurisdiction entertaining the plaint in the first place.

16. The second issue, was the question of *locus standi*; where it was submitted that the 1st and 2nd respondents were duly enjoined in the suit vide the order issued by **Ojwang J.**, (as he then was); which order was never appealed from and therefore, the assertion that they lacked *locus standi* to bring the

application is baseless. In addition, that given their positions as directors in the company, their participation in the proceedings was integral and it was only fair as per the rules of natural justice that they were accorded an opportunity to be heard; more so, because the proceedings in question affected their proprietary rights as well. The last issue the respondents addressed was the memorandum of appeal, whose grounds they termed as superfluous and scandalous, saying that the same are only calculated to embarrass fair trial and determination of the matter.

17. This being a first appeal, this Court is enjoined to 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 (see. **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**). A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence, or the Judge is shown demonstrably, to have acted on wrong principles in reaching the findings he did (see. **Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-88]1 Kar 278**)

We have analysed the history of this matter and the material that was placed before the learned Judge. Having considered the entire record before us and the submissions of counsel along with the grounds of appeal, we come to the conclusion that the issues for determination by this court can be condensed into four;

- a. ***Whether the superior court had the jurisdiction to set aside the consent; and if so;***
- b. ***Whether the 1st respondent had the locus standi to seek the orders sought in the application.***
- c. ***Whether the review was merited and lastly;***
- d. ***Whether the impugned ruling was based on unpleaded issues and if so, the effect thereof.***

18. On the issue of jurisdiction, we note that the jurisdiction of the superior court over this matter was questioned on two distinct fronts; on one hand, the appellants contended that by failing to observe the procedure for registration and enforcement of foreign judgments as set forth under the Act, the 1st respondent failed to properly invoke the court's jurisdiction in the review application. Conversely, the 1st respondent on the other hand, asserted that the court's lack of jurisdiction was due to the fact that Italy is not one of the recognized reciprocal countries under the Act and the Kenyan courts can therefore not recognize any judgment from Italy. In view of these two contestations, it was argued, that the High court had no jurisdiction to hear any of the proceedings instituted before it in this matter.

19. In its preamble, the Foreign Judgments (reciprocal enforcement) Act is defined as being enacted;

'to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith' (emphasis added)

Accordingly, foreign enforceable judgments under the Act are those from designated courts set out under section 2. The section defines a '*designated court*' as:

- a. ***a superior court of a reciprocating country which is a Commonwealth country;***
- b. ***a superior court of any other reciprocating country which is specified in an order made under [section 13](#);***
- c. ***a subordinate court of a reciprocating country which is specified in an order made under [section 13](#);***

20. Consequently, in order for a judgment to qualify for enforcement under this Act, the same must emanate from the list of reciprocating countries identified by the Minister under **Section 13(1)** of the Act.

In this regard, the schedules to the Act identify reciprocal countries as Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, United Kingdom and the Republic of Rwanda. It would thus appear that the 1st respondent was correct in contending that since Italy fails to find mention, the Milan court is not a designated court under the Act.

21. What then, is the fate of a judgment emanating from a non-reciprocating country? To the 1st respondent, any proceedings founded on such a judgment are a nullity and void *ab initio*. On their part, the appellants did not address that assertion, save to state in passing, that the court had the inherent jurisdiction to determine the matter.

22. Under the law however, the enforceability of foreign judgments from non-designated countries and the procedure thereof was given focus by this court in the case of **Jayesh Hasmukh Shah v Navin Haria & another [2016] eKLR**; where it was held that if a foreign judgment emanates from a non reciprocating country, the judgment fails to find application under the Act. Furthermore, if no treaty exists between Kenya and that country, regarding the (reciprocal) enforcement of each other's judgments, then any judgment emanating from such a country is equally unenforceable in Kenya under the said Act. The court however hastened to add that such a judgment, though unenforceable under the Act, is nonetheless enforceable under Common law, specifically under the realm of private International law. To this court therefore, a judgment from a non reciprocating country can still find local enforcement under Common law. This is achieved by filing a Plaint before the High Court; subject though, to the provisions of **Section 9** of the Civil Procedure Act.

23. Consequently, the suit in **HCCC 118 of 2009** was properly instituted under Common Law. None of the objections availing under **Section 9** of the Civil Procedure Act were ever raised. In view of this alternate jurisdiction that avails under Common Law, the 1st respondent's contestation that the trial court below lacked jurisdiction due to Italy being a non- reciprocating country, fails. Similarly, having established that the Milan judgment did not fall under the Foreign Judgment (reciprocal) enforcement Act; the argument that the 1st appellant could only invoke the trial court's jurisdiction through the procedure for registration provided under the Act, also fails. The 1st appellant was well within the law to institute the suit as he did. The long and short of it is that both attacks on jurisdiction fail, for the trial court had jurisdiction to hear **HCCC 118 of 2009** and the review application as well.

24. On the issue of *locus standi*, the appellants stand is that the 1st respondent lacked the *locus standi* to initiate the review application, for two reasons. Firstly, that having been a stranger to the proceedings leading up to the impugned consent and decree, the 1st respondent should not have been considered '*an aggrieved party*' within the meaning of **Order 45 rule 1** aforesaid. Secondly, that even if a complaint were to arise about the consent, then legally speaking, the same could only be agitated by the 2nd appellant company; and not by the 1st respondent, regardless of his capacity within the company. This was said to be in line with the '*proper plaintiff rule*' as established in **the Harbottle case (supra)**; which stipulates that as a separate legal entity/ person, a company has the capacity to sue and be sued in its own name.

25. The parameters on who may lodge a review application as well as how that application is to be determined, are set out Under **Order 45 rule 1** of the Civil Procedure Rules, which states that:

1. Any person considering himself aggrieved-

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a

review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being the respondent, he can present to the appellate Court the case on which he applies for review. (emphasis added)

In this case the appellants have, by implication, contended that review can only be sought by parties to the previous proceedings leading to the decision that is to be reviewed. That by extension, in seeking the review, the 1st respondent was basically a busy body, having not been a party to those prior proceedings.

Before addressing the question of who qualifies to seek review, it is indeed common ground that at the time the consent was recorded and adopted as an order of court, neither 3rd nor 4th appellants, nor the two respondents herein, were party to the suit. From the record, the consent was made on 18th December, 2009 between the 1st and 2nd appellants. The same was adopted as an order of the court on 21st December, 2009. The enjoinder of the rest of the parties came almost a year later, on 8th September, 2010.

26. In the appellants' view, the 1st respondent, having joined the fray so late in the day, lacked legal authority or *locus standi* to bring the application for review, for he was not an aggrieved party within the meaning of Order 45 rule 1 aforesaid. *Locus standi* is defined in the **Oxford Dictionary of Law, 5th Ed.** as

'the right to bring an action or challenge some decision. It is also defined in **Black's Law Dictionary, 9th Ed.** as **'the right to bring an action or to be heard in a given forum.'**

Our understanding of Order 45 is that it has two distinct parts and accords *locus standi* in review applications to two distinct persons. Under sub rule (1) thereof, the review application may be brought by 'any person considering himself aggrieved' and under sub rule (2), by 'a party who is not appealing from the decree or order'. Consequently, Order 45 recognizes that review may be sought either by; a non party or by a party to the proceedings.

While some may argue (as the 1st respondent did) that recognition of applications for review instigated by non parties opens the flood gates to interference by busy bodies, it is to be remembered that the person aggrieved is required to meet certain conditions. Under sub rule (1) (b), the aggrieved person instituting such review must satisfy the court that

a. There has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or

b. There is some mistake or error apparent on the face of the record, or

c. There exists sufficient reason to review the decree/ order.

In short, he has to prove that though he maybe a non party, he is no busybody and that the decision he seeks to have reviewed affects his cognizable rights.

Recognizing **Order 45** as allowing the inclusivity of a non party to institute review does not expose it to abuse by busy bodies. On the contrary, when read holistically, **Order 45** is in fact designed to facilitate the exercise of the court's inherent powers, and to protect the rights of persons directly affected by decisions which they were not made parties to.

27. The place of inherent powers of the court was explained in **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 fulfill 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.”(emphasis added)

28. In view of the foregoing, the submission that the review was incurably defective for having been instigated by a non party to the previous proceedings, falls flat on its face. Closely related to the above was the contention that the 1st respondent also lacked *locus standi* since under ‘*the proper plaintiff*’ rule, the 2nd appellant company was a juristic person, who could sue and be sued in her own name. It was thus argued, that the 1st respondent had no authority to pursue the review in her stead. It is without doubt that the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. (see. **Salomon vs. Salomon Company Limited [1895-99] All ER 33**). In equal measure, decisions by the simple majority of the shareholders of a company are binding on the entire company and no individual member can deviate from them or sue on them.

29. Suits on behalf of a company can only be done by the company itself (acting in its own name) and not by individual and/ or minority shareholders (see. **Harbottle case, supra**). The rule in the **Harbottle case** was enunciated with greater clarity in **Burland v. Earle (1990) All ER 1452**; as follows:

‘In order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself’

The principal effect in the Harbottle rule is to bar futile actions by minority shareholders (see. **Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another [2015] eKLR**). Nonetheless, the rule is not without exception. The exceptions, though established over time in a plethora of cases; were aptly summarized by Jenkins L.J in **Edwards v. Halliwell [1950] 2 All ER 1064**, where he stated that a minority shareholder is allowed to bring a derivative suit in one of the following instances:

- a. ***Where the act complained of is ultra vires the company and/ or illegal.***
- b. ***Where the decision/ act complained of required the sanction of a special majority (as opposed to a simple majority) which was not obtained.***
- c. ***Where personal rights (of the minority shareholder) are invaded by the act complained of.***
- d. ***Where fraud has been perpetrated by the majority against a minority.***

Did any of these exceptions avail herein and if so, was the grant of review merited?

30. For purposes of this appeal, it was contended, both before this Court and that below, that there was no such thing as a judgment from Milan, that the consent in question was procured through threats,

intimidation and fraud and that if the consequential orders thereof were to be effected, the same would prejudice the 1st respondent, a minority shareholder who was also the actual owner of the property in question. From the record, in a bid to prove that the Milan judgment was fictitious, the 1st respondent had, in his supporting affidavit alluded to information supplied by his Italian legal counsel, Messrs. Taglioretti Farese Cicerchia Capua. From that information, he said, he was able to establish that the said judgment was simply a creation of the 1st appellant. That according to the Milan court of Appeal, there were no such orders in subsistence in favour of *Viaggi Del Ventaglio* or her assignees. In fact, that contrary to the 1st appellant's allegations, the case number indicated on the appellants' purported judgment pertained to unconcluded proceedings. Further, that the sole reason why the 1st appellant had slyly and fraudulently purported that there were such orders in force, was so that he can unlawfully execute the same to his benefit, thereby illegally taking over the operations and ownership of the 2nd appellant. To prove this fraud, the 1st respondent produced in court, a copy of the legitimate judgment, ostensibly reflecting the true state of affairs in Italy. The same appeared to bear the names of the parties as follows:

'Viaggi Del Ventaglio Spa, in Liquidation (as the claimant)

Versus

Listos AG Liquidazione (formerly Adinos AG) and Accredo Aktienegesellschaft)(as the defendants)

31. According to information supplied by the said Italian law firm; though the Milan Court had ordered Viaggi to pay Accredo a sum of 825,000 Euros in respect of legal fees and going expenses pending the hearing of the suit, counsel was emphatic that the order was not final but interlocutory and that the same had since been overturned. In a letter from the said counsel to the 1st respondent, they are seen to have expressed themselves as follows:

'On December 14, 2001, the civil court of Milan ordered Viaggi Del Ventaglio to pay Listos the amount of 825,000 Euros plus legal expenses, corresponding some fees of the lease of going concern entered between them (sic) (encl. no. 1)

The order was issued by means of a provisionally enforceable injunction.... This type of injunction is granted ex parte to the plaintiff...the defendant is anyway entitled to file an opposition before the same court within forty (40) days from the receipt of the injunction's service....

Viaggi del ventaglio filed its opposition, asking the court to declare the termination of the lease due to Listos' liabilities, to reject Listos' claims and to condemn Listos to return the amount already paid...

On July,7, 2004,the Court of Milan declared the termination of the lease, rejected Listos' claims and condemned Listos to return the amount of 412,500 euros.

Listos challenged this decision before the court of appeal of Milan and, during the proceedings, Accredo voluntarily appeared before the court, claiming that Listos previously transferred to Accredo its credit towards Viaggi Del Ventaglio. On 27 May, 2008, the Court of Appeal accepted Listos' appeal and rejected Viaggi Del Ventaglio's opposition to the injunction issued by the Court of Milan.

Viaggi Del Ventaglio challenged this decision before the Italian Supreme Court.

On September, 10, 2010, the Supreme Court took (sic) declared the decision of the Court of Appeal partially null and void, and ordered the parties to resume the proceedings before another department of the same Court of Appeal of Milan, to determine the amount really due by Viaggi Del Ventaglio to Listos/ Accredo'

The Italian Counsel concluded by stating that as at 2010, though it had been decreed that Viaggi is no longer obliged to pay part of the fees, she was still indebted to Listos and that in fact, the only issue still pending determination is the actual amount owed by Viaggi to Listos. As a result, at the time the Kenyan proceedings were instituted, it would appear that the decretal sum under the purported Milan proceedings was still uncertain.

32. It is crucial to note that the appellants never controverted these claims as to the existence or validity of the Milan judgment. It is therefore without doubt, that at all material times to the High court proceedings, there was no order or decree from the court of Milan in favour of Viaggi capable of enforcement; given the proceedings pending before the Italian courts and the lack of clarity as to the decretal sum. Equally clear from all this, is that Viaggi could not assign the 1st appellant a nonexistent decree.

33. On his part, the learned trial Judge addressed his mind that aspect and found that the proceedings instituted by the 1st appellant in **HCCC 118 of 2009** were therefore founded on fraud and mistake, and cannot stand. That the 3rd appellant knew very well that there was no judgment from the court of Milan and yet he knowingly misrepresented to the 1st respondent and to the court that such judgment existed. Consequently, the learned Judge found the application for review to be merited and proceeded to set aside the consent. This court can find no reason to interfere with that finding. It is clear from the status report dated 11th March, 2013 showing the status of the 2nd appellant's shareholding as at 5th September, 2012; that the 1st respondent was a minority shareholder. As such, given the fraud and misrepresentation perpetrated by the 1st and 3rd appellants, he was eligible to institute legal proceedings notwithstanding the rule in **Harbottle**.

34. Finally, is the issue that the impugned review orders were based on unpleaded issues. It is without question that in granting the review, **Chitembwe J.**, also reversed the alteration of the 2nd appellant's shareholding in the following terms:

2. 'The Registrar of Companies shall remove the names of the 2nd and 3rd respondents, that is to say, Hans Jürgen Langer and Zahra Langer, as directors of Salama Beach Limited and shall ensure that the status of the company in its registry is restored to the position as at 14th December, 2009; (emphasis added)

Granted, pleadings are binding not just on the parties to the suit, but on the court as well (see. **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**). In this appeal, the appellants claim that the learned Judge erred in making that order, because the shareholding of the 2nd appellant was never an issue at review and that by so ordering, the learned Judge was in essence issuing a mandatory injunction at an interlocutory stage. However, it does not escape this court's attention that prior to the impugned review by **Chitembwe J.**, the decree under review had substantially altered the shareholding of the 2nd appellant in favour of the 1st appellant. It had been decreed:

'That the registrar of companies be and is hereby mandated to transfer all the shares held by the defendant shareholders to the directors of the plaintiff company, namely HANS-JUERGEN LANGER & ZAHRA LANGER on equal number (50%50%) basis.

That one STEFANO UCCELLI the current resident director of the defendant company shall continue to be in the board of directors of the defendant company for the purposes of ensuring that the judgment and decree of this court is fully satisfied and for the interest of the defendant company's previous shareholders and directors without being a shareholder'

35. Notably, shareholding was one of the central grounds in the review application. The 1st respondent had, claimed *inter alia*, that the execution of the decree would result in an unlawful divestiture of shares in the company and to his deprivation of the property in question, notwithstanding his legitimate title thereto. In addition to this, he also contended that the 3rd and 4th appellants had fraudulently caused

changes in shareholding and that the issue of shareholding needed to be determined by the court. It is thus not correct, as the appellants claim, that shareholding was never in issue. If anything, shareholding was at the heart of the review application. It is on account of the alteration of shareholding that the 1st respondent complained of his potential unlawful deprivation of property. Consequently, the reversal of the orders on shareholding which had been made in the decree was well within the ambit of the pleadings.

36. On the whole therefore, we are persuaded that this appeal lacks merit and the same is hereby dismissed with costs.

Dated and delivered at Nairobi this 15th day of December, 2017

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR