IN THE COURT OF APPEAL AT NAIROBI

(CORAM: OUKO, M'INOTI & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 3 OF 2003

BETWEEN

SULTAN HASHAM LALJI ……..……... 1ST APPELLANT
BAHADURALI HASHAM LALJI …….....…… 2ND APPELLANT

ESMAIL HASHAM LALJI …….....…… 3RD APPELLANT

AND

AHMED HASHAM LALJI …….....…… 1ST RESPONDENT
DIAMOND HASHAM LALJI …….....…… 2ND RESPONDENT

ATTA (KENYA) LIMITED …….....……... 3RD RESPONDENT
DIAMOND JAMAL …….....…… 4TH RESPONDENT

AZIM VIRJEE …….....……. 5TH RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (O'Kubasu, J.) dated 21st July, 2000)

in

H.C.C. NO. 189 OF 1998)

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JUDGMENT OF THE COURT

We owe this brief explanation why an appeal initiated by a notice of appeal on 2 nd August 2000 is being decided in 2014, fourteen (14) years later.

Apart from numerous adjournments obtained at the behest of both sides the court heard and determined three (3) interlocutory applications in respect of this appeal between April 2002 and March 2012. In addition, the respondents at some stage changed their advocates.

> With that brief explanation, we turn to the background of this long-drawn family dispute. The appeal arises from the decision of the High Court (O'Kubasu, J, as he then was)

striking out the suit in respect of the claims brought by the appellants.

The appellants, Sultan Hasham Lalji, Bahadurali Hasham Lalji and the late Esmail Hasham Lalji are brothers to the 1st and 2nd respondents, Ahmed Hasham Lalji and Diamond Hasham Lalji. The appellants together with Atta (1974) Limited (the company) brought an action against the 1st and 2nd respondents along with a company called Atta (Kenya) Limited, the 3rd respondent and two others, Diamond Jamal and Azim Virjee, the 4th and 5th respondents claiming, apart from Diamond Hasham Lalji, that the remaining 4 brothers were shareholders of the company. Diamond Hasham Lalji, according to the plaint was a non-shareholding director in the company. Out of the 60,000 shares, the appellants held 44,367 shares, constituting 73.9% of the total shares of the company. The 4th and 5th respondents were directors of Samvir Management Services Limited, which acted as the company secretary for the company.

The appellants averred that on 13th November 1991 at an alleged meeting of directors of the company it was purportedly resolved that the assets of the company be disposed of by way of sale with the option to purchase going first to the existing shareholders of the company. The appellants contended that they neither had notice of the alleged meeting nor did any of them attend it. They also argued that prior to the alleged notice of the meeting being issued by Samvir Management Services Limited, that company had resigned as the company secretary.

The appellants further pleaded that Ahmed Hasham Lalji, (the 1st respondent) as the Managing Director of the company purported to send a letter to himself in that capacity offering to purchase the company assets for Kshs. 40 million and proceeded to forward a banker's cheque of Kshs. 4 million to cover the 10% deposit. On the other hand the firm of A.B. Patel and Patel Advocates, Mombasa, purportedly acting on the instructions of the 2nd appellant wrote to the Managing Director of the company also placing an offer to buy the assets at Kshs. 35 million and forwarded with the offer a banker's cheque in the sum of Kshs. 3.5 million constituting 10% deposit together with a letter of recommendation by the Manager, Habib Bank, A.G. Zurich,

Mombasa. The 2nd appellant denied having instructed A.B. Patel and Patel Advocates to act for him as he was not even aware that the company assets were being sold; that he did not apply for the banker's cheque in question; that he had no relationship with Habib Bank A.G. Zurich, Mombasa or any of its managers and did not request for the letter of recommendation issued by the bank to the Managing Director of the company. The 3rd plaintiff (now deceased) denied the assertion by the respondents that he attended the meeting of the directors at which the resolution to sell the company assets was passed.

It was also the appellants' case that after the sale of the assets, the 4th and 5th respondents who were the directors of Samvir Management Services Limited, the company secretary, incorporated Atta (Kenya) Limited – the 3rd respondents. Shortly after the incorporation the two directors resigned as such and were replaced by the 1st and 2nd respondents. Atta (Kenya) Limited then proceeded to obtain loans amounting to Kshs. 85 million from DFCK Limited, Kenya Commercial Bank Limited and Kenya Commercial Finance Company Limited on the security of the company assets.

These two events, namely, the resolution to dispose of the company assets and the transfer of those assets to the 1st defendant and subsequently to Atta (Kenya) Limited, were in the appellants' estimation, fraudulent acts committed by all the five respondents against all the appellants as individual shareholders and against the company. For this, they prayed the court in the plaint to:-

i) declare that the transfer of the company assets to the 1st respondent and subsequently to the 3rd respondent was fraudulent against the appellants and the company;

ii) restrain the respondents by an order of injunction from alienating the assets of the

3rd respondent, (Atta (Kenya) Limited) by way of sale or otherwise pending the determination of the suit.

iii) order that account into the affairs of the 3rd respondent (Atta (Kenya) Limited) be

rendered from the date the assets of the company were acquired by the 1st respondent and thereafter transferred to the 3rd respondent until such date that the order would be given.

iv) appoint a receiver for the 3rd respondent (Atta (Kenya) Limited) and during the receivership the appellants be allowed access and/or active participation in the receivership exercise especially in relation to the assets of the 3rd respondent (Atta (Kenya) Limited).

v) order, after the accounts are taken, that all assets of the company fraudulently transferred as explained above be restituted to the company and any money found to be due to the company paid back to it.

vi) order for the payment of damages and costs.

Naturally, all the respondents in their respective defences denied the accusations of fraud and maintained that the meeting at which the resolution was passed to dispose of the company assets was regularly called by the company secretary before its letter of resignation was accepted by the company; that the 1st respondent, pursuant to a power of attorney given to him by the 2nd appellant represented the latter at the directors' meeting while the late Ismail Hasham Lalji was present in person; that under the company's Articles of Association, the directors were authorized to dispose of all the assets of the company without reference to the shareholders and any director outside Kenya was not entitled to receive any notice of the meeting; that the 1st respondent being the 2nd appellant's attorney instructed A.B. Patel and Patel Advocates on behalf of the former and the offer of Kshs. 35 million was made with the 2nd appellant's knowledge and consent.

The 3rd respondent (Atta (Kenya) Limited) specifically denied having obtained loans on the security of the company's assets but upon a charge of its own new machinery and equipment. For these reasons, the respondents contended that the suit did not disclose any or any reasonable cause of action in favour of the appellants, as a result of which the suit in the name of the company was not maintainable by reason of the fact that the company did not authorize its institution.

At the close of pleadings, the following six applications, bearing marked similarity in their prayers, were filed;

i) On 10th February 1998, a notice of motion brought by the 1st and 2nd respondents for, *inter alia*, the plaint, so far as it related to the claims of the 1st, 2nd and 3rd appellants to be struck out and the action in their names against the respondents be dismissed.

ii) On 10th February, 1998, a motion by the 3rd respondent also for the striking out or dismissal of the claim by the appellants, in so far as it was filed on behalf of the 1 st,

2nd and 3rd appellants.

iii) On 10th February 1998 another notice of motion brought by the 1st and 2nd respondents for orders that the company's suit against the respondents be struck out or dismissed,

iv) On 10th February 1998, the 3rd respondent filed another motion seeking orders that the plaint be struck out in so far as it purported to have been filed on behalf of the company (the 4th plaintiff).

v) On 11th February 1998 a notice of motion was filed by the 4th and 5th respondents for orders that the appellants' suit be struck out or dismissed, and

vi) On 11th February 1998 another motion was brought by the 4th and 5th respondents

praying that the plaint, in so far as it purported to have been filed on behalf of the company, be struck out.

While the last four applications are still pending in the High Court, sixteen (16) years since they were filed, the first two were, by consent heard and disposed of by O'Kubasu, J. (as he then was) and constitute the subject of this appeal. We note further that an application for interlocutory injunction brought simultaneously with the plaint is also yet to be heard *inter partes.*

The grounds upon which the two applications in question were based were similar, namely, that the claims made by the appellants did not disclose or did not disclose any reasonable cause of action against the respondents; that the claims were misconceived in law and that suit amounted to an abuse of the process of the court.

In other words, the respondents argued before the High Court that the appellants being the majority shareholders in the company had no capacity to bring the suit jointly with the company complaining of transgressions against the company by the respondents; that in such a situation the proper plaintiff was the company itself.

For their part, the appellants submitted that by fraudulently transferring the company's assets, the respondents denied the appellants the right to participate in the purchase process; that apart from making their own independent claims the appellants also sought a remedy on behalf of the company.

Upon consideration of these arguments the learned Judge found as an uncontested fact that the appellants were the majority shareholders in the company. He also found that since the thrust of the appellants' complaint was that the company's assets were fraudulently transferred by the respondents, it followed that the company alone could bring an action against the respondents.

Relying on the English cases of **Burland V. Earle** [1902] 71 LJPC, **Stein V. Blake &**

Others [1998], All ER 724 and **Prudential V. Newman Industries** [1982] 1 All ER 354, all of which followed the celebrated **Foss V. Harbottle** [1843] 2 Hare 461, the learned Judge concluded with the following words:-

> **"…..it is now clear that the 1st, 2nd and 3rd plaintiffs being majority shareholders in the plaintiff company (the 4th plaintiff) could not bring this suit. I should hasten to state that by upholding the preliminary objection that does not mean that the suit had no merit. The three plaintiffs may have genuine complainants against the defendants but they have not come in the proper way since the law clearly states that as they are complaining of the injury to the company (4th plaintiff) then it is the company which should bring this suit……. It is a pity that the first three plaintiffs are shut out but that does not mean that their complaints cannot be entertained since the company has the right to ventilate their grievances in a proper suit."**

With that conclusion, the appellants' suit was struck out leaving the company as the only plaintiff in the suit. Being aggrieved, the appellants have now preferred this appeal to challenge the above decision on eight (8) grounds which were summarized and argued by Mr. Kigen, learned counsel, broadly in a cluster of two, as follows:-

i) That the learned Judge erred in holding that the suit by the appellants was a derivative action exclusively when infact the cause of action and the remedies sought were outside the confines of a derivative action as the wrongs complained of were committed against the appellants as well as the company – jointly and severally,

ii) That the learned Judge erred and misdirected himself by misapprehending and/or failing to give effect to the *ratio decidendi* in the case of **D.T. Dobie & Company (K) Ltd V. Joseph Mbaria Muchina & Another**, Civil Appeal No. 37 of 1978.

Mr. Katwa submitted that there was a clear case of fraud whose particulars were set out in the plaint; that the learned Judge having appreciated that the appellants had a genuine complaint ought not to have taken the drastic action of striking out their claim; and that the appellants were individually aggrieved by the actions of the respondents of selling the assets of the company without their participation as shareholders of the company. He finally submitted that the learned Judge ought to have preserved the suit and ordered for an amendment since the only issue was that of joinder of parties.

Learned counsel separately representing the five respondents, Mr. Omuga (for the 1st respondent) Dr. Khaminwa (for the 2nd respondent), Mr. Esmael (for the 3rd respondent) and Mr. Lutta (for the 4th and 5th respondents) in opposing the appeal were unanimous in their respective submissions that, because the alleged wrong was committed against the company, it was the company, and not the company jointly with the appellants that ought to have sued; that no law allowed the appellants as majority shareholders to bring an action on behalf of the company; that it was only the company that could demand from the 3rd respondent to render account; that the appellants do not stand to suffer prejudice as the entire suit was not struck out; that the appellants

failed to seek to amend the plaint before the applications, the subject of this appeal, were presented; and that the averments in the plaint were clear as regards who was aggrieved, namely, the company.

The applications were expressed to be brought under the provisions of **order 6 rule 13 (1) (a)** of the repealed Civil Procedure Rules which allowed a court, at any stage of the proceedings to order to be struck out or amended any pleading on any of the following grounds;

a) that it discloses no reasonable cause of action or defence; or

b) that it is scandalous, frivolous or vexatious; or

c) that it may prejudice; embarrass or delay the fair trial of the action; or

d) that it is otherwise an abuse of the process of the court.

The court may in any of the above circumstances also order the suit to be stayed or dismissed, or enter judgment, as the case may be. Where it is alleged in an application for striking out that the pleading discloses no reasonable cause of action, no evidence is required by way of affidavit in support of the application. In such a case, the application must state concisely the grounds on which it is made. The two applications in question were brought on the premise that the suit by the appellants disclosed no reasonable cause of action against the respondents, hence no affidavit in support thereof was necessary and none was filed, but the grounds upon which the applications were made were, in our view, concisely stated in the grounds on the face of the 1st application as follows:-

> **“a) That on the allegations made in the plaint, the first, second and third plaintiffs have no or no reasonable cause of action against the defendants or any of them in that the defendants are not alleged to have done any actionable wrong to them or any of them; and**
>
> **b) That the first, second and third plaintiffs’ claims as against the defendants, as formulated in the plaint, are misconceived in law and amount to an abuse of the process of the court.”**

The grounds on the face of the 2nd application are:

> **“a) That in the circumstances alleged in the plaint herein only Atta [1974] Limited can acquire a cause of action to redress the alleged wrongs done to it by the defendants and/or to recover loss or damages allegedly caused to it by the defendants;**

b) The first, second and third plaintiffs who claim to own 73.9% of the shares in Atta [1974] Limited have not suffered any personal loss and are not directly affected by any alleged wrong doing done to Atta [1973] Limited by the defendants;

c) The claim by the first, second and third plaintiffs is misconceived……."

In determining this appeal, we bear in mind and reiterate that the main suit and the *inter parte* hearing of an application for temporary injunction are still pending in the High Court, while four applications as explained earlier are also pending before this Court. For this reason, we shall avoid expressing any concluded views on the issues that will be the subject of determination by the trial court or the bench of this court that will ultimately hear the remaining applications.

The broad issue for determination in this appeal is whether the appellants' claim against the respondents disclosed a reasonable cause of action and by extension, whether the learned Judge properly exercised his discretion in dismissing the appellants' claim.

We emphasize the words ***"reasonable cause of action"*** to underscore the fact that a pleading will be said to disclose a reasonable cause of action if it exhibits some chance of success when the allegations in the plaint or defence only are considered. See Lord Peason in **Drummond – Jackson V. B.M.A.** [1970] 1 W.L.R. 688 at p. 696. A pleading or part thereof will be struck out if the court is satisfied that even if all the allegations of fact set out in the pleading are proved, those facts would not establish the essential ingredients of a cause of action or

constitute a defence.But as explained in **D.T. Dobie & Company (Kenya) Limited V.**

Muchina [1982] KLR 1, the power to strike out pleadings must be resorted to sparingly and

cautiously because at that stage when striking out is sought the court does not have full facts and merits of the case through discovery and oral evidence. Yet, at the same time, it is also true that the object of the summary procedure of striking out is to ensure that defendants are not burdened by claims which ultimately are bound to fail having regard to the uncontested facts. We reiterate Lord Blackburn's words in **Metropolitan Bank V. Pooley** [1885] 10 App Case 210 or p. 221 that **"…a stay or even dismissal of proceedings may often be required by the very essence of justice to be done."**

The suit in the High Court, as explained earlier was brought by Sultan Hasham Lalji, Bahadurali Hasham Lalji, Esmael Hesham Lalji and Atta [1974] Limited. The first three (brothers) are described in plaint as follows:-

"6. The 1st, 2nd and 3rd plaintiffs together with the 1st defendant were at all material times shareholders in the 4th plaintiff company, holding

14,789 shares each in the said company. The 2nd defendant was at all material times a non-shareholding director in the company. The 1st, 2nd and 3rd plaintiffs were therefore, at all material times holding a total of 44,367 shares in the company out of a total of

60,000 shares, an equivalent of 73.9% of the total shares of the company."

In view of the above pleaded shareholding, the appellants were the majority shareholders in the company. Who, according to the plaint was aggrieved by the respondents' actions; the appellants, the company or both the appellants and the company?

The genesis of the dispute was a meeting of the company's board of directors held on 13 th

November 1991 at which it was purportedly resolved that:-

> **"9. …..all the assets of the 4th plaintiff be disposed off by way of sale with the option going first to the existing shareholders of the company…..** (Emphasis ours)

The following deposition contained in the plaint are critical in answering the question; who was aggrieved by the transfer of the company's shares?

"21. Very shortly after the 1st and 2nd defendants became directors of Atta, Atta used the assets of Atta [1974] Limited, the 4th plaintiff herein (which had not as at October 1992 been transferred to Atta) to obtain loans amounting to a total of Kshs. 85 million from DFCK Limited, Kenya Commercial Bank Limited and Kenya Commercial Finance Company Limited (KCFC).

22. The plaintiffs shall plead at the hearing hereon that the transfer of the assets of Atta [1974] Limited to the 1st defendant and thereafter to Atta, the 3rd defendant was fraudulent against the plaintiffs and was done with a view to benefitting the 1st and 2nd defendants to the exclusion of the plaintiffs."

Particulars of Fraud

i) ……. ii) ……. iii) ……. iv) ……. v) ……. vi) ……. vii) …….

viii) **The assets of the 4th plaintiff were immediately after the alleged resolutions transferred to Atta (Kenya) Limited, a company whose initial subscribers were the**

4th and 5th defendants, directors and/or shareholders of Samvir which ought to have acted in a fiduciary capacity as regarded the plaintiffs. The said incorporation of Atta and the transfer thereafter was done with the sole aim of removing the assets from the reach of the plaintiffs with fraudulent intentions.

ix) **The audited accounts of the 4th plaintiff for the year ending 31st December 1992 show that the 4th plaintiff as operating at a profit and the sale of its assets was both unnecessary and not in the interest of the company. The plaintiffs shall, at the hearing hereof produce for reliance upon the said audited accounts.**

x) **The assets of the 4th plaintiff were in any event sold at such a gross undervalue as to point to fraud. Atta (Kenya) Limited was able to borrow substantial sums of money using the assets of the 4th plaintiff soon after the fraudulent transfer of the assets to itself. The amounts borrowed are clear indication of the then value of the assets of the 4th plaintiff.**

23. The plaintiffs shall plead at the hearing hereof that the 1 st, 2nd and

3rd defendants fraudulent actions were not too clever way of appropriating to themselves (with the fraudulent help of the 4th and 5th defendants) the assets of the 4th plaintiff to the exclusion of the 1st, 2nd and 3rd plaintiffs, the majority shareholders of the 4th plaintiff.

24. Pursuant to the foregoing particulars of fraud, the plaintiffs plead that the

1st and 2nd defendants with the help of the 4th and 5th defendants colluded to create the 4th plaintiff into a shell by transferring the assets of the 4th plaintiff into a shell by transferring the assets of the 4th plaintiff to a company – the 3 rd defendant, incorporated for the purpose and thereby enrich themselves at the expense of and to the exclusion of the 1st, 2nd and

3rd plaintiffs.

25. The plaintiffs fear that unless stopped by injunction, the 1st and 2nd defendants with the active help of the 4th and 5th defendants shall, using the same fraudulent means as set out above transfer and/or alienate the assets of the 3rd defendant and thereby hopefully remove any trace of the assets of the 4th plaintiff that have been transferred with the full knowledge and help of the 4th and 5th defendant to the 3rd defendant, Atta."

We have set out the foregoing *in extenso* to demonstrate that by their own averments in the pleading the appellants explicitly conceded that the assets in question belonged to the company; that it is the company that was defrauded as pleaded. It follows therefore that it is the company that would be aggrieved. Not even in a single paragraph of the plaint have the appellants pleaded what loss they have suffered individually or jointly by the alleged fraudulent transfer of the company assets.

As a general rule and subject only to specific well established exceptions, due to its separate legal personality, the law does not permit shareholders to bring an action on behalf of the company in which they hold shares. If the duty to be enforced is one owed to the company, then the primary remedy for its enforcement is an action by the company itself against those in default. This proposition, articulated for the first time by Wigram, VC in 1843 has come to be known commonly as the rule in **Foss V. Harbottle** (supra), so called after the leading authority

of company law that has stood the test of time (for the last 171 years) since it was elucidated. Normally, therefore, the company itself is the proper plaintiff, and the only proper plaintiff, in an action arising out of a dispute within the company. And the appropriate agency to start an action on the company's behalf is the board of directors, to whom this power is delegated as an incident of managing the company: The rule has greatly strengthened the position of the majority shareholders. Indeed if there were no exceptions to the rule the minority in a company would be completely in the majority's hands and at their mercy.

A few years after the decision in **Foss V. Harbottle** James LJ in **Gray V. Lewis** [1873] 8

Ch App 1035 justified the principle that any body corporate is the proper plaintiff in proceedings to recover its property by pointing to the obvious danger of a multiplicity of shareholders' suits in the absence of the rule. That every member would be able to sue any director, officer or shareholder alleged to have enriched themselves at the company's expense. There might be as many suits as there are shareholders multiplied by the number of the defendants. The situation would be aggravated where suits were discontinued at will, or dismissed with costs against plaintiff shareholders with some or most of them being unable to meet those costs. This justification remains true today in several jurisdictions, including Kenya, where due reverence is paid to the "*proper plaintiff*" principle and other aspects of the rule in **Foss V. Harbottle.**

In **Rai & Others V. Rai and others** [2002] 2 EA 537 this Court confirmed that the rule in **Foss V. Harbottle** still stands in Kenya. The Court further observed that the exceptions to the rule may only be taken advantage of by minority shareholder (and not majority shareholders) in a derivative action. The four (4) well-known exceptions to the rule are; firstly, where the directors or a shareholding majority use their control of the company to take actions which would be *ultra vires* the constitution of the company or are illegal. Secondly, if some special voting procedure would be necessary under the company's constitution or under the Companies Act, it would

defeat both if they were to be sidestepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed **(Edwards V. Halliwell** [1950] 2 ALL ER

1064. Thirdly, where there is invasion of individual rights of the shareholder, such as voting rights **(Pender V. Lushington** [1877] 6 Ch D 70 and fourthly, where a fraud on the minority is being committed. In all those cases, a *"derivative action"* could be brought before the court on behalf of the company where the wrongdoer is in control of the company or by the individual shareholder whose personal right is violated.

The appellants, from our consideration of the pleadings, and without expressing any firm view, have not brought themselves within any of these exceptions. The alleged acts of fraud as particularized in the plaint were, if proved, committed against the company.

In any case, we have observed that it is common ground that the appellants are the majority shareholders of the company. It is the minority not the majority shareholders that are availed the protection by the exceptions since generally majority shareholders exercise powers of the company and control its affairs.

In his characteristic literary style, Lord Denning MR, summed up the law in **Moir V.**

Wallersteiner [1975] 1 ALL ER 849 at p. 857, as follows;

> **"It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs – by directors who hold majority of the shares - who then can sue for damages? Those directors themselves are the wrong doers. If a board meeting is held they will not authorize proceedings to be taken by the company against themselves. If a general meeting is called they will vote down any suggestion that the company should sue themselves. Yet the company is the one person who is damnified.**
>
> **It is the person who should sue otherwise the law would fail in its purpose; injustice would be done without redress. In Foss V. Harbottle (supra) Wigram V-C, saw the problem and suggested a solution. He thought the company could sue in the name of someone who the law has appointed to be its representative.**
>
> **A suit could be brought by individual cooperators in their private characters, and asking in such character the protection of rights to which in their corporation character they were entitled. This suggestion found fulfillment in the Merry Weather case [1867] LR 5 EQ. 464 which came before Wood V- G on two accessions. It was accepted in that case that the minority shareholders might file a bill asking leave to use the name of the company. If they showed reasonable ground for charging the directors with fraud, the court would appoint the minority shareholders as the representative of the company to bring proceedings in the name of the company against the wrong doing directors. By that means, the company would sue in its own name for the wrong done to it. That would be, however, a circuitous course as Lord Hatherley L.C. said himself, at any rate in cases where the fraud itself could be proved on the initial application.**
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> **To avoid that circuity, Lord Hatherley L.C. held that the minority shareholders themselves could bring an action in their own names (but in truth on behalf of the company) against the wrong doing directors for the damage done to them by the directors,**

provided always that it was impossible to get the company itself to sue them. He ordered the fraudulent directors in that case to repay the sums to the company…..stripped of mere proceeding the principle is that, where the wrong doers themselves control the company, an action can be brought on behalf of the company by the minority shareholders, on the footing that they are its representatives, to obtain redress on its behalf."

It is our considered view that the learned Judge in dismissing the appellants' claims exercised his discretion in the matter properly and correctly directed himself to the facts as pleaded and the law. It would be wrong for this court to interfere with the exercise of that discretion as doing so would defeat the elementary principle of litigation, that all matters in dispute must be effectively and completely determined and adjudicated upon and the overriding consideration which govern parties to an action being that all necessary and proper parties to an action, but no others, should be before the court. There is no dispute that the company is in existence and the appellants remain its majority shareholders. By partially striking out their claims, the learned Judge merely did what the appellants themselves ought to have done by way of an amendment as mandated, at the time by **order 6 rule 13 (1)** of the repealed Civil Procedure Rules. They had no capacity to bring the action jointly with the company. The company being the proper plaintiff, no purpose would have been served to retain the appellants' non-existent claim in the suit only to be struck out or dismissed at the trial.

Accordingly, we arrive at the conclusion that this appeal lacks merit and is, in the result, dismissed with costs to the respondents.

We note however, from the High Court ruling (Mwera, J. – as he then was) delivered on

18th November, 2010 that the suit by Esmael Hasham Lalji, named in this appeal as the 3rd appellant was declared to have abated following his death on 18th November, 2006, during the pendency of this appeal.

Dated and delivered at Nairobi this 18th day of July 2014.

W. OUKO.

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR