REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 59 of 1999

PAOLO MURRI ..... APPELLANT

AND

GIAN BATTISTA MURRI ..... 1ST RESPONDENT

"K" BOAT SERVICES LIMITED ..... 2ND RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Mr. Justice Kuloba) dated 1st October, 1998

in

H.C. Winding Up Cause No. 35 of 1997)

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JUDGMENT OF LAKHA, J.A.

This is an appeal from the decision of the superior court (Kuloba, J.) given on 1 October 1998 in the Winding Up Cause No. 35 of 1997 on a petition under the Companies Act, Cap 486 section 211 relating to a company called K. Boat Services Limited ("the Company"). By that order, the learned judge struck out the petition and dismissed it with costs. The appellant now appeals from that decision.

The company was incorporated in January 1967 with an authorised capital of Kshs.400,000/= divided into 20,000 shares of Shs.20/= each with the objects of carrying on business of builders and repairers of boats and other vessels and as shipping and ship's agents and other objects as set out in the Memorandum of Association thereof. The shareholding of the Company was as follows:-

(a) Paolo Murri, the Petitioner - 6, 666 shares

(b) Pietro Murri, his brother - 6,667 shares

(c) Gian Battista Murri, his brother - 6,667 shares

Gian Battista Murri has been the Managing Director at all times since the incorporation of the Company and for the most part Pietro and the Petitioner have not been directors of the Company and had left the running of the Company entirely in the hands of Gian Battista all these years with barely any intervention.

Pietro Murri however, passed away in 1987. Since then there has been a succession dispute and it is before the Italian Court. It is between Gian Battista and Marianna Murri, a sister, in whose favour he left

all his estate under a written will.

It is in the background as set out above that Paolo Murri, on 24 September 1997, filed a Petition in the superior court dated 25 August 1997 under section 211 of the Companies Act, Cap 486, (as earlier stated) on the basis that the affairs of the Company have been conducted in a manner oppressive to the other members of the Company (including himself) in that Gian Battista has:

(a) excluded the Petitioner from the management of the Company;

(b) mismanaged the affairs of the Company;

(c) appropriated and used the assets and income of the Company for his own benefit illegally.

There is no prayer for the winding up of the Company but it prays for:

(I) Gian Battista and Galli being removed from the running of the Company and acting as directors of the Company;

(II) the appointment of an interim liquidator vested with necessary powers;

(iii) the appointment of the Petitioner and Marianna as directors of the Company; and

(iv) accounts and reimbursement of all monies, assets and profits wrongfully taken or diverted by Gian Battista and Mr. Galli (the General Manager and also director of the Company) from the Company.

The company's response to the Petition was an application dated 15 May, 1998 made under the inherent powers of the court and supported by the affidavit of Gian Battista, a director of the Company, to strike out the Petition on the main ground that the Petition was, inter alia, a scandalous abuse of the process of the court. The supporting affidavit running into 15 foolscap sheets dealt with and sought to explain the Company's position relating to the management of the Company, the Company's assets, improvement in asset value of the Company, personal emoluments, Murri International Salvage Operation Company, Outrigger Hotel, leasing of the Hotel and return on shares.

The learned judge heard the application to strike out the petition between 17 June 1998 and 28 July 1998. In a reserved ruling which he delivered on 1 October 1998 he granted the application. He held, inter *alia,* that basically this is a dispute about the internal management of the company and stated:

"*and an elementary principle is that a*

court does not interfere with the internalmanagement of companies acting within theirpowers: the rule in FOSS V Harbottle (1843),2 Hare 261 ..... "

At another point, he stated:

"Courts will interfere only where the act omplained of is ultra vires or is of a raudulent character or not rectifiable by rdinary resolution. It is really very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company it

He further held that the court takes into account delay and with this was intertwined the doctrine of estoppel. He concluded:

"From my findings I hold that this petitionis not presented in good faith and forlegitimate purposes, but for other purposes,such as a desire to put pressure on thecompany or the applicant director, and toimpose the petitioner's will illegitimatelyupon the other directors. This is wrong: ReA Company, [1894]

2 Ch 349,351 VaughanWilliams, J. In particular, petition is anextension of the succession dispute in Italy,and that is not a proper purpose forpresenting this petition..... "

For these reasons, I grant the application, strike out the petition and dismiss it with costs. It is so ordered."

From that decision the petitioner has appealed to this Court and set up thirteen grounds of appeal. But when Mr. Alibhai, advocate for the appellant opened the appeal he limited himself essentially to making one broad submission dealing, in general, with the nature of an application to strike out. He submitted that nowhere in his ruling had the learned Judge referred to Section 211 of the Companies Act, the provision under which the petition had been lodged and thus erred in law and, secondly, he erred in that he had embarked on a trial by affidavit and made findings on affidavit excluding some important documents and that the striking out procedure was intended only for simple plain and obvious cases which the instant case was not.

I now turn to consider each of these submissions. As to the first that there was no reference to the section of the Act, I cannot accept the submission made by Mr. Alibhai. It should not be assumed that because the learned Judge did not refer to the relevant section he did not have it in his mind. Nor does his ruling become any the less transparent because the section was not referred to. This was a decision taken by an experienced Judge. He had the relevant authorities cited to him. It would be quite wrong to infer from the fact that he did not specifically refer to it, or to the argument, that it was not present in his mind. In my judgment, there is no merit in this argument and I reject it.

It is, with respect, wrong, in my judgment, to say that the learned Judge embarked on a trial by affidavit. He did nothing of the sort. I have carefully examined his ruling and do not find that he made any findings on the basis of affidavits before him. There is no disputed question of fact which he has resolved. Throughout his ruling, he has relied on what the petitioner himself has said and has acted upon evidence which is not in dispute or that which was supplied by the petitioner himself. It is, I think, grossly unfair to the learned Judge to criticise his ruling on the ground that he held a trial on affidavit. He did not. Nor did he hold a mini-trial.

Finally, on this limb of the appeal, it was said that the power to strike out was one which should be exercised only in plain and obvious cases. In my judgment, the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse on the proccess of the court or that it is unarguable. It has nothing to do with a case being complex or difficult or that it requires a minute or protracted examination of the documents and the facts of the case. The summary jurisdiction was stated by Lord Greene, M.R. in *Cow v. Casey* (1949) I K.B. 474 at 481 as follows:-

"however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable, it will give final judgment."

This robust approach was followed in our jurisdiction by Sheridan, J. in Melas v New Cartton Hotel Ltd [1977] KLR 47.

And as was said by Buckley, J (as he then was) in Carl-Zeiss- Stiftung v Rayner (1969) 3 All ER 897 at 908:-

"It has been suggested in this case that, if the question whether the issue is res judicata is a difficult or complicated one, this in itself is a sufficient ground for refusing to strike out the plea. I cannot think that this is right. If, as will normally be the case, the relevant information is before the court before which the interlocutory application comes, the Judge ought then to decide whether the issue is res judicata or not. However difficult or obscure the point may be, for it will not become less so by waiting for the trial. If, on the other hand the necessary information is not before him, the application will be premature and should fail."

Before leaving this part of the appeal I would add that the object of the summary procedure of striking out is to ensure that defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. It seems to me that when that situation arises the comments of Lord Blackburn in *Metropolitan Bank v Pooley* (1885)10 App Cas 210 at 221, are applicable. He said that a stay or even dismissal of proceedings may 'often be required by the very essence of justice to be done'. The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackle will fall to the ground the moment the uncontested facts appear; and that is just this case. It is, I think, convenient now to turn briefly to consider if this is so.

The petitioner claims he was excluded from management of the company but he himself says in the petition (paragraph 6) that at all times since the acquisition of the company by the Murri Brothers, Gian Battista Murri has been the Managing Director of the company and for the most part the petitioner and the other brother Pietro have not been directors and had left the running of the company entirely in the hands of Gian Battista (my emphasis). This puts the claim for being excluded out of the question.

As for the claims for mismanagement, misappropriation, the petitioner concedes that these were known to the petitioner for some ten years before the filing of the petition and no explanation for this long delay is proferred. The petitioner is estopped from raising these after such a long delay. Such claims, as Mr. Oyatsi, advocate for the respondents submits, rightly in my view, are barred by delay and estoppel. As for the latter, see: *Nurdin Bandali v. Lomnbank Tanganyika Ltd* [1963] E A 304 and *Century Automobiles Ltd v Hutchings Biemer Ltd* [1965] E A 304. To accede to such claims would not be consonant with the fundamental principles on which a court of equity acts.

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

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

In view of the foregoing I am persuaded that the petitioner's claims are bound to fail and that they are obviously unsustainable. Like the learned Judge, I have no doubt at all that it is an abuse of the process of the Court and I would strike it out accordingly. He dealt very fully with the application before him and there are no grounds on which his discretion can be successfully challenged in this Court. For this reason, addition to those stated above, I would dismiss the appeal with costs.

Dated and delivered at Nairobi this 2nd day of June, 2000.

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Dated and delivered at Nairobi this 2nd day of June, 2000.

A.A. LAKHA