



REPUBLIC OF KENYA



**Sifunja & 4 others v Njoki & 2 others (Civil Suit E012 of 2020)
[2022] KEHC 10725 (KLR) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 10725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E012 OF 2020
MN MWANGI, J
MARCH 31, 2022**

BETWEEN

**ABU-BAKAR MASIALA SIFUNJA 1ST PLAINTIFF
EMILY GATHONI MATIMY 2ND PLAINTIFF
BENSON MAINA MURIUKI 3RD PLAINTIFF
LUCY NDUATA GACHOKA 4TH PLAINTIFF
VERSEFIELD PETROLEUM LIMITED 5TH PLAINTIFF**

AND

**JAMES NGUGI NJOKI 1ST DEFENDANT
IDA MUTHONI 2ND DEFENDANT
NANCY WAMAITHA MUNGAI 3RD DEFENDANT**

RULING

1. The application before me is a Notice of Motion dated 30th October, 2020 brought under the provisions of Sections 143, 145, 148, 194, 238, 239, 240, 241, 242 of the *Companies Act*, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules & Article 159(2)(a), (b) & (c) of *the Constitution*, 2010. The plaintiffs seek the following orders -
 - i. Spent;
 - ii. That this Honorable Court do grant leave to the 1st to 4th plaintiffs to continue and prosecute the forgoing (sic) suit as a derivative action against the defendants;
 - iii. Spent;



- iv. That pending the hearing and determination of this suit the defendants be restrained by themselves and/or their servants and agents from running, managing and/or in any other manner howsoever from interfering with the affairs of Versefield Petroleum Limited; and
 - v. That the costs of this application be provided for.
2. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 30th October, 2020, by Abu-Bakar Masiala Sifunja, the 1st plaintiff and a director of the 5th plaintiff.
 3. In opposition to the application dated 30th October, 2020, the defendants filed a Notice of Preliminary Objection dated 10th November, 2020. The 3rd defendant filed a replying affidavit sworn on 26th November, 2020, by Nancy Wamaitha Mungai, the 3rd defendant, the 1st defendant filed a replying affidavit sworn on 18th December, 2020 and a supplementary affidavit sworn on 12th May, 2021 by James Ngugi Njoki, the 1st defendant and a director of the plaintiff.
 4. The application and the Notice of Preliminary Objection dated 10th November, 2020 were canvassed by way of written submissions. The plaintiffs' submissions were filed on 18th February, 2021 and on 26th July, 2021 by the law firm of Omondi Waweru & Company Advocates, while the defendants' submissions were filed by the law firm of Titus Marenye Kagiri on 20th January, 2021 and on 27th April, 2021.
 5. In support of the application dated 30th October, 2020, Mr. Waweru, learned Counsel for the plaintiffs relied on the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and submitted that before the Court can grant an order of injunction, an applicant must show a prima facie case with a probability of success. That an applicant must also establish that unless the order is granted, he stands to suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. The plaintiffs' Counsel also relied on the case of *Mary Kathambi v Julius K. Ithai & another* [2020] eKLR, where the Court held that the provisions of the *Companies Act* allow the Court to grant injunctive orders where the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interest of members generally, shareholders and/or directors.
 6. It was submitted by Mr. Waweru that pursuant to the provisions of Section 239 (1) of the *Companies Act*, 2015, in order to continue a derivative claim, a member has to apply to the Court for permission to continue it. He relied on the case of *Mahesh Meghji Shah v Jewel Holdings Ltd & 2 others* [2017] eKLR, where the Court reiterated the principle set out in *Salomon v Salomon Co. Ltd* [1895-99] and *Foss v Harbottle* [1843] 2 Hare 461, that a company is a legal personality in its own right with its own corporate identity, separate and distinct from the directors or shareholders, including the capacity to sue or be sued in its own name. He stated that there are however recognized exceptions to the *Foss v Harbottle* rule such as on the issue of illegality.
 7. Mr. Waweru also relied on the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, where the Court of Appeal cited with approval the case of *Grace Wanjiru Munyinyi & another v Gedion Waweru Githunguri & 5 others* [2011] eKLR where the Court noted that there are four exceptions to the *Foss v Harbottle* rule, firstly, where the directors or a shareholding majority use the control of the company to paper over actions which would be ultra vires the company or 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 could be sidestepped by ordinary resolutions of a simple majority and no redress for aggrieved minorities were to be allowed; thirdly, where there is invasion of individual rights, such as voting rights; and fourthly, where a fraud



- on the minority is being committed. He submitted that 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 where his personal right is violated.
8. The plaintiffs' Counsel stated that in the case of *Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another* [2015] eKLR, the Court of Appeal cited the case of *Edwards v Halliwell [1950] ALL ER 1064*, which is regarded as the locus classicus that laid out the exceptions. He indicated that in the latter case it was held that the Foss v Harbottle rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice. He submitted that the acts of the defendants herein in running the company has been fraudulent and illegal and ultra vires the company, thus the defendants cannot possibly sue themselves to right the wrongs because they are the directors who would be expected to pass the requisite resolutions to enable the company to sue.
 9. He submitted that the suit herein has been filed as a derivative suit and that prayer No. 2 of the instant application is for leave to bring this suit as a derivative action against the defendants. He cited the case in *Milimani HCCC No. E279 of 2020 Dr. Frank Mwangera v Nairobi Hospital & others* to support his assertion.
 10. He posited that the plaintiffs have established a prima facie case with a probability of success and in the event that the orders sought are not granted, the company stands the danger of collapsing at the hands of the defendants thereby causing the plaintiffs irreparable loss and damage.
 11. In opposition to the Notice of Preliminary Objection dated 10th November, 2020, Mr. Waweru argued that this Court has jurisdiction to hear and determine this matter since the 5th plaintiff, Versefield Petroleum Limited, is a company duly incorporated in Kenya carrying on business in Mombasa and Nairobi. He was of the view that institution of the suit in Mombasa is not only lawful but cannot be said to cause hardship to the defendants.
 12. In support of the Preliminary Objection dated 10th November, 2020, Mr. Kagiri, learned Counsel for the defendants submitted that for a defendant in Kenya to be subject to a suit, he or she must be determined to be within the jurisdiction of that Court. He relied on Section 15 of the [Civil Procedure Act](#) and submitted that while instituting a suit, it is incumbent on the plaintiff to take into consideration where the defendants reside, carry on business or work for gain so as to ensure that the plaintiff does not make it inordinately difficult for the defendants to mount a defence.
 13. He stated that in the present case, all the defendants reside in Nairobi and that the 1st defendant executed a letter of offer to enable the fifth plaintiff to acquire an office in Nairobi and as such, the only real connection with Mombasa is that the 1st plaintiff is a resident of Mombasa and the imports of the 5th plaintiff are offloaded at the Port of Mombasa. He contended that this Court lacks the territorial jurisdiction to entertain this suit and the same should be transferred to Nairobi for disposal.
 14. Mr. Kagiri further relied on practice Note of the year 2009, which provides that the place of suing is to be determined in accordance with the provisions of Sections 11 to 18 of the [Civil Procedure Act](#) and not according to the preference or convenience of the plaintiff. He submitted that where suits have already been filed in the wrong Court, the Court should exercise its authority under Order VII Rule 9 of the Civil Procedure Rules to return the plaint to be presented to the Court in which the suit should have been instituted. He relied on the case of *Swiss Deli Trade (Panama) Inc v Privamnuts EPZ Kenya Limited* [2020] eKLR, where the Court held that suits should not be instituted in places that cause unnecessary hardships to the defendant which would in turn hinder access to justice. He stated that this Court has the power to transfer this suit to the place it should have been filed in the first place.



15. It was submitted by Mr. Kagiri that on the issue of where the cause of action arose, explanation 3 of Section 15 of the [Civil Procedure Act](#) provides that in suits arising out of contract, the cause of action arises at the place where the contract was made or the place where it was to be performed and/or the place of performance of the contract or any money to which the suit relates was expressly or impliedly payable. He stated that from the replying affidavits of the 1st and 3rd defendants, the 5th plaintiff had its operational office in Nairobi procured by the 1st plaintiff and that the allegations of fraud in this suit are in relation to the bank transactions held at Equity Bank Accra Road branch, which is the operational bank for the company and it is evident and beyond peradventure where the cause of action arose.
16. He cited the case of *Power Solutions Limited v CMA CGM Kenya Limited & 2 others* [2012] eKLR, where the Court held that the legislature went into detail in Sections 12 to 15 of the [Civil Procedure Act](#) as to where certain suits have to be filed as litigation is supposed to be affordable. He indicated that is the reason why Court registries have been established in various stations in this Country. He stated that the Court in the said case stated that to bypass those registries for no good reason and file a suit in a faraway station would not be just to the other parties concerned and transferred the suit to Mombasa, as it lacked jurisdiction to hear it.
17. Mr. Kagiri submitted that the jurisdiction of a Court to transfer a case lies with the superior Courts as was held by the Court in *Milka Nanyokia Masungu v Robert Wekesa Mwembe & 2 others* [2013] eKLR. He stated that it is only fair that the suit herein be transferred to Nairobi in compliance with the laid out provisions outlined in [the Constitution](#) of Kenya, 2010, the [Civil Procedure Act](#) and the High Court Practice Rules of 2009, so as to facilitate the defendants' attendance in Court and provide them with an opportunity to defend themselves against the allegations leveled against them.
18. In regard to the plaint herein, the defendants' Counsel submitted that the same has not been verified by each of the plaintiffs nor is there evidence of any authority by the plaintiffs to have one of them verify the plaint on their behalf in contravention of Order 4 Rule 3 of the Civil Procedure Rules, 2010 thus the plaint is incompetent and should be struck out. He stated that no verifying affidavit had been filed by the 5th plaintiff sworn by an officer of the company, duly authorized under the seal of the said company to do so in terms of Order 4 Rule 4 of the Civil Procedure Rules, 2010 hence the suit on the part of the 5th plaintiff is incompetent and must be struck off.
19. Mr. Kagiri submitted that the 5th plaintiff has no locus standi in this suit as the legal prerequisites imposed by the [Companies Act](#) were not complied with as there was no resolution authorizing the 5th plaintiff to be joined in the institution of this suit as provided under Section 241(2) of the [Companies Act](#). He cited the case of *Affordable Homes Africa Limited v Ian Handerson & 2 others* HCCC No. 524 of 2004, where the Court held that in the absence of a Board resolution sanctioning the commencement of a cause of action by the company therein, the company was not before the Court at all. He further submitted that the law requires the plaintiff to not only pass the appropriate resolutions but to also file the same in Court but in the list of documents filed by the plaintiffs, there is no resolution of the Board authorizing the institution of this suit. The defendants' Counsel urged this Court to strike out the 5th plaintiff from the suit herein.
20. In opposition to the application dated 30th October, 2020, Mr. Kagiri submitted that the affidavit in support of the instant application is incurably defective as the same was served without any annexures referred to therein. He submitted that the affidavits of the 1st and 3rd defendants are clear that there was never an MoU as alleged by the 1st plaintiff. That what is not in doubt is that the parties had an agreement as to the shareholding of the company which was given effect by the 1st plaintiff himself by making the necessary returns and paying for them.



21. He argued that the allegation that the defendants have not paid an agreed sum of Kshs. 15,000,000/= is false since minute (ii) of the minutes which are annexed to the 3rd defendant's replying affidavit reveals that the 3rd defendant was to confirm on the final ratio with the financiers thus it was evident that the financiers were parties other than those at the meeting.
22. Mr. Kagiri submitted that the directorship of the company was discussed and signed off by the plaintiffs and more particularly by the 1st plaintiff as is evident from the minutes annexed to the 3rd defendant's replying affidavit as well as the annual returns annexed to the 1st defendant's affidavit. He contended that as any other going concern, the 5th plaintiff incurred operational debts but that is neither unique nor illegal, and the 5th plaintiff incurred debts from very early when the set up costs exceeded the authorized share capital of Kshs. 100,000/=.
23. He argued that the 1st to 4th plaintiffs have not met the threshold to invite this Court to exercise its discretion in granting them leave to commence a derivative suit as they have not even alleged that they attempted to convene a meeting to discuss any issues of the 5th plaintiff but were denied an opportunity to do so. He urged this Court to follow the criteria as set out by Onguto J., in Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another [2017] eKLR.

Analysis and Determination.

24. I have considered the application filed herein and the affidavit in support thereof. I have also considered the replying and supplementary affidavits, the Notice of Preliminary Objection by the 1st and 3rd defendants and the written submissions by Counsel for the parties. The issues that arise for determination are: -
 - i. Whether the Preliminary Objection dated 10th November, 2020 is merited;
 - ii. Whether the plaintiffs should prosecute the suit herein as a derivative action against the defendants;
 - iii. If the defendants by themselves and/or their servants and agents should be restrained from running, managing and/or in any other manner howsoever from interfering with the affairs of the 5th defendant pending the hearing and determination of this suit.
25. In the affidavit filed by the plaintiffs, they deposed that sometime in the year 2018, the 1st, 2nd and 3rd plaintiffs incorporated the 5th plaintiff herein with the primary object of carrying out petroleum business. They also deposed that they obtained the requisite petroleum business licenses together with a single business permit from the County Government of Mombasa and acquired office space at Epic Business Park in Nyali, Mombasa. They averred that sometime in May, 2019, the 5th plaintiff entered into a transportation and storage agreement with Kenya Pipeline Company Limited and commenced the request for petroleum products.
26. They averred that pursuant to a Partnership Deed dated 20th August, 2018, the 1st defendant was admitted as a director of the company sometime in July, 2019, principally in consideration of injection of capital into the company. It was stated that he confessed his inability to do so and a meeting was held on or about September, 2019 and in the said meeting, the other defendants were brought on board primarily with the role of financiers. A memorandum of understanding was also arrived at, between the plaintiffs and the defendants. That in the said meeting, it was agreed that the defendants were to inject Kshs. 15,000,000 into the company in exchange for 50% shareholding, with the 1st, 2nd, 3rd and 4th plaintiffs retaining 50% shareholding. They further averred that the loans advanced to the company by the 2nd plaintiff in the sum of Kshs. 5,400,000/= and by the 1st defendant in the sum of Kshs. 3,410,000/



- = were to be refunded by the company within the first six months of business from the date of the Memorandum of Understanding (MoU).
27. It was stated by the plaintiffs that it was also agreed that the company would have two directors, one from the promoters and one from the financiers. They also stated that the MoU was to be reduced into writing by Gichuki King'ara & Company Advocates and on the said basis, changes were to be effected at the Companies' Registry with two directors in the CR-12. The plaintiffs deposed that the defendants deliberately failed to reduce the MoU into writing and that the minutes of the meeting held on 5th September, 2019 did not reflect the deliberations therein.
 28. They further deposed that the defendants unlawfully, illegally and fraudulently effected changes in the company by appointing the 1st and 2nd defendants as directors with 300 and 500 shares respectively, and they have kept the plaintiffs in the dark in respect of the running and management of the company business. The plaintiffs claimed that the defendants have also mismanaged the business of the company and transacted business through accounts other than the designated company bank accounts. It was alleged that the defendants have run the company into debt and that two clients of the company, Nomad Petroleum Limited and Asharami Synergy Limited have an aggregate claim of Kshs. 6,777,000/= against the company and have threatened to institute recovery suits against the company, including Kenya Pipeline Company to whom the company is indebted in the sum of Kshs. 4,173,905/=.
 29. It was stated by the plaintiffs that the defendants have to date not injected into the company the agreed sum of Kshs. 15,000,000/= and for the entire period they have run the company, they have failed to call any meetings as required by the law. It was further stated that the plaintiffs as shareholders of the company have not received a penny from the defendants either as earnings, profits or return on their investments. That the defendants have also failed and/or refused to produce audited accounts and records of the earnings and profits of the company despite requests by the plaintiffs to do so.
 30. It was deposed by the plaintiffs that to demonstrate the fraudulent management of the accounts and theft of company funds by the defendants, virtually any funds that were banked in the accounts were almost instantly withdrawn in cash by the 3rd defendant and within a period of under nine months, the defendants had withdrawn over Kshs. 10,000,000/= from the company's accounts in reckless theft of company funds. In addition, it was deposed that the defendants have failed to make the statutory returns for the company to facilitate renewal of the various business licenses and permits and there is grave danger that the company may be deregistered and/or be unable to undertake business in the very sensitive petroleum industry.
 31. They averred that in a meeting held on 16th June, 2020, the plaintiffs agreed that the defendants be removed as directors and/or shareholders of the company for the interest of the company.
 32. The defendants opposed the application dated 30th October, 2020 vide a Notice of Preliminary Objection dated 10th November, 2020 on the following grounds -
 - i. That this suit and consequently the instant application was filed in contravention of the provisions of the Civil Procedure Act and should be struck out with costs;
 - ii. That the 5th plaintiff herein has been enjoined (sic) in contravention of the express provisions of the Companies Act, 2015 and should be struck off as a party to this suit; and
 - iii. If leave should be granted to the plaintiff to continue with this suit as a derivative action.
 33. The 3rd defendant in her replying affidavit deposed that the 2nd defendant is a shareholder in the 5th plaintiff holding five hundred shares in trust and as a nominee for the 3rd defendant. She averred that a



- meeting was convened on 1st September, 2019 at the request of the 1st plaintiff since the 5th plaintiff had been allocated ullage in the system and was about to fall in default owing to its non-payment for the product and the relevant taxes. That thereafter, she was able to negotiate on behalf of the 5th plaintiff with her existing contacts to move products already paid for to the 5th plaintiff's stock account thus placing the 5th plaintiff in a positive stock record with the Kenya Pipeline Company thereby enabling the 5th plaintiff to continue trading.
34. It was stated by the 3rd defendant that the 5th plaintiff was brought in for purposes of effectuating professional management owing to having decades of experience in the petroleum sector. The 3rd defendant stated that she had sourced and obtained an investor interested in injecting Kshs. 15,000,000/= into the 5th plaintiff on the pre-condition that the 3rd defendant would hold 50% of the 5th plaintiff and that the 5th plaintiff would have only three directors for ease of decision making, that is the 3rd defendant and two others from the previous Board of the 5th plaintiff. She deposed that the said investor would wait to see how the 5th plaintiff performed operationally with this set up before putting up his investment.
35. The 3rd defendant denied knowledge of a meeting held on 5th September, 2019 and stated that she received a WhatsApp message on the said date advising her that the paperwork to effect the agreed changes had been prepared and handed over to Mr. Gichuki for processing. She averred that the proposed December, 2019 Board meeting summoned by the 1st plaintiff aborted owing to the rigours and exigencies of the professional and private lives of the directors during the festive season.
36. She contended that in line with sound management practice, she engaged a firm to do operational and management accounts for the 5th plaintiff and that the responsibility of appointing auditors to audit those accounts lies with the Board which the 1st plaintiff is a member.
37. The 1st defendant in his replying affidavit deposed that he joined the 5th plaintiff sometime in July, 2018 for purpose of financing it as it had liquidity problems. He stated that he only joined the Board and took up shares in the 5th plaintiff in July, 2019 and that the changes to reflect his entry were signed off, lodged and paid for by the 1st plaintiff. The 1st defendant averred that at no point did the Board of the 5th plaintiff resolve the institution of these proceedings in their name nor granted any authorization to the 1st plaintiff to make and swear the supporting affidavit herein on its behalf. He averred that the funds for the acquisition of the petroleum business license were contributed by the 2nd plaintiff and the 1st defendant while those for the acquisition of the single business permit from the County Government of Mombasa were provided by the 1st defendant.
38. It was stated by the 1st defendant that there was no consensus to acquire an office in Mombasa since he felt that the 5th plaintiff did not need an office in Mombasa thus it should not be incurring such expenditure as the company was yet to begin trading and this was creating unnecessary debts. He further stated that he came up with the idea of signing a partnership deed which was meant to allocate duties and streamline lines of communication and decision-making after he found out that the 1st and 3rd plaintiffs had made too many promises, commitments and guarantees to third parties without the knowledge of the other directors.
39. The 1st defendant averred that sometime in August, 2019, the 1st plaintiff requested the 3rd defendant to look for means to ensure that the products did not fall into default as he convened a meeting to discuss the failing fortunes of the 5th plaintiff. That by the time the meeting of 1st September, 2019 was convened, the 3rd defendant had moved stocks that were in her control to the 5th plaintiff's stock account and negotiated with Kenya Pipeline Company to regularize their records and remove the 5th plaintiff from the list of defaulter companies.



40. He contended that the 2nd, 3rd and 4th plaintiffs resigned as directors and ceded their shareholding so as to allow the 3rd defendant to acquire the biggest individual shareholding in return for her services in sourcing funds to finance operations, run and manage the 5th plaintiff and they also consciously altered the bank account operating mandate to enable the 3rd defendant to take over operations. That thereafter, the 3rd defendant nominated her daughter, the 2nd defendant, to hold her shareholding to allow the company to additionally exploit any opportunities arising under the Access to Government Procurement Opportunities
41. It was stated by the 1st defendant that he had identified an investor willing to inject Kshs. 15,000,000/= into the company for as long as the 3rd defendant maintained 50% of the shareholding in the 5th plaintiff as their sole security for their investment and she being a member of a Board of directors consisting of three directors, whereupon he would await to gauge the performance of the 5th plaintiff before putting up his investment. He averred that no timelines on individual refunds was discussed other than the refund of Kshs. 2,700,000/= paid to OSMAG which was to be prioritized when the 5th plaintiff was stable enough to make the payment. The 1st defendant stated that the 3rd defendant later confirmed that only Kshs. 1,800,000/= was paid to OSMAG and the 1st, 2nd and 3rd plaintiffs had diverted the difference of Kshs. 900,000/=
42. The 1st defendant averred that it was agreed that the 3rd defendant would hold 50% of the shares for the 5th plaintiff and serve as the Operations Director and on the Board of the 5th plaintiff, while the 1st plaintiff and the 1st defendant would hold the rest of the shares and also serve on the Board. That the 1st plaintiff was nominated by the 2nd plaintiff who had also financially contributed to the 5th plaintiff. That the 3rd defendant nominated the 2nd defendant to sit on the Board and hold her shareholding on her behalf.
43. The 1st defendant deposed that a meeting was held on 2nd September, 2019 which was attended by Mr. Gichuki of Gichuki Kang'ara Advocates, all the plaintiffs and the defendants, and Mr. Gichuki was verbally instructed to execute changes in the shareholding of the 5th plaintiff so that the 3rd defendant could hold 500 shares through her nominee the 2nd defendant. That the 1st defendant held 300 shares and the 1st plaintiff held 150 shares. The 1st defendant averred that the 1st plaintiff was always kept apprised of the conduct of the business and only expressed disagreement over his determination to take up a credit facility which was to be secured by assets belonging to persons who were wholly extraneous to the 5th plaintiff.
44. He further averred that the 5th plaintiff's operations halted as the company did not have a petroleum business license for the period 2020-21 and that all business transactions were conducted through the 5th plaintiff's business accounts with Equity bank Ltd and KCB bank Ltd which accounts are known to the 1st plaintiff as a signatory. He contended that the 5th plaintiff's debts are a direct consequence of start-up undercapitalization leading to expensive sourcing of working capital and unnecessary but unavoidable penalties related to delayed product cargoes which are normal trading debts.
45. It was stated by the 1st defendant that he was not available for the December, 2019 Board meeting summoned by the 1st plaintiff owing to the rigours and exigencies of his professional demands during the festive season. He also stated that none of the shareholders have received any emoluments by way of dividends as the same can only legally be distributed upon the 5th plaintiff turning a profit and the Board recommending the distribution of a dividend.
46. The 1st defendant averred that the 1st plaintiff has engaged in numerous instances of fraud which have been reported to the Directorate of Criminal Investigation, Makadara under OB Reference Number



- 28/25/11/2020 which complaints are pending under investigation. He averred that the defendants have jointly and severally not acted in any manner contrary to the resolutions of the meeting of 1st September, 2019.
47. He deposed that the 5th plaintiff has never had audited accounts but the 3rd defendant engaged a firm to do the operational and management accounts for the 5th plaintiff which should be placed before the Board for ratification.
48. The 1st defendant in response to paragraph 29 of the 1st plaintiff's affidavit stated that most of the cash payments comprised the payment of fines, the movement of money from the 5th plaintiff's KCB Ltd accounts to the Equity Bank Ltd account for ease of international settlement of transactions as well as in recognition of foreign exchange rate differentials between the two banks.
49. He averred that the renewal of the petroleum business license requires the provision of 1000MT line fill petroleum products to Kenya Pipeline Company, which requirement the 5th plaintiff was unable to currently meet as it sought to deal with the injury occasioned by the 1st plaintiff to its business reputation. He further averred that no meeting took place on 16th June, 2020 and if it did, it cannot in law constitute a duly convened meeting of a company as known in law since none of the participants save for the 1st plaintiff was competent to convene, attend and participate in any meeting to deliberate on the affairs of the 5th plaintiff.
50. The 1st defendant stated that when the defendants visited the Company's registry, they discovered that false documents had been submitted to the Registry, complete with their forged signatures which was reported to the Directorate of Criminal Investigation, Makadara, under OB reference Number 28/25/11/2020 which complaints are pending and under investigation. He also stated that the plaintiffs had commenced this action in this Court knowing fully well that the offices of the 5th plaintiff as well as the defendants are situate in Nairobi, in Vision Plaza, off Mombasa Road, for the sole purpose of inflicting inconvenience, expense and impracticality upon the defendants.

Whether the Preliminary Objection dated 10th November, 2020 is merited.

51. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* [1969] EA 696 Law JA at page 700 explained what constitutes a preliminary objection as hereunder -
- “So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” (emphasis added).
52. The defendants relied on Section 15 of the *Civil Procedure Act* and submitted that all the defendants herein reside in Nairobi and that the 1st defendant executed an offer letter to enable the 5th plaintiff acquire an office in Nairobi and as such, the 5th plaintiff's business is conducted in Nairobi. He further submitted that the only connection with Mombasa is that the 1st plaintiff is a resident of Mombasa and the imports of the 5th plaintiff are offloaded at the Port of Mombasa. It was submitted that this Court lacks territorial jurisdiction to entertain this suit and the same should be transferred to Nairobi for disposal.
53. The plaintiffs on the other hand are of the view that this Court has jurisdiction to hear and determine this matter since the 5th plaintiff, Versefield Petroleum Limited, is a company duly incorporated in Kenya carrying on business in Mombasa and Nairobi.



54. This Court is guided by the decision in the Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. [1989] where the Court held as hereunder-

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

55. Section 15 of the *Civil Procedure Act* provides as hereunder -

“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction: -

- a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
- b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
- c. the cause of action, wholly or in part, arises.....”

56. Sections 1A and 1B of the *Civil Procedure Act* introduced the overriding objective of the Act and the Civil Procedure Rules made thereunder so as to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the said Act. Parties to a suit are therefore under a statutory duty to assist the Court in furtherance of the overriding objective. Similarly, this Court has a statutory duty while exercising the powers conferred upon it thereunder, to give effect to the overriding objective.

57. The defendants’ Counsel submitted that since all the defendants reside in Nairobi, the 5th plaintiff has an office in Nairobi, the operational Bank for the 5th plaintiff company is Equity Bank, Accra Road branch, Nairobi and the impugned transactions giving rise to the allegations of fraud in the plaint relate to the said bank account, the suit herein should be transferred to the High Court sitting in Nairobi for hearing and determination.

58. Order 47 Rule 6(2) of the Civil Procedure Rules, 2010, gives the High Court the power to invoke its inherent jurisdiction and transfer a case from one High Court Registry to another.

59. As seen from the case of Mukisa Biscuits Manufacturing Co. Ltd., (supra), Preliminary Objection must stem from the pleadings and raise pure points of law. See the case of Avtar Singh Bhamra & another... Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the Court held that:-

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”



60. In *Mukisa Biscuit Manufacturing v West End Distributors* (supra) at page 701, the Court held as follows-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessary increase costs and occasion confuse the issues. This improper practice must stop.”

61. In the instant case, it is evident that the 5th plaintiff company was incorporated on 28th May, 2018 with the 1st, 2nd and 3rd plaintiffs as directors and shareholders. As of the 18th July, 2019, the 4th plaintiff and the 1st defendant were brought on board as directors and shareholders in the 5th plaintiff company. Its registered office was then in Mombasa. I have looked at the documents annexed to the 1st plaintiff's affidavit and seen that on 12th October, 2018, the 5th plaintiff was issued with a provisional single business permit by the County Government of Mombasa and on 14th May, 2019, it got into a lease agreement with Epic Business Park Limited over space on the eighth floor comprising super built up area 1170 sqft in Epic Business Park Limited situated on subdivision No. 21712 section I Mainland North (C.R.NO.70768) partitioned and fitted with AC office together with one car parking space and common facilities. The said lease was for a fixed term of five years and three months from 1st June, 2019, renewable upon mutual consent.
62. There is also a proforma rent invoice from Epic Business Park Limited to the 5th plaintiff for Kshs. 375,000/= and a banker's cheque dated 29th May, 2019 in favour of Epic Business Park Limited. It is evident that indeed the 5th plaintiff was carrying out business in Mombasa and had office space in Mombasa at the time of inception of the company.
63. I have also gone through the documents annexed to the defendants' affidavits and found that on 1st October, 2019, the 1st plaintiff and the 1st defendant executed another lease agreement on behalf of the 5th plaintiff for office space measuring approximately, 280sqft inclusive of common area apportionment situated on 3rd floor, unit No. 7D of Vision Plaza, Nairobi. The said lease was to run up to 31st December, 2024. Therefore, it is evident that the 5th plaintiff also has office space in Nairobi and has been carrying out business in Nairobi.
64. From the plaint, it can easily be deduced that the nature of the plaintiffs' suit against the defendants is based on allegations of fraud. It is not disputed that the meeting of 1st September, 2019, was held at Marble Arch Hotel in Nairobi. The plaintiffs have also not disputed the claims that on 2nd September, 2019, at a restaurant close to Times Towers, Nairobi with Mr. Gichuki of Gichuki King'ara Advocates, the 1st, 2nd, 3rd and 4th plaintiffs and the defendants, confirmed the minutes of 1st September, 2019 as full and final. It is also noteworthy that the bank account in question is held at Equity Bank, Accra, Road Branch, Nairobi.
65. From the CR12 dated 12th September, 2019 the 3rd defendant's postal address is for Nairobi and the 1st defendant's is in Mombasa. The 1st plaintiff's address is in Nairobi. In the said circumstances this Court will go by the fact that the cause of action and/or events leading to the filing of the suit herein took place and/or arose in Nairobi. It is my considered view that with the current offices for the 5th defendant being in Nairobi, the witnesses are likely to come from Nairobi and parties and their witnesses are likely to incur unwarranted expenses in traveling to Mombasa, and maintaining the witnesses to attend and



give evidence in Court at Mombasa, thus making it expensive for the parties to defend this case at a reasonable expense.

66. In the case of Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd [2012] eKLR, the Court addressed the conditions to be considered in determining whether or not to grant an order transferring a case and stated as follows -

“In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and maintaining witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.” (emphasis added).

67. In Francis Mwangi Githuku & another vs Jane Wambui Kingari & another [2017] eKLR, the Court held that the place from where payments were made does not confer the Court in that place jurisdiction to hear and determine the matter unless it has been expressly provided in a contract.
68. The parameters of the Courts in which cases should be instituted are well set out in Sections 11, 12, 13, 14 and 15 of the *Civil Procedure Act*. It is therefore my finding that inasmuch as this Court has jurisdiction to hear and determine this case, it lacks the territorial jurisdiction but the High Court at Nairobi has all the requisite jurisdiction to hear and determine the issues raised herein. This Court is of the view that the plaintiff will not be prejudiced in any way if the suit herein is transferred to Nairobi for hearing and determination. In view of the above finding, this Court shall not deal with the remaining issues of whether or not leave should be granted to the plaintiffs to continue with this suit as a derivative action and whether the interim orders should be affirmed pending the hearing and determination of the case herein, as the same shall be dealt with by the Judge who will be seized of this matter at the High Court Milimani Commercial Court in Nairobi.
69. The upshot is that the suit herein is hereby withdrawn from the Mombasa High Court and transferred to the High Court sitting at Milimani, Nairobi for hearing and determination. Costs are awarded to the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 31ST DAY OF MARCH, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the plaintiffs

No appearance for the defendants

Mr. Oliver Musundi – Court Assistant

