



**Benard v Davis & 2 others (Civil Case 189 of 2018) [2022] KEHC 250 (KLR)
(Commercial and Tax) (29 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 189 OF 2018
DAS MAJANJA, J
MARCH 29, 2022**

BETWEEN

AHIMBISWE BENARD PLAINTIFF

AND

KORIR DAVIS 1ST DEFENDANT

PARTH INTERNATIONAL LIMITED 2ND DEFENDANT

KENYA COMMERCIAL BANK 3RD DEFENDANT

JUDGMENT

1. Although the Plaintiff dated 15th May 2018 is rather prolix, the cause of action is straightforward and succinct and has been summarized in paragraph 9 of the Plaintiff as follows:

[9] On 3rd May 2018, the 1st Defendant unlawfully and fraudulently transferred the sum of US Dollars 55,000 (United States dollars Fifty Five thousand) from the company account to his personal account No. 117xxxx without sanction and authority of the Plaintiff and the 2nd Defendant. The transfer was for the sole benefit of the 1st Defendant and was to the 1st Defendant's personal account No. 117xxxx held at the 3rd Defendant Bank.
2. It is not in dispute that the Plaintiff and 1st Defendant are shareholders and directors of the 2nd Defendant ("the Company").
3. Before I deal with the substance of the Plaintiff's claim, I think it is important to outline the procedural history of the matter. When he filed this suit, the Plaintiff also filed an application dated 15th May 2018 seeking, inter alia, leave to institute this suit as a derivative suit and an order directed to the 3rd Defendant ("the Bank") preserving monies held in account no. No. 117xxxx being the 1st Defendant's



account. From the record, the 1st Defendant filed a memorandum of appearance dated 18th May 2018 and a replying affidavit to the application.

4. In due course and in the meantime, the court granted an order on 18th May 2018, ordering the Bank to preserve the funds in the 1st Defendant's account to no more than USD 50,000.00. In response to the application and the order, the Bank filed an affidavit and declared that the 1st Defendant had withdrawn the money by the time the court order was served on it. The Bank thereafter filed an application dated 13th September 2018 seeking to have it struck out from the suit. When the matter came up for hearing on 26th October 2018, the Plaintiff and the Bank recorded a consent marking the suit as withdrawn with no order as to costs to that extent.
5. On 28th January 2021, counsel for the Plaintiff applied to withdraw the application dated 15th May 2020 paving way for hearing of the matter. It is apparent from the record, that the 1st Defendant did not take part in the proceedings any further. On the understanding that the 1st Defendant had filed its defence, the court issued a notice to show cause as to why its defence should not be struck out for failing to take part in pre-trial processes. When the 1st Defendant failed to attend court on 20th December 2021, the court struck out the its defence and fixed the matter for the formal proof. For reasons that are apparent, the 2nd Defendant ("the Company") did not file a defence.
6. It is clear from the record that the order of 20th December 2021 was made in error as the 1st Defendant did not file any defence hence there was nothing to be struck out. This is however not fatal as the matter would still be set down for formal proof in the absence of the 1st Defendant's defence on record.
7. The matter proceeded for formal proof with the Plaintiff giving testimony. His advocate filed written submissions.
8. The Plaintiff recalled that the Company received monies from a client who paid shipping charges at a cost of USD 57,205. On or around 3rd May 2018, the 1st Defendant unlawfully and fraudulently transferred USD 50,000 from the Company account to his personal account No. 117xxxx held at the Bank without the sanction of the Plaintiff and the Company. The Plaintiff alleged that the transfer was for the 1st Defendant's sole benefit and amounted to breach of his fiduciary duty and duty of care owed to the Plaintiff and Company as a director.
9. On 10th May 2018, the Plaintiff notified the Bank of the illegal and fraudulent transfer of the Company's money. He recalled that the transfer of the money from the Company account grounded it and forced him to put in more money for it to stay afloat. The Plaintiff stated that the 1st Defendant's conduct caused severe hardship to the Company's management, business and finances.
10. The Plaintiff submits that the 1st Defendant, being a director owed the Company fiduciary duties of good faith and loyalty and also owed a duty of care and skill in the discharge of their duties as directors of the company hence he is liable to refund the money.
11. In order to support his case, the Plaintiff cited Black's Law Dictionary (11th Ed.) which at p.770 defines "fiduciary" as someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another duties of good faith, loyalty, due care and disclosure. It is also defined as someone who must exercise a high standard of care in managing another's money or property. He also relies on Gower's Principles of Modern Company Law (4th ed.) at p. 571 where it states that, ".....In truth, directors are agents of the company rather than trustees of it or its property. But as agents, they stand in a fiduciary relationship to their principal, the company. The duty of good faith which this fiduciary relationship imposes are virtually identical with those imposed on trustees and to this extent, the description "trustee" still has validity. The duties of



- directors can conveniently be discussed under two heads: (a) fiduciary duties of loyalty and good faith (analogous to the duties of trustee's stricto sensu) and (b) duties of care and skill." (See "Fiduciary Relationships" (1962) C.L.J. 69 and 91963) C.L.J. 119 and "The Director as Trustee" (1967) C.L.J. 83).
12. The Plaintiff submits that the 1st Defendant's actions were in breach of his duties as a director and as such he should be ordered to return to the Company the money he misappropriated and if he fails then his shares with the Company be attached to recover the same.
 13. I have anxiously considered the Plaintiff's case from his pleadings, testimony and submissions. They are all clear that the Plaintiff seeks to enforce the right which clearly belongs to the Company as the 1st Defendant took money from the Company without authority or consent. Under the common law rule in *Foss v Harbottle* [1843] 67 ER 189, a wrong alleged to have been done to a company, can only be remedied by an action by the company itself. In order for a shareholder to intervene, the court may grant leave for a minority shareholder to bring a claim on behalf of the Company in cases where there is clear fraud. The common law rule has now been supplanted by the provisions of sections 239, 240 and 241 of the *Companies Act*, 2015.
 14. The Plaintiff accepts this position because in the application dated 15th May 2018, he sought an order for, "leave to institute a derivative suit on behalf of the 2nd Defendant Company herein." When I asked counsel whether the order was granted, he confirmed that it was. However, the court record reflects a contrary position. On 18th May 2018, Mr Cohen, counsel for the Plaintiff prayed that the order for leave be granted but Tuiyott J., did not accede to the request. There is no indication that the order was indeed granted at any other time until the application was withdrawn on 28th January 2021 on the Plaintiff's advocate's own application.
 15. Even though this matter is in the nature of a formal proof, the Plaintiff still has a duty to establish its case on a balance of probabilities. As I have stated, on its own pleadings, the Plaintiff seeks to exercise a right that belongs to the Company. It is for this reason that it sought permissions to commence a derivative suit on behalf of the Company against the 1st Defendant. No such permission was granted and no suit was filed or indeed commenced. Although I did grant permissions on 21st February 2021, it was grounded on the withdrawn application and no action was taken by the Plaintiff to amend its plaint to reflect that the Company was suing the 1st Defendant.
 16. The Plaintiff's claim as drawn and prosecuted cannot succeed in the absence of permission granted by the court to the Plaintiff to prosecute the suit on behalf of the Company and the same prosecuted as such. The Plaintiff's claim is therefore struck out but with no order as to costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2022.

A. MABEYA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Cohen instructed by Agan Opolo and Alosa Advocates for the Plaintiff.

