



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL SUIT NO.14 OF 2017 (O.S.)**

**(FORMERLY HCCC NO. 53 OF 2008**

**CONSOLIDATED WITH HCCC NO. 55 OF 2010)**

**IN THE MATTER OF VOLUNTARY WINDING UP OF COMPANY SECTION 297 AND 241 COMPANY ACT CAP 486 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SALE OF ART (K) LIMITED SECTION 286 OF TRANSFER OF BUSINESS ACT CAP 296 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SALE ART (K) LIMITED TO PELELE LIMITED AND LATER TO ART (2005) LIMITED**

**BETWEEN**

**OTULO OLOO SISSO AND OTHERS.....PLAINTIFF**

**VERSUS**

**1. HARISH MEDIRATTA, HITESH MEDIRATTA**

**& DIPACK MEDIRATTA (DIRECTORS ART (K)**

**LTD IN RECEIVERSHIP.....1<sup>ST</sup> DEFENDANT**

**2. BARCLAYS BANK OF KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**3. ROGER ORION T/A KINGSLAND AND COURT**

**(INTERIM ADMINISTRATORS).....3<sup>RD</sup> DEFENDANT**

**4. PRICE WATERHOUSE COOPERS.....4<sup>TH</sup> DEFENDANT**

**5. ADRIAN SPENCER DEARING AND**

**JOHN STANLEY WARD**

**(RECEIVERSHIP MANAGERS).....5<sup>TH</sup> DEFENDANT**

**6. PELELE LIMITED (NOW ART (2005) LIMITED).....6<sup>TH</sup> DEFENDANT**

**7. KARIM KASSAMALI SULTAN AND**

**FARID MOHAMMED (DIRECTORS PELELE LTD).....7<sup>TH</sup> DEFENDANT**

**8. HITESH MEDIRATTA,**

**A.M. NTHIGA (TRUSTEES SRBS).....8<sup>TH</sup> DEFENDANT**

**9. ART (K) LIMITED**

**(CORPORATE TRUSTEES SRBS).....9<sup>TH</sup> DEFENDANT**

### **RULING**

1. This ruling is on the 6<sup>th</sup> defendant's preliminary objection raised against the plaintiff's amended originating summons. The plaintiff sought to challenge the sale of his former employer, African Retail Traders (K) Limited ("ART (K) Ltd") in his Further Amended Originating Summons, which he filed together with a statement and issues for determination on 6<sup>th</sup> March 2020.

2. In his aforementioned pleadings, the plaintiff, who had filed the suit on behalf of other former employees claimed that they were unaware of any financial strain between their former employer ART (K) Ltd and the 2<sup>nd</sup> defendant, Barclays Bank of Kenya until the bank introduced receiver managers from the 4<sup>th</sup> defendant, Price water house Coopers on 11<sup>th</sup> February 2002. On 14<sup>th</sup> February 2002, Hitesh Mediratta, the then managing director of ART (K) Ltd issued a memo urging staff to cooperate with the receiver managers as they had come to manage the company and would leave it financially strong on their exit. It later dawned on the employees that that was not the case. ART (K) Ltd was sold off to the 6<sup>th</sup> defendant, Pelele Limited, leaving the staff with no alternative but to seek legal redress for their benefits. The plaintiff claimed that the managing director filed evidence in court showing that the loan was cleared by December 2003 and ART (K) Ltd and the 2<sup>nd</sup> defendant embarked on negotiations for a new loan facility which was approved and shared between ART (K) Ltd and Hutchings Beimer Ltd.

3. The questions raised for determination by the plaintiff in his Further Amended Originating Summons are reproduced verbatim hereunder:

*1A. Whether the company business was being managed by directors and professionals of high integrity and all along the business that was started on or about 1967 or thereabout was doing well without any difficulty.*

*2A. Whether the former employees of ART (K) were informed of any financial difficulty before the 11<sup>th</sup> February 2005 when the 2<sup>nd</sup> defendant sent in receiver manager to manage ART. In fact, in the month of November 2001 the employees were all given a pay increase for the reason that the financial position of the company had improved.*

*3A. Whether there was any notice or information from the employer before the company was placed under receivership in the month of February 2005.*

*4A. Whether in the receivership there was fraud that was being played by the company directors.*

4. The plaintiff enumerated the following particulars of fraud against the defendants:

*a. Why the Receiver Managers were only instructed by the 2<sup>nd</sup> defendant without showing that the company was unable to pay the debts if there were any.*

*b. Why Pelele Limited, the company that bought the assets and goodwill of the company was formed in 2003 two years before the purchase of company.*

*c. Failure to advertise the sale of the company to enable competitive bidding from any interested buyers and selling the company to Pelele limited a company that according to communications from the receiver managers, Pelele was formed mainly to buy the company assets.*

*d. Sale of the company at a sum of Kshs. 40 Million with a down payment of only Kshs. 3 Million without even indicating on how and when the remaining Kshs. 37 Million was to be paid.*

*e. The purported sale the company assets and at the same time allowing the purchaser to also operate the business in the former company African Retail Traders was suspect.*

*f. Failure by the former employer and the receiver managers to recognize the plaintiffs as creditors worth to be included as liabilities of the alleged bankrupted ART (K)LTD.*

And sought the following reliefs as a former employee of ART (K) limited:

*a. A declaration that the sale of ART (K) Limited was irregular and sale should be rescinded;*

- b. A declaration that a notification of change of directors dated 21<sup>st</sup> day of July 2005 just days before the sale was fraudulent;
- c. A declaration that the former employees of ART (K) Ltd are entitled to compensation and general damages for gainful employment;
- d. Whether the plaintiffs are entitled to costs of this suit; and
- e. A declaration whether the plaintiffs are entitled for compensation.

5. The 6<sup>th</sup> defendant raised a preliminary objection against the plaintiff's Amended Originating Summons on 6<sup>th</sup> October 2020 contending that this court lacks the requisite jurisdiction to entertain the matter since the appropriate forum is the Employment and Labor Relations Court pursuant to section 87(1) of the Employment Act, 2007 and section 12 (1) of the Industrial Court Act, 2011. It was further urged that the Amended Originating Summons offends the provisions of sections 238 and 239 of the Companies Act and the plaintiff does not fall under any category of persons under Order 37 of the Civil Procedure Rules who can take out originating summons. The defendant also contended that the Amended Originating Summons is incurably defective in law and in substance and urged this court to dismiss the suit with costs.

6. The preliminary objection was heard before this court on 17<sup>th</sup> December 2020. Mr. Ratemo, learned counsel for the 6<sup>th</sup> defendant limited his oral submissions to the first and second grounds of the preliminary objection. He argued that this court's jurisdiction is provided for under **Article 165 (3)** of the **Constitution** and it could not hear matters related to a labour dispute which was the preserve of the Employment and Labour Court. He recalled that when the issue had been brought up in open court, it had been stated that only the commercial aspect of the dispute be brought before this court, but the plaintiff had still raised labour matters.

7. He also submitted that the plaintiff had no locus to file the suit as they were not shareholders of the company. They had also failed to seek leave to institute the suit under **Section 238 (1)** of the **Companies Act**. He referred to the authorities cited in his written submissions and urged that the suit had been brought in the wrong forum and was therefore a nullity.

8. Mr. Onyango, learned counsel for the 1<sup>st</sup> and 5<sup>th</sup> defendants, associated himself with the submissions of his colleague Mr. Ratemo.

9. Counsel for the 2<sup>nd</sup> defendant, Mr. Wakhusi, also supported the 6<sup>th</sup> defendant's preliminary objection. He urged that from his perusal of the amended originating summons, the prayers sought therein related to employees' benefits and this court lacked jurisdiction to determine matters relating to employers and employees. He also submitted that the preliminary objection was not premature as argued since they had raised the issue at paragraph 8 (d) of the affidavit of the 2<sup>nd</sup> defendant's Corporate Recoveries Manager, Lukas Githungo, sworn on 29<sup>th</sup> September 2020 in response to the Further Amended Originating Summons. He submitted that since a significant part of the suit related to employment reliefs, the whole suit was incompetent and the entire suit should be struck out with costs to the 2<sup>nd</sup> defendant.

10. Conversely, Mr. Osoro for the plaintiffs submitted that the preliminary objection was premature and had been brought in bad faith. On the issue of jurisdiction, counsel argued that the court had directed the plaintiffs to amend their Originating Summons to bring it within the court's jurisdiction which was done. He maintained that their prayers did not deal with employment but was on the appointment of receivers, the legality of the sale of ART and whether the plaintiffs' were entitled to general damages. Counsel explained that the plaintiffs were former employees of ART (K) Ltd which was sold while they were working and their salaries were detained. He urged the court to look at the public interest of the matter as it affected 300 people and also contended that the preliminary objection was premature since the parties had not taken directions.

## **ISSUES**

11. On considering the preliminary objection and the parties' submissions on it, I found that the issues arising for determination are:

- a. Whether this court has jurisdiction to deal with the matter; and
- b. Whether the plaintiffs have locus to sustain the suit.

## **ANALYSIS AND DETERMINATION**

12. This court is called upon to determine whether the plaintiffs' suit should be dismissed before it is heard for being bad in law. The definition of a preliminary objection was set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** thus:

*"... a preliminary objection consists of a 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."*

13. An objection to the court's jurisdiction fits under the parameters of a preliminary objection. It must be disposed of at the earliest instance in proceedings, as the court cannot move a step further in adjudication of any matter where it lacks the mandate to do so.

14. The 6<sup>th</sup> defendant has contested the jurisdiction of this court to hear and determine the plaintiff's suit for the reason that the matter is between employees and an employer which are matters under the purview of the Employment and Labour Relations Court.

15. The issue of jurisdiction has challenged the plaintiff's suit from the outset. Initially, the plaintiff had filed his case as Civil Suit No. 55 of 2010 which was later consolidated with Civil Suit No. 53 of 2008. Subsequently, the suit was transferred to the Employment and Labour Relations Court by Okwany J. vide a ruling dated 5<sup>th</sup> December 2016 for the reason that the questions posed by plaintiff in his Originating Summons touched on issues of terminal benefits, staff retirement benefits scheme pensions and rules of the scheme among other employer/employee issues.

16. On 26<sup>th</sup> July 2017, the Employment and Labour Relations Court found that the terminal benefits of the employees were not in dispute as they were contained in their terminal letters. The court therefore held that the suit was not an employment matter as there was no dispute over the plaintiff's terminal dues but was a commercial dispute for the reason that the main issue in contestation was who should pay the plaintiff's benefits considering that his employer was under receivership. For these reasons, the court re-transferred the matter to this court for determination of the issue of who should pay the plaintiff.

17. When the matter was brought back to this court, the plaintiff sought and was granted leave to amend his Originating Summons. He raised new questions for determination, added parties to his amended Originating Summons and also struck out other parties in the further amended Originating Summons. Some of the cancellations made by the plaintiff in his Further Amended Originating Summons are not clear; which is why this court opted to adopt the heading as set out in the amended Originating Summons.

18. As previously stated, the plaintiff sued the defendants on behalf of former employees of ART (K) Ltd contesting the management of the company business by the directors, the legality of the winding up of the company, the bidding process prior to the sale of the company and other issues concerning the sale of ART (K) Ltd.

19. The Employment and Labour Relations Courts were established under **Article 162 (2) (a)** of the **Constitution** to hear and determine disputes relating to employment and labour relations whereas the jurisdiction of the High Court is provided for under **Article 165 (3)** of the **Constitution**. Article 165 (3) (a) provides that the High Court has unlimited original jurisdiction to hear civil matters.

20. The questions raised by the plaintiff in his Further Amended Originating Summons are distinctly commercial in nature. The plaintiff left out issues concerning the Staff Welfare Retirement Benefit Scheme which he had raised in his Originating Summons. The changes he made to his Further Amended Originating Summons, brought the suit under this court's jurisdiction. The first issue is thus answered in the affirmative.

21. The second issue for determination is whether the plaintiff has locus to institute the suit against the defendants. The 6<sup>th</sup> defendant argues that the plaintiff had no capacity to institute the suit before this court for the reason that he did not fall within the province of section 238 (1) of the Companies Act. **Section 238 (1)** of the **Companies Act** deals with derivative actions. It stipulates:

*In this Part, "derivative claim" means proceedings by a member of a company—*

*(a) in respect of a cause of action vested in the company; and*

*(b) seeking relief on behalf of the company.*

22. This raises the question whether the plaintiff's suit is a derivative action. Derivative actions were developed to enable minority shareholders prosecute suits on behalf of the company as an exception to the rule in the case of **Foss v Harbottle [1843] 2 Hare 461** which provided that in any action in which a wrong was alleged to have been done to a company, the proper claimant was the company itself.

23. The court in **Ghelani Metals Limited & 3 Others v Elesh Ghelani Natwarlal & another [2017] eKLR** defined derivative actions thus:

*"37. Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: see Wallersteiner v Moir (No.2) [1975] 1 All ER 849."*

24. Before the enactment of the Companies Act, 2015, parties seeking to bring derivative actions were required to meet the exceptions to the rule in **Foss v Harbottle** developed under common law. In the case of **Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another Civil Appeal No. 101 of 2004 [2015] eKLR** the Court of Appeal distilled these exceptions as follows:

*"(i) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company.*

*(ii) Where it is alleged that the personal rights of the plaintiff shareholder have been or are about to be infringed.*

*(iii) Any other case where the interests of justice require that the general rule, requiring suit by the company, should be disregarded."*

25. On the procedure for granting leave to institute a derivative action, the Court of Appeal in **Amin Akberali Manji (supra)** held:

*"On this, the trial court was right in adopting the exposition of the procedure in the treatise **"Minority Shareholders: Law,***

**Practice and Procedure”** by **Joffe** that ‘there is no approved pre-action protocol in relation to derivative action’ and that

“... after the claim form has been issued, the claimant is required to make an application - which must be supported by written evidence- for permission to continue with the claim.” **It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such action, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in Foss vs. Harbottle.**” **Emphasis added**

26. The Companies Act, 2015 codified the procedure for instituting derivative actions in **Section 239** thus:

(1) In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.

(2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—

(a) shall dismiss the application; and

(b) may make any consequential order it considers appropriate.

(3) If the application is not dismissed under subsection (2), the Court—

(a) may give directions as to the evidence to be provided by the company; and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(4) On hearing the application, the Court may—

(a) give permission to continue the claim on such terms as it considers appropriate;

(b) refuse permission and dismiss the claim; or

(c) adjourn the proceedings on the application and give such directions as it considers appropriate.”

27. It comes out clearly, from an analysis of the Further Amended Originating Summons that the cause of action and the reliefs sought therein are based on wrongs purportedly committed against ART (K) Ltd. The plaintiff has raised concerns on the manner in which ART (K) Ltd was run and finally wound up and sold off by the defendants. He questioned whether ART (K) Ltd was indeed unable to pay off debts advanced by the 2<sup>nd</sup> defendant considering the fact that the employees had received pay increments before the 2<sup>nd</sup> defendant sent in receivers to manage the company. In his particulars of fraud, the plaintiff stated that the 6<sup>th</sup> defendant was formed two years before the purchase of ART (K) Ltd. He averred that this, coupled with the fact that the sale of the company was not advertised to enable competitive bidding from interested buyers showed that the 6<sup>th</sup> defendant was formed mainly to buy the company assets. According to the plaintiff, ART (K) Ltd was sold off at a sum of Kshs. 40 million with a down payment of a sum of Kshs. 3 million with no indication on how the balance would be paid. The plaintiff stated that the sale of the company’s assets while at the same time allowing the purchaser to operate the business of ART (K) Ltd was suspect. He also complained of the failure by their former employer and the receiver managers to recognize them as creditors worthy to be included as liabilities of ART (K) Ltd.

28. Although the suit may be well intentioned, the plaintiffs have no locus to bring the claim on behalf of the company. Their failure to make an application to institute a derivative action would not be fatal to his case since courts have the discretion to grant leave to prosecute a derivative action even after a suit has been filed. However, as held in **Amin Akberali Manji (supra)**, a claimant must not only show that he has a *prima facie* case but must also demonstrate that he has *locus* to commence and prosecute the suit. Further, under the Companies Act, 2015, derivative actions can only be instituted and prosecuted by members of a company.

29. The plaintiff is former employee of ART (K) Ltd who has brought this suit on behalf of other former employees of ART (K) Ltd. The issues he presents in his pleadings concern the internal affairs of the company which can only be questioned by the shareholders of a company. He and the persons he represents are not members of the company and would therefore have no capacity to commence proceedings on behalf of the company. Consequently, I find that the plaintiff has no locus standi to maintain the suit before this court. The plaintiff’s Further Amended Originating Summons is therefore struck off.

30. Each party shall bear its costs of the suit.

**DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF MARCH, 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence:**

**Mr. Osoro For the Plaintiff**

**Mr. Baganda h/b for Mr. Onyango For the 1<sup>st</sup> Defendant and one of the 5<sup>th</sup> Defendants**

**Mr. Wakhusi For the 2<sup>nd</sup> Defendant**

**Mr. Ratemo For the 5<sup>th</sup> & 6<sup>th</sup> Defendants**

**Ms Rael Court Assistant**