REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NUMBER 12 OF 2019

1. WAN LAISU

2. WU JANHUI.....PLAINTIFFS/RESPONDENTS

VERSUS

1. OVERSEE BOAT AND FISHING SUPPLIER LIMITED

2. AHMED MUSTAFA SHARIF

3. MUDHHIR MUSTAFFA SHARIF.....DEFENDANTS/APPLICANTS

Coram: Hon. Justice Nyakundi

Mr. Okuto Advocate for the 1st, 2nd and 3rd Defendants/ Respondents

GNK Advocates for the Plaintiffs/Applicants

JUDGEMENT

Introduction

The Applicants herein filed a notice of motion application dated 04.07.2020 seeking the following orders:

> **(1). THAT this Honorable Court be pleased to grant the Applicants/Plaintiffs leave to amend the Plaint filed herein in terms of the draft annexed amended plaint.**
>
> **(2). THAT if the orders are granted as prayed, the annexed draft amended Plaint be deemed as duly filed and subject to payment of requisite fees.**
>
> **(3). THAT an inventory of the goods in the two containers bill of lading numbers OOLU2107363020 and No. ONEYSZPVC8770400 be retaken in the presence of the parties or their duly appointed representatives to ascertain their condition and a report be filed in court.**
>
> **(4). Costs of this suit plus interest on thereon from the date of trespass till payment in full.**

In support of the said notice of motion, the applicants annexed their amended plaint.

The Respondents in turn filed Grounds of Opposition dated 21.10.2020 as well as a Replying Affidavit by one **Ahmed Mustafa Sharif** dated 21.10.2020 stating inter alia that there was no application seeking leave to file a derivative suit consequently there would be no need to grant leave to amend the said plaint.

Submissions by Parties

The Plaintiff/Applicants submitted that their application is brought under Order 8 Rule 3, sub rule 1 of the Civil Procedure Rules, 2010 which allows a party to amend its pleadings. They submitted that this court in its ruling dated 27.05.2020 had granted leave to the

Plaintiffs/Applicants to file a derivative suit which made it necessary for the Plaintiff to frame their pleadings appropriately. They submitted that a derivative suit may be brought in accordance with an order of the court in proceedings for protection of members against unfair prejudice.

Counsel also submitted that the Respondents had not demonstrated what injustice they would suffer in case the applicant's Plaint is amended and that most of the issues raised are issues to be determined at trial and the Defendant can address the same vide an amended Defence.

For these submissions Counsel relied on the cases of **James Peter Mbiyu Wambui & Another v Waweru Kuria [2018] eKLR,** and **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR.**

Counsel for the Respondents submitted that the court acted in excess of its jurisdiction by making an order granting leave to the plaintiff/applicants to amend their suit whereas the plaintiffs had not filed an application for amendment at the time when the orders were issued. Further they submitted that no application seeking leave to file a derivative suit had been made to date. They further argue that to file a derivative suit certain legal principles must be observed as set out in section 239 and 241 of the Companies Act 2015 which are couched in mandatory terms and reflect the principles of Foss v Harbottle. He submitted that no meeting of the directors of the 1st Defendant/Respondent had been held as the plaintiffs/applicants refuse to attend hence nothing about the company's affairs can be resolved. They further submit that no oppression had been disclosed in the instant suit and as such the court would be acting without jurisdiction in allowing the suit by the applicants in an application to amend where no application for leave was made by the applicants.

Counsel further submits that the court must consider whether the applicants are seeking leave to amend bona fide and in good faith which is not the case here as all the property of the 1st Defendant has been held under lock and key at a premises owned by the 1st Defendant at Malindi Airport for almost one year by consent. They submitted that should the court allow the amendment it would severely prejudice the 1st Respondent who claims ownership of the property and subsequently the rights of the 2nd and 3rd Respondents. They concluded that the applicants had not shown any instance of oppression to warrant the admission of their application to amend the plaint on the basis of a derivative suit as required under the Companies Act 2017 provisions.

For these submissions Counsel relied on the case of **Foss v Harbottle [1843] 2 Hare 461, Mac Dougal v Gardiner (1875) 1 Ch, D** and **Pavlides v Jensen and others (1956), 2 All E.R. 518.**

Issues for Determination

I have considered the Notice of Motion, affidavits and brief submissions. I find that there are only two issues for determination in this cause of action:

1. Are the Plaintiffs/Applicants entitled to the grant of leave to amend their Plaint?

2. Is an inventory of the goods contained in the two containers necessary?

Legal Analysis

This court had previously addressed and canvased the issue of a derivative suit with regards to the instant case in its ruling dated 27.05.2020. The rule in **Foss –v- Harbottle [1843] 2 Hare 461** was that ***"a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it".*** In common law the derivative action would have to fall under the exceptions to the rule in **Foss –v- Harbottle [Supra].** The exceptions to the rule in were mainly where there was fraud on a minority caused by majority shareholder(s). The action to be commenced had to be in the best interest of the company and without any ulterior motive [1]. The Companies Act has fundamentally changed this law as the requirement to fall under the exceptions to the rule in **Foss v Harbottle** was replaced with **judicial discretion** to grant permission to continue a derivative action without limit but with statutory guidance.[2]

A derivative action is therefore 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[3]. Members/shareholders of a company have a limited right to bring a derivative action on the Plaintiffs own behalf and on behalf of the company[4]. Sections 143 & 144 of the Companies Act impose a duty on the directors of a Company to act in a way as to promote the success of the company for the benefit of its members.

Not to belabor the point as I had earlier stated, the manner in which the Courts approach the litigation of this nature is provided for in Part XI of the Companies Act 2015 (Sub-section 238 – 241). Further **in Foss v Harboltle {1843} 67 ER 189 2 Hare 461** the court stated as follows:

> **"In how a corporation is a legal entity distinct from its shareholders. It followed from this, that shareholders were precluded from bringing their own action in respect of a wrong done to the corporation except as modified by the derivative action, the oppression remedy and winding up proceedings. The derivative action was designed to counteract the impact of Foss v Harboltle proceeding a complainant broadly defined to include, more than minority shareholders with the right to apply to the Court for leave to bring an action in the name for on behalf of a corporation for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate."**

In the instant case the plaintiffs are still owners of **Oversee Boat and Fishing Supplier Ltd** holding majority shareholding with another director **Ahmed Mustafa Sharif** as a minority shareholder. The nominal share capital of the company is Kshs.100,000/= divisible into 1000 ordinary shares of Kshs.100/= each. However, as has been established earlier from the averments the Registrar of Companies caused an entry change to the directorship of the company, **Oversee Boat and Fishing Supplies** by introducing a new director by the name **Mudhhir**

Mustafa Sharif with an allotment of 200 ordinary shares. As the company was originally conceived and incorporated by the plaintiffs and the 2nd defendant, the making of the changes to automatically reduce their majority shareholding and incorporate an additional director is evident that the interests of the corporation is at stake. As I opined in my earlier Ruling, altering the register where previously held shares were transferred to a third person created an oppression intimate and personal to the plaintiffs both of which require an action be filed to remedy the situation. This court had already established that the plaintiffs do indeed have *locus standi* to file an action against the defendants without a resolution based on the principles in **Edwards v Halliwell {1950} 2 ALL ER** at the outset the court held as follows:

> **"The cases falling within the general ambit of the rule are subject to certain exceptions, in cases where the act complained of is wholly ultra vires the companies, the rule has no application because there is no question of the transactions being confirmed by any majority. Where what has been done amounts to what is generally called in these cases a fraud on the majority and the wrongdoers are themselves in control of the company, the rule is related in favour of the aggrieved minority who are aggrieved to bring what is known as minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control would not allow the company to sue; the rule did not prevent an individual member from suing if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority."**

And further in **Tallisman Technologies Inc. v Queensland Electronic Switching PTY Ltd {2001} QSC 324:**

> **"Again, the company may be a joint venture company in which the venturers are dead locked so that the proposed derivative action is seen as being for the purpose of vindicating one side's position rather than the others in a way which will not achieve a useful result. Second there should be evidence of the business, if any, of the company so that the effects of the proposed litigation on its proper conduct may be appreciated. Third, there should be evidence enabling the court to form a conclusion whether the substance of the redress which the applicant seems to achieve is available by a relation which does not require the company to be brought into litigation against its will. So, for example, if the applicant can achieve the desired result in proceedings in his or her own name, it is not in the best interest of the company to be involved in litigation at all. This was the case in Tallisman in which it appeared from the evidence that the most desirable outcome for the applicant was to obtain an order for specific performance of a contract, which it could do in a suit in which the company did not need to be a party." Forth, there should be evidence as to the ability of the defendant to meet at least a substantial part of any Judgement in favour of the company in the proposed derivative action so that the court may ascertain whether the action would be of any practical benefit to the company."**

Giving effect to the facts of this case as pleaded there are legal considerations which might have been illegitimately taken into account to undertake a change in the company's shareholding and directorship unknown to the plaintiffs. In fixing the remedy there would scarcely be any better avenue than the plaintiffs to file suit in their own names for the grant of any relief against violation of the company's constitution.

I wish to reiterate that the court's exercise of discretion on derivative action is a strong disposition that the applicants are motivated in the claim greatly on good faith.

The persuasive case by the **Court of Appeal Singapore in Ang Thiam v Low Hian Chor {2013} SGCA 11,** it was stated:

> **"The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all. Naturally, the parties opposing Section 216A (with similar provisions with our Part XI of the Companies Act 2015 application will seek to show that the application is motivated by an ulterior purpose; such as dislike, ill feeling or other personal reasons, rather than by the applicants concern for the company. Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his Judgement will be clouded by purely personal considerations, that may be sufficient for the court to find a lack of good faith on his part: An applicant's good faith would also be in doubt if he appears set in damaging or destroying the company out of sheer spite or worse, for the benefit of the competitor. It will also raise the question whether the intended action is going to be in the interests, of the company at all."**

The applicants herein are yet to discharge the irrebuttable presumption that the action being undertaken by the plaintiffs/applicants are induced by ill will, hatred or not for the interest of the company. This court characterizes the conduct by the plaintiffs to file a cause of action against the defendants as a sign of good faith furthering the interest of the corporation and presumably their own interests as well-being owners and shareholders. Therefore, there can be no other self-serving motive save to defend themselves against a hostile takeover by other directors of the corporation. It is now a well settled principle as seen in both ***Altaf Abdulrasul Dadani & Another v Amin Akeberali Manji & 3 others*** **[2004] Eklr** and ***Kuldeep Singh Sehra & Another v Bullion Bank Ltd & 2 Others*** **[2014] eKLR**, that leave of the court can be granted **after** a derivative action has already been commenced. Consequently, I place no basis on Counsel for the Defendants/Respondents submission that the Plaintiff/Applicants should have sought leave before they filed suit.

As previously stated I am satisfied that relating to the process of filing suit the plaintiff have shown that it had to be initiated in their individual names and limited to good faith and is not harmful to the corporation. I therefore see no issue in granting leave to the Applicants to amend their pleadings as this court had already granted them leave to continue the derivative action in the first place, I wish to refer the parties to my earlier obitum in the ruling dated 27.05.2020 wherein I stated that;

> **"As it stands out notwithstanding the provisions of the Act under Part XI on derivative a suits, I grant leave to the plaintiffs to sue in their own names as duly framed in the Plaint against the defendants. That the issue of leave be deemed as duly granted to the plaintiffs as required under Section 238, 239, 240 and 241 of the Companies Act No. 17 of 2015." And "If there**

are any defects to the Plaint, I am of the view that they can be remedied by way of an amendment".

It is my opinion that this was the correct position and therefore I find that there will be no prejudice suffered by the Respondents if this court grants leave to the Applicants. Further the Respondents may as well if they wish to do so amend their Statement of Defence.

I further refer the Respondents to the Court of Appeal in **Co-operative Merchants Bank Ltd v George Wekesa Civil Appeal No. 54 of 1999,** where the Court pointed out that:

> **"Striking out a pleading is a draconian act, which may only be resorted to, in plain cases, whether or not a case is plain is a matter of fact. A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."**

On order number 3 neither party has submitted on the same nor I do believe that the Respondents would suffer any prejudice should the same be granted.

Disposition

Having carefully considered the application and submissions by learned counsel. I wish to reiterate the provisions of Section 1A and 1B of the Civil Procedure Act which opine that this court should endeavor to deal with case management fairly, speedily, proportionately and with least costs. I now proceed to make the following orders;

1. **THAT leave is hereby granted to the Applicants to amend the Plaint.**

2. **THAT the draft amended plaint be deemed as duly filed subject to payment of the requisite fees.**

3. **THAT leave is hereby granted to the Respondents herein, if they wish to do so file an amended Defence within 14 days hereof.**

4. **THAT an inventory of the goods in the two containers bill of lading numbers OOLU2107363020 and ONEYSZPVC8770400 be retaken in the presence of the parties or their duly appointed representatives to ascertain the condition and a report be filed in this court within 45 days hereof.**

5. **THAT Costs of this application be in the cause.**

The upshot, the notice of motion dated **04.07.2020** be and is hereby allowed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF MARCH 2021.

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R. NYAKUNDI

JUDGE

NB: ***This Judgment is dispatched electronically to the respective emails of the advocates in the matter.***

(info@gnklaw.co.ke and okutoadv@yahoo.com)

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[1] Nurcombe v Nurcombe [1985] 1 All ER 65.

[2] See Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another [2017] eKLR

[3] Ibid

[4] See Rai and Others v Rai and Others [2002] 2 EA page 537