REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMM CIVIL CASE NO. E 293 of 2020

VIREN D. M. JOSHI.....PLAINTIFF/RESPONDENT

versus

BAGS AND BALERS MANUFACTURERS (K) LTD.....1st DEFENDANT/APPLICANT

BIPINCHANDRA HAMITLAL VORA.....2nd DEFENDANT/APPLICANT

RULING

Introduction

1. Vide a Notice of Motion dated **18th** December 2020, the defendants pray that this court strikes out the Plaintiff's suit *in limine* on grounds that the Plaintiff lacks the *locus standi* to initiate the suit. The defendants also pray for costs of the application to be provided for.

Grounds relied upon

2. The nub of defendants'/applicants' is that the Plaintiff alleges that he is minority shareholder of the **1st** defendant, and he brings this suit on his own behalf. The defendants argue that the Plaintiff cites alleged breaches committed by the **2nd** defendant, a majority shareholder in the company. The breaches alleged by the Plaintiff include breach of fiduciary duty, abuse of power by, conflict of interest, breach of duty of care, skill and diligence.

3. The defendants state citing the above infractions, the Plaintiff claims to have suffered damage, loss and inability to get value for his alleged shareholding. The defendant's case is that the Plaintiff's suit is defective and incurable because: -

*a. **That** the alleged breaches are alleged to have been committed by the **2nd** defendant who is a majority shareholder and controlling director of the **1st** defendant.*

*b. **That** as disclosed by the Plaint, the alleged acts of breach were allegedly committed by the **2nd** defendant in exercise of his powers as a controlling director of the **1st** defendant.*

*c. **That** since the **1st** defendant is a separate and legally distinct entity from its shareholders, any alleged acts of breach allegedly committed by the **2nd** defendant would ordinarily result in loss and damage on the **1st** defendant and not its shareholders.*

*d. **That** no claim may validly be brought by the Plaintiff on his own behalf as a minority shareholder for alleged acts of breach done by the **2nd** defendant against the **1st** defendant, and, that, the Plaintiff and the **1st** defendant are separate and legally distinct entities.*

4. The defendants state that owing to the foregoing, the Plaintiff is not the proper Plaintiff in this suit and thus does not have the requisite *locus standi* to institute this suit. Further, they argue that despite lacking the requisite *locus standi*, the Plaintiff has filed this suit and has failed to obtain the permission of this court to continue the same as a derivative claim as provided under the law. In view of the foregoing reasons, the defendants state that this suit is fatally and incurably defective, hence it ought to be struck out with costs.

Plaintiff's Replying Affidavit

5. The Plaintiff, Mr. Viren D. M. Joshi swore the Replying affidavit dated **10nd** February 2021 in opposition to the application. He deposed that the application is a way of oppressing and obstructing the Plaintiff's claim and that it is a sham and it is intended to intimidate the Plaintiff/Respondent. Further, he averred that the application was made in bad faith and it's intended to diminish or stifle the Plaintiff/Respondent from enjoying his inalienable right to access to justice and as a minority shareholder in the 1st defendant, he has the *locus standi* to institute an individual action to assert his individual membership rights.

6. Mr. Joshi also averred that he has f a strong case I which he cites fraud and misrepresentation and acts of breach by the **2nd** defendant/applicant which have directly affected his share value in the company. He deposed that he is not bringing a derivative suit but an

individual action contending that the **2nd** defendant misapplied and misappropriated the **1st** defendant's resources causing direct damage to the Plaintiff.

7. Mr. Joshi deposed that where an individual shareholder has suffered a personal wrong, whether perpetrated by the director(s), or the majority, or the company is threatening an *ultra vires* act, the proper form of action is a direct, personal claim by the shareholder, with the company as a true defendant along with the directors where appropriate, hence his suit is properly before this honourable court.

8. He deposed that he is not claiming that the company was being wronged, but he alludes to the possible use of the company as a vehicle to defraud him. He averred that in such circumstances the Plaintiff/Respondent cannot be said to have come to court as an agent for **1st** defendant.

9. He deposed that the application is made in bad faith, it is bad in law, has no legal basis, it is frivolous and vexatious and it is aimed at derailing the course of justice in the suit. Mr. Joshi deposed that the application contradicts paragraph **3** the defence in which the defendants allege that the Plaintiff is not a shareholder but, in the application, they admit that the Plaintiff is a minority shareholder

Defendants'/applicants' advocates submissions

10. Mr. Nyiha, the defendants' counsel submitted that the Plaintiff lacks the *locus standi* to institute this suit because he filed the suit on his individual behalf as an alleged minority shareholder instead of instituting the suit on behalf of the company. He argued that the Plaintiff is bringing a derivative action which can only be brought on behalf of the company by minority shareholders against the directors who are the agents of the company for an alleged breach of fiduciary duties by the directors. He argued that such an action cannot be brought on an individual capacity by a shareholder.

11. To buttress his argument, Mr. Nyiha cited *Altaf Abdulrasul Dadani v Amini Akberazi & 3 others*[1] which held that *"by derivative suits, the minority shareholders feeling that wrongs have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company, come to court as agents of the "wronged" company to seek reliefs or for the company itself, all the shareholders including the wrong doers, and not for personal benefit of the suing minority shareholders…it is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights and actions vested in the company to sue for the wrongs done to it.."*

12. Mr. Nyiha cited *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another*[2] which held that "a derivative action is a mechanism which allows shareholders to litigate on behalf of the corporation aften against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporations. The action is designed as a tool of accountability to secure redress obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation…"

13. Fortified by the above decisions, Mr. Nyiha submitted that the Plaintiff has sued seeking personal compensation for alleged loss and damage caused to him as a minority shareholder in the **1st** defendant as a result of breach of fiduciary duties by the **2nd** defendant. Additionally, he argued that the Plaintiff in the Plaint pleaded that the alleged breach of fiduciary duties by the **2nd** defendant caused loss to the company. He argued that the proper Plaintiff ought to be the company. He placed reliance on *Foss v Hardbottle*[3] and argued that since in such a situation, the directors and or majority shareholders are usually unwilling to act, the law provides that the minority shareholder can institute a derivative action on behalf of the company and not for their own personal benefit. He submitted that in the instant case, the Plaintiff has sued suit on his own behalf and not on behalf of the company. He urged the court to strike out the suit.

Plaintiff's/Respondent's advocates submissions

14. Mr. Kimakia submitted that the Plaintiff pleaded in his Plaint that he instituted an Individual action. He submitted that the instant application is aimed at oppressing and obstructing the Plaintiff's claim. Counsel submitted that the Plaintiff has a strong claim based on fraud and misrepresentation caused by the **2nd** defendant. He argued that the **2nd** defendant's actions have directly affected the Plaintiff's share value in the company. Further, he submitted that the Plaintiff is not bringing a derivative suit, but an individual action contending that the **2nd** defendant being a majority shareholder and with direct control of the company fraudulently misapplied and misappropriated the **1st** defendant's resources with an intended effect of devaluing the Plaintiff's shares which has directly caused damage to the Plaintiff.

15. To buttress his argument, he cited *In the Matter of CMC Holdings Limited*[4] which helds: -

"It should be borne in mind that in derivative suits the applicant usually alleges that some ills have been or are being committed by some directors against the company…

> *...the plaintiff is not claiming that the company was being wronged. If anything, he appears to be alluding to the possible use of the company as a vehicle to defraud him. Therefore, he could not be said to have come to court as an agent for the company. In a nutshell, the suit herein is not a direct claim of a shareholder against the company and also against other shareholders."*

16. Mr. Kimakia submitted that the Plaintiff in his Plaint pleaded that he is bringing the suit as individual action against the defendants for breach of legitimate expectation, breach of shareholders' contract, breach of shareholder's rights, the constitution, the Companies Act and common law. Further, he argued that he pleaded the **2nd** defendant's illegal conduct and breach of common law, fraud and breach of directors' duties. He submitted that the Plaintiff has not brought a derivative action as argued by the defendants.

17. On the submission that the Plaintiff has no *locus standi*, Mr. Kimakia submitted that where an individual has suffered a personal wrong

occasioned by the company or majority shareholder's action, he has the right to seek redress from the court. He submitted that the Plaintiff's *locus standi* to institute an individual action is derived from his rights as a member/shareholder in the **1st** defendant, and, that the right cannot be limited or denied by the **1st**defendant or the **2nd**defendant or a majority shareholder. He submitted that the right of a minority shareholder to institute an individual action is meant to secure his interests in the company and act as checks and balances where the company or majority shareholders choose to act to the detriment of the shareholders.

18. Mr. Kimakia cited an article entitled *When a Company's Shareholders and Creditors Make Claims Separately from the Company*[5] in which the author reiterated the Rule in *Foss v. Harbottle* at paragraph 38 (c) that: -

> *"When an individual shareholder has suffered a personal wrong, whether perpetrated by the director (s), or the majority, or the company is threatening an ultra vires act, the proper form of action is a direct, personal claim by the shareholder, with the company as a true defendant (along with the directors where appropriate)."*

19. Mr. Kimakia submitted that the defendants have chosen to intentionally mislead the court that the Plaintiff's suit is a derivative action yet the Plaintiff is not seeking to protect the company but rather his personal interests in the company in which the **2nd** defendant being the controlling director and majority shareholder is using the company to defraud him.

20. On the plea to strike out the suit, Mr. Kimakuia submitted that the application is brought in bad faith, it is bad in law, oppressive and it is intended to intimidate him and/or to derail the course of justice. He also argued that the application contradicts the defendant's defence in which at paragraph **3** the defendants aver that the Plaintiff is not a shareholder contrary to the averment in the application in which they admit that the Plaintiff is a minority shareholder.

Determination

21. Before me is a prayer to strike out a plaint. Decided cases are in agreement on the applicable principles to guide the courts in striking out of pleadings. These principles were set out with sufficient clarity in *D T Dobie & Company (K) Ltd v Muchina*.[6] No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.

22. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. The rationale for this reasoning is due to a realization that the exercise of the powers of summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgement seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad.

23. 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[7] or where a pleading is vague or frivolous. An argument that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It need not be directed at a particular paragraph within a cause of action but it is directed at the cause of action as a whole which must be demonstrated to be vague and embarrassing.

24. A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses.[8] A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.[9] An argument that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. In *Madison Insurance Company Limited v Augustine Kamanda Gitau*[10] the court addressed the grounds for striking out a pleading with admirable clarity. It stated: -

> *11. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

25. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)*[11] the court stated: -

> *"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case*

but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

26. The jurisdiction to strike out suits must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case or striking out a defense for not disclosing a reasonable cause of action defense for being otherwise an abuse of the process of the court.

27. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

28. A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details.[12]

29. The word "scandalous" for the purposes of striking out a pleading is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous.[13] But they may not be scandalous if the matter however scandalizing it is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defense so that when considering whether the matter is scandalous regard must be had to the nature of the action.

30. A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defense would be wasting Court's time; or (v) when it is not capable of reasoned argument.[14] Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.[15]

31. A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good.[16]

32. Pleadings tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or(iv) where the defendant does not say how much of the claim he admits and how much he denies.[17]

33. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process.[18]

34. A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.[19]

35. *First*, there is nothing to show that the Plant contains an incurable defect which cannot be cured by way of an amendment. *Second*, the Plaintiff says he is suing in his individual capacity for wrongs allegedly committed against him. *Third*, in the defense, it is admitted that he is a minority shareholder. *Fourth*, he has cited breach of his right to legitimate expectation which impinges on constitutionally guaranteed rights. *Fifth*, the prayers sought in the Plaint in my view go beyond the mere allegation that he is bringing a derivative action. *Sixth*, if the only defect is to fully bring the suit within the ambit of a derivative action, then it has not been shown that an amendment brought in good faith cannot cure such a defect. *Seventh*, decided cases are all in agreement that striking out a pleading is a draconian step that should be resorted to sparingly where a pleading is hopeless, frivolous, vexatious and a clear abuse of court process. *Eighth*, the drastic order(s) sought if unleashed as prayed have the import of impinging on a citizen's right to access justice and depriving a citizen the right to be heard.

36. Talking about access to justice and the right to be heard, before me is a citizen who has exercised his constitutional right to access justice. The court is being invited to close the doors of justice to a citizen without affording him an opportunity to be heard.

37. The Constitution of Kenya 2010 has been hailed as highly progressive, liberal and transformative. Article **19 (1)** provides that the Bill of

Rights is an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies. Article **19 (2)** provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Article **19(3)** provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Bill of Rights and are subject only to the limitations contemplated in the Constitution.

38. This discussion cannot be complete without mentioning Article **48** which guarantees the right to access justice. I need not mention the supremacy of the Constitution over all other laws and its binding nature decreed in Article **2.** On the face of all these constitutional provisions and in particular the right to access justice, the question that arises is whether this court can close the doors of justice before affording a litigant a hearing as guaranteed under Article **50 (1)** of the Constitution. Section **7 (1)** of Part two of the sixth schedule to the Constitution provides that: -

> *(1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."*

39. All law must conform to the Constitutional edifice. It follows that the provisions of the Civil Procedure Act and Rules which permit striking out suits must be conform to the constitution or ought to be construed with such adaptations, alterations, modifications so as to conform with the Constitution. As the Supreme Court of Appeal of South Africa observed[20] *"All statutes must be interpreted through the prism of the Bill of Rights."* The governing statute and the resultant decision must be interpreted through the prism of Articles **48 & 50** of the Constitution.

40. Flowing from my discussion above, it is my view that it has not been shown that this is a proper case for the court to issue such draconian orders as prayed. As stated above, striking out a pleading is a drastic and draconian step that should be resorted to in rare and clear circumstances where a pleading is hopeless and incurably defective. Even then, it is a jurisdiction which must be exercised with great care and circumspection because it impacts on the right to access justice and the right to be heard. From my analysis of the law, authorities, it is clear that the defendants' application dated **18th** December 2020 is totally unmerited and fit for dismissal.

41. Accordingly, I dismiss the defendant's application dated **18th December** 2020 with costs to the Plaintiff.

Orders accordingly

SIGNED AND DATED AT NAIROBI THIS 17TH DAY OF MARCH, 2021

JOHN M. MATIVO

JUDGE

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[1] Nairobi HCCC No. 913 of 2002, {2004} 1 KLR 95.

[2] {2017} e KLR.

[3] {1843} 2 Hare 461, 67 ER 189.

[4] Misc. Civil Case No. 273 of 2012.

[5] Teresa Rosen Peacock

[6] {1982} KLR 1.

[7] See *Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* Civil Appeal No. 54 of 1999.

[8] See *Kivanga Estates Limited v National Bank of Kenya Limited* {2017} e KLR.

[9] See Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 16.

[10] {2020} e KLR.

[11] Civil Appeal No. 35 of 2000.

[12] *See Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.*

[13] *See J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997.*

[14] *See Dawkins vs. Prince Mercy Nduta Mwangi t/Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited [2019] eKLR Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.*

[15] *See Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.*

[16] *See Willis Vs. Earl Beauchamp (1886) 11 PD 59.*

[17] *See Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).*

[18] *See Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.*

[19] *See* **Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164.**

[20]Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and [2000]