



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 133 OF 2020

JONES BITANGE NYAMBARIGA (suing on his behalf and that of

Imap International Limited..... PLAINTIFF/APPLICANT

VERSUS

EVANS KIPNGETICH.....1ST DEFENDANT/RESPONDENT

JOYCE KAMENE PAUL.....2ND DEFENDANT/RESPONDENT

IMAP INTERNATIONAL LIMITED..... 3RD DEFENDANT/RESPONDENT

RULING

1. At the heart of this action is the question whether Jones Bitange Nyambariga (**Jones or the Plaintiff**) is a shareholder and director of Imap International Limited (**the Imap or the Company**). Arising from that controversy is the control and management of Imap and Jones seeks the permission of the Court to bring this suit as a derivative action.

2. That request for permission is brought in an omnibus Amended Notice of Motion dated 25th May 2020 which has the following prayers:-

a)

b)

c) *THAT the applicant do have leave to continue this suit as a derivative action on behalf of Imap International Limited.*

d) *THAT indemnity be granted by the said Imap International Limited, the interested party, for all costs and expenses reasonably incurred in prosecuting this suit.*

e) *THAT the Respondents be restrained from banking its income in any other bank account apart from its bank account No. 0240278680533 at Equity Bank Limited or opening any bank account on behalf of the interested party pending hearing and determination of this suit.*

f)

g) *THAT the Respondents be and are hereby restrained whether by themselves, agents, servants or otherwise howsoever from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns, invoicing, transacting and any other documents with regard to contract No. CA/PROC/REP/13/2018-2019 in the name of and/or on behalf of the interested party without the consent and concurrence of the Applicant, pending the hearing of this suit.*

h) *THAT the Respondents be restrained from holding an extra ordinary general meeting at any other future date pending the hearing and determination of this suit.*

i) *THAT the Respondents be restrained until further orders from serving as directors of Imap International Limited.*

j) THAT the costs of this application be provided for.

3. The case by Jones is that on 15th February 2019 he applied to be appointed a director of Imap. A meeting was convened and held between him, Evans Kipngetich (**the 1st Defendant or Evans**) and Joyce Kamene Paul (**the 2nd Defendant or Joyce**). Jones alleges that Evans and Joyce are husband and wife.

4. That in the meeting it was resolved that Evans and Joyce would each be allotted 2500 shares and he would get 5000 shares. The consequence of which the couple would hold 50% shares and he the other 50%.

5. That things moved on and Imap opened account No. [...] at Equity Bank in which Evans and Jones were signatories. The fortunes of Imap were bright and it secured a tender for the provision of consultancy services to undertake implementation of the National Addressing System. Jones attributes this to his connections and industry. Evans and Joyce think otherwise.

6. Jones' grievance is that Evans and Joyce have conspired to remove him as a director and shareholder and caused and proceeded to pass a resolution to open a bank account with Equity without his knowledge and pleads the following orders:-

a) The status quo of the company as at 28th February 2019 be reinstated.

b) Any contract made or entered between 28th February 2019 be annulled or be subjected to a ratification by the Annual Special Meeting of Meeting.

c) A permanent injunction does issue restraining the Defendants from passing any resolution for removal of the Plaintiff as a director and shareholder.

d) The Costs of the Defendants bear the costs of the suit.

e) Such other or further relief as this Honourable Court may deem just to grant.

7. The Defendants responded to the application through a replying affidavit sworn by Joyce on 12th June 2020. In it she denies being present in the meeting purportedly held on 15th February 2019 and signing any documents relating to the allotment of shares in Imap in favour of Jones. She alleges forgery of her signature by Jones. She has lodged a complaint in that respect at Mlolongo Police Station under OB number 39/21/04/2020.

8. She and Evans wrote to the Registrar of Companies notifying the registrar of the forged documents and that the registrar gave Jones a chance to respond to the grievances.

9. Joyce is emphatic that this action is not brought for the benefit of Imap and sees a selfish motive on the part of Jones. That he seeks to paralyze the lawful execution of the Imap's NAS Contract. That unless he is made part of it, he has made frantic efforts to scuttle the signing of the contract and to demonize Imap before the procuring entity; that the application does not disclose any element of breach of trust owed to Imap by the Defendants and that the Application is not in the best interest of Imap.

10. Before considering the substance of the Application, the Court must deal with a preliminary issue raised by the Defendants. In their submissions, the Defendants state that the Plaintiff's amended Application dated 25th May 2020 is fatally defective in light of the failure of the deponent to have his supporting affidavit sworn before a commissioner of oaths pursuant to section 5 of the Oaths and Statutory Declaration Act.

11. It is true that the only supporting affidavit to the Motion being of Jones said to be sworn on 25th May 2020, although signed, is not attested at all. Ordinarily then there would be no proper Motion before the Court and so would be eligible for striking out. But certain circumstances in this matter militate against this Court making such a drastic order.

12. What is before Court is an Amended Notice of Motion which is an amendment to an original Motion dated 6th May 2020. What was amended was prayer (f) of the original Motion which read:-

“(f) THAT the Respondents be restrained from signing of tender contract No. CA/PROC/REP/13/2018-2019 for the Provision of Consultancy Services to undertake implementation of National Addressing System (NAS) pending hearing and determination of the suit.”

And now reads:-

“THAT the Respondents be and are hereby restrained whether by themselves, agents, servants or otherwise howsoever from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns, invoicing, transacting and any other documents with regard to contract No. CA/PROC/REP/13/2018-2019 in the name of and/or on behalf of the interested party without the consent and concurrence of the Applicant, pending the hearing of this application suit.”

13. Other than that change, the entire Motion including the grounds and supporting affidavit do not change. Indeed, the unsworn affidavit of

Jones is word for word a reproduction of his affidavit in support of the original Motion. In so far as it is a replica of a properly attested affidavit, this Court is willing to ignore the oversight in attestation of the affidavit and to consider the substance of the evidence revealed in the properly attested affidavit.

14. That is the Court's answer to the said objection. Substantial justice is better served by this Court disregarding that omission than in striking out the Application. In particular, because the Defendants have through the replying affidavit of Joyce fully reacted to contents of the unsworn affidavit. Both sides have presented material before the Court and it is the duty of the Court to consider the matter on merit.

15. The Application before Court is brought substantially under the provisions of Section 238 to 242 of Companies Act 2015.

16. The procedure by which a member of a company applies to Court for permission to continue a derivative claim is two stepped as is evident in Section 239 which reads:-

“239. Application for permission to continue derivative claim

(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.”

17. The first step, and which is a sieving process, is that required by subsection (2) and (3). The Court is to satisfy itself that the application and evidence in support discloses a case for giving permission. If this threshold is passed then the Court may give directions as to the evidence to be provided by the company and once it considers the application and responses thereto, including that of the company, then to grant or refuse permission or give such directions as it considers appropriate.

18. Very often, as happened in this case, the Respondent to the application files a response not just on his/her own behalf but also on behalf of the company. In which event the evidence of the company is also placed before Court. So, as in this case, the two steps are collapsed into one.

19. On what to consider in whether or not grant permission, section 241 reads:-

“241. Application for permission to continue claim as a derivative action

(1) If a member of a company applies for permission under section 239 or 240, the Court shall refuse permission if satisfied—

(a) that a person acting in accordance with section 144 would not seek to continue the claim;

(b) if the cause of action arises from an act or omission that is yet to occur—that the act or omission has been authorised by the company; or

(c) if the cause of action arises from an act or omission that has already occurred — that the act or omission—

(i) was authorised by the company before it occurred; or

(ii) has been ratified by the company since it occurred.

(2) In considering whether to give permission, the Court shall take into account the following considerations:

- (a) whether the member is acting in good faith in seeking to continue the claim;
- (b) the importance that a person acting in accordance with section 143 would attach to continuing it;
- (c) if the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—
 - (i) authorised by the company before it occurs; or
 - (ii) ratified by the company after it occurs;
- (d) if the cause of action arises from an act or omission that has already occurred—whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;
- (e) whether the company has decided not to pursue the claim;
- (f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in the member's own right rather than on behalf of the company.

(3) In deciding whether to give permission, the Court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest (direct or indirect) in the matter.”

20. As to what to look at in applying Section 241, the Defendants' counsel correctly cites two decisions which comprehensively discuss the provisions of the provision. In Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u [2016] eKLR; Ngugi J observed:-

“In making that determination, the Court is guided by the considerations stipulated in section 241(2) of the Companies Act. Among other things, the Court considers the following factors:

- a. Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors' challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;
- b. Whether the Plaintiff has made any efforts to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;
- c. Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of Recchion v Kirby 637 F. Supp. 1309 (W.D. Pa. 1986), for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;
- d. Whether the Plaintiff is acting in good faith;
- e. Whether the action taken by the Plaintiff is consistent with one a faithful director acting in adherence to the duty to promote the success of the company would take;
- f. The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company – is likely to be authorised or ratified by the company in the future; and
- g. Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative action.”

21. Onguto J in Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another [2017] eKLR adds his voice:-

“53. Firstly, the court should always also consider the seriousness of the alleged wrong-doing by conducting a cost-benefit analysis of the intended action. The court ought to satisfy itself that the litigation will not disrupt the company business and additionally that the cost of the intended litigation is not burden-some to the company. Likewise the court ought to reflect on the reputational damage, if any, the company is likely to suffer in the event the claim fails.

54. Secondly, I would hasten to add that of critical import is also the factor that the derivative suit ought to be allowed if it is in best interest of the company. This factor should be of the highest concern especially when ss. 143 & 144 of the Act are read into context. Both sections advocate the duty of the director to act in a way as to promote the success of the company for the benefit of its members.

55. Finally, the existence of alternative remedies and the view of independent members of the company where the court has invited such evidence pursuant to s.239 (4) & (5) of the Act ought to also be considered before granting or disallowing an application for permission to continue a derivative suit: see also s. 241(3) of the Act.”

22. Jones submits that he and the Defendants are the only directors of Imap and the Defendants are dealing with the Company without consulting or involving him. That as there are only 3 directors who have differences, Imap is unable to file suit for its own benefit.

23. It is submitted that the Defendants’ actions give them exclusive control over the affairs of Imap in order that they may continue to pilfer the capital and income of Imap whilst asset stripping it.

24. For the Defendants it is submitted that while Jones’ gravamen is his alleged removal as a shareholder and director of Imap, the Defendants hold that Jones has attempted to acquire the shares fraudulently. It is submitted the Jones’ complaint does not disclose a cause of action deserving to continue as derivative action. Emphasized is that the Jones is purely pursuing his own personal interests and not that of Imap.

25. The Defendants argue that this action is brought by Jones in bad faith and that this is demonstrated by the fact that once the issue of property of Jones’ shareholding and directorship was before the Registrar, then Jones should not have abandoned that process and commenced those proceedings. It is further asserted that the remedy available to the Plaintiff is not a derivative action but for rectification under section 862 of the Companies Act.

26. The duty of the Court is to examine the material placed before it and determine whether it is satisfied that leave should be granted for the action to proceed as a derivative action. The threshold to be reached by the applicant is on a prima facie basis. And in examining the material before it, the Court must be cautious not to carry out a mini trial as the evidence before it is untested and any definitive and firm findings has the potential of embarrassing the trial Court should permission be granted.

27. In this matter there is allegation and counter allegation as to whether or not Jones is a shareholder and Director of Imap. A document that is at the heart of the controversy is the minutes of a meeting of the company purportedly held on 15th February 2019. Minute 03, is partly, the following resolution;

“(i) Mr. Jones Bitange Nyambariga is allotted five thousand (5,000) ordinary shares in the company and he be appointed as a director of the company.”

The minutes show that they were signed by Evans, Joyce and Jones.

28. Jones places reliance on this document. Joyce challenges its authenticity and states that the signature appearing there is not hers and was forged. She infact denies attending the meeting. Curiously however Evans has not said anything of that meeting nor about his signature although Joyce states that she swears her affidavit on the due authority of Evans.

29. There is something that persuades the Court that the issue raised by Jones is not a trifle. He complains that the Defendants opened a new account at Equity Bank on the basis of a forged resolution dated 2nd April 2019. On the mandate to run the account, the resolution is that either Evans or Joyce are to sign. The resolution shows that Jones, Joyce and Evans signed it.

30. Jones denies signing this document and has lodged a forgery complaint in its respect. What the Court finds rather strange is that Joyce does not react to this serious allegation. She does not deny the existence of this account. The question to be asked at this point is why Jones would be included in that resolution as a member of the Board of Directors of Imap if he was not a shareholder? Further, the CR12 lodged alongside the resolution shows Jones as holding 5000 shares. Given that there is no express denial by Evans and Joyce regarding the resolution of 2nd April 2019, the Court finds that the evidence as presented discloses a serious question as to the propriety of the account opened and operated by Evans and Joyce to the exclusion of Jones.

31. Although the name of Jones as shareholder and Director of Imap had been removed from the register of the company, a letter of 28th April 2020 by the Registrar of Companies is to the effect that his directorship and shareholding had been restored. Now, it is clear that at the time this matter was presented, the shareholding and directorship was that reflected in the Register of the Company held by the Registrar of Companies (See the letter dated 28th April 2020 by the Registrar of Companies). For that reason, there would be no need for Jones to pursue an action for rectification under section 862 of the Companies Act as the Registrar has taken restorative action to his satisfaction.

32. The Court has held that the challenge by Jones on the legality of the Account No. [...] at Equity Bank Limited is not to be ignored. It may deserve further interrogation. If then there is a possibility that it was not opened and operated without the due authority of Imap, then Imap has a grievance as the account may be used to divert and deplete company funds. A grievance of this nature belongs to the Company and is properly the subject of a derivative action.

33. As to whether, Jones who holds half the shares in Imap is entitled to bring a derivative action which is typically an action of a minority shareholder, this Court simply restates the decision in **David Langat v St. Lukes Orthopedic & Trauma Hospital Ltd & 2 Others [2013] eKLR:-**

“If the 5th exception indeed exists, then I think outright, given the circumstances herein, it would be in the interests of justice that I allow Sunrise Ltd the opportunity to have its case put forth. As stated by Jenkins L.J himself in Edwards v Halliwell, "that the rule is not an inflexible rule and that it will be relaxed where necessary in the interests of justice." It is a reality that law must evolve and for the situation herein, I am of the view that a strict application of majority/minority must

give way to the interests of justice so as to enable the company ventilate its case. The position in which a shareholder in a 50:50 situation finds himself is no less different from the position that a minority shareholder finds himself. A minority shareholder is handicapped and frustrated because he can pass no resolution to benefit the company. His views are prone to being trampled upon by the majority and he finds himself hamstrung, unable to do anything on behalf of the company. That position is similar to that which a person holding 50:50 shareholding finds himself. He is unable to pass any resolution because the other half must accede to it. If the other half does not permit the resolution to pass then the one shareholder is stuck, just as he would be stuck if he was a minority. In our case, there is strictly no majority and no minority. The person against whom the action is intended is however in de facto control of all resolutions, including resolutions to sue. There is no other way that Sunrise Ltd can put forth any claims separate from having a derivative action filed on its behalf. “

34. Being in a deadlock position, Jones alone cannot possibly summon a resolution of Imap to bring a suit against the supposed wrongdoers.
35. In analysis, Jones has a genuine grievance in regard to the operations of the Company and this Court does not discern bad faith in him bringing this action.
36. I turn now to the orders of injunction sought. I start by observing that the suit has demonstrated a prima facie case with probability of success and satisfies the first principle in **Giella vs Cassman Brown [1973] E.A 358** for the grant of injunction.
37. But closer attention must be paid to the orders of injunction sought. They are:-

“(e) THAT the Respondents be restrained from banking its income in any other bank account apart from its bank account No. 0240278680533 at Equity Bank Limited or opening any bank account on behalf of the interested party pending hearing and determination of this suit.

(g) THAT the Respondents be and are hereby restrained whether by themselves, agents, servants or otherwise howsoever from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns, invoicing, transacting and any other documents with regard to contract No. CA/PROC/REP/13/2018-2019 in the name of and/or on behalf of the interested party without the consent and concurrence of the Applicant, pending the hearing of this application suit.

h) THAT the Respondents be restrained from holding an extra ordinary general meeting at any other future date pending the hearing and determination of this suit.

i) THAT the Respondents be restrained until further orders from serving as directors of Imap International Limited.”

38. This Court has found, on the evidence so far presented, that Account No. No. [...] at Equity Bank does not seem contested. There is however a serious contestation about the lawfulness of A/c. No. [...]. While it is not for the Court to direct the Company as to whether or not to open other accounts, I think that Jones has made out a case for grant of injunction against the operation of the contested account.

39. Straight away, I cannot grant prayers (h) and (i). First, because it is not the business of the Court to run and manage the Company. Second, on his own admission Evans and Joyce are his co-directors, why then should this Court restrain them from serving in that capacity?

40. This Court has given anxious consideration to prayer (g), again it seems to me that it is a plea by Jones for the Court to intervene on the day to day running of Imap. The Court has no capacity to micromanage the affairs of Imap. Jones and Imap have sufficient remedy in law to check any director or shareholder who acts ultra vires the Memorandum and Articles of Association of the Company.

41. Ultimately the Court grants the following orders in respect to the Amended Notice of Motion of 25th May 2020:-

41.1 Prayer (c) is hereby allowed

41.2 Prayer ((d) is hereby allowed subject to any variation that the Trial Court may grant at the end of the Trial or at whatever point of the proceedings.

41.3 Prayer (e) is granted but on the following terms; the Respondents are restrained from banking all or any company income in any other Bank account other than Bank Account No. 0240278680533 at Equity Bank.

41.4 Prayers (g), (h) and (i) are disallowed.

41.5 Each party to bear its own costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 21ST DAY OF MAY 2021

F. TUIYOTT

JUDGE

ORDER

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 Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Omollo for Respondents/Interested Party

Manwa for Plaintiff/Applicant

Court Assistant: Nixon