



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. E204 OF 2021

KAPTIKA LIMITED.....PLAINTIFF

VERSUS

PRINCE KAYBEE MANAGEMENT.....1ST DEFENDANT

KABELO MOTSAMAI also known as PRINCE KAYBEE.....2ND DEFENDANT

MTICKETS KENYA LIMITED.....3RD DEFENDANT

JACOB NGUNYI WAMBUGU.....4TH DEFENDANT

STEPHEN NJERU WAMBUGU also known as SAINT EVO.....5TH DEFENDANT

AND

ANZANA GARDENS LIMITED.....INTERESTED PARTY

RULING

1.The plaintiff herein lodged a suit against the defendants vide the plaint dated 18th August, 2021 and sought for various reliefs including damages out of a claim for breach of contract.

2.The suit was filed together with the Notice of Motion of like date wherein the plaintiff sought for temporary injunctive orders against the defendants pending the hearing and determination of the suit.

3.Subsequently, the 4th and 5th defendants filed the notice of preliminary objection dated 20th August, 2021 to challenge the competency of the suit for offending the provisions of Section 238 of the Companies Act 2015, Laws of Kenya (“the Act”) for the reason that the 4th and 5th defendants are directors/shareholders of the plaintiff company of equal share; and to further challenge the suit for not being brought as a derivative action.

4.To oppose the preliminary objection, the plaintiff filed the Grounds of Opposition dated 13th September, 2021.

5.The parties dispensed with the preliminary objection through the filing and exchanging of written submissions.

6.I have considered the grounds laid out in the notice of preliminary objection; the Grounds of Opposition thereto and the contending written submissions and authorities relied upon.

7.It is clear that the preliminary objection is fundamentally challenging the validity of the suit by dint of Section 238 of the Act.

8. On their part, the 4th and 5th defendants argue that the present suit is derivative in nature going by the pleadings since the directors and members of the plaintiff company have approached this court on behalf of the company on grounds of breach of duty by the 4th and 5th defendants who are co-directors thereof.

9. The 4th and 5th defendants therefore argue that leave of the court ought to have been first sought and obtained prior to instituting the suit and that in the absence thereof, the suit is defective and ought to be struck out.

10. In response, the plaintiff denies that the claim is derivative in nature since the same has directly been lodged by the plaintiff and that its directors who passed the resolution to bring the suit enjoy equal shareholding with the 4th and 5th defendants.

11. At the submission stage, the plaintiff argues that the preliminary objection further raises issues of fact concerning the nature of shareholding for the plaintiff, contrary to the principles surrounding preliminary objections.

12. In the renowned case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** the court analyzed the definition of a preliminary objection in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

13. The above was restated by the court in the case of **Margaret Nyiha Gatambia & 2 others v Peninah Ngechi Njaaga & 3 others [2019] eKLR** cited in the plaintiff’s submissions.

14. The provisions of **Section 238** (supra) express that:

“(1) 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.

(2) A derivative claim may be brought only—

(a) under this Part; or

(b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.

(3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

(4) A derivative claim may be brought against the director or another person, or both.

(5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

(6) For the purposes of this Part—

(a) “director” includes a former director;

(b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.”

15. Upon perusing of the pleadings on record, this court notes that the claim was brought directly by the plaintiff being a company registered under the Act and not by its members. It is also noted that the claim arises out of an alleged breach of contract/ statutory duties resulting in loss and damage to the plaintiff.

16. In view of the foregoing, there is evidence to indicate that the claim is derivative in nature in order for the provisions of Section 238 of the Companies Act, 2015 to become applicable.

17. Furthermore, I am of the view that the issue of shareholding in the plaintiff company which was raised in the preliminary objection is an issue of fact which would need to be ascertained, and cannot therefore be termed as an issue based on a pure point of law.

18. Consequently, I find the 4th and 5th defendants' notice of preliminary objection dated 20th August, 2021 to be lacking in merit and the same is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

.....for the 3rd Defendant

..... for the 4th and 5th Defendants

.....for the Interested Party