



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 489 OF 2017

NAYAN MANSUKHLAL SAVLA.....PLAINTIFF

- VERSUS -

PIYUSH MANSUKHLAL KACHRA SAVLA....1ST DEFENDANT

MANSUKHLAL KACHRA SAVLA.....2ND DEFENDANT

JUMBO COMMODITIES LIMITED.....3RD DEFENDANT

RULING

1. What is for determination, by this Ruling, is the preliminary objection dated 25th January 2018 filed by the defendants. The objection is as follows:

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that the Defendants shall during the hearing of the plaintiff's Notice of Motion application dated 15th November 2017 raise and argue a preliminary objection on the following point of law:

a. THAT the plaintiff's application dated 15th November 2017 and the suit therein is fatally defective and an abuse of the court process for failure to seek leave from court before instituting a derivative action as provided under Section 239 (1) of the Company Act, 2015.

b. THAT the plaintiff's application dated 15th November 2017 and the suit therein offends the rule of Foss vs Harbottle (1843)67ER 189.

c. THAT the applicant has not previously sought the court's intervention under section 780 and 782 of the Company Act, 2015 prior to the present application dated 15th November 2017.

d. THAT in the circumstances, both the suit and Notice of Motion application should be struck out with costs.

2. The court ordered parties to file their submission in respect to the above objection but only the defendants filed theirs. I therefore have not had the benefit of considering the plaintiff's submissions.

3. The defendants' objection is that the plaintiff, who was obligated to seek leave of the court prior to instituting the present suit, failed to do so. Such leave to file derivative action is sought as provided under section 238 (3) of the Companies Act 2015. It provides:

“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. It is section 239 (1) and section 240(1)(a) and (b) of the Companies Act that obligates a party instituting derivative action to obtain leave to continue with the action.

5. That section 239(1) provides:

“239. (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.”

Section 240 (1) (a) and (b) provides:

240. (1) If —

Application to Court for permission to continue claim as a derivative claim: how disposed of.

a company has brought a claim; and

(b) the cause of action on which the claim is based could be pursued as a derivative claim under this Part, a member of the company may apply to the Court for permission to continue the claim as a derivative claim on the ground specified in subsection (2)

6. It is now time to examine whether the plaintiff's claim hereof is a derivative action. One gets a glimpse of the cause of action from the Amended plaint which I shall reproduce. In that Amended plaint the 3rd defendant is Jumbo, Commodities Limited (the company). The plaintiff introduces himself, in the plaint, as a co-director of the company together with the 1st, 2nd and 4th defendants. After that introduction the plaintiff pleaded:

“4C. The interested party is a male adult of sound mind and disposition and works for gain as a businessman in Nairobi within the republic of Kenya. (Service of summons to be effected through the plaintiff's Advocates offices)

5. At all material times to this suit the plaintiff has been a Co-Director of the 3rd Defendant together with the 1st, 2nd and 4th Defendants respectively.

6. That sometimes in the month of May 2017, the 1st defendant embarked on a scheme of running **JUMBO COMMODITIES LIMITED** an Amalgamation of several companies and businesses together with the bank accounts solely without the participation of other directors more specially the plaintiff and **SUNIL MANSUKHLAL SAVLA** another director of the company.

7. That this act of isolation and sole management of Jumbo Commodities Ltd by the 1st Defendant meant that he could draw huge personal salaries, servicing orders and L.P.O withdrawing huge amounts of petty cash of about **Kshs. 40,000** per day for personal use and making major decisions regarding the running of the company without the input of the other directors.

8. That the style of managing Jumbo Commodities Ltd solely and in secrecy has culminated in putting the company in huge debts by taking huge bank loans and over-drafts, which in the near future will make it crumble down and run bankrupt.

8A. The 1st, 2nd and 4th Defendants in connivance and collusion with the 5th Defendant I&M BANK have taken huge loans while using family properties as collaterals which actions have put the lives of the plaintiff and the interested party at risk in case there occurs default and the properties are auctioned.

8B. The 5th defendant I & M BANK is freely giving huge loans to the 3rd defendant without proper evaluation or due diligence on the financial soundness of the defendant since one of its directors is related to the 4th defendant which in itself is a danger to the welfare of/and or interest of the plaintiff and the interested party in the 3rd defendant's operations.”

7. The final prayers of the plaintiff's case are directed at enforcing the rights of the company. It therefore is abundantly clear the plaintiff's case is derivative action.

8. There are two cases that speak to the requirement of obtaining leave to file derivative action. The first is **Timau Farmers Company Ltd & another v John Gathogo & 6 others**[2016] eKLR, viz:

Timau Farmers Company Ltd & another v John Gathogo & 6 others [2016] eKLR, viz:

“In that case Mwera, J refer to the learned Author Joffe in ‘**Law Practice and Procedure**’ viz;

“Where the shareholders seek to enforce a right not invested in himself by the company of which he is a member for example a claim for the company's property misappropriation by the Director, he can only do (if at all) by means of a derivative claim. The derivative action is a claim brought by an individual shareholder in his own name but on behalf of the company. The reason the claim takes this form is that the minority shareholder is not in a position to see that the claim is brought in the name of the company itself to enforce the company's rights.”

11. What essentially the second plaintiff should have done was to get the authority of the members of the company on his own to meet and overturn the decision made on 18th October 2014 which the plaintiff allege was an irregular meeting. If however the

second plaintiff intended to enforce a right on behalf of the company he could only have brought a derivative claim. To bring a derivative claim the second plaintiff needed to obtain the leave of the court. Indeed it is important to note that the **Company's Act 2015** under **Part XI** provides for derivative action. Under **section 239** of that Act a party has to seek the court's permission to continue derivative action.

12. The second plaintiff therefore having failed to obtain the company's authority through the general meeting to institute this action and further having failed to obtain leave of court to either file or continue with the derivative action this action is therefore invalid for want of authority and leave of the court."

9. The second case is **Nikunj Ratilal Dodhia v Shashrkant Mepa Shan & 5 Others (2018)eKLR** viz:

"19. Part XI of the Companies Act is dedicated to provisions on Derivative Actions. It mainstreams the concept of a Derivative Claim into Statute. An enduring feature of a Derivative Claim is that it can only be commenced or continued with the express sanction of the Court. In this matter the Applicant seeks permission to commence, not to continue, the Action."

10. The plaintiff did not respond the preliminary objection.

11. It follows the plaintiff's case having been filed without leave and leave not having been sought as was stated in the case *Timau Farmers (supra)* the suit, ***"is therefore invalid for want of authority and leave of the court."***

12. The plaintiff's suit will as consequence to that above finding be struck out with costs to all the defendants.

CONCLUSION

13. The order of the court is that this suit is hereby struck out with costs to all the defendants.

DATED, SIGNED and DELIVERED at **NAIROBI** this **11th** day of **March** 2020.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendants