



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E211 OF 2019

SHARAD WADHIA.....APPLICANT

VERSUS

WADHIA POLYMERS E. A. LIMITED.....RESPONDENT

RULING

1. Through the application dated 6th June 2019 the applicant seeks orders to stay proceedings in Milimani CMCC No. 6281 of 2016, to withdraw the said suit and to transfer it to Milimani High Court for hearing and determination.

2. The application is brought under Section 18(1) (b) (i) of the Civil Procedure Act (CPA) and is premised on the grounds listed on the face of the Notice of motion which include the following grounds:

1. That the matter in dispute is the directorship and/or shareholding in the respondent company, the management of the company and company's assets which should be determined by the High Court of Kenya.

2. That the Chief Magistrate Court also lacks the pecuniary jurisdiction to handle this matter as the subject matter of this suit being the respondent's assets are valued at Kenya Shillings Forty Million (Kshs 40,000,000.00).

3. That the Special Resolution to bring this matter to court is defective since one of the individuals claiming to be a director in the respondent company is not in law a director in the respondent company hence lacks the authority to act on behalf of the respondent.

3. The application is supported by the applicant's affidavit sworn on 6th June 2019 wherein the grounds on the body of the application have been repeated.

4. The respondent opposed the application through the replying affidavit of the respondents Director, **Sandeed Mohanlal Shah**, who avers that the Magistrates Court has the jurisdiction to hear and determine the civil suit and that the present application is a delaying tactic employed by the applicant, 3 years after the filing of the suit, upon his failure to obtain favourable orders in other proceedings namely; HCCC Misc 15 of 2019.

5. The respondent also states that the cause of action before the lower court is founded on the tort of trespass which is premised on the applicant's invasion of the suit property and that the lower court therefore has the jurisdiction to hear and determine the suit.

6. It is the respondent's case that the issue of shareholding, directorship, agency or employment in the respondent company are auxiliary to the main dispute of trespass. The respondent maintains that the determination of the issues in dispute before the magistrate's court will have no bearing on the value of the respondent's assets.

7. Parties canvassed the application by way of written submissions which I have carefully considered.

8. The main issue for determination is whether the applicant has made out a case for the transfer of the suit before the lower court to this court. Section 18(1) (b) (i) of the Civil Procedure Act stipulates as follows:

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or

of its own motion without such notice, the High Court may at any stage—

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same;

9. The application is founded in the provision of Sections 1A, 1B, 3A and 5 of the Civil Procedure Act which stipulate as follows:

1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.[Act No. 6 of 2009, Sch.]

1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

5. Courts to try all civil suits unless barred.

Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.

Section 2 of the Companies Act.

Objects of this Act

The objects of this Act are to facilitate commerce, industry and other socio-economic activities by enabling one or more natural persons to incorporate as entities with perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular in the interests of their members and creditors.

10. Previously, the court took the position that Section 18 of the Civil Procedure Act grants the High Court the power to transfer all suits at any stage of the proceedings as long as the suit was filed in the first instance before a court that had jurisdiction to hear and determine it. (See *Kenya Seed Company Ltd v Joseph Bosire* C.A. No. 72 of 2002 (unreported), and *Kagenyi v Musiramo & Another* [1968] E.A. 43.

11. Evolving jurisprudence from our courts, with the enactment of Sections 1A and 1B of the Civil Procedure Act, is that the issue of transfer of suits from one court to another is essentially a procedural issue that ought not to be elevated to the status of jurisdiction.

12. In *Grace Thongori Komo v Dan Njagi Ndwiga* [2013] e KLR Hatari Waweru J. Held:

“If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated “ what prejudice would any party suffer in that event” After all, the overriding objective of the Civil Procedure

Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (Section 1A(1)).

The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions.....

To my mind therefore, the principle of law regarding transfer of cases under Section 18 of the Civil Procedure Act originating from the Ugandan case of Kagenyi –VS- Musiramo (supra) is no longer good law, particularly in the light of Sections 1A and 1B of the Civil Procedure Act, and should no longer be persuasive authority to this court. On my part I refuse to be persuaded by it.”

13. In the present case, I note that the main argument presented by the applicant in seeking the transfer of the suit from the lower court to the High Court as the suit relates to shareholding in a company for which under Section 2 of the Companies grants jurisdiction to the High Court.

14. On its part, the respondent maintained that the suit is founded on the tort of trespass which the lower court can entertain. A perusal of the respondents plaint filed before the lower court indicates that the prayers sought are mainly as follows:-

a. A declaration that the defendant is not a shareholder, director, agent and/or employee of the plaintiff and that the defendant is not authorized to conduct, transact or in any way conduct business or affairs of the plaintiff howsoever.

b. Orders compelling the defendant to render an account of monies received on behalf of the plaintiff and refund all the said monies to the plaintiff.

c. Permanent mandatory orders of injunction, compelling the defendant, his agents, employees and/or servants, to vacate and/or hand over possession of all the premises of the plaintiff including premises situate on L.R. NO. 209/10648.

d. Permanent prohibitory orders of injunction restraining the defendant, his agents, employees and/or servants from visiting or accessing all premises belonging to the plaintiff’s including premises situate on L.R. No. 209/10648 and/or representing himself to the general public as an agent, employee, shareholder and/or director of the plaintiff, or in any transacting or conducting business for or on behalf of and calling for rental proceeds or profits on behalf of the plaintiff.

e. Damages.

15. At paragraphs 5, 6, 9 and 11 of the plaint, the plaintiff avers as follows:-

1. The said Kaushik Wadhia resigned as director and transferred all his shares to the plaintiff to Trusha Nemchand Shah on 21/1/2016 after having entered into an agreement with Trusha Nemchand Shah.

2. In that regard the two directors and shareholders of the plaintiff after the transfer of the shares were Sandeep Monhalal Shah and Trusha Nemchand Shah.

3. Further, having resigned as a director and transferred all his shares, Kaushik Wadhia has no legal right or obligation in the plaintiff or its affairs.

4. Despite being informed of the current constitution of shareholders of the plaintiff, defendant continues to present himself to the general public as a director and /or shareholder, agent and /or employee of the plaintiff and as such illegally transacted on behalf of the plaintiff without its authority or consent.

16. From the prayers sought by the plaintiff before the lower court and the averments contained in the plaint, I note that while the plaintiff submitted that its claim is founded on the tort of trespass, a reading of the plaint in its entirety, presents a totally different picture.

17. I find that the plaintiff’s case revolves around the shareholding and running of the affairs of company and the alleged interference by the defendant.

18. My take is that the issues raised in the lower court are cross cutting between the tort of trespass and management of the company such that Section 2 of the Companies Act can be invoked so as to conclusively determine all the issues more so considering that the plaintiff is itself a company.

19. In the circumstances of this case, I find that it will be prudent and indeed, in the interest of justice to allow the application. Consequently, Nairobi CMCC 6281 of 2016 is hereby withdrawn from the lower court and transferred to this court for hearing and disposal. The respondent is granted the costs of the application considering the delay exhibited by the applicant in seeking the transfer of the case 3 years after it was instituted before the lower court.

Dated, signed and delivered via Skype at Nairobi this 30th day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Sang for respondent

C/A & DR – Hon. Tanui