



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 117 OF 2019

ISAAC KINYANJUI MUITHEREROPLAINTIFF/APPLICANT

VERSUS

JONATHAN CRAIG BUFFEY.....1ST DEFENDANT

ANDREW LESLIE BECK.....2ND DEFENDANT

GERALD VAN DER WALT.....3RD DEFENDANT

AND

WILD EYE EAST AFRICA LIMITED.....AFFECTED PARTY

RULING

INTRODUCTION

1. Through the plaint dated 17th May 2019, the plaintiff/applicant herein, who describes himself as an adult male of sound mind and Managing Director of the Affected Party herein sued the defendants seeking the following orders;-

a. A declaration that on the whole, the conduct of the 1st, 2nd and 3rd respondent in relation to the plaintiff herein and the Affected Party are oppressive and unfair to the plaintiff and prejudicial to the Affected Party herein.

b. This Honourable court be pleased to issue an order restoring the plaintiff/applicant as the Managing Director of the Affected Party, with all the duties, responsibilities, remuneration and benefits that go with that office.

c. In the alternative to prayers b, above, this honourable court be pleased to order the 1st, 2nd and 3rd defendants to conduct a forensic audit of the Affected Parties account and pay the plaintiff his share of profits, including any outstanding benefits as at the date of judgment.

d. Costs of the suit.

e. Should the honourable court award prayer (c), interest on (c) above at court rates from the date each payment fell due and payable to payment in full.

f. Any such further or other relief as may to this honourable court appeal ft and just to grant.

2. A summary of the plaintiff's case is that on or about 5th January 2012, the plaintiff and the defendants incorporated the Affected Party (hereinafter "the **Company**") under the plaintiff's leadership as the Managing Director after which the company enjoyed tremendous growth but that sometime in 2015, the 3rd defendant started a quiet campaign against the plaintiff geared towards lowering his stature as a Director.

3. The plaintiff states that an air of hostility then started to build up between him and the defendants arising from certain accounts queries

that culminated in the plaintiff's suspension on 27th March 2019. He states that on 1st April 2019, he received a notice of meeting of the Board of the Company calling for resolutions to remove him as a Director and to terminate his employment.

4. He further states that the defendants have prevented him for accessing the company's offices, and to carry out his duties as the Managing Director of the company and further; that all the locks of the company's offices have been changed and the staff directed not to allow him around the offices.

5. He further avers that on 29th April 2019, he received a letter from the company's bankers advising him that he was not a signatory or a Director of the company and that a search from the Registrar of Companies showed that he had been removed as a Director of the Company.

6. He contends that the attempt to remove him as a Director was fraudulent and irregular. He adds that the company cannot sue in its own name as it is now under the control of defendants who are the offending parties and that he is the only other legal director and/or shareholder of the company and thus has the locus standi to commence derivative action on behalf of the company.

7. He contends that the company is at risk of serious management crisis as none of the defendants is able to work in Kenya without work permits since they are all foreigners.

Application.

8. Concurrently with the plaint, the plaintiff also filed the application dated 17th May 2019 seeking the following orders.

1. – 4. Spent

2. This Honourable Court be pleased to order the 1st, 2nd & 3rd Defendant herein to refrain from taking any action to remove the Plaintiff as a Director/ Shareholder of the Affected Party pending the hearing and determination of this suit.

3. This Honourable Court be pleased to issue an order restoring the Plaintiff/Applicant as the Managing Director of the Affected Party, with all the duties, responsibilities, remuneration and benefits that go with that office, pending the hearing and determination of this suit.

4. This Honourable Court be pleased to issue an order freezing Account Nos. Nos. 010 000 609 6508 and 010 000 609 6507 domiciled at Stanbic Bank Kenya Limited International Life House Branch, pending the hearing and determination of this suit.

5. The this Honourable Court be please to grant leave to the Plaintiff/ Applicant to continue this suit on behalf of Wild Eye East Africa Limited as a derivative suit.

6. Cost of this Application.

9. The application is brought under Articles 50 and 159 of the Constitution, Section 238, 780 and 782 of the Companies Act and is supported by the applicant's affidavit and is premised on the grounds that:-

a. The 1st, 2nd & 3rd Defendants have continued running the Affected Party in a manner that is most unfair and oppressive to the Plaintiff.

b. The 1st, 2nd & 3rd Defendants have ejected and locked the plaintiff out of the offices of the Affected Party without any colour of right, and purported to terminate his services as an employee.

c. The 1st, 2nd & 3rd Defendant have thrown out the Plaintiff from the Affected Parties offices, changed locks and directed staff not to allow him in.

d. The 1st, 2nd & 3rd Defendants have attempted to fraudulently remove the Plaintiff as a director of the Affected Party and used the information to close the Affected Parties Accounts at Stanbic Bank Kenya Limited and opened others without the Plaintiffs knowledge.

e. The activities of the 1st, 2nd & 3rd Defendant, who are now in control of the Affected Party, and who have no work permits to work in Kenya is injurious and prejudicial not only to the Plaintiff, as a minority shareholder, but also to the smooth running of Affected Party.

f. The making of such an order is necessary for the protection of the Applicant and the children.

The defendant's/respondent's case.

10. The defendants opposed the application through the 1st defendants' replying affidavit sworn in 20th May 2019 wherein he avers that contrary to the plaintiff's claim that he (the plaintiff) is the majority shareholder of the company, the company's Memorandum and Articles of Association marked as exhibit "1KM-6" shows the correct shareholding as follows:

- a. Paul Mc Dougal - 200 shares
- b. Isaac Kinyanjui Muitherero (plaintiff) - 200 shares
- c. Jonathan Craig Buffey (myself) - 200 shares
- d. Andrew Leslie Beck(2nd defendant) - 150 shares
- e. Gerard Van Der Walt (3rd defendant) - 150 shares.

11. He avers that the plaintiff has never been appointed as the Managing Director (MD) of the company and that at the incorporation of the company it was expressly agreed that;-

- a. **The company to be incorporated would be the affected party.**
- b. **The 2nd and 3rd defendant and I would be the majority shareholders with the plaintiff and Paul McDougal holding 400 shares in total.**
- c. **Wild Eye South Africa would be responsible for putting in place all operational structures of the affected party, marketing and online presence of the affected party and financing. Wild Eye South Africa would specifically finance the purchase of camping equipment to set up a fully operational mobile camping unit and purchase motor vehicles for carrying out game drives.**
- d. **The affected party would invoice Wild Eye South Africa for all its expenses.**
- e. **The plaintiff and Paul McDougal would be charged with the day today running of the affected party Kenya.**
- f. **Once the affected party established the distributable income being the difference between the costs less income and subject to the affected party being profitable the parties all agreed on a profit split of 45% of the profits payable to the affected party and 55% to Wild Eye South Africa.**

12. He states that pursuant to the agreement, he sent the sum of GBP 150,450 to one **Paul McDougal** and one Wild Connections Safaris Limited between 2011 and 2014 for the purchase of motor vehicles camping equipment and to cater for the day to day running of the company. He also states that he sent a further sum of GBP 14,630.37 to the company and that when the company opened the bank account it was agreed that plaintiff would be the sole signatory to the said account.

13. He avers that sometime in February 2019 a discrepancy of uncounted amount of money estimated at about USD 20,000 was discovered in the financial records of the company that necessitated the appointment of auditors to reconcile the Company's books of accounts. The said auditors found that an amount of USD 21,927.88 was unaccounted for after which the 2nd and 3rd defendants decided to suspend the plaintiff ("**IKM-11**") and send a notice for the meeting of the Board of Directors ("**IKM12**") to deliberate over the issue. Owing to the loss of funds and the apparent lack of trust for the plaintiff the 2nd and 3rd defendants decided to open a new bank account for the company.

14. He further avers that by a letter dated 2nd April 2019, the company's Board of Directors set the board meeting for 8th April 2019 and requested the plaintiff to attend the said meeting so as to show cause why his employment should not be terminated but the plaintiff failed to attend the said meeting thereby leading to the resolution to terminate his engagement with the company in accordance with its constitution.

15. He contends that on 11th April 2019, the company's Advocate lodged Forms CR29, CR9, CR19, CR7 and CR8 with the Registrar of Companies signifying the plaintiff's removal as a Director of Company and that CR12 dated 15th April 2019 (annexure "**IKM-23**") only confirms the plaintiff's status as that of a shareholder of the company. He further avers that the plaintiff's action to reinstate himself as a Director of the company without complying with the company's constitution is fraudulent and a breach of the law.

16. It is the defendants' case that most of the allegations made by the plaintiff are misleading alarmist and aimed at diverting the court's attention from the pertinent facts of the case especially the amount of USD 21,000 that he did not account for.

17. The defendants contend that that it will be unjust to compel them to continue carrying on business with the plaintiff as a Director in the company when he no longer has their trust.

18. He confirms that the plaintiff is still a shareholder of the company and is thus entitled to participate in the profits and/or losses of the company but that does entitle him to pursue the derivative suit on behalf of the company.

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

Analysis and determination

20. The main issue for determination is whether the plaintiff has made out a case for the granting of the orders sought in the application.

21. The orders sought can be summarized as intended to restrain the defendants from removing the plaintiff as a Director/Shareholder of the Company, to restore him to the position of the Managing Director of the Company, to freeze the company's account Nos. 0100006096508 and 10000609 (hereinafter "**the Bank Accounts**") domiciled at Stanbic Bank Kenya pending the hearing and determination of the suit and to grant leave to the plaintiff to continue this suit on behalf of the company as a derivative suit.

a. Removal of plaintiff as a Director.

22. The plaintiff's case was that his removal as a Director was anomalous, riddled with bad faith and done without following the due process. On their part, the defendants argued that the plaintiff's removal was done in strict compliance with the provisions of the Company's constitution.

23. I note that the orders sought to restrain the plaintiff's removal are injunctive in nature. The principles governing the granting of orders of injunction were stated in the oft cited case of *Giella v Cassman Brown & Company Ltd* [1973] EA 358 at p. 360 where it was stated:-

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES VS. TRUFOODS [1972] E.A. 420.)"

Prima facie case.

24. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 it was held :-

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

25. In the present case, while the plaintiff contends that his removal as a Director was irregular and tainted with illegality, the defendants contend that they adhered to the Company's Constitution and issued the plaintiff with the requisite notices to attend meetings in order to defend himself from the claims of financial impropriety. I note that the plaintiff did not deny that he was served with the requisite notices prior to his removal and that he did not attend the said meetings. In essence therefore, the plaintiff gave up his opportunity to defend himself over the allegations of financial impropriety before the Company's Board of Directors' meeting. In the circumstances of this case, I am not satisfied that the plaintiff has established that he has a prima facie case against the defendants so as to warrant the granting of the orders of injunction.

26. By their very nature, orders of injunction are geared towards stopping a respondent from taking certain action. In the present case, the plaintiff seeks orders to restrain the defendants from removing him as a Director of the Company. In the same breath, the plaintiff claims that he was irregularly removed as Director of the company. Clearly therefore, the action the plaintiff seeks to stop, through this application has already been overtaken by events.

27. My finding is that the court cannot in the circumstances called upon to stop an act that has already taken place. I am guided by the decision in *Stanley Kirui v Westland Pride Limited* [2013] eKLR wherein it was held:-

"The court cannot injunct what has already happened. I will be guided by the findings in case of *Mavoloni Company Ltd vs Standard Chartered Estate Management Ltd, Civil Appeal No. 266 of 1997[1997] LLR 5086*, where the court held that "an injunction cannot be granted once the event intended to be injuncted has been overtaken by events." Similar findings were held in the case of *Eso Kenya Ltd Vs Mark Makwata Kiya, Civil Appeal No. 69 of 1991* where it was stated "an injunction cannot issue to restrain an event that has taken place."

28. My finding on the issue of prima facie case settles the two remaining conditions for granting injunctive orders which I do not have to consider once I find that no prima facie case has been established.

Restore plaintiff as the Managing Director.

29. The plaintiff also sought orders to be restored as the Managing Director of the company pending the hearing and determination of suit. The defendants, on the other hand, maintained that the plaintiff did not hold any such position as the Managing Director of the company.

30. I have carefully perused the plaintiff's detailed supporting affidavits and I note that nowhere in the said affidavits has the plaintiff provided proof of his alleged position as the company's Managing Director so as to entitle this court to consider restoring him back to the said position.

31. Be that as it may and even assuming that the plaintiff held the position of the Managing Director of the Company, I note that the defendants provided a detailed explanation of the circumstances that led to the plaintiff's removal. It is therefore my finding that the order to restore a Managing Director upon his removal, before the full hearing of the case, could amount to unnecessary interference with the internal affairs of the company. Needless to say, courts have taken the position that they will not interfere with the internal affairs of a company. This is the position that was advanced in the celebrated case of *Foss v Harbottle (1843) 2 Hare 261* wherein it was held that

"..... an elementary principle is that a court does not interfere with the internal management of companies acting within

their powers:

The court further stated:

"Courts will interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company"

32. In the instant case, I find that the matters complained of do not border on fraud or ultra vires but are such that can be resolved by the company itself.

Freezing of the Company's Bank Accounts.

33. The plaintiff also sought orders for the freezing of the company's Bank Accounts that were opened by the defendants following his removal as a Director. The plaintiff has however not explained the reasons for such a freezing order and how it will impact on the running of the affairs of the company considering that the initial company account wherein he plaintiff was the sole signatory was found to have unanswered audit queries.

34. I am not persuaded that the freezing of the company's accounts will be beneficial for the running of the company especially considering the fact that the plaintiff has not shown that there is any impropriety in the operation of the said accounts. In any event, the defendants were categorical that the plaintiff still remains a shareholder of the company and is thus entitled to benefit from its profits and to enquire into its financial dealings in the event he suspects any impropriety.

Leave to continue the suit on behalf of the company as a derivative suit.

35. The law on derivative actions is captured in Part IX of the Companies Act 2015 which provides as follows;

PART XI — DERIVATIVE ACTIONS

238. Interpretation: Part XI

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.**
- c. 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.**
- d. A derivative claim may be brought against the director or another person, or both.**
- e. 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.**
- f. 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.**

36. In *Ghelani Metals Limited & 3 Others v Elesh Ghelani Natwarlal & Another* [2017] eKLR, Onguto J. observed, in part, as follows:

“Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or

other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: see *Wallersteiner v Moir* (No.2) [1975] 1 All ER 849. Until 2015, in Kenya, the common law guided derivative actions in Kenya. Ordinarily under common law, one had to fall under the exceptions to the rule in *Foss v Harbottle* [1843] 2 Hare 461 that “a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it”: see also *Hawes v Oakland* 104 U.S 450 [1881]. The exceptions to the rule in *Foss v Harbottle* were mainly where there was fraud on a minority caused by majority shareholder(s). The action to be commenced had also to be in the best interest of the company and without any ulterior motive: see *Nurcombe v Nurcombe* [1985] 1 All ER 65. The rule in *Foss v Harbottle* along with its exceptions held sway locally as well: see *Rai & Others v Rai & Others* [2002] 2 EA 537. A party seeking to ‘by-pass’ the company had, in limine, to show that he fell within the exceptions to the rule: see *Murii v Murii & Another* [1999] 1 EA 212. With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in *Foss v Harbottle* was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance.”

37. I have considered the prayers sought by the plaintiff in the plaint and I note that they mainly relate to the affairs of the company in which case, the final orders that may eventually be granted will have a bearing on the rights and/or obligations of the company. It has not been disputed that the plaintiff was both a shareholder and Director of the company and that the legality of his removal is one of the issues to be determined at the hearing of the main suit. I also find that there are pertinent issues raised in these proceedings on the operations of the company by the plaintiff whose resolution should benefit the company.

38. In other words, I find that the company would have an interest that the propriety of the directorship be enquired into and resolved which means that the resolution of the issues in this suit would be beneficial for the company. It is therefore my finding that in the circumstances of this suit, it will be just to grant the plaintiff leave to continue this suit as derivative suit. I find guidance in the decision in *Mohamed Muyonga Wekesa v Nicholas Oyen Otukey & Another* [2016] eKLR wherein it was held:

“A company is an artificial person and only acts through its Members and Directors. In the present case the shareholding of Mohamed and the 2nd defendant (or the 1st defendant) is on a 50:50 basis. The shareholding of the either member though not a majority is significant. Anything done by either member on behalf of the company is therefore equally significant. It is therefore obvious that it is in the interest of the company that the Shareholding and Directorship of either member is not tainted by impropriety. The company would have a real interest that the propriety of the Shareholding and Directorship of the company be enquired into and resolved. An action to resolve that issue is therefore to the benefit of the company.”

Disposition

39. Having regard to the findings and observations that I have made in this ruling, I allow the application dated 17th May 2019, albeit partly, in the following terms:-

- a. The plaintiff is granted leave to continue this suit on behalf of the company as a derivative suit.
- b. The costs of the application shall abide the outcome of the main suit.

Dated, signed and delivered via skype at Nairobi this 29th 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. Githinji for plaintiff/applicant

Mr. Mwangi for defendant

C/A

&

DR

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Hon.

Tanui