



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E412 OF 2018

MARGARET WACERA MAINA.....PLAINTIFF/APPLICANT

VERSUS

STANBIC BANK KENYA LIMITED.....1STDEFENDANT/RESPONDENT

NEGAWATT LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant herein **MARGARET WACERA** filed in court a **Plaint** dated **3rd December 2018**. Contemporaneously with said **Plaint** the Plaintiff/ Applicant also filed the **Notice of Motion** dated **3rd December 2018** seeking the following Orders:-

“1. SPENT

2. SPENT

3. SPENT

4. SPENT

5. THAT pending inter partes hearing and determination of the main suit, the Honourable Court be pleased to issue an order restraining the Respondent or their agents from dealing, transacting or in any way whatsoever performing any transaction with respect to the account number*** held with the 1st Defendant/Respondent.**

6. THAT this Honourable Court be pleased to issue any such further orders as it deems mete and just.

7. THAT the costs of this Application be awarded to the Plaintiff/Applicant

2. STANBIC BANK KENYA LIMITED the 1st Defendant filed their statement of defence dated **10th January 2019** and also filed in Reply to the Notice of Motion a **Replying Affidavit** dated **10th January 2019**.

3. However before the application could be heard the 1st Defendant filed a **Notice of Preliminary Objection** dated **4th March 2019**. The **Preliminary Objection** sought to have the entire **Plaint** and **Notice of Motion** dated **8th December 2018** struck out on grounds that:-

“(1) The Plaintiff/Applicant has not sought leave of this Court to continue the Derivative Action pursuant to the provisions of Section 239 of the Companies Act No.17 of 2015.

(2) In the absence of the leave being granted by this Court to continue the Derivative Action the suit before the Court is defective and should be struck out “in limine”.

4. The Court directed that the **Preliminary Objection** be heard and determined first by way of written submissions. The 1st Defendant filed its

written submissions on **5th March 2019** whilst the Plaintiff/Applicant filed her written submissions on **29th March 2019**.

BACKGROUND

5. On or about **5th November 2014** the 2nd Defendant **NEGAWATT LIMITED** was incorporated as a Private Limited Company with two Directors who were also shareholders. One **Mark Andrew Washer** held a 60% stake in the company whilst the Plaintiff/Applicant held 40% of the shares. In the year 2014 the two directors approached Stanbic Bank, the 1st Defendant/Respondent and opened an account **No.******* in the name of the Company. The account mandate was that the two directors were to transact on behalf of the company.

6. The Plaintiff/Applicant alleges that on or about **30th October 2018**, the 1st Defendant without any lawful justification denied her access to transact on the company bank account despite her being a signatory to said Account. The Plaintiff/applicant by her Notice of Motion dated **3rd December 2018** sought orders as stated above.

7. In support of their notice of Preliminary Objection the 1st Defendant submits that the Plaintiff/Applicant suit seeks to enforce a right which is vested in the 2nd Defendant and as such the suit ought to have been filed as a derivative suit. The 1st Defendant further submits that in order to bring such a derivative suit the Plaintiff/Applicant was required by law to seek the leave of the Court.

8. In her written submissions the Plaintiff/Applicant counters that her suit constitutes a claim which is personal to herself and is not being brought on behalf of the Company. That the cause of action is aimed not at obtaining any restitution for the 2nd Respondent (Company) but, seeks that the Court finds fault as against both the 1st and 2nd Defendant/Respondents. The Plaintiff/Applicant cited and relied upon the case of **LABAN ONDITI RAO –VS- KIPRONO KITTONY & ANOTHER [2017] eKLR** wherein the Court held thus:

“From that story, I have found nothing which can be construed as a cause of action vested in the Company. Secondly, the reliefs which the applicant is seeking are not being sought on behalf of the company.” [own emphasis]

The Plaintiff/Applicant therefore urged the Court to dismiss the Preliminary Objection.

ANALYSIS AND DETERMINATION

9. The definition of what constitutes a true Preliminary Objection was given in the case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED –VS- WEST END DISTRIBUTORS LTD [1969] E.A** where it was held:-

“A preliminary objection is in the nature of what use to be a demurer. 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 if any fact has to be ascertained or if what is sought if exercise of judicial discretion.”

10. The 1st Defendant’s Preliminary Objection is premised on the grounds that the present suit ought to have been filed on behalf of the company as a derivative suit and that the Plaintiff ought to have sought and secured leave from the Court to file the same in line with **Section 239 of the Companies Act**. **Section 239(a)** provides as follows:-

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; an

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.

11. The key question therefore is whether the suit before this court does actual fact constitute a derivative action. **Section 238** of the **Companies Act** defines derivative actions in the following terms:-

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.

12. For a party to succeed in an action for derivation action, he or she must demonstrate the following:-

a. He or she must be a member of the company and includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law;

b. The proceedings must be in respect of a cause of action vested in the company.

c. The proceedings must be seeking relief on behalf of the company.

d. The proceedings must be for protection of members against unfair prejudice brought under the Companies Act.

e. The proceedings are 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.

13. By virtue of **Section 241 (2) (f)** of the **Companies Act** the applicant has legal grounding to pursue a suit in her own right. I have perused the Plaintiff filed on **4th December 2013**. I note that the reliefs being sought relate to the Plaintiff/Applicant in her personal capacity as a signatory to the account in question. The Plaintiff has brought the suit on her own behalf and **not** on behalf of the company. As such I find that this is **not** strictly speaking a derivative suit.

14. Furthermore there exists legal authority to the effect that leave to file a derivative suit can be sought and obtained **after** the suit has been filed. In **AMIN AKBERALI MANJI & 2 OTHERS –VS - ALTAF**

ABDUL RASUL DADANI & ANOTHER [2015] eKLR, the Court held:-

“Leave of the court shall be obtained before filing of a derivative suit but may also be obtained to continue with the suit once filed. On this the court was right in adopting the exposition of the treatise “Minority shareholders”, Law, Practice and Procedure” by Joffe that “there is no approved pre-action protocol in relation to the derivative action” and that after the claim form has been issued, the claimant is required to make an application which must be supported with written evidence for permission to continue with the claim.” It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such an action, the company is entitled to the intended relief and the action falls within any of the exceptions of the rule in Foss Vs Harbottle.”[own emphasis]

15. It has long been held that Courts ought to be slow to strike out suits as this will deny a party the right and ventilate its issues before a court of law. In **DT DOBIE & COMPANY (KENYA) LTD–VS- JOSEPH MBARIA MUCHINA & ANOTHER [1980] KLR**, it was

held thus: -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be infected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness with the full facts of a case before it.”

16. Based on the foregoing, I find no merit in the Preliminary Objection dated **4th March 2019**. The same is hereby dismissed with costs to the Plaintiff/Applicant.

Dated in Nairobi this 29th day of May 2020.

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Justice

Maureen

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