REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 12 OF 2019

WAN LAISU...1ST PLAINTIFF

WU JIANHUI... 2ND PLAINTIFF

VERSUS

OVERSEE BOAT AND FISHING SUPPLIER................1ST DEFENDANT

AHMED MUSTAFA SHARIF..2ND DEFENDANT

MUDHHIR MUSTAFA SHARIF......................................3RD DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Odongo B. O. Advocate for the Plaintiffs

Antony Okuto & Co. Advocate for the Defendants

RULING

Background

On 8.10.2019, the plaintiffs who identify themselves as Chinese Nationals residing and working for gain at Malindi filed suit against the defendants, **Oversee Boat and Fishing Supplier Ltd, Ahmed Mustafa Sharif** and **Mudhhir Mustafa Sharif** seeking the following declarations and orders:

> ***(a). A declaration that the imported raw materials shipped vide Ningbo City Fenghua Felhong Import and Export Company Limited and lading No. OOLU2107363020, be unconditionally released to the Plaintiffs and for the said plaintiffs to be allowed to use the raw materials.***
>
> ***(b). A declaration that the 2nd and 3rd Defendants are not entitled to any share in profits and/or losses made from the imported raw materials contained in the containers of lading No. OOLU21O7363020 and No. ONEYSZPVC8770400 transported to Kenya vide the shipping companies Ningbo City Fenghua Felhong Import and Export Company Limited and Ocean Network Express (China) Limited, Shenzhen Branch.***
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> ***(c). An order directed to the 2nd and 3rd Defendant prohibiting them from interfering with the use by the 1st and 2nd plaintiffs of the raw materials contained in the containers of lading Nos. OOLU2107363020 and No. ONEYSZPVC8770400.***
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> ***(d). An order directed at the 2nd and 3rd Defendants to handover the Company Lenovo laptop and the Black Honda Motor Vehicle of registration No. KCQ 479V to the 1st and 2nd plaintiffs.***
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> ***(e). A declaration that the 2nd and 3rd defendants are entitled to a twenty percent (20%) share each of their monetary contribution towards the 1st defendant.***
>
> ***(f). Costs of this suit plus interest on thereon from the date of trespass till payment in full.***

That at all times to this suit both the plaintiff along with the 2nd and 3rd defendants were directors and shareholders of the 1st defendant, with

share of 300 ordinary shares for each of the plaintiffs and 200 ordinary shares for each of the 2nd and 3rd defendant.

That the plaintiffs had tasked the responsibility of incorporation of the 1st defendant to the 2nd defendant with a nominal capital of Ksh.100,000/= divided in ordinary shares of Kshs.100/=. However, instead of the 2nd defendant carrying on the instructions to the letter as agreed, it is alleged that he went further to incorporate the 1st defendant with an additional director herein the 3rd defendant without any resolution from the company.

Further, the 1st defendant commenced business operations which involved purchase and importation of goods from China vide Bill of Lading No. OOLU2107363020 ONE YSZPV87708770400. The goods were to be received and sold by the 2nd defendant with an understanding of appropriating the monetary contribution. That however did not happen necessitating the present suit.

During the pendency of the suit the defendants jointly brought a notice of motion dated 3.12.2019 in terms of Section 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule (15), of the Civil Procedure Rules in which a substantive order was sought from this court to be pleased to strike out the plaintiffs entire suit herein on the grounds that it discloses no reasonable cause of action in Law.

For ease of understanding, I will set out the grounded reasons for the orders to strike out the plaint as couched in the following language;

> ***(a). The plaintiffs/applicants are directors and shareholders in the 1st defendant.***
>
> ***(b). The 2nd and 3rd defendants/respondents have without any reasonable cause or justification taken possession of a container of lading No. OOLU2107363020 which has been shipped and paid for solely by the 1st and 2nd plaintiffs and have detained the same in a warehouse and refused to grant access of the said warehouse and refused to grant access of the said warehouse to the plaintiffs.***
>
> ***(c). The plaintiffs/applicants and the operations of the 1st defendant, have been paralyzed due to the detention and refusal to release the container of lading No. OOLU2107363020 as the raw materials contained therein are crucial for processing.***
>
> ***(d). The raw materials contained in the container lading No. OOLU2107363020 are perishable in nature and have a life span of six months and of the six months, four months have already passed.***
>
> ***(e). Unless the 2nd and 3rd defendants/respondents their agents, successors in title, servants and/or employees are restrained and/or prohibited from denying the plaintiffs/applicants, access to the container lading No. OOLU2107363020 and they be allowed to use the raw materials therein, the plaintiffs/applicants and 1st defendant shall suffer loss which cannot adequately be quantified in damages or otherwise compensated.***
>
> ***(f). The plaintiffs application meets the criteria for the grant of orders sought.***
>
> ***(g). It is in the interests of justice that this application be allowed.***

In support of the said notice of motion, the applicants annexed their statement of defence.

On 16.1.2020, the respondents through a replying affidavit sworn by **Wan Laisu** objected to the application and subsequent orders being sought by the defendants. Further, in her affidavit she enumerated the history of incorporation of the 1st defendant company which had initial shareholders – namely:

> ***Wan Laisu – 350 ordinary shares***
>
> ***Wu Janhui – 350 ordinary shares***
>
> ***Ahmed Mustafa Sharif - 300 ordinary shares***

That on 15.3.2019 one of the directors **Ahmed Mustafa Sharif** fraudulently altered the shareholding of the company by illegally adding another shareholder by the name **Mudhhir Mustafa Sharif**, without any consultation or resolution with the other directors.

The notice of motion was disposed off by way of written submissions filed by **Mr. Odongo** for the plaintiffs and **Mr. Okuto** for the defendants respectively.

In my view this was in keeping with compliance of Section 1A and 1B of the Civil Procedure Act to deal with case management fairly, speedily, proportionately and with least costs.

Law and Analysis

The primary question that arose in this case is whether the plaintiffs can be restrained from bringing a cause of action against the defendants where, then, is the line to be drawn between the company as a legal person separate from its shareholders and directors capable of instituting suit or being sued as a body corporate.

The manner in which the Courts approach the litigation of this nature is provided for in Part XI of the Companies Act 2015 (Sub-section 238 – 241) which stipulates as follows:

"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 seeking relief on behalf of the company.

(2). Derivative claim may be brought only under this part or

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

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

(5). It is immature 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 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 the Law 239 Application for permission to content a derivative claim

(1). In order to construe a derivative claim brought under this part by a member, the member has to apply to the Court for permission to continue or

(2). If satisfied that the application and the evidence adduced by the applicant, in support of it do not disclose a case, for granting permission,

The Court

(a). May make any consequential order it considers appropriate.

(b). 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 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

240 Application to Court for permission to content a claim as a derivative claim, how disposed of if

(a) Company has brought a claim.

(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 a claim on the ground specified in subsection (2)

(2). The ground is that

(a). The matter in which the company commenced or continued the claim amounts to an abuse of the process of the Court.

(b). The company has failed to prosecute the claim diligently and

(c). It is appropriate for the member to continue the claim as a derivative claim.

(3). 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.

(b). May make any consequential order that it considers appropriate

(4). If the application is not dismissed under subsection (3) the court may give directions as to the evidence to be provided by the company (b) and may adjourn the proceedings to enable the evidence to be obtained.

(b). On hearing the application,

The court may

(a). Give permission to continue the claim as a derivative claim on such terms as it considers appropriate

(b). Before permission and dismiss the application or

(c). Adjourn the proceedings on the application and give such directions as it considers appropriate.

(c). If the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be

(i). Authorized by the company before it occurs or

(ii). Ratified by the company after it occurs

(d) If the cause of action arises from an act or omission that has already occurred whether, the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

(e). Whether the company has decided not to pursue the claim.

(f). Whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in the members own right rather than on behalf of the company.

The true significance of these provisions no doubt has been summed up in the following cases in **Isaiah Waweru Njumi & 82 others v Muturi Ndungu {2016} eKLR** the relevant part of the Courts decision is that:

"Among other things, the court considers the following factors

(a). Whether the plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts, must be sufficiently particularized to create a reasonable doubt whether the board of directors challenged the actions or omissions deserve protection under the business. Judgement rule in determining whether they breached their duty of care or loyalty.

(b). Whether, the plaintiff has made any efforts to bring about the action the plaintiff desires from the directors or from the shareholders our Courts have developed this into a demand futility requirement where a plaintiff is required either to demonstrate that they made a demand on the board of directors or such a demand is excused.

(c). Whether the plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the composition. Hence, a shareholder seeking to bring a demote suit in order to pursue personal vendetta or private claim should not be granted leave.

(d). Whether the plaintiff is acting in good faith.

(e). Whether the action taken by the plaintiff is consistent with one, a faithful director acting in adherence to the duty to promote the success of the company would take.

(f). The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company, is likely to be authorized or ratified by the company in the future.

(g). Whether, the cause of a claim contemplated is one that the plaintiff could bring as a direct as opposed to a derivative action."

At this stage in the development of the Law on statutory derivative action as provided for. Part XI of the Companies Act, the Court in **Arlin Akberahmanji & 2 others v altar Abaulrasell & another {2015} eKLR** adopted the following approach:

"There is an exception to the rule where what has been done amounts to a fraud and the wrongdoers are themselves in control of the company. In this case, the rules is related in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves being in control, would not allow the company to sue."

The predominant principle here is to distinguish the well-known doctrine to Corporate Law, to wit the notion of a corporate personality and the indoor management. Both of these principles can be traced back to a decision of now almost mythical, stature, that vice chancellor **Wigram in Foss v Harboltle {1843} 67 ER 189 2 Hare 461**.

"In how a corporation is a legal entity distinct from its shareholders. It followed from this, that shareholders were precluded from bringing their own action in respect of a wrong done to the corporation except as modified by the derivative action, the oppression remedy and winding up proceedings. The derivative action was designed to counteract the impact of Foss v Harboltle proceeding a complainant broadly defined to include, more than minority shareholders with the right to apply to the Court for leave to bring an action in the name for on behalf of a corporation for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate."

In the instant case as at 5.2.2019 the plaintiffs are owners of **Oversee Boat and Fishing Supplier Ltd** holding majority shareholding with another director **Ahmed Mustafa Sharif** as a minority shareholder. The nominal share capital of the company is Kshs.100,000/= divisible into 1000 ordinary shares of Kshs.100/= each.

However, from the averments on 18.3.2019 the Registrar of Companies caused an entry change to the directorship of the company, **Oversee Boat and Fishing Supplies** by introducing a new director by the name **Mudhhir Mustafa Sharif** with an allotment of 200 ordinary shares. It is their contention that no formalities such as a resolution by the company in writing authorizing the Registrar of companies to effect the change in the shareholding of the company. The other one exception which the plaintiffs took offence as pleaded in the plaint is the execution of the deed on behalf which fundamentally transferred their shares to the new Director without their consent.

As the company was originally conceived and incorporated by the plaintiffs and the 2nd defendant, the making of the changes to automatically reduce their majority shareholding and incorporate an additional director is evident that the interests of the corporation is at stake.

In addition, altering the register where previously held shares were transferred to a third person created an oppression intimate and personal to the plaintiffs both of which require an action be filed to remedy the situation.

According to **Mr. Okuto** for the defendants it may well be that since the plaintiffs are directors of the 1st defendant they cannot decide to file an action without first seeking a resolution of the company. In this particular case **Mr. Okuto** is aware that he took up the unenviable task to try and mediate the dispute involving two different containers of lading No. OOLU2107363020 and one YSZPVC770400 being goods supplied from China to Kenya with belief that the 2nd defendant would take charge, sell off the goods and appropriate the profits to the company.

In that case, no mediation pre-conference or hearing ever took place to mediate the dispute. That in regard to the context of a resolution, equally the directors would not accede to a meeting. This court has some difficulties with the arguments and submissions by **Mr. Okuto** that the plaintiffs have no *locus standi* to file an action against the defendants without a resolution.

Based on the principles in **Edwards v Halliwell {1950} 2 ALL ER** at the outset the court held as follows:

"The cases falling within the general ambit of the rule are subject to certain exceptions, in cases where the act complained of is wholly ultra vires the companies, the rule has no application because there is no question of the transactions being confirmed by any majority. Where what has been done amounts to what is generally called in these cases a fraud on the majority and the wrongdoers are themselves in control of the company, the rule is related in favour of the aggrieved minority who are aggrieved to bring what is known as minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control would not allow the company to sue; the rule did not prevent an individual member from suing if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority."

On the other hand there is need here to look at the type of company and its administrative structure. In particular some companies enjoy wide autonomy while some incorporated as private vehicles vested with memorandum and Articles of Associations to further the interest of the shareholders.

As adumbrated in **Tallisman Technologies Inc. v Queensland Electronic Switching PTY Ltd {2001} QSC 324:**

"Again, the company may be a joint venture company in which the venturers are dead locked so that the proposed derivative action is seen as being for the purpose of vindicating one side's position rather than the others in a way which will not achieve a useful result. Second there should be evidence of the business, if any, of the company so that the effects of the proposed litigation on its proper conduct may be appreciated. Third, there should be evidence enabling the court to form a conclusion whether the substance of the redress which the applicant seems to achieve is available by a relations which does not require the company to be brought into litigation against its will. So, for example, if the applicant can achieve the desired result in proceedings in his or her own name, it is not in the best interest of the company to be involved in litigation at all. This was the case in Tallisman in which it appeared from the evidence that the most desirable outcome for the applicant was to obtain an order for specific

performance of a contract, which it could do in a suit in which the company did not need to be a party." Forth, there should be evidence as to the ability of the defendant to meet at least a substantial part of any Judgement in favour of the company in the proposed derivative action so that the court may ascertain whether the action would be of any practical benefit to the company."

Giving effect to the facts of this case as pleaded there are legal considerations which might have been illegitimately taken into account to undertake a change in the company's shareholding and directorship unknown to the plaintiffs.

In fixing the remedy there would scarcely be any better avenue than the plaintiffs to file suit in their own names for the grant of any relief against violation of the company's constitution.

A proper bearing to this and in particulars to the courts exercise of discretion on derivative action is a strong disposition that the applicants are motivated in the claim greatly on good faith.

The persuasive case by the **Court of Appeal Singapore in Ang Thiam v Low Hian Chor {2013} SGCA 11,** it was stated:

> ***"The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all. Naturally, the parties opposing Section 216A (with similar provisions with our Part XI of the Companies Act 2015 application will seek to show that the application is motivated by an ulterior purpose; such as dislike, ill feeling or other personal reasons, rather than by the applicants concern for the company. Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his Judgement will be clouded by purely personal considerations, that may be sufficient for the court to find a lack of good faith on his part: An applicant's good faith would also be in doubt if he appears set in damaging or destroying the company out of sheer spite or worse, for the benefit of the competitor. It will also raise the question whether the intended action is going to be in the interests, of the company at all."***

In this context the applicants have not discharged the irrebuttable presumption that the action being undertaken by the plaintiff are induced by ill will, hatred or not for the interest of the company. The prescribed suit spelt out in intelligible terms demonstrates that the plaintiffs have assumed the burden of providing evidence that the applicants in meeting their changed decision to transfer shares and introduce a new director have breached one of the triads of their fiduciary duty.

This court characterizes the conduct by the plaintiffs to file a cause of action against the defendants as a sign of good faith furthering the interest of the corporation and presumably their own interests as well being owners and shareholders. Therefore, there can be no other self-serving motive save to defend themselves against a hostile takeover by other directors of the corporation.

I am satisfied that relating to the process of filing suit the plaintiff have shown that it had to be initiated in their individual names and limited to good faith and is not harmful to the corporation.

As it stands out notwithstanding the provisions of the Act under Part XI on derivative a suits, I grant leave to the plaintiffs to sue in their own names as duly framed in the Plaint against the defendants. That the issue of leave be deemed as duly granted to the plaintiffs as required under Section 238, 239, 240 and 241 of the Companies Act No. 17 of 2015.

What is the effect of all this?

The defendants counsel motion was mainly to have this Court strike out the Plaint and the persisting issues between the parties be left in limbo. As regards the requirement of striking out pleadings the Court of Appeal in **Co-operative Merchants Bank Ltd v George Wekesa Civil Appeal No. 54 of 1999,** the prerequisite in all cases brought under Order 6 Rule 13 (1) (b) (c) and (d) is a discretionary power of the Court to be exercised judiciously. The Court pointed out that:

> ***"Striking out a pleading is a draconian act, which may only be resorted to, in plain cases, whether or not a case is plain is a matter of fact. A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."***

I have had the advantage of conceptualizing the submissions by **Mr. Okuto** for the defendants and also the outstanding claim as pleaded in the Plaint. It must be clearly and unequivocally stated that all documents in connection with the business venture between the plaintiffs and the defendants there are issues touching on the rights of the parties to be adjudicated in legal proceedings. If there are any defects to the Plaint, I am of the view that they can be remedied by way of an amendment.

The upshot, the notice of motion dated 3.12.2019 be and is hereby dismissed for want of merit with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF MAY, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Wambui for Okuto for the applicant