



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 157 OF 2019

SIMON WALLINGTON HORNER.....1ST PLAINTIFF/APPLICANT

RADIO FREQUENCIES SYSTEMS (EA) LTD.....2ND PLAINTIFF/RESPONDENT

VERSUS

EQUITY BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 9th July, 2019, brought under the provisions of; Section 238, 239, 240 and 241 of the Companies Act No. 17 of 2015, Order 1A, 1B, and 3A of the Civil Procedure Act, Order 1 Rule 15 (1) (c) and Order 51 Rule 1 of the Civil Procedure rules 2010 and all the enabling provisions of the law.

2. The 1st Plaintiff herein (“the Applicant”) is seeking for orders: -

- a) *That leave be granted to the 1st Plaintiff to continue this suit as a derivative suit on behalf of the 2nd Plaintiff;*
- b) *That, a temporary injunction do issue restraining the defendant whether by itself or its agents and/or servants from freezing and /or continuing to freeze, placing a lien over 2nd plaintiff’s bank account number [...], at Equity Bank Community branch on the basis of a letter dated 23rd May 2019 and in absence of a court order pending the hearing and determination of the instant suit;*
- c) *That an order of injunction do issue compelling the defendant by itself or through its servants and/ or agents to unfreeze or lift the lien placed over the 2nd plaintiff’s bank account number [...], at Equity Bank Community branch which was done on the basis of a letter dated 23rd May 2019 and in absence of a court order pending the hearing and determination of the instant suit.*
- d) *The costs of this application be provided for.*

3. The Applicant avers that, the 2nd Plaintiff is a limited liability company incorporated on 18th June 2003, under the Companies Act (Cap 486) Laws of Kenya) as evidenced by certificate of incorporation number C104120. It has two directors/and or shareholders being; the 1st Plaintiff who is also the Chief Executive Officer and one Michael John Mwaura.

4. That by a board of directors’ resolution passed on 21st January 2011, the 2nd Plaintiff opened a Kenya Shillings and United States Dollar bank accounts with the Defendant (herein “the Respondent”) at its community branch. The bank mandate provided that, it would be operated singularly. Subsequently on 2nd February 2011, a bank account number [...] was opened.

5. The Applicant avers that on 7th June 2019, he received a copy of a letter dated 23rd May 2019, which informed him that, the subject bank account had been frozen. However, he argues that, the freezing of the account is illegal as it has not been sanctioned by a resolution passed by the 2nd Plaintiffs board of directors nor a court order.

6. That, it was based on ulterior motives and is intended to circumvent the orders issued on 15th May 2019; in *Miscellaneous Civil Application Number 393 of 2019 Simon Horner v Michael John Mwaura & 3 others*. The said order directed that all the monies held in account number [...] at NIC Bank be transferred to the account stated herein held at Equity Bank Limited. It is instructive to note that, the letter dated 23rd May 2019 was written seven days after the order given in the miscellaneous matter.

7. Further, the Honourable court on 20th September 2018, through a ruling delivered in the miscellaneous case referred to herein expunged forged documents from the record of the 2nd Plaintiff held at the Registrar of Companies which documents fraudulently allocated shares in the 2nd Plaintiffs company to third parties. That the freezing of the account is as a result of the dispute over the management of the 2nd Plaintiff.

8. Therefore, it is in the interest of justice that the application be allowed. For if the orders sought are not granted the business of the 2nd Plaintiff will ground to a halt thereby exposing the company to a multiplicity of lawsuits from third parties.

9. However, the application was opposed by the Respondent through grounds of opposition dated 24th October 2019, and a replying affidavit of even date sworn by its Manager Legal Services; Mr Kariuki Kingori. He averred that, the application is unmerited, frivolous, misconceived, vexatious, fatally defective and an abuse of the court process and is meant to subvert the course of justice. That, the affidavit in support of the application contravenes the provisions of the oath and Statutory Declaration Act, as it was sworn without the authority of the board of directors of the 2nd Plaintiff.

10. The Respondent conceded to have frozen the 2nd Plaintiff's account on the strength of the letter dated 29th May 2019, from one of the directors alleging that, his signature to open the account had been allegedly forged. That, pursuant to the provisions of clause 24 and clause 25 of the terms and conditions of account opening, the bank is allowed to terminate the relationship with the account holder without giving any reason. Further the complaint raises serious issues of fraud which are a subject of criminal proceedings in; *Case Number 830 of 2019 Republic v Peter Ngari*.

11. The Respondent averred that by a letter dated 2nd July 2019, the 1st Plaintiff sought that the account be unfrozen immediately, and he informed him that, the company either opens a new account or they give a new mandate to operate the existing account which advice the Applicant has refused to heed.

12. The application was canvassed through written submission. I have considered the application in the light of the arguments advanced and the submission tendered and I find that first and foremost, the 1st Plaintiff is seeking for leave to continue the suit as a derivative suit on behalf of the 2nd Plaintiff, yet the 2nd Plaintiff is already named as a Plaintiff in the suit.

13. Secondly, a derivative suit is defined under Section 238(1) of the Companies Act (cap 486), Laws of Kenya as proceedings brought by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company. Thus, if the 1st Plaintiff is suing on behalf of the company, then the company cannot be as a substantive party to the suit in particular as a Plaintiff. The company is always a neutral party, in a derivative suit and at most it can only be a nominal Defendant. Therefore, on that ground alone this suit as filed cannot be sustained.

14. In addition, a derivative suit is usually brought by a member and/or shareholder of a company against the officers and/or directors of a corporation for mismanagement an or acts or omissions that, have caused harm to the shareholders' interest in the corporation. It therefore follows that, the person against whom action is brought should be in the internal management of the company. The Defendant/Respondent is not in the internal management of the company's affairs.

15. The Applicant however, avers that, there exists a prima facie wrong doing as against the 2nd Plaintiff, by the Respondent within the meaning of section 238(3) of the Companies Act by virtue of the Defendant freezing the 2nd Plaintiff's bank account. The provisions of that section states that: "*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.*" In the instance case, the Plaintiffs have brought the suit against a party who is neither an officer, shareholder or even a director of the company. At most the 1st Plaintiff should have named the co-director and/or shareholder as a defendant. On this ground alone the claim herein cannot stand.

16. Even if the court were to assess the application on merit, the 1st Plaintiff depones under paragraph 15 and 16 of the affidavit in support of the application that, the freezing of the account is meant to circumvent the orders in *Miscellaneous Civil Application Number 393 of 2019*, therefore, the Applicant can seek for the orders sought for herein in that matter.

17. On the basis of the aforesaid and without delving into the substance of the matter herein, I find that, as matters stand the Applicant has no *locus standi* to seek for the orders sought for in the notice of motion herein as a consequent it is dismissed with no orders as to costs. Each party to meet its own costs.

18. It is so ordered.

Dated, delivered and signed on this 28th day of July, 2020 virtually

GRACE L NZIOKA

JUDGE

In the presence of:

Ms Kilonzo holding brief for Mr Wena for the Plaintiffs

Mr Oketch for the Defendant/Respondent

