



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION E 493 OF 2019

SAMUEL KABII KAMAU.....PLAINTIFF/APPLICANT

-VERSUS-

SAMSON MBUTHIA KINYANJUI.....1st DEFENDANT

JAMES MUIGAI KIBATHI.....2nd DEFENDANT

TRIGENTULAR HOLDINGS LIMITED.....3rd DEFENDANT

RULING

BACKGROUND

The Plaintiff/Applicant filed certificate of urgency application of 25th October 2019 seeking leave to prosecute the suit as a derivative action on behalf of Yesbet Limited. The Applicant also sought pending hearing and determination of the application and suit the Court grants temporary/interim injunction restraining the Respondents either by themselves agents, servants or in any manner whatsoever from holding themselves out to be owners of book maker's licence No 0000085 and conducting any proceedings as or on behalf of Yesbet Limited.

The Respondents filed Replying Affidavit on 18th November 2019 and objected to the application.

PRELIMINARY OBJECTION

The Respondents raised Preliminary objection on the same date as follows;

- a) The suit as canvassed before Court is incompetent, fatally defective in law incurable and cannot stand in law and therefore should be struck out.
- b) The suit offends **Section 238 of Companies Act 2015**.
- c) The suit as canvassed cannot stand and should be dismissed with costs.

The Supporting Affidavit by Counsel for the Respondents averred that in May 2019, on instructions of the 3rd Defendant, Trigentular Holdings Limited he witnessed the signing of share transfer Agreement and Joint Venture Agreement between the 3rd Defendant and Yesbet Limited counsel for the Respondent also witnessed.

The Plaintiff/Applicant was paid Ksh 500,000/- by the 2nd Defendant for and on behalf of 3rd Defendant.

The Deponent Counsel was/is shocked of the Applicant's averments terming his signature a forgery.

The Plaintiff/Applicant filed Supplementary Affidavit on 20th December 2019 to the following effect;

- i) The Respondents failed to remit taxes exposing Yesbet Ltd to steep penalties for tax evasion
- ii) The Respondents collected from people; 'agents' Ksh 100,000/= and changed their company offices

iii) The Respondents engineered fraudulent transfer of 66% of shares of the company Yesbet limited to themselves purporting to become majority shareholders over the operator's licence.

iv) The Respondents side lined the Plaintiff not only as Director but shareholder putting the interest of Yesbet Limited [in jeopardy]

DETERMINATION

The Court considered submissions by parties on the Preliminary Objection.

The essence of a preliminary objection was stated by Law, JA and Sir Charles Newbold P. in Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696. At page 700, Law, JA stated that:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

The Preliminary Objection must be on the face of it a pure point of law which goes to the root of the dispute. It is on whether the Court is clothed with jurisdiction or whether the suit/application filed is competent before the court.

The Pure point of law is argued on the assumption that all facts pleaded by either side are correct and agreed on. In the instant case, the facts are contested as demonstrated by pleadings filed by parties. Therefore, the only Preliminary Objection is whether the suit and application filed offends **Section 238 of the Companies Act 2015**.

Section 238 provides;

(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 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.

The outline of **Section 238 of Companies Act** defines a derivative suit, a member/shareholder may file suit on behalf of the Company seeking relief for the Company and for protection of members against unfair prejudice. The Action maybe brought on act omission or breach of duty by Director. It is not clear in what way the Plaintiff/Applicant's suit and application has offended under **Section 238 of Companies Act**. The Plaintiff/Applicant by virtue of **CR-12** dated 29th August 2019 is confirmed shareholder/member of Yesbet Limited with 340 shares.

The Plaintiff/Applicant filed suit and application Notice of Motion filed on 25th October 2019 and sought as one of the prayers;

a) leave to prosecute the suit as a derivative action on behalf of Yesbet Limited.

The Application has not been heard and determined yet, the Respondents shall be at liberty to raise any objection to the application during *interpartes* hearing.

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.

Section 239 of Companies Act allows a party who did not join the Company as a party to apply to Court for permission to continue with the suit. So the Plaintiff/Applicant's suit/application are competent before the Court. The law grants opportunity to the Applicant to regularize its proceedings to include the Company Yesbet Limited as a party under a derivative suit with leave of Court.

See: Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarlal & Anor[2017] provides;

“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 tall wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation.”

Dadani vs Manji & 3 Others (2004)KLR on derivative suits, provides;

“It is a cardinal principle in Company Law that it is for the company and not an individual shareholder to enforce right of actions vested in the company and to sue for wrongs done to it. It is also cardinal that in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where majority are entitled to present the bringing of an action in relation to such matter (see Foss vs Harbottle (1843) 2 Hake 461). All this is in deference to the self-regulation the law allows corporations and thus limits the interference by the courts in the running of such bodies on their own. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit.”

DISPOSITION

1. For these reasons, the Preliminary Objection is dismissed with Costs to the Plaintiff/Applicant
2. The Matter to be set down for hearing of the application/suit as parties may agree or take directions.

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH AUGUST 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. MUNGANIA FOR THE PLAINTIFF

MS SUNA FOR THE DEFENDANT

COURT ASSISTANT – TUPET

Mr. Mungania: I wish to inform the court that the Plaintiff/ Applicant is deceased

Court: The Ruling shall be read to parties/Counsel as from facts and submissions emanating from the previous circumstances.

Following the information that the Plaintiff/Applicant is deceased, the matter shall proceed upon appointment of Administrator/ Executor of the deceased’s Estate vide a grant of Administration/probate.

M.W. MUIGAI

JUDGE

28TH AUGUST 2020