



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 6 OF 2020

NISSI CIVIL ENGINEERING & BUILDING CONTRACTORS CO. LTD.....PLAINTIFF

VERSUS

JEPITHER GITONGA MAUTA.....1ST DEFENDANT

JEDIEL MUTURA MAUTA.....2ND DEFENDANT

R U L I N G

1. This matter came up on 1/7/2020 for the mention of the plaintiff's Motion dated 23/4/2020. On the same day, the defendants filed a preliminary objection dated the same date. They contended that the Court lacked jurisdiction to hear and determine the matter as the suit was filed without leave as required by law.

2. The Court directed the parties to file their respective submissions. As at the time of writing this ruling, only the defendants had filed their submissions. It was submitted for the defendants that the court granted leave to the plaintiff on 4/06/2020 in **Meru HC Misc. Civ Appln. No. 46 of 2020** to file a derivative suit within seven days.

3. However, the plaintiff did not file the suit. The present suit was filed way back on 24/4/2020 before leave was granted on 26/6/2020. In the premises, the suit was a non-starter *ab initio*. They relied on **Owners of Motor Vessel "Lillian S" v Caltex (Kenya) Ltd [1989] eKLR, Samel Kamau Macharia v KCB & 2 others, Civil Application No. 2 of 2011** and **Nicholas Kiptoo Arap Korir Salat v IEBC and 6 Others [2013] eKLR** in support their submissions.

4. The plaintiff did not file any submissions.

5. The definition of a preliminary objection was set out in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696** wherein **Sir Charles Newbold P.** held: -

"A Preliminary Objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

6. This Court granted the plaintiff leave to commence a derivative suit against the defendants on 26/6/2020. In its ruling, the Court granted the plaintiff 7 days to do so. The plaintiff had not indicated in the aforesaid **Meru HC. Misc. Civ Appln. No. 46 of 2020**, that she had filed this suit and what she needed was leave to continue with it. If she had done so, under **section 239 of the Companies Act, 2015**, the Court would have permitted her to continue with this suit. That, the applicant did not do.

7. The ruling was very clear. The order was futuristic. The suit was one to be filed within 7 days of 26/6/2020. If the plaintiff was desirous that the orders apply in this suit, she should have either filed that application in this suit or apply for the review of that ruling so as to capture this suit. This she did not do.

8. Jurisdiction is everything and without it a court has no power to make one more step but to down its tools. See **Owners of Motor Vessel "Lillian S" v Caltex (Kenya) Ltd [1989] eKLR**. From the foregoing, it is clear that this suit was filed without leave since the leave granted in **Misc Civ. Appln No. 46 of 2020** did not apply to this suit which had been filed 2 months before. Neither can that leave be imported to this suit by implication. This is not a technicality. It goes to the heart of this suit.

9. Accordingly, I find the Preliminary Objection to be meritorious and I uphold the same. In the end the application and the suit are hereby

struck out with costs to the defendants.

Signed at Meru: -

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 17th day of September, 2020.

F. GIKONYO

JUDGE