



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 132 OF 2018

MICHAEL MWANGI WANJOHI.....PLAINTIFF

VERSUS

PATRICK KANGETHE NJUGUNA.....1ST DEFENDANT

EDWARD NJUGUNA KANGETHE.....2ND DEFENDANT

GEORGE JAMES KANGETHE.....3RD DEFENDANT

COMMERCIAL BANK OF AFRICA LIMITED.....4TH DEFENDANT

RULING

1. Michael Mwangi Wanjohi (**Wanjohi**) seeks to continue this claim as a derivative action on behalf of Ndonga Limited (**Ndonga or the Company**). In the Notice of Motion dated 31st October 2018 he also seeks the following prayers:-

THAT this Honourable Court be pleased to issue a temporary injunction Order restraining the 4th Defendant, whether by itself, or through its auctioneers, agents, or servants from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, advertising for sale, selling, disposing of, alienating, transferring, completing the sale, or registering any interests in favour of a third party and/or in any other manner interfering with or effecting transactions inconsistent with the proprietary interests and rights of NDONGA LIMITED, as the registered proprietor of all that parcel of land known as Land Reference Number 209/12513 (I.R No. 64007), pending the hearing and determination of this suit.

2. Wanjohi states that Patrick Kangethe Njuguna (**Patrick or the 1st Defendant**), Edward Njuguna Kangethe (**Edward or the 2nd Defendant**), George James Kangethe (**George or the 3rd Defendant**) and himself were at all material times to this suit directors of Ndonga. The Company is the registered proprietor of all that parcel of land known as Reference Number 209/12513, Moi Avenue, Nairobi (**the suit property**). That property is currently charged to Commercial Bank of Africa Limited (**The 4th Defendant or CBA or the Bank**).

3. Wanjohi asserts that notwithstanding that he was a director of the company he was neither aware nor involved in the transaction that resulted in the property being charged to the Bank. He accuses the 1st to 3rd Defendants of unlawfully causing or procuring the suit property to be charged to the Bank. In the Plaint amended on 3rd December 2018, he seeks the following prayers:-

*1. An order of permanent injunction restraining the 4th Defendant, whether by itself, its auctioneers, agents, or servants from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, advertising for sale, selling, disposing, alienating, transferring, completing the sale, or registering any interests in favour of a third party and/or in any other manner interfering with the quiet possession, occupation and enjoyment of all that piece of land known as **LAND REFERENCE NUMBER 209/12513, Moi Avenue Nairobi** and registered to and owned by **NDONGA LIMITED**.*

2. A declaration that the 1st to 3rd Defendants willfully and recklessly abuse their trust and obligations as well as duty owed to the Company.

*2A. A declaration that the loan facility advanced by the 4th Defendant to the 1st to 3rd Defendants on the strength of the security known as **LAND REFERENCE NUMBER 209/12513, Moi Avenue Nairobi** did not bind the Company, **NDONGA LIMITED** or at*

all.

2B. A declaration that the charge created over LAND REFERENCE NUMBER 209/12513, Moi Avenue Nairobi by the 1st to 3rd Defendants in favour of the 4th Defendant is for all intents and purposes null and void.

3. An order that the 1st to 3rd Defendants do indemnify the Plaintiff as well as the Company, **NDONGA LIMITED** against all and any liability (including, without prejudice to the generality of the indemnity, all and any liability for interest and costs arising on the part of the Company from the Action and all and any costs incurred by or on behalf of the Plaintiff and the Company in prosecuting the Action.

4. An order that the Defendant do disclose and account for all details relating to the loan facility or any other so obtained facility and payment of all sums found due to the Company on taking the Account above by the 1st to 3rd Defendants personally.

5. Costs of this suit together with interest thereon.

6. Such other or further order as this Honourable Court may deem fit to grant.

4. In replying to the application, Patrick states that at no time was he involved when Ndonga approached the Bank for financial facilities. He denies taking part in any meeting where a proposal for the application for financial facilities was discussed or approved. Further, that he is not aware of any benefit that flowed from the alleged financial facility to Ndonga.

5. Edward swore a replying affidavit on 18th May 2020. Under a written authority dated 18th May 2020 he also pleads on behalf of George. He asserts that Ndonga is the registered owner of L.R No. 209/12513. He gives the history of the directorship of the company. That upto August 2013 he, together with George and Gladys Njeri Kangethe (**Gladys**) were directors of the company. Gladys resigned and was replaced by Patrick and Wanjohi.

6. He states that any decisions affecting the company would only be through a board of directors comprising a quorum of at least three members in terms of Article 11 of the Articles of Association of the company. That only he and George were involved in the application and acquisition of the facility from the Bank and that the Bank did not demand that the other directors be involved.

7. Edward then introduces another matter. That it has dawned on him that the Bank had not registered any interest in the subject property and that the title document used in the purported charge was a forgery.

8. In a further affidavit sworn on 18th June 2020, he takes issue with the registration of the charge instrument. He contends that although the Bank appears to have presented the charge instrument for registration on 17/12/13 under presentation Day Book 1674, the records at the land registry shows that the Day Book number does not exist.

9. The Bank opposes the application. It states that Ndonga approached it for various facilities among them a term loan of Kshs.100,000,000/= to finance the balance of the purchase price in respect of the property. Upon approving the request, the company presented it with minutes of its board meeting held on 27th August 2013 and the minutes presented complied with Article 11 of the Articles of Association of the Company. The Bank states that it was not privy to any internal wrangles between the directors of the company.

10. The application before Court has two limbs. In the first, the Plaintiff seeks leave of this Court to continue this claim as a derivative claim on behalf of Ndonga. The second is directed at the Bank only. It is for an order of injunction to restrain the Bank from commencing realization of security, exercising its power of sale, advertising for sale, selling, disposing of, alienating or in any other manner interfering with the rights of Ndonga Limited as the registered owner of the suit property. The Court will consider the plea for permission first.

11. Our Courts have on many occasion set out the approach and criteria for grant or refusal of permission for the continuation of a derivative action within the statutory precincts of Part XI of the Companies Act No. 15 of 2017 (The Act). In the decision of **Michael Mwangi Wanjohi V Patrick Kang'ethe Wanjohi & 3 others**[2019]eKLR cited by counsel for the Bank and which the other parties herein would be familiar as they were the main actors therein, this Court observed:-

“9. On a plain reading of Section 239, it seems that the application for permission is a two stage process, (see Onguto J. in Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwartal & another [2017] eKLR). The first is provided under Section 239(2) in which the Court, in an ex parte session, assesses the application and the evidence adduced by the Applicant to see whether it is worth of further consideration. If the Court comes to the conclusion that it does not disclose a case for giving permission then it shall dismiss the application and that may be the end of the matter. The application will not have passed the screening stage. Where however the Court does not dismiss the application it proceeds under sections 239(3) and 239(4). This is the second stage. At this stage the Court may give direction as to the evidence to be provided by the Company and will grant an opportunity for that evidence to be obtained. The Court will then be ready to consider the application.

10. It seems to this Court that the nature of evidence that needs to be provided by the Company is that which can assist the Court make an evaluation as to whether the conditions and factors set out in section 241 of the Act and those developed under common law tradition (but not inconsistent with statute) are met. In the matter at hand the application was heard interparties and the Court did not give directions as to the evidence to be provided by the Company. The Court did not deem this as necessary as all the Directors and Shareholders of the Company are parties to the suit and each have given their perspective of the matter. The Court takes the view that it has sufficient material before it to determine whether or not the application passes the test for permission.

12. The onus is on the Applicant to make out a prima facie case that on its pleadings and on facts presented, the suit deserves to proceed as a derivative claim.
13. I need to emphasize this early that the suit is presented by the Plaintiff and belongs to him although he now wants it to continue as a derivative claim on behalf of Ndonga Limited. In responding to the Plaintiff's request for leave the 1st, 2nd, and 3rd Defendants attempted to introduce matters around the validity of the registration of the charge document and therefore the validity of the security held by the Bank. The suit does not belong to the three Defendants and they are in fact sued. They cannot purport to introduce matters not taken up in the Plaintiff and seek to improve the prospects of a case in which they are at the receiving end (or at least ought to be). For this reason the Court confines itself to what is pleaded by the Plaintiff. The permission is sought on the basis of the Amended Plaintiff and must be scrutinized from that perspective.
14. Cast in that pleading is a complaint by the Plaintiff that the 1st to 3rd Defendants caused or procured **"the charge of the company property (the suit property) in favour of the 4th Defendant to secure private loans for the Directors without a company resolution to that effect"** (Paragraph 12 of the Amended Plaintiff). In Paragraph 13, the Plaintiff reveals the underlying objective of these proceedings. That it is intended to protect the company property and that the 1st to 3rd Defendants ought to be held personally liable to meet the financial obligation due to the Bank as they obtained it in disregard to procedure and in their own capacity.
15. Of significance is that in those pleadings no blame or allegation is made against the Bank. There would be no reason to allow the claim against the Bank because no wrongdoing is attributed to it and that, really, should be the end of the matter as against the Bank. That said the Bank thought it prudent to confront the allegation around the impropriety of the resolution.
16. Shown to Court is an extract of minutes of a meeting of the board of directors of the company said to have been held on 27th August 2013. In attendance were Edward, George and Gladys. In it, the board resolves to borrow Kshs.189,509,000/= from the Bank and to grant, amongst other securities, a first legal charge of Kshs.100,000,000/= over the suit property.
17. Edward and George do not deny attending this board meeting. Neither do they state that Gladys did not attend the meeting. Instead they claim (and this is shared by the Plaintiff) that Gladys was not a director of the company having resigned by August 2013 and having been replaced by the Plaintiff and Patrick (the 1st Defendant). However, a copy of a CR 12 dated 11th February 2016 obtained by the Bank shows that according to the records held by the Department of the Registrar General the directors of the company as at that date are Edward, George and Gladys. This then needs to be compared with the CR 12 produced by Wanjohi which shows that as at 17th August 2013, ten days before the meeting of 27th August 2013, the directors were himself, Edward, George and Patrick. In essence, that Gladys was not a director.
18. What the Plaintiff needed to demonstrate was that as at 27th August 2013 (the day of the meeting) Gladys was not a director of the company. A copy of the record of 17th August 2013 does not establish this crucial aspect of the Plaintiff's case. Is it possible that the directorship changed so soon after 17th August 2013 because by 11th February 2016 the position was not the same? Put differently, is it not possible that although Gladys may not have been a director as at 17th August 2013, she was a director on 27th August 2013 and continued to be on 11th August 2016? What was difficult about the Plaintiff obtaining the records as at the date of the meeting?
19. The Plaintiff has not made out a prima facie case that the resolution presented to the Bank was flawed or faulty or illegal. Taking that into account, and that as early observed, no wrongdoing is attributed to the Bank, it is needless to have a case maintained against it.
20. As for the other Defendants they support the continuation of the suit.
21. This then are the Court's orders. The Application of 31st October 2018 is allowed only to the limited extent that leave is granted to the Plaintiff to continue this claim as a derivative claim on behalf of Ndonga Limited against the 1st, 2nd and 3rd Defendants. Leave to continue against the 4th Defendant is declined. As the action against the 4th Defendant is a cropper so too must the Application for injunction against it fail. Costs of the application and suit to 4th Defendant. The other costs shall be in the cause.

Dated, Signed and Delivered in Court at Nairobi this 18th Day of December 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE