



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO. 13 OF 2018

IBACHO TRADING COMPANY.....PLAINTIFF

VERSUS

SAMUEL MONDA NYONGOKI ONDORA.....1ST DEFENDANT

WILLIAM ONSONGO MAYAKA.....2ND DEFENDANT

WILLIAM OMBONGO MATUNDURA.....3RD DEFENDANT

DONALD BARONGO MOCHAMA.....4TH DEFENDANT

REGISTRAR OF COMPANIES.....5TH DEFENDANT

RULING

1. The plaintiff/applicant (the Applicant) filed an application dated the 24th of December 2018 seeking to restrain the 1st to 4th Defendants/ Respondents (the Respondents) by themselves, servants, agents or any person acting under their instruction from acting holding themselves, representing, managing, selling, transferring, collecting rent, spending, transacting or in any manner interfering with the management of the plaintiff's affairs. Simultaneous with the application the plaintiff filed a plaint dated the 24th December 2018. The plaintiff seeks judgment against the defendants jointly and severally for;

a) A declaration that the 1st to 4th defendants are not entitled to act, hold themselves, manage or purport to be legally elected directors of the plaintiff

b) Permanent injunction do issue against the defendants 1st to 4th defendants themselves, servants, agents or any person acting under their instruction from acting holding themselves, managing, acting, transacting, representing, selling, collecting, withdrawing money, spending, transferring or in any manner purporting to be legally elected directors of the plaintiff with mandate to run the affairs of the plaintiff.

c) An order directed to the 5th defendant requiring him/ her to delete the names of the 1st to 4th defendants from the plaintiff's list of directors and replacing the same with the names of **John Kenyaga Mochama, Kevah Nyakundi Gadinar, Zablun Ombongi, Rodah Ondieki, Mary Ratemo, Truphena Moraa, Ogata Siriako, Nelson Moruri and John Arumba.**

d) General damages.

2. On the 3rd January 2019 the 1st to 4th Respondents filed a Notice of Preliminary Objection on the following grounds that ;

a. **The plaintiff's case is subjudice and/or res judicata.**

b. **The applicant lacks the requisite locus standi to institute this suit and therefore should be struck out with costs.**

c. **The application and the suit is frivolous and vexatious and an abuse of the process of the court and therefore should be struck out with costs.**

3. On the 14th January 2019 the 5th defendant too filed a Notice of Preliminary Objection on the following grounds that ;

i. The dispute as framed has been commenced in violation of Part XI of the Companies Act 2015, the suit is therefore incompetent before the Court and is liable to be struck out.

ii. The cause of action and the suit as framed is statutorily time barred and stale.

4. The application dated the 24th of December 2018 is supported by the affidavit of John Kenyaga Mochama who describes himself as a duly elected director of the plaintiff company. The application was opposed. A replying affidavit was filed by William Onsongo Mayaka the 2nd defendant who describes himself as the elected chairman of the plaintiff's board of directors. When the matter came up for hearing I directed that the parties proceed with the preliminary objections filed by the respondents.

5. Mr. Matoke for the 1st to 4th Respondent submitted as follows; the applicants have no *locus standi* to file suit as they failed to comply with the provisions of Order 4 Rule (1) (4) which provides that *"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."* That the minutes attached by John Kenyaga the deponent of the Applicant's affidavit does not show whether the persons present at the meeting were just members or directors. That exhibit 1b shows the list of directors as per the register at Companies Registry. That members number 6, 7 and 8 as per the resolution dated 2/1/2018 are not directors. That there was no quorum in the meeting giving the deponent authority to act for the plaintiff and therefore the resolution did not meet the legal threshold as provided in regulation 6 & 7 of the articles of association. That the resolution of 2/10/ 2018 was only signed by one director in contravention of the provisions of regulation 22 of the articles of association, that any resolution of the company must be signed by two directors. That the deponent of the applicant's affidavit has not shown that there was a resolution that the plaintiff company instructed the firm of Ombachi advocates to sue the defendants. That the suit as it stands was not properly instituted and should be struck off.

6. It was further argued that the matter is *res judicata* as there is a judgment in High Court Civil Case No. 25 of 2014, the plaintiff sought the same orders, what they have now is to have the 5th defendant delete the names of the directors. That the suits are substantially the same, the defendants are the same. That at paragraph 40 of the judgment in Civil Case no. 25 of 2015 Justice Okwany held that *"My take is that at the center of this case is the issue of the company directors elections. This is an internal affair of the company which courts have held that they should not interfere with. My view is supported by the decision in the case of Foss vs. Harbottle (1843) 2 Hare 261 where it was stated that courts will interfere only where acts complained of is ultra vires, or is fraudulent or not rectifiable by an ordinary resolution. In the instant case, I find that the matters complained of do not border on fraud or ultra vires but are such that can be resolved by the company itself. My humble view is that the order sought by the plaintiff in this case, to declare who is or who is not duly elected director of the company or who should call for meetings are clearly the company's affairs in which this court should not interfere."*

7. That the plaint in this suit raises issue of fraud that even if they had the *locus* to file suit where there is fraud the court should intervene, the plaint should be brought through derivative action and not through the company which is the rule in the case of **Foss vs. Harbottle (supra)**. That by virtue of the judgement in **Civil Case no. 25 of 2014** the matter has been heard and determined, and therefore the suit is vexatious and an abuse of the court process. That the case at Keroka has not heard and there is a presumption of innocence. That under section 6 of the Civil Procedure Act the court can stay the criminal suit until the elements of fraud are proved. The 1st to 4th Respondent sought to have the suit struck off with costs.

8. Mr. Odhiambo for the 5th Respondent argued the applicant has not complied with the provisions of **section 238 and 239 of the Companies Act**, that the applicant should have sought permission to continue with the derogative claim. That there was a previous suit with a similar action in HCC No. 25 of 2014, the parties are the same. That only 2 persons are missing but the 1st, 3rd and 4th defendant are the same and that the matter is *res judicata* should be dismissed with costs.

9. Mr. Ombachi for the Applicants in response submitted that sections 238 and 239 are irrelevant to this matter as the rights referred to are rights given to minority shareholders. That the issues in this suit are *ultra vires* and is based on fraud. That the preliminary objection is premised on the position that the 1st to 4th defendants are true directors is not the true position. That at paragraph 4 of the plaint the Applicant's state that the 1st to 4th respondents fraudulently presented forged documents to the registrar of companies purporting to be genuine documents from the plaintiff company. That the 1st to 4th respondents have not shown any notice calling for a meeting in conformity with the memorandum of articles and company law. That the suit is brought by the company against persons who have violated the memorandum and articles of association and are illegally running the affairs of the plaintiff company. That the resolution of 2/10/2018 gave the plaintiff authority to institute the suit. That the plaintiff cannot bring a derivative suit against itself and that section 238 of the Companies Act gives the court wide discretion in dealing with procedural matters if it's a matter brought by the minority. That the issues raised are not on pure points of law as the respondents referred to several exhibits to bring out their points. On *res judicata* it was submitted that the issues raised in the pleadings are different and are not the same as in the previous suit. That the cause of action in this suit arose in 2017, the previous suit was filed in 2014, the suit is not *res judicata* and the provisions of section 7 do not apply. That there were minutes to showing that there were 8 members in the meeting, the seal exhibited is clear. That the court should go into the heart of the matter on whether there was a fraud against the company by the respondents. That the 2 the criminal case and the civil case are properly before the court as both are based on fraud. That the court can make appropriate orders under section 3A of the Civil Procedure Act (the CPA) for the ends of justice. The Applicant sought to have the preliminary objection dismissed.

10. In determining whether the preliminary objections can be entertained, this court is guided by the decision in **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd (1969) EA 696** where it was held as follows:

"A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of judicial review does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."

11. From the parties submissions the issues this court is called to determine are as follows:

- i. Whether the applicant have the locus to file this suit
- ii. Whether the matter is res judicata
- iii. Whether the provisions of section 238 and 239 apply in this matter

12. On the 1st issue of failing to comply with the provisions of Order 4 Rule 1 Justice Okwany in her judgment in **Civil Case 25 of 2014 (supra)** held as follows that “The authorization envisaged by Order 4 Rule 1 (4) is written authority under seal, but courts have however held that the mere failure to file the resolution of a company together with the plaint did not invalidate the suit as such a resolution could be filed at any time before the suit is fixed for hearing. (See **Leo Investments Ltd vs. Trident Insurance Company Ltd [2014] eKLR and Republic vs. Registrar General and others (2005) eKLR**). Kimaru, J in **Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** held that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit. I associate myself with the findings of Justice Kimaru and Justice Okwany. This limb of the preliminary objection therefore fails. Further I note that the issue being challenged is the legality of the defendants as directors of the plaintiff company. This in my view is not a matter that can be dealt with by way of preliminary objection.

13. The doctrine of res judicata is provided for under Section 7 of the Civil Procedure Act which provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. For the doctrine to be applied, it must be established that all of the following elements have been satisfied:

- i. The suit or issue was directly and substantially in issue in the former suit.
- ii. That former suit was between the same parties or parties under whom they or any of them claim.
- iii. Those parties were litigating under the same title.
- iv. The issue was heard and finally determined in the former suit.
- v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

14. I have read the plaint filed in by the plaintiff. At paragraph 4 it is averred that, “On or about August 2017 the 1st to 3rd Defendants illegally, fraudulently and wrongfully presented forged documents to the registrar of companies purporting to be the genuine documents. This is a new cause of action based on fraud for acts alleged to be done in August 2017. The cause of action arose as a result of actions alleged to be done by the defendants in August 2017. The issue for determination are the alleged fraudulent acts of the defendants. The previous suit said to be similar to this one was not based on fraud, some of the parties were parties in the previous suit, however, I therefore find that the matter is not res judicata.

15. On the issue whether section 238 and 239 of the Companies Act apply in this matter. The rights referred under the said section are rights given to minority shareholders. It is an action brought on behalf of the corporation by shareholders. This is not the case in this matter. This objection has no merit. All in all I find no merit in the preliminary objections raised they are dismissed with costs.

Dated, signed and delivered at Kisii this 27th day of March 2019.

R.E.OUGO

JUDGE

In the presence

Plaintiff Present

Mr. Matoke For the 1st to 4th defendants and

h/b For the 5th Defendant

Rael Court Clerk