



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

MISC APPL NO. 78 OF 2019

P& L CONSULTING COMPANY LIMITED.....PLAINTIFF

-VERSUS

SCRIBE SERVICES REGISTRARS.....1ST RESPONDENT

DIANA GICHAGA.....2ND RESPONDENT

MARGARET GICHAGA.....3RD RESPONDENT

RULING

PLEADINGS

By a Notice of Motion dated 5th February 2019, the Applicant prayed to the court for the following orders;

- a) That the court to grant the Applicant leave to institute and prosecute a derivative action against the company secretary and the former director of the company on behalf and for the benefit of the Applicant company herein;*
- b) An order for a mandatory injunction be issued pending the hearing and determination of this application, compelling the Respondent whether by itself, servants and/or agents to release the Applicant and all of the Applicants and those of its affiliates; files and other relevant documents currently in their possession.*

The Applicant prayed to the court for the matter to be heard urgently on the grounds that;

- a) The 1st Respondent has failed to release the files belonging to the Applicant herein or to reconfigure the company as per the current director's instructions, claiming to be taking directions from the 2nd Respondent herein, now a stranger to the company, despite numerous attempts to have the company reconfigured or its files released back to the Plaintiff from the 1st Respondent's possession;*
- b) The Respondents have greatly inconvenienced the Applicant in running its day to day affairs and business due to the unavailability of their company files and the improper and negligent part on reconstruction of the company to the Applicant's detriment;*
- c) The Applicant is apprehensive that the Respondents may go ahead and further tamper with how the Applicant is construed, its running of business and even loss of it, with the continued possession of the Applicant's files and further reconstruct the Applicant as it wishes to the Applicants dire detriment.*

2ND RESPONDENT'S REPLYING AFFIDAVIT

The 2nd Respondent, **Diana Gichaga**, a former Director of the applicant company, in a replying affidavit dated 15th February 2019 stated that she joined the applicant company as a shareholder in 2013 and was a non-executive Director until 2016 when she started working fulltime.

The 2nd Respondent also stated that she nominated the 3rd Respondent who was her mother, to hold **49%** of shares therein on her behalf pending her transition to full-time executive role with the applicant company.

Furthermore, the 2nd Respondent stated that it was indeed true that a board resolution was agreed to have her resign as an executive director of the Applicant company where she would transfer her shares to the remaining shareholder, **Mercy Randa**, upon an expressly written letter stating that she would have no further claims against the 2nd Respondent and that **Mercy** would also move with the clients that the 2nd Respondent had engaged with for **Private Equity Business**.

The 2nd Respondent also stated that while the process was pending, one of the issues was raised was that the 2nd Respondent was to pay the Applicant company monies upon her exit. This was based on a valuation report done by **M/S Clyde & Associates** indicating that her shareholding of **49%** at the company was negative to a tune of **Kshs.14,444,265.24**, whilst that of the other Director was valued at **Kshs.14,181,411.70** being **51%** of the shareholding.

The 2nd Respondent protested against the said narrative and wished to state that to the best of her knowledge, the apparent company was a limited liability company governed by the **Memorandum and Articles of Association**.

The Company was valued at **Kshs.28,625,676.94** as at 2016, then **49%** of **kshs.14,444,265.24**, as a shareholder cannot be legally compelled to transfer their shareholding whilst simultaneously paying for the same.

APPLICANTS FURTHER AFFIDAVIT

In response to the 1st Respondent's Replying Affidavit the Applicant replied through a further affidavit dated 6th March 2019. The Applicant stated that it attached an official status report which was formerly Form **CR12** from the **Registrar of Companies** which reflected that the 3rd Respondent is a shareholder whereas **Mercy Randa** was a Director and Shareholder, hence having *locus standi* to file for the orders under the above application.

The Applicant denied that the 1st Respondent was still the Company Secretary of the Applicant Company as the company had withdrawn their instructions for such agency and had requested the 1st Respondent to hand over all files in their custody on or about early 2018.

The Applicant also stated that it was untrue that the agreement of the parties was to transfer the **49%** shares held by the 2nd and 3rd Respondent upon furnishing the 2nd Respondent with a letter or undertaking to the effect that the remaining Director shall not make any demand for payment on the basis of the Valuation Report requisitioned and commissioned by the 2nd Respondent herein.

1ST RESPONDENT'S REPLYING AFFIDAVIT

The Director of the 1st Respondent replied to the sworn affidavit of **Mercy Randa** dated on 18th February 2019.

The Director of the 1st Respondent, **Bernard Kiragu** stated that he was aware that the 2nd and 3rd Respondents' had an interest in the affairs of the company, where the 3rd Respondent held **49%** of the shares of the Company on behalf of the 2nd Respondent.

1st Respondent stated that he recalled instructions of the 2nd Respondent via a board resolution which resolved that the 2nd Respondent should cease to be a Director of the Applicant Company and further have the shares held in her trust by the 3rd Respondent, **Margaret Githaga** transferred to the existing Director, **Mercy Randa**.

1st Respondent also stated that the issues agreed upon were that the shares shall be transferred to the existing Director upon furnishing the 2nd Respondent with a letter/undertaking to the effect that the remaining Director shall not make demand for payment on the basis of the valuation report attached to the application dated 5th February 2019. Despite verbal promises from the existing Director, the letter/undertaking had not been availed to him.

1st Respondent also stated that the 3rd Respondent duly signed the shares transfer form in favour of the existing Director which remains in the custody of the 2nd Respondent as a beneficial owner of those shares, due to the outstanding undertaking from the remaining Director.

1st Respondent also stated that he was holding files as a lien over unpaid fees amounting to **Kshs.226,510** as annexed in **BK 2**, which are copies of invoices raised to the applicant company.

DETERMINATION

The Applicant sought orders for leave to file a derivative suit against the Company Secretary and former Director of the Company on behalf and for the benefit of the Company.

The 2nd request for mandatory injunction will be considered after the 1st request is /not granted.

With regard to leave to file a derivative suit the Companies Act prescribes;

Section 238 (1) of the Companies Act defines derivative claim as 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.

Section 238 (2) of the Companies Act provides that a derivative claim may be brought only:-

a) under this Part; or

b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act or the wrong complained of, contravenes the objects of the company and cannot be ratified by ordinary resolution.

From the above provisions, the Applicant a Director of the Company may bring in Court a suit for and in the interest of the Company against member(s) of the Company.

The Applicant's claim is that due to ongoing dispute between Co- Director(s) and Company Secretary; documents of the Company have not been released/returned to the Company's head office. The carting

away of Company's documents is against the interest of the Company, which would hamper/hinder smooth operations of the Company which is against the objects of the Company. In spite of the ongoing disputes amongst Directors/shareholders/members of the Company; the documents of the Company ought to remain at its headquarters to facilitate normal operations. The Company is a separate legal person/entity from the Applicant and Respondents.

Due to these reasons, the Applicant has brought proceedings on behalf and for the benefit of the Company and is hereby granted leave to file the derivative suit, serve the parties and the matter is heard and determined on its merits.

Whilst leave is granted, the Company Secretary has a claim against the Company of payment of services rendered to the Company, the Company documents ought to be released upon payment by the Company of the debt.

With regard to the 2nd Respondent on being removed as Director whether her shares are to be transferred to her mother 3rd Respondent with or without payment of the value of shares and/or debt to the Company are issues to be resolved during the hearing of the derivative suit.

DISPOSITION

- 1. The Applicant's application seeking leave to file derivative suit on behalf of the Company is granted.**
- 2. The matter be heard on a date to be obtained by parties from Registry.**
- 3. Each party to bear own costs**

DELIVERED SIGNED & DATED IN OPEN COURT ON 27TH MAY 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MS OWOUR HOLDING BRIEF MS. AKELLO FOR APPLICANT

MS WEKESA HOLDING BRIEF MS SIFUNA FOR 1ST RESPONDENT

MS WEKESA HOLDING BRIEF MR. NGIRA FOR 2ND & 3RD RESPONDENT

COURT ASSISTANT – JASMINE

Ms Awour: In the circumstances Mrs Akello will be applying for the typed Ruling.

Court: Copies will be availed before the Deputy Registrar Commercial Division on 29th May 2019.

M.W. MUIGAI

JUDGE

27TH MAY 2019