



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HIGH COURT CIVIL CASE NO. 1 OF 2019

IBRAHIM MUKHTAR ABASHEIKH.....PLAINTIFF

VERSUS

KAAB INVESTMENTS LIMITED.....1ST RESPONDENT

KCB BANK LIMITED.....2ND RESPONDENT

NIC BANK LIMITED3RD RESPONDENT

Waziri Omollo & Co. Advocates for the Plaintiff Gicharu Kimani & Associates for the

1st Respondent Munyao Muthama & Kashindi Advocates for the

2nd Respondent Iseme, Kamau & Maema Advocates for the 3rd Respondent

RULING

The 1st and 3rd Defendants' herein filed preliminary objections dated 8th April 2019 and 28th February 2019 respectively both seeking to have the Plaintiff's application and suit dated 25th January 2019 struck out.

Briefly, the background of the matter is that the Plaintiff herein, Ibrahim Mukhtar Abasheikh instituted a suit against the Defendants herein seeking inter alia injunction and freezing orders against the Defendants themselves as well as the directors of the 1st Defendant Company on various grounds advanced therein. While the Plaintiff is neither a Director nor a Shareholder of the 1st Defendant Company, there is a Special Power of Attorney dated 26th November 2018, that was annexed to the Plaintiff's application which purports to donate to him by one Balwinder Kaur Sagoo a Director and shareholder of the 1st Defendant Company, the power to institute civil proceedings.

The 3rd Defendant's objection was based on the following point:

1. That the suit instituted herein is bad in law in that the Power of Attorney of a disclosed principal Baldwinder Kur Sagoo held by the plaintiff, Ibrahim Mukhtar Abasheikh does not authorize him to institute proceeding in his own name and his doing so has rendered these proceedings fundamentally and incurably irregular and as such the same should be dismissed with costs

The 1st Defendant's objection on the other hand was based on the following points:

1. The suit is in breach of clause 6 of the alleged Special Power of Attorney registered on 11th December 2018 and the plaintiff therefore lacks locus standi to institute this suit.

2. The suit is in breach of the provisions of Part XI of the Companies Act, 2015.

3. The plaintiff cannot approbate one set of documents (the resolution/ minutes and Transfer Shares dated 13th October, 2013) and reprobate another set of documents (the resolution/ minutes and Transfer Shares dated 15th January, 2015) which are prepared in similar circumstances.

This court directed that the matter proceed by way of written submissions which all the respective parties' advocates subsequently filed and exchanged.

Plaintiff's Submissions

For a definition of what comprised a preliminary objection, Mr. Waziri advocate for the Plaintiff placed reliance on **Hotstar Investment Limited vs Peter Kuria (2019) eKLR** and **Republic vs Eldoret Water and Sanitation Company Ex Parte Booker Co and 2 others [2007] eKLR**

Counsel framed the issue as whether the Preliminary Objections as filed raised issues of law or were a concoction of both issues of law and fact. He further submitted that the 1st Defendant doubted the validity of the Special Power of Attorney hence this was a substantive issue which ought heard and determined at the full trial. He made the case that the Defendants' were interpreting the clause that donated the power to institute suit in a lopsided manner and that on proper interpretation, the Power of Attorney did not bar the Plaintiff from instituting the suit in his own name but gave him unfettered discretion to do everything as may be necessary to prosecute the suit to its logical conclusion.

On whether the suit is a derivative suit, it was submitted that one of the principles of a derivative suit was that the subject matter should not be marked with illegality which was not the case.

In the instant matter as the substratum of this suit was grounded on illegality committed by the Directors of the 1st Defendant company. Reliance was placed on **Dedani V Masiji and 3others [2004] eKLR**. Counsel sought to distinguish the instant suit from the provisions of **Section 238(3) of the Companies Act, 2015** as the said provision alluded to a suit brought where the cause of action involved negligence, breach of duty or breach of trust by a Director of the Company while his client's case involved fraud, forgeries and material non disclosures.

1st, 2nd and 3rd Defendants' Submissions

Per the Defendants', the relevant clause of the Special Power of Attorney was clause 6 which gave the donee the power:

"6. To institute or cause to be instituted, in my name as a shareholder or in the name of the Company, civil proceedings and in that regard to swear affidavits, issue statements, give evidence and do all such acts as may be necessary to prosecute the suit to its logical conclusion."

According to the Defendants therefore, the Plaintiff as donee could only bring the suit in the name of the donor Bawinder Kaur Sagoo, or in the name of the company, Kaab Investment Limited, the 1st Defendant herein. It was submitted that by instituting the suit herein in his own name as opposed to doing so in the donor's or the 1st Defendant's name, the Plaintiff had acted in excess of his powers as stipulated in the Special Power of Attorney. As such, the suit was fatally defective and the court ought to uphold the preliminary objection and strike out the suit. Reliance was placed on the cases of: **Anthony Maina Njiiri (suing as attorney for James Njiiri) vs National Bank of Kenya Ltd [2010] eKLR**; **Bryant, Powis and Bryant Ltd vs La Banque Du Peuple, Bryant Powis and Bryant Ltd vs Quebec Bank [1893] A.C. 170 (1891-4) ALL E.R. 1253**; **Mohammed Hassim Pondor & Another vs Resident Travel Limited & 3 Others [2013] eKLR** and **Republic vs Public Procurement Administrative Review Board Ex parte Symphony Technologies Limited (Kenya) & 2 others (2016) KLR**.

Regarding whether the Plaintiff's suit was a derivative claim and whether the same was properly instituted, it was submitted that it was a derivative suit and hence the Plaintiff ought to have followed the procedures laid out under Part XI and specifically **Sections 238(3) and 239 (1)** of the Companies Act, 2015. Since the Plaintiff had not endeavoured to do so, the instant suit was invalid for want of authority and leave of court to institute and continue the derivative suit. Reliance was placed on the cases of: **Foss vs Harbottle (1843) 2 Harn 461**; **Hawes v Oakland 104 U.S 450 [1881]**; **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another (2017) eKLR**; **Timau Farmers Company Ltd & Another v John Gathogo & 6 Others [2016] eKLR** and **Lawrence Mwangi Wambooh & 7 others vs Francis Wainaina Mugo & 9 others [2017] eKLR**.

Analysis and Determinations

Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696 set out the precincts of a preliminary objection as:

"so far as I am aware, 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 per Sir Law J.A."

Sir Charles Newbold P. in the same case stated that:

"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 has to be ascertained or if what is sought is exercise of judicial discretion."

Per Ojwang, J (as he then was) in **Oraro v Mbaja (2005) [2005] LLR 7550 (HCK) 1 KLR 141**, 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. Further, 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.

I have duly apprised myself of the contesting arguments and authorities cited set out in the submissions in support of the respective positions taken by the parties. What flows from the arguments made in support of the Preliminary Objection is that according to the Defendants' the

Plaintiff did not have the locus standi to sue in his own name as the Special Power of Attorney was very specific in donating the power to institute a suit. Further it was argued that as the Plaintiff's suit was derivative in nature, it was fatally defective for failure to comply with the provisions relating to the institution of derivative suits as outlined under Part XI of the Companies Act, 2015.

The crux of Plaintiff's advocate argument on the other hand was that the preliminary objection contained factual issues and that the wording of the impugned clause in the Power of Attorney did not bar the Plaintiff from instituting the suit in his own name. It was further argued that the application and suit dated 25th January 2019 was not a derivative suit and even if it were, leave to institute said suit could be granted at any stage hence submitting on this ground amounted to putting the cart before the horse.

My analysis of the issues leaves only one conclusion. The Power of Attorney upon which the Plaintiff relied on to institute the suit was unambiguous in providing for suits to be instituted in the name of the donor and not the donee as the Plaintiff herein did. There can only be one interpretation of the impugned phrase which for completeness I have highlighted below:

"6. To institute or cause to be instituted, in my name as a shareholder or in the name of the Company, civil proceedings and in that regard to swear affidavits, issue statements, give evidence and do all such acts as may be necessary to prosecute the suit to its logical conclusion."

Lack of capacity, and indeed this case indeed express authority donated under power of attorney is indeed a point of law upon which a preliminary objection may be founded. I am inclined to agree with the holding by **Ogola J** in **Mohammed Hassim Pondor & Another vs Resident Travel Limited & 3 Others [2013] eKLR** where faced with a preliminary objection filed under similar circumstance, he expressed himself thus:

"9. I have carefully considered the Preliminary Objection by the Defendants. I have considered the said Power of Attorney, the submissions of the parties and the case law. It is clear to me that by filing the suit in his own name the Plaintiff exceeded the power and authority ceded to him in that Power of attorney. The Power of Attorney is replete with clauses restricting the powers of the donee. Clauses 1 (e), (g), (i) and Section B (1) required the donee to act "in the name of, and on behalf of the donor."

On this ground alone therefore, the preliminary objection succeeds. Having ruled so, I need not go further. However, I am inclined to comment on the second issue raised by the Defendants for the purposes of making my final orders. Erstwhile, the procedure for bringing derivative suits was not codified in law and different approaches were used by parties seeking to rely on said relief to ameliorate the actions of rogue directors and shareholders. The advent of the Companies Act, 2015 heralded a new dawn.

Derivative claims and the procedure for instituting them became codified under Part XI of that Act. So while the Plaintiff's advocate advanced the argument that the suit was not derivative in nature, an examination of the pleadings reveals that they fit the description ascribed to derivative claims under **Section 238 (1)** which 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."***

Section 238 (2) of the Act further mandates that a derivative claim can only be brought under the Act while **Sections 239-242** outline the procedure to be followed, which procedure was not adhered to by the Plaintiff in bringing his application and suit dated 25th January, 2019.

On this line of reasoning, I draw inspiration from the holding in **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another (2017) eKLR** where the court held inter alia:

"44. Statutory procedure is now the exclusive method of pursuing derivative claims. The Act sets out what sorts of company claims may be pursued and is also explicit that derivative claims may only be pursued under the Act. The question must only be the factors the court ought to consider before approving a derivative claim.

45. There appears, in my view, to exist a two stage process. The court must first satisfy itself that there is a prima facie case on any of the causes of action noted under s.238(3). S.239(2) of the Act provides that the application for permission will be dismissed if the evidence adduced in support "do not disclose a case" for giving of permission. The essence of judicial approval under the Act is to screen out frivolous claims. The court is only to allow meritorious claims. All that the applicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed.

46. The second stage entails a consideration of statutory provisions and factors which ordinarily guide judicial discretion albeit in the realm of derivative action.

47. I must point out that the exercise of discretion in the circumstances would be more than adjudication, in view of the rather clear provisions of Part XI of the Act. I also observe that it is not feasible for the legislature to draw an exhaustive list of factors to be considered in the exercise of judicial discretion. In these respects, there must be something new through statute, something old through factors which guided common law exceptions to the rule in Foss v Harbottle and something borrowed from various decisions in the United Kingdom which have interpreted and applied the Companies Act 2006 (UK) especially ss. 260-264 which are pari materia ss. 238-242 of the Act, 2015.

48. The statutory provisions to be met include the requirement under s. 238(3) of the Companies Act that the derivative action be commenced only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty, breach of trust by a director of the company. It is also necessary to establish that the claimant is a member of the company.”

The effect of a successful preliminary objection is the striking out of a suit. However, per Birech J in **Quick Enterprises Limited vs Kenya Railways Corporation Kisumu HCCC No. 22 of 1999 [1999] LLR 7566 (HCK)**, a good case is always one where parties are given an opportunity of being heard and not driven away from the Court unless it is extremely necessary to do so on the facts which are very clear. I am of the considered view that striking out is a drastic remedy and courts should endeavor to make decisions that are least likely to visit injustice upon the parties.

To this end, the court is unfettered in its discretion to ensure substantive justice prevails.

In the upshot, the court makes the following orders:

- i. The preliminary objections dated 8th April 2019 and 28th February 2019 are herewith upheld.*
- ii. The Plaintiff is at liberty to seek leave to file a fresh suit based on the same facts and brought under the provisions of the Companies Act, 2015.*
- iii. The 1st, 2nd and 3rd Defendants’ shall have the costs of the Preliminary Objections*
- iv. Costs of the application and suit dated 25th January, 2019 shall be borne by each Party.*

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI ON THE 26TH DAY OF JUNE 2019

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R NYAKUNDI

JUDGE