



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 50 OF 2016

Consolidated with

CIVIL CASE NO. 54 OF 2016

1. PATRICK KANG'ETHE NJUGUNA
2. EDWARD NJUGUNA KANG'ETHE
3. GEORGE JAMES KANG'ETHE.....APPLICANTS

VERSUS

1. CO-OPERATIVE BANK OF KENYA LTD
2. ROBERT MAINA NGURU t/a NGURU AUCTIONEERS
3. LEAKEY AUCTIONEERS
4. JOSERICK MERCHANTS AUCTIONEERS
5. JOHN MARIARA KIGOTHO.....DEFENDANTS

R U L I N G

1. By an Notice of Motion dated the 24/01/2018, one MICHAEL MWANGI WANJOHI seeks orders:-

1. THAT this application be certified as extremely urgent and due to the said urgency and for reasons as will be recorded, service of the same be dispensed with in the first instance.

2. THAT this Court be pleased to join the Intended Interested Party as a Party to this suit.

3. THAT pending the *interpartes* hearing and determination of this application, this Honourable court be pleased to issue a Temporary Injunction Order restraining the 1st and 2nd Defendants jointly whether acting by themselves or through their agents, servants or workmen from doing any of the following acts, that is to say, further advertising for sale, attempting to sale, selling, alienating, transferring, disposing off by Public Auction or otherwise or in any other manner whatsoever dealing with or effecting transactions inconsistent with the Plaintiffs proprietary interests and rights through Wardpa Holdings Limited in all that parcel of Land known as Land Reference Number 209/2489/22 (I.R No. 74175).

4. THAT this Honourable court be pleased to issue a Temporary Injunction Order restraining the 1st and 2nd Defendants jointly whether acting by themselves or through their agents, servants or workmen from doing any of the following acts, that is to say, further advertising for sale, attempting to sale, selling, alienating, transferring, disposing off by Public Auction or otherwise or in any other manner whatsoever dealing with or effecting transactions inconsistent with the Plaintiffs' proprietary interests and rights through Wardpa Holdings Limited in all that parcel of Land known as Land Reference Number 209/2489/22 (I.R No. 74175) pending the hearing and determination of this suit.

5. THAT the Honourable Court be pleased to Order the Plaintiffs/Respondents to make full disclosure of all transactions between them on the part and the 1st Defendant on the other part to enable the Interested Party respond substantively to the

issues for determination.

6. THAT costs of the Application be in the cause.

2. The applicant seeks to be joined to these proceeding in order that he contents the actions of the plaintiffs in using a property known as LR No. 209/2489/22 own by a corporate, WARDPA HOLDINGS LTD, as a collateral for financial facilities from the 1st defendant be litigated. The Applicant contends that being a shareholder in the said company, holding 1 share, as each of the three plaintiffs, he should have been consulted before the company's property was used as a collateral but was never consulted and only came to learn about the transaction when he saw an advert in the daily newspapers of 9/01/2018. He was then prompted to seek to forestall the sale by filing Nairobi E.L.C. No. 3 of 2018 and later learnt of this suit. That suit, he says, was withdrawn on 23/01/2018 so as not be seen to go against the dictates of the *sub-judice Rule*.

3. The application is supported by the affidavit by the Applicant which exhibits form CR 12 showing that he indeed holds 1 share in the company, the advertisement for sale scheduled for 26/01/2017, the pleading in the ELC case and Notice withdrawing it as well as the letter of offer signed between the plaintiffs and the 1st defendant.

4. Based on those reasons he seeks to be joined in the proceedings as party to the proceedings; an interim and temporary injunction as well as an order for disclosure of all transactions between the plaintiffs and the 1st defendant.

5. The Application was not opposed by the plaintiffs but the 1st defendant did oppose it by Grounds of Opposition dated 30/01/2018 as well as list of authorities dated and filed the same date.

6. In the grounds, the defendant take the position that the Applicant has no identifiable interest or stake in the suit land as only the company can pursue the alleged cause disclosed; that he lacks the capacity to be a party as plaintiff on a transaction he was never party to; that the company has itself filed a suit as admitted and lastly that the question whether or not to sell the suit property has been the subject of adjudication by this court and another court in Nairobi hence it has become *Res judicata*.

Submissions by the parties

7. The submissions by Mr. Gachie Advocate on behalf of the Intended Interested Party grounded the Application on the alleged fact that the said interested party was kept away from knowledge of the transaction entered into between the plaintiffs and the defendant yet he is an equal shareholder of the company with each of the 3 plaintiffs. It was then submitted that the intended interested party was utterly surprised to read in the daily newspapers that the property owned by a company in which he is a director would be sold hence be filed Nairobi ELCC No. 3 of 2018 to forestall the sale. Before filing the suit, he sought to know from the plaintiffs what had happened but could not get an explanation at all. However having filed the suit and served he was himself served with responses which revealed the existence of this suit hence he opted to withdraw the ELCC Case and bring the current application.

8. The counsel premised the application on the position that the intended interested party is a proper party who needs to be joined because the plaintiffs acts of charging the property without a proper resolution by the company was a violation against him as a minority shareholder and towards the plaintiffs enriching themselves at the expense of the company as the loan was obtained by the plaintiffs in their individual capacities.

9. Based on his view to be a proper party the intended interested party sought from court over and above the prayer for joinder an order for injunction to stop the sale or doing any acts that would be in derogation of the plaintiffs proprietary interests through the company, WARDPA HOLDINGS LTD on the property LR No. 209/2489/22 (I.R No. 74174) pending determination of the suit and an order against the plaintiffs to disclose All the transactions between them and the 1st defendant.

10. The counsel cited to court the decision in *Triton Gas Stations Ltd vs KCB & Another[2014] eKLR* in which the Court granted an injunction to the plaintiff on the basis that a document the defendant relied upon, a deed of settlement, was not shown to have been validly sanctioned by a board resolution. In it the plaintiff asserted that there had been no resolution and the defendant did not dispute such assertion.

11. On the opposition by the Defendant on the basis of Company Law that the company being separate and distinct from its shareholders and therefore a shareholder has not interests in the company assets, the applicant did very little to dispute the position as put forth by the defendant.

12. On the challenge that the application was *res judicata* the applicant took the position that this is the first time he is coming into the matter and seeking the orders sought. He relied on *HFCK vs Capt. Wafubwa[2014] eKLR* where the Court of Appeal explained in details the application of the principle of *Res Judicata*. Lastly the applicant relied on the decision of *Macaura vs Notherin Assurance Co. Ltd [1925] AC* to urge the point that the plaintiffs themselves had no proprietary interests in the company property so as to charge it as they did.

13. Miss Murage for the plaintiffs did not oppose the application by the intended interested party but tacitly supported it by stating that she held the view that the applicant was a proper party to be included rather than excluded in the suit and that being the position they were entitled to the injunctive orders sought.

14. The application was opposed by the Defendant/Respondent on the grounds of opposition dated 30/01/2018 and filed in court the same day. Those grounds oppose the application on four broad grounds being that; the interested party/Applicant grounding his interests on the pedestal of a shareholder did not have an identifiable or legitimate interest in the suit property; that the Applicants' disclosed interest could only vest and be pursued by the company which had in any event filed and prosecuted an application in Nairobi HCC No. 292 of 2017 which

application was determined to be res judicata; and that being not a charger, the Applicant lacks the *locus standi* to bring the suit on the doctrine of privity of contract and to forestall the defendants contractual and statutory power of sale.

15. On the lack of identifiable or justifiable interest the Defendant/Respondent submitted that the applicants' directorship or shareholding in the registered proprietor could not entitle him to any interest in the company's assets beyond the legitimate claim to share in the companies profits as and when profits are made and dividends declared. Otherwise a shareholder lacks any legal or equitable interests in the property of the company like the suit land in this matter. He relied on the decision in MACAURA (supra) for that proposition and in particular the judgments of Lord Buckmaster and Lord Wrenbury for the proposition that no shareholder, even if he has all the shares in the company has any right to any item of property owned by the company, save for the shares in the profits when the company trades and declares dividends and in the surplus of the company assets over debts at the time of winding up.

16. Related to that point, Mr. Kongere argued that as the complaint is an alleged wrong committed against the company, only the company would sustain a claim against the perpetrators of such wrongs and not the applicant. He made a point that the applicant had no capacity to sustain a suit on behalf of the company in the manner shown here rather it could only be done by a derivative suit to assert his right an oppressed minority if the Applicable thresholds as established in the case of *Foss vs Harbottle [1843] 2 Hane 461* were to be met. He cited to court the decisions in Sultan Hasham *Halji vs Ahmed Hashan Lalji & Others [2014] eKLR* and *Amin Mamji vs Davani & Another [2015] eKLR*. The two decision enunciate the principle of company law that a company has a separate and distinct legal personality away from its promoters and shareholders and that in the event of a breach or violation of the company's rights only the company and nobody else, including the shareholders, can bring an action on behalf of the company except for the well-established exceptions known to law and that a derivative is the only vehicle so recognized.

17. The advocate proceeded and added that the rule is grounded on the two well established principles known as '*the proper plaintiff*' and the '*majority principle*'. Based on what the defendant deemed an established and trite principles of law the defendant deemed this suit misconceived and a vexation because the company itself had sought to remedy the alleged wrongs done to it by filing Nairobi HCCC Nos. 292 and 293 both of 2017 in which suits the court by a decision dated 22/09/2017 struck out applications for injunction for being res judicata. However the main suit remain pending determination by the court. Mr. Kongere implored the court to find as Mrs. Olga Sewe J, found that to consider an application for injunction over the same suit properly after this court's decision of 26/7/2017 would be to reopen what this court and the court sitting in Nairobi have twice considered and determined.

18. On the decision in *HFCK vs Captain Wafubwa(supra)*, Mr. Kongere submitted that the facts therein were distinguishable from those here and therefore that decision was inapplicable and of no assistance to the Applicant and the court at all.

19. Still on the prayers for injunction the Defendant submitted that he who seeks an injunction must satisfy the principles laid down in the now well known case of the *Giella vs Cassman Brown [1969] EA*. He reiterated that no prima facie case could be demonstrated as the law forbid the manner in which the Applicant has approached the court to seek the remedies asked for. Reliance was then placed on the decision in *Triton case (supra)* with an emphasis that there, unlike here, it was the company rather than a shareholder, as the Applicant has done herein. On those grounds the Defendant prayed that the Application be dismissed with costs to it.

20. In his rejoinder to the submissions by the defendant, Mr. Gachie did concede that the decision in Sultan lalji was indeed the apt and respected enunciation of the law but submitted that there are exceptions and the Rule in *Foss vs Harbottle* is not absolute. He added that the decision by the court in the suit filed by the company Wardpa Holdings Ltd is distinguishable being grounded on the pendency of this suit. On the ability of the defendant to pay damages in lieu of injunction the counsel submitted that the defendant as a bank has no money of its own to pay as damages but only keeps peoples deposits. He urged that application be allowed.

Issues for determination

21. Having read the papers filed and the submissions offered and the relevant law applicable, I do discern the following questions to present themselves for the determination by the court:-

- **Whether the Applicant is a proper party to be joined as an interested party.**
- **Whether the Applicant, if a proper party is entitled to the Orders of injunction to stop the sale of the security pending determination of the suit and an Order for disclosure of all the transaction between the plaintiffs and the 1st defendant.**
- **What Order commend themselves to be made as to costs.**

22. A determination of the first issue would definitely determine the course the Application takes regarding other prayers. If the first issue is answered in the negative it would be futile to go to the others which will only become due for consideration if it be answered in the affirmative.

Is the Applicant proper party for joinder?

23. The application before court is premises on the provisions of Order 1 Rule 8(3) as well as Order 40 Rule 1 as read with Section 3A Civil Procedure Act. I consider Order 1 Rule 8(3) to have been cited to ground the application for joinder while the Order 40 Rule [\[1\]](#) to found the prayer for an injunction.

24. To this court Order 1 Rule 8 only applies in situations where there is in place a representative suit. That is definitely not be the situation prevailing here because the applicant seems to blame the plaintiffs and the 1st defendant to have conspired to deprive him or just unfairly enrich themselves by entering into a contract of charge over a property owned by a company in which he is a shareholder without information to him. He can thus not be seen to be a beneficiary of the participation in the suit by the plaintiffs or the defendant. He is in fact an adversary to both. When Mr. Gachie argued the matter before me and I posed to him the question on which side of the dispute his client would wish to be. He hinted that his client desires to be on the side of the plaintiff and therefore sought to be joined as a co-plaintiff.

25. I would therefore consider the propriety of joinder of the applicant as either interested or necessary party as well as a co-plaintiff. Both scenarios are provided for under Order 1 Rule 10 and not Rule 8. The law under Order 1 Rule 10 provides:-

“Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit”.

Joinder as an interested or necessary party

26. I read Order 1 Rule 10(2) to grant to court the power to order the joinder any party whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit. This provision does not limit such joinder to either plaintiff or defendant. It allows any party to be added and I consider it to be the only provision which allows the court to join parties as interested or necessary parties.

27. For this matter, therefore, the question that would assist court gauge the propriety of joining the applicant is whether his presence in the matter would help me effectively and completely determine all questions in the suit.

28. That question cannot be determined in isolation but must be looked at in the context of the pleadings filed by the original parties to the suit and what the applicant alleges. The totality of that analysis is to me agreed to be that the only connection the Applicant shows to have with the dispute between the plaintiffs and the defendant is that, him being one of the shareholders of the company called **Wardpa Holdings Ltd**, and holding one share, as the three plaintiffs also do, feels aggrieved that the three plaintiffs as co-shareholders, opted to obtain a loan from the defendant and secured such a loan using the company property without resort to him.

29. That grievance may genuinely be asking the court to determine whether the company's internal working protocols and legal mechanisms were indeed adhered to in entering the contract to charge. It may as well be asking the question whether the plaintiff conducted themselves inappropriately or indeed unlawfully as against the Applicant. That however is not a matter that is proximate to the initial dispute between the plaintiffs and the defendants which essentially does not question the propriety of the charge but only that of the process to realize the security. It is to this court a new and independent dispute.

30. To bring that new and independent dispute would be to this court to convolute the matter rather than simplify it. That however is not the bigger question. The bigger question is that the Applicant, on the facts pleaded in the application for joinder doesn't have a legal nor equitable interest in the suit property so as to invite in his favour a remedy akin to an order of injunction as sought in the application. I say this because, the application cannot be limited to joinder as the ultimate goal. The ultimate goal is evidently to stop the process of realization of the security offered to the defendant by the plaintiffs. That can only be achieved by one who demonstrates a prima facie case with probabilities of success as basic threshold to grant an injunction in the interlocutory period.

31. I consider, on the authorities cited and reiterating the rule in **Foss vs Harbottle (supra)** that the Applicant being a shareholder in **Wardpa Holdings Ltd** has no discernible interest in the property of the company but only has a legitimate expectation to share in the profits of the company while it trades as and when it declares dividends. Short of that, only in the event of a surplus of assets over liabilities in the event of insolvency and or liquidation. That is what the courts in this country and elsewhere have unequivocally said while dealing with the questions of legal personality of a corporate like **Wardpa Holdings Ltd**.

32. It is in no doubt to me that the dispute is whether or not the company could by a resolution, passed by a simple majority, decide to secure borrowing of its directors or indeed any other person from the defendant. In that event no individual director, like the plaintiff, can maintain and sustain a cause of action or a claim. This is because, a company decision is made by voting grounded on the strength of shareholding and vote is weighed by the shareholding of the voter as a shareholder or a nominee of shareholder where the Articles allow voting by proxy.

33. In that event, the governance of the corporate as envisaged in law is that such a decision is taken at the members meeting in accordance with the constituting instruments. Such a decision need be handled first and foremost at the meeting of members so that a simple majority decides to sanction or countermand the decision. In the decision cited to me by the Defendant, **Amin Akberale Manji & 2 Others (supra)**. The court said:-

“Where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or associations in favour of what has been done, then candido questio; or if the simple majority challenges the transactions, there is no valid reason why the company should not sue”.

34. Here, in this suit, the grievance disclosed is that questioned commercial transactions were done against the company and therefore under the 'proper plaintiff principle' only the company and the company alone can sue on that transgression. The twin principles is that of the 'majority principle' which mandates that let the affairs of the company be run by decision of a simple majority and a minority who chooses to lone-range be given no pleasure and leisure to overrule or overrun the majority. Put in shot, let the majority have their way even if the minority must have their say. Here the Applicant is entitled to his say but at the right forum in the meeting of members not here.

35. Of course, the applicant is entitled to legal advice, and depending on whether or not it, can fit within the exceptions to the very stringent rule in the case of Foss vs Harbottle then he is entitled to bring a derivative action. I however hasten the point out that a derivative action would essentially be by him on behalf of the company and as against the other directors. It would have to be a suit by the Applicant on behalf of the company as against the current plaintiff *qua-directors* of the company. That surely cannot conveniently and properly fit within the current suit as erected and built.

36. I have come to the conclusion that on the facts here reveal the Applicant as not a proper party to be joined in these proceedings and litigation either as an interested party or a plaintiff.

37. As an interested party or necessary party he faces a stonewall erected by the law that it has no legal nor equitable interest in the suit property. As a co-plaintiff it faces the vanity of having to seek to benefit from a transaction he was not privy to over and above the rule that only a party to a contract, may seek to benefit from its benefits or be burdened by its obligations. There is also the undesirable prospects that as the person who could have been defending the company, whose interests he seeks to secure, he would be playing on the same side with the transgressor. That would be unity and bereft of neatness. But even then that can only be ordered if there is a legal right to be protected.

38. Having found that there is no merit in joining the Applicant to the suit, the rest of the questions isolated become moot phantom and shadowy meriting no consideration by the court. Consequently, the Application dated the 24th January 2018 is held and determined to have no merit and is hereby dismissed with costs.

39. Having said so, I have in the past and on occasions more than one asked both counsel for the plaintiff and the defendant the propriety of this matter having been filed in Mombasa and it remaining here considering the fact that the suit property is undeniably located within Nairobi County and the contract itself was made in Nairobi and anticipated to be performed in Nairobi. On all the occasions the advocates have pleaded with the Court that their respective clients desire that the matter remains here.

40. However as this matter continues to pend here it has come to the attention of the court that the same parties have also engaged the court in Nairobi in HCCC No. 292 & 293 of 2017. Those two suit were filed in the year 2017 well after this matter was filed. It is clear that in HCCC No. 293 of 2017 the first plaintiff here is the plaintiff there. That development suggest to this court that even that first plaintiff and his party do appreciate that a suit ought to be filed where the property sued on is situated or where the defendant resides or carries his business and short of that where the contract was entered into and intended to be performed.

41. None of these thresholds present themselves here to justify this matter remaining in Mombasa. Rather it would be desirable that all the suits between the parties and involving the same subject matter(s) be housed under one registry so that the court before which all may be presented can make a deliberate decision at case management stage on whether those suit can be tried together or if one may be tried as a test suit. That is the purpose of Order II which I consider purposed for the expeditious and prompt disposal of court business besides guarding against prospects of the different courts considering one matter and arriving at different decisions thereby embarrassing administration of justice.

42. That being my appreciation of the law when applied the fact of this case and while invoking the court inherent powers to do justice to the parties by enforcing the courts' overriding objectives and to avoid abuse of its processes, I direct that this file and No. HCC No. 54 of 2016 be forthwith transmitted to High Court of Kenya, Milimani Commercial Court, NAIROBI and be put together with HCC 292 and 293 of 2017. After being so put together let the files be placed before a judge in that division to direct on how the three files shall be progressed forward.

43. I direct further that the Deputy Registrar implements these directives within the next 7 days by having the file being transmitted not later than the 6th March 2018.

44. It is so ordered.

Dated and delivered at **Mombasa** this **26th** day of **February 2018**.

P.J.O. OTIENO

JUDGE

[1]