



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL DIVISION MULTI-TRACK
CIVIL SUIT NO. 18 OF 2017

MOHAMED DINE MOHAMED.....FIRST PLAINTIFF
NURREYNNEN DIINE MOHAMED.....SECOND PLAINTIFF
ABDULKADIR DINE MOHAMED.....THIRD PLAINTIFF
HAJI MOHAMED HAJI.....FOURTH PLAINTIFF
CASSIM AHMED MOHAMED.....FIFTH PLAINTIFF
OMAR DINE MOHAMED.....SIXTH PLAINTIFF
QAYRAT FOODS LIMITED.....SEVENTH PLAINTIFF

VERSUS

SAFIYA AHMED MOHAMED.....FIRST DEFENDANT
AWEYS AHMED MOHAMED.....SECOND DEFENDANT
ZEIN AHMED MOHAMED.....THIRD DEFENDANT
ABDIFATAH HASSAM MOHAMED.....FOURTH DEFENDANT
KAAB INVESTMENTS LIMITED.....FIFTH DEFENDANT
MIDDLE EAST BANK LIMITED.....SIXTH DEFENDANT
THE REGISTRAR OF COMPANIES.....SEVENTH DEFENDANT

RULING

1. There are two applications before me for determination. The first one was filed by the plaintiffs on 16th February, 2017 under the provisions of Order 40 rules 1, 2, 3 and 9 Order 50 rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B, 3A and 63E of the Civil Procedure Act and all enabling provisions of the Laws of the land (sic). It seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of this suit a temporary injunction do issue restraining the defendant (sic), its servants, agents and/or employees from destroying, selling, alienating, transferring, charging, disposing, removing or in any manner whatsoever dealing with the management and assets of the 7th plaintiff including parcel of land (sic) known as Kilifi/Mtwapa/1865 or altering any company records of the company pending the hearing and determination of this application (sic);

(iv) That the plaintiffs be at liberty to apply for any further orders as the circumstances of the suit may permit; and

(v) The costs of the application be provided for.

2. The application is supported by the affidavit of Omar Dine Mohamed. The 6th Defendant filed grounds of opposition on 27th March, 2017 to the application dated 16th February, 2016.

3. On 28th March, 2017, the 6th defendant, Middle East Bank Ltd, filed an application under the provisions of Sections 1A (1) and 1B (1) of the Civil Procedure Act, Order 2 rule 16, Order 9 rule 1 and Order 4 rule 1(4) of the Civil Procedure Rules for orders that the suit herein be dismissed as against the 6th Defendant and for the costs of the suit and for the application to be paid by the defendants jointly and severally (sic). It is supported by the grounds on the face of it.

4. The firm of Hamilton Harrison and Mathews Advocates which had entered appearance for the 2nd and 5th defendants obtained orders from the court on 18th September, 2017, to cease from acting for the said defendants. The 1st, 3rd, 4th and 7th defendants did not enter appearance.

5. Counsel filed their submissions which they highlighted. Mr. Anyoje, Learned Counsel for the plaintiffs submitted that the striking out of a suit is a draconian step that should be used as a last resort and that courts should sustain suits for final determination. He sought injunctive orders to restrain the defendants from dealing with the management of the company (7th plaintiff, Qayrat Foods Limited), pending the hearing of the suit. On injunctive orders, Counsel cited the case of **Giella vs Cassman Brown** [1973] EA 358 that set out 3 tenets to be proved in an application for an injunction.

6. In making reference to the 6th Defendant's claim that the plaintiffs have no *locus standi* to bring the suit, he referred to paragraph 13 of the plaint where they have averred that there was change in shareholding which made the 2nd defendant (Aweys Ahmed Mohamed) to become a non – shareholding Director while the 1st plaintiff remained a Director, with shareholding capacity. Mr. Anyoje indicated that initially, the Directors were the 1st plaintiff and the 2nd Defendant, with the latter having 52-shares. He stated that as shown by the annexures marked ODM 5 and 3, the shareholding did change with the 5th defendant (KAAB Investments Ltd) being granted 99 shares.

7. The Court was informed that directions as to the filing of the present suit on behalf of the company has not been done due to the fact that the 2nd defendant as seen from annexure ODM 12, was left with Directorship of the company when the 1st to the 5th plaintiffs went to reside in the United Kingdom. It was argued that the 2nd Defendant could not give the go ahead to file a suit due to fraudulent allegations made against him as a Director. Counsel urged the court to refer to the annexure marked as ODM 8 where the 7th plaintiff's piece of land was charged to the sixth defendant resulting in a loan of Kshs. 35.1 Million being advanced for the personal use of the 2nd defendant.

8. On *locus standi*, it was stated that a power of attorney was granted to the 6th plaintiff (Omar Dine Mohamed) by the 1st, 2nd, 3rd, 4th and 5th plaintiffs as stated in paragraph 3 of the supporting affidavit. It was submitted that there is an exception to the Tarquand's rule where there are allegations of fraud. Mr. Anyoje referred to the case of **Arthi Highway Developers vs West End Butchery and another** CACA No. 246 of 2013 at page 33 where it addresses the issue of lifting the veil of a company where there is forgery.

9. It was pointed out that the 6th Defendant did not file any document to show how the suit property was charged such as authorization by the 7th plaintiff and requisite signatures but the said Defendant opted to file grounds of opposition and not a replying affidavit.

10. On the issue of a derivative suit, Mr. Anyoje cited the case of **Tash Goel Vedprakash vs Moses Wambua Mutua & Another** HCCC No. 64 of 2014 on page 12 at paragraph 45, where the court granted leave for the suit to be held as a derivative suit. With regard to the 6th Defendant's argument that the 1st to 6th plaintiffs ought to have brought a derivative suit for being Directors and shareholders of the company, it was contended that such an omission, if any, is within the court's jurisdiction to order that the suit continues as a derivative suit.

11. On the injunction, Counsel submitted that the plaintiffs have established a *prima facie* case based on the fact that the suit property has been charged and is accruing interest, yet there was no proper notice to the other plaintiffs. He added that it may lead to the alienation of the only property the 7th plaintiff has.

12. On the principle of irreparable loss, it was argued that the 2nd defendant might fail to discharge the property and liability will fall on all the shareholders of the company. The court was referred to paragraphs 14 and 17 of the supporting affidavit where the 6th plaintiff deposes that that the 2nd defendant is using the premises to park vehicles from which he is collecting money. He also submitted that the balance of convenience tilts in favour of the plaintiffs. Counsel urged the court to refer to the authorities filed in support of the plaintiffs' case.

13. Mr. Esmail, Learned Counsel for the 6th Defendant started off his submissions by stating that no authorization was given by Directors of the 7th plaintiff to file the present suit yet under Order 4 rule (1)(4) of the Civil Procedure Rules, a plaint must be verified by an Officer of the company and authority must be given to him under the seal of the company. Counsel for the 6th Defendant rebutted the claim of the 5th plaintiff having been given authority to file a suit and that the said authority was given by the 1st plaintiff, a recognized Director, to the 5th plaintiff to file a suit on his own behalf but not on behalf of the company. He stated that there was complete silence on authorization of filing the suit on behalf of the company.

14. It was argued that in the 6th Defendant's statement of defence, it is averred that Directors are the 1st plaintiff and 2nd defendant but no effort has been made to call a meeting by the Directors to decide on the filing of this suit. Counsel stated that the 6th Defendant has nothing to do with the internal wrangles of the company. He submitted that only paragraph 14 of the supporting affidavit makes reference to the 6th defendant. It was however not shown under what provisions of the law shareholders should give consent and that the onus of charging of the property of the company falls in the purview of Directors of a company.

15. It was submitted that the 1st principle for the grant of an injunction had not been proved as there was no cause of action, as such the plaintiffs failed to establish a *prima facie* case. He added that the property in issue is a commercial property put up for rental purposes. He prayed that application for an injunction be dismissed.

16. On the striking out of the plaint, it was submitted that it was incurably bad with contradictory averments. Mr. Esmail argued that the complaint is that authority of shareholders was not given. He stated that the 6th plaintiff is the majority shareholder from when the company was formed and even after share transfers was made. Counsel indicated that the submissions in support of the plaint are completely different, in that the complaint is that the charge was fraudulent and in the submissions they state that approval was sought with the connivance of the defendants. He submitted that there is no dispute as to who the Directors of the company are, as it is known that the 1st plaintiff and 2nd defendant are Directors of the company.

17. It was further submitted that the 1st to 6th plaintiffs are majority shareholders, and it is trite that the company is separate from the shareholders, therefore the said plaintiffs have no cause of action. Mr. Esmail took the position that if they were minority shareholders, they could have filed a derivative action. He cited the case of **Sultan Hasham Lalji and Others vs Ahmed Hasham Lalji and 4 Others** [2014] eKLR, where the Court of Appeal held that majority shareholders could not file a suit. He submitted that the proper plaintiff herein is the company and the appropriate agency to start the action on the company's behalf is the Board of Directors.

18. He submitted that the company (7th plaintiff) has no cause of action. The complaint against the company is in paragraph 18 of the plaint and no fraud is disclosed. He contended that the plaint refers to failure to undertake various activities and that amounts to negligence not fraud. In reference to the case of **Arthi Highway Development vs West End Butchery** (supra), Mr. Esmail stated that the Court of Appeal held that fraud is a serious accusation which has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt and that fraudulent conduct must be distinctly proved. It was submitted that the plaintiff's sole witness has not said a word of complaint against the bank. He referred to **Sultan Hasham Lalji vs Diamond Hasham Lalji & 3 Others** [2016] eKLR, where Judge Ogolla struck out a suit which had no possibility of success having regard to the evidence contained in the witness statement that was to be tendered at trial.

19. In making reference to the provisions of Order 4 rule 1(4) of the Civil Procedure Rules, the court was informed that it contains mandatory provisions for a verifying affidavit in support of a suit by a company to be duly authorized under the seal of the company and for the pleadings to be signed by Officers who have been authorized by the said company.

20. In response to the submissions made by Counsel for the 6th Defendant, Mr. Anyoje stated that they filed a verifying affidavit by the 6th plaintiff who was authorized by the 1st – 5th plaintiffs. He added that the 7th plaintiff did not file a verifying affidavit. It was submitted that the 2nd defendant is a Director of the 7th plaintiff and the allegation is that he fraudulently used the 7th plaintiff's assets. The 2nd defendant would not have granted leave for a suit to be filed against him.

21. With regard to fraudulent claims, he indicated that at paragraph 33, page 34 of the **Arthi Highway Development vs West End Butchery** (supra) the court stated that although the words fraud had not been used distinctively, the allegations must show fraud.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If the suit should be dismissed for being fatally defective; and
- (ii) If an interim injunction should issue against the defendants pending the hearing of the suit herein.

22. The grounds relied upon by Counsel for the 6th Defendant in his application dated 28th March, 2017 are similar to the grounds of objection raised in support of the plaintiffs' application dated 16th February, 2017. In his submissions, Mr. Esmail stated that the said application was not signed by duly authorized Advocates of the 7th Plaintiff in accordance with Order 2 rule 16 and Order 9 rule 1 of the Civil Procedure Rules. Order 2 rule 16 of the Civil Procedure Rules provides as follows:-

"Every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person.

23. Order 9 rules 1 and 2 of the Civil Procedure Rules provides as follows:

"1. Any application to or appearance or act in any Court required or authorized by the law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that –

- (a) any such appearance shall, if the Court so directs, be made by the party in person; and
- (b)

"2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal." (emphasis added).

24. On the foregoing issue, the plaintiffs' Counsel submitted that the 6th plaintiff had through a power of attorney been authorized by the 1st to 5th plaintiffs to swear the verifying affidavit on their behalf to support the suit filed on 16th February, 2017. No authority was however given in respect to the 6th plaintiff for the filing of a verifying affidavit on behalf of the 7th plaintiff which is a company. It was submitted that the said authority could not have been given by the 2nd defendant to institute a suit against himself after the alleged fraudulent charging the 7th plaintiff's property reference No. Kilifi/Mtwapa/1865 for Kshs. 35,100,000/=. No Board resolution was also filed authorizing V. N. Okata & Co Advocates to institute the suit herein. Do the foregoing omissions then render this suit fatally defective and should the court dismiss the same as prayed by Counsel for the 6th defendant?

25. As regards the necessity for a company resolution to back the institution of the suit, **Odunga J.**, in his Judgment in the **Leo Investments Ltd v Trident Insurance Company Ltd [2014] eKLR** referred to the holding of Hewett J. in **Asia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** as follows:

"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified." (emphasis added).

26. The Articles of Association of the 7th plaintiff in clause 21 do empower majority shareholders to undertake certain actions to ensure the smooth running of the company. The said provisions seem not to have been resorted to. As was submitted by Mr. Anyoje, the 2nd defendant who is alleged to have fraudulently charged land owned by the 7th plaintiff would not have given authority for a suit to be instituted against him. Failure to exhibit such authorization at the time of filing of the suit as shown by the case of **Leo Investments Ltd** (supra) is not fatal as proceedings started without proper authority can be ratified at a later date. I therefore decline to dismiss the suit herein due to lack of authority.

27. On whether the suit herein is a derivative suit as argued by Mr. Esmail. Part XI of the Companies Act, No 17 of 2015 in Sections 238-241 provides for derivative actions. Section 238 thereof provides as follows:-

(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.

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.

(3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

(4) A derivative claim may be brought against the director or another person, or both.

(5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

(6) For the purposes of this Part—

(a) "director" includes a former director;

(b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

28. Although Mr. Esmail submitted that the suit herein is a derivative suit, it cannot be. It is clear from the annexure marked as ODM5 attached to the affidavit of Mr. Omar Dine Mohamed sworn on 16th February, 2017 that the 1st to the 6th plaintiffs are the majority shareholders, not minority shareholders of the 7th plaintiff. They can therefore not file a derivative action. In **HCCC NO. 83 OF 2012 DR. Jane Wambui Weru v Overseas Private Inv. Corp. & 3 Others** it was held as follows:-

“By derivative suits, the minority shareholders (s)(sic) feeling that wrongs have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company, come to court as agents of the ‘wronged’ company to seek reliefs or relief for the company itself, all the shareholders including the wrong doers, and not for the personal benefit of the suing minority shareholders (s)(sic)..... it is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights and actions vested in the company to sue for the wrongs done to it and in the absence of illegality a shareholder cannot bring these proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters.... However if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such shareholder can bring an action by way of derivative action... mere irregularity in internal running of a company cannot be a basis for one to bring a derivative suit for such can be rectified by a vote/resolution at the company’s meetings and if a shareholder contemplates using a personal claim of infringement of his rights then a derivative suit will not avail as the relief must be for the benefit of the company...” (emphasis added).

29. On whether the 1st to 6th plaintiffs should have filed the suit herein in their own names in their capacity as shareholders, it is my finding that the proper person to sue is the 7th plaintiff. In *Moir vs. Wallerstainer* [1975] 1 All ER 849 at pg 857, it was held thus:-

*“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss V. Harbottle* (1843) 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue.”* (emphasis added).

Lord Denning had the following to say in the **Moir case** (supra)

“.....But suppose (the company) is defrauded by insiders who control its affairs – by directors who hold a majority of the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorize the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue themselves. Yet, the company is the one person who is indemnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.....”

30. As stated earlier, the 1st to 6th plaintiffs are the majority shareholders and they have the tools necessary through the articles of association to call for meetings and set in motion the process of the 7th plaintiff to sue in its own name. The fact that the majority shareholders have filed this suit together with the 7th plaintiff does not render the suit fatally defective as the 1st to 6th plaintiffs have a window of opportunity to seek leave to amend the pleadings, if they so please.

31. On the submission by the 6th Defendant's Counsel that the plaintiffs have no *locus standi* to file the suit, having perused the plaint in this case, there are allegations of fraud having been perpetrated by the 2nd defendant by effecting transfer of shares and uttering and filing false change of shareholding of the 7th plaintiff company. There also exists an allegation that the 2nd defendant charged the land that had been bought by the 7th plaintiff, with the 6th defendant, and expended the loan in the sum of Kshs.35,100,000/- to his own benefit. Such allegations however can only be established after a full trial. This court after considering all the submissions made by Counsel on record in respect to the 6th defendant's application dated 27th March, 2017 is more inclined towards sustaining the case rather than dismissing it.

32. The Court of Appeal in **Trust Bank Ltd v Amalo Co. Ltd** (2009) KLR 63 held that:-

“(1) The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.

(2) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

33. On the issue of grant of an injunction pending the hearing and determination of this suit, in **Giella v Cassman Brown** (1973) EA 358 the court stated as follows:-

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

“... But as I earlier endeavoured to show, and I cite ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

34. This court notes that the 6th defendant is a banking institution, it however took the risk of only proceeding on points of law in opposing the application by the applicant seeking injunctive orders. The 6th defendant's Counsel failed to address the issue of damages that would be payable if the plaintiffs succeed in the suit. Factual issues raised by the plaintiffs in the affidavit in support of their application were not rebutted. Having considered all the documentation availed by the plaintiffs to support the application dated 16th February, 2017, I find that they have established a *prima facie* case. The balance of convenience tilts in favour of granting the plaintiffs an order of an interim injunction. The plaintiffs stand to suffer irreparable injury if an injunction is not granted.

35. I therefore make the following orders:-

(i) The application dated 16th February, 2017 is hereby allowed;

(iii) The application dated 27th March, 2017 is hereby dismissed;

(ii) The plaintiffs are hereby granted sixty (60) days to regularize the anomalies in their pleadings and to file and serve an amended plaint;

(iii) The 6th defendant will be at liberty to file an amended statement of defence within 21 days of service of the amended plaint;

(iv) Costs of the two applications are awarded to the plaintiffs.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of March, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Okata for the plaintiffs

No appearance 6th defendant

Mr. Oliver Musundi - Court Assistant