



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 67 OF 2018**

**ALISON THETHY.....PLAINTIFF**

**VERSUS**

**SNVERAMPA**

**KARLA KAMPA**

**TRADEWINDS INTERNATIONAL SCHOOL LTD**

**CASTADEN LIMITED**

**TRADING AS TRADE WINDS ACADEMY.....DEFENDANTS**

**RULING**

**1. INTRODUCTION**

The Plaintiff, ALISON THETHY has filed in court a plaint dated 27<sup>th</sup> day of August, 2018 in which she is claiming that she is a shareholder and Director of the 3<sup>rd</sup> Defendant on equal terms with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, with each holding 50%. She has sought a raft of orders, reproduced as follows;

**(a) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are in breach of the memorandum of understanding in joint venture Agreement dated 19<sup>th</sup> April, 2017;**

**(b) An order of Permanent Injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from holding any Board meetings or raising any Board Resolutions of the 3<sup>rd</sup> Defendant company in the absence of the plaintiff.**

**(c) An order of Permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from operating any Bank accounts of the 3<sup>rd</sup> Defendant company including Kenya shillings Account Number 7972640017, United States Dollar Account Number 7972640025 al held at Commercial Bank of Africa without the written consent of the plaintiff.**

**(d) An order of Permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from interfering in any manner whatsoever with the manning and operations of the 3<sup>rd</sup> Defendant company and Trade Winds International School and from interfering with the Plaintiffs duties as the principle of Trade Winds International School.**

**(e) An order of Permanent Injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants either by themselves, their officers and or their agents from running of other school or any other rival school to the 3<sup>rd</sup> Defendant and from running such school or educational facility in the same premises where the Defendant is located or at all.**

**(f) An order of permanent injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants either by themselves, their officers and or agents from collecting any school fees, admitting any student, entering into any employment contracts with teachers or other staff in respect with any school or any other educational facility in the name of Trade Winds Academy or in the name of any other rival school to the 3<sup>rd</sup> Defendant or in the premises of the 3<sup>rd</sup> Defendant company and form interfering in any manner whatsoever with the employment contracts of the staff of the 3<sup>rd</sup> Defendant company.**

**(g) General damages.**

**(h) Costs of the suit.**

**(i) Any other relief that this Honourable Court may deem fit to grant.**

2. The prayers are supported by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which include the;

- the exclusion of the Plaintiff from the management of the 3<sup>rd</sup> Defendant.
- refusal to honour the memorandum of understanding.
- refusal to reply to agreed options to settle dispute, and
- unilaterally calling Board meetings discussing financial issues and passing resolutions.
- breach of the Company's Act, 2015,

hence the orders sought.

3. Simultaneously, the Plaintiff filed an application (Notice of Motion) dated on even date for an injunction which was mentioned in chambers before Justice P. J Otieno on the same day and injunction and preservative orders were granted.

4. This was met by;

- a preliminary objection founded on five (5) grounds and a 27 paragraph replying affidavit sworn on 3<sup>rd</sup> September, 2018.
- a list of Authorities dated 3<sup>rd</sup> September, 2018.
- a Notice of Motion application dated 6<sup>th</sup> September, 2018.
- Chamber Summons dated 6<sup>th</sup> September, 2018, and
- subsequent application and submissions by both counsels.

5. On 20<sup>th</sup> September, 2018 directions were issued on how the said application would be heard and in what order. It was directed that the applications be disposed of by way of written submissions, the parties to file and serve each other with their written submissions, which they did together with their lists of authorities and the first to be heard was the preliminary objection because of challenging the jurisdiction of the court. The highlighting of the submissions with regard to the preliminary objection dated 6<sup>th</sup> September, 2018 was done on 15<sup>th</sup> October, 2018 when parties canvassed their respective arguments. After listening to the highlights of the written submissions by both counsel, I have also read through the pleadings and written submissions in consideration of the preliminary objection.

6. In determining the preliminary objection dated 3<sup>rd</sup> September, 2018, I wish to first appreciate the definition of a preliminary objection, that is, what it is and under what circumstances the same can be granted. There is no better definition than that which was given by the president of the then Court of Appeal of East Africa Law J.A in **MUKHISA BISCUITS MANUFACTURING COMPANY LTD –VS- WEST END DISTRIBUTERS LTD (1969) E.A 696** at pages 700 and 701. He stated as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or what arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

This was re-emphasized by the judgment of Sir Charles Newbold in the same case in which he expressed himself as follows:

“The first matter relates to increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 other side are correct. It cannot be raised if any fact had to be ascertained or what is sought is an exercise of judicial discretion. The improper raising of point by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issue. The improper practice should stop.

He summed up his frustration with unmerited preliminary objection in these words:

“One should not be allowed a second bite at a cherry.”

This definition by Law J.A is apt to the finite meaning which is further refined by Sir Charles Newbold, J.A. A Party opting to litigate by

raising preliminary points should be equally prepared to accept the harshness of its failure to succeed as warned by the two judges.

7. Applying this definition to the grounds of preliminary objection dated 3<sup>rd</sup> September, 2018, I will proceed by:

(a) first treating Grounds 1, 2 & 3 as one, that is, they are dealing with the grant of an injunction. An injunction is granted as an equitable remedy based on the discretion of a trial judge in the matter before the court. It is not cast in stone tablet rather the court considers principles that evolved over time and which crystallised in the decision in **Giella –versus- Casmann Brown Case**, which was an improvement on the **Treetop –versus- Tru fine case**. In the first ground, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants have asserted that the accounts are not in the name of the Plaintiffs and that the proper Plaintiffs should have been the 3<sup>rd</sup> Plaintiff; which is not the case here.

(b) In the 2<sup>nd</sup> ground, the objection is based on the ground that after the Plaintiffs services as a Principal were terminated, the matter was removed from the High Court's jurisdiction and became an Employment and Labour Relations Court's matter, by dint of Article 165(2)(c) of the Constitution.

In ground NO. 3, counsel avers that the land on which the school stands also has a dispute so that the Plaintiff's disputes effectively fall under the Jurisdiction of court established by Article 162(2)(a) and (b), hence the Civil, Commercial and Admiralty Division under the High Court has no jurisdiction to grant the orders of injunction sought thereunder, but the same should go to the Environment and Land Court.

(c) The fourth (4) ground stands alone as it has challenged this court's authority to grant the orders sought because they are in violation of the Children's rights as protected by statute.

(d) The last ground deals with the issue of derivative suit in that the Plaintiff will breach part xi of the Companies Act, 2015. It can clearly be seen that the preliminary objection is standing on "three legs"

8. Justice Ibrahim M.K, sitting at Eldoret High Court then in the case of **Republic –versus- Eldoret Water & Sanitation Company Ltd Ex-parte Booker Onyango & 2 Others** (2007) eKLR applied the principle set in the Mukisa case and dismissed the case. The principles laid out prevent the parties from litigating in instalments and to protect the court's process so that it is not abused by litigants.

9. On the first ground, it is trite law that companies have no blood, brain or eyes to operate on their will, but operate through its Board of Directors. It is through this that its legal personality functions. The plaintiff has described herself as a shareholder holding 50% of the shares in the 3<sup>rd</sup> Defendant. The CR 12 PVT AAA DVNG annexed at page 2 of her list of documents reveals she has 500 shares while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold 250 shares each. Half of the 3<sup>rd</sup> Defendant is owned by her. By dint of the Companies Act, 2015, and the established principle, together with known practice, where directors have equal strength and are pulling in different directions, to protect their interest, can sue in their name other directors and the 3<sup>rd</sup> defendant becomes a necessary defendant so that orders made are carried out by the company. The scenario is different where it is a minority shareholder suing. Take the case of the 1<sup>st</sup> Defendant and 2<sup>nd</sup> defendant, each suing on their own, they would need to file a relator suit or derivative suit (see the case of **TITUS MUSYOKI NZIOKI VRS- JOHN KIMATHI MAINGI & ANOTHER (2013) eKLR** and **ISAIAH WAWERU NGUMI & 2 OTHERS –VRS- MUTURI NDUNG'U (2016) KLR**).

From the aforesaid, grounds No. 2 and 3, are disposed with, being that legal personality of a company moves with ownership and management. This merely a vehicle through which individuals work together and therefore to treat it as if its independence is for it to assist wrong doers, would be a distortion of company law.

In my considered view, and in line with what I have stated above, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds are dismissed.

10. The next argument is on ground No. 4 which relies on the Children's Act, and the Constitution of Kenya, 2010. The dispute before court is that the plaintiff is being forced out of business by reason that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have by breach of the memorandum of understanding and the Companies Act, on breach of conflict of interest principle guiding directors of a company, established a rival school, the 4<sup>th</sup> defendant and passing off almost a similar name and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the ones running the said school.

There is admission by the 1<sup>st</sup> and 2<sup>nd</sup> defendants that indeed the school is running. I have perused through the pleadings to see if there is anything the Defendant are denying to be incorrect. The explanation given in this ground No. 4 reveals that indeed the 4<sup>th</sup> defendant is running without the knowledge of the plaintiff and the plaintiff, who is also a director and Principle in the 3<sup>rd</sup> defendant has been sacked.

Here, there is need to balance the rights of the children and the plaintiff. With due respect to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants, the rights of the plaintiff and 3<sup>rd</sup> defendant are equally protected by the law and the defendants are answerable to the children and not the plaintiff.

The plaintiff has a higher duty of care towards the 3<sup>rd</sup> defendant and the children therein than in the 4<sup>th</sup> defendant. The plaintiff, an owner of the 3<sup>rd</sup> defendant is not a normal employee. The only foreseeable manner of separation would be as laid out by the Companies Act, 2015 and no other matter. In view of the said reasons, Section 49 of the Employment Act, does not apply to provide a remedy here. I therefore hold that ground 4 does not stand the test and the same is dismissed.

11. The last ground, No. 5 protests that court's jurisdiction on the premise of part Xi of the Companies Act, 2015. The said part provides that leave of court is required before the (plaintiff) files a suit. Section 240 of the Companies Act provides as follows;

“If :

240 (1):

- (a) a company has brought a claim;
- (b) the cause of action on which the claim is based

could be pursued as a derivative claim under this Part, a member of the company may apply to the Court for permission to continue the claim as a derivative claim on the ground specified in subsection (2).

(2) The ground is that-

- (a) the manner in which the company commenced or continued the claim amounts to an abuse of the Court process
- (b) the company has failed to prosecute the claim diligently; and
- (c) it is appropriate for the member to continue the claim as a derivative claim.

I have read through this Section and my interpretation of it is that Section 240 of the Companies Act, places responsibility on that person who believes that the suit is hurting the company. What the defendant ought to have done was for them to apply to this court to take out the suit for reasons outlined at Section 240 (2) (a) (b) and (c) thereof, and as per the discretion accorded vide Section 240(3)(a) and (b), the court would make appropriate orders. Again, ground NO 5 fails.

All in all if find and hold that the preliminary objection dated 3<sup>rd</sup> September, 2018 by the defendant has no merit and the same is hereby dismissed with costs.

**Ruling DELIVERED, DATED & SIGNED this 22<sup>nd</sup> day of October, 2018.**

**D. CHEPKWONY**

**JUDGE.**

In the presence of:

Mr Oluga, counsel for the plaintiff.

M/S Muyaa, counsel for the defendant.

Court assistant; Beja Nduke