



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 84 OF 2017

EAST AFRICA CAPITAL PARTNERS MANAGEMENT LP.....PLAINTIFF

VERSUS

WANANCHI NOMINEES LIMITED.....1ST DEFENDANT

ISP KENYA LIMITED.....2ND DEFENDANT

EAST COAST TELECOMS LIMITED.....3RD DEFENDANT

(By original action)

And Between

WANANCHI NOMINEES LIMITED.....1ST PLAINTIFF

INTERNATIONAL CONSULTING MARKETING SERVICES

LIMITED (formerly ISP KENYA LIMITED).....2ND PLAINTIFF

EAST COAST TELECOMS LIMITED.....3RD PLAINTIFF

VERSUS

EAST AFRICA CAPITAL PARTNERS MANAGEMENT LP.....1ST DEFENDANT

AFRICA TELECOMMUNICATIONS MEDIA

AND TECHNOLOGY FUND I, LLC.....2ND DEFENDANT

WANANCHI GROUP HOLDINGS LIMITED.....3RD DEFENDANT

RICHARD BELL.....4TH DEFENDANT

(By Counterclaim)

And further Between

WANANCHI GROUP HOLDINGS LIMITED.....PLAINTIFF

VERSUS

WANANCHI NOMINEES LIMITED.....1ST DEFENDANT

INTERNATIONAL CONSULTING MARKETING SERVICES LIMITED

(formerly ISP KENYA LIMITED).....2ND DEFENDANT

EAST COAST TELECOMS LIMITED.....3RD DEFENDANT

(By Further Counterclaim)

RULING

1. This Ruling is on a Preliminary Objection which was raised by the 3rd Defendant in the Counter-claim, WANANCHI GROUP HOLDINGS LIMITED (WGHL).

2. There are 5 grounds upon which the preliminary objection are founded, which can be summarized as follows:

1. The court lacks jurisdiction to hear the matters set out in the counter-claim.

2. The plaintiffs in the counter-claim have no locus standi to bring any action against the 3rd defendant to the said counter-claim.

3. The counter-claim and the application for injunctive orders are incurably incompetent as they were filed without the requisite court sanction.

4. The counter-claim discloses no cause of action against the 3rd defendant in the counter-claim.

5. The application is extra judicial, oppressive and an abuse of process, and is an attempt to further the concerted scheme of harassment and extortion by the plaintiffs in the Counterclaim to compel the 3rd Defendants in the Counterclaim and its investors to buy off the shareholdings of the plaintiffs in the Counterclaim in the ATMT Fund 1.

3. When canvassing the preliminary objection WGHL submitted that the counterclaim was, in reality, a derivative action brought on behalf of the plaintiffs in the counterclaim and other unidentified investors, disguised as a personal claim.

4. The plaintiffs in the counterclaim have not purported to bring a derivative action. Therefore, by asserting otherwise, the 3rd defendant in the counterclaim is suggesting matters of fact which may or may not be true.

5. In my understanding, it would be necessary for the 3rd defendant in the counterclaim to first lead evidence to prove the factual matters alluded to, before the court could conclude whether or not the counterclaim was in reality a derivative action.

6. As matters currently stand, the plaintiffs in the counterclaim have only brought their claim in their own personal capacities. If they should thereafter seek to extend the counterclaim so as to make it a claim for and on behalf of either identified or unidentified investors, the plaintiffs would then face the roadblocks stated by the 3rd defendant in the counterclaim.

7. For now, I find no factual basis upon which to found the contention that the counterclaim was, in reality, a derivative action.
8. If the suit were a derivative action, the plaintiffs in the counterclaim would have had to seek and obtain the leave of the appropriate court to institute it.
9. On the question of the alleged failure by the plaintiffs in the counterclaim, to obtain mandatory sanction from the court before instituting the proceedings, I hold the view that if such requirement were mandatory, the failure to obtain sanction could be the basis for striking out pleadings. The absence of court sanction would not, per se, deprive the court of jurisdiction.
10. Interestingly, the 3rd defendant in the counterclaim did submit that this court can only issue its sanction for the filing of a suit with respect to companies incorporated under the Companies Act, 2015. Considering that **WGHL** was not incorporated in Kenya, its position was that this court cannot, in any event, grant its sanction to the institution of the proceedings against it.
11. If this court cannot, in any event, sanction the institution of proceedings against **WGHL**, I cannot understand why **WGHL** is finding fault with the plaintiffs in the counterclaim for failing to obtain the said sanction.
12. On the issue of *Locus standi*, **WGHL** says that the plaintiffs in the counterclaim have conceded that they are not shareholders in **WGHL**.
13. If that be the case, the plaintiffs would lack the requisite locus to institute a derivative action against **WGHL**.
14. The plaintiffs in the counterclaim categorically state as follows;

“The counterclaim is NOT, and does not claim to be, on behalf of ATMT Fund 1. It is not a derivative action”.
15. The plaintiff’s would therefore be held to their word, in that respect. And if their claim is not a derivative action, the rules and regulations which govern derivative actions do not apply to this court.
16. **WGHL** submitted that if the counterclaim was a personal claim, it did not disclose any cause of action against it, as the plaintiffs have not disclosed or demonstrated any right owed to it by **WGHL**.
17. It is also the case of **WGHL** that the plaintiffs have failed to demonstrate how they would suffer any personal loss from the sale of the **WBS** entities.
18. As far as **WGHL** was concerned, it was only its shareholders who could be affected by the sale of the **WBS** entities. And, as the plaintiffs in the counterclaim were not shareholders in **WGHL**, the latter contends that the plaintiffs were not owed a right of participation in **WGHL**.
19. In response, the plaintiffs in the counterclaim pointed out that they are investors in the **ATMT** Fund 1. Therefore, in that capacity, they have rights. It is those rights that the plaintiffs have set out to pursue in the counterclaim.
20. As far as the plaintiffs were concerned, the results of their case would impact on other investors, but the plaintiffs had not lodged their counterclaim on behalf of any other shareholders.
21. I therefore reiterate that the arguments founded upon the assertion that the counterclaim was a derivative action are not sustainable.
22. The counterclaim against **WGHL** is said to stem from the fact that there was a relationship between **WGHL** and the plaintiffs in the counterclaim. Such a relationship is not due to shares which the

plaintiffs hold in **WGHL**; that is common ground.

23. It is further common ground that through the intricate Purpose Service Vehicles which were incorporated to facilitate a smooth and seamless profitable business, there exists some connection between **WGHL** and the plaintiffs. I say that it is common ground because both parties acknowledge the said connection.

24. Of course, **WGHL** describes the plaintiffs' claim against it as being remote.

25. To my mind, the alleged remoteness of the claim would not, of itself, strike a fatal blow at the said claim. At most, the remoteness of the claim may possibly be the basis for concluding that the claim was weak.

26. However, when determining whether or not the preliminary objection should be upheld, the court must refrain from determining the strengths or weaknesses of the case. If the court were to wade into issues about the chances of success of the case, that would constitute an assessment of the merits of the case: That is not a function of the court when it is called upon to determine a preliminary objection.

27. In conclusion, I find that the preliminary objection in this case bears factual aspects which require evidence for authentication, as some of the facts upon which it is premised are disputed. Therefore, it offends the following requirements, which was set out by Sir Charles Newbold **P. in MUKISA BISCUIT MANUFACTURING Co. LTD Vs WEST END DISTRIBUTORS LIMITED [1969] E.A 696, at page 701;**

“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 the exercise of judicial discretion”.

28. In this case, the 3rd defendant in the counterclaim did not canvass its preliminary objection on the assumption that all the facts pleaded by the plaintiffs were correct. The said 3rd defendant actually challenged some of the facts which the plaintiffs had pleaded, and then built its submissions on the “*new facts*”, as it understands them.

29. In conclusion, I find no merit in the preliminary objection. It is therefore overruled.

30. The 3rd defendant in the counterclaim shall pay to the plaintiffs in the counterclaim, the costs of the said preliminary objection.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of July 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Kimani for the Plaintiff

Miss Rachier for Amuko for E.A. Capital Partners Management & Richard Bell

Monari & Miss E. Omondi for the 3rd Defendant in counterclaim

Miss Kimani for Plaintiffs in counterclaim

Collins Odhiambo – Court clerk