



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL SUIT NO 1 OF 2017

WILMOT MWADILO.....1ST PLAINTIFF

EDWIN MWAKAYA.....2ND PLAINTIFF

AMOS NYATTA.....3RD PLAINTIFF

PATRICK MBINGA.....4TH PLAINTIFF

VERSUS

ELIUD TIMOTHY MWAMUNGA.....DEFENDANT

AND

SAGALLA RANCHERS LIMITED.....AFFECTED PARTY

RULING

INTRODUCTION

1. The Plaintiffs filed suit on 20th January 2017. On the same date, they filed a Notice of Motion application dated 18th January 2017 under Certificate of Urgency. The said application was brought pursuant to the provisions of Articles 50 and 159 of the Constitution of Kenya 2010, Section 1A, 1B and 3A of the Civil Procedure Act and Section 238 of the Companies Act, 2015.
2. Prayer No 1 of the said application was spent. It sought the following remaining orders:-

a. Spent.

b. THAT the Court directs all persons who have an interest in the affairs of Sagalla Ranchers Limited to submit names of persons who have the capacity to process the registration of the extension of the lease pf all that land captured in Plot No. 12177 Voi Taita Taveta County and disclose the full fee payable to such persons and also indicate within which period the said exercise would be completed thereupon the court to appoint the person who will appear most competent to undertake the said venture on terms that the fee thereof will be paid upon conclusion of the said service.

c. THAT be granted to the Plaintiffs/Applicants to continue with the suit for the benefit of the Affected Party as a derivative action.

d. THAT directions be given for the advertisement of this suit to notify all persons who have an interest in the affairs of the affected party to participate if they so wish in these proceedings.

e. THAT costs be in the cause.

3. Before the said application could be heard and determined, on 8th February 2017, the Defendant filed a Notice of Preliminary Objection dated 6th February 2017. The ground of the Defendant's Preliminary Objection were as follows:-

1. THAT the application was misconceived and an abuse of the court process.

2. THAT the Plaintiff/Applicants did not have the requisite *locus standi* to institute this suit and should therefore be struck out with costs.

3. THAT the matter was *subjudice* and /or *Res judicata*.

4. THAT granting the orders sought herein would totally prejudice the Defendant/Respondent who had been irregularly brought to this Court on the basis of innuendos and rumours.

5. THAT the suit was defective having been instituted against the Defendant in his personal capacity.

6. THAT the issues raised by the Plaintiffs/Applicants could only be addressed during the Annual General Meeting [AGM] Hence (sic) the suit ought to be dismissed with cost (sic).

7. THAT this court lacked jurisdiction to entertain this suit herein as it was vexatious and an abuse of the court process.

4. The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned Notice of Motion as the same touched on its jurisdiction.

THE DEFENDANT'S CASE

5. In his Written Submissions, the Defendant pointed out that under the Companies Act, only two (2) classes of people can commence a derivative suit to wit, *bona fide* shareholders and persons who are not shareholders of a company but to whom shares of the company have been transferred or transmitted to him or her by the operation of the law.

6. He argued that the Plaintiffs did not have jurisdiction as they had not adduced in evidence confirmed Grants of Administration for the estates of Japheth Mwadilo (deceased), Edwin Mwamunga Mwakaya (deceased) and Florence George Sowa (deceased). He relied on the case of **Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo & Another CA No 31 of 1987** in which the Court of Appeal held as follows:-

“But an administrator is not entitled to bring an action as ...before he has taken out letters of administration. If he does the action is incompetent from the date of inception.”

7. He also referred this court to the case of **Patrick Kiseki Mutisya (Suing as the Personal Representative of the Estate of Nzomo Mutisya (Deceased) vs K.B Shangani & Sons Limited & Others [2012] eKLR** in which Asike-Makhandia (as he then was), upheld the dismissal of a suit on a preliminary objection on the ground that it was filed by incompetent parties citing with approval the case of **Macfoy vs United Africa Ltd [1961]3 ALL E.R. 1169 at page 1172**, Lord Denning rendered himself as follows:-

“If an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order to set aside. It is automatically null and void and without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

8. He also placed reliance on the case of Apex International & Anglo Leasing Finance Ltd vs Kenya Anti-Corruption Commission [2012] eKLR where Emukule J (as he then was) quoted the case of Goodwill and Trust Investment Ltd & Another vs Witt & Bush Limited (Nigerian SC 266/2005) where the import was that that proper parties must be identified before an action can be found to be competent and have jurisdiction.

9. He therefore urged this court to dismiss the Plaintiffs’ case for being incompetent *in limine* for not having proper parties.

THE PLAINTIFFS’ CASE

10. On their part, the Plaintiffs argued that the Defendant did not deny that the 4th Plaintiff herein was a *bona fide* shareholder thereby allowing the suit herein to stand by virtue of his undisputed capacity to sue. In this regard, they referred this court to the case of Amin Akberali Manji & 2 Others vs Altaf Abdulrasul Dadani & Another [2015] eKLR in which it was held as follows:-

“There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case, the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves being in control, would not allow the company to sue.

The rule in Foss vs Harbottle still stands good in Kenya. The exception to the rule referred to above may be taken advantage of by minority shareholders if they can show fraud but they cannot do so by a petition. They can only do so as a derivative action.”

11. They further argued that the 1st, 2nd and 3rd Plaintiffs were beneficiaries of the estates aforementioned and the Affected Party had listed their names as shareholders of therein and that the Defendant had mismanaged the affairs of the Affected Party by failing to ensure statutory meetings are held, applying for extension of lease of the aforementioned property and passing resolutions against the interest of the Affected party and thus put them at risk.

12. It was therefore their contention that they could commence the derivative action by virtue of Section 238 of the Companies Act which permits persons who are not members of a company to institute a derivative suit where shares in the company have been transferred or transmitted to them by operation of law where there was 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 a company, who in this case was the Defendant herein.

13. They also submitted that the leave to continue with the derivative suit herein had been sought in their Notice of Motion application dated 18th January 2017 and filed on 20th January 2017. They referred this court to the case of Amin Akberali Manji & 2 Others vs Altaf Abdulrasul Dadani & Another where the Court of Appeal held as follows:-

“Leave of the court shall be obtained before filing a derivative suit but may also be obtained to continue with the suit once filed. On this the trial court was right in adopting the exposition of the procedure in the treatise “Minority Shareholders: Law, Practice and Procedure” by Joffe that “ there is no approved pre-action protocol in relation to derivative action” and that after the claim form has been issued, the claimant is required to make an application –which

must be supported with written evidence- for permission to continue with the claim.” It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a *prima facie* case demonstrating that he has locus standi to institute such an action, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in *Foss vs Harbottle*.”

14. They averred that they had raised substantive issues for hearing and just determination by this court and as provided for in Articles 10, 47 and 50 of the Constitution of Kenya, 2010, the policy of the law is to hear and determine cases and not summarily dismiss the same. It placed reliance on the case of **Mukhisa Biscuit Manufacturers Ltd vs West End Distributors Ltd [1969] E.A. 696** in which Sir Charles Newbold was emphatic that it was an improper practice which ought to stop.

15. They also relied on the case of **Transcend Media Group Limited vs Independent Electoral Boundaries and Electoral Commission (I.E.B.C.) [2015] eKLR** where the holding was that a court should never strike out a case if it has chances of success, if it can be injected with real life by an amendment, if it is plain, obvious, clear and beyond doubt and that the court ought not to engage in engaging in a minute and protracted examination of facts and documents before the matter proceeds for hearing.

16. In addition, they asserted that it was next to impossible to canvass the issues they had raised in the suit herein at an Annual General Meeting (AGM) as the Defendant was a majority shareholder who had control of the Affected Party. They placed reliance on the holding of Lord Denning in the **Moir case** (Supra) (sic). The citation of this case was not provided to this court. In the said case, the Plaintiffs contended that Lord Denning held that any suggestion by a minority in a general meeting would definitely be shot down by the majority shareholders.

17. They were emphatic that they had annexed documents showing that they had *locus standi* to institute the suit herein against the Defendant herein and if at the conclusion of the case this court found their assertions not to have been merited, then the suit can be dismissed at that juncture.

18. They submitted that the Preliminary Objection that was raised by the Defendant was neither clear nor plain and that the determination of the same would require a minute and protracted examination of the documents that they had filed herein.

THE AFFECTED PARTY'S CASE

19. On its part, the Affected Party supported the Defendant's case and argued that the Plaintiffs had not shown this court how they came to be its shareholders as provided for in the Companies Act and the Law of Succession Act. It pointed out that Japhet Mwadilo Mwaisaka was its director and shareholder but that after his death, the 1st Plaintiff who was his beneficiary had not demonstrated how he became its shareholder. It added that the 3rd Plaintiff did not also show how he was entitled to the shares of Flora George Sowa who was its shareholder.

20. It averred that the Plaintiff should have adduced in evidence, Grants of Letters of administration to demonstrate that they were personal administrators of the deceased's estates as defined in the Law of Succession Act. In this regard, they relied on the case of **Mary Nanjala Muhalya vs Ambrose Kipruto [2014] eKLR** where E. Obaga held that a legal representative is a person to whom a grant of letters of administration has been made under the Law of Succession.

21. It also referred this court to Section 239 (sic) of the Companies Act that provides that a derivative claim means proceedings that have been instituted by a member of the company in respect of a cause of action vested in the company. It placed reliance on the case of **Tatu City Limited & 3 Others vs Stephen Jennings & 6 Others [2015] eKLR** where Ogola J held that a derivative action is not open to non- shareholders in a company.

22. It therefore urged this court to strike the suit as the Plaintiffs were neither its majority nor minority

shareholders.

LEGAL ANALYSIS

23. According to Section 3 of the Companies Act No 17 of 2015, a “member” means “**a member of a company.**” The company must have been formed and registered under this Act or has been an existing company.

24. Under Section 238 of the Companies Act it is stated 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.**
- 2. 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.**

25. For a party to succeed in an action for derivation action, he or she must demonstrate the following:-

- a. He or she must be a member of the company and includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law;**
- b. The proceedings must be in respect of a cause of action vested in the company;**
- c. The proceedings must be seeking relief on behalf of the company;**
- d. The proceedings must be for protection of members against unfair prejudice brought under the Companies Act.**
- e. The proceedings are 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;**

26. A close reading of the instant Defendant's Preliminary Objection relating to the *locus standi* of the Plaintiffs herein, this court is only limited to establishing whether or not they have satisfied this court if they are members of the Affected Party and if they are not, that the shares in the Affected Party have been transferred or transmitted to them by operation of law.

27. As was rightly pointed out by the Plaintiffs, a court ought not to examine and pore over documents before hearing and determining the substantive matter with a view to striking out the proceedings *in limine*. Indeed, Article 50 of the Constitution of Kenya, 2010 provides that every person has a right to access a court of law for the determination of a dispute. Notably, Article 159(2)(d) of the Constitution of Kenya also mandates courts to administer justice without undue regard to procedural technicalities.

28. However, this court was tasked with duty of determining whether or not the Plaintiffs' failure to demonstrate that had *locus standi* to institute the proceedings herein, if at all, was a defect that could be overlooked so that the court could delve into the merits or otherwise of their derivative action against the Defendant, who is a majority shareholder of the Affected Party.

29. Indeed, as the issue of the *locus standi* of the Plaintiffs goes to the root of the matter, poring over and examining of their documents cannot be avoided as this court will have to be satisfied that they had jurisdiction to institute the proceedings herein. Indeed, no busy bodies ought to be permitted to occupy the court's time if indeed they are not closely related to a matter. Judicious time is precious and must be guarded jealously.

30. A perusal of the Affected Party's Memorandum and Articles of Association shows that when it was incorporated on 12th March 1968, the initial shareholders having one (1) share each were Nganyi Warombo and Isaac Njema. The first directors were indicated as Nganyi Warombo, Japhet Mwadilo, Isaac Njema and Laban Mwateri.

31. The Form of Annual Return made up to 12th January 2011 (CR 12) lodged by M/S Victor Were & Associates that was attached to the Plaintiffs' List of Documents at the time of instituting the derivative action was incomplete as it did not show who were the past and present members of the Affected Party making it difficult to know how the Plaintiffs herein became members of the Affected Party.

32. Paragraph 7 of the Plaintiff's Complaint that was dated 18th January 2017 and filed on 20th January 2017 showed that the directors certified by the Registrar of Companies in Certificates of Search (CR 12) (**sic**) dated 23rd February 2011, 7th March 2012 and 15th December 2014 indicated that the genuine directors were as follows:-

1. Clorent Mwacharo

2. Ronald Mwanyama

3. Eliud T. Mwamunga

4. Amos Nyatta

5. Wilmot Mwadilo

6. Raphael Lewela Mbinga

7. Patrick Mbinga

8. Edwin Mwakaya

33. Notably, there was no document in the Plaintiffs' Bundle of documents that demonstrated this position with certainty. In Paragraph 4 of his Replying Affidavit that was sworn on 28th February 2017

and filed on the same date, Rapheal Lewela Mbinga who described himself as a director of the Affected Party contended that the Plaintiffs were not members of the Board of Directors and that they had been masquerading as such despite them not having been re-elected to the Board following an Extra Ordinary General Meeting held at Maungu on 25th January 2014.

34. In Paragraph 4 (c), the said Rapheal Lewela Mbinga did acknowledge that the Plaintiffs herein were not re-elected to the Board of Directors. The key words in Paragraph 4 of the said Affidavit were that the **Plaintiffs were not members of the Board of Directors** (emphasis court) and not that the Plaintiffs were not members of the Affected Party.

35. Whilst it is true that the Plaintiffs did not initially file any documents to demonstrate how they became directors of the Affected Party, it did appear to this court that the admission by the said Rapheal Lewela Mbinga that the Plaintiffs were not re-elected on 25th January 2014 pointed to the fact that they were members of the Affected Party. Indeed, the Plaintiffs could not have been elected as members to the Board of Directors if they were not members of the Affected Party.

36. The question of who was or was not a genuine director was beyond the scope of the Preliminary Objection herein as evidence ought to be tendered to establish whether or not elections had been held as required by the law and in accordance with the Articles of Association of the Affected Party and who indeed were the directors.

37. As was held in the case of **Amin Akberali Manji & 2 Others vs Altaf Abdulrasul Dadani & Another** (Supra) that was relied upon by the Plaintiffs and **Tatu City Limited & 3 Others vs Stephen Jennings & 6 Others** (Supra) that the Affected Party placed reliance upon, minority shareholders can institute a derivative action against the majority shareholders.

38. This was also the position in the case of **Rai & Others vs Rai & Others [2002] 2 EA 537** and **Sultan Hasham Lalji & 2 Others vs Ahmed Hasham Lalji & 4 Others [2014] eKLR**. In the latter case, it was held as follows:-

“It is the minority not the majority shareholders that are availed the protection by the exceptions since generally majority shareholders exercise powers of the company and control its affairs.”

39. Appreciably, Section 238 of the Companies Act refers to members instituting derivative actions against majority shareholders. Such members need not be directors in a company. It is sufficient that they institute the derivative action in their capacity as members of the company. The Defendant did not adduce any evidence to demonstrate that he was not a majority shareholder and that the proceedings could not be instituted against him in his personal capacity or that the Plaintiffs were not members of the Affected Party. They merely asserted that the Plaintiffs were not directors in the Affected Party.

40. In the absence of evidence to demonstrate how the Plaintiffs really acquired the *locus standi* to institute the proceedings herein, this court noted that Section 239 of the Companies Act provides that at the time of considering whether or not to grant an applicant leave to continue with a derivative action, a court has the discretion of adjourning the proceedings to give such an applicant to adduce evidence to demonstrate that he or she has a cause of derivative action.

41. Section 239 (2) and (3) of the Companies Act provides as follows:-

2. If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—

a. shall dismiss the application; and

b. may make any consequential order it considers appropriate.

3. If the application is not dismissed under subsection (2), the Court—

a. may give directions as to the evidence to be provided by the company; and

b. may adjourn the proceedings to enable the evidence to be obtained.

42. Dismissing a suit *in limine* by this court would be ill-advised bearing the life line given to an applicant to adduce more evidence at the time of hearing the application for leave to continue with a derivative suit. As was held in the case of Mukhisa Biscuit Manufacturers Limited vs West End Distributors Ltd (Supra), Law , J.A. at page 700 observed:-

“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 pleading and which if argued as Preliminary Objection may dispose of the suit.”

43. Indeed, as has been seen hereinabove, the effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party its day in court. Such summary dismissal or striking out of a case is a draconian issue that must be exercised with caution and as a last resort. It was evident to this court that disputes between the Plaintiffs, the Defendants and other parties relating to the affairs of the Affected Party and who or who was not a director of the Affected Party have inundated different courts in Voi and Mombasa.

44. The multiple filing of suits and seeking to strike out matters on technicalities ought to stop forthwith so as to get to the root of the dispute between the parties herein. In the same breathe, dismissing the action herein *in limine* suit herein will have denied this court the opportunity of hearing and determining the real issues that are in dispute or in controversy over the parties.

45. Accordingly, having considered the Defendant’s present Preliminary Objection and the Written Submissions and case law that were relied upon by the parties herein, it was the considered view of this court that upholding the said Preliminary Objection when Section 239 (3) of the Companies Act permits a court to adjourn the proceedings to enable an applicant adduce evidence would be denying the Plaintiffs an opportunity to ventilate their case. This court was not satisfied that the Plaintiffs’ action had reached the threshold of being dismissed on the grounds the Defendant relied upon.

46. Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

47. Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application.

DISPOSITION

48. For the reasons foregoing, the Defendant’s Notice of Preliminary Objection dated 6th February 2017 and filed on 8th February 2017 was not merited and the same is hereby dismissed. Costs shall be in the cause.

49. It is so ordered.

DATED and DELIVERED at VOI this 17th day of October 2017

J. KAMAU

JUDGE