



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 142 OF 2011

MANGO VILLAS LTD.....APPLICANT

VERSUS

MANFORD RICHARD JOHN.....RESPONDENT

RULING

1. The applicant, REBECCA ACHIENG OKELO has filed a notice of motion dated 19.2.2015 and filed in court the same day and prays to court for orders that:

(a) That this Honourable court be pleased to grant leave to the Plaintiff to institute derivative proceedings on behalf of and for the benefit of Mango villas limited.

(b) That upon leave to institute derivative proceedings being granted this Honourable court be pleased to further grant leave to the Plaintiff to amend the Plaintiff filed herein.

(c) That the proposed 2nd Defendant to file its Defence, if any, within 14 days from the date of the Court Order granting the Plaintiff/Applicant Leave to amend his Plaintiff.

(d) That the costs of this application be provided for.

2. The grounds upon which the application is made are that the applicant and the defendant being the only shareholders in the plaintiff, holding 50% each, have differences which cannot allow them to meet and hold meeting to transact the business of the company to among other things; institute a suit against the defendant, who is said to have crafted resolutions without the participation of the applicant which resolution has the effect of acknowledgment of a debt of kshs.10,655.050 owing by the company to the defendant.

3. The application is supported by the Affidavit of the applicant in which it is contended as in the grounds on the face of the application that due to the differences between the parties, the defendant has been in charge of the company affairs and acts *ultra vires*, by among other appointing a third party things to collect rent, passing a resolution acknowledging indebtedness to the company in the sum of kshs.10,655,050 fraudulently and appointing one Jophece Yogo to be the Company Secretary.

4. The application is opposed by the defendant/Respondent who swore and filed replying affidavit on 24.7.2015 and in which affidavit the defendant largely contended and deny any of the wrongdoings he is

accused of, that he is entitled to repayment of his loan to the company and that he is entitled to continue with the activities complained of courtesy of his 90% shareholding.

Analysis and determination:

5. The substratum of the suit before the court is the complaint as evident in the Amended plaint filed in court on the 19.2.2015 and is intended to remedy the alleged wrongs alluded to in the application under consideration. The applicant seem to say on behalf of the company that as a result of their difference, the company's directors have not met to transact its business and that while that state persists the defendant has unilaterally appointed other people to collect rent and to be company secretary.

6. Those to me are *prima facie* genuine complaint and need to be accorded a chance to be canvassed at trial. That can only be done if the leave sought herein is granted and a derivative action allowed to be proceeded with.

7. If indeed the company only owns a single property, and the rents therefore are not accounted for but employed outside the direct benefit of the company, then I, without deciding the veracity of the complaint, would hold the view that the company is entitled to the income from its asset and only it can pursue that right. In the absence of a resolution to file such a recovery suit, the only other available avenue is a derivative suit.

8. I say so because the defendant is convinced and has sworn on oath that the actions the applicant seeks to restrain are actions to which he is entitled to undertake as the majority. One would wonder how else the company will make a decision on such important matter as appointment of Company Secretary without board's resolution.

9. It has not been denied by the defendant that by reason of the disclosed disagreement the directors are unable to meet and transact the company business. It is however tacitly admitted, that he has appointed the person collecting rent and the company secretary because he has the controlling powers.

10. Picking on the issue of income of the company assets and its application, I am convinced that is squarely a corporate right of the company for which it is entitled to sue and I entertain no doubt at all that this suit is in the interests of the company and not the personal interests of the applicant.

11. The next question is whether there is proof that the matter squarely falls within the exceptions in the Rule in FOSS -VS- HARBOTTLE.

12. It is agreed by both sides that the Defendant holds 90% while the applicant holds 10% of the shares. In contention in the suit before the court is the company resolution of the alleged meeting of 26.9.2007 and the decision to acknowledge debt of KShs.10,650,050 from the Defendant to be paid from the rental income from the company's only asset. Should the contention be proved right, it would be a situation, where the majority is using the company assets for own benefit and against the benefit of the company and other share holder. Such is the scenarios anticipated by the exceptions to the Rule in FOSS -VS- HARBOTTLE, that the majority is employing the controlling stake in the company to perpetuate fraud on the minority.

13. If that comes to pass then the direct effect and ramification would be to deny the company declaring any dividends since any income would be directed wholly to the Defendant for a long time to come.

14. In such a case, the applicant's right as a shareholder, to expect earnings on her shareholding will have been infringed and that invokes the exception to the Rule in FOSS -VS- HARBOTTLE.

15. The totality of my findings foregoing is that I find merit in the application dated 19/2/2015, I allow it as prayed and order that costs be in the cause.

Dated, signed and delivered at Mombasa this 19th day of February 2016.

In the presence of:-

No appearance for the Applicant/plaintiff.

Akee for Maina for the Defendant/Respondent.

P.J.O.OTIENO

JUDGE