



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI COMMERCIAL COURTS)

MISC CAUSE NO. 58 OF 2015

IN THE MATTER OF ASHBOURNE PROPERTIES LIMITED (“the Company”)

AND

IN THE MATTER OF COMPANIES ACT, (CAP 486)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE DERIVATIVE ACTION

BY

**ROBERT NICHOLAS DARBY (A SHAREHOLDER)
.....APPLICANT**

RULING

Derivative suit

[1] This is an application to commence a derivative suit on behalf of and for the benefit of Ashbourne Properties Limited (the Company). It has been made by a Motion dated 16th January 2015 which is expressed to be brought under section 3A of the Civil Procedure Act. The Application is supported by the Affidavit of ROBERT NICHOLAS DARBY sworn on 16th January 2015.

Brief Facts

[2] The Applicant gave a brief account of the fraud committed by one of the directors, Hillary Maina Thegeya. He stated that Ashbourne Properties Limited was incorporated on 09/09/2008 as a limited liability company (C. 161153) and its registered office was in Nairobi. The Company has a share capital of Kshs. 100,000/= divided into one thousand (1,000) shares of Kshs. 100 each. The shares are fully allotted to two shareholders in the following equal proportions:

- i. Fintel Limited-500 ordinary shares
- ii. Robert Nicholas Darby-500 ordinary shares

The shares in Fintel Limited as at 10/5/2012 were held by Evans Kuria Thegeya (49 shares) and

Hillary Maina Thegeya (51 shares) both of P.O. Box 17244 Nairobi.

[3] Sometime in November 2010, the Company acquired a property L.R. No. 209/9859 measuring nought decimal one one one three (0.1113) of a hectare at Dam Estate, along Langata Road in Nairobi (hereafter called “the property”). Evans Kuria Thegeya unfortunately passed away on 25/4/2011 leaving Hillary Maina Thegeya to represent FINTEL LIMITED on the Board of the Company. Africa Registrars who were the Company Secretaries opted to resign and the Company has been unable to meet and transact the affairs of the Company.

The alleged fraud

[4] According to the Applicant, on 26/11/2012, one M.M. THEGEYA of ID No. 1909758 and L.N. KAHATA of ID No. 3052126 usurped the powers of the Company and purported to sign and transfer the property of the Company to one MAINA MWANGI THEGEYA for a consideration of Kshs. 500,000/=. Upon inquiry it was discovered that the name of MAINA MWANGI THEGEYA was by Kenya Gazette Notice No. 2295 published on the 12th April 1996 renounced and abandoned and the owner assumed and adopted the new name of HILLARY MAINA THEGEYA. The Applicant averred that he was unaware of the purported sale of the property as the company had not made any resolution to sell or transfer the property to M.M. Thegeya. Hillary Maina Thegeya used the name M.M. Thegeya to conceal his identity and defraud the company of its property. The said transfer of the property was illegal and not authorized by the Company. The relations between the Applicant and the said Hillary Maina Thegeya are strained as Hillary is a beneficiary of the fraud against the company. Hillary and the Applicant are unable to meet and conduct the business of the Company making it necessary for the Applicant to obtain leave to commence a derivative suit for and on behalf of the Company.

[5] The Applicant cited the case of **the Matter of CMC Holdings Limited [2012] eKLR** where Musinga J. summarized the procedure for commencing derivative actions and stated thus:

“ ...In the circumstances, the long standing practice, and which I find reasonable, has always been that before a derivative action is filed, the applicant brings to court an ex-parte application for leave supported by a detailed affidavit so as to demonstrate that he has locus standi to institute such an action and that he has a prima facie case.”

[6] And also the case of **David Langat-vs-St. Lukes Orthopedic and Trauma Hospital Ltd. & 2 others [2013] eKLR** where the court held that for an Applicant to be granted leave to commence a derivative suit they must demonstrate the following:

- i. That the company is entitled to the relief claimed; and
- ii. That the action falls within the proper boundaries of an exception to the rule in Foss-vs-Harbottle.

Determination

[7] I have considered all the facts as stated by the Applicant. Taking those facts to be true, one of the Directors, Mr. Hillary Maina Thegeya used his earlier names, which he officially renounced, to purchase company asset. Such action would in ordinary circumstances be stealth, for it smells concealment of identity to obtain a benefit in a fraudulent manner. It is certainly a form of stealth fraud on the company and the other shareholders. Again, the director committing the fraud holds a 50% shareholding of the Company. In a sense, he is possessed of control of the Company as no resolution can be passed without him. Strict insistence of majority and minority especially in such case as this where there are only two directors and shareholders each holding 50% shareholding will be absurd and out of touch with reality of facts of the case. Courts have dealt with this question of majority vs minority in a great number of cases but I am content to cite the following cases relied by the Applicant. The case of **David Langat-vs-St. Luke’s Orthopaedic & Trauma Hospital Ltd. & 2 Others (supra)** where the court observed as follows as regards the fourth exception:

“But at least it is clear that both fraud and minority are used somewhat loosely. There need not be an actual deceit... nor is it necessary that those who are injured should be a minority; indeed the injured party will normally be the company itself...Keenan refers to the fraud on the minority exception as ill-defined. He lists two broad categories of fraud on the minority to cover first where the company itself is defrauded and secondly, where the minority individuals are themselves defrauded. The concept of fraud on the minority therefore has to be understood in this wider sense.”

The Court further held thus:

“I would therefore allow this application based on the 4th exception to the Rule in Foss-vs-Harbottle expanded in the interests of justice to accommodate the situation that the deadlock herein has brought as the company is unable to pass a resolution to institute suit.”

See further rendition of the court in the **David Langat** case that:

“I think to insist that there must be a majority and minority before the exceptions in the Rule in Foss-vs-Harbottle can be applied has the capacity to lead to injustice. In my view the court has inherent jurisdiction to ensure that justice is done. This inherent jurisdiction is indeed the very foundation of the exceptions to the Rule in Foss-vs-Harbottle. These exceptions are founded in equity and are meant to cure the hardship and injustice that may be occasioned to the company and to its shareholders by a strict application of the Rule in Foss-vs-Harbottle.”

And that:

“The position in which a shareholder in a 50:50 situation finds himself is no less different from the position that a minority shareholder finds himself. A minority shareholder is handicapped and frustrated because he can pass no resolution to benefit the company. His views are prone to being trampled upon by the majority and he finds himself hamstrung, unable to do anything on behalf of the company. That position is similar to that which a person holding 50:50 shareholding finds himself. He is unable to pass any resolution because the other half must accede to it. If the other half does not permit the resolution to pass then the one shareholder is stuck, just as he would be stuck if he was a minority.”

[8] From the averments by the Applicant, the relationship between the directors is strained and there is not possibility of remedying the fraud through ordinary mechanisms of company through resolutions. The facts as presented to the Court support inference that fraud has been committed on and the company will suffer unless leave to commence derivative suit for remedy is granted. As a matter of law, the company will suffer from the fraud and is, therefore, entitled to the relief claimed herein. Accordingly, this is a perfect case to commence a derivative suit as it falls squarely within the exceptions to the rule in **Foss vs. Harbottle**. As such, I grant the Applicant leave to file a derivative suit for and on behalf of the company in the company name; such suit to be filed in 14 days of today. It is so ordered.

Dated, signed and delivered in court at Nairobi this 24th day of April 2015

F. GIKONYO

JUDGE