



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 416 OF 2013

BILLY AMUGUNE PLAINTIFF

VERSUS

JENNIFER GESARE MIHESO 1ST DEFENDANT

NAOMI BOCHERE ONSONGO 2ND DEFENDANT

ROBIN IVORY VENTURES LIMITED 3RD DEFENDANT

DEVELOPMENT BANK OF KENYA LTD. 4TH DEFENDANT

KENYA COMMERCIAL BANK 5TH DEFENDANT

R U L I N G

1. Before this Court for determination is the Notice of Motion dated 29th November 2013 filed by the first, second and third Defendants. The Application is brought under the provisions of **Order 2 rule 15** of the *Civil Procedure Rules* as well as **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Application seeks the simple prayer that this suit be struck out with costs on the grounds that it is incurably defective and that the Plaintiff lacks *locus standi* to bring the same. The first, second and third Defendants maintain that the entire suit herein is incompetent, discloses no cause of action as against them, is frivolous and scandalous and an abuse of the process of this Court. The Application is supported by the Affidavit of the first Defendant sworn on 29th November 2013 and she makes the Affidavit on behalf of herself and the second Defendant. The deponent noted that the Plaintiff is not a director of the third Defendant and has never been such since inception. As a result, the Plaintiff has no *locus standi* to institute the suit. She also noted that the documents relied on by the Plaintiff herein are a forgery.
2. The Plaintiff swore a Replying Affidavit on 22nd January 2014. He maintained in paragraph 3 of that Affidavit that he became a director of the third Defendant company in June 2013 as per the copy of the Annual Return together with accompanying documents (including a Resolution of the Company dated 17th June 2013) filed at the Companies Registry on 20th June 2013, duly signed by the first Defendant, as well as form CR 12 issued by the Registrar of Companies dated 29 July 2013. The Plaintiff noted that in early September 2013, he had complained against the conduct of the first and second Defendants in the running of the third Defendant Company. He maintained that the third Defendant hurriedly filed with the Registrar of Companies, another set of documents on 27th September 2013 which purported to remove him as a director and to redistribute his shares amongst themselves. The first and second Defendants had then obtained from the Registrar of

Companies another Form CR 12 which did not reveal the Plaintiff as a director. The Plaintiff maintained that the actions and conduct of the first and second Defendants were actually criminal as he had never signed any resignation, Statutory Declaration or Transfer of his shares in the third Defendant Company. In his opinion, the Suit before Court raises triable issues as to whether he was entitled to participate in the running of the third Defendant Company. He maintained that the Application brought by the Defendants was before Court prematurely, that it was bad in law and brought in bad faith.

3. The first, second and third Defendants' submissions in connection with the Application before Court dated 29th November 2013 were filed herein on the 26th February 2014. They submitted that the fifth Defendant had not opposed the Application while the fourth Defendant had never filed any papers in connection with the suit. The first, second and third Defendants continued their submissions by detailing that this suit was incurably defective on the grounds that the Plaintiff had no capacity to bring it as he was not a director of the third Defendant and no manner of amendments could be made so as to make him become a director of the third Defendant. They maintained that it could not be a coincidence that two parties carrying out a search at the Companies Registry came out with the same results - that the Plaintiff was not a director of the third Defendant company. As he was not a director or indeed a shareholder, the Plaintiff had no locus and therefore, no right to be heard. The first, second and third Defendants had raised the issue of fraud and had reported the same to the police. However, in his replying affidavit, the Plaintiff also tried to raise the issue of fraud but gave no particulars therefore as required by law. The first, second and third Defendants explained that, in relation to the business of the third Defendant company, the documents attached to the Replying Affidavit of the Plaintiff had come into his hands for, at the time, he was cohabiting with the first Defendant. The first, second and third Defendants submitted that there was no cause of action against them and indeed the Plaintiff was frivolous, scandalous and an abuse of the Court process. The first, second and third Defendants concluded their submissions by referring this Court to **Bullen & Leake Precedents of Pleadings 12th Edition** as regards the definition of abuse of Court process and to the case of **National Bank of Kenya Ltd v Kahumbu HCCC No. 510 of 2006 (2007) eKLR**.
4. The Plaintiff filed his submissions herein on 3rd March 2014. They commenced by stating that there was no Statement of Defence filed by the first, second and third Defendants. Indeed, those Defendants only filed their Defence on 3rd March 2014. The Plaintiff maintained that his Plaintiff raised triable issues as follows:

“i) Whether or not the Plaintiff as a Director of the 3rd Defendant is entitled to participate in decision-making processes and affairs of the 3rd Defendant.

ii) Whether or not the 1st, 2nd and 3rd Defendants ought to conduct business in accordance with the Memorandum & Articles of the Company.

iii) Whether or not the 1st and 2nd Defendants ought to render accounts for the funds of the 3rd Defendant; and

iv) Whether the Plaintiff is a Director of the 3rd Defendant, according to the Defendant's lame argument based on documents they have criminally forged and fraudulently lodged in the Companies Registry on 20th September 2013, contrary to the 3rd Defendant's Articles of Association, which was done as a malicious reaction against the demand and notice that was served upon them on 16th September 2013.

Note: This is an issue that can only be determined if properly pleaded by the Defendants in a Defence after hearing evidence, including the evidence of the Registrar of Companies, though it is clear on the face of the documents used to change the Directorships that the same were fraudulent and forgeries – which is criminal”.

The Plaintiff laid emphasis on what he maintained was the first and second Defendant's criminal acts of fraud and forgery and maintained that it was self-defeating for those Defendants to say that the

Plaintiff had never been a director of the third Defendant company when the registered documents at the Companies Registry clearly indicated that he was so.

- Continuing with his submissions, the Plaintiff maintained that the Application before Court was an abuse of its process for the reasons that the first and second Defendants had forged the Plaintiff's signature on his so-called letter of resignation as a director and the Transfer in relation to his shares as well as the Statutory Declaration. As regards the use of the court process in bad faith and for improper purposes, the Plaintiff referred to **Paragraph 434 of Volume 37 Halsbury's Laws of England 4th Edition**. In his view, the Plaintiff maintained that for the first and second Defendants to present to this Court, annexed to an affidavit copies of documents made or obtained irregularly, was an abuse of this Court's process. Finally, the Plaintiff referred the Court to the well-known authority of **DT Dobie & Co. Ltd v Muchina (1982) KLR 1**. He maintained that the first, second and third Defendants' Application before Court lacked merit and was based on the criminal activities of the first and second Defendants and was thus an abuse of the Court process.
- Madan JA** (as he then was) in the **D. T. Dobie** case (supra) adopted the finding of **Sellers LJ** in **Wenlock v Moloney** when the learned Judge had this to say:

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

Further and in the same case, **Danckwerts LJ** detailed:

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading”.

Madan JA (as he then was) went further in the **DT Dobie** case (as above) adding his own view as to the matter of striking out:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it.”

- The first, second and third Defendants main thrust of argument is that the Plaintiff lacks *locus standi* to bring this suit more particularly as he is not a director of the third Defendant. Looking at the latest Form CR 12 from the Assistant Registrar of Companies dated 14th October 2013 annexed to the Supporting Affidavit at page 1 (presumably as Exhibit “EN 1”), the Plaintiff's name does not appear as a director and shareholder. Neither does his name appear on the earlier Form CR 12 dated 4th October 2013 exhibited as “EN 2”. However, the Replying Affidavit of the Plaintiff dated 22nd January 2014 refers to the exhibits annexed to his Affidavit filed herein dated 21st November 2013. In fact, the Plaintiff did not swear that Affidavit it was sworn by his advocate at the time one **Burton Isindu** on that date and filed herein on 25th November 2013. Annexed to that Affidavit was a nundle of documents including a copy of a letter written by the deponent's firm to the Registrar of Companies dated 18th October 2013 marked as Exhibit “BI 3”. Attached to that letter was a Form CR 12 dated 29th July 2013 which details the Plaintiff as a director holding 200 shares in the third Defendant Company. The said Mr. Isindu then attached further documents that he maintained that his firm had obtained relating to the purported change of directors. I have examined those documents and at page 8 of the annexures I have noted a Resolution of the third Defendant Company dated 17th June 2013 which appointed the Plaintiff as a “New Director” of the company and allotted him 200 shares. That document was lodged with the

Registrar of Companies on 20th June 2013. Over and above that, there is a Notification of Change of Directors and Secretaries again dated 17th June 2013 detailing the Plaintiff's Appointment as a director with effect from that date. The same was lodged with the Registrar at Companies on 20th June 2013. Further on page 10A of the Annexure, is a copy of a Return of Allotments made on 17th June 2013 which details the allotment of 200 Ordinary shares to the Plaintiff. Finally in this sequence, there is an Annual Return for the third Defendant company made up to the 18th June 2013 filed again on 20th June 2013 with the Registrar of Companies. The Plaintiff is shown as a shareholder holding 200 shares as at that date and he is also shown as a director on page 15 of the said Annexure.

8. Later, at page 17A of the said Annexure the deponent exhibited what was termed a Form of Interim Return of a Company having a Share Capital made up to the 19th September 2013. That document revealed that on the 20th July 2013 the Plaintiff had transferred 100 shares to the first Defendant and on 20th September 2013, he had transferred 100 shares to the second Defendant. On page 20A of the Annexure the Plaintiff's name no longer appears as a director. That Return was lodged with the Registrar of Companies on 20th September 2013. At page 21A of the Annexure, there appears what seems to be a resignation of the Plaintiff as a director of the third Defendant company dated 17th September 2013. Then at pages 22A and 23 of the Annexure appear two share transfer forms both allegedly executed by the Plaintiff, the first transferring 100 ordinary shares to the first Defendant being dated 17th September 2013 and the second transferring 100 ordinary shares to the second Defendant bearing even date. The share transfer forms are accompanied by a copy of a Stamp Duty Declaration Assessment dated 20th September 2013 detailing the payment of Shs. 200/- in Stamp Duty and Shs. 110/- Bank charges. In this sequence, there are three other copy documents of note being a Statutory Declaration dated 17th September 2013 allegedly signed by the Plaintiff detailing that he had resigned as a director of the third Defendant Company on 17th September 2013. There is an extract of a unanimous written resolution of the directors of the third Defendant Company, again dated 17th September 2013, accepting the resignation of the Plaintiff as a director of the company. Finally, there is a Notification of Change of Directors and Secretaries dated 17th September 2013 but registered with the Registrar of Companies on 30th September 2013 detailing the resignation of the Plaintiff as a director of the third Defendant Company. The Plaintiff has submitted that the signatures appearing on the resignation (as a director) form, the share transfer forms and the Statutory Declaration are not his. He maintains that he never resigned as a director and shareholder of the third Defendant Company and that the aforementioned documentation (or at least his signature thereon) is forged.
9. I have set the above out in detail because, to my mind, the documentation clearly sets up triable issues which are detailed in the Plaint herein. These are all matters to be determined at the hearing of the suit in due course. It will be for the trial Judge to determine whether the documentation is genuine or otherwise and, presumably, both parties will lead *Viva voce* evidence in that regard including evidence from expert witnesses. Whether the Plaintiff has locus or not will be determined at the trial. Bearing in mind that the guidelines set out in the **D. T. Dobie** case as above, I do not consider this a case which should be struck out under the provisions of **Order 2 rule 15** of the *Civil Procedure Rules, 2010*. As a result, I find no relevance in the authorities quoted by the first, second and third Defendant in relation to abuse of the court process or that the Plaint discloses no cause of action. I consider that the Notice of Motion of the first, second and third Defendants dated 29th November 2013 has no merit and the same is dismissed with costs to the Plaintiff.

DATED and delivered at Nairobi this 29th day of May, 2014.

J. B. HAVELOCK

JUDGE