



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 82 OF 2014

CHARLES METO.....PLAINTIFF

- VERSUS -

AMOS KOSGEY.....1ST DEFENDANT

DAVID MUGUN.....2ND DEFENDANT

COLLINS SAINNA.....3RD DEFENDANT

CAD HOLDINGS LIMITED4TH DEFENDANT

RULING

1. The application before me was brought by the defendants, with a view to having the suit struck out. The defendants have advanced the following grounds as a basis for the application;

- i) *The suit is scandalous, frivolous and vexatious.*
- ii) *The suit is a derivative action which could only have been instituted with leave of the court. As no such leave was sought, the suit constitutes an abuse of the process of the court.*
- iii) *Pursuant to the Memorandum and Articles of Association of CAD HOLDINGS LIMITED, the dispute ought to have been resolved through arbitration. As the plaintiff did not seek arbitration, the suit was prematurely brought to the High Court.*
- iv) *The Verifying Affidavit was invalid or defective as it was commissioned by an incompetent person.*
- v) *The suit was devoid of material particulars of the alleged falsehood or misrepresentation attributed to the defendants. Consequently, the fair trial of the action may be prejudiced, delayed or embarrassed.*

2. In order to place the application within its proper perspective, it is important to state some basic facts about the case.

3. The plaintiff purchased 25% shares in **CAD HOLDINGS LIMITED**. He paid USD \$ 152,480.52 as the purchase price for the said shares.
4. **AMOS KOSGEY, DAVID MUGUN** and **COLLINS SAINNA** were the other shareholders in **CAD HOLDINGS LIMITED**. Indeed, it is those three (3) individuals who first put together the company. They then invited **CHARLES METO** (the plaintiff) to also buy shares in the company.
5. At the time when Charles was paying for his shares he was residing in the United States of America.
6. Amos, David and Collins are said to have made it clear to Charles that **CAD HOLDINGS LIMITED** was a Special Purpose Vehicle (SPV), which was incorporated to develop Holiday Homes on L.R. No. **KILIFI/MTWAPA/729**.
7. At that time, Charles was made to understand that each of the other three (3) shareholders had also taken up their shares in the company. Therefore, Charles expected to find that the land had been purchased and also that the Holiday Homes were being developed.
8. But when he visited the property two (2) years after he paid for his shares, he found that the company had not bought the land. There were also no developments on the land.
9. The defendants appear to confirm that the land was not purchased by the company.
10. Charles felt that his co-shareholders had cheated him out of his money.
11. As far as he was concerned, the defendants had set out to deliberately swindle him.
12. He was of that persuasion because the money which he had paid into the company account had been withdrawn, with nothing to show for it.
13. But Amos, David and Collins sought to explain that the only reason why the company had not bought the land was that the said parcel of land was purchased by a competing party named **BEN GITONGA MUIRURI**.
14. After the sale fell through, the money which the company had paid out to the vendor, were said to have been repaid to the company.
15. It would appear that Charles has lost faith in both his co-shareholders and also in the company. He has therefore instituted these proceedings, seeking to recover the money which he had used to buy shares. He is also demanding General Damages and costs of the suit.
16. In the face of the suit, the defendants have brought the application to strike out the plaint.
17. I will now endeavour to take a closer look at each of the grounds upon which the defendants' application was founded.

a) Derivative Action

The defendants have submitted thus;

“...in general if a wrong (whether a breach of contract or a tort) is done to a company, only the company may sue for the damage caused to it: a shareholder

has no right to bring an action on behalf of the company in order to protect the value of his shares”.

18. That is known as the rule in **FOSS VS HARBOTTLE** [1843] 2 HARE 461.

19. Jenkins LJ elaborated on the two elements of that rule, when he made the following pronouncement in **EDWARDS VS HALLIWELL** [1950] 2 ALL E.R 1064, at page 1066:

“First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter, for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then ‘cadit quaestio’.

20. That legal position was recognized by Mwera J. (as he then was), as being applicable in Kenya. This is what the learned Judge said in **ALTAF ABDULRASUL DADANI VS AMINI AKBERAZA & 3 OTHERS, MILIMANI HCCC NO. 913 OF 2002;**

“By derivative suits, the minority shareholder (s) feeling that wrongs have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company, can come to court as agents of the “wronged” company to seek reliefs or relief for the company itself, all the shareholders including the wrong-doers, and not for the personal benefit of the suing minority individual shareholder (s). ...It is a cardinal principle in company law that it is the company and not the individual shareholder to enforce rights and action vested in the company and to sue for the wrongs done to it, and in the absence of illegality a shareholder cannot bring proceedings...”

21. Therefore, there can be no doubt that where a individual shareholder holds or minority shareholders hold the view that a wrong had been done to the company, the said shareholder may bring a derivative action as an agent of the company.

22. When that is done, noted Mwera J;

“The permission or leave to continue a derivative action is sought after the suit has been instituted”.

23. In effect, if the suit herein was a derivative action, the plaintiff would have to seek and obtain leave of the court before continuing the said action.

24. As such leave is to be sought after the suit had been instituted, the fact that leave had not yet been obtained should not necessarily lead to the striking out of the plaint. In the first instance, the fact that leave had not yet been sought, should lead to the stay of any further proceedings in a derivative suit.

25. If the court rejects the application for leave, then the derivative action cannot proceed at all.

26. In the case of **IN THE MATTER OF CMC HOLDINGS LIMITED MISC. CIVIL CASE NO. 273 OF 2012**, Musinga J. (as he then was) said:

“It should be borne in mind that in derivative suits the applicant usually alleges that

some ills have been or are being committed by some directors against the company...”

27. In this case Charles is not alleging that the directors or shareholders have done or are doing something which is an ill against the company.

28. The claim by the plaintiff is that;

“The 1st, 2nd and 3rd Defendants defrauded him through an elaborate scheme of falsehood and misrepresentation”.

29. Indeed, the plaintiff is of the view that Amos, David and Collins had withdrawn the money which Charles deposited, and that those 3 shareholders had used those funds for purposes other than those which the money was intended for.

30. In those circumstances, the plaintiff is not claiming that the company was being wronged. If anything, he appears to be alluding to the possible use of the company as a vehicle to defraud him. Therefore, he could not be said to have come to court as an agent for the company.

31. In a nutshell, the suit herein is not a direct claim of a shareholder against the company and also against other shareholders.

32. Teresa Rosen Peacock, in her publication **“WHEN A COMPANY’S SHAREHOLDERS AND CREDITORS MAKE CLAIMS SEPARATELY FROM THE COMPANY”**, reiterates the Rule in Foss Vs. Harbottle. However, at paragraph 38 (c) of her said publication, the learned author says;

“When an individual shareholder has suffered a personal wrong, whether perpetrated by the director (s), or the majority, or the company is threatening an ultra vires act, the proper form of action is a direct, personal claim by the shareholder, with the company as a true defendant (along with the directors where appropriate)”.

33. **SCANDALOUS FRIVOLOUS AND VEXATIOUS**

The defendants submitted that the claim by the plaintiff was scandalous, frivolous and vexatious because the plaintiff seeks to derive a personal benefit at the expense of the company, wherein the said plaintiff remained a member shareholder and a director.

34. The plaintiff may not have expressly sought to cease being a shareholder in **CAD HOLDINGS LIMITED**. But he wishes to reclaim the whole sum which he used to buy shares in the company.

35. If the money is paid back to him, he could not thereafter continue to remain as a shareholder.

PARTICULARS OF FALSEHOOD AND OF MISREPRESENTATION

36. The plaint lists particulars of fraud, falsehood and misrepresentation, which are attributed to Amos Kosgey, David Mugun and Collins Sainna.

37. The defendants hold the view that the particulars provided were neither concise nor precise.

38. Even assuming that the particulars provided by Charles Meto were imprecise, that could not be reason enough to warrant the striking out of the plaint.

39. In the event that the defendants or any of them wanted further and better particulars, they need only take the requisite steps by seeking appropriate orders from the court.

VERIFYING AFFIDAVIT

40. The affidavit verifying the plaint was commissioned by **VERONICA WAHETI MAINA**.

41. The defendants have described the said person as incompetent. Her alleged incompetence stems from the fact that whereas she commissioned the verifying affidavit, the names **VERONICA WAHETI MAINA** do not appear on the Roll of Advocates.

42. Ms Maina has told this court that the name **NDUATI** was her maiden name, whilst the name **MAINA** is her husband's name. In her affidavit, Ms Maina depones that the names **VERONICA WAHETI NDUATI** and **VERONICA WAHETI MAINA** refer to one and the same person. She explained, on oath, that she acquired the name **MAINA** upon marriage.

43. Notwithstanding that explanation, the defendants submitted that no advocate was permitted to practice under any name other than his own name or the name of a past or present member or members of the firm.

44. That submission is premised on Rule 10 A of the Advocates (practice) Rules.

45. Frankly, I must confess that I found it difficult to appreciate where that submission was coming from, considering that Ms Maina advocate had explained, on oath, that the name **VERONICA WAHETI MAINA** was hers. Therefore, she was not practicing in any name which was not hers.

46. Accordingly, the learned Advocate and Commissioner for oaths had not violated any rule when she commissioned the verifying affidavit.

ARBITRATION

47. Pursuant to Article 146 of the Memorandum and Articles of Association of **CAD HOLDINGS LIMITED**;

“Whether any difference arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching any breach, or alleged breach of these Articles, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company, shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference. Arbitration shall be subject to the Arbitration Act”.

48. This court is alive to the fact that when an Agreement between parties provides for arbitration as the avenue for resolving disputes which may arise between the said parties, the court should, ordinarily, refer the dispute to arbitration. That is exactly what Section 6 (1) of the Arbitration Act stipulates.

49. In **PENT APHARM LIMITED VS PETER MURIITHI GITHUI & ANOTHER, HCCC NO. 726 OF 2012**, Havelock J. stayed the court proceedings and referred the parties

to arbitration.

50. In this case, the defendants did not seek the stay of court proceedings or a reference of the dispute to arbitration. Instead, the defendants asked this court to strike out the Plaintiff because the court lacked jurisdiction.

51. I hold the considered view that just because an Agreement contained an arbitral clause does not, of itself, oust the jurisdiction of the High Court.

52. The arbitral clause may be null and void or inoperative or incapable of being performed.

53. In the alternative, there may not be any dispute between the parties, with regard to the matters which they had agreed to refer to arbitration.

54. Those two scenarios are expressly noted at Section 6 (1) of the Arbitration Act.

55. Furthermore, there is the question about the stage at which a party may wish to invoke an arbitral clause. If the party had taken steps in the court proceedings it may well find itself blocked from thereafter seeking to invoke the arbitral clause.

56. However, the only point I wish to make, for now, is that the presence of an arbitral clause in the Memo and Articles of Association of **CAD HOLDINGS LIMITED** does not warrant the striking out of the plaintiff.

57. Accordingly, the defendants application dated 7th May 2014 fails. It is dismissed. The costs of the said application will be paid by the defendants, to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 22ND day of September 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Terer for the Plaintiff.

Masika for the 1st Defendant.

Masika for the 2nd Defendant.

Masika for the 3rd Defendant.

Masika for the 4th Defendant.

Mr. C. Odhiambo, Court clerk.