



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 219 OF 2014

INTERACTIVE ADVERTISING LIMITED:.....:1ST PLAINTIFF

GEORGE RAGUI KARANJA:.....:2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED :.....: DEFENDANT

R U L I N G

1. The **Notice of Motion** application before the court is dated **23rd June 2014**. It is filed under Order 2 Rule 15 (1) (d) and (d); Order 51 Rule 1 of the Civil Procedure Rules, 2010.

2. The application seeks the following prayers:-

1. The suit is incompetent as there was no resolution of the board of the 1st Plaintiff to institute legal proceedings and incur liability in costs in its name;

2. The 2nd Plaintiff has not sought leave of the court to pursue the suit as a derivative action;

3. The suit is bad in law, incompetent, frivolous and is otherwise an abuse of the court process and the same ought to be struck out with costs;

4. The costs of this application and of the suit be borne by the Plaintiffs.

3. The application is premised on grounds set out therein, and is opposed vide a replying affidavit by **George Ragui Karanja** dated **14th July 2014** and filed in court on **15th July 2014**.

4. The brief history of the application is that by a Plaint filed in court on **26th May 2014** the **1st Plaintiff**, a limited liability Company and the **2nd Plaintiff** a Director in the **1st Plaintiff's** Company, seek various orders against the Defendant, and a liquidated sum of **Kshs.19,197,200/=** on account of negligence and fraud. The Defendant has filed a defence totally denying the claim and allegations of fraud and negligence. Vide this application, the Defendant now seeks to strike out the Plaint on the grounds that there were no company resolutions for the filing of the **1st Plaintiff's** suit, while the **2nd Plaintiff** also has no *locus standi* to bring the suit on his behalf. To understand the Defendant's application it is necessary to know that the **1st Plaintiff** Company has only two Directors who are estranged, and no longer see eye to eye. One such Director is the **2nd Plaintiffs** while the other, who is not a party to this suit, is alleged to have conspired with the Defendant to commit the alleged acts of negligence and fraud which led to the

Plaintiff to the loss of the said Kshs.19,197,200/=.

5. The Applicant's case is purely based on a law and is that a company can only institute legal proceeding and incur costs in its name upon resolution by its board. In the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. According to the Applicant, it is settled that a corporation should sue in its name and in its corporate character, or in the name of someone whom the law has appointed. The Director or a shareholder of a company can only file suit on behalf of the company through a derivative action upon firstly obtaining the leave of the court. No leave of the court was sought or obtained to file a derivative action. Further, the Applicant's case is that the firm of Atonga Miyare & Associates Advocates lacks the authority to act on behalf of Interactive Advertising Limited, the 1st Plaintiff herein as there was no resolution of the board of the company appointing them to act on its behalf.

6. The 2nd Plaintiff/Respondent's case is that he is a 50% shareholding director in the 1st Plaintiff Company and the remaining shares belong to his co-director, Ms. Edith Njeri Kimani. Besides being a director in the 1st Plaintiff's Company, the 2nd Plaintiff states that he is personally interested in the subject matter of the claim herein as the 2nd Defendant. The 2nd Plaintiff alleges that the business of the 1st Plaintiff Company herein was undertaken on his Industrial Design Registration No. I.D. 400; and he is entitled beneficially and equitably to the income of the 1st Plaintiff converted by the Defendant in collusion with his co-director aforementioned. The 2nd Plaintiff's case is that his co-director/shareholder was involved in the fraud against them together with the Defendant, resulting to the diversion, conversation and hence loss of the sums claimed in this suit. That their claim is specific to the Defendant/Applicant. By the suit herein, the Plaintiffs seek to recover Kshs.19,197,200.00 fraudulently and negligently converted by the Defendant/Applicant; and to stop further or future fraud by the Defendant and its accomplices against them. The Defendant is individually interested in the subject matter of the suit and liable to be called upon to answer to it. The 2nd Plaintiff states that joining his co-director to the suit as a Defendant will not add any value to this suit. If the Defendant alleges participation of his co-director then it should pursue her for contribution in a separate suit and that in any event, it was not possible for the said co-director who is involved in the fraud with the Defendant and a potential Defendant in this suit to consent to its institution, neither is her permission required in order to validate the proceedings. Given the circumstances of the case, it is impossible that the director would give permission or consent to bring the suit. The institution of the instant suit was not dependant on the authority of the directors or a resolution of the board or of the company, as to hold that way the possibility of injustices being done would be very real. The 2nd Plaintiff further stated that the filing of this suit in the name of, or by the 1st Plaintiff company is within the objects and powers of the 1st Plaintiff as an *intravires* act, and that in the circumstances, no leave of the court is necessary for the Plaintiffs to sue the Defendant in their own name for negligence and fraud. In any event, the Defendant/Applicant's advocates have themselves not annexed any resolution to defend the suit on behalf o the Defendant Company.

7. From the submission of the parties, it is clear to me that the issues for determination are two:-

- ***Whether the 1st Plaintiff required a resolution to commence these proceedings.***
- ***Whether the 2nd Plaintiff has a locus to file this suit on his own behalf.***

8. Mr. Kiche for the Applicant correctly submitted that a company can only institute legal proceedings and incur costs in its name upon a resolution by its board, and that in the absence of a board resolution sanctioning the commencement of this action by the Company, the Company is not before the court at all. This law concerns the internal management of limited liability companies, and is ensured to forestall situations where a set of directors or shareholders would sneak behind other members of the Company and purport to perform acts on the behalf of the Company. For this rule to strictly apply, the complainant must be a member of the Plaintiff's Company. A third party Claimant cannot benefit from this requirement unless the third party was sued together with a member of the Plaintiff's Company. The third party is at all times (*except with certain restrictions*) entitled to believe that a third party company had complied with its internal management rules. The Defendant therefore cannot question in the suit whether or not the 1st Plaintiff is lawfully in court. The Defendant must take it that the 1st Plaintiff has fully

complied with its own internal management rules, and that the Plaintiff is lawfully in court. This position will drastically change if the complainant is a member of the Plaintiff Company. In the case of **SIOKWEL TARITA LTD – VS DR. CHARLES WALEKWA [2012] eKLR** Justice Munyao stated that:-

“to argue that a suit has not been instituted with the requisite resolution of the company in accordance with its articles of association, is to me, an argument that asserts that the suit has been instituted in violation of a company’s articles of association. Articles of association only bind the members inter se, and, the members and the members and the company. They are a contract between members inter se and the members and the company.

. . . there is no requirement that a suit instituted by a company be accompanied by a resolution and I am not prepared to hold that a Plaintiff filed by a company must be accompanied by a resolution. This is not to say that a Defendant, if he is an insider, or the company itself, cannot demonstrate that the suit has not been filed in accordance with the Articles of Association of the Company either by want of the appropriate authorisation or otherwise. Such allegation however, must be accompanied by the appropriate evidence indicating that the suit was not so authorised by the company.”

9. It is also important to note that the co-directors of the 1st Plaintiff Company are not seeing eye to eye, and so it would require an eminent optimist to hope that the two co-directors would convene a board of directors. This is not possible in this situation. Even if a resolution was required by law, which I have said was not the position, this court, being inherently required to do justice, would still ensure that a suit such as the one before the court is not killed at the altar of procedural technicality. It would still give a chance for the 2nd Plaintiff directors to bring a derivative suit on behalf of the Company. So on the first issue before the court 1, rule that the Plaintiff did not require a resolution of its board of director to commence these proceedings.

10. The second issue was whether the 2nd Plaintiff had the locus to file this suit on his own behalf and to claim against the Defendant individually. In my view, there is no way this court can question the 2nd Plaintiff if he believes that he has a cause of action against a party he has sued. The 2nd Plaintiff has explained the cause of action he has against the Defendant. At paragraphs 4 and 5 of his replying affidavit the 2nd Plaintiff states:-

4. That besides being a director of the 1st Plaintiff Company, I am personally interested in the subject matter of the claim herein as the 2nd Defendant (he probably meant Plaintiff).

5. That the business of the 1st Plaintiff Company herein was undertaken on my Industrial Design No. I.D. 400; and I am entitled beneficially and equitably to the incomes of the 1st Plaintiff converted by the Defendant in collusion with my co-director aforementioned.

11. It is my view that the 1st Plaintiff’s claim against the Defendant can legally co-exist with the 2nd Plaintiff’s claim against the same Defendant to the extent of any existing contractual or other business relations between the 1st and 2nd Plaintiffs internally. It is therefore presumptuous at this stage to purport to exclude the 2nd Plaintiff from the suit. The 2nd Plaintiff has alleged that he has a separate and individual cause of action against the Defendant. The Plaintiff will be allowed to go ahead and establish or prove his claim.

12. The upshot of the foregoing is that the Notice of Motion application dated 23rd June 2014 is dismissed with costs to the Plaintiffs/Respondents.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiffs

Kichie for Defendant

Teresia – Court Clerk