



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 162 OF 2012

MALEWA RANCHING CO. LIMITED.....APPLICANT

VERSUS

RAFAEL CHEGE NJAGA.....1ST RESPONDENT

CECILIA NGENDO MUNYIRI.....2ND RESPONDENT

STANLEY MAINA MUTAHI.....3RD RESPONDENT

JAMES KIHANDA KIMANI.....4TH RESPONDENT

CHARLES MAINA KINYATI.....5TH RESPONDENT

CECILIA WANJIKU GATHUNGU.....6TH RESPONDENT

JAMES NGANGA KARANJA.....7TH RESPONDENT

ISAAC MWAURA MURIUKI.....8TH RESPONDENT

RULING

On 14/5/2002, the firm of Wambeyi Makomere filed a plaint on behalf of Malewa Ranching Co. Ltd. against the 8 defendants namely; Rafael Chege Njaga, Cecilia Ngendo Munyiri, Maina Mutahi, James Kihanda Kimani, Cecilia Wanjiku Gathungu, James Nganga Karanja and Isaac Mwaura Muriuki.

The plaintiff/applicant sought an order of injunction to restrain the defendants/respondents from carrying themselves as directors of the plaintiff or transacting or interfering with the running of the said company. On 24/5/2012, Mr. Githui filed a notice of change of advocate and purported to come on record for the plaintiff. Together with the notice of change, counsel also filed a notice to withdraw the suit filed by Wambeyi Advocate on behalf of the plaintiff company.

When the matter came up on 18/6/2012, the court directed that both counsel appear before the court to sort out the issue of representation. The counsel being unable to resolve who is properly on record for the plaintiff, the court directed that the parties file affidavits for the court to consider who is properly on record for the plaintiff. As a result of those directions Mr Wambeyi's clients filed the following affidavits:-

1. Affidavit dated 15/6/2012 sworn by Peter Njuguna Njoroge;

2. **Affidavit dated 28/6/2012 by Peter Njuguna Njoroge;**
3. **Affidavit by Peter Njuguna Njoroge dated 28/8/2012;**
4. **Affidavit by Mr. Wambeyi dated 16/10/2012 .**

Mr. Wambeyi also filed submissions.

Cecilia Ngendo Munyiri, the 2nd defendant swore an affidavit on behalf of Mr. Githui's clients and submissions were filed on 7/12/2012. The questions that arise are who are the bona fide directors of the plaintiff and who should have instructed the counsel to file this case and represent the plaintiff.

Peter Njuguna deponed that he is a director and secretary to the Board of Directors of the applicant company having been elected at a shareholders annual general meeting held on 23/3/2012. He identified Cecilia Ngendo Munyiri, 2nd defendant and Stanley Maina Mutahi, 3rd defendant as some of the directors elected with him but that the two had jumped camp and joined those opposing the other Board of Directors in the discharge of their duties.

In his affidavit, Mr. Wambeyi annexed a consent order recorded in HCC 9/2012, **Peter Njuguna Njoroge & Others v John Mburu** on 2/10/2012 before J Ouko, in which it was agreed that the directors elected at the Annual General Meeting of 23/3/2012 continue to run the company. Mr. Odhiambo urged that Mr. Githui has confirmed that the directors are the genuine directors of the company and all the respondents are bent on doing is interfering with the smooth running of the company.

In opposition Cecilia deponed that she is one of the directors of the company and that under the Articles of Association, all decisions of the plaintiff company including appointment of advocate or filing suit must be taken by the Board of Directors at an annual or special general meeting. She denied having attended any meeting where a resolution was made to appoint a firm to file suit on behalf of the company.

I have considered the rival affidavits and submissions. It is trite law that a company is a legal entity which is distinct from its directors and shareholders. A company being a legal/person acts through its directors or Board of Directors. In this case, it is not disputed that there is a pending case HCC 9/2012 in which a consent was recorded on 2/10/2012. Part of the consent reads:-

“3. That the directors elected in the Annual General Meeting of 23/3/2012 to proceed with the running the affairs of the company i.e.

- **Samuel Kimani Kariuki – Chairman**
- **Peter Njuguna Njoroge**
- **Stanley Ngnaga**
- **Joseph Nyutu**
- **Tipi Nyanga**
- **Joseph Kamau Kimani**
- **Stanley Maina Mutahi**
- **Cecilia Ngendo.”**

The above order was supposed to abide the outcome of the main suit. There is no evidence that the said suit has been determined. It means that the persons listed above are the bona vide directors of the plaintiff company.

From the above list, Peter Njuguna Njoroge is the secretary of the Board. He claims to have been advised by the Board of Directors to file this suit. It is however evident that Cecilia Ngendo Munyiri, 2nd defendant, and Stanley Maina Mutahi 2nd defendant, are also directors and yet they are some of the defendants. It is obvious that there is a dispute between one set of directors against others. It is therefore evident that not all the Board of Directors of the plaintiff are in agreement. One group of directors have a dispute with the other group over the running of the company. Indeed Peter Njoroge has not exhibited any resolution of the company authorising the appointment of counsel and the filing of this suit.

Peter Njoroge has deponed that Cecilia Ngendo is not a shareholder of the company, but in the same breadth annexed the consent order which indicates that she is one of the directors appointed as such at the Annual General Meeting of 23/2/2012. If there is any dispute as to who the directors of the company are, that is an issue to be determined by the Registrar of Companies because after an election of directors at an annual general meeting, the returns must be filed with the Registrar. It will not be for this court to determine who the directors are.

A question of representation arose and with is the question of the propriety of this suit, that is, is it properly before this court? On the propriety of the suit, Mr. Githui submitted that the aggrieved set of directors should have sought the leave of the court to bring a derivative action. He relied on the decision of **Dadani v Manji (2004) KLR 95** in which J Mwera discussed when a shareholder can bring a derivative action on behalf of the company and the procedure to be followed.

In the case of **Foss v Harbottle (1843) 2 Harne 461**, the court said thus:-

“In law the corporation and the aggregate member of the corporation are not the same thing for purposes like this, the only question can be whether the facts alleged in this case can justify departure from the rule which prima facie would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed.”

The rule in the above case is simply that a shareholder, in this case a director of a corporate even a controlling shareholder or the sole shareholder, does not have a personal cause of action for a wrong done to the corporation. The rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholder. A shareholder cannot be sued for the liabilities of the corporation and, equally, a shareholder cannot sue for the losses suffered by the corporation.

In applying the principles in **Foss** case, **Dadan v Manji & 3 Others HCC 913/2002**, Mwera J held inter alia:-

“It is a cardinal principal in company law that it is for the company and not the individual shareholder to enforce rights of action vested in the company and sue for wrongs done to it. That in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters.”

In this case, one set of directors has filed this suit against the other set of directors. The directors who brought this suit who include Peter Njoroge should have sought the leave of the court through a derivative action. After filing the suit, the applicant should first file an application seeking the leave of the court to bring the action which the court has to hear and determine whether it is brought on behalf of the company or not. To that end, Peter Njoroge and his team cannot purport to represent the company unless they seek permission of the court to do so. In addition to that, the same group of directors cannot purport to appoint an advocate on behalf of the company until the permission to bring a derivative action has been granted. In the same breadth, the defendants cannot purport to have appointed counsel to act on behalf of the company. None of the advocates represents the company.

In the end, I direct that the faction of Peter Njuguna do comply with the law by bringing a derivative suit within 14 days hereof, in default, this suit will be deemed to have been irregularly filed and will stand struck out and Peter Njuguna and faction will bear the costs

DATED and DELIVERED this 27th day of September, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Wanjiru holding brief for Mr. Wambeyi for the applicant

N/A for the respondent

Kenned – Court Assistant