



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

CIVIL CASE NO. 859 OF 2009

CONSOLIDATED BANK OF KENYA 1ST
PLAINTIFF

VERSUS

LOTUS CLOBUS INTERNATIONAL LTD 1ST
DEFENDANT

DR. P. N. WAMBUGU 2ND
DEFENDANT

ISAIAH MUTAHI MARANGA 3RD
DEFENDANT

AND

RAYMOND WAMBUGU NGUNJIRI 1ST
PROPOSED PARTY

ARNOLD NDUNG’U NGUNJIRI 2ND
PROPOSED PARTY

R U L I N G

1. What is for consideration before this Court is a Notice of Motion dated 5th March 2013, brought by the first and second proposed parties namely **Raymond Wambugu Ngunjiri** and **Arnold Ndung’u Ngunjiri** who seek to be enjoined in the suit as either Defendants or as Interested Parties. The Application is brought under the provisions of **sections 1A, 1B, 3, 3A and 63** of the *Civil Procedure Act* as well as under **Order 1 Rule 10 (2)** of the *Civil Procedure Rules, 2010*. It is also brought under the provisions of *Article 159 (2) (d)* of the *Constitution*. The Application is premised on the grounds as follows:

“(a) THAT the proposed parties are Directors & Share holders of the 1st Defendant.

(b) THAT the proposed interested parties became directors of the 1st Defendant when they were below the age of majority.

(c) THAT the proposed parties have discovered that certain transactions adversely affecting their interest took place between the 1st Defendant and the Plaintiff.

(d) THAT the proposed parties have also discovered that the 3rd Defendant was without their knowledge or participation appointed as their Trustee in circumstances that render the Trusteeship and board meetings illegal.

(e) THAT the aforesaid transactions were ostensibly made on behalf of the proposed parties and having reached the age of majority, the proposed parties are entitled to avoid or validate the said transaction herein and indeed desire to have those transactions nullified.

(f) THAT it would be in the interest of justice if the prayers sought are granted”.

2. The proposed parties' Application was supported by Affidavits sworn by each of them again dated 5th March 2013. The Supporting Affidavit of the first proposed party noted that he was a director and shareholder of the 1st Defendant company herein holding 100 shares thereof. He annexed to his said Affidavit a copy of an official company search dated 2nd February 2010 as well as a copy of the company's Certificate of Incorporation. He noted that at the time of incorporation of the Company, he was only 12 years old and his fellow proposed party only 11. He had come to learn that in 2007 that the Plaintiff and the Defendants herein had entered into financial arrangements and agreements involving large sums of money and that the 3rd Defendant had been appointed as a trustee representing the interests of the deponent and his fellow proposed party, at a board meeting of the Defendant company held on 5th of February 2007. Neither of them had been informed of the financial agreements nor the trusteeship. He had been advised by his advocate that the said Board meeting was not a proper meeting and that the resolutions passed thereat were avoidable so far as the deponent and his fellow proposed party were concerned. He stated that he had also discovered that the financial agreements entered into between the Plaintiff and the Defendants had not been completed which gave rise to this suit wherein the Plaintiff was claiming an amount in excess of Shs. 30,761,114/15 with interest at 32% **per month**. The deponent went on to say that he was disturbed and dissatisfied with the manner in which his interests had been handled as regards the transactions giving rise to this suit. He maintained that as a director of the 1st Defendant, he stood exposed to certain liabilities of that Company. He concluded his affidavit by stating that he wished to invalidate all the transactions which touch on his interests. The Supporting Affidavit of the second proposed party detailed that he had read the Affidavit of the first proposed party and concurred entirely with the contents thereof. He asked that he and the first proposed party be enjoined as necessary parties in this suit.
3. The Advocates for the Plaintiff filed Grounds of Opposition to the proposed parties' Application on 22nd May 2013. Those Grounds put forward that there had been inordinate and inexcusable delay in filing the Application. They maintained that the proper recourse if any, for the issues raised by the proposed parties' Affidavits, would seem to be by way of an action against the trustee. The Plaintiff maintained that the proposed parties were estopped from alleging that they were minors when, all along, they had represented themselves as adults. In its submissions, the Plaintiff detailed that the proposed parties were claiming to have no knowledge of the transactions of the 1st Defendant company and that they did not know that a trustee had been appointed to look after their interests. Now they had reached the age of majority, they sought to be enjoined in the suit to void or invalidate the transactions which had been entered into on their behalf. In its opinion, all that the proposed parties were seeking to do with their Application before Court was to look for a means to delay this case. Ordinarily, the Plaintiff maintained that an application to be enjoined was rarely opposed. However in this case, the sole object of the present Application before Court was to delay the hearing of the suit. The Plaintiff noted that the Application was filed in Court two days prior to a slated hearing of the suit. The applicants had not disclosed their interests in the matter. In support of its submission that a company is a *persona juridica* the Plaintiff referred the Court to 2 cases being **Friendship Container Manufacturers Ltd v**

Mitchell Cotts (2001) EA 338 and HCCC No. 258 of 2004 NSSF v Ankhan Holding & 2 Ors (2006) eKLR. It maintained that the applicants' counsel action would be to bring a suit against the trustees. They had derived economic benefit from the facilities provided by the Plaintiff and now that it was time to pay the same back, they protest that they are minors. Finally, the Plaintiff referred the Court to the rule in **Turquand's** case. When the loan was advanced to the 1st Defendant, the Plaintiff had carried out due diligence and had registered a Debenture in its favour before disbursing the facility funds. It maintained that for the applicants to now come to court and to dispute the trust that enabled them to obtain the facility, should not be visited upon the Plaintiff. It finally referred the Court to the case of **Jacob Juma v Agricultural Finance Corporation & 2 Others HCCC No. 136 of 2005.**

4. The first and second proposed parties' submissions opened by detailing the background of the suit and the issues in contention. It noted that they were shareholders and directors of the 1st Defendant having become so while they were minors. The first issue that the proposed parties have in connection with this suit was the manner in which the 3rd Defendant was appointed as their nominee/trustee through a resolution of the 1st Defendant passed solely and unilaterally by the 2nd Defendant. They also noted that the suit before Court was founded on transactions which were entered into ostensibly for and on behalf of the proposed parties. They maintained that, having attained the age of majority, they were entitled to void or validate the actions taken on their behalf by the trustee, which was the main reason for them being enjoined as parties to this suit. The proposed parties also noted that the 3rd Defendant, although described in the Plaint as a director of the 1st Defendant, had denied that he was so appointed. Moreover, the Official Search of the Company dated 2nd February 2010 exhibited as "RWN 1" to the Supporting Affidavit of the first proposed party showed that the 3rd Defendant was not a director or, indeed, a shareholder. As a result, the proposed parties maintained that the relationship between the 3rd Defendant, themselves and the 1st Defendant needs to be determined in these proceedings before a final and conclusive decision is arrived at. Turning to the law, the proposed parties drew the attention of the Court to the provisions of **Order 1 rule 10 (2)** of the *Civil Procedure Rules 2010* which sets out the procedure for enjoining a party to a suit. They noted **Mulla's** treatise on the (Indian) **Code of Civil Procedure 16th Edition** where the power to strike out or add parties to a suit can be exercised at any stage of the proceedings even before issues are framed. The proposed parties emphasised from the authority of Mulla that:

"The question is whether the right of a person may be affected if he is not acting as a party. Such a right however, will include necessarily and enforceable legal right... A proper party is one in whose absence an order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings."

Further, the proposed parties quoted from the finding of **Onyancha J.** in the case of **Shariff Mohamed Omar v Bontempi Luigi & 3 Ors (2002) eKLR** when the learned Judge stated:

"in exercising the powers under Order 1 rule 10 (2) the court only needs to be certain that any addition is for the purpose of enabling it to effectually and completely adjudicate upon and settle all questions involved in the suit."

5. The proposed parties then went on to detail factors which had been found applicable by my learned brother Justice **Azangalala** in the case of **Atlantis Insurance Brokers Ltd v Crescent Construction Co. Ltd (2005) eKLR** as follows:

"(i) Has there been undue delay?

(ii) Does the proposed substitution/addition change the nature or character of the cause of action?

(iii) Does the proposed substitution or addition adversely affect an adversary's acquired rights under the law?

(iv) Will the adversary suffer irreparable injury?

(v) Was is just in the circumstances?”

The proposed parties concluded their submissions by stating that they ought to have been enjoined in these proceedings as they are proper parties in the suit as a result of their shareholding and directorships in the 1st Defendant. They felt that their presence in the suit would help the court to effectively and conclusively adjudicate on the issues in the matter hence ensuring that the interests of justice are met.

6. As regards the authorities cited to court by the Plaintiff, none of them were really on point as to enjoinder of parties. However, the case of **Bachoo Patel v George Wamutira (2010) eKLR** examined the position of a limited liability company at law. Quoting from the leading case of **Solomon v Solomon & Co. Ltd (1987) AC** as well as **Lee v Lee's Air Farming Ltd (1960) 3 All ER 420**, my learned brother **Makhandia J** detailed:

“It is trite law that a limited liability company is a legal entity separate from the directors. It can sue and be sued in its name. Accordingly it cannot be said that merely because the appellant was a director of the company, he can be held personally for the liabilities of the company. The company’s separate legal entity and or personality is not clouded and cannot be transferred to its director. The appellant cannot thus assume the debts and/or responsibilities of a limited company.”

This point was taken up further by my learned brother **Ochieng J** in the **National Social Security Fund** case (supra) when he quoted at length from the English House of Lords case of **Williams & Anor. v Natural Life Health Foods Ltd & Anor. (1998) 2 All ER 577** wherein **Lord Steyn** held as follows:

“It will be recalled that Waite L.J took the view that in the contet of directors of companies the general principle must not set at naught the protection of limited liability. In *Frevor Ivory Ltd v Andersen (1992) 2 NZLR 517 Cooke P.* (now Lord Cook of Thordon) expressed a very similar view. It is clear what they meant. What matters is not that the liability of shareholders of a company is limited but that the company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal.”

In citing these cases, this Court assumes that the submission that the Plaintiff was trying to put over is that in view of the fact that the 1st Defendant company is a separate legal entity, there can be no point in joining the proposed parties to this action because they have nothing to add to the suit against the Defendants herein. The Plaintiff’s claim is that the Defendants defaulted in servicing an asset finance facility advanced to the 1st Defendant by the Plaintiff. Under paragraph 5 of the Plaint this suit is brought against the 2nd and 3rd Defendants as well as the 1st Defendant as they executed a Letter of Set-Off, Directors’ Personal Guarantees as well as a fixed Debenture over the 9 motor vehicles financed by the Plaintiff. By allowing the proposed parties to be enjoined in the suit would serve no purpose as the Plaintiff had no claim against either or both of the proposed parties in their capacity as shareholders or directors of the 1st Defendant company.

7. The Plaintiff also took up the point raised by the proposed parties, that one of the issues that they had in connection with this suit was that a resolution had been duly passed solely by the 2nd Defendant appointing the 3rd Defendant as trustee to look after the interests of the proposed

parties during their minority. The Plaintiff by referring the Court to the **Jacob Juma** case (supra) was, in my opinion, emphasising the rule in the case of **Royal British Bank v Turquand (1856) 6 E & B 327** which was quoted by **Njagi J** as follows in circumstances where a company borrowed without a resolution of the Board:

“ ‘.... Parties dealing with them (i.e. companies) are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but permission to do so on certain conditions. Finding that the authority might be made complete by resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done.’

The same applies to this case. Unless there was another anomaly, the 1st defendant was entitled to assume that a resolution had been duly passed. The fact of a resolution not having been passed, if any such resolution were required, does not exonerate the 2nd defendant from liability. An outsider is not bound by the internal irregularities in the operations of the company’s organs unless he is aware of such irregularities or there are suspicious circumstances putting him on enquiry.”

If I understand the Plaintiff correctly, what it was inferring by reference to the above case was that such disposed of the issue raised by the proposed parties, as to whether or not the resolution appointing the 3rd Defendant was regular or otherwise. The Plaintiff, in my opinion quite rightly, was pointing out that the proposed parties’ so-called issue as regards the illegality or otherwise of the said resolution was irrelevant to this suit before Court.

8. To revert back therefore, the two main issues raised by the proposed parties as to why they should be joined into this suit were firstly, the question of the validity of the resolution as above and secondly, that the suit was founded on transactions which were entered into for and on behalf of the proposed parties who had now (having been minors at the time) reached their majority, entitling them to void or validate such transactions. The rule in **Turquand’s** case has often been adopted by our courts and certainly applies here. I cannot see how the proposed parties are able, in any way, contribute to the issues between the Plaintiff and the Defendants herein. It may be that whatever decision this Court reaches in determining this matter in due course, will have an effect on the proposed parties as shareholders and directors of the 1st Defendant. However, in my opinion, the proposed parties can do nothing about such determination and add nothing useful to the proceedings before Court.
9. As a consequence, I tend to agree with the Plaintiff herein that the proper recourse for the issues raised by the proposed parties would be an action against the trustee (the 3rd Defendant) or even the 2nd Defendant. However I find that they have no place in these proceedings and their presence is not necessary for a complete and final decision on the issues raised herein. Accordingly, I dismiss their Notice of Motion dated 5th March 2013 with costs to the Plaintiff.

DATED and delivered at Nairobi this 20th day of November, 2013.

J. B. HAVELOCK

JUDGE