



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL CASE NO. 15 OF 2002.

MASAI SAKWA & 40 OTHERSPLAINTIFFS.

VERSUS

ALFRED TUMWET & 2 OTHERSDEFENDANTS.

R U L I N G.

1.This suit was instituted as a representative suit by 41 plaintiffs against **Alfred Tumwet, Johnson Bureto Masai** and **Francis Ngugi Gakunga**. The suit was filed on September, 1995 before the High Court Nakuru. It was subsequently transferred to Kitale High Court. The records show that by a ruling that was delivered on 23rd July, 2007, the plaintiffs were given leave by the Court to substitute James Sitio Simatwa, Masai Sakwa and Masai Kiboi Nasandick who had passed away and their claims under the suit had abated. Pursuant to that order, the plaintiffs filed fresh pleadings titled amended plaint on 7th April, 2008 in which a 4th defendant namely **Chemkengen Farm Enterprises Ltd.** was added as a 4th defendant.

2. Mr. Kiarie , learned counsel for the defendant filed a notice of a preliminary of objection on points of law seeking to have the entire suit struck out on the following grounds:-

(i) ***THAT***, the suit is incompetent and bad in law, in that the same is filed against the defendants in their capacity as the directors of Chemkengen Farming Enterprises Ltd., a limited liability Company, and which is still legally in existence.

(ii)***THAT***, Chemkengen Farming Enterprises Ltd has never been a party to these proceedings.

(iii) ***THAT***, Chemkengen Farm Enterprises Ltd the 4th defendant was sneaked in as a party in the amended plaint, dated 30/11/2007 unprocedurally and without the leave of this Honourable court.

(iv) ***THAT***, the plaintiffs as shareholders have no locus standi to institute suit in their own names.

3. In further arguments to support the above grounds, it was submitted that leave of the court was not

obtained to add the 4th defendant as a party in these proceedings. The order of 23rd July, 2007 only gave leave to substitute the deceased's plaintiffs whose suit had abated. Despite the fact that the plaintiff's suit was amended and the 4th defendant was added as a party, no summons had been served to the 4th defendant to enter appearance. Secondly, it was argued that the 1st, 2nd and 3rd defendant are sued in their capacity as directors of the 4th defendant by the plaintiff who described themselves as shareholders of the company. A limited liability company is a legal entity in its own right distinct from the shareholders and also from directors.

4. In the case of **Paul Oganda vs. Kassim Owango, Justice Njagi** reiterated the locus classicus case of; **Salomon Vs. Salomon & Co. Ltd. [1897] A.C. 22 (H.L)**. That case set out the principle that a limited liability company is a body cooperate with its own legal personality which is entirely distinct from its shareholders and directors. Thus the directors who acted on behalf of the company and as the agent of the company, they cannot be held liable for the acts of the company. In that case, **Njagi J.**, struck out the suit against a director who was sued in his capacity as the director of a company. It was further argued that the suit by the plaintiffs who are shareholders of the company is a derivative suit because the remedy sought is basically alleged to have committed by the company. In that case, it is the company that should sue for the wrongs done to it because a mere illegality in the internal running of the company cannot be a basis for one to bring a derivative suit.

5. Such matters are supposed to be rectified by a vote/resolution at the company's meeting. (See the case of **Dadani vs. Manji & 3 others** www.kenyalaw.org. Since the plaintiff did not requisition for a special general meeting, the court cannot intervene in the running of the internal affairs of the company. Thus, according to counsel for the defendants the plaintiffs lack locus standi to bring a suit such as the present one which only seeks for a permanent injunction which will cripple the operations of the company.

6. This preliminary objection was opposed on the grounds that it raises issues of fact which can only be determined by way of trial. Counsel for the plaintiff contended that the existence of **Chemkengen Farmers Ltd** is a matter of fact not law because the company does not exist. It was further contended that there is no amended plaint and there is no 4th defendant. This suit was brought pursuant to the rights of minorities who are allowed under section 211 of the Companies Act to file a suit in certain restricted matters especially where the actions by the directors is ultra vires or the dealings are fraudulent. It was argued that the plaint alleges fraud against the defendants in the manner the shares were allotted. The fraud would affect the shareholders. Moreover, it was argued that the defendant acrobating and reprobating because they denied their description and further alleged that the plaintiffs were not members of the company. Those matters can only be determined after evidence by way of viva voce evidence.

7. On the outset, it is common ground that no leave was granted to add a 4th defendant and indeed counsel for the plaintiff conceded that there is no amended defence featuring the 4th defendant. However, a perusal of the pleadings filed on 7th April, 2008, titled amended plaint, the name of **Chemkengen Farm enterprises Ltd** is featured as the 4th defendant. In view of the submissions by counsel for the plaintiff that the 4th defendant is not a party, I hereby strike the name of **Chemkengen Farm Enterprises Ltd** as the 4th defendant. The principles to bring to bear on whether the suit should be struck out on a preliminary point of law has been settled in a long line of authorities key among them is the case of **D.T. DOBIE & COMPANY KENYA LTD VS. JOSEPH MBARIA MUCHINA CA NO. 37 OF 1978**, the Court of Appeal stated that:-

“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 sui shown 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 a case before it.”

8. This matter raises the issue of whether the plaintiff's suit is a derivative action brought by the shareholders against the directors of the company. However, counsel for the plaintiff was emphatic that the company called **Chemkengen Farm Enterprises Ltd** did not exist. However, according to Mr. Kiarie, the defendants are sued in their capacity as directors of the company. At this stage, it is not possible for this court to determine the two prepositions they can only be determined by way of oral evidence. A preliminary objection can only determine pure points of law but the facts in this case are disputed, I find it is not appropriate to strike out the plaintiff's suit.

(See the case of Mukisa Biscuit Co. vs. West End Distributors [1969] E.A. Where Sir Charles Newbold expressed himself as follows, regarding the practice of the raising preliminary objections.

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

9. For reasons that the facts are disputed, I decline to strike the plaintiff's suit but order the name of the 4th defendant be expunged from the pleadings. Cost of this application shall be in the cause.

Ruling read and signed this 25th day of March, 2011.

M. KOOME.

JUDGE.