



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL DIVISION
ELECTION PETITION 304 OF 2009

JOYCE AKINYI OCHIENG.....PLAINTIFF/APPLICANT

VERSUS

ANTHONY CHINEDU IFEDIGBO.....1ST DEFENDANT/RESPONDENT

JOSEPH KAMAU MUCHINA.....2ND DEFENDANT/RESPONDENT

KENYA INSTUTUTE FOR THE BLIND.....INTERESTED PARTY

RULING

There are two applications herein. There is an application by way of Chamber Summons under Sections 5 and 6 of the Civil Procedure Act Cap 21 Laws of Kenya and Order VI Rule 13(1) b,c,d and Rule 16 of the Civil Procedure Rules brought by the 1st defendant for the substantive order that the plaint dated 24th June, 2009 filed on behalf of the plaintiff be struck out and the plaintiff's suit be dismissed with costs.

There is then the application by way of Notice of Motion brought by the plaintiff under Order L Rule 1 of the Civil Procedure Rules seeking an order that the suit filed by the plaintiff on 24th June, 2009 be continued by way of derivative suit or alternatively leave be granted to proceed with the plaintiff's suit by way of derivative suit.

On 28th April,2010 I made an order that these two applications be heard together. Subsequently I directed that both counsel do file skeletal written submissions in respect of the two applications which

they have done. I have taken some time to go through the material before me and the authorities cited.

The plaintiff and the 1st defendant are said to be co-directors of a company known as Elegance Investments Limited which is said to have leased its property known as Deep West Resort to the 2nd defendant. It is the plaintiff's case that the lease was fraudulent and irregular neither was it authorized nor executed by the company. The lease of the said property has been attributed to the 1st defendant which the plaintiff says was an action *ultra vires* the company's Memorandum and Articles of Association which has occasioned loss to the company and exposed it to possible legal liability by the 3rd party subject of the sub-lease. It is her case that neither her nor the company ratified nor condoned the actions of the 1st defendant. It is therefore in the interest and benefit of the company that this suit be proceeded with as a derivative suit for and on behalf of the company.

It is her case that the company is not in a position to lend or donate its name to the plaintiff to bring an action for the wrongs complained of as there are only two directors, that is the plaintiff and the 1st defendant, both of whom are also estranged husband and wife and locked up in dispute over this and other properties.

On the other hand, it is the 1st defendant's case that, the property of Elegance Investment Limited including Deep West Resort, is distinct from that of the plaintiff and the 1st defendant as the shareholders of Elegance Investments Limited and, the plaintiff has no proprietary rights to the company's property apart from the shares she holds. Accordingly, the plaintiff has no *locus standi* to institute this suit in her capacity as shareholder and a Director of Elegance Investments Limited nor is there jurisdiction to entertain the suit by the plaintiff on the assets and property of Elegance Investments Limited.

It is also the 1st defendant's case that the issue of the plaintiff's and his interest in the Elegance Investments Limited cannot be determined in an ordinary civil suit between the plaintiff and himself but in terms of the Memorandum and Articles of Association and Company Law.

There have been cases in respect of the suit property in particular ***HCCC NO.10 of 2008 (OS) Anthony Chinedu Ifedigbo – vs – Joyce Akinyi and Elegance Investments Limited, HCCC No.172 of 2009 Joseph Kamau Muchina – vs – Joyce Akinyi Ochieng and HCCC No.291 of 2009 Susan Akoth Ochieng*** (duly constituted attorney of ***Joyce Akinyi Ochieng and Elegance Investments Limited – vs – Antony Chenedu Ifedigbo and Joseph Kamau Muchina*** involving the same parties and issues herein which the plaintiff has concealed or failed to disclose.

It is his case that the matters canvassed are *res judicata*, the plaint is grounded on false, erroneous and intentional misrepresentation and the same is scandalous, frivolous and vexatious.

It is true that the plaintiff herein has not disclosed the previous suits touching on the same property. The consequences of non disclosure by any party who comes to court are that no audience should be extended to such a party. This is because non disclosure necessarily implies that the material not disclosed is adverse to such a party and it is intended to mislead the court. There is yet a more serious matter when it comes to the capacity of the plaintiff herein. It is a basic principal of Company Law that the Company has a distinct and separate personality from its shareholders and directors even where the directors happen to be sole shareholders. The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. Indeed, the interest of a shareholder is restricted to that share and does not extend to the property except the right to vote in a meeting called by the company and any dividends that may be declared. It is obvious therefore that, the plaintiff in this case lacks the legal competence to institute the suit in her own name or even in her capacity as director and shareholder. Only the company has capacity to enforce its legal rights....*See Omondi and another – vs – National Bank Kenya Limited & two others.(2001)KLR 579.*

I am told that the other suits that have been concealed by the plaintiff are still pending. Section 6 of Civil Procedure Act provides as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

It has been shown that the other pending suits relate to the same property and involve the parties litigating in the name or on behalf of the plaintiff. This has not been denied by the plaintiff. This present suit cannot therefore be sustained. *See also HCCC No.321 of 2006 Ann Buhasyo Okinyo – vs – Housing Finance Company of Kenya Ltd.*

And so the plaintiff lacks the *locas standi* to bring the present suit and the order sought to proceed by way of derivative suit cannot be granted.

Having said so, I must observe that the striking out of a suit is a drastic measure which however, must be invoked when the suit is completely hopeless in the eyes of the law and the facts. I have tried to weigh the interests of the plaintiff *vis a vis* those of the 1st defendant in relation to the company and I am persuaded that this suit cannot be sustained.

Accordingly, the plaintiff's application by way of Notice of Motion dated 25th April, 2010 is hereby dismissed and her suit struck out in

terms of the application dated 6th July, 2009. She shall pay the costs to the 1st defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of September, 2010.

A. MBOGHOLI MSAGHA

JUDGE