REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO 958 OF 2001

GEORGE W M OMONDI

NASARINA ANYANGO………………………..………… PLAINTIFFS

VERSUS

NATIONAL BANK OF KENYA LTD

DEVELOPMENT BANK OF KENYA LTD

GRAHAM W SILCOCK………………………………….. DEFENDANTS

RULING

On 22nd June, 2001 George W M Omondi and Nasarina Anyango, the plaintiffs herein, instituted this suit against the National Bank of Kenya Ltd, the Development Bank of Kenya Ltd and Graham W Silcock, the first, second and third defendants respectively seeking the following reliefs:-

(a) A permanent injunction to restrain the defendants from in anyway alienating, disposing of or selling in any manner the assets of Lake Victoria Fish Ltd comprised and or being on LR No Kisumu/Kogony/ 2915 inclusive of all machineries, fixtures and fittings being thereon and movables.

(b) A declaration that the appointment of the third defendant by the first and second defendants as receiver/ manager over the business of Lake Victoria Fish Ltd on 27/1/97 and 10/1/97 respectively were irregular, oppressive unlawful, null and void.

(c) General damages against the first defendant [NBK] for breach of agreement for export financing of 30/10/ 96 resulting in the loss of revenue of US Dollars 7,729,000 and profits therefrom.

(d) Special and general damages against the first defendant NBK for loss of off-shore financing of US Dollars 6 million.

(e) Special and general damages against all the defendants jointly and/or severally for loss of business, profits and income at Kshs 44 million per year from January 1997 until date of judgment.

(f) General damages for loss of investment and anticipated income therefrom together with anticipated growth from January, 1997 until final judgment.

(g) An order removing the third defendant as receiver/ manager of Lake Victoria Fish Ltd.

(h) Interest on damages in [c], [d], [e] and [f] at prevailing treasury bills rates.

(i) Costs of this suit together with interest at court rates.

(j) Such further or other relief as the Court deems fit and just to grant.

The plaintiffs brought the suit in their capacity as directors and shareholders of Lake Victoria Fish Ltd, a company in receivership. I shall hereafter refer to the said company as "LVF". It is evident from the plaint that the plaintiffs are aggrieved by the appointment of the third defendant as receiver by the two banks pursuant to powers conferred on them by debentures executed by their "company", in favour of the banks. The plaintiffs are also rankled by the manner in which the receiver has exercised his powers over the LVF. Simultaneously with the filing of the plaint, the plaintiffs took out a summons in chambers in which they sought an interlocutory order of injunction to restrain the defendants from disposing of, alienating or selling the property and assets of LVF situated on LR No Kisumu/Kogony/2915 as well as for an order to remove the receiver appointed by the banks and his replacement by a court appointed receiver.

All the defendants filed their respective defences. In all of them, it is pleaded that the plaintiffs lack capacity to institute the suit. In addition, both the first and third defendants have pleaded that the suit is *res judicata*.

At the hearing of the plaintiffs' application for interlocutory relief, preliminary objections of which due notice had been given were taken by the defendants' counsels to the effect that the plaintiffs' lacked legal standing (*locus standi*) to institute the suit and that the said suit was in any event *res judicata* and/or an abuse of the process of the Court. On *locus standi*, Mr Rachuonyo, counsel for the third defendant, in submissions with which Mr Raiji counsel for the second defendant, and Mr Ahmed Nassir, counsel for the first defendant associated themselves argued as follows. The plaintiffs could not in their own names institute a suit seeking reliefs for wrongs allegedly done or intended to be done to LVF, a limited liability company, for it was basic company law that only the company itself could sue for wrongs done to it. The only exception is where persons in control of the company and who ought to give consent or permission to sue have refused to do so. Counsel relied on the following statement of the law in *Halsbury's Laws of England*, 4th Edition, Paragraph 713:-

"To redress a wrong done to the company or to recover money or damages due to it, the action must *prima facie* be brought by the company itself, if the matter constituting the cause of action is a cause of action properly belonging to the company or the general body of members. However, where the persons against whom relief is sought hold and control the majority of shares, and will not permit an action to be brought in the company's name, shareholders complaining may bring an action in their own names and on behalf of the others, and they may do so also where the effect of preventing them so suing would be to enable a company by an ordinary resolution to ratify an improperly passed special resolution."

He pointed out that the exceptions contemplated had no application to the facts of the present case. He argued further that the fact that a company was under receivership made no difference for it does not loose its identity and the Board of Directors does not cease to exist. Reliance was placed on the case of *Newhart Development v Cooperative Commercial Bank Ltd* [1978] QB 814.

On *res judicata*, Mr Ahamed Nassir argued as follows. The issues in dispute in the present suit were the same issues which were in dispute in HCCC No 867 of 2000 and the parties are the same. The earlier suit was determined by a consent order made on 28.5.2001. There is no material difference in the two suits save that there are additional parties and prayers in the present suit. Adding new parties or prayers which ought to have been included in the earlier suit would not avail the plaintiff any escape from the doctrine of *res judicata*. He relied on section 7 of the Civil Procedure Act and in particular explanation four thereof. Also relied on were the cases of *Mwangi Njangu V Meshack Mbogo Wambugu and Esther Mumbi* [HCCC No 2340 of 1991] (unreported), *Mburu Kinyua v Gachini Tuti* [1978] KLR 69, and *E N Wainaina v Franz Haas* [1986] 2 KAR 79.

Counsel emphasized that parties must go to Court with all their causes of action and must sue all the persons they ought to sue; they cannot be allowed to wriggle away from the doctrine of *res judicata* by suing in instalments or giving the subsequent suit a cosmetic facelift by adding new parties or causes of action. He also emphasized that both HCCC No 867 of 2000 and the present suit revolved around the assets of Lake Victoria Fish Ltd (in receivership) and that the plaintiffs in the earlier suit had agreed that those assets may be sold. Both Mr Rachuonyo and Mr Raiji associated themselves with the above submissions. Mr Rachuonyo added that there was also another suit, namely HCCC No 350 of 1998, which was similar to the present suit and which had been determined. He pointed out that the parties to that suit were the present plaintiffs and the present third defendant. The suit was challenging the sale of the company assets and sought an injunction to restrain their sale. The application for injunction was dismissed and the suit was withdrawn. Counsel argued that in those circumstances the present suit was not only *res judicata* but also an abuse of the process of the Court for a subsequent suit could not be brought without justification and without payment of costs in the earlier suit. Mr Raiji in supporting the contentions that the present suit was *res judicata* argued that although the second defendant was not enjoined in the two previous suits, the issues raised therein affected the second defendant in the same manner as they affected the other two defendants. Indeed the second defendant was named in the body of the previous pleadings. He also submitted that the issues were the same, namely the realization of the securities given to the first and second defendants to secure monies advanced to LVF and the remedies were sought against a receiver appointed jointly by the first and second defendants. He also argued that the charges and debentures impugned in the present suit are the same securities which were impugned in the earlier suit and that the remedies sought against the second defendant could have been sought in the earlier suits.

Mr K'Opere vehemently opposed the application. His defence was two pronged. The first prong was at a technical level. The second at a substantive level. At the technical level, he submitted that the objections raised did not amount to true preliminary objections because: (i) If one wanted to raise *res judicata* it had to be pleaded and it could not be established save by an analysis of the previous pleadings, the issues and determination of the Court, all of which were matters of evidence, and (ii) if it was sought to strike out a suit, for the plaintiffs' lack of *locus standi* or on grounds of it being an abuse of the process of the Court it was necessary to make a proper application under order 6 rule 13 of the Civil Procedure Rules. At the substantive level, he argued that the plaintiffs had *locus standi* and the suit was neither *res judicata* nor an abuse of the process of the Court.

On *locus standi*, he argued as follows. Once a receiver is appointed he dispossesses the directors of the managerial function. He has obligations both to the company and the debenture holders. Since a company is constituted by its shareholders, who are its members, the duty to the company means a duty to its shareholders. Accordingly, if action is to be taken against the receiver it should be taken by those whose investment in the company is deteriorating as a result of the actions of the receiver. It is not possible for a company which operates through a board from which the receiver has taken over to institute proceedings. Minority rights are protected by law and it is not possible to get a resolution to institute a suit if a receiver is in charge. All in all, the persons with a legitimate right to complain are the plaintiffs who are the members of the company.

On *res judicata*, Mr K' Opere submitted that the doctrine did not apply in the circumstances of this case. He contended that HCCC No 867 of 2000 involved different parties and different issues. The suit was brought by George Omondi, the first plaintiff in this suit, in his capacity as a guarantor to LVF. He was joined in that suit by Lawe Investments Ltd a company in which he had substantial interests. The said company was also suing in its capacity as a guarantor to LVF. The proceedings related to two properties situate in Nairobi which were intended to be sold by the National Bank, the sole defendant in that suit and the first defendant in this suit, in exercise of its statutory power of sale. Counsel submitted that in those circumstances the capacity in which the first plaintiff was litigating and the subject matter of the suit were different from what obtained in the present suit. He also argued that the Development Bank of Kenya could not be brought into that suit as it had not financed the pre export facility the subject matter of the guarantees. And the receiver could also not be sued in the earlier suit as he was not connected with pre export facility and guarantee. As regards HCCC No 350 of the 1998, counsel conceded that the issues were more or less similar to those in the present suit but submitted that as the suit had been withdrawn the

plea of *res judicata* was inapplicable. He further submitted that the application in that suit was dismissed for non attendance by the advocate for the applicant and that could not form a basis for *res judicata*.

On whether the plaintiffs could institute the present suit without paying costs in HCCC No 350 of 1998, counsel took refuge in the fact that he was not the plaintiffs' advocate in that suit and did not know whether the costs had been paid. In any event, he argued, there were established ways of recovering costs.

In a brief rejoinder to the submission on behalf of the plaintiffs, counsel for the defendants argued that the issues they had raised were true preliminary objections for if they were successful, they could finally determine the suit. They also argued that the pleadings and rulings in the proceedings are part of the record and the Court is at liberty to look at its previous records both for purposes of determining whether a matter before it is *res judicata* and whether its process is being abused.

From the above submissions it is apparent that the issues which fall for determination are (i) whether or not the defendants' objections are properly taken as preliminary objections (ii) whether the plaintiffs have *locus standi* to institute the suit, and (iii) whether the suit is *res judicata* or otherwise an abuse of the process of the Court. I now move to consider those points in the light of the submissions thereon.

On whether the defendants' objections are proper preliminary objections, I think I should start by an appreciation of what a preliminary objection is. In *Mukisa Biscuit Company v West End Distributors Limited* [1969] EA 696, Sir Charles Newbold, P laid down the meaning of a preliminary objection as follows:

"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."

That passage was cited with approval by the Court of Appeal in *Nitin Properties Limited v Jagjit Singh Kalsi & another* [CA No 132 of 1989] (unreported) which case Mr K'Opere relied upon in contending that the defendants were not raising true preliminary objections. Bearing that definition in mind, I agree with counsels for the defendants that both the objection as to the legal competence of the plaintiffs to sue and the plea of *res judicata* are pure points of law which if determined in their favour would conclude the litigation and they are accordingly well taken as preliminary objections. In fact I must confess I was taken aback by the plaintiffs' counsel's insistence that the issues of *locus standi* and *res judicata* were not proper points for a preliminary objection for in my experience at the bar and on the bench I had not before heard it doubted that they were. And I hasten to add that in determining both points, the Court is perfectly at liberty to look at the pleadings and other relevant matters in its records. It is not necessary to file affidavit evidence on those matters as contended by counsel for the plaintiffs. What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of a judicial discretion. In that regard, I am inclined to think that the contention by the first defendant that the present suit is an abuse of the process of the Court for the reason that the defendant's costs in HCCC No 350 of 1998 which was withdrawn have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.

As regards whether the plaintiffs have *locus standi* to institute this suit, I am in complete agreement with the submissions made by the defendants' advocates that they do not. It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even when the directors happen to be the sole shareholders (see *Salmon v a Salmon & Co Ltd* [1897] AC 22). 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. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights. The contention by counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly the proper plaintiffs in this action is manifestly without legal foundation. And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors *functus officio*, it does not destroy the corporate existence and personality of the company. That

appointment makes the directors unable to act in the name of the company but, as I understand the law, it does not make them in their capacity as members equally disabled. On that view, it was open to the two plaintiffs in the name of the company, but only in the name of the company, to institute the present proceedings which relate to alleged wrongs against the company *qua* company. But they definitely lacked legal competence to institute the suit in their own names in their capacities as directors and shareholders of LVF. I would on this ground alone, order the suit struck out with costs to the defendants.

Having taken that view of the matter, it may seem unnecessary to consider whether the suit should fail for the additional reason that it is *res judicata*. However, as this Court is not the final Court, I am obliged to express my findings on all the issues raised for determination. And so I must deal with the issue of whether the suit is *res judicata*. In that regard, I accept the submission by counsel for the defendants that the doctrine of *res judicata* would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments. I wholly agree with the opinion of Kuloba J in *Mwangi Njangu v Meshack Mbogo Wambugu* (*supra*) where he said:-

“If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of *res judicata* plays”.

It cannot be otherwise if the doctrine is to serve the two public policy objectives for which it was fashioned, namely, that it is desirable that there be an end to litigation and that a person should not be vexed twice in respect of the same matter.

Be that as it may, having perused the pleadings and determinations in the suits which are said to conclude the present one on the basis of the plea of *res judicata* and having weighed the submissions of the counsel thereon,

I have concluded that the present suit is not *res judicata* for the following reasons. First, as regards HCCC No 350 of 1998, I accept Mr K’Opere’s submission that the same having been withdrawn rather than determined on its merits, there would be no basis of pegging the plea in bar thereon for it is a fundamental condition precedent to this plea in bar that the previous suit should have been heard and finally determined by a Court of competent jurisdiction. Secondly, I accept the plaintiff’s submissions that HCCC No 867 of 2000 involved a different matter from what is at stake in the present suit and that the first plaintiff therein who is also the first plaintiff in the present suit was litigating in a different capacity. The subject matter of the former suit was the property known as LR No 12882/ 15-Karen and LR No 209/2029 Parklands which had been charged to the National Bank as collateral security for advances to LVF. And the first plaintiff had initiated the suit in his capacity as a guarantor and chargor of the Karen property. The present suit is concerned with the property known as LR No Kisumu/Kogony/2915 which is registered in the name of LVF and seeks totally different reliefs from the earlier suit. The first plaintiff is also suing in a different capacity, namely as a member and director of LVF. Those two considerations, to my mind, remove the present suit from the ambit of *res judicata*. Considering the pleadings and reliefs sought, I am on the whole persuaded that there is more than just the additional of another party and other reliefs in the present suit. It is more than a cosmetic face-lift of the suit in HCCC No 867 of 2000. I accordingly find that the suit is not *res judicata.*

The upshot of this matter is that I uphold the defendants’ preliminary objection that the plaintiffs have no *locus standi* to institute this suit in their own name and I accordingly order that the same be struck out with costs to the defendants. In those circumstances, the application for interlocutory relief which was appurtenant to the suit is deemed to be also struck out.

Dated and delivered at Nairobi this 19th day of October, 2001

A.G. RINGERA

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JUDGE