



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 210 OF 2015

LUCY WANJIKU MUKU (suing as a Director of

Karl Salzmann Limited).....PLAINTIFF

VERSUS

KARL SALZMANN LIMITED.....DEFENDANT

RULING

1. This is the Notice of Motion dated 10th October 2016. It is brought under Section 3A of the Civil Procedure Act and Order 2 Rule 15(1) (a) of the Civil Procedure Rules, 2010.

2. It seeks orders;

- a) That the Plaintiff's suit be struck out for disclosing no reasonable cause of action in Law.
- b) That the Plaintiff suit be struck out for want of jurisdiction.
- c) That costs of this application and of the struck out suit be awarded to the Defendant to be paid personally by the Plaintiff.

3. The application is based on the following grounds;

- i) The Plaintiff has specifically stated in paragraph 12 of the plaint dated 10/9/2015 that she is a director of the Defendant as well as being a shareholder, holding 51% of the shares. She is therefore the majority shareholder.
- ii) No suit can be commenced by a shareholder in her own name to redress any wrong committed by any person insider or outsider against the company. The company is the only person that can institute the suit and in its own name.
- iii) There is no right and therefore no cause of action that personally accrues to the Plaintiff independent of the right and cause of action accruing to the Defendant.
- iv) The suit is an absurdity since the Plaintiff is basically suing herself.

4. The application is opposed. There are grounds of opposition filed by advocate for the Plaintiff dated 30/1/2017 and filed in court on 1/2/2017.

5. I have considered the application and the grounds of opposition. I have considered the submissions of both counsels and the authorities cited. The issue for determination is whether the suit herein ought to be struck out.

6. It is the Defendant/Applicant's contention that the Plaintiff being the majority shareholder of the Defendant cannot sue the company as it amounts to suing herself. The Defendant/Applicant has cited the case of Richard Otieno Muga –versus- Grace Wangari Muthirania And 5 Others, Kisumu ELC No. 122 of 2013. Which referred to the case of Stein –Versus- Blake And Others (1988) All ER 724 where it was held that;

“Ordinarily no court will interfere with the internal management of companies and infact there is no jurisdiction to do so.

Infact there is no jurisdiction to do so. In order to redress any wrong done to the company the action or suit for such redress should be brought by the company itself."

7. They also relied on the case of Sultan Hasham Lalji And 3 Others –versus- Ahmed Hasham Lalji And 4 Others, Nairobi (Milimani) HCCC No 189 of 1998 which quoted the case of Burland –versus- Earle (1902) 71 LJPC where it was stated;

"It is an elementary principle of law relating to joint stock companies that the court will not interfere with the material management of companies acting within their powers and infact has no jurisdiction to do so. Again it is clear that in order to redress a wrong done to the company or to recover money or damages alleged to be due to the company, the action should prima facie be brought by the company itself."

8. The matter went up to the Court of Appeal in Sultan Hasham Lalji And 3 Others –versus- Ahmed Hasham Lalji And 4 Others, Civil Appeal No 3 of 2003 – where the Court of Appeal while referring to the case of Foss –Versus- Harbottle (1843) 2 Hane 461 stated;

"As a general rule and subject only to specific well established exceptions, due to its separate legal personality, the law does not permit shareholders to bring an action on behalf of the company in which they hold shares. If the duty to be enforced is one owed to the company then the primary remedy for its enforcement is an action by the company itself against those in default."

9. The Plaintiff/Respondent on the other hand, submitted that allowing this application to strike out suit is a drastic and draconian action.

It amounts to denying a party who has come to court a chance to be heard. That Article 50 of the Constitution guarantees the Plaintiff the right to be heard and to have the dispute determined by court.

10. Mr Gikandi for the Plaintiff/Respondent further referred this court to the case of D.T. Dobie (Kenya) Limited –versus- Muchina (1982) KLR. He also urged the court to treat this case as an exception as there are only two shareholders who are husband and wife. That this suit ought to be allowed to proceed to full hearing.

11. It is not in doubt that the Plaintiff owns the majority shares at 51%. There are no authorities put forward by the Plaintiff to validate this position, that she can sue the company. The Plaintiff/Respondent failed to demonstrate that special circumstances exist to warrant the Plaintiff to bring this suit against the company.

12. I am guided by the authorities cited by the Defendant/Applicant. I find that the Plaintiff's suit does not disclose any reasonable cause of action.

I also find that this court has no jurisdiction to entertain this suit. There is also no special requirement that the company ought to file its resolution in which it appointed advocates to act for it. It is assumed that the company in the cause of business would conduct affairs in a manner befitting a limited liability company.

13. All in all I find merit in this application and I grant the orders sought namely;

- a) That the Plaintiff's suit be and is hereby struck out for disclosing no reasonable cause of action.
- b) That the Plaintiff's suit be and is hereby struck out for want of jurisdiction.
- c) That costs of this application and of the suit be awarded to the Defendant to be paid personally by the Plaintiff.

It is so ordered.

Dated, signed and delivered at Mombasa on the 1st day of November 2017.

L. KOMINGOI

JUDGE

1/11/2017