



REPUBLIC OF KENYA



KENYA LAW
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**Jun v Yan & 2 others (Civil Case E019 of 2024) [2025] KEHC 2978 (KLR)
(Commercial and Tax) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
CIVIL CASE E019 OF 2024
A MABEYA, J
MARCH 17, 2025**

BETWEEN

LI JUN PLAINTIFF

AND

FU YAN 1ST DEFENDANT

WANG LIPING 2ND DEFENDANT

FUXIN ENGINEERING LIMITED 3RD DEFENDANT

RULING

1. By a Plaint dated 8th January, 2024, the Plaintiff sued the defendants seeking various reliefs for the benefit of the 3rd defendant. It was a derivative suit for all intents and purposes. The Plaintiff and the 1st defendant were the original shareholders and directors of the 3rd defendant until 22nd January, 2021 when the 2nd defendant was incorporated as a director.
2. In the Plaint, the plaintiff made various allegations of fraud and unlawful transactions against the 1st and 2nd defendant. He alleged that vide their various unlawful actions, the 3rd defendant (the Company) had incurred massive losses. That the said defendants had breached their fiduciary duty owed to the company.
3. It is on those allegations that the plaintiff prayed for various reliefs in favour of the company including repayment of Kshs.81,997,628/=.
4. Together with the Plaint, the plaintiff lodged an application under, inter alia, sections 238 and 239 of the *Companies Act* and Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules seeking, inter alia, permission to pursue a derivative suit and temporary orders of injunction.



5. On 17th October, 2024, the defendants lodged a Notice of Preliminary Objection of even date against both the Motion and the suit. There were 4 grounds of objection for seeking to strike out the suit and notice for allegedly being defective. These were that:-
 - a. The description of the plaintiff was inconsistent. That while to Plaintiff showed Li Jun was named as the plaintiff in the Motion, one Qiu Jie was described as the Plaintiff and swore the affidavit in support on the basis of a Power of Attorney.
 - b. That the Power of Attorney given to Qiu Jie was not registered within 2 months as required under the [Registration of Documents Act](#), Chapter 285 Laws of Kenya.
 - c. That the suit being a derivative suit, it should be brought in the shareholders' name. That it should not have been delegated to a 3rd Party by way of a Power of Attorney.
 - d. Finally, that the Plaintiff had failed to obtain the permission before bringing the derivative suit.
6. The plaintiff opposed the objection vide Grounds of Opposition dated 6th November, 2024. It was contended that the objection was in breach of the requirement in the case of Mukisa Biscuits Manufacturing Company vs West End Distributors (1969) EA 696 as it contained contested facts. That though the company was indicated as a defendant, the suit was brought for its benefit. That there was nothing wrong for a donee of a Power of Attorney deposing on affidavit on behalf of an indisposed plaintiff. That the suit was in terms of Sections 238 and 239 of the [Companies Act](#).
7. The matter was determined through submissions. The defendants submitted that their objection was merited as it raised issues of law. They relied on the case of Mukisa Biscuits Manufacturing Company vs West End Distributors (supra); George Oraro vs Mbarak Easton Mbaja (2005) eKLR for the said proposition.
8. That there was inconsistency in the pleadings. That the plaintiff described the plaintiff as Li Jun while in the Motion, it was Qiu Jie who was so described as such and as the Plaintiff's Attorney and agent. That this inconsistency was embarrassing and the pleadings were evasive and imprecise. The texts of Bullen & Leake & Jacobs precedents of pleadings (20th edition), Pleadings Without Tears: A guide to legal drafting under the Civil Procedure Rules and the cases of Choitram & Another vs Nazari (1984) KECA 47 (KLR) and Yang Guang Property Design & Manufacturing Limited vs China Wu Yi Company (K) Limited (2021) eKLR amongst others, were relied on for these propositions.
9. As to the validity of Qiu Jie's Power of Attorney, section 4(1) of the [Registration of Documents Act](#) Cap 485 was cited as authority for the proposition that its failure to be registered within 2 months made it invalid. That while the Power of Attorney was executed on 4th October, 2023, it was only registered on 15th December, 2023. The cases of Stephen Lolo Tathi & Others vs Mahahm Musa Kioko Ziwani Mosque & School Association (2003) eKLR and Francis Mwangi Mugo vs David Kamau Gachago (2017) eKLR were cited in support of the submission that that Power of Attorney was invalid.
10. That authority should have existed as at the time of filing suit. That the plaintiff had admitted that the Power of Attorney was registered subsequent to the filing of the suit. That permitting retroactive validation would undermine the legal framework for registration, procedural fairness and certainty in litigation.
11. Finally, on whether the suit was a properly conceived derivative suit, it was submitted that such a suit can only be brought by a member. That it cannot be initiated through an agent or attorney acting on behalf of a shareholder. That the requirement to be brought by a shareholder ensures that pursuit of legal action is done genuinely and for accountability. That in the present case, the case was instituted



- through an agent. The texts of Sealay & Worthington's Text; Cases and Materials in Company Law (12th Edition, Oxford University Press) and Company Law by Alan Dignam and John Lowry (12th Edition Oxford University Press) were cited in support of those contentions.
12. That there was no permission sought before the filing of the derivative claim. It was contended that leave of Court should have been sought before the filing of the Plaint. The case of *In the Matter of CMC Holdings Limited (2012) eKLR* was relied in supporting that submission.
 13. For the plaintiff, it was submitted that the defendants were only concerned with technicalities rather than the merits of the grounds upon which the suit was predicated upon. That the matters raised in the objection were not pure law but touched on evidence and therefore not characterized as pure points of law.
 14. On the Power of Attorney granted to Qiu Jie, it was submitted that the law does not invalidate a document registered outside the time specified for registration. That the sanction provided under section 10 of the [Registration of Documents Act](#) is not invalidity of the document but a fine. That the cases relied on are inappropriate. That in those cases, the courts were considering documents that had not been registered at all.
 15. On the errors in the description of the parties, they were mere typographical errors and should not be over emphasized. The cases of *Fubeco China Fushun vs Naiposha Company Limited & 11 Others (2014) KLR* and *Joyce Mukeli Mutuku vs Public Trustees Machakos (2004) 660 KLR* were cited in support of the proposition that errors of description can be amended and cannot lead to the striking out of pleadings.
 16. On the nature of the suit as a derivative claim it was submitted that the suit was properly conceived and brought by the Plaintiff as a shareholder. He had not delegated his right to Qiu Jie as alleged. That the permission to continue the suit was properly sought.
 17. I have carefully considered the rival contestations and the authorities relied on.
 18. The first objection to the Preliminary Objection was that the same was not merited as it did not fit the definition given in the celebrated case of *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited (supra)*. In that case, the Eastern Court of Appeal held that a preliminary objection is to be raised only on matters of law and not where facts are to be ascertained or where it is a matter of exercise of judicial discretion.
 19. In the present objection, the first and second points were not pure points of law. They would require ascertainment of facts. These are as to the description of the plaintiff and the use of the Power of Attorney. However, since the other two points were of law, I will not reject the Preliminary Objection. I will consider the same on merit.
 20. The first point was that there was inconsistency in the description of the plaintiff. Notwithstanding the many authorities cited in support of this point, the Court does not find any merit on it. Firstly, the suit cannot be rejected on the ground that the name of the plaintiff is subsequently described otherwise than it was described in the primary pleading. The record shows that the Plaintiff in the Plaint as well as the subsequent Notice of Motion is Li Jun. The description of one Qiu Jie in paragraph 1 of the supporting affidavit as the Plaintiff does not gravely offend the law of pleadings to warrant the striking out of the Plaint.
 21. It is clear from paragraph 1 of the Plaint and the title to both the Plaint and the Motion that the Plaintiff is one Li Jun. The averment in paragraph 1 of the supporting affidavit to the Motion dated 8th January, 2024 is the one that is misleading. If the same is struck out, it will leave paragraph 2 of the said Affidavit



intact which will show that the deponent is but the plaintiff's attorney. I think the dicta of Gikonyo J in *Fubeco China Fushun vs Naiposha Company Limited & 11 Others* (supra) is apt. Further, the holding in *Joyce Mukeli Mutuku & Another vs The Public Trustees Case* (supra) is persuasive enough. In the latter case, the court found that, the description of the respondent as "Public Trustee Machakos" was not fatal to the pleading as there was no entity as "Public Trustee Machakos" but "Public Trustee". The court held: -

"Section 23(3) of the *Public Trustee Act* provides that: all proceedings in law the Public Trustee shall sue and be sued by the name 'Public Trustee'. It means that the 1st Respondent as described does not exist. However, I do find that (sic) anomaly would not be a reason to strike out the whole proceedings because of a misdescription of a party."

22. For the foregoing reasons, the first objection is without basis and is rejected.
23. The 2nd objection was that the Power of Attorney used by Qiu Jie to act on behalf of the plaintiff was invalid for non compliance with Section 4 of the *Registration of Documents Act*, Cap 285, Laws of Kenya. That the same was executed on 4th October, 2023 but registered on 15th December, 2023, outside the two-month period provided.
24. I have considered the provisions of the *Registration of Documents Act*, Cap 285, Laws of Kenya. ('the Act'). The relevant provisions are as follows: -

Section 4(1) of the Act provides: -

"All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immoveable property (other than such documents as may be of a testamentary nature) and vakallac shall be registered as hereinafter prescribed."

Then section 9 of the Act provides: -

"Every document the registration whereof is compulsory shall be registered within two months after its execution and if it is executed outside Kenya it shall be registered within two months after its arrival in Kenya."

25. From the foregoing, it is quite clear that those documents that confer or purport to confer an interest or a right in immoveable property must be registered within two (2) months of their execution. If they are not registered, they are not capable of passing any interest, confer a right, title or inhibit, as the case may be, what they purport to. See the cases of *Francis Mwangi Mugo vs David Kamau Gachago* (supra) and *Mayfair Holdings Limited vs Ahmed* (supra). These include Powers of Attorney. See *Sanjay Varma & 2 Others vs Jackson Eshiwani Lokoye & 2 Others* (2000) eKLR.
26. The above cases and those relied by the defendants are where the documents were not registered at all. What happens if the document is subsequently registered outside the period prescribed? The two sections, to wit, 4 and 9, of the Act do not state the effect of such an eventuality. That leaves us with the option of rummaging through the rest of the Act to see what the effect is.
27. In this regard, section 10 of the Act provides: -

"If any such document is not registered within the time prescribed, the person in whose favour the document is made, or his successor in title, shall be liable to the payment of a fine not exceeding ten times the prescribed registration fee on the document in question,



with a maximum of One Thousand Shillings, and the registrar may impose the fine in his discretion and delay the registration until the fine has been paid.”

28. My reading of the foregoing provision is that, while the document remains ineffective and incapable of passing any interest so long as it remains unregistered, there is room for registration subsequent to the period prescribed upon payment of the prescribed fine. Indeed, the registrar is given the discretion to delay the registration until the fine has been paid. Once the fine is paid and the document is registered, the document becomes valid for all intents and purposes.
29. In the present case, there is evidence and it is admitted that, the Power of Attorney was subsequently registered on 15th December, 2023. Upon such registration, the powers donated therein enured to Qiu Jie as if the document had been registered within time. Accordingly, that objection is rejected as being without basis.
30. The next objection was that the suit was conceived as a derivative suit but the suit was not brought in the name of the plaintiff. That the suit was defective as Qiu Jie acted for the Plaintiff.
31. I accept the proposition that the suit as brought is one of a derivative claim. In such a suit the same must be brought by either a member or a director of the company in his own personal name and capacity as aforesaid. This emphasizes the importance of accountability and the duty of care that a shareholder/member or director has towards the company. In such a proceeding, the Plaintiff always must be the shareholder or director of the Company and the company is always a nominal defendant.
32. What makes a claim a derivative one is because, for reason of the principle in *Foss vs Harbottle* 2 Hare 461, 67 ER 189, the Company cannot bring the suit against its members and there is no resolution to do so as the majority shareholders may be unwilling to bring such a suit against themselves. Further, what is critical is that the wrongs complained of must be against the company and the reliefs sought be for its benefit. All these are present in the present suit. The company has been properly named as a nominal defendant while the plaintiff is shown to be Li Jun. Section 238(1) of the [Companies Act](#) has therefore been complied with.
33. I reject the contention that just because Li Jun has donated a Power of Attorney to Qiu Jie makes the suit defective. For all purposes and intents, Li Jun remains the plaintiff and the owner of the suit. The averments in the plaint are his notwithstanding that Qiu Jie swore the affidavit in support thereof. It is not mandatory in law that Li Jun personally swears the affidavit. The law of agency is perfectly in operation in derivative claims. That objection has no merit and is rejected.
34. The final objection was that the Plaintiff failed to obtain permission of Court before filing the derivative claim. There is no law that was cited to support this contention. The case relied on of *In the matter of CMC Holdings Limited* (2012) eKLR is only persuasive. It is persuasive as the Court was clear in its mind that if the application and the suit are filed simultaneously and the application is rejected, an applicant would have wasted his resources.
35. In my view, the operative provision is section 239 of the [Companies Act](#), 2015, which provides: -
 - “ 1) In order to continue a derivative claim brought under this part by a member, the member has to apply to the court for permission to continue it. ...”
36. The operative words are ‘permission to continue’. We cannot read into the law the words that are not there. The [Companies Act](#) does not provide that leave to file or to commence a derivative suit should be sought first. All that it provides is that permission must be sought to continue the suit. Permission to continue means that the suit or claim should have already existed or has already been filed.



37. In an application under section 239 aforesaid, all that the Court has to satisfy itself is if the ingredients set out in section 238 of the Companies Act are present or exist before it can grant the permission. It is to satisfy itself that an applicant has satisfied the conditions set out therein for it to allow or give permission for the suit to be proceeded with.
38. In the present case, the suit has been properly lodged. Let the matter be considered in accordance with the provisions of section 238 for the proper orders or directions under Section 239 (3) of the Companies Act to be given.
39. Accordingly, I find that the Preliminary Objection has no merit and dismiss the same with costs.
- It is so ordered.

SIGNED AT KISUMU ON THIS 4TH DAY OF MARCH, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2025.

F. GIKONYO

JUDGE

