



**Grewal v Grewal & another (Commercial Case E437 of 2023)
[2024] KEHC 3742 (KLR) (Commercial and Tax) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E437 OF 2023**

MN MWANGI, J

APRIL 12, 2024

BETWEEN

RAVINDER SINGH GREWAL PLAINTIFF

AND

JATINDER KAUR GREWAL 1ST DEFENDANT

SATVINDER SINGH GREWAL 2ND DEFENDANT

RULING

1. The plaintiff filed a suit against the defendants vide a plaint dated 12th September, 2023 seeking the following orders –
 - i. A declaration that the 1st defendant is not a director of Danbat Limited;
 - ii. A declaration that the 1st defendant does not qualify to be a signatory to Danbat Limited’s Account at NCBA Bank Kenya PLC account xxxxx/xxxxx and should be removed as a signatory forthwith;
 - iii. A declaration that henceforth Danbat Limited’s account at NCBA Bank Kenya PLC Account xxxxx/xxxxx should be operated and transacted jointly by the plaintiff and the 2nd defendant; and
 - iv. An order directing that a financial forensic audit be conducted on the accounts of Danbat Limited.
2. Contemporaneously with the said plaint, the plaintiff filed a Notice of Motion seeking the following orders-
 - i. Spent;



- (ii) That orders be issued restraining the 1st defendant from being a signatory to NCBA Bank Kenya PLC Account Number xxxxx/xxxxx belonging to Danbat Limited until the suit herein is heard and determined;
 - (iii) That orders be issued restraining the 1st defendant from being a signatory to NCBA Bank Kenya PLC Account Number xxxxx/xxxxx belonging to Danbat Limited until the suit herein is heard and determined;
 - iv) That orders be issued restraining the 2nd defendant from operating and transacting on NCBA Bank Kenya PLC Account Number xxxxx/xxxxx solely without the joint signature of the plaintiff until the application herein is heard and determined;
 - (v) That orders be issued restraining the 2nd defendant from operating and transacting on NCBA Bank Kenya PLC Account Number xxxxx/xxxxx solely without the joint signature of the plaintiff until the suit herein is heard and determined; and
 - (vi) That costs be provided for.
3. The application is supported by an affidavit sworn on 12th September, 2023 by Ravinder Singh Grewal, the applicant herein.
 4. In opposition thereto, the defendants filed a Notice of Preliminary Objection dated 18th September, 2023 raising the following grounds –
 - i. The plaintiff lacks locus standi to institute a suit to protect the assets of Danbat Limited, the former owner of LR No. 209/8901 which has been subdivided into LR No. 209/21576 and LR No. 209/21577;
 - ii. The plaintiff lacks *locus standi* to bring a suit to protect LR No. 209/21577 as he is not the owner of the same and because of the separate legal personality from that of the plaintiff as a Shareholder and Director of Danbat Limited;
 - iii. Sathar Limited, the registered proprietor of LR No. 209/21577 is the proper plaintiff. In the alternative, Danbat Limited is the proper plaintiff as it is the former owner of LR No. 209/8901 which has been subdivided into LR No. 209/21576 and LR No. 209/21577;
 - iv. The suit is bad in law as it is for protection of the assets of Danbat Limited, and Sathar Limited which, by virtue of the rule in *Salomon vs Salomon* belong to companies and not the Shareholders in and Directors of those companies; and
 - v. The suit is bad in law because it is a derivative suit which has been filed by the plaintiff in contravention of Sections 238 and 239 of the *Companies Act* 2015.
 5. The defendants also filed Grounds of opposition dated 17th September, 2023 raising the following grounds –
 - i. The plaintiff has not and cannot satisfy the requirements for the grant of an injunction as laid down in *Giella vs Casman Brown* 1973 EA 358;
 - ii. The plaintiff lacks locus standi to institute a suit to protect the assets of Danbat Limited, the former owner of LR No. 209/21576 and LR No. 209/21577;
 - iii. The suit is fraudulent as it does not disclose the real dispute between the plaintiff and the defendants;



- iv. The suit is bad in law as it is for protection of the assets of the company by virtue of the rule in *Salomon vs Salomon* and the proper plaintiff is the owner, a private limited liability company known as Danbat Limited which is not the plaintiff/applicant in this suit;
 - v. In the circumstances the plaint is a derivative suit which has been filed by the plaintiff in contravention of Sections 238 and 239 of the *Companies Act* 2015;
 - vi. The suit is fraudulent in two respects namely that the first object is to defeat the 1st defendant's estate plan title deed of allocation to which the plaintiff is a party and secondly, to perpetrate a fraud on the 2nd defendant. The suit therefore offends public policy as its purpose is to achieve an illegal purpose;
 - vii. Further to the above, the defendants contend that the plaintiff is a party to an estate plan title deed of allocation which the parties to this suit and the late Hamider Singh Grewal executed on 14th October, 2014. Under that deed of allocation LR NO. 209/8901 which was over 2 acres in area was to be given to the plaintiff and the 2nd defendant by the 1st defendant who was the beneficial owner of all allotted shares in a company known as Danbat Limited which owned the said property. The plan was that the 1st defendant transfers her 5000 shares in it to the plaintiff and 1st defendant so that they become the shareholders and the said LR No. 209/8901 be divided equally into two portions one of which would be transferred to family companies owned by the plaintiff and the 2nd defendant respectively, in which event the gifts of those shares to the plaintiff and the 2nd defendant would be completed. To facilitate the transfer of the subdivisions of LR No. 209/8901 to the plaintiff and 2nd defendant's two companies namely Rio Investments Limited and Sather Limited were incorporated by the plaintiff to enable them to receive the respective shares of the property;
 - viii. The plaintiff has never owned beneficially the 2500 shares registered in his name or the property known as LR No. 209/8901 which was formerly registered in the name of Danbat Limited and now portions of it namely LR No. 209/21576 and LR 209/21577 are registered in the names of Rio Investments Limited and Sathar Limited respectively;
 - ix. The plaintiff/applicant has forfeited all his gifts under the deed of allocation by his breach of its terms. He holds the following properties upon a constructive trust for the 1st defendant:
 - a. 2500 shares in Danbat Limited.
 - b. LR No. 37/113 and LR No. 37/114
 - x. The plaintiff's company Rio Investments Limited holds LR No. 209/21576 upon a constructive trust for Danbat Limited; and
 - xi. The plaintiff is no longer a Shareholder in or a Director in Danbat Limited.
6. The Notice of Preliminary Objection was canvassed by way of written submissions. The defendants' submissions were filed on 4th October, 2023 by the law firm of Kamau Kuria & Company Advocates. The plaintiff's submissions were filed by the law firm of Othieno & Company Advocates on the same day.
 7. Dr. Kamau Kuria (SC), learned Counsel for the defendants submitted that the suit amongst the parties herein should be struck out with costs since it is for the protection of money belonging to a company known as Danbat Limited and an immovable property belonging to the said company and Sathar Limited, neither of which is the plaintiff in this suit. In addition, that the plaintiff herein is not the



majority shareholder, thus he lacks the legal capacity to institute this suit on behalf of the aforesaid companies. Senior Counsel relied on the case of *Mukisa Biscuits v West End Distributors Limited* [1969] EA, 696 and urged this Court to consider the contents of the plaint dated 12th September, 2023, the Notice of Motion dated 12th September, 2023, the plaintiff's affidavit in support of the said application and his witness statement all dated 12th September, 2023.

8. He submitted that the said documents show that the purpose of this suit is to preserve the company's assets being money held in a bank account at NCBA Bank opened by Danbat Limited, and all that parcel of land known as LR. No. 209/21577 which has since been transferred to Sathar Limited. Dr. Kamau Kuria (SC) asserted that the plaintiff does not have the requisite locus standi to institute a suit on behalf of Sathar Limited and Danbat Limited for preservation of the said assets. He referred to the case of *Salomon v Salomon* 1897 AC 1 and argued that only Danbat Limited and Sathar Limited have the requisite locus standi to sue for the said assets, since a suit on behalf of a company should be brought in the name of the company.
9. Mr. Waigara, learned Counsel for the plaintiff submitted that the plaintiff moved this Court in his capacity as a signatory to Bank Account No. xxxxx/xxxxx held at NCBA Bank seeking for orders that his mother be removed as one of the signatories of the said account since she resigned from Danbat Company Limited. He further submitted that it is important for a member of a company to be allowed to sue when a wrong is done to the company especially in instances of personal wrong, fraud, and illegal conduct. Counsel referred to the provisions of Sections 238-239 of the *Companies Act* which provides for the rights of a shareholder and contended that the issue of locus standi does not arise in this case since the company's rights are being violated.
10. Counsel stated that none of the prayers sought in the plaint relate to any property belonging to Danbat Company Limited since this suit was not filed to protect any of its assets. He further stated that this suit does not impact the identity of the company, ownership, and rights of shareholders in any way, but the suit has been brought for accountability and good management of the company.
11. In a rejoinder, Dr. Kamau Kuria (SC) submitted that this is not a derivative suit, and there is no authority allowing the plaintiff to file a suit in the event that he is concerned about the management of the company, as that can be done in a Board meeting. In addition, he stated that a shareholder cannot file a suit to protect the assets of a company as the plaintiff has done in this suit.

Analysis And Determination.

12. I have considered the plaint and Notice of Motion application filed by the plaintiff both dated 12th September, 2023. I have also considered the defendants' Notice of Preliminary Objection and Grounds of Opposition, as well as written submissions filed by Counsel for the parties. The issue that arises for determination is whether the plaintiff has the requisite locus standi to institute the suit between the parties herein.

Whether the plaintiff has the requisite locus standi to institute this suit.

13. A Preliminary Objection should only raise a pure point of law. It should be 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. See *Mukisa Biscuits Manufacturing Co. Ltd v*



West End Distributors Ltd (supra). The Court in the case of *Oraro v Mbaja* [2005] 1KLR 141 made the following observation in this regard –

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

14. The defendants are challenging the validity of this suit amongst the parties herein on the ground that the plaintiff lacks the requisite locus standi to institute it. In support of the said allegation, the defendants urged this Court to consider the contents of the plaint, the Notice of Motion, the plaintiff's affidavit in support of the said application and his witness statement all dated 12th September, 2023.

15. The *Black's Law Dictionary* defines locus standi as the right to bring an action or to be heard in a given forum. This term was defined by the Court of Appeal in the case of *Njau v Council of Nairobi*, KLR [1983] 625 as hereunder -

“Locus Standi literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus means that he has no right to appear or be heard in such and such proceedings”.

16. On perusal of the plaint, it is clear that the plaintiff's suit against the defendant is based on the allegation that the defendants unlawfully, irregularly and fraudulently colluded to mismanage the assets of Danbat Company Limited through non-disclosure and secret dealings designed for transaction without the plaintiff's knowledge and consent. The plaintiff contended that the 1st defendant ceased to be a director and shareholder of Danbat Limited in the year 2014, thus she cannot lawfully form a quorum to operate and transact on behalf of Danbat Limited, and/or be a signatory of Danbat Limited's account No. xxxxx/xxxxx held at NCBA Bank Kenya.

17. The plaintiff further alleges that the defendants conspired to deplete the assets of Danbat Limited when they illegally constituted a quorum of the Board of Directors without his knowledge and consent, and formed Sathar Limited to which they transferred all that parcel of land known as LR. No. 209/21577, and that these acts substantively decreased the value of Danbat Limited.

18. Based on the foregoing allegations and the reliefs sought by the plaintiff in his plaint dated 12th September, 2023, this Court is of the considered view that the wrongs complained against by the plaintiff as against the defendant, are not wrongs done to him personally but to Danbat Limited. The plaintiff's complaints revolve around mismanagement of Danbat Limited and of its assets decreasing its value. It is trite law that a company is a separate legal entity from its shareholders and has the authority to inter alia, to sue and be sued in its own name. That was the position held by the Court in the celebrated case of *Salomon v Salomon & Co Limited* [1897] ACC where it was held as follows -

“a limited company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued, and it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders”. (own emphasis)

19. In this case, the bank account complained of belongs to Danbat Limited, and the parcel of land that was transferred to Sathar Limited also previously belonged to Danbat Limited. Further, it is noteworthy that the plaint does not disclose any wrong committed by the defendants to the plaintiff in his personal capacity. To the contrary, the plaintiff complains of the defendants mismanaging the affairs and assets of Danbat Limited in their capacity as Directors and Shareholders of the said company.



20. Having considered the averments in plaint and in the supporting affidavit to the instant application, it is my finding that the issues complained of by the plaintiff can either be resolved in a Board meeting, or the plaintiff with leave of the Court can institute a derivative suit on behalf of Danbat Limited against the defendants as provided for under Sections 238 to 241 of the Companies Act, 2015. A derivative claim is defined under Section 238 of the Companies Act as follows -

- (1) In this Part, "derivative claim" means proceedings by a member of a company-
 - a. in respect of a cause of action vested in the company; and
 - b. seeking relief on behalf of the company.
2. A derivative claim may be brought only-
 - a. under this Part; or
 - b. in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
2. A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company."

21. A derivative action was well explained by Cumming – Bruce, Templeman & Brightman L.JJ, in the case of *Prudential Assurance Company Limited vs Newman Industries Limited and Others* [1982] 1 All E.R 364 (at 357) in the following terms-

“The classic definition of the rule in *Foss v Harbottle* is stated in the judgment of Jenkins LJ in *Edwards vs Halliwell* [1950] 2 All E.R 1064 at 1066-067 as follows.

- (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation,
- (2) where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter, because, if the majority confirms the transaction, cadit question; or, if the simple majority challenges the transaction, there is no valid reason why the company should not sue,
- (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority shareholders cannot confirm the transaction,
- (4) There is also no room for the operation of the rule if the transaction complained of could be validly sanctioned only by a special resolution or the like because a simple majority cannot confront a transaction which requires the concurrence of a greater majority,
- (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.” (emphasis added).



23. In the case of *Sultan Hashem Lalji & 2 Others v Ahmed Hasbam Lalji & 4 others* [2014] eKLR, it was held thus on derivative suits -

“It is the minority shareholders that are availed the protection by the exceptions since generally majority shareholders exercise power of the company and control its affairs”.
(emphasis added)

24. This suit was filed by the plaintiff in his capacity as a shareholder and director of Danbat Limited and also as a signatory to Danbat Limited’s account No. xxxx/xxxx held at NCBA Bank Kenya Limited. It is not disputed that the plaintiff did not first seek leave of the Court prior to institution of the suit. In the absence of leave of the Court allowing the plaintiff to institute the suit on behalf of Danbat Limited, this Court finds that the plaintiff does not have the requisite locus standi to institute the suit on behalf of Danbat Limited.

25. The upshot is that the defendant’s Notice of Preliminary Objection dated 18th September, 2023 is hereby upheld. Consequently, the plaintiff’s plaint and Notice of Motion application both dated 12th September, 2023 are hereby struck out. Costs are awarded to the defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF APRIL, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the plaintiff

Dr. Kamau Kuria (SC)

Ms B. Wokabi – Court Assistant.

