



**Gichana v Chairperson Board of Directors Tombe Tea Factory Limited & 3 others;  
Joshua Mosoti Onyancha & Associates (Outgoing Auditor); BP Ombuku & Associates  
(Incoming Auditor); Institute of Certified Public Accountants Of Kenya (Interested  
Party) (Civil Suit 001 of 2022) [2023] KEHC 22312 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22312 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL SUIT 001 OF 2022  
WA OKWANY, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**CALEB GICHANA ..... PLAINTIFF**

**AND**

**CHAIRPERSON BOARD OF DIRECTORS TOMBE TEA FACTORY  
LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE COMPANY SECRETARY TOMBE TEA FACTORY  
LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**UNIT MANAGER TOMBE TEA FACTORY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**TOMBE TEA FACTORY LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**JOSHUA MOSOTI ONYANCHA & ASSOCIATES ..... OUTGOING AUDITOR**

**AND**

**BP OMBUKU & ASSOCIATES ..... INCOMING AUDITOR**

**AND**

**INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF  
KENYA ..... INTERESTED PARTY**



## RULING

### Background

1. The Plaintiff/Respondent herein, who describes himself a tea farmer and a member/shareholder of Tombe Tea Factory Ltd filed the Plaint dated 3<sup>rd</sup> February 2022 seeking a raft of orders including a declaration that the firm of JM Onyancha and Associates was illegally in office after it had been ousted through a Resolution of the members at the Annual General Meeting held on 8<sup>th</sup> November 2021 where the firm of BP Ombuki and Associates was appointed as auditors.
2. Before the matter could be set down for hearing, the Plaintiff filed an Application dated 3<sup>rd</sup> February 2022 seeking several orders including orders for a temporary injunction to restrain the defendants from allowing or contracting anyone as auditors and from dealing with the firm of JM Onyancha and Associates. The Plaintiff also sought orders for disciplinary action to be taken against the firm of JM Onyancha and Associates by ICPAK and that the officials of the company be fined for contravening the Resolution of the Shareholders.
3. In a Ruling dated 7<sup>th</sup> July 2022, Ochieng J. (as he then was) dismissed the said Application on the grounds that the proceedings constituted a derivative suit and had not been sanctioned by leave of the Court.
4. When the matter came up for mention to confirm compliance with Order 11, Counsel for the Defendants informed the Court that they were yet to be served with an Application to continue with the suit as a derivative suit. This position formed the basis of the Preliminary Objection (PO) that is the subject of this ruling.

### Preliminary Objection

5. The Defendants filed the PO dated 20<sup>th</sup> February 2023 wherein they listed the following grounds: -
  1. The Suit as filed is incompetent. The Plaintiff as the alleged shareholder ought to have sought leave of the Court to file a derivative suit or continue with the suit as a derivative suit as required under the Companies Act.
  2. ICPAK have an internal dispute resolution mechanism provided under the Accountants Act. The issue touching on J.M. Onyancha and Associates and BP Ombuki and Associates ought to have been determined by the Disciplinary Committee first as provided under the Accountants Act. This Court therefore has no jurisdiction to determine the issues raised regarding the two auditors.
6. The PO was canvassed by way of written submissions. The Plaintiff/Respondent herein did not participate in the PO and did not file any response to it.

### The Applicants' Submissions

7. The Defendants submitted on two main issues, namely; whether the suit is competent as filed and whether the court has jurisdiction to entertain the suit.
8. It was submitted that the suit was incompetent as the Plaintiff did not attach any share certificate confirming that he was a shareholder or a farmer and did not attach the list of the farmers that he purported to represent. The Defendants argued that there was no proof that the farmers in this suit had



consented to the filing of the suit and that failure to obtain such consent made the suit incompetent ab initio. According to the Defendants, it was also not clear if the suit was meant to be a representative suit or a derivative suit.

9. The Defendants argued that the Plaintiff ought to have complied with Order 1, Rule 8 of the *Civil Procedure Rules* which requires notice to be issued to all those affected by the suit if he meant it to be a representative suit, he. It was also submitted that Section 780 of the *Companies Act* required the Plaintiff to prove that he was a member of the company or a shareholder, which he did not do.
10. It was the Defendant's case that even if the Plaintiff was a shareholder, he ought to have applied for leave of the court to proceed with the suit as a derivative suit. He cited the case of *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga vs. Eliud Timothy Mwamunga & Sagalla Ranchers Ltd* (2017) eKLR where the court set out the requirements for a derivative suit and *Tatu City Ltd & 3 Others vs. Stephen Jennings & 6 Others* (2015) eKLR where Ogola J held that the remedy in a derivative action was not available to non-shareholders in a company.
11. It was submitted that the Plaintiff did not demonstrate that he was seeking reliefs on behalf of the company or protecting the other members against unfair prejudice by the acts of the directors and neither did he demonstrate that he was a member of the firm of BP Ombuki & Associates so as to seek orders on their behalf. The Defendant maintained that the proper plaintiff in any proceedings in respect of a wrong done to the company was the company itself as stated by Jenkins L.J. in *Edwards vs. Halliwell* (1950) All ER 1064 and as reiterated by the Court of Appeal in *Amin Akberalis Manji & 2 Others vs. Altaf Abdulrasul Dadani & Another* (2015) eKLR. It was argued that the Plaintiff did not institute this suit within the exception of the rule in *Foss vs. Habottle*.
12. On jurisdiction, the Defendants submitted that the issues raised in the Plaint related to a dispute between the outgoing and incoming auditors and should have been raised before ICPAK for consideration by its Disciplinary Committee under Section 32 of the *Accountants Act* before being brought to the High Court, which could only sit on appeal in such matters. It was submitted that because the Plaintiff had not exhausted the Dispute Resolution Mechanism under the *Accountants Act*, the High Court lacked jurisdiction to entertain the suit.
13. The main issue for determination is whether the PO is merited. What constitutes a PO was discussed in the locus classicus case of *Mukisa Biscuits Manufacturing Ltd vs. West End Distributors* (1969) EA 696 where it was held: -

“.....a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

14. In the same case Sir Charles Newbold, P. stated: -

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.



15. From the pleadings filed before this Court, it is evident that the Respondent instituted this suit on his own behalf as a shareholder of Tombe Tea Factory Company Ltd and on behalf of other shareholders. It is averred that the Respondent should have made an Application seeking leave of the Court to commence or to continue with the suit as a derivative action.
16. A company is considered a separate entity from its members and is a legal person. Thus, if it is wronged or commits a wrong, it can seek its own remedy or be sued. In *Moir vs. Wallersteiner* (1975) 1 ALL ER 849 at p. 857. Lord Denning held: -
- “It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue.”
17. Thus, a shareholder can institute legal proceedings on behalf of a company through a derivative action. The legal framework for a derivative suit is premised on Sections 238 and 242 of the [Companies Act](#). Section 238 stipulates 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.
  3. 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.
  4. A derivative claim may be brought against the director or another person, or both.
  5. It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.
  6. For the purposes of this Part—
    - a. "director" includes a former director;
    - b. a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.
18. It is trite that before a member/shareholder can bring an action under a derivative suit, such a party must first seek the leave of the court or may in other instances, seek leave to continue with the suit as a derivative action where he has already instituted proceedings on behalf of the company. The Court



of Appeal provided guidance on this issue in the case of *Amin Akberali Manji & 2 Others vs. Altaf Abdulrasul Dadani & Another* [2015] eKLR as follows:-

“Leave of the court shall be obtained before filing a derivative suit but may also be obtained to continue with the suit once filed. On this the trial court was right in adopting the exposition of the procedure in the treatise “Minority Shareholders: Law, Practice and Procedure” by Joffe that “there is no approved pre-action protocol in relation to derivative action” and that after the claim form has been issued, the claimant is required to make an application –which must be supported with written evidence- for permission to continue with the claim.” It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such an action, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in Foss vs. Harbottle.”

19. Similarly, in *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another* [2017] eKLR Onguto J. explained the principles in a derivative suit thus:-

“37. Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: See *Wallersteiner v Moir* (No.2) [1975] 1 All ER 849.

38. Until 2015, the common law guided derivative actions in Kenya. Ordinarily under common law, one had to fall under the exceptions to the rule in *Foss v Harbottle* [1843] 2 Hare 461 that “a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it”: See also *Hawes v Oakland* 104 U.S 450 [1881]. The exceptions to the rule in *Foss v Harbottle* were mainly where there was fraud on a minority caused by majority shareholder(s). The action to be commenced had also to be in the best interest of the company and without any ulterior motive: See *Nurcombe v Nurcombe* [1985] 1 All ER 65.

39. The rule in *Foss v Harbottle* along with its exceptions held sway locally as well: See *Rai & Others v Rai & Others* [2002] 2 EA 537. A party seeking to ‘by-pass’ the company had, in limine, to show that he fell within the exceptions to the rule: See *Murii v Murii & Another* [1999] 1 EA 212.”

20. In the present case, I note that the Respondent/Plaintiff did not obtain leave of the Court before instituting this claim on behalf of the company. It is noteworthy that the Respondent/Plaintiff did not comply with the requirements under section 238 of the *Companies Act* despite the Ruling of 7<sup>th</sup> July 2022 requiring him to seek leave of the Court to proceed with the suit at hand. Furthermore, the Plaintiff did not demonstrate to this Court that he sought and obtained the consent of the other shareholders to institute the present suit.

21. I have also considered the Applicants’ argument on the issues raised concerning the accountants actions, which, to my mind, fall under the ambit of professional misconduct as outlined in Section 30 of the *Accountants Act* No. 15 of 2008. The same legislation provides for a disciplinary mechanism that



must first be explored under Sections 31-32 thereof before any matter is referred to the High Court on appeal under Section 34 of the said *Act*.

22. From the above foregoing, it is clear that the High Court lacks original jurisdiction to determine any matters relating to professional misconduct because there is already in place a body mandated with that authority under the *Accountants' Act*. It is trite that jurisdiction is everything. In *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd.* (1989) it was held: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

23. In the premises, I find that this Court lacks jurisdiction to hear and determine matters relating to the professional misconduct of the incoming and outgoing accountants of Tombe Tea Factory Ltd.
24. I further find that since the issues raised in this Application are purely on points of law, I will steer clear from delving into any other substantive issues in these proceedings. The proceedings before me are improper and it is my finding that the Preliminary Objection has merit. The effect of upholding a Preliminary Objection is to summarily dispose of an entire case. Such an eventuality seems to be draconian and this Court must exercise caution and only reach that conclusion as a last resort.
25. I have perused the Record and noted that the Plaintiff/Respondent was last seen in Court on 22<sup>nd</sup> March 2022 and has never made any further steps to pursue the case even after the Ruling of 7<sup>th</sup> July 2022. It is probable that he has lost interest in pursuing the cause.
26. In the premises, I hereby allow the Preliminary Objection dated 20<sup>th</sup> February. Civil Suit No. 001 of 2022 is hereby struck out with costs to the Defendant.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**W. A. OKWANY**

**JUDGE**

