



**Souba v Mutua & 3 others (Civil Suit E018 of 2023)
[2024] KEHC 16897 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 16897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E018 OF 2023
F WANGARI, J
OCTOBER 24, 2024**

BETWEEN

MINA SOUBA PLAINTIFF

AND

EDITH KANANU MUTUA 1ST DEFENDANT

REMSAFE TRAINING AND DRIVING SCHOOL LIMITED ... 2ND DEFENDANT

JONAH KOMORA 3RD DEFENDANT

CAROLINE NDILA MUSEMBI 4TH DEFENDANT

RULING

1. The ruling relates to a Notice of Preliminary Objection by the Defendants dated 21/07/2022 and the Notice of Motion dated 07/03/2022. The Preliminary Objection is premised on the ground that the suit be dismissed with costs as the Plaintiff had no locus standi in filing of the suit. The Defendants stated that the nature of the suit is a Derivative Action, and the 1st Plaintiff not being a shareholder of the 2nd Plaintiff Company, he had no locus to prosecute the case.
2. On the other hand, the Plaintiffs in the application dated 07/03/2022 had sought for a total of 15 prayers based on 29 grounds. In summary, the Plaintiffs sought for prohibitory and injunction orders against the Defendants from dealing in anyway with the 2nd Plaintiff Company including the bank accounts. The Plaintiffs also sought inter alia for the surrender of all the books, financial statements and all documents in possession of the Defendants involving the 2nd Plaintiff company.
3. In reply to the Preliminary Objection via the Replying Affidavit dated 14/10/2024, the Plaintiffs averred that the suit was in respect to the 1st Plaintiff seeking to recover her 40% share of the 2nd Plaintiff company from the 1st Defendant, thus the suit was not derivative in nature. Further, the Plaintiffs



averred that the issues raised in the Preliminary Objection could only be ascertained upon production of evidence and cannot be termed as pure points of law.

4. The court directed that the application and the P.O be disposed of simultaneously and by way of written submissions. From the records, only the Plaintiff complied by filing their submissions dated 14/10/2022.

Analysis and Determination

5. I have duly considered the Preliminary Objection, submissions together with the authorities relied as well as the law and in my view, the following issues are for determination;

- a. Whether the notice of preliminary objection is merited;
- b. Who bears the costs?

6. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“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 the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

7. For a Preliminary Objection to succeed the following tests ought to be satisfied; Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.

8. The issue of locus standi in filing of a derivative claim is an issue of law. Section 238 of the [*Companies Act*](#) provides 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.
13. Further, Section 239 (1) of the Act provides as follows;
- “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.”
14. From the pleadings by the Applicant, it has been stated by the Applicants/ Defendants that the 1st Plaintiff has filed a derivative action suit without leave of the court, hence the suit ought to be dismissed. On the other hand, the Plaintiffs state that the 1st Plaintiff is seeking to restore her shares in the 2nd Plaintiffs company which were being held by the 1st Defendant.
15. In consideration of Section 238 and 239 (1) of the Companies Act. I do agree with the response and the submissions by the Plaintiffs that the issues raised on whether or not the Plaintiff had locus standi in filing this application and the suit, can only then can it be determined after the hearing in the matter. The Preliminary Objection is therefore lacks merit and is hereby dismissed.
16. On the Notice of Motion, some of the orders being sought for if granted, would be short of having the suit determined. Further, some issues raised can be resolved at the Case Management Conference, before fixing this matter for hearing.
17. I note that interim orders had been granted by this court. It is hereby directed that status quo obtained as of today be maintained pending hearing and determination of this suit, or review of these orders if need arises.
18. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The Notice of Preliminary Objection dated 21/07/2022 is hereby dismissed.
- b. Orders being sought for in the Application dated 07/03/2022 shall be determined after hearing of the suit, subject to what may be resolved at the Case Management Stage.
- c. Costs to follow the outcome of the suit.
- Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 24TH DAY OF OCTOBER, 2024

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F. WANGARI

JUDGE

In the presence of;

Mr. Musana Advocate for the Plaintiffs.

N/A by the Defendants

Mr. Brian, Court Assistant

