



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E308 OF 2020

BRENDA NYAMBURA KIRAGUPLAINTIFF

VERSUS

I & M BANK LIMITED 1ST DEFENDANT

CO-OPERATIVE BANK LIMITED 2ND DEFENDANT

CONSOLIDATED BANK LIMITED 3RD DEFENDANT

MARGARET WANGARI NGINYO 4TH DEFENDANT

SILAS MACHARIA KARIUKI 5TH DEFENDANT

JANE WAMBUI KIRAGU (*née Kariuki*) 6TH DEFENDANT

SCHOLASTICA NJERI KARIUKI 7TH DEFENDANT

SARAH MUKUHI KARIUKI 8TH DEFENDANT

ROSE WANJIRU KARIUKI 9TH DEFENDANT

JAMES ANTHONY KARIUKI 10TH DEFENDANT

RULING

1. Before me are several applications. There is a Motion on Notice dated 21/8/2020 (“the injunction application”), two Preliminary Objections dated 15/9/2020 and 19/10/2020 to that Motion, a Motion on Notice dated 14/9/2020 and another Motion on Notice dated 23/9/2020, respectively (“the striking out applications”).

2. On 11/11/2020, the Court gave directions that all the applications together with the Preliminary Objections be heard together. The Court also directed that the parties do file their respective responses to the applications as well as submissions in support of their respective positions.

3. The injunction application was by the plaintiff and was brought under *sections 1A, 1B and 3 of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, sections 255-258, 275, 278, 280-287 and 297 of the Companies Act (2015) and Article 159 of the Constitution of Kenya*.

4. The application sought various injunctive orders against the defendants in relation to **Five Hills Company Ltd, Nginyo Investments Limited, Pema Holdings Ltd, Mtwapa Holdings Ltd, Swiss Lenana Mount Hotel Ltd and Lenana Mount Hotel Ltd** (“the Companies”).

5. The plaintiff averred that she is one of the beneficiaries of one **Lawrence Nginyo Kariuki** (“the deceased”) who was the majority shareholder of the companies. That after his demise on 24/2/2020, the 4th to 6th defendants engaged in financial carnage and maladministration of the companies to the prejudice of the estate of the deceased upon whom no personal representative had been appointed.

That **Succession Cause No. 336 of 2020** was still pending before the Family Division of this Court.

6. The application was opposed by the defendants through the affidavits of **Jane Wambui Kariuki – Kiragu, Silas Macharia Kariuki, Rebecca Michubu, Christopher Ndolo and James Anthony Kariuki**. The application was also objected to through the two preliminary objections.

7. It was contended that the banks had acted in accordance with the mandate given by the companies and had not acted wrongly. That the banks could not inquire into the internal arrangement and/or dealings of the companies. That the plaintiff had no *locus standi* to bring the suit as she was neither a shareholder nor a director of the companies. In any event, the orders sought could not be granted as the companies were not parties to the suit.

8. As regards the applications to strike out the suit, the Motions were brought under **sections 1A, 1B and 3A of the Civil Procedure Rules and Order 2 Rules 15(1) (a), (b), (c) and (d) of the Civil Procedure Act**. They sought that the plaintiff's suit against the 1st, 4th and 5th defendant be struck out for disclosing no reasonable cause of action against the 1st, 4th and 5th defendant and for being an abuse of the process of the court.

9. It was also contended that the plaintiff was neither a director nor shareholder of the companies, she was neither an administrator nor representative of the Estate of the deceased. That in the premises, she could not bring the present suit which was in the nature of a derivative suit.

10. All the parties filed their respective submissions on all the applications and the preliminary objections. I have carefully considered the said submissions. I propose to start with the applications to strike out the suit.

11. It was the submission of the 1st defendant that the plaintiff was neither a shareholder nor director of any of the companies. She could not therefore bring a derivative suit. The cases of **Tatu City Limited & 3 Others v. Stephen Jennings & 6 Others [2015] Eklr**, **Amin Akberali Manji & 2 Others v. Altaf Abdulrasul Dadani & Another [2015] Eklr** among others were relied on in support of those submissions.

12. For the 3rd defendant, it was submitted that this Court, as a Commercial and Admiralty Court, has no jurisdiction to determine the plaintiff's suit. This is so because, the plaintiff's claim is based on her being a beneficiary of the estate of the Late **Lawrence Nginyo Kariuki**. That the plaintiff did not have the authority to bring the present suit.

13. That the suit against the 3rd defendant was unsustainable. The cases of **Ghelani Metals Ltd & 3 Others v. Elesh Ghelani Natwarlal & Another [2017] Eklr** and **Kenya Trypanomiasis Research Institute v. Anthony Kabimba Gusinjilu (suing for and on behalf of 112 plaintiffs)** among others were cited in support of those submissions.

14. For the 4th and 5th defendant, it was submitted that the reliefs sought in the plaint related to the impeachment of resolutions passed by the companies. That the plaintiff had not disclosed any legally recognized personal right that had been infringed. That she was not an administrator of the estate of the deceased. That what the plaintiff should have done was to bring a derivative suit, which the present one was not.

15. It was further submitted that, the suit would lead to a multiplicity of suits thereby becoming an abuse of the court process. The cases of **Peter Kimani Nene v. Nation Newspapers Ltd [2010] Eklr** and **Parag Bhabwanjighai Savani v. Jitu Tribhovanshai Savani & 2 Others [2017] Eklr** were cited in support of those submissions.

16. For the plaintiff, it was submitted that the Court has discretion when dealing with an application for striking out a pleading. That the plaint discloses a cause of action against all the defendants. That the power to strike out a pleading is one to be exercised sparingly and that the plaint was not so hopeless to warrant to be struck out. The cases of **Crescent Construction Co. Ltd v. Delphis Bank Ltd [2007] Eklr**, **Michelina Forino & Another v. Alfonso Forin & 4 Others [2020] Eklr** and **D. T. Dobie v. Muchina CA No. 37 of 1978** were relied on in support of those submissions.

17. These are applications to strike out the suit for disclosing no reasonable cause of action and for being an abuse of the court process. The principles applicable are well known. The power to strike out a suit or defence is a summary power which should be sparingly exercised. It should only be exercised in the clearest of cases, where a suit or defence is so hopeless that it cannot be saved by even an amendment. **D. T. Dobie v. Muchina CA No. 37 of 1978**.

18. In **Ghelani Metals Limited & 3 Others v. Elesh Ghelani Natwarlal & Another [2017] Eklr**, the court held: -

‘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 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’.

19. In **Tatu City Ltd & 3 Others v. Stephen Jennings & 6 Others [2015] Eklr**, it was held: -

‘The second issue is whether the suit by the 3rd Plaintiff should be struck out for being filed as a derivative action yet the 3rd plaintiff is not a shareholder. It is the law that a derivative action is a remedy available to shareholders who are able to bring

themselves within the exceptions set out in the case of Foss v. Harbottle, being a minority shareholder, or part of that minority shareholding who would not marshal strength to prevail upon the board of the company to authorise the filing of a suit on their behalf. This action is not open to non-shareholder in a company”.

20. And what does the substantive law of the land provide? **Section 238 of the Companies Act, 2015** provides: -

(1) In this Part, a 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; and

(b) in accordance with an order of the Court in proceedings for the protection of members against unfair prejudice brought under this act.

...

(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”.

21. From the foregoing, it is clear that, where wrongs are being committed to a company or its members and for reasons that the company or the members are unable to mount an action against the perpetrators of the wrong, the injured member is entitled to bring an action known as a derivative action on behalf of the company. The inability of the company to sue may be as a result of the aggrieved members not being able to marshal the adequate number required for a resolution allowing the company to sue.

22. It is therefore clear that the dictate of **section 238 of the Companies Act** is that a derivative action is only to be commenced in respect of a cause of action arising from default, omission, act, breach of duty or trust by a director of a company. It is also mandatory that the claimant should be a member of the company.

23. In the present case, the plaintiff pleaded that she is a daughter of the late **Lawrence Nginyo Kariuki**, the majority shareholder of the companies. That as such, she was a beneficiary of the estate of the deceased. That the defendants had acted in a reprehensible manner that is highly prejudicial to the companies. In this regard, she proceeded to seek declarations and reliefs on behalf of the companies.

24. It is clear that the plaintiff does not claim to be a member of any of the companies. She would in the circumstances have no *locus standi* to bring an action for and on behalf of the companies. The principle set out in the centuries old case of **Salomon v Salomon Company Limited [1895-99] ALL ER 33**, is that a company is a juristic person. The proper plaintiff in any proceeding in respect of wrongs committed to a company, is the company itself.

25. The Plaintiff submitted that by virtue of **section 284 of the Companies Act**, she is a member of **Pema Holdings Limited and Nginyo Investments Ltd** and therefore entitled to Notice of any Ordinary and Special General Meeting.

26. The answer is simple, that section does not make the plaintiff a member of the companies cited. It only gives her a right to receive a notice for such a meeting. It does not give her a right to bring a suit to challenge that breach. The right to bring an action is set out in **section 238** aforesaid.

27. In any event, the pertinent wording of the section is, “..., **if the company has been notified of their entitlement**”. This presupposes a scenario where a succession has been lodged and the distribution of the estate shows that the beneficiary will be entitled to the shares or confirmation has been undertaken.

28. In the present case, while a Succession Cause in respect of the estate of the deceased is said to be pending, no personal representative has been appointed. Neither has distribution been proposed or undertaken.

29. A cause of action is a right that inures to a person. The plaintiff has pleaded that the wrongs complained of, as grave as they look or may be, are as against the companies. The reliefs sought are in favour of the companies. Accordingly, this was an attempt to bring the suit as a derivative action. The plaintiff could not bring such a suit when she is clearly not a member of any of the companies.

30. There was submission that the prayers sought were in respect of entities not yet parties to the suit. That in my view is a matter that could be cured by an application for joinder and amendment. However, to the effect that the plaintiff is not a member of any of the companies, no amount of amendment or joinder can cure that anomaly.

31. Accordingly, I hold that the plaintiff's suit does not disclose any cause of action against the defendants and is for striking out. With that conclusion, it will serve no purpose to consider the Motion dated 21/8/2020 or the preliminary objections.

32. Accordingly, the two applications are meritorious and I allow them.

33. Regarding costs, although the Defendants were successful, it was on a technicality. I take judicial notice that this is a family dispute that has spilled over fro, the family division. It would seem that the family of the deceased is engaged in a vicious battle for the soul of the deceased's wealth.

34. The allegations raised by the Plaintiff are very serious. It is only that she was not well advised. Had she properly pursued the remedies and routes given under the Law of Succession Act, the fate that has befallen her suit would have not been a reality. It is clear from what is on record that the Defendants cannot be said to be free from fault. It is only that the Plaintiff, who is genuinely aggrieved, as any erosion of the companies lessens her share in the estate of the deceased, was misadvised.

35. In the circumstances and notwithstanding the provisions of Section 27 of the Civil Procedure Act, I will order that each party do bear their own costs of the applications and suit.

It is so ordered.

DATED and DELIVERED at Nairobi this 11th day of March, 2021.

A. MABEYA, FCI Arb

JUDGE