



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO.E023 OF 2021(OS)

DAMARIS KAGWIRIA GITUMA.....PLAINTIFF/APPLICANT

-AND-

ERASTUS GITUMA..... 1ST DEFENDANT/RESPONDENT

SCHOLARS PLAZA CO. LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. A Notice of Preliminary Objection dated 14/09/2021 was taken out by the respondents. The same is grounded on the allegations that the application is not only res judicata and sub judice, as it was heard and determined by the ruling delivered on 12/8/2021, but it is also frivolous, vexatious, an abuse of the court process, meritless hence it should be dismissed. The applicant is accused of lacking a cause of action against the 1st respondent, and locus standi to institute the suit, as it offends the provisions of part XI of the Companies Act.

2. The court on 16/09/2021 heard lengthy oral submissions from Mr. Thangicia for the applicant and Mr. Ayieko for the respondents. Mr. Ayieko took the very firm position that the prayers sought in HCC E018 of 2021, were the very same ones sought herein. He urged the court to bring this litigation to finality, as the issues raised herein had been conclusively heard and determined. He accused the applicant of abusing the court process and cited the case of Muriithi v Arap Moi & anor (2017) eKLR in which the origin and application of the doctrine was explained.

3. On the other limb of the objection, counsel submitted that the plaintiff lacked the requisite capacity to bring the suit on behalf of the company, in terms of the principles established in the case of Foss v Harbottle [1843] 2 Hare 461 as no leave had been sought and obtained as mandatory under section 238 of the Companies Act, 2015, therefore, it was contended, the suit did not lie. He concluded that since there was no demonstration of a danger on the company's assets or an illegality going on against the company and its assets, the suit ought to be struck out. He relied on Manji v Dadani (2015) eKLR and Ghelani Metals v Elesh Ghelani (2016)eKLR in support of those submissions.

4. In rejoinder, Mr. Thangacia maintained and submitted that the orders issued by the court did not relate to the properties in this suit. He was firm that the applicant had the requisite standing to bring the suit. He drew the court's attention to the case of Mwadilo v Mwamunga (2017) eKLR, where the court distinguished between sections 238 and 239 of the Companies Act. He invited the court to do substantial justice in terms of the provisions of Article 50 & 159 of the Constitution. In urging the court to allow the suit to proceed, he referred to the case of Oraro v Mbaja (2005) eKLR to show what constitutes a Preliminary Objection. He concluded that the requirement for leave was not mandatory and could be sought post institution of the suit.

Analysis and Determination

5. The doctrine of *res judicata* has been coded under Section 7 of the Civil Procedure Act in mandatory terms and to the effect that 'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

6. The basis for this doctrine being embedded in the Civil Procedure Act is to ensure public confidence in the finality of decisions made by the courts and to afford to litigants a breather from being faced with a vicious circle of disputes which have been determined by a competent court. The doctrine further bolsters the safeguards against prospects of two different courts of concurrent jurisdiction making divergent and contradictory determinations over the same matter.

7. For the doctrine to be applicable, there are three conditions to be satisfied in the words of the court in Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others (1996) eKLR :-

i) There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.

ii) The issue in dispute was directly or substantially in issue in the former suit.

iii) That a court with competent jurisdiction had heard the matter and finally determined it.

8. The record reveals that a decision was rendered by the court, on 12/8/2021, in an application, filed in **H C Civil Case No. E018 of 2021** by the plaintiff/applicant against the 1st defendant /respondent. The obvious discernable distinctions between the two causes is that the joinder of the 2nd defendant/respondent in the current suit and the fact that the earlier suit is a dispute between the two natural persons over what constitutes their matrimonial property while here the dispute is over the control of the 2nd defendant as a juristic person in which the two natural persons hold shares. In my appreciation it remains trite that the interests of a shareholder in a company must be limited to the shares held and never extend to the assets of the company. Accordingly, property of the company belongs to the company alone and can never be deemed to form part of the personal assets of the individual shareholders. By parity of reasoning therefore, property owned and registered in the name of the company cannot be deemed matrimonial even if the couple be the only shareholders in the corporate entity.

9. It therefore follows that the dispute regarding control of the second defendant between the plaintiff and the 1st defendant, cannot be determined in the Originating Summons since the company must remain separate and distinct from its promoters and equity holders. I therefore find that the two causes of action are distinctively different from each other and therefore a determination on the former suit affects not this suit so as to invite the application of the doctrine of res judicata. The objection was thus improperly founded, it lacks merit and cannot succeed but is a good candidate for dismissal.

10. On the other limb of the objection asserting that the plaintiff has no locus to bring the suit and that the suit is frivolous, vexatious and abusive of the court process, I take the view that to prove such demand evidence and cannot be ascertained at this level when there is no denial that the plaintiff is a shareholder in the company. It is a matter that is most unsuited to be handled by way of a preliminary objection because there are facts that demand ascertainment.

11. The instant notice of preliminary objection reminds the court of the words of **Sir Charles Newbold, P** in **Mukisa Biscuits Co vs West End Distributors Limited (1969) EA 696 at 701** to the effect that *'the improper raising of ordinary points as preliminary objections does nothing but to confuse issues, waste time and escalate costs and therefore such improper practice should be stopped.'*

12. Having so found, and upon reading of sections 239 to 242 of the Companies Act, I take the learning that being a derivative action, permission to continue the action is imperative and not optional. The leave must be sought prior or after the suit is instituted. For that reason, the plaintiff and counsel have their liberties to move as appropriate. I thus disagree with the defendant that leave must be sought and obtained beforehand just as I disagree with the plaintiff that the leave is unnecessary or just optional.

13. In conclusion I find the objection not to lie and order that it be dismissed with costs

DATED SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 14TH DAY OF OCTOBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Thangicia for the plaintiff

Mr. Ayieko for the defendant

PATRICK J.O OTIENO

JUDGE