



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 1 OF 2020

ERIC ANGWENYI ORANGI.....1ST PLAINTIFF/ APPLICANT

CJ ONE LIMITED.....2ND PLAINTIFF/ APPLICANT

VERSUS

CLIVE NYAANGA OGWORA.....1ST DEFENDANT/RESPONDENT

CJ ONE BAR & RESTAURANT LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. Contemporaneously with his plaint, the plaintiff/applicant, Eric, filed an application dated 25th March 2020 under Certificate of Urgency seeking the following orders against the respondents;

a. spent

b. That this Honorable court be pleased in the first instance to allow, the 1st plaintiff/applicant Eric Angwenyi Orangi a director of the 2nd plaintiff/applicant company to institute and to continue derivative action for and on behalf of the 2nd plaintiff (herein after "the Company") against the Defendant/Respondent, a second director of the Company;

c. That this Honorable Court be pleased in the first instance to issue an interim order of injunction stopping all the operations of the company in particular the bar and restaurant business being operated by the defendant/respondent at Acacia Plaza, 1st floor within Kisii town pending the taking of proper accounts and/or audit;

d. That the honorable court do issue a disqualification order against the defendant from being a director of the company or any other company for such period as will be specified;

e. That upon hearing *inter partes*, prayer (c) be granted pending the hearing and determination of this suit;

f. That this Honorable Court be pleased to issue any other order(s) as will be necessary to ensure that the ends of justice are met;

g. Costs of this application be provided for.

2. The application was supported by grounds listed at the foot of the application and the affidavit of the 1st applicant which was sworn on 25th March 2020. The 1st applicant, Eric, averred that he and the 1st respondent, Clive, incorporated CJ One Limited on 27th May 2019 to run a bar and restaurant business at Acacia Plaza at the 1st floor within Kisii Town. It was agreed that Clive would run the day to day operations of the company and payments would be made by way of pay bill deposits in the company's collection account no. 0252376518001.

3. Eric averred that in the course of their engagement, Clive withdrew colossal sums of money without consulting him. He accused the Clive of forging his signature to withdraw money from the company's account and further deposed that Clive incorporated the 2nd respondent, CJ One Bar & Restaurant Limited on 21st January 2020 and was conducting business from the 2nd applicant's premises and channeling the proceeds to his newly incorporated company. He urged that the orders sought should be granted to halt his co-director's fraudulent acts against the 2nd applicant.

4. Eric filed a subsequent application dated 16th April 2020 on the grounds that Clive had, instead of filing a response to the earlier application as directed by the court, filed Miscellaneous Application No. 26 of 2020 before the lower court at Kisii with the aim of withdrawing a sum of Kshs. 1,400,000/= from the 2nd applicant's bank account. He sought orders *inter alia* for the calling of the records in Miscellaneous Application No. 26 of 2020 and an order vacating the orders of the lower court allowing Clive to withdraw a sum of Kshs. 1,400,000/= from the 2nd applicant's account.

5. This court allowed the application dated 16th April 2020 in the following terms;

- a. There be a stay of execution of the orders of the magistrate's court (E.O. Obina, PM) dated 9th April, 2020;
- b. There be a general stay of any further proceedings in the matter seized by the magistrate court;
- c. The record of the magistrate court is hereby called to the High Court for further action at the *inter partes* stage;
- d. The respondents be served;
- e. Mention date for directions shall be given by notice.

6. In opposition to the applications dated 25th March 2020 and 16th April 2020, Clive swore an affidavit on 24th April, 2020. He acknowledged that he and Eric had agreed to the joint venture and had formalized their business relationship by signing a partnership deed on 3rd May 2019. Being doubtful of Eric's trustworthiness, Clive incorporated the company by the name of CJ One Limited in which he holds 24000 ordinary shares and Eric holds 16,000 ordinary shares.

7. Clive averred that later on Eric intimated to him that he could not meet his obligations of running the company as they had agreed and that he wished to relinquish his shares in the company on condition that he be refunded his paid up share capital of Kshs. 1,600,000/= together with "good will" of Kshs. 1,600,000/=. Clive claims that he raised the money and paid him off but despite receiving the entire amount, Eric became uncooperative and this triggered him to incorporate the 2nd respondent company. Clive states that Eric has been out to tarnish his name. He is emphatic that he has never forged Eric's signature and claims that the allegations are only calculated to sabotage the business.

8. He avers that being the majority shareholder, he authorized the 2nd applicant to file the miscellaneous application before the magistrate's court. He also challenges this court's decision to call for the lower court proceedings in Kisii Civil Misc. App. No. 26 of 2020 on the grounds that the matter before the lower court and the instant suit are unrelated. It is also his averment that Eric has not met the threshold to be granted leave to file a derivative suit and further that he has not met the conditions for granting of the injunctive orders sought.

9. In his response sworn on 2nd June 2020, Eric dismissed the claim that he had forfeited his shares in the 2nd applicant company or that he had been refunded his paid up capital and good will as claimed by Clive. He also deposed that the documents annexed to Clive's affidavit to prove that he paid him the refund are forgeries. He pointed out that Clive had not responded to the allegation that he had made numerous fraudulent withdrawals from the company's account and dismissed the replying affidavit as a sham.

10. In attempt to put an end to the assertions of forgery leveled against him, Clive, allegedly forwarded the impugned documents to the Directorate of Criminal Investigations in Kisii. He stated that after investigations, he was absolved of the claims. To support this averment, he annexed the report of one C.I. Susan Wambugu to his further affidavit sworn on 11th June 2020. He averred that after he had refunded Eric his paid up share capital and good will, Eric resorted to avoiding him instead of officiating his resignation at the companies' registry and the bank hence, he was still a signatory of the 2nd applicant's account.

11. Eric responded to the foregoing affidavit of Clive vide an affidavit sworn on 17th June 2020. He stated that because the report by the forensic document examiner was not accompanied by a covering letter, he got suspicious and instructed his advocates to confirm the authenticity of the report with the Directorate of Criminal Investigations.

12. On 16th June 2020, Eric's advocates received a letter from the Director of Forensics, DCI, Mr. John Muinde, denying the existence of the report. The Director advised them to contact the County Criminal Investigations Officer which they did and the County Criminal Investigations Officer, Kisii County wrote an email on 17th June 2020 affirming that they were not aware of the investigations or the document examiner's report annexed to Clive's affidavit. The officer, Geoffrey Kathurima also indicated that interim investigations showed that the impugned documents had been forged.

13. Upon the request of the parties, Mr. John Muinde, Head of Forensics DCI Nairobi, Geoffrey Kathurima, County Criminal Investigations Officer, Kisii and CPL Susan Ndung'u of DCI Headquarters were summoned to court for examination on their various reports. The court also allowed the respondent's application to issue summons to Chief Inspector Washington Mwiti of DCI Kisii.

14. C.I. Washington Mwiti testified that when Eric made the complaint to the C.C.I.O Kisii, he was tasked with conducting the investigations. He recorded Eric's complaint, took his specimen and known signatures and also obtained orders addressed to the Manager SBM Bank Kisii Branch for certified copies of the alleged forged documents and cheques. C.I. Mwiti also summoned Clive and took his statement and his specimen and known signatures. He delivered the documents to the Forensic Examiners Office and personally picked the examination report on 13th May 2020. He stated that the author of the report, C.I. Susan Wambugu, found that there were no forgeries and he was authorized to arrest Eric for making false accusations,

15. C.I. Susan Wambugu stated that she was stationed at the DCI head quarters, Forensic Document Examination Section and her

responsibilities included giving expert opinion on disputed documents. Regarding the matter at hand, C.I. Wambubu testified that from her analysis, the impugned documents were not forged. She insisted that the report Reference No. 290 of 2020 was genuine. She stated that if a report was subjected to review, the maker of the document had to be reached for comment which had not happened in this case.

16. Senior Superintendent and Document Examiner, John Muinde, testified that he received the documents in question and the specimen and known signatures of Eric and Clive together with an exhibit memo from the DCI, Kitutu Central. He stated that when he checked their records, he found that there was a similar case but the forensic analysis of his junior expert, CI Susan Wambugu was wrong. He told the court that when he examined the documents, he found that Eric's signatures had been forged.

17. The parties then canvassed the application by way of written submissions.

18. Eric's learned counsel submits that the orders sought in the application are merited as there is sufficient proof that Clive has acted in breach of trust against the 2nd applicant. He has highlighted numerous instances when Clive withdrew money from the 2nd applicant's account and also accuses him of frequently forging Eric's signature. Further that he went ahead to incorporate the 2nd respondent with a strikingly similar name to the 2nd applicant with the aim of hoodwinking the client base into thinking they were dealing with the 2nd applicant.

19. Counsel urges the court to expunge from the record, the report of C.I. Susan Wambugu for the reason that the report was wrongfully acquired during the pendency of investigations. He submits that illegally procured information accessed without following the requisite procedure renders it inadmissible. That the court should uphold the report by SSP John Muinde which reviewed C.I. Wambugu's report and established that Eric's signature had been forged.

20. Referring to the cases of *Ghelani Metals Ltd & 3 Ors vs Elesh Ghelani Natharwal & Another [2017] eKLR*, *James Peter Mbiyu & Anor v Waveru Kuria and Mohamed Muyonga Wekesa v Nicholas Rarasa Simiyu* counsel submits that the 1st applicant has met all the conditions necessary to be granted leave to conduct a derivative action. In the alternative, he beseeches this court to order that Clive be disqualified from being a director of the company as provided under **section 214 (4)** of the **Companies Act**.

21. For his part, counsel for the respondents argues that the plaintiff does not meet the test for one to be allowed to institute a derivative suit. He states that the particulars of fraud have not been particularized as provided under **Order 2 Rule 4 (1)** of the **Civil Procedure Rules**, which states that;

4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

22. He contends that the allegations of forgery have not been proved. According to counsel, the applicant's act of raising the complaint of forgery after he had been refunded his paid up shares shows that he is not acting in the best interest of the company. He states that the Eric never raised the issue with the board of directors and simply left the business to decline.

23. As to the order of injunction, counsel submits that the 2nd applicant is no longer in business and the 2nd respondent is the one operating business at Acacia Plaza. He contends that the registration of the 2nd applicant was done procedurally and the proper way to challenge its registration is to lodge a complaint with the Registrar of Companies as provided under **Section 58 (1) (a)** of the **Companies Act**. It is also his argument that the conditions necessary for one to be granted injunctive orders have not been met and the orders seeking to disqualify Clive from directorship can only be made once the parties have been heard.

24. Counsel also opposes the order for taking of accounts which he says should be brought by way of Chamber Summons as opposed to a Notice of Motion according to **Order 20 Rule 1** of the **Civil Procedure Rules**.

25. He also contests the claim that the report of CI Wambugu was obtained illegally. He states that the report was made on the applicant's request and it was only fair that the respondent be called and given the report relating to him. The review by SSP John Muinde on the other hand was done without notifying the respondent. It is argued that SSP John Muinde was not clear on who prompted the review which only means that he was driven by ulterior motives to review his junior's report .

ISSUES

26. The issues arising for determination from the submissions and the parties' depositions are;

- a. Whether the leave should be granted to the 1st applicant to continue derivative action on behalf of the 2nd plaintiff against the respondents;
- b. Whether an interim order of injunction stopping all the operations of the 2nd applicant should issue pending the taking of proper accounts and/or audit;
- c. Whether a disqualification order should issue against the 2nd respondent from being a director of the company or any other company for such period as will be specified;
- d. Who should bear costs of the application

ANALYSIS & DETERMINATION

27. Learned counsels for the parties agree that prior to the enactment of the Companies Act, the law governing derivative actions were exceptions to the rule in the case of **Foss v Harbottle [1843]2Hare 461** which stated that in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. The law now governing derivative actions is codified in **Part XI** of the **Companies Act**. The relevant provisions in the Act stipulate;

238. (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.

239. (1) 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.

(2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court-

(a) shall dismiss the application; and

(b) may make any consequential order it considers appropriate.

(3) If the application is not dismissed under subsection (2), the Court-

(a) may give directions as to the evidence to be provided by the company; and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(4) On hearing the application, the Court may-

(a) give permission to continue the claim on such terms as it considers appropriate;

(b) refuse permission and dismiss the claim; or

(c) adjourn the proceedings on the application and give such directions as it considers appropriate.

241. (1) If a member of a company applies for permission under section 239 or 240, the Court shall refuse permission if satisfied-

(a) that a person acting in accordance with section 144 would not seek to continue the claim;

(b) if the cause of action arises from an act or omission that is yet to occur—that the act or omission has been authorised by the company; or

(c) if the cause of action arises from an act or omission that has already occurred—that the act or omission —

(i) was authorised by the company before it occurred; or

(ii) has been ratified by the company since it occurred.

(2) In considering whether to give permission, the Court shall take into account the following considerations:

(a) whether the member is acting in good faith in seeking to continue the claim;

(b) the importance that a person acting in accordance with section 143 would attach to continuing it;

(c) if the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be —

(i) authorised by the company before it occurs; or

(ii) ratified by the company after it occurs;

(d) if the cause of action arises from an act or omission that has already occurred— whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

(e) whether the company has decided not to pursue the claim;

(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in the member's own right rather than on behalf of the company.

(3) In deciding whether to give permission, the Court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest (direct or indirect) in the matter.

28. Eric and Clive are the sole directors and shareholders of the company known as CJ One Limited. According to the certificate issued by the Registrar of Companies, annexed to Clive's affidavit sworn on 24th April, 2020 and marked "C0-3", Eric held 16,000 ordinary shares while Clive held 24,000 ordinary shares as at 27th May 2019. There is no evidence that the structure of the company has since changed.

29. Given that the action he intends to pursue implicates Clive who is the majority shareholder and runs the day to day activities of the company, it is easy to see the predicament Eric faced in bringing a cause of action in the name of the company. Actions by a company must be authorized by the company.

30. The rationale for instituting derivative suits was discussed by the court in *Altaf Abdur Rasul Dadani V Amini Akberazi Manji & 3 Others Civil Case No. 913 Of 2002 [2004] eKLR* thus;

"So this basically is intended to be what is called a derivative action. By such actions in company law, minority shareholder(s) feeling that wrongs have been done to the company which cannot be rectified by internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company, come to court as agents of the "wronged" company to seek reliefs or relief for the company itself, all the shareholders including the wrong-doers, and not for the personal benefit of the suing minority shareholder(s)."

31. The factors to be considered in determining whether to grant an application for leave to continue or commence derivative actions were elaborately discussed by the late Onguto J. in the case of *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another (supra)*. He held;

45. *There appears, in my view, to exist a two stage process. The court must first satisfy itself that there is a prima facie case on any of the causes of action noted under s.238(3). S.239(2) of the Act provides that the application for permission will be dismissed if the evidence adduced in support "do not disclose a case" for giving of permission...*

46. *The second stage entails a consideration of statutory provisions and factors which ordinarily guide judicial discretion albeit in the realm of derivative action.*

47. *I must point out that the exercise of discretion in the circumstances would be more than adjudication, in view of the rather clear provisions of Part XI of the Act. I also observe that it is not feasible for the legislature to draw an exhaustive list of factors to be considered in the exercise of judicial discretion. In these respects, there must be something new through statute, something old through factors which guided common law exceptions to the rule in *Foss v Harbottle* and something borrowed from various decisions in the United Kingdom which have interpreted and applied the Companies Act 2006 (UK) especially ss. 260-264 which are pari materia ss. 238-242 of the Act, 2015.*

48. *The statutory provisions to be met include the requirement under s. 238(3) of the Companies Act that the derivative action be commenced only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default,*

breach of duty, breach of trust by a director of the company. It is also necessary to establish that the claimant is a member of the company.

49. The court then has the onus of determining whether the permission ought to be granted and on what terms.

32. To determine whether the applicant has established a *prima facie* case this court will first analyze the applicant's pleadings and determine whether he has demonstrated an apparent infringement of a right which will necessitate the respondents' rebuttal to the claim. (see **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**)

33. The plaint contains averments to the effect that the 1st respondent has acted fraudulently in breach of his duty as a director of the company. Although he did not plead the particulars of fraud in the usual manner, the 1st applicants set out his claim in a way that the respondents would understand the fraudulent acts they were being accused of.

34. The purpose of pleadings is to communicate with a degree of certainty the complaints of the claimant and to notify the other party of the case he has to answer. (See **Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others CA No. 22 of 2015 [2016] eKLR**.)

35. In my view, the applicant was clear enough in his pleadings on what was being alleged. The plaint states that the 1st respondent withdrew money from the 2nd applicant's account and used it without the knowledge or authorization of his co-director. He is also accused of forging his co-director's signature to perpetuate this breach of trust. Further that he has incorporated a company with a name similar to the 2nd applicant's and has been using the 2nd applicant's premises, stock and facilities to advance the 2nd respondent's business.

36. If indeed the 2nd applicant's funds have been embezzled by the 1st respondent, it would be in the best interest of the company to investigate that claim as misappropriation of the company's funds would hinder it from carrying on its business at the optimum.

37. Additionally, **Section 140 (2) (a)** and **Section 146 (1) & (2)** of the **Companies Act** imposes upon directors a duty not to exploit information or an opportunity which they become aware of while a director. The director also has a duty to avoid a situation in which his interests may conflict with an interest of the company. Thus, the claim that the 1st respondent is using the 2nd applicant's resources to advance the 2nd respondent's business will also need to be looked into.

38. For the foregoing reasons, I am satisfied that the 1st applicant has met the conditions required for grant of leave to continue a derivative action against the respondents. I am convinced that the 1st applicant is acting in good faith with the aim of promoting the 2nd applicant's success.

39. I now turn to the second issue. The applicants have sought an interim order of injunction to stop all operations of the defendants/respondents in particular the bar and restaurant business from being operated by the respondents at the 2nd applicant's premises in Acacia Plaza pending the taking of proper accounts or audit.

40. The conditions for granting of temporary injunctions are now well settled. In the *locus classicus*, **Giella vs Cassman Brown & Company Limited (1973) E A 358**, the court held that :-

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

41. These principles are amplified in the case of **American Cyanamid Co. vs Ethicon [1975] 1ALL ER 504**, where the House of Lords set out a three stage test for the granting of an interim injunction. It held that before granting an injunction;

1. The court must be satisfied that there is a serious question to be tried i.e. the claim must not be frivolous or vexatious.

2. The court must consider whether if the plaintiff were to succeed at trial, damages would be an adequate remedy. If damages would be an adequate remedy and the respondent would be in a financial position to pay them, no interim injunction should normally be granted.

3. The court must consider whether if the defendant was to succeed at trial, he would be adequately compensated by the plaintiff's undertaking in damages for loss caused by being prevented from carrying out the work between the time of the application for interim injunction and the trial. If he would not be adequately compensated, then the interim injunction should not be granted.

4. If there is doubt as to the adequacy of damages to the claimant or the defendant, the court must consider the 'balance of convenience'.

42. I have already found that the applicants have established a *prima facie* case in my analysis of the foregoing issue. In the course of the proceedings herein, witnesses were summoned to testify on whether documents and cheques uttered by the 1st respondent were forgeries. Having considered the evidence and the arguments advanced by the parties, I find that the issue of the authenticity of those documents can only be determined and resolved after a full hearing of the suit.

43. This legal position is supported by the decision of the Court of Appeal in **Nguruman Limited v Shompole Group Ranch & Another**

We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The orders granted were final in nature as they effectively determined the main suit without the benefit of a trial.

44. Are the claimants likely to suffer irreparable injury that cannot be compensated by damages if the orders sought are not granted? The applicants state that the 1st respondent is bent on unjustly enriching himself to the detriment of the 2nd applicant and will stop at nothing in his quest to do so. Further, there are allegations that the 1st respondent is diverting the 2nd applicant's funds to promote the 2nd respondent which carries on a business similar to the 2nd applicant.

45. It is plainly obvious on the material before court that the applicants and more specifically the 2nd applicant would suffer irreparable injury that cannot be compensated by an award of damages. The existence of the 2nd applicant as a legal entity is under a serious threat. No amount of damages would compensate the 2nd applicant should its existence as a legal entity collapse. The 1st applicant is staring at a possible loss of directorship in the 2nd applicant. Again, no amount of damages would adequately compensate for such loss of directorship.

46. On the contrary, any loss of business occasioned to the 1st and 2nd respondent should an injunction issue is quantifiable and capable of being adequately compensated by damages should the defendant be successful at trial.

47. A careful analysis of the facts before the court clearly demonstrate that the balance of convenience in the end tilts in favour of granting a temporary injunction albeit to give room for the taking of accounts which is the next issue for consideration hereafter.

48. There are serious allegations of withdrawal of monies from the 2nd applicant's account at SMB Bank. Secondly, the 1st respondent does not deny that he has set up the 2nd respondent and is operating business in the 1st applicant's premises. He argues that he had to do this as the 1st applicant became uncooperative and the 2nd applicant was not able to meet its financial obligations. At paragraph 21 of his affidavit sworn on 24th April 2020, the 1st respondent also averred that the 2nd applicant is no longer operational.

49. **Order 20 Rule 1** of the **Civil Procedure Rules** provides for orders for taking accounts thus;

Order 20 Rule 1. Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.

50. Although the application was not made in the manner prescribed in **Order 20 Rule 3** of the **Civil Procedure Rules**, it is my considered opinion, that the taking of accounts of the 2nd applicant is necessary to illuminate the true position. It will also enable a conclusive determination of the matter as the applicants pray for an order for the refund of the 1st defendant to the 2nd plaintiff of all monies embezzled from its accounts in their plaint. I believe that audited accounts will aid in the cause of justice and save precious judicial time. Such accounts would enable this court determine with accuracy, the loss, **IF ANY**, occasioned to the applicants.

51. The court has also been moved for disqualification orders under **section 214 (4)** of the **Companies Act** which provides;

214.(1) If a court makes a disqualification order against a person, the person is, unless the court gives leave to the contrary, disqualified from—

(a) being or acting as a director or secretary of a company;

(b) being or acting as a liquidator, provisional liquidator or administrator of a company;

(c) being or acting as a supervisor of a voluntary arrangement approved by a company; or

(d) in any way, whether directly or indirectly, being concerned in the promotion, formation or management of a company, for such period as may be specified in the order.

...

(4) A disqualification order may be made on grounds that are or include matters other than criminal convictions, whether or not the person in respect of whom it is to be made may be criminally liable in respect of those matters.

52. I find that granting an order to disqualify the 1st respondent from being a director at this juncture would amount to condemning him unheard. Such an order is final in nature and effectively determines the suit before hearing. The Court of Appeal in **Agip (K) Ltd. vs Vora [2000] 2 EA 285** warned against granting such orders at interlocutory stage. The Court held;

"In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute.

He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit.”

53. In the end the application is allowed in the following terms;

a. **ERIC ANGWENYI ORANGI** is hereby granted leave to continue a derivative action for and on behalf of the 2nd plaintiff/applicant against the defendants/respondents;

b. **ERIC ANGWENYI ORANGI and CLIVE NYAANGA OGWORA** are directed to jointly appoint an accredited auditor for the auditing of the 2nd plaintiff/applicant’s collection account No. 0252376518001 at SBM Bank, Kisii branch or any other account in the 2nd plaintiff/applicant’s name within 30 days of the delivery of this Ruling;

c. In the event that the parties cannot agree upon a mutually acceptable auditor after 30 days, then the Chairman for the time being of the Institute of Certified Public Accountants of Kenya shall be called upon, at the instance of either party, to make such appointment;

d. The audit shall be filed in court within 30 days of the day the auditor is appointed;

e. An interim order of injunction is hereby issued stopping all the operations of the Bar and Restaurant business being operated by the defendants/respondents at Acacia Plaza, 1st floor within Kisii town pending the taking of proper accounts and/or audit;

f. Costs of the application shall be costs in the cause.

Dated and Delivered at Kisii this 1st day of October, 2020.

.....

A. K. NDUNG’U

JUDGE