



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO. 210 OF 2019**

**TRIPAT SINGH MANGAT**

**(Suing on his own behalf and on behalf of**

**MANGAT I. B. PATEL (MIBP) LIMITED.....PLAINTIFF**

**- VERSUS -**

**MANJEET SINGH BHACHU.....1<sup>ST</sup> DEFENDANT**

**RANJIT SINGH RUPRA.....2<sup>ND</sup> DEFENDANT**

**RATNA MANJI HIRANI.....3<sup>RD</sup> DEFENDANT**

**MANGAT I.B. PATEL & PARTNERS (sued as a firm).....4<sup>TH</sup> DEFENDANT**

**RULING**

1. **TRIPAT SINGH MANGAT**, the plaintiff, has filed this case on his own behalf and on behalf of **MANGAT I.B. PATEL (MIBP) LIMITED** (hereinafter the company).

2. The plaintiff's claim is that he and **MANJEET SINGH BHACHU**, **RAJIT SINGH RUPRA** and **RATNA MANJI HIRANI**, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants respectfully entered into an agreement dated 23<sup>rd</sup> May 2014 (hereinafter the agreement) whereby they agreed to incorporate the company. The company on being incorporated was to carry on engineering services business. The agreement provided that the plaintiff would be allocated 875 ordinary shares of the company and subject to the plaintiff committing himself to the company the plaintiff would be allotted additional 625 shares and ultimately a further 2,120 ordinary shares. It is the plaintiff's further contention that the draft Articles of Association of the Company failed to include the Principles of the Agreement but that the plaintiff signed the same after appeal by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. That he was led to believe that the principles of the Agreement would be grandfathered in Company. The company was incorporated on 10<sup>th</sup> July 2014 and the plaintiff was allocated the initial 875 ordinary shares. That in June 2018 the plaintiff was unlawfully removed from the directorship of the company. That this was despite his contribution in the company which saw the award of work to the company increase by five folds. This the plaintiff pleaded was substantially attributable to his personal commitment to the company's client's. The plaintiff alleged oppressive conduct and malice by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in that they had excluded the plaintiff from the company's clients and staff, that they have unfairly created oppressive working environment for the plaintiff. The plaintiff further pleaded that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants colluded and registered another company known as **HYSEAL INVESTMENT LIMITED** (hereinafter Hyseal) through which they acquired office units using the capital of the company without the Company's shareholders' approval. The plaintiff alleged that the acquisition of those office units was fraud against the company. The plaintiff by this action seeks leave to lift the veil of Hyseal and to audit the transactions of the office units. The plaintiff further pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had failed to hold the company's Annual General Meeting (AGM). The plaintiff also pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendant's unjustifiably issued him with notice to forfeit or remove the plaintiff as a shareholder of the company in contravention of sections 424/447 of the companies Act 2015. This the plaintiff pleaded was a violation of the plaintiff's right to property. The plaintiff sought permission of the court to bring or continue this suit as a derivative action to address the mismanagement of the company.

3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants hereinafter the defendants by their defence denied that the plaintiff had immersed himself in his duties at the company, as alleged, and further pleaded that it was a condition in the Agreement that the plaintiff was required to commit himself in writing within one year of incorporation of the company, to engage in full time employment and service of the company. The defendant pleaded that the plaintiff failed to commit himself as afore stated. Further the defendants pleaded that the Agreement was superseded by the Memorandum

and Articles of Association on incorporation of the company and that therefore the Agreement could not sustain the plaintiff's action. The defendants denied the plaintiff was unlawfully removed as director of the company but that his removal was in accordance with the law and the Company's Articles of Association. Further the defendants pleaded that the plaintiff is neither a shareholder or director of the company and therefore no cause of action accrues to him. The defendants denied the plaintiff's allegations against them of oppressive conduct and instead pleaded that the plaintiffs' claims were motivated by vendetta against the defendants. The defendants case is that they have always acted in the best interest of the company, they have not violated any law in incorporating Hyseal, they are not in breach in the company leasing the office units of Hyseal and that the plaintiff had failed to justify the piercing of the corporate veil of Hyseal. Further the defendants stated in their defence that the AGM for the company had been held save for the year 2018/2019 which was pending. The defendants denied, and termed the plaintiff's allegations that the company shall suffer loss or damages as baseless.

4. The plaintiff sought by the Notice of Motion dated 27<sup>th</sup> August 2019 interlocutory orders as follows:

*v THAT pending the hearing and determination of this suit, this Honourable court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their respective agents, company secretaries, employees and or servants from executing and or registering the compulsory re-purchase by the company, Mangat I.B. Patel (MIBP) Limited, of the plaintiff's 1,000 ordinary Shares.*

*v THAT pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from re-sale and or re-transfer of the plaintiff's 1,000 ordinary shares of the company, Mangat I. B. Patel (MIBP) Limited and or removal of the plaintiff from the share register of the company, Mangat I.B. Patel (MIBP) Limited.*

*v THAT pending the hearing and determination of this suit, the Honourable court be pleased to direct the 1<sup>st</sup> and 2<sup>nd</sup> defendants to issue notice to the plaintiff, of any Annual General Meeting (AGM) or Extra Ordinary General Meeting (EGM) that shall be held by the company, Mangat I. B. Patel (MIBP) Limited, to the plaintiff and to permit him to participate and vote in the company's meetings.*

*v THAT pending the hearing and determination of this suit, this Honourable Court be pleased to order and direct the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, servants and or employees to reinstate and readmit the plaintiff as a Director of the Board of Directors of the company, Mangat I.B. Patel (MIBP) Limited.*

*v THAT pending the hearing and determination of this suit, this Honourable Court be pleased to grant leave to the plaintiff to bring and or lodge and or continue with this suit as a derivative suit on his own behalf and on behalf of the company, Mangat I. B. Patel (MIBP) Limited.*

*v THAT pending the hearing and determination of this suit, this Honourable Court be pleased to order and direct the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to file an indemnity as to the costs that the Company, Mangat I.B. Patel (MIBP) Limited, may incur in the proceedings of this suit.*

*v THAT pending the hearing and determination of this suit, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be restrained from selling mortgaging, pleading and or in any way dealing with their respective shareholding and those of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' respective children in a company known as Hyseal Investment Limited, the registered and or beneficial owner of 5 office units A,B,C,D,E and F situate on the 8<sup>th</sup> Floor constructed on LR.No. 209/4490 Nairobi in a building known as "The Address" in Westlands Nairobi.*

#### **ANALYSIS AND DETERMINATION**

5. The plaintiff's application is supported by the plaintiff's affidavit sworn on 27<sup>th</sup> August 2020. That affidavit makes references to documents which were filed when the plaint was filed. Those documents exhibits were not sealed or marked by the commissioner of Oaths. The defendant argued, quite rightly that those documents/exhibits having not been presented to the commissioner of oaths, as required under Rule 9 of the Oaths and Statutory Declarations Rules, the plaintiff's depositions in his affidavit were unsupported by documentary evidence. Rule 9 of the Oaths and Statutory Declarations Rules provides:

***All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.***

6. The Third Schedule of the Oath and Statutory Declarations Rules goes further to set out how the Commissioner of Oaths should seal exhibits as follows:

#### **THIRD SCHEDULE** ...

**Sworn**

**before me.....this.....**

**Declared**

**Day of.....20.....at.....**

*This is the exhibit marked .....referred to in annexed affidavit of .....*

7. It follows that plaintiff's affidavit does not get support of the documents that is minutes of the company's meeting, the Agreement, evidence of incorporation of the company, sample of contracts signed with various institutions, the audited accounts, contracts signed with the county and Government agencies, AGM notices, various letters, and the agreement of sale of the office units. It needs to be noted that the above, and indeed all the exhibits referred to by the plaintiff in his affidavit, do not have the mark or seal of the commissioner of oaths as required under Rule 9 of the Oaths and Statutory Declarations Rules or the Third Schedule there under. I approve the finding of the court in a similar scenario in the case **Weetabix Limited v Healthy U Two Thousand Limited (2006) eKLR** thus:

*".....distinct exhibits and have clearly not been properly exhibited in accordance with Rules 9 and 10 of the Rules made under Section 6 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya. Faced with a similar situation in **West Kenya Sugar Company Ltd. vs. Panachand Jivraj Shah: HCCC No.907 of 1999 (UR)**, Onyango Otieno, J. as he then was said at page 6 of his ruling:*

***"My understanding of this rule (Rule 9 made under the Oaths and Statutory Declarations Act) is that the exhibit itself is the one to be sealed and not a clean sheet of paper to be sealed and annexed to the affidavit as was done here. I think the reason for this rule is to ensure that the person before whom such affidavit is made, sees the exhibits and ascertains that the exhibits produced before him confirms the statements in the Oath ....."***

***I think the seal should be on the actual exhibit. ....***

***That it has always been done the way it was here is neither here nor there as two wrongs cannot add to a right.***

*I agree with the Learned Judge entirely and hold that pages 1 to 6 (g) of the bundle annexed to the affidavit of Manji offend the provisions of Rules 9 and 10 made under Section 6 of the Oaths and Statutory Declarations Act."*

8. It follows that because the plaintiff's exhibits are neither marked or sealed as required by law they cannot be considered as I proceed to consider the applications.

9. With that shortcoming to the plaintiff's application I shall proceed to consider two issues. They are:

***i. Has the plaintiff met the standards of granting interlocutory injunction?***

***ii. Has the plaintiff made a case for leave to be granted to proceed with derivative suit?***

10. I shall begin by considering issue (ii) first.

11. Under Section 238 (1) of the Companies Act 2015 (hereinafter Act 2015) derivative claim is defined as:

**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.**

In the case **Anthony v NPV Management Ltd 2003 NLCA 41(CanLII)** a Canadian case, the court defined derivative as:

***"A helpful definition of "derivative action" is found in McGuinness, The Law and Practice of Canadian Business Corporations, (Toronto: Butterworths, 1999), at paragraph 9.171:***

***A derivative action is an action brought in the name or on behalf of a corporation or any of its subsidiaries, or an intervention in an action brought by or against the corporation or its subsidiary, by a shareholder or other complainant, to assert or defend rights to which the corporation or its subsidiary is entitled. It is always a class action brought or conducted in a representative capacity, and it is, therefore, binding upon all of the shareholders, rather than just the complainant."***

12. Section 238(3) of the Act 2015 provides the cause of action that would be entertained as a derivative action. It provides:

**(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.**

13. The plaintiff supports the prayer that he be permitted to continue this suit as a derivative suit, inter alia, on the grounds that the defendants used the company's funds and their position as majority shareholders to enter into contracts for their personal benefit, using the company's funds the defendants with their children incorporated Hyseal, the defendants caused the company to lease the office units belonging to Hyseal which transaction was not at arm's length, and that the defendants have acted oppressively against the plaintiff.

14. The defendants deponed in the affidavit in opposition to the application, sworn by the 2<sup>nd</sup> defendant, that contrary to what is stated by the

plaintiff it was the plaintiff who informed the other directors of the company that he wished to resign from position of director. In subsequent meetings, in the presence of the plaintiff's proxy, a resolution was passed for the removal of the plaintiff. Those depositions of the 2<sup>nd</sup> defendant are supported by the relevant minutes of meetings. The plaintiff did not respond and deny those meetings took place and therefore the 2<sup>nd</sup> defendant's deposition is accepted as the correct position. There is therefore no evidence of the plaintiff being oppressed or coerced to resign as director or to have his shares purchased by the other directors.

15. On the whole bearing the above in mind the plaintiff has failed to show that there were any acts that were ultra vires the company to justify the orders he seeks. The plaintiff has failed on prima facie basis to prove that the defendants incorporated Hyseal using the funds of the company. The plaintiff has failed, as stated in section 238(1) Act 2015, to prove that there is a cause of action vested in the company or that the relief he seeks is on behalf of the company. What comes out clearly from the evidence presented is that the plaintiff, by this action, seeks to advance personal claim. That finding takes this case out of realm of derivative action. See the case **Anthony v NPV Management Ltd** (supra)

*“The distinction between a derivative and a personal action is referenced in **The Law and Practice of Canadian Business Corporations**, at paragraph 9.171:*

*. . . Derivative actions must be distinguished from personal rights of action belonging to a shareholder. In deciding whether a particular cause of action is derivative or personal, the question to resolve is whether the essence of the action is the violation of some right of the corporation or some personal right to which the shareholder is entitled. Either one can produce a loss to the shareholder. The difference is whether the loss is suffered by the shareholder directly or by the reduction in the value of his or her shares.”*

16. In the case **Isaiah Waweru Njumi & 2 Others v Muturi Ndungu (2016) eKLR** the court in considering factors to be borne when leave is sought for derivative action to be commenced stated:

*“c) Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of **Recchion v Kirby 637 F. Supp. 1309 (W.D. Pa. 1986)**, for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;”*

17. I am in this case inclined to concur with the defendants' submissions that the plaintiff seeks by this action to pursue personal grievances and private interest which have nothing to do with the company. In seeking leave to proceed with this action as derivative action the plaintiff is only seeking to bolster his personal claim. Accordingly, in respect to the second issue I find that the plaintiff has not made a case for leave to be granted to proceed with derivative suit. Accordingly, the prayer seeking leave to proceed with derivative action is dismissed with costs.

18. On the first issue, identified above, I am to determine if the plaintiff has met the standards or principles of granting an injunction.

19. The plaintiff's deposition of the alleged wrongs in his removal as director and purchase of his shares was responded by defendants who have shown, on a prima facie basis that the plaintiff consented to the same. The plaintiff therefore has failed to show a prima facie case with probability of success, the first principle of granting an injunction as held in **Giella v Cassman Brown Co. Ltd 1973 E.A. 358**. Having failed to show that first principle and because the principles of granting injunction are sequential the plaintiff's prayer for injunction fails. This applies to both prohibitive and mandatory injunction prayers.

20. In the end the plaintiff's Notice of Motion application dated 27<sup>th</sup> August 2019 is dismissed with costs. The interim orders of injunction issued on 3<sup>rd</sup> September 2019 are vacated. The court will now proceed to give direction for case management conference.

**DATED, SIGNED and DELIVERED at NAIROBI this 2<sup>nd</sup> day of OCTOBER 2020.**

**MARY KASANGO**

**JUDGE**

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendants:

**ORDER**

**This decision is hereby virtually delivered this 2<sup>nd</sup> day of October, 2020.**

**MARY KASANGO**

JUDGE