



**REPUBLIC OF KENYA**

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

**CIVIL, COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 53 OF 2017**

JOSEPH MUNYOKI NZIOKA..... PLAINTIFF

VERSUS

RAINDROPS LIMITED ..... 1<sup>ST</sup> DEFENDANT

MUHAMMAD ABDULMUTALIB AZZINJIBARI ..... 2<sup>ND</sup> DEFENDANT

AZZA NZARA NASSORO..... 3<sup>RD</sup> DEFENDANT

JOSEPH KINGWAGU ..... 4<sup>TH</sup> DEFENDANT

**RULING**

1. The defendants filed a Notice of Preliminary Objection (PO) dated 15<sup>th</sup> August, 2018, brought under the provisions of Article 162(2) of the Constitution of Kenya, Section 12 of the Employment and Labour Relations Court Act No. 20 of 2011 and Sections 238 and 239 (1) of the Companies Act of Kenya, 2015. The said notice seeks to have the suit dismissed in its entirety for reason that:-

(i) This court lacks jurisdiction to hear and determine the application as its jurisdiction to hear the suit has been challenged;

(ii) The court lacks jurisdiction to hear and determine this suit for the following reasons:-

(a) It is primarily an Employment and Labour dispute; and

(b) There is no trigger to activate the court's jurisdiction under derivative actions as this is not a derivative suit as paraded by the plaintiff.

2. The defendants filed their written submissions on 3<sup>rd</sup> October, 2018 whereas the plaintiff filed his on 29th October, 2018. The said submissions were thereafter highlighted.

**Submissions**

3. Mr. Ochieng, Learned Counsel for the defendants submitted that the suit herein is not a derivative suit and that the prayers in the plaint are not sought against the company. He submitted that Section 238 of the Companies Act provides for the filing of suits in the name of a company to seek relief on behalf of the company but not against the company. He was of the view that the suit herein cannot survive since it has been filed against the company and as such, it contravenes the provisions of Section 239 of the Companies Act. He further submitted that a suit must be filed first and then leave of the court sought to continue with a derivative suit.

4. Counsel for the defendants contended that the suit herein runs counter to the procedure laid out in Sections 238 and 239 of the Companies Act. He argued that the said suit is an employment and labour relations dispute as the prayers sought are for salaries, allowances and a motor vehicle. This court was informed that the plaintiff was an employee and Director of the 1<sup>st</sup> defendant. Mr. Ochieng made reference to a Malindi Court of Appeal decision which states that money deposited in the bank account of the 1<sup>st</sup> defendant was to be paid towards salaries. He referred to page 87 of the defendants' list of bundles which is a Court of Appeal order which was given based on the consent of the parties hereto.

5. Counsel for the defendants cited the decision of the **Owners of the motor vessel Lilian S vs Caltex (Kenya) Oil Ltd** [1989] KLR which

states that without jurisdiction, the court must down its tools. He also cited the Supreme Court of Kenya decision in **Republic vs Karisa Chengo and 2 Others** [2017] eKLR which set out the different jurisdictions of various courts. The case of **Samuel Kamau Macharia & Another vs KCB Limited and 2 Others** [2012] eKLR which also addressed the issue of jurisdiction was relied upon.

6. To fortify his argument on what a derivative suit is, Mr. Ochieng relied on the case of **Ghelani Metals Limited & and 3 Others vs Elesh Ghelani Natwarlal and Another** [2017] eKLR.

7. Mr. Bwire, Learned Counsel for the plaintiff in responding to the submissions made by Counsel for the defendants referred to the plaint filed on 17<sup>th</sup> May, 2017 and the application filed on the same date in which leave was sought to file a derivative suit. He pointed out that the plaintiff herein is not a party to the Court of Appeal order contained on page 87(i) of the defendants' bundle of documents. Counsel stated that the plaintiff's contention is that the money that was deposited in the 1<sup>st</sup> defendant's bank account was misappropriated. He contended that when Kshs. 23 Million was deposited in the said account on 17<sup>th</sup> May, 2018, it was withdrawn on 23<sup>rd</sup> May, 2018, with Kshs. 5 Million going to one person.

8. Counsel for the plaintiff stated that on 11<sup>th</sup> April, 2018 they filed an application seeking leave to enjoin other parties. He further pointed out that an account statement from Chase Bank showed various withdrawals that were done in quick succession to various persons who were not employees of the 1<sup>st</sup> defendant. For the said reasons he argued that anyone else who was not an employee of the said company should explain the said withdrawals.

9. With regard to the issue of whether the suit herein is a derivative one, Mr. Bwire submitted that Section 238 of the Companies Act provides that derivative suits are proceedings by a member of the company and the cause of action must be vested in a company and for the benefit of a company. He expounded that a derivative suit provides an avenue for an oppressed member of the company to complain. He stated that if a minority shareholder has a complaint he cannot file a suit on behalf of the company as a Board resolution is required for the said purpose.

10. Counsel for the plaintiff relied on the case of **Sunrise Orthopedic and Trauma Hospital Ltd. and another vs Lectany Kibor Keiyo Lelei** [2011] eKLR, in which the court cited with approval the case of **Spokes vs Grosvenor and West End Railway Terminus Hotel Company Limited and Others** [1897] 11 QB, 124, where Lord A.L. Smith held that the only way to proceed in derivative suits is to put the company as a defendant.

11. Echoing the said holding, Mr. Bwire asserted that the only way to proceed in this suit was by putting the company as a defendant. He indicated that one of the prayers sought in the plaint is a declaration that the actions of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants amount to oppression that is being meted out against the plaintiff.

12. In making reference to paragraph 31(d) of the plaint, Mr. Bwire stated that the plaintiff seeks an order to compel the defendants to avail a financial report of the 1<sup>st</sup> defendant. He explained that the company cannot speak for itself and that is the reason why the plaintiff has filed this suit.

13. In making reference to Section 238(3) of the Companies Act, he submitted that a derivative suit can be brought when there are issues of negligence, default, breach of duty or breach of trust through commission or omission. He further submitted that by filing this suit, the plaintiff seeks orders for the Court to interrogate the actions of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and to make declarations thereof.

14. Mr. Bwire stated that the court on 29<sup>th</sup> May, 2017 granted leave to the plaintiff to file a derivative suit and that they had before that filed a suit on 17<sup>th</sup> May, 2017. He also stated that they attached statements of withdrawal of cash from the 1<sup>st</sup> defendant's account to the affidavit in support of their application seeking leave to file a derivative suit. He submitted that the issue of whether or not leave to file a derivative suit is left to the discretion of the court. Counsel for the plaintiff referred to the case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd** [1969] EA 696, where the Court stated that an order for a PO cannot be issued on a matter which gives discretion to the court.

15. On the issue of whether the suit herein falls in the realm of Employment and Labour Relations, Mr. Bwire fell back to the provisions of Section 12 of the Industrial Court Act which stipulates the disputes that may be referred to the Employment and Labour Relations Court (ELRC). He indicated that in the Companies Act definition of the word "Court" means the High Court. In making reference to the annexure marked as JMN 1 attached to the affidavit in support of the application filed on 17<sup>th</sup> May, 2017, he submitted that the plaintiff is a shareholder of the 1<sup>st</sup> defendant with a shareholding of 134 shares, thus a member of the company. He prayed for the PO to be dismissed with costs to the plaintiff.

16. Mr. Ochieng in a rejoinder to the foregoing submissions stated that the court in the case of **Sunrise Orthopedic Trauma Hospital and Another vs Lectany Kibor Keiyo Lelei** (supra) did not state that a company in a case of this nature, must be a defendant.

17. He reiterated that leave to file a derivative suit should not have been granted as a suit had not been filed at the time leave was sought. He referred to paragraph 31(c) of the plaint to demonstrate that the suit herein is against the 1<sup>st</sup> defendant as the plaintiff seeks orders to compel the defendants to pay him his arrears. He prayed for the PO to be upheld.

## **ANALYSIS AND DETERMINATION**

18. The issues for determination are:-

- (i) If the dispute herein falls in the purview of the Employment and Labour Relations Court; and

(ii) If the suit herein is a derivative suit;

### **Employment and labour relations**

19. The plaintiff in paragraph 13 of the plaint claims for allowances that he was receiving from the company. The defendants' Counsel submitted that the same were not payable as they fall in the realm of the Employment and Labour Relations Court. Among the documents filed by the plaintiff are minutes of the 6th Raindrops Limited Board meeting at the RDL Complex in Mombasa held on 1st August, 2014. Minute 2.2 reads thus:

***"It was also resolved that Directors shall keep their offices and monthly allowances hitherto paid to them."*** (emphasis added).

20. With regard to the above, it is my finding that a claim for Directors allowances which is a benefit accruing directly to the plaintiff, should have been filed as a separate suit as it is not for the benefit of the company. It is for the personal benefit of the plaintiff. I therefore strike out the claim for payment of Directors allowances from this suit. I however do not wish to delve into the issue of the court where such as claim should be filed.

### **Derivative suit**

21. The plaintiff filed suit on 17th of May, 2017. A receipt was duly issued by the Judiciary which indicates that a sum of Ksh. 70,500 was paid for filing of the plaint. An *ex parte* Chamber Summons was also filed on the same day. The said application was heard on 29<sup>th</sup> May, 2017 and leave was granted to the plaintiff to file a derivative suit. It is therefore apparent that the plaintiff filed the plaint contemporaneously with the Chamber Summons seeking leave to file a derivative suit.

22. Section 238 of the Companies Act, No. 15 of 2017 defines a "derivative claim" in Part XI in the following manner-

***"(1) In this part, "derivative claim" means proceedings by a member of the 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."***

23. As seen from the provisions of Section 238 of the Companies Act, for the plaintiff to succeed in an action for a derivative suit-

(i) He must be a member of the Company and this includes a person who is not a member of the Company but to whom shares in the Company have been transferred or transmitted by operation of the law;

(ii) The proceedings must be in respect to a cause of action vested in the Company;

(iii) The proceedings must be seeking relief on behalf of the Company;

(iv) The proceedings must be for protection of members against unfair prejudice brought under the Companies Act; and

(v) The proceedings are 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.

24. In paragraphs 6 and 7 of the plaint, the plaintiff avers that he is a Shareholder and Director of the 1<sup>st</sup> defendant where he holds 150 shares. He also avers that he is the Director in charge of operations of the Raindrops Company Limited (the company), where he was receiving certain allowances by virtue of that office he held as outlined in paragraph 13 of the plaint.

25. In paragraphs 18 and 19 of the said plaint the plaintiff states that his relationship with Mr. Shaib, the Chief Executive Officer of the company has become sour leading to multiple civil and criminal cases and the defendants' nominees namely, Mr Shaib Hamis Mtuwa - the Chief Executive Officer, Willy Baraka Mtengo – the General Manager, and Abdalla Ali Taib – Chairman of the company have colluded and become hostile towards him. The plaintiff alleges that he has been excluded from the business affairs and decisions of the 1<sup>st</sup> defendant. He also alleges that the said company's nominees have removed him from office and declined to give him allowances and a share of the profits.

26. The plaintiff contends in paragraphs 20 and 21 of the plaint that the defendants and their nominees have been making large cash withdrawals from the 1<sup>st</sup> defendant's account and diverting them to their personal use. The plaintiff therefore avers that the defendants and their nominees have acted in a manner oppressive to his interest and he has been grossly prejudiced. He further argues that his right and interest in the company has been unfairly jeopardized.

27. The defendants deny the claim in their statement of defence filed on 6th July, 2017, which includes a counter-claim. In paragraph 6 of the said statement of defence, they contend that the dispute in issue is one for Director's pay which is subject to ELRC. In paragraphs 11 and 12 thereof, they contend that the suit herein does not meet the requirements set out in Section 238 of the Companies Act. They aver that the claim is not a derivative suit as it is filed against the company which is joined in the proceedings as the 1<sup>st</sup> defendant and it is not filed on or behalf of the company.

28. In the counter-claim, the defendants claim Kshs. 23,462,850 as at 31<sup>st</sup> May, 2017 being 15% of the fixed capital and working capital required from the plaintiff as per an oral agreement entered into in the year 2014, in consideration of the plaintiff obtaining 150 shares in the company.

29. The CR12 dated 6th February, 2017 indicates that the plaintiff herein is one of the minority shareholders with 150 shares. The other shareholders are Muhammad Azzinijibari with 500 shares, Azza Nassoro with 250 shares and Joseph Kingwagu with 100 shares. In the case of **Sultan Hasham Lalji and 2 Others vs Ahmed Hasham Lalji and 4 Others** [2014] eKLR, it was held as follows:-

***“It is the minority shareholders that are availed to the protection by the exceptions since generally majority shareholders exercise powers of the Company and control its affairs.”***

30. In **Altaf Abdulrasul Dadani Vs. Amini Akberazi & 3 Others, Nairobi (Milimani) Hccc No. 913 of 2002 [2004] 1 KLR 95**, Mwera, J (as he then was) stated as follows:-

***“By derivative suits, the minority shareholders (s) feeling that wrongs have been done to the company which cannot be rectified by the 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 shareholders (s)..... it is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights and actions vested in the company to sue for the wrongs done to it and in the absence of illegality a shareholder cannot bring these proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters.... However if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such shareholder can bring an action by way of derivative action... mere irregularity in internal running of a company cannot be a basis for one to bring a derivative suit for such can be rectified by a vote/resolution at the company’s meetings and if a shareholder contemplates using a personal claim of infringement of his rights then a derivative suit will not avail as the relief must be for the benefit of the company...”*** (emphasis added).

31. An analysis of the documents in the court file and more particularly, the bank statements in the plaintiff's bundle of documents reveal a lot of bulky withdrawals from the company's bank account at Chase Bank. As to whether the said money was withdrawn to pay salaries or not is a matter of evidence that cannot be established by just looking at the said statements. I am satisfied that the plaintiff has filed the suit herein with a view of safeguarding the interests of the company, more so, because he is apprehensive that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are not exercising their fiduciary duties to protect the company from wastage. He has therefore filed this suit for the 1<sup>st</sup> defendant company not against it. Save for the parts in the plaint where the plaintiff has expressed personal interest, paragraph 23 of the plaint clearly underpins the assertion that the claim herein is a derivative suit.

32. In the case of **Nitia Properties Limited vs Jagjit Singh Kalsi & Another**, CA No. 132 of 1937, the court stated that it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the plaint are disputed and the suit cannot be said to be lacking of substance that would call for trial.

33. The cases cited by the defendants' Counsel in **the Owners of the Motor Vessel “Lillian S” vs Caltex (Kenya) Oil Ltd** (supra) and **Republic vs Karisa Chengo and 2 Others** are very clear on the need for a court not to transgress into an area where it lacks jurisdiction. The said authorities are not applicable in to the circumstances of this case.

34. In an instance such as this where the complainant is one of the minority shareholders, it would be impossible to obtain a Board resolution authorizing the filing of a suit on behalf of the company. The correct position was as submitted by Mr. Bwire when he cited the case of **Spokes vs the Grosvenor and West End Railway Terminus Hotel Company Limited and Others** (supra) where Lord A.L. Smith rendered himself thus:-

***“The proper plaintiff in such an action would obviously be the company; but in the circumstances existing, this is not possible for the impeached directors who have the controlling power in the company do not assent to the company being made plaintiffs. To obviate this difficulty, it has for many years been the practice of the court of chancery in circumstances such as the present, to make the company parties to the action as defendants in which action the plaintiff shareholder asks for an order,***

35. Having considered the submissions, the authorities cited and the documents in the court file, I am satisfied that the suit herein save for the paragraphs in the plaint that refer to payment of the plaintiff's allowances, meets the test of a derivative suit. This court granted leave to the plaintiff to file a derivative suit but as it turned out, the plaint and the application seeking leave were filed contemporaneously. That being the case, the plaintiff's Counsel should have specifically sought for orders to continue with a derivative suit as it had already been filed as at the

time the application seeking leave to file the same was made. The foregoing procedural technicality is curable under the provisions of Article 159(2)(d) of the Constitution of Kenya. The derivative suit filed by the plaintiff is deemed as having been properly filed and the plaintiff can continue with prosecution of the same.

36. The preliminary objection raised by the defendants is hereby dismissed. Costs are awarded to the plaintiff.

**DELIVERED, DATED and SIGNED at MOMBASA on this 8th day of February, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms Obura holding brief for Mr. Ochieng for the plaintiff

Ms Ombat holding brief for Mr. Bwire for the defendants

Mr. Oliver Musundi - Court Assistant