



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. E087 OF 2018

MICHAEL MWANGI WANJOHI PLAINTIFF

VERSUS

PATRICK KANG'ETHE WANJOHI.....1ST DEFENDANT

EDWARD NJUGUNA KANG'ETHE.....2ND DEFENDANT

GEORGE JAMES KANG'ETHE.....3RD DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED.....4TH DEFENDANT

RULING

1. This Court is asked to determine the Notice of Motion dated 26th September 2018 for the following substantive prayers:-

1) Spent

2) THAT the Honourable Court be pleased to grant leave to the Plaintiff to continue this claim as a Derivative claim on behalf of WARDPA HOLDINGS LIMITED.

3) THAT this Honourable Court be pleased to issue a temporary injunction order restraining the 4th Defendant, whether by itself, or through its auctioneers, agents, or servants from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, advertising for sale, selling, disposing off, alienating, transferring, completing the sale, or registering any interests in favour of a third party and/or in any other manner interfering with or effecting transactions inconsistent with the proprietary interest of all that parcel of Land known as WARDPA HOLDINGS LIMITED, as the registered proprietor of all that parcel of Land known as Land Reference Number 209/2489/22 (I.R No.74175) pending the hearing and determination of this suit.

4) THAT costs of the application be borne by the Defendants/Respondents.

2. The Plaintiff together with the 1st, 2nd and 3rd Defendants are Shareholders and Directors of Wardpa Holdings Limited (hereinafter Wardpa or the Company). Each hold one share. Wardpa is the registered owner of all that property known and described as LR. No.209/2489/22 which is currently charged to the Cooperative Bank of Kenya Limited (the 4th Defendant or the Bank).

3. In a Plaint presented to Court on 26th September 2018, the Plaintiff complains that he was not aware that the property had been charged to the Bank. He says that he learnt of it sometime on 5th January 2018 when he saw an advertisement for the sale of the property on the 'Daily nation' newspaper. The Plaintiff avers that he is a stranger to the transactions that led to the property being charged to the Bank allegedly on a facility granted to the 1st and 3rd Defendant.

4. The Plaintiff assails the 1st to 3rd Defendants for failing to act bonafides the interest of the Company. Failing to act for the proper purposes of the Company in relation to its affairs. Failing to protect Company property including the suit property. The Plaintiff alleges that the said Defendants caused or procured the charge of the Company property to secure private loans for the Directors without a Company Resolution.

5. The Bank's reaction is that the Directors of the Company did not act *ultra vires* the Company's Articles of Association. And in any event the issue of quorum is an internal arrangement of the Company and as a third party it was entitled to presume that all internal arrangements

had been complied with. It is asserted that as the Company has power to borrow and to guarantee borrowings by the 3rd parties, the complaint by the Plaintiff is a decision which is *intra-vires* the powers of the Company and can be rectified by the majority.

6. That aside, the Bank sees the present suit as part of a scheme to frustrate it from realizing the charged property. That the 1st, 2nd and 3rd Defendants had through two civil suits being Mbsa Hcc No. 50 of 2016 and Mbsa HCC No. 54/2016 sought to injunct the Bank from selling the suit property. The Defendants were without success. That the Plaintiff has also filed Nrb. ELC Case No.3 of 2018 against the Bank. This however appears to have been withdrawn. Because of these suits the Auctions slated for 26th July 2016, 12th May 2016, 19th May 2017, 3rd July 2017 and 26th January 2018 have all aborted.

7. The 1st Defendant appears to support the application. His case is that by a resolution made on 2nd January 2008, it was agreed that for purposes of legitimate conduct of the Company business a quorum of 3 members was necessary. He takes the view that the resolution of the 2nd and 3rd Defendants of 3rd January 2007 was in defiance of that Resolution and should not be allowed to stand. The 2nd and 3rd Defendants gave a response through an affidavit sworn by the 2nd Defendant sworn on 15th October 2018. Their case is that at the time of giving the security to the Bank, they honestly believed that all laid down procedures as prescribed in Law had been followed and adhered to. That the Lawyer for the Bank sat with the two and verified that the documentation was in order. However, that on advice from their current advocates they realized patent lapses in the Law as the Company policy provided that a mandatory of 3 Directors bind the Company to any transaction.

8. The Court has considered the argument for and against the Application. Section 238 of the Companies Act allows a member of a Company to bring a Derivative claim. A Derivative claim is in respect to a cause of action vested in the Company and seeking relief on behalf of the Company. The provision in respect to an Application for permission to continue a Derivative claim is in Section 239 of the Act which reads:-

“(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”.

9. On a plain reading of Section 239, it seems that the application for permission is a two stage process, (see Onguto J. in Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwartal & another [2017] eKLR). The first is provided under Section 239(2) in which the Court, in an ex parte session, assesses the application and the evidence adduced by the Applicant to see whether it is worth of further consideration. If the Court comes to the conclusion that it does not disclose a case for giving permission then it shall dismiss the application and that may be the end of the matter. The application will not have passed the screening stage. Where however the Court does not dismiss the application it proceeds under sections 239(3) and 239(4). This is the second stage. At this stage the Court may give direction as to the evidence to be provided by the Company and will grant an opportunity for that evidence to be obtained. The Court will then be ready to consider the application.

10. It seems to this Court that the nature of evidence that needs to be provided by the Company is that which can assist the Court make an evaluation as to whether the conditions and factors set out in section 241 of the Act and those developed under common law tradition (but not inconsistent with statute) are met. In the matter at hand the application was heard inter partes and the Court did not give directions as to the evidence to be provided by the Company. The Court did not deem this as necessary as all the Directors and Shareholders of the Company are parties to the suit and each have given their perspective of the matter. The Court takes the view that it has sufficient material before it to determine whether or not the application passes the test for permission.

11. There can be no doubt that a Claim brought to protect an Asset of a Company is generally speaking an action to protect the interests of the Company. And if the Company Assets are in danger of dissipation through a sale, then the Assets property are imperiled.

12. That said a Plaintiff who seeks to continue a derivative Claim is enjoined to make out a prima facie case that on the pleadings and facts it

is deserving of such permission. In determining whether the necessary threshold has been reached the Court will give regard to the provisions of section 241 of the Act which provides:-

- “(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”.

To this list will be principles of common law in respect of matters of this nature but which are not inconsistent with the express provisions of statute (Morris & Company [2004] Ltd vs. Diamond Trust Bank & 4 others [2008] eKLR).

13. The fulcrum of the Plaintiff's case is that the 1st to 3rd Defendants committed Company Assets to the Bank without due authority of the Company's Board. In this regard the Courts attention is drawn to a special resolution of 2nd January 2008 to the following effect:-

- “1. From the 2nd day of January 2008 Mr. Edward Kangethe Njuguna shall be the Managing Director.
- 2. From the 2nd day of January 2008 Mr. Patrick Kangethe shall be the Executive Director.
- 3. From the 2nd day of January 2008 the quorum of the Company shall consist of THREE (3) MEMBERS and thus Article No.11 is amended accordingly”.

14. The Plaintiff argues that Article 11 of the Memorandum and Articles of Association of the Company are in respect to quorum of the Company's Board while the Bank asserts that it is for a General meeting of members. The Plaintiff's position finds that support from the 1st to 3rd Defendants and the other three co-directors.

15. For some reason none of the parties found it necessary to place the said Memorandum and Articles of Association before Court. The Court cannot therefore take a view on this critical matter. Nevertheless as the 1st to 3rd Defendants appear to acknowledge that the Resolution for the grant of the charge appears faulty, this Court shall grant the permission sought. The Court does so because the property of the Company has been placed in jeopardy and those who committed the Company appear to concede to this. Indeed the submissions of the 1st to 3rd Defendants support the application.

16. But must the application for injunction against the Bank necessarily succeed because this Court has granted permission for continuation

of this suit? I hold not because while the Plaintiff may have a prima facie case against the 1st to 3rd Defendants, the Plaintiff must still demonstrate such a case against the Bank in addition to the other pre-requisites of **GIELLA VS. CASSMAN BROWN** [1973] EA 358.

17. On this the Plaintiff's case is rather pale. An application for injunction is considered in the context of the pleaded case of the Applicant. A party must in arguing an application for injunction state a case that is consistent with his pleadings. The Plaintiff has filed a 23 paragraph Pleint. Yet in none does the Plaintiff impute any wrong doing or negligence on the part of the Bank. On the overall, the Plaintiff beseeches the Court to find that the 1st to 3rd Defendants should bear personal liability for the facility they took and to exonerate the Company from any obligation. Clearly the Plaintiff makes no case against the Bank.

18. For the reasons given, this Court grants permission to the Plaintiff to continue this claim as a Derivative claim but must decline the prayer for injunction. Only to that extent does the Notice of Motion dated 26th October 2018 succeed. Costs of the declined Motion for injunction to the Bank. The Plaintiff shall however have costs on the Motion as against the 1st, 2nd and 3rd Defendants.

Dated, delivered and signed in open Court at Nairobi this 1st day of March, 2019.

F. TUIYOTT

JUDGE

Present:

Wanjiku for Gachie for Plaintiff

Wilson for 4th Defendant

Thuo h/b Ithondeka for 1st Defendant

N/a for 2nd and 3rd Defendants