REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 645 OF 2006

RICHMOND COMPANY LIMITED.....PLAINTIFF

VERSUS

SIMON MUKUNJU MWANGI.....1ST DEFENDANT

FAMILY FINANCE BUILDING SOCIETY LTD.....2ND DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....3RD DEFENDANT

JUDGMENT

1. At the outset of these proceedings Richmond Company Limited (Richmond or the Plaintiff) sued three Defendants for an alleged loss of Kshs.11,049,000/=. However on 4th November 2016, it withdrew its case against National Bank of Kenya Limited (the 3rd Defendant).

2. Richmond is a Limited Liability Company incorporated under the then existing Companies Act (Chapter 486 laws of Kenya). The Company was the local representative of manufacturers of Tents and other military supplies from the United Kingdom. One of the Directors of the Company was or is Simon Makunju Mwangi (Mwangi or the 1st Defendant).

3. Through a Local Purchase Order (LPO) dated 16th January 2006, Richmond were contracted by the Department of Defence of the Government of Kenya to supply some assorted Tents at a sum of Kshs.11,049,000/=. Supply was made and payment for it tendered vide cheque No.337359 of September 2006. The cheque was however not banked in the Company's ordinary account domiciled at The Middle East Bank (Kenya) Limited at its Milimani Branch.

4. Meruya Kenmure Melville (Melville), another Director of the Company was later to learn that the cheque was banked and paid at the Harambee Avenue Branch of the Family Finance Building Society Limited (the 2nd Defendant or Family Bank). It turns out that an account had been opened there in the name of Richmond on the strength of an alleged resolution of the Company's Board meeting of 9th August, 2006 purportedly attended by Mwangi and another individual by the name Gibson M. Mwangi (Gibson). The account operating mandates were Mwangi and Gibson. Richmond asserts that this was a fraud on the part of Mwangi and in paragraph 10 of the Plaint sets out the particulars of fraud said to have been committed by Mwangi. These are:-

a. Giving falsified documents to the second Defendant.

b. Falsifying or causing Richmond Company's limited documents to be falsified.

c. Failing to seek the leave of the Plaintiff or the other director of the Plaintiff to open and operate an account with the second Defendant.

d. Opening an account with the second Defendant.

e. Banking cheque number 337359 in the account number 01-0080412600 at Cargen house Branch of the second Defendant.

f. Failing to bank the aforesaid cheque at the Plaintiff's bank account numbers 0250075006 or 0250075014 at Middle East Bank.

g. Converting the value of the aforesaid cheque to his own use.

5. As for Family, the case by Richmond is that it was negligent in allowing the Account to be opened, operated and maintained. Further, that in honouring payments out of that account on the instruction of Mwangi,the Bank was negligent. The particulars of negligence are set out in paragraph 13 of the Plaint as follows:-

a. Failing to do any due diligence.

b. Failing to carry out any search of the Plaintiff's particulars at the Company's registry prior to opening the subject account.

c. Failing to verify the full particulars of the Plaintiff

d. Failing to establish, vet or verify the Plaintiff's details and particulars that were or may have been supplied by the second Defendant.

e. Failing to address or adhere to the Company's law as regards the conduct of business by limited liability Companies.

f. Failing to study and uphold the Memorandum and Articles of the Plaintiff.

g. Failing to uphold and adhere to banking regulations, stipulations and guidelines of Central Bank and Kenya Bankers Association.

6. Ultimately Richmond seeks judgment against the Defendants jointly and severally for Kshs.11,049,000/-, interest thereon at Court rates and loss of business. Costs are also sought.

7. In a statement of Defence dated 29th December2006 and filed on the same date, Mwangi denies and resists the claim by Richmond. The thrust of his Defence is that the account was opened and operated in accordance with the law and the Plaintiff's Memorandum and Articles of Association. He also asserted that there was no valid resolution passed by the Plaintiff's Board of Directors to institute this suit and the same was thus nonsuited.

8. For the Bank, it presented a Statement of Defence dated 19th December 2006. In it, the Bank avers that Account No.01-0804120600 was and is operated by the duly authorised Directors of Richmond as signatories and in a legal and legitimate manner and in accordance with the Memorandum and Articles of Association presented to the 2nd Defendant when the account was being opened. It denies allegations of negligence.

9. At the hearing of this matter only Richmond and Family Bank participated. Mwangi did not attend any of the hearings notwithstanding service of hearing notices on the advocates on record as appearing for him.

10. By a statement dated 13th December 2007 and filed on even date, the parties herein agreed on the issues to be determined. They are multiple issues but will be reduced to the following:-

(i) Was this suit properly instituted and/or was the pre-requisite resolution authorizing the filing of this suit made by the Plaintiff's Directors or any other competent and/or authorized machinery?

(ii) Was account No. 01-00804126600 opened and operated in a lawful manner and in accordance with the Memorandum and Articles of Association presented to the Bank?

(iii) If the answer to (ii) above is in the negative, was Mwangi fraudulent?

(iv) If the answer to (iii) above is in negative was the Bank negligent?

(v) What is the suitable order on costs?

11. The issue of validity of this suit was raised by the 1st Defendant in his Defence of 29th December 2006 and filed on the same day. Paragraph 10 of the statement of defence reads:-

"*The 1st Defendant avers that no valid resolution was passed by the Plaintiff Board of Directors to institute the current suit and the same is non suited*".

The Plaintiff responded to that defence through a reply of 18th January 2017 and filed on the same day. In respect to the averment on the lack of a resolution by the Company, the Plaintiff makes this general averment,

"*In response to paragraph 8,9,10,11 and 12 of the 1st Defendant's defence the Plaintiff reiterates the contents of the Plaint and adds that the Defendants were fraudulent and unprofessional*".

12. At the risk of repetition I have to state that on 13th December 2007 the parties herein filed two sets of agreed issues. One between the Plaintiff on the one hand and the Defendants on the other. The second set was between the Plaintiff and the 3rd Defendant. The issue of the propriety of the suit was one of the issues identified as between the Plaintiff and the 1st and 2nd Defendants and was specifically framed as

follows:-

> "*Was this properly instituted and/or was the pre-requisite resolution authorizing the filing of this suit made by the Plaintiff's Directors or any other competent and/or authorized machinery*?"

Clearly that issue persisted as one that called for determination by Court.

13. The only evidence given by the Plaintiff was by Melville. Melville's evidence was contained in the written statement of 10th October 2012 and oral testimony of 4th March2015. In that evidence he makes no mention at all about a resolution by the Company to commence this suit. Simply that evidence does not address the issue of the propriety or impropriety of these proceedings.

14. On the Defence side, only the 2nd Defendant called evidence and the 1st Defendant did not participate in the hearing notwithstanding having filed a defence. In the evidence presented on behalf of the 2nd Defendant nothing came up in respect to whether or not Richmond's suit had been properly instituted.

15. That aside both the Plaintiff and the 2nd Defendant produced the Memorandum and Articles of Association of Richmond. Article 32 provides as follows in respect to the transaction of business of the Company,

> "*The quorum of Directors for transaction of business shall unless otherwise fixed by directors be two*".

In his testimony Melville emphasised as follows,

> "*Article 32 of the Memorandum and Articles of Association says that quorum was two Directors*".

16. Counsel for the Plaintiff submitted that the Board of Directors of Richmond comprise of Melville, Mwangi and Mwangi's wife and that it would have been impossible to obtain a Board resolution to commence the suit. This was because Mwangi was the one to be sued and that neither Mwangi nor his wife could agree to a Board resolution to commence the suit. An argument that it was impractical to obtain a resolution.

17. On another front, Richmond argues that Mwangi choose not to address the issue notwithstanding that he raised it in his defence. It being submitted that 'he who asserts must prove'. Richmond asked the Court to find that the burden of proof lay in the hands of the Defendants who needed to discharge it.

18. On a slightly different argument, Richmond submitted:-

> "*Not at any point did the Defendants challenge the locus of the Plaintiff to institute these proceedings having no resolution to institute the same. It was not necessary for the directors of the Company who include the 1st Defendant in this suit to issue a resolution to institute the proceedings, neither was it possible at the time. The action that has been brought is in the Plaintiff's, that's the Company's interest"*.

19. Richmond beseeches the Court to look at the justice of the matter and to find that a fraud had been committed against the Company.

20. For the 2nd Defendant it was asserted that a Company can only sue in its own name with the sanction of its Board of Directors or by a resolution in a General or Special Meeting. Citing the decision in East Africa Portland Cement Ltd vs. Capital Markets Authority & 4 others [2014] eKLR, the 2nd Defendant submitted that the Advocates acting for the Plaintiff did not act with due diligence to establish that they had the relevant authority to institute this suit. The Court was asked to find that the suit was improper and to dismiss it accordingly.

21. The first issue to be addressed is who shouldered the onus to prove the existence or otherwise of a Board Resolution authorising the commencement of this suit. The 1st Defendant who is a Director of the Company was the one who took up the plea and this was embraced by the 2nd Defendant when it was agreed in the statement of issues that the issue was not only as between the Plaintiff and the 1st Defendant but also the Plaintiff and the 2nd Defendant. Now, there were 3 Directors of the Company namely, Melville, Mwangi and Mwangi's wife. If Melville and Mwangi's wife had sat down to pass a resolution to sue, then it would be information in the Special knowledge of the Company. These being Civil proceedings, section 112 of The Evidence Act is relevant and provides:-

> "*In Civil Proceedings, when any fact is especially within the knowledge of any party to those proceedings the burden of proving and disproving that fact is upon him*".

This Court would think that the burden of proving that the Plaintiff had a proper Board resolution to institute this suit is with the Plaintiff Company which has special knowledge as to whether or not that Board resolution existed.

22. Even if I was wrong on this finding as between the Plaintiff and the 1st Defendant because the 1st Defendant was also a Director, it would be different in regard to the 2nd Defendant. Let me emphasis again that the issue of the propriety of the proceedings was a live issue as between the Plaintiff and the 2nd Defendant. As between the Plaintiff and the 2nd Defendant, the Plaintiff would have the special knowledge as to its internal workings including whether or not a resolution was duly passed to institute the proceedings. Clearly then the Plaintiff Company (at least as against the 2nd Defendant) borne the responsibility, by dint of section 112 of the Evidence Act, to provide proof of the

requisite resolution.

23. Having failed to discharge that onus, this Court finds that this suit was commenced contrary to the Memorandum and Articles of the Plaintiff's Company. Indeed in his final submissions Counsel for the Plaintiff seems to concede to this when he argued that it was impossible for Melville to move the Company for such a resolution given that he was in the minority.

24. That takes the Court to the next issue. Can it be said that, given his minority status, Melville was so helpless and without an avenue to bring an action that could protect the interests of the Company? I would think not because Common Law and at the moment The Companies Act has created the devise that is the Derivative Action. In Ghelani Metals Limited & 3 others v. Elesh Ghelani Natwarlal & another [2017] eKLR, Onguto J. explained the purpose of a Derivative Action as follows:-

> "37. *Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: see* ***Wallersteiner v Moir (No.2) [1975] 1 All ER 849"***

25. If Melville thought that it was impossible to obtain a board resolution of the Company to commence an action against Mwangi and the 2nd Defendant, then he should have pursued a derivative action. He was not without recourse. To embark on an action in the name of the Company which is not a Derivative Claim and made without due authority of the Company was to walk a treacherous path!

26. This Court must find that the Claim has met an insurmountable obstacle and cannot go any further. This Court has no alternative but to dismiss the suit with costs. Costs shall only be to the 2nd Defendant who actively participated in these proceedings.

Dated, Signed and Delivered in Court at Nairobi this 10th day of April, 2019.

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F. TUIYOTT

JUDGE

PRESENT;

Chege for 2nd Defendant

Njoki for Kahonge for Plaintiff

Nixon - Court Assistant