



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCC NO. 56 OF 2018

WILSON KIPKEMBOI KIPKOTI.....1ST PLAINTIFF/RESPONDENT

LALLY FARM LIMITED.....2ND PLAINTIFF/ RESPONDENT

VERSUS

SAMUEL KIPTALA CHEMILIL.....1ST DEFENDANT

ALBERT KIMWATAN.....2ND DEFENDANT

ENDO INVESTMENTS LIMITED.....3RD DEFENDANT

SIRIKWA ELDORET HOTEL LTD.....4TH DEFENDANT/OBJECTOR

MAYFAIR SERVICES & INVESTMENTS LIMITED.....5TH DEFENDANT/OBJECTOR

RULING

1. The preliminary objection is seeking to have the Plaintiff's suit dismissed on grounds that;

- i. The court lacks requisite jurisdiction to entertain the matter by dint of clause 9 of the shareholders agreement between the parties herein dated 3rd November 2011;
- ii. The plaintiff's application and the suit in its entirety offends the mandatory provisions of the Companies Act as the same being a derivative claim has been preferred without leave of the court.

2. The matter was to be canvassed through written submissions by both parties.

DEFENDANTS/ OBJECTOR'S WRITTEN SUBMISSIONS

3. In citing a brief history of the parties, it is said that the **4th and 5th defendant** are limited liability companies incorporated under the Companies Act where the 1st and 2nd defendants through their company (**the 3rd Defendant**) hold 70% of the shares in the **4th and 5th defendants** while the **1st and 2nd plaintiff** own 30% shares. The **1st plaintiff and the 1st & 2nd Defendants** are therefore directors of the 4th & 5th defendants.

4. The defendants deduced the issues for determination as being (a) the derivative action and (b) the jurisdiction of the court.

5. The defendant highlights that it is now mandatory requirement for an application to be made for permission to continue a derivative claim, citing **section 239 of the Companies Act**. They cite **Ghelani Metals Ltd & 3 Others vs. Elesh Ghelani Natwaral & another** as the legal foundation for the need to file an application for permission. As a consequence of this, the defendants urge that this matter should not be entertained until the approval of the court is obtained. The approval is said to weed out excessive claims which may not be in the interest of the company and as a result end up putting the company into more trouble than it was.

6. They further state that it is also crucial that the plaintiffs establish that they have the **locus standi** to institute a matter/ to continue a claim on behalf of a company. They state that failure to find that the case is incompetent would amount to an abuse of court process and offend the

overriding objective enshrined under **Article 159 of the Constitution and the Civil Procedure Act.**

7. The defendants claim that the suit has no business being in court as it was brought courtesy of a personal vendetta by the plaintiffs and moreover, there are other avenues through which the matter could have been pursued such as at shareholder meetings and through the arbitration cause.

8. On the issue of jurisdiction, the defendants cite the renowned case of **Mukisa Biscuit Co. Ltd. vs. West End Distributors Ltd. (1969) EA 696**. They state that the court lacks requisite jurisdiction to hear and determine the matter since their shareholders' agreement states that recourse shall be sought in negotiations and then arbitration in the event it fails.

9. On account of this, they say that the court is incompetent to make any step with regards to the matter. The defendants seek that the suit be struck out and costs be borne by the plaintiffs.

PLAINTIFF/ RESPONDENT'S WRITTEN SUBMISSIONS

10. On the issue of validity of the preliminary objection, the plaintiffs cited several cases reiterating that a preliminary objection should only be founded upon a settled point of law to the intent that its application to the undisputed facts, leads to one conclusion: that the facts are incompatible with the point of law.

11. They highlighted that it is improper for a preliminary objection to be used as a sword, for winning a case otherwise destined to be resolved judicially and on the merits. They state that where there exists any proper contest as to the facts, the suit ought not to be dismissed by way of preliminary objection.

12. The respondents claim that there are several factual assertions presented before the court and therefore the suit is not a suitable candidate for a preliminary objection.

13. On Jurisdiction, the plaintiff/respondents argue that the arbitration clause in their agreement does not oust the court's jurisdiction to hear and determine disputes. They further cite Article 165 (3) which grants the High court unlimited original jurisdiction in criminal and civil matter. The plaintiffs cited authorities to the effect that the presence of an arbitration clause does not necessarily preclude the assured from bringing an action to enforce his claim resting with the decision in **AVIATION AND ALLIED WORKERS UNION KENYA V KENYA AIRWAYS LTD & 3 OTHERS [2015]eKLR** where the Supreme Court of Kenya was categorical that in any suit where there exists any proper contest as to the facts, then the suit cannot be subject to a dismissal by way of a preliminary objection.

ANALYSIS & DETERMINATION

14. In addressing the issue of Jurisdiction the Arbitration Act which the parties relied upon in coming up with their arbitration clause is a self-regulating legislation.

Section 6(1) states;

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or take any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed, or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(c) Notwithstanding that an application has been brought under Section (1) and the matter is pending before the court, arbitral proceedings maybe commenced or continued and an arbitral award may be made.”

15. Clause 9 of the Share-holders' agreement is categorical that in the event of a dispute, the first step is an attempt at an amicable settlement, and if such negotiations fail then it shall be referred to arbitration. Certainly the arbitration clause does not oust the jurisdiction of the court nor does it bar the parties from accessing the court process [see **Vol 25 Halsbury's Laws of England 4th Edition page 275**]. However I do not agree with the proposition that the issue of referring the matter for arbitration cannot be raised at the preliminary stage. In my view this is the appropriate time to raise it as it is the initial option before court process litigation begins. What emerges from a lot of case law is that the first step to take on the part of the defendants was to have a stay of proceedings once the plaintiff's filed a suit. This was exhibited in the case of **CORPORATE INSURANCE CO. -VS- WACHIRA (1995) IEA 20** quoted in the **SAFARICOM LTD -VS- FLASHCOM LTD (2012) EKL**R, which held that if the defendant wanted to invoke the arbitration clause, (reference of disputes to arbitration) it ought to have applied for a stay of proceedings after appearance and before delivery any other pleading. Parties in an agreement/contract are bound by the mutually agreed and express terms of their agreement. It is not the duty of a court to re write the agreement for the parties.

16. Consequently, though the arbitration clause does not oust the court's jurisdiction in handling matters such as the instant case, the parties ought to stay with the mode of dispute resolution they had initially agreed upon.

17. A look at the issues raised by the claimants as well as the rebuttal by the defendants indicates that there are triable issues as envisaged under **Section 6(1) a & b of the Act meaning that** the agreement/contract between the parties is still in effect and not void.

18. The learned judge in the case of **UNION TECHNOLOGY KENYA LTD V COUNTY GOVERNMENT OF NAKURU [2017] EKLR** stated thus;

“Section 6(2) does not prohibit a court from referring a dispute to arbitration despite provisions of Section 6(1) of the Arbitration Act. In my view the nature of the dispute and the contract subject of the dispute must be taken into account to determine its appropriateness for arbitration or otherwise.”

19. Clause 9 of their Shareholders Agreement does not oust the jurisdiction of the Court as this would make the agreement void ab initio. It should however be construed to empower the agreement made between the parties at the onset and not to summarily disqualify the agreement all together. I hold the view that whether breach of contract alleged constitutes a dispute to be referred to arbitration is all the reason why these proceedings should be stayed while the parties exhaust the arbitration window first. I decline to dismiss the suit on this limb. I will order stay of the proceedings pending hearing and determination of the arbitration. The matter shall be mentioned after 60 days to confirm the status.

20. On the issue of the derivative claim, the nature of the suit i.e. where the part of the directors/shareholders are displeased or in disagreement with another part of the directors/shareholders for alleged breach, negligence or default constitutes a derivative claim as captured under Section 238 of the Companies Act.

A derivative action has been described as a mechanism which allows shareholders to litigate on behalf of a corporation against and insider or a third party whose action has injured the corporation. It is encapsulated under section 238 of the Companies Act. It is brought 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 directive of the company.

21. In **AMIN AKBERALI MANJI & 2 OTHERS VS ALTAF ABDULRASUL DADANI & ANOTHER (2015) ekdr** a case which has been cited by the defendants in their submissions;

“Leave of the court shall be obtained before filing a derivative suit but may also be obtained to continue with the suit once filed.

22. In this same case, the court proceeded to refer to the text “Minority Shareholders: Law, Practice and Procedure” by Joffe where it was cited that,

“There is no approved pre-action protocol in relation to derivative action” and that after the claim form has been issued, the claimant is required to make an application –which must be supported with written evidence- for permission to continue with the claim.” It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such an action, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in Foss vs Harbottle.

23. Being shareholders, the parties cannot be said to be lacking in *locus standi*. That said, it is clear that there is room for the Plaintiffs to seek the leave/permission required by the law and this can therefore not stand as a ground to dismiss the suit.

24. In view of these factors, the preliminary objection filed by the defendants ought not to succeed. The court has already given directions as to whether the matter returns to be canvassed first in arbitration. I make no orders on costs. Mention on 18th day of June 2019 at Eldoret

DELIVERED, SIGNED AND DATED THIS 2ND DAY OF MAY 2019 AT ELDORET.

H. A. OMONDI

JUDGE