



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 102 OF 2019**

**VSO JITOLEE.....APPELLANT**

**-VERSUS-**

**BETTY WAFULA.....RESPONDENT**

**RULING**

1) Betty Wafula, the 1<sup>st</sup> respondent herein, filed an action by way of a plaint against VSO Jitolee the appellant herein and 2 others before the Chief Magistrate's Court in which she sought for judgment as follows:

- a) A permanent injunction against the defendants from transferring, selling or otherwise appropriating the plaintiff's KCB shares;***
- b) A declaration that the plaintiff is the owner of 27,500 shares held by the defendants and that the defendants hold the shares in trust for her;***
- c) An order compelling the defendants to transfer to her 27,500 shares in KCB Bank Limited;***
- d) An order for account for dividends for the years ended 2010, 2011, 2012, 2013, 2014, 2015, and 2016 as declared and paid by KCB Bank Kenya Limited;***
- e) Interest on the dividends unremitted to the plaintiff by the defendants at the rate of 20% per annum from the time the dividend was transmitted by KCB Bank Kenya Limited until payment in full;***
- f) General damages for breach of their trustee position and the resultant anxiety, anguish and inconvenience occasioned to the plaintiff***
- g) The costs of this suit.***

2) The appellant took out the motion dated 28.5.2018 whereof it applied for the 1<sup>st</sup> respondent's suit to be struck out for various reasons. The application was opposed by the 1<sup>st</sup> respondent. Hon. Gesora, learned Chief Magistrate, heard the application and had it dismissed. Being aggrieved by the decision, the appellant preferred this appeal.

3) The appellant has now taken out the motion dated 5<sup>th</sup> March 2019 in which it sought for the proceedings of the trial court to be stayed pending the hearing and determination of this appeal. The 1<sup>st</sup> respondent filed a replying affidavit he swore to oppose the motion.

4) It is the submission of the appellant/applicant that this appeal raises fundamental issues of law and the prosecution of the suit before the trial court will be detrimental to the appellant/ applicant's rights in law and that the applicant stands to suffer irreparable loss and damage if the order for stay of proceedings is not granted.

5) The applicant further pointed out that if the case proceeds for hearing and the issue is determined it may contradict the possible judgment and orders from this court. It is also argued that if the lower court proceeds for hearing, judicial time as well as that of the parties will have been wasted at an unnecessary expense.

6) The respondent opposed the motion arguing that the same lacks merit and is meant to delay the determination of the suit before the trial court. It was also pointed out that the threshold for the grant of an order for stay of proceedings has not been met. The respondent further

stated that the applicant has failed to demonstrate the substantial loss or prejudice it would suffer if the order is denied.

7) I have carefully considered the grounds stated on the face of the motion dated 5<sup>th</sup> March 2019 and the facts deponed in the affidavits filed in support and against the motion. I have further taken into account the oral submissions of the applicant's advocate. Though the respondent's advocate did not turn up in court during the interpartes hearing of the application, this court took into account the facts deponed in the respondent's replying affidavit as enjoined by law.

8) It is not in dispute that the appellant/applicant took out the motion dated 28<sup>th</sup> May 2018 where it sought to have the appellant's suit ordered struck out with costs for the following reasons: **First**, that the appellant is a duly registered NGO under the **Non-governmental Organizations Act, 1990**, hence it is precluded from conducting any form of business for profit. **Secondly**, that the subject matter of the suit was a criminal act perpetrated by the plaintiff. **Thirdly**, that the suit does not state the nature of shares allegedly held in trust of the respondent and that the suit does not have evidence of the existence of a trust deed between the respondent and the appellant.

9) The respondent denied the allegations arguing that appellant held the shares in trust for her hence the shares held in trust for her did not constitute an illegal transaction.

10) It was also argued that the organization did not profit from the transaction since the shares were purchased for the benefit of the respondent's national members and not for the organization.

11) The learned Chief Magistrate considered the rival arguments and came to the conclusion that there was no merit in the application proceeded to dismiss the appellant's/applicant's application.

12) The appellant is before this court seeking to challenge the dismissal order on appeal. One of the grounds of appeal which is put forward is that the learned Chief magistrate failed to appreciate the fact that the appellant did not exist at the time of the investment scheme was hatched and set up hence it could not be held liable for any acts or omissions. This is one of the fundamental issues which has to be determined on appeal.

13) If the issue inter alia is determined in favour of the appellant, it will mean that the suit would have to be struck out. Therefore if the suit is allowed to proceed to full hearing, the scarce judicial time will have been wasted. The trial court may also end up pronouncing a decision which may be in conflict with that of this court.

14) I am convinced that the appellant's motion is meritorious. The same is allowed in terms of prayer 2. Consequently, an order for stay of proceedings in Nairobi C.M.C.C No. 7283 of 2017 Betty Wafula =vs= VSO Jitolee and 3 others pending the hearing and determination of this appeal. Costs of the motion to abide the outcome of the appeal.

**Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> day of July, 2019.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....**for the Appellant**

.....**for the Respondent**