



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 25 OF 2015

ABDULKARIM SALEH MUHSINPLAINTIFF

VERSUS

NEDIM MOHAMED IBRAHIM.....1ST DEFENDANT

SARA ABDELLA ABDUSEMED.....2ND DEFENDANT

ZUMZUM INVESTMENT LIMITED.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

1. The plaintiff on 17th December, 2014 filed an application dated 16th December, 2014 under the provisions of Sections 1A, 1B, 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 40(1)(a) and Order 40(3) of the Civil Procedure Rules, 2010 and any other enabling provisions of the law. He seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) That this court be pleased to issue an interim injunction restraining the 1st and 2nd defendants whether by themselves and their agents or whomsoever from selling, leasing or disposing of all subdivision plots under mother Title No. CR 17051, plot No. CR 19849 (land reference No. sub division No. 5905/1/MN, plot No. CR 9750 (land reference No. sub division No. 1067/1/MN, plot No. Mombasa/BLK XXIII/205, plot No. MN/1/6431 and plot No. MN/1/6432 respectively, pending the hearing and determination of this suit;

(v) That the Honourable court be pleased to issue an interim injunction against the 2nd and 3rd defendants from interfering in any way whatsoever with the 3rd defendants property namely all sub division plots under the mother Title No. 17051, PLOT NO. CR NO. 19849 (LAND REF NO. SUB DIV NO. 5905/1/MN, PLOT NO. CR 9750 (LAND REF NO. SUB DIV NO. 1067/1/MN, PLOT NO. MOMBASA/BLK XXIII/205, PLOT NO. MN/1/6431 and PLOT NO. MN/1/6432 without the sanction of the 3rd defendants' entire Board of Directors, pending the hearing and final determination of the suit herein;

(vi) That in the alternative an order be issued for the preservation of the 3rd defendant's properties namely all sub division plots under the mother Title No. 17051, PLOT NO. CR NO. 19849 (LAND REF NO. SUB DIV NO. 5905/1/MN, PLOT NO. CR 9750 (LAND REF NO. SUB DIV NO. 1067/1/MN, PLOT NO. MOMBASA/BLK XXIII/205, PLOT NO. MN/1/6431 and PLOT NO. MN/1/6432 pending the determination of this suit; and

(vii) That the cost of this application be provided for.

2. The application is supported by the affidavit of the plaintiff, Abdulkarim Saleh Muhsin, sworn on 15th December, 2014 and a

supplementary affidavit sworn on 28th July, 2015.

3. On the 6th July, 2015 the 1st, 2nd and 3rd defendants filed an application under the provisions of Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 2 Rule 15(b), (c) and (d) of the Civil Procedure Rules, Section 118(1)(a) of the Companies Act, Article 159(2) of the Constitution of Kenya, the inherent jurisdiction of the court and all the other enabling provisions of the law.

4. They seek the following orders:-

(i) Spent;

(ii) That this court be pleased to set aside and/or vacate that part of the order of this Honourable Court (Lady Justice A. Omollo) made and/or issued on 17th December, 2014 granting the plaintiff leave to institute a derivative suit on behalf of the 3rd defendant herein (prayer No. 2) or in the alternative, the plaintiff be denied leave to continue this suit as a derivative action on behalf of the 3rd defendant;

(iii) That this Court be pleased to grant an order of rectification of the register of Zumzum Investments Limited (Incorporation No. C 38413) under Section 118 of the Companies Act, a notice of such rectification be immediately given to the office of the Registrar of companies, requiring it to forthwith-

(a) Revoke the transfer of shares registered on 16th August, 2004 from Nedim Mohamed Ibrahim to the plaintiff herein, Aabdulkarim Saleh Muhsin and any and/or all subsequent transfers of those shares to other persons or entities;

(b) Remove and/or delete the name Abdulkarim Saleh Muhsin as both a director and shareholder in Zumzum Investments Limited; and

(c) Remove and/or delete the name of Lloyd Mwenda Njenga (CPS Reg No. R/1352) as the Company Secretary of Zumzum Investments Limited;

(d) Rectify the register of Zumzum Investments Limited (Incorporation No. C38413) to revert to its status as at 4th June, 2008 where the only Directors and shareholders of the company were as follows:-

1. Mr. Nedim Mohamed Ibrahim

P. O. Box 89999 Mombasa

Director and shareholder

149,999 shares

2. Sara Abdalla Abdulsamed

P.O. Box 89999

Director and shareholder

1 share

Total shares 150,000

(iv) That this court be pleased to strike out the plaintiff's plaint dated 16th December, 2014, with costs to the 1st, 2nd and 3rd defendants; and

(v) That this court be pleased to make such further or alternative orders as it may deem fit in the circumstances.

5. The 1st defendant swore an affidavit on 1st July, 2015 on behalf of himself, the 2nd and 3rd defendants, to not only support their application but also to respond to the plaintiff's application dated 16th December, 2014.

6. The plaintiff's Counsel filed written submissions on 25th May, 2015 and a list of authorities on 28th May, 2015 to support the application dated 16th December, 2014. The said submissions are to the effect that the plaintiff in the year 1999 became a Director and shareholder of the 3rd defendant. It was stated that the 3rd defendant became profitable and secured large tracts of real estate but it was thereafter plagued by disagreements between the plaintiff on one hand and the 1st and 2nd defendants on the other. It was submitted that the said disagreements arose from the 1st defendant's reluctance to account for the day to day management/running of the 3rd defendant and especially dealings in the company's real property.

7. It was submitted for the plaintiff that although he is the majority shareholder, he had left the daily management of the company to the 1st

defendant. He however took over the management of the 3rd defendant due to the 1st defendant's failure to account.

8. It was further stated that the plaintiff lodged caveats against the 3rd defendant's properties including the suit premises herein. The plaintiff posited that during the pendency of the registered caveats, the 1st and 2nd defendants unlawfully and irregularly sold 11 plots belonging to the 3rd defendant without consultation with the plaintiff. It was thus argued that due to the deep wrangles between the plaintiff and the 1st and 2nd defendants, the 3rd defendant which is a corporate entity, was unable to institute legal proceedings in order to forestall any other irregular and illegal sale of its properties by the 1st and 2nd defendants.

9. It was also argued that the plaintiff's actions as the majority shareholder, Chairman and Director of the 3rd defendant had been infringed by the irregular and illegal sale of its assets and stood to suffer irreparable loss in if the 1st and 2nd defendants continued with the wanton sale of company properties for their own personal gain. It was submitted that it was for the foregoing reasons which had rendered the instant suit necessary.

10. The plaintiff relied on the exception to the rule in **Foss vs Harbottle** 1843) 67 ER 189 on what a claimant is required to do when a wrong is alleged to have been done to a company.

11. Counsel for the plaintiff relied on the case of **Pender vs Lushington** (1877) 6 Ch. D 70 to show that a derivative action can be maintained whether a claimant votes in the majority or the minority to have his rights protected as appertains to the property of a company.

12. It was submitted that the personal and individual rights of the plaintiff as a member, majority shareholder and director in the 3rd defendant company were being invaded by the sale of the suit property herein.

13. On the issue of an interlocutory injunction, it was submitted that the plaintiff had satisfied the 3 principles for grant of an injunction as held in the case of **Giella vs Cassman Brown Ltd** [1973] EA 358.

14. It was submitted that the plaintiff had established a prima facie case with a probability of success due to the wanton, irregular and illegal sale of the 3rd defendant's properties, to the detriment of the plaintiff.

15. On the issue of irreparable loss/injury it was submitted that in **Films Rover International Limited and Others vs Cannon Film Sales** [1986] 3 ALL ER 772, the court defined irreparable loss as that injustice which would be caused to the defendant if the applicant were granted the injunction and later failed at the trial to establish that the injustice that would be caused to the plaintiff if the injunction were to be refused, would outweigh the benefits of the order being granted.

16. With regard to the application by the 1st defendant dated 1st July, 2015, the plaintiff filed a replying affidavit and grounds of opposition on 31st July, 2015.

17. The 4th defendant filed no response to the applications addressed in this ruling.

18. On 1st August, 2015, Counsel for the defendants filed his written submissions to address the application that had been filed by the plaintiff on 16th December, 2014 and the defendants' application dated 1st July, 2015. In the said submissions, the said Counsel stated that the parties consented to the two applications being disposed of together.

19. With regard to the application by the 1st, 2nd and 3rd defendants dated 1st July, 2015 it was submitted that although leave had been given to the plaintiff *ex parte* to institute a derivative suit, no leave was sought nor granted by the court for the plaintiff to continue with the suit as a derivative action beyond close of pleadings, which was a condition precedent to continuing with the proceedings herein or for granting the other prayers sought by the plaintiff.

20. It was submitted that the order made on 17th December, 2014 by Lady Justice A. Omollo, did not preclude this court from considering whether the plaintiff has a legal basis for continuing with the action as a derivative suit on behalf of the 3rd defendant, and if not, to proceed to set aside the leave granted to institute the derivative proceedings.

21. It was further submitted that what was being presented under the guise of a derivative claim was an individual claim of harm by the plaintiff that his personal interest as a shareholder was being adversely affected, yet nothing ultra vires the 3rd defendant's Articles of Association was made. Further, that the harm sought to be remedied had not been suffered by all the shareholders collectively. Counsel made reference to the rule in **Foss vs Harbottle** (*supra*) which provides that a controlling or even sole shareholder does not have a personal cause of action for a wrong done to the corporation.

22. It was submitted that generally, a derivative action is brought by aggrieved minority shareholders with the ability to pursue a cause of action on behalf of a corporation to redress wrongs done in respect of the corporation. Further, irregularity in the internal running of a company can be rectified by a vote/resolution at the company's meetings. This court was urged to set aside/vacate the order made on 17th December, 2017 granting the plaintiff leave to institute a derivative suit on behalf of the 3rd defendant. In the alternative, the 1st, 2nd and 3rd defendants prayed for the plaintiff to be denied leave to continue this suit as a derivative action on behalf of the 3rd defendant.

23. On the issue of rectification of the register of the 3rd defendant, incorporation certificate No. C38413, it was submitted that under Section 118(1) of the Companies act, such a procedure is resorted to only in the clearest of cases. The case of **Prab Hualal Tejpa Haria and Another vs Pravin Chandra Meghji Dodhia and 2 Others** [2007] eKLR was cited to support the argument.

24. Counsel for the 1st, 2nd and 3rd defendants also relied on the case of **MCFOY vs United Africa Co. Limited** [1961] 3 All E.R. 1169 to indicate that the plaintiff unlawfully obtained shareholding in the 3rd defendant since no meeting was called by the 1st and 2nd defendants wherein they resolved to appoint the plaintiff as a Director or transfer their shares to him. Further, that no resolution was signed by the 1st and 2nd defendants to transfer their shares to the plaintiff.

25. It was submitted that the plaintiff prepared fictitious minutes which he dated 7th November, 2009 and signed the same when he was not a Director of the 3rd defendant. It was claimed that the plaintiff appointed Lloyd M. Njenga as the Company Secretary and the two parties purported to constitute themselves into a Board of the 3rd defendants and registered the transfer of shares.

26. It was further claimed that the foregoing was done fraudulently thus the prayer for rectification of the register in a summary manner, for the 3rd defendant in the companies registry.

27. The defendant's Counsel in submitting on the plaintiff's application dated 16th December, 2014 stated that he had not established a *prima facie* case with a probability of success for the reason that the suit by the plaintiff is not a derivative action but an individual claim.

28. Further, that the case must be considered in the context of the 3rd defendant's memorandum and articles of association and the reliefs sought in the plaint dated 16th December, 2014.

29. It was submitted that the order sought in paragraph 5 of the plaintiff's application was a final order which this court should not grant. It was argued that injunctive relief should not be granted to the plaintiff for he had failed to disclose material facts such as how he became a shareholder in the 3rd defendant and how the 1st and 2nd defendants' shares were transferred to him.

30. It was also submitted that the balance of convenience lies heavily in favour of denying the orders sought by the plaintiff as granting of injunctive or preservation orders would lead to the irreversible, decline and ultimate death of the 3rd defendant.

ANALYSIS AND DETERMINATION

31. The issues for determination are:-

(i) If this court should set aside the leave granted to the plaintiff to file a derivative suit or if he should be granted leave to continue the suit herein as a derivative action;

(ii) If an interim injunction or conservatory order should be issued against all the defendants pending the hearing and determination of this case;

(iii) If this court should order rectification of the register for the 3rd defendant incorporated under certificate No. C.38413 at the companies' registry; and

(iv) If this court should strike out the plaintiff's plaint dated 16th December, 2014 with costs to the 1st, 2nd and 3rd defendants.

32. The court must from the outset consider an aspect of this case that came up in the course of the proceedings herein after the plaintiff filed the application dated 13th February, 2017 seeking leave of the court to admit further/additional evidence prior to the delivery of the ruling in respect to the application dated 16th December, 2014.

33. The parties herein entered into a consent on 25th September, 2018 which was adopted by the court. The effect of the said consent was *inter alia*, to allow the application dated 13th February, 2017. On the same day through the same consent, the proceedings in this case were stayed pending the outcome of investigations into the 3rd defendant's company by the Directorate of Criminal Investigations and the Registrar of Companies.

34. Following forensic examination of some documents in this case, a Forensic Document Examiner's report was filed on 1st July, 2019. Consequently, leave was granted to Counsel for the parties herein to file submissions based on the outcome of the said report. Counsel for the plaintiff filed supplementary submissions on 16th July, 2019. The defendants' Counsel filed none.

35. This court will replicate the outcome of the forensic examination of the documents submitted to the Document Examiner first so that the same can be borne in mind when considering the issues raised by the plaintiff and defendants in their respective applications.

36. Through an exhibit memo received in the Document Examiner's Office on 6th May, 2019, Superintendent John Muinde undertook forensic examination of various documents outlined on the said memo form, on the request of Corporal Reuben Onyiego. For ease of understanding, the documents marked A1-A15 were:-

(a) A-1 Transfer of share or stock by Nedim Mohamed Ibrahim to Abdulkarim Saleh Muhsin;

(b) A-2 Transfer of share or stock by Nedim Mohamed Ibrahim to Sara Abdella Abdulsemed;

- (c) A-3 Notice of situation of registered office or any change therein;
- (d) A-4 Letter of appointment of Company Secretaries;
- (e) A-5 Shareholders/Directors Resolutions;
- (f) A-6 Certificates and other documents accompanying annual returns for year 2009;
- (g) A-7 Particulars of directors and secretaries;
- (h) A-8 Certificates and other documents accompanying annual returns for year 2010;
- (i) A-9 Particulars of directors and secretaries;
- (j) A-10 Minutes of Annual General Meeting held on 1st November, 2010;
- (k) A-11 Attendance sheet for Annual General Meeting held on 1st November, 2010;
- (l) A-12 Power of Attorney issued to Abdulkarim Saleh Muhsin by Nedim Mohammed Ibrahim and Sara Abdella Abdulsemed on 22nd May, 2002;
- (m) A-13 Middle East Bank account opening specimen signatures for:
 - a. Abdul Karim Saleh Muhsin.
 - b. Nedim Mohamed Ibrahim.
 - c. Sara Abdala Abdulemed.
- (n) A-14 Memorandum Acceptance signatures; and
- (o) A-15 Extract from the minutes of a meeting of the board of directors held on 7/4/2010 signed by the three directors.
- (p) B1 Extracts of the minutes of meeting of the board of directors held on 14/7/2011;
- (q) B2 Arbitration agreement signed by the three directors; and
- (r) B3 Letter of guarantee from Habib Bank Limited signed by the three directors
- (s) C1 specimen signatures of Abdulkarim Saleh Muhsin;
- (t) C2 Specimen signatures of Sara Abdella; and
- (u) C3 Specimen signatures of Nedim Ibrahim.

37. The Forensic Document Examiner analyzed and compared disputed signatures pointed by arrows in yellow ink on the exhibits marked A1- A15 with the standard signatures of Nedim Ibrahim Mohamed on the exhibit marked "C3" and his known signatures also pointed by yellow ink on B1 – B3. The Document Examiner was of the opinion that they were made by the same author.

38. The Forensic Document Examiner also examined and compared the disputed signatures pointed by arrows in pink ink on the exhibits marked A1- A15 with the standard signatures of Abdulkarim Saleh Muhsin on the exhibit marked "C1" and his known signatures also pointed by arrows in pink on "B1- B3". He was of the opinion that the signatures were similar and indistinguishable and in his opinion they were made by the same author.

39. He also examined and compared the disputed signatures pointed by arrows in blue ink on the exhibits marked "A1 – A15" with the standard signatures of Sarah Abdella Abdulsemed on the exhibit marked "C2" and her known signatures also pointed by arrows in blue ink on "B1 – B3". In his opinion, the signatures were similar and indistinguishable and made by the same author.

If the court should set aside the leave that was granted by the plaintiff to file a derivative suit or if the plaintiff should be granted leave to continue with the suit herein as a derivative action.

40. The 1st and 2nd defendants contention on the above issue was that leave to file a derivative suit was granted *ex parte* and that the plaintiff did not seek leave to continue with the said suit after close of pleadings. It was also argued that the plaintiff was after protection of his own rights as an individual and he had not brought the suit to protect the interests of Zumzum Investments Limited which is the 3rd defendant.

41. Whereas the plaintiff claimed to be the majority shareholder, the 1st and 2nd defendants vehemently denied having transferred their shares to him and alleged that he fraudulently transferred their shares to himself.

42. The Companies Act, No. 17 of 2015 in part XI makes provisions for derivative actions. In Section 238(i), it states that:-

“A *“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.”*

43. Section 238(3) of the said Act states as follows:-

“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.”*

44. Section 239 of the companies Act provides as follows:-

“(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 sub section (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.”*

45. The above provisions come to play in instances where a suit has already been filed but a member of the company wishes to proceed on with the suit as a derivative action.

46. In the present case, on 16th December, 2014 the plaintiff filed an application under certificate of urgency seeking leave to file a derivative suit. On 17th December, 2014, the application was considered *ex parte* and Judge A. Omollo granted leave to the plaintiff to institute a derivative suit on behalf of the 3rd defendant company.

47. On 27th April, 2015 Kasango Judge gave directions that the application dated 16th December, 2014 would be heard by way of written submissions. The Counsel for the parties herein complied by filing their respective submissions. It is the said application and the 2 others mentioned earlier that have given rise to this ruling.

48. On the issue of setting aside of the leave granted, I have considered the affidavit of the plaintiff herein and the plaint filed *vis-a-vis* the statement of defence filed and the replying affidavit by the defendants. The plaintiff's main complaint is that the 1st defendant failed to give an account of the 3rd defendant's properties when he was the Managing Director of the company. Further, that when there was a caveat in place in the land registry which had been lodged by the plaintiff, 11 plots which comprised sub-divisions under the mother Title No. CR 17051 were unlawfully and unprocedurally sold by the 1st and 2nd defendants.

49. The 1st defendant in his replying affidavit sworn on his own behalf and that of the 2nd and 3rd defendants averred that the plaintiff was not a Director and shareholder of the 3rd defendant. The 1st defendant also deposed in his affidavit that the plaintiff ended up being fraudulently registered as a Director and shareholder as per the CR 12 which was attached to the affidavit in support of the application dated 16th December, 2014. The 1st and 2nd defendants articulated their arguments through the said affidavit and annexures thereto.

50. Although none of the Counsel on record raised the issue of leave having been granted by A. Omollo, a Judge in the Environment and Land court, I have considered it necessary to address the issue following the Supreme Court decision in **Republic vs Karisa Chengo & Others** [2017] eKLR, which addressed the requirement for all courts to strictly act within their respective jurisdictions and oaths of office. The Supreme Court in the above decision stated thus:-

“[79] It follows from the above analysis that, although the High Court and the specialized courts are of the same status, as stated, they are different courts. It also follows that the Judges appointed to those courts exercise varying jurisdiction, depending upon the particular courts to which they were appointed. From a reading of the statutes regulating the specialized courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flow from Article 165(5) of the Constitution which prohibits the High Court from exercising jurisdiction in respect of matters “reserved” for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(c) Falling within the jurisdiction the courts contemplated in Article 162(2).”

51. The said Supreme Court decision was rendered after the plaintiff in this case had been granted leave *ex parte* to file a derivative suit. The 1st, 2nd and 3rd defendants challenged the said leave that was granted and prayed for it to be set aside albeit for different reasons. That court has no option but to set aside the leave that was granted on 17th December, 2014 to the plaintiff to file a derivative suit. Does the foregoing then sound the death knell to the suit herein? I think not. The issue of the Judge who heard the application dated 16th December, 2014 was a factor that was beyond the control of the plaintiff herein. If this court stops at the point of setting aside the leave that had been granted to the plaintiff, it will lead to him being denied justice through no fault of his own. This court must then consider if it can grant the plaintiff leave to continue with the suit filed on 16th December, 2014 as a derivative action.

52. In **Amin Akberali Manji & 2 Others vs Altaf Abdur Rasul Dadani and Another** [2015] eKLR, the Court of Appeal held as follows:-

“Leave of the court shall be obtained before filing of a derivative suit but may also be obtained to continue with the suit once filed. On this the court was right in adopting the exposition of the treatise “Minority shareholders”; Law, Practice and Procedure” by Joffe that “there is no approved pre-action protocol in relation to the 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 the action falls within any of the exceptions of the rule in Foss vs Harbottle.” (emphasis added).

53. The above means that this court has the discretion in this case to grant the plaintiff leave to continue the suit herein as a derivative claim depending on whether or not the he has met the exceptions of the rule in **Foss vs Harbottle** (supra).

54. In this case the plaintiff is the majority shareholder. That fact is supported by the Document Examiner’s Report. Can the plaintiff then, as a majority shareholder bring a derivative suit in the name of the company?

“In Sultan Hashem Lalji and 2 Others vs Ahmed Hasham Lalji and 4 Others [2014] eKLR, it was held thus:-

“It is the minority shareholders that are availed the protection by the exceptions since generally majority shareholders exercise power of the company and control its affairs”.

55. The 3rd defendant has 3 Directors and shareholders. These are the plaintiff, the 1st and 2nd defendants. Despite the plaintiff holding the position of a majority shareholder, he however cannot hold meetings on his own and arrive at resolutions without involving the 1st and 2nd defendants. He is a majority shareholder with no teeth to bite so to say, since the 1st and 2nd defendants, though minority shareholders are uncooperative and reconciliatory meetings that were called to resolve the deadlock amongst them yielded nought. The 1st and 2nd defendants therefore have undue advantage over the plaintiff. Since they hold the veto power they are unlikely to pass a resolution for the 3rd defendant to file a suit against them.

56. In the decision of **Grace Wanjiru Munyinyi and Another vs Gideon Waweru Githunguri and 5 Others** [2011] eKLR, the court while discussing the exceptions to the rule in **Foss vs Harbottle** in derivative actions stated thus:-

“There is also another remedy arising from the English Legal precedent on corporate law which continues to apply in Kenya more than 160 years since it was decided: Foss vs Harbottle (supra). As stated earlier, in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. This is the rule in Foss v Harbottle. But there are four exceptions to that rule which appear in the leading case itself but also in subsequent decisions on the subject.

Firstly, where the directors or a majority use their control of the company to paper over actions which would be ultra vires the company or illegal.

Secondly, if some special voting procedure would be necessary under the company’s constitution or under the company’s Act, it would defeat both if they could be side stepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed (Edwards v Halliwell [1950] 2 ALL ER 1064, Thirdly, where there is invasion of individual rights, such as voting rights (Pender vs Lushington [1887] 6 ch D 70. Fourthly, where a fraud on the minority is being committed. In all those cases, a “derivative action” could be brought before the court on behalf of the company where the wrongdoer is in control of the company or by the shareholder where his personal rights are violated.”

57. Jeseel MR in **Pender vs Lushington** [1877] 6 ch D 70 in amplifying an additional exception to the rule in **Foss vs Harbottle** stated as follows:-

“But there is another ground on which the action may be maintained. This is an action by Mr. Pender for himself. He is a member of the company, and whether he votes with the majority or the minority and he is entitled to have his vote recorded – an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in Foss vs Harbottle and that line of cases. He has a right to say, “whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you” what is the answer to such an action? It seems to me, it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it.”

58. In the circumstances of this case, although the plaintiff is the majority shareholder, he is disadvantaged because he has the 1st defendant and the 2nd defendant who is the 1st defendant’s wife working against him and they have the veto power which technically makes the plaintiff a minority when it comes to voting rights.

59. Taking all factors into consideration, I am satisfied that the suit herein falls in the exception to the rule in **Foss vs Harbottle** (supra) as *prima facie* the plaintiff has established that 11 plots which were the property of the 3rd defendant were fraudulently sold even after he had lodged caveats in the lands registry. I hereby invoke the inherent powers of this court and grant the plaintiff leave to continue with this suit as a derivative claim. In addition, the Forensic Document Examiner’s Report demonstrates that the plaintiff is a shareholder of the 3rd defendant company and he therefore has the *locus standi* to continue with this suit. .

If an interim injunction or a conservatory order should be issued against the 1st, 2nd, 3rd and 4th defendants pending the hearing and determination of this case.

60. The decision in **Giella vs Cassman Brown Ltd** [1973] EA 358 set out the principles of injunction as follows:-

- (i) The applicant must demonstrate a *prima facie* case with a probability of success.
- (ii) If the injunction is not granted, the applicant will suffer irreparable damage that cannot be easily compensated in damages; and
- (iii) If the court is in doubt, it will decide on a balance of convenience.

61. The plaintiff’s allegation is that despite demands having been made by the plaintiff requiring the 1st defendant who was the Managing Director of the 3rd defendant to account for its property, he failed to do so without any justifiable cause. Prior to the plaintiff taking over the day to day management of the company, he had lodged caveats against several parcels of land owned by the 3rd defendant. The plaintiff claims that the 1st and 2nd defendants managed to have 11 parcels of land sold without consulting the plaintiff and as such the company has suffered loss.

62. The plaintiff is apprehensive that if a temporary injunction is not granted against the defendants, there is a real risk of all the properties owned by the 3rd defendant being disposed of. The 1st and 2nd defendants assert that they are the only Directors and shareholders of the 3rd defendant and that the plaintiff was a business partner of the 1st defendant but not a shareholder or Director of the 3rd defendant.

63. After making reference to the Forensic Document Examiner’s Report and in particular the findings with regard to the exhibits marked A1 to A15, the report dated 17th May, 2019 leaves no doubt that the plaintiff is a shareholder and Director of the 3rd defendant. It is therefore my finding that the plaintiff has established a *prima facie* case with a probability of success.

64. On the principle of irreparable loss, the 3rd defendant is said to own several parcels of land under the mother Title CR 17051, PLOT No. 19849 (Land reference No. Sub Div. No. 5905/I/MN, Plot No. 9750 (Land ref No. 1067/I/MN and plot No. Mombasa /Block XXIII/205, which according to the plaintiff stand the risk of being sold if an interim injunction is not issued.

65. The 1st and 2nd defendants deposed that the plaintiff only entered into a profit sharing agreement in respect to plot No. 1482/II/MN Mombasa (the Kiembeni plot) which was divided into about 570 plots, whose profits were to be shared after recovering the principal sums.

66. In their replying affidavit, the 1st and 2nd defendants have made no mention to land reference No. 1067/I/MN and plot No. Mombasa /Block XXIII/205 against which injunctive orders are being sought. The allegations made by the plaintiff with regard to the said plots remain uncontroverted.

67. The plaintiff attached a certificate of title and a certificate of lease respectively, to show that the properties for which an injunction is sought are registered in the name of the 3rd defendant. It is this court’s considered view that if the said parcels of land were to be disposed of it is unlikely that the 3rd defendant would find others of similar acreage in the same location where they are situated and at the same cost as when they were acquired years back.

68. Having considered the foregoing facts and that the plaintiff is a shareholder and Director of the 3rd defendant, it is this court’s finding that the plaintiff stands to suffer irreparable harm which cannot be compensated by an award of damages if an order of a temporary injunction is not granted against the defendants to stop disposal, sale, alienation, leasing of the said properties by them or by their servants and/or agents.

69. A totality of the above factors leads to the inevitable conclusion that the balance of convenience tilts in favour of the plaintiff.

If the court should order rectification of the register for the 3rd defendant.

70. The above order cannot be granted at an interim stage but calls for the parties herein to adduce evidence to enable this court to determine if the register for the 3rd defendant needs to be rectified. The said prayer was made prematurely before this court.

If this court should strike out the plaintiff's plaint dated 16th December, 2014.

71. The reasons for striking out the plaintiff's plaint were not clearly brought out in the affidavit filed by the 1st, 2nd and 3rd defendants. It seems that the said order was being sought in the event that the court found that the suit herein was not a derivative claim. I have held that it is. I also find that there are triable issues that have been raised in the plaint that call for the hearing of the case to finality. I therefore decline to strike out the plaint.

72. The final orders are that:-

(i) The plaintiff is granted leave to continue with the suit herein as a derivative claim on behalf of the 3rd defendant;

(ii) That an interim injunction is hereby issued restraining the 1st and 2nd defendants whether by themselves and their agents or whomsoever from selling, leasing, transferring, or disposing off all sub division plots under the mother Title NO. 17051, PLOT NO. CR. NO. 19849 (LAND REF NO. SUB DIV NO. 5905/1/MN, PLOT NO. CR 9750 (LAND REF NO. SUB DIV. NO. 1067/1/MN, PLOT NO. MOMBASA/BLK XXIII/205, PLOT NO. MN/1/6431 and PLOT NO. MN/1/6432 the suit properties herein pending the hearing and determination of this suit;

(iii) An interim injunction is hereby issued against the 2nd and 3rd defendants restraining them from interfering in any way whatsoever with the 3rd defendant's property namely all sub division plot sunder the mother Title NO. 17051, PLOT NO. CR NO. 19849 (LAND REF. NO. SUB DIV NO. 5905/1/MN, PLOT NO. CR 9750 (LAND REF NO. SUB DIV NO. 1067/1/MN, PLOT NO. MOMBASA/BLK XXIII/205, PLOT NO. MN/1/6431 and PLOT NO. MN/1/6432 without the sanction 3rd defendant's entire Board of Directors pending the hearing and determination of the suit herein;

(iv) The application dated 1st July, 2015 is hereby dismissed; and

(v) The costs of the applications dated 16th December, 2014 and 1st July, 2015 are awarded to the plaintiffs.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 18th day of October, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Tebino for the plaintiff

No appearance for the defendants

Mr. Oliver Musundi - Court Assistant