



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. E157 OF 2019**

**JACQUELINE MACK DAMON.....APPLICANT**

**VERSUS**

**JEAN FRANCOIS RAYMOND LOUIS DAMON & 3 OTHERS....RESPONDENT**

**RULING**

**PRELIMINARY OBJECTION**

The Respondent/Applicant raised the **Preliminary Objection** to the application of 9<sup>th</sup> May 2019 on the following grounds;

- a) The annexures referred to in the affidavit in support of the Application do not comply with **Rule 9 of the Oaths and Statutory Declarations Rules made under Section 6 of the Oaths and Statutory Declarations Act** in that they are not properly Sealed and stamped;
- b) The application being commenced by way of miscellaneous application without any substantive suit being filed is misconceived, incompetent and fatally defective;
- c) The interim orders being sought are interlocutory in nature and as such intimate the need for a substantive suit for the purpose of hearing the matter. Therefore, the same cannot be granted against the respondent as requested in the application since this court has no jurisdiction to hear and determine this matter in its current form;
- d) Prayers for Orders 6, 7, 8 and 9 of the Application having been coached as final orders cannot be granted against the respondent as requested in the application since this court has no jurisdiction to hear and determine this matter in its current form.

The Applicant/Respondent filed Grounds of Opposition in response to the Preliminary Objection on the following terms;

- a) **Rule 9 of the Oaths and Statutory Declarations Rules made under Section 6 of the Oaths and Statutory Declarations Act requirements** though mandatory by virtue of the use of the word 'shall' it is not fatal as espoused in **R vs Public Procurement Administrative Review Borad Exparte Syner- Chemie Ltd [2016] eKLR**
- b) The Miscellaneous Application was/is filed vide requirements of **Section 780 & 782 of Companies Act** and its Preamble and the Applicant is entitled to be heard on merits in Court.
- c) The Applicant's application is within the jurisdiction of this Court as espoused in **John Muturi Nyaga vs Graham Alexander Walsh & 3 Others [2017] eKLR**.
- d) The High Court has unlimited and inherent original jurisdiction to hear , determine and make necessary orders to ensure that justice has been met in relation to matters that have been raised in the Applicant's application in accordance to **Article 165 COK 2010 Section 3 & 3A of CPA 2010 and overriding Objective in Section 1A & 1B CPA**.

**APPLICANT'S SUBMISSIONS**

Under **section 782 of the Companies Act 2015**, on the Power of Court to make orders for protection of members against oppressive conduct and unfair prejudice, it is stated as thus;

***1) If on the hearing of an application made in relation to a company under section 780 or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.***

Under section 238 of the Companies Act, 2015 a derivative claim may only be brought

(1) .....

(a) In respect of a cause of action vested in the company; and

(b) Seeking relief on behalf of the company.

(2) A derivative claim may be brought only –

a. Under this Part; or

b. In accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.

The application by the Respondent herein of 9<sup>th</sup> May 2019 is deemed improper and incompetent by virtue of the case of *Amin Akberali Manji & 2 Others vs Altaf Abdulrasul Dadani [2015] eKLR* where C.A. held;

*“Leave of Court shall be obtained before filing a derivative suit, but may also be obtained to continue suit once filed... 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 action, the Company entitled to relief and that the action falls within any of the exceptions to the rule in Foss vs Harbottle.”*

#### **RESPONDENT’S SUBMISSIONS**

The application before this Court has been brought under section 780 and 782 of the Companies Act No.17 of 2015 to which the following is what the said Sections provide for:

*“A member of a company may apply to the Court by Application for an order under section 782 on the ground that the company’s affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the Applicant); or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.”*

*“If, on the hearing of an Application made in relation to a company under section 780 or 781, the Court finds the grounds on which the Application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.”*

In *John Muturi Nyaga vs Graham AlexanderWalsh & 3 Others [2017]* the Court held the view that that the procedure of Section 780 Application;

*“must be one that allows and provides for a substantive interrogation of the Applicants grievances. In addition it must be a procedure within which a deserving Applicant can seek and obtain interlocutory relief pending the substantive outcome.”*

The Respondent reiterated the Court’s discretion to ensure the justice of the matter whereas complying with technical provisions and procedures and outlined the scope of the Court’s jurisdiction.

*“Subject to clause (5), the High Court shall have-*

*(a) Unlimited original jurisdiction in criminal and civil matters;*

*(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened;*

#### **DETERMINATION**

The Applicant raised 2 fundamental issues to the competency of the instant matter;

a) The sealing and stamping of the Affidavit in support to the Application filed on 9<sup>th</sup> May 2019; and

b) The fact of the Plaintiff/substantive suit not being filed and hence the Interlocutory orders under Order 40 CPR 2010 cannot be granted.

To the 1<sup>st</sup> issue if not in conformity of the statutory provision of **Rule 9 of the Oaths and Statutory Declarations Rules made under Section 6 of the Oaths and Statutory Declarations Act requirements**; the Applicant is granted leave to amend and comply.

With regard to whether, the application is competent before Curt as interim orders of injunction were granted and are deemed final orders as there is no Plaintiff, this Court concurs with the Applicant that the Miscellaneous Application under **Section 780 of Companies Act** pending the issue of leave to be canvassed and upon determination proceed to file a Plaintiff of the substantive suit.

a) With respect; the High Court has jurisdiction to hear and determine Miscellaneous Applications. However, in this case there are parallel and competing provisions and procedures of law to be complied with. In filing derivative suits and other suits. In the absence of any other issue I shall rely wholly on the excerpt from *in John Muturi Nyaga vs Graham Alexander Walsh & 3 Others [2017] eKLR* as follows;

**“A striking out order is drastic and draconian. It brings an end to proceedings and must be a measure of last resort. As observed earlier Nyaga may well be entitled to a Section 780 Application, he is guilty of abusing the Court process. While striking out of the suit maybe too punitive a measure, the existing state of affairs cannot be allowed to continue.....these proceedings be stayed pending the hearing and determination of the Application for leave.**

Similarly, in the instant case, the issue of leave shall be canvassed first depending on the outcome, the Applicant shall then be at liberty to file and serve a Plaintiff and the Defendant to file a Defense.

The Preliminary Objection is dismissed with costs to Respondent/Applicant. Parties to agree on the way forward it terms of hearing dates.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 4<sup>TH</sup> OCTOBER 2019**

**M. W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**MR. LIMO H/B MR. R. G. MWANGI FOR 1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENT**

**MR. WAKOKO FOR MR. AGIMBA FOR APPLICANT**

**COURT ASSISTANT – MS JASMINE**