



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION- MILIMANI
HCCOM E095 OF 2018

NJIRU AGERIA DEVELOPMENT CO.LTD.....1ST PLAINTIFF
FRANCIS MWANGI GITHUA.....2ND PLAINTIFF
ERIC S KAIRUWANAINA.....3RD PLAINTIFF
DANIEL NJUGUNA NGANGA.....4TH PLAINTIFF

VS

WAWERU KIRATU.....1ST DEFENDANT
ALEXANDER ONON.....2ND DEFENDANT
EDWARD NDIRANGU NDERITU.....3RD DEFENDANT
LILIAN WAMBUI WAWERU.....4TH DEFENDANT

RULING

BACKGROUND OF THE APPLICATION

The Defendants raised a preliminary objection to the application dated 15th April 2019 on the grounds that the 2nd, 3rd, 4th Plaintiffs lack *locusstandi* to institute the suit in the name of the 1st Plaintiff.

APPLICATION DATED 15TH APRIL 2019

The Plaintiff/ Applicants approached the court by filing the Chamber Summons dated 15th April 2019 for the orders that;

- a. Leave be granted for the Notice of Motion Application dated 15th April 2019 be heard during the courtvacation
- b. Injunctive orders be issued pending the hearing of the application 15th April 2019

The application was based on the grounds that;

- a. The Court was on Easter vacation;
- b. Unless the injunctive orders are granted, the Applicant shall suffer immense losses which are irreparable;
- c. The 1st Respondent who is the former Chairman of the 1st Plaintiff Company has already secured a Gathering Permit dated 4th April 2019 from Kayole Police Station for purported illegal Special General Meeting slated for Saturday 20th April 2019 with the aim of hiring goons and a “crowd” to pass irregular resolutions in order to illegally remain in office, to the detriment of over 849 shareholders;

d. The application would be overtaken by events unless the orders sought were granted.

The application was supported by the affidavit of Martin Wachira, advocate for the Plaintiff/ Applicants. The deponent stated that the 2nd, 3rd, 4th Plaintiffs were *bonafide* directors and officials. The advocate also deponed that the Gathering permit had been issued fraudulently and through non disclosure of material facts by the 1st Respondent.

GROUND OF OPPOSITION

The Plaintiff/ Applicant filed grounds of opposition dated 9th May 2019 to the preliminary objection stating as follows;

- 1. The preliminary objection does not raise any arguable pure points of law;**
- 2. The issue raised in the preliminary objection is factual and thus can only be determined during the hearing of the suit;**
- 3. The preliminary objection is frivolous, vexatious and an abuse of court process.**

The Applicant also filed a further affidavit stating that the 1st Defendant's assertion that there were pending criminal investigations against the Plaintiff was malicious. The request had been made to the Directorate of Criminal Investigation on the 17th of April 2019 as annexed **WK-1**, which was on the same day the defendants were served with the pleadings.

The Applicant deponed that after the defendants realized that they had been sued, they advertised the special general meeting through Kameme Fm which could not be accessed by all members who are from diverse tribes. The receipts produced by the 1st Defendant in his affidavit dated 18th April 2019 marked as **annexure WK-5** showed the abrupt maneuvers adopted by the Defendants as the adverts had been paid for. The directors of the 1st Plaintiff are stated in the **CR-12** duly produced in court as annexure FM-3.

DEFENDANTS SKELETAL SUBMISSIONS ON THE PRELIMINARY OBJECTION

In the Defendants written submissions dated 7th June 2019, the Defendants submitted that the Plaintiffs lacked *locus standi* to institute the suit for the following reasons;

- a. The Plaintiffs were neither bonafide Directors, nor members as per the Company's subscribers to the memorandum dated 21st November 1977 and the CR 12 dated 2nd February 2015;**
- b. The CR-12 dated 12th April 2019 filed by the Plaintiffs was questionable as it listed former Directors who had been deceased for more than 2 decades;**
- c. The Defendants were all members of the Company as evidenced by the Company register at pg 57 of the Plaintiffs bundle;**
- d. The action purportedly taken was done so without due notice to the said Board Member- Chairman(1st Defendant), in his absence and without notice of any meeting.**

The Plaintiffs purported to authorize the resignation of two Directors, which investigation was being done by the DCI. The lodged documents did not have the official letterhead of the Company and no Board resolution had been made to institute the suit.

PLAINTIFF/RESPONDENTS WRITTEN SUBMISSIONS ON THE PRELIMINARY OBJECTION

The Plaintiff addressed its issue to the Application in the written submissions dated 6th June 2019 as ;

1. Whether preliminary objection raises any point of law

The Plaintiff submitted that the issue raised in the preliminary objection was not a point of law but of fact which could only be determined through evidence. This was because, both parties claim to be bonafide elected officials of the 1st Defendant and the only way the court would determine the issue would be by hearing all parties.

The Plaintiff relied on case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696.***

DETERMINATION

Having considered the submissions by the parties, the issue for this court's determination is whether the preliminary objection raised by the Defendants on whether the 2nd, 3rd and 4th Plaintiffs have the locus standi to institute a suit on behalf of the 1st Plaintiff Company is one of law or fact.

Firstly, in ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696,*** it was held;

“..... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

The memorandum and Articles of Association of the Plaintiff Company have listed Directors different from list of Plaintiffs and Defendants except for 1st Defendant. The CR-12s indicate list of Directors that include the Plaintiffs and Defendants except the 1st Defendant. Clearly, this is a matter to be determined at the hearing who has *locus standi* to file suit on behalf of the 1st Plaintiff Company.

Derivative suits on behalf of the Company are granted under Section 238 Companies Act which provides;

(1) In this Part, "derivative claim" means proceedings by a member of a company—

(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;

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

(3) 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.

(4) A derivative claim may be brought against the director or another person, or both.

(5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

The Companies Act also provides for a member to file suit on behalf of the Company with leave of Court sought before filing derivative action or after filing and seeking leave to proceed with the suit on behalf of the Company.

For the above reasons, the Preliminary Objection raised is not a matter of law alone but law and facts, which are disputed by the rival parties. The issues raised will be canvassed during hearing and determination of the application *inter partes*. The Preliminary Objection is dismissed with costs to the Petitioners. The interim orders of 18th April 2019 are extended for a further 14 days. Hearing date for application *inter partes* and mode of disposing the application to be agreed on by parties.

DELIVERED DATED SIGNED IN OPEN COURT ON 4TH OCTOBER 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. LIMO H/B MR.WACHIRA MAINA FOR PLAINTIFFS

MR. WAKOKO HOLDING BRIEF FOR ALL DEFENDANTS

COURT ASSISTANT – MS JASMINE