



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.419 OF 2017

KENNEDY ODHIAMBO NYAGUDI.....1ST PLAINTIFF

THE LION'S HEART SELF HELP GROUP.....2ND PLAINTIFF

VERSUS

NIC BANK LIMITED.....1ST DEFENDANT

AMAYA GAMING GROUP (K) LTD.....2ND DEFENDANT

RULING

This is a ruling on two applications filed under certificate. The Plaintiff's application dated 10th October 2017 and the Defendant's application dated 3rd November 2017.

The Plaintiff's application sought an order compelling the Defendant to provide the Plaintiff's with documents to enable the Plaintiffs make necessary preparations for the trial and a mandatory injunction compelling the Defendant to return/refund the amount of **Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000)** paid to the Advocates while pursuing the documents before the filing of this suit.

The grounds on the face of the application are that the 2nd Defendant had been licensed to promote a lottery with the purpose of raising funds for the 2nd Plaintiff under the name M-Lotto. In particular, the lottery license number 2665 collected over 400 million of which the 2nd Plaintiff was to be paid Kshs. 101,062,825 yet only Kshs. 28,000,000 has been paid leaving a balance of Kshs. 73,062,825.

Further grounds are that, the 1st Defendant has facilitated the 2nd Defendant to transfer all funds out of the country and avoid tax; that the 2nd Defendant has since fled the country.

The application is supported by Affidavit sworn by Hon Kennedy Odhiambo Nyagudi. He avers that the 2nd Defendant had been licensed by the Betting Control and Licensing Board to promote an SMS Lottery under the name M-Lotto. While forwarding the license, BCLB stipulated conditions, one being that the 2nd Defendant would involve the Licensing Board during presentation of 25% of gross proceeds to the 2nd Plaintiff.

To facilitate the operations of the Lottery, the 2nd Defendant opened various bank accounts with the 1st Defendant which remained active during the time the lotteries were conducted.

He avers that the 2nd Defendant refused to provide audited accounts in order to make a report to the BCLB despite several requests made by the BCLB for the audited accounts to be availed. Further, that due to the 1st Defendants direct involvement in aiding and facilitating the 2nd Defendant's capital flight out of the country, he lost 15% of the total income to the 2nd Defendant as a shareholder, whereas the 2nd Plaintiff lost the outstanding 73 million being 25% of gross proceeds from the lottery permit number 2665. He avers that the 1st Defendant chose to avoid engaging him in order to assist and facilitate the 2nd Defendant to fraudulently collect funds and transfer the funds out of the country.

In response the Defendant filed Replying Affidavit sworn by Waweru Mathenge the Deputy Group Company Secretary and Head of Legal Department of the 1st Defendant. He averred that the Plaintiffs have no locus to file the present suit reason being that the suit can only be sustained as a derivative suit as against the Directors of the 2nd Defendant and that even failing that, there is no privity of contract between either Plaintiff and the 1st Defendant for them to purport to sue on it.

He further averred that while the bank had been served with the pleadings, it was not notified of the hearing date of the 18th of October 2017. He also averred that the Plaintiffs had raised allegations of fraud, collusion, conspiracy, and money laundering which allegations are unsupported by any evidence before the Court.

He further averred that the 1st Plaintiff having held himself out as a Director of the 2nd Defendant, should be able to access information internally and should not require any orders to obtain information in the possession of a company where he is both a shareholder and Director. He averred that the 1st Plaintiff is guilty of serious material non-disclosure by which they have disentitled themselves of the orders they are seeking.

The Defendant's application dated 3rd November 2017 sought the orders to stay the *ex parte* order granted on the 18th October 2017 and the application to serve as opposition to the Plaintiff's Notice of Motion dated 10th October, 2017.

Grounds on the face of the application were that, the Plaintiff did not have the *locus standi* to seek the orders and there was breach of banker client confidentiality when the documents were inadvertently supplied before legal advice was sought.

The application is supported by Affidavit sworn by Waweru Mathenge the deponent of the Replying Affidavit filed in response to the Plaintiffs application herein. His averments are restated in the said Replying Affidavit.

In response to the Defendant's application, the Plaintiff filed Replying Affidavit sworn by Kennedy Odhiambo Nyagundi who is the Director of the 2nd Defendant. He restated grounds on Notice of Motion application of 10th October, 2017.

In submissions Counsel for the Plaintiff restated the grounds on the Notice of Motion, Replying Affidavit and the Supporting Affidavits.

Counsel for the Defendant cited the case of *Charles Omanga & 8 Others Vs. Attorney General & Anor. [2014] eKLR*, where the High Court in dismissing a constitutional petition on access to information, set out the principles to be observed in determining an application for access to information by stating as follows:-

“The Court before issuing peremptory orders is obligated to satisfy itself that a request was made to the relevant agency and either ignored or rejected. Further, the Court must interrogate the reasons for the rejection of the request and the relevant institution must be given an opportunity to respond before any peremptory orders are issued.”

ANALYSIS AND DETERMINATION

I have considered averments by parties herein. I have perused the documents attached, perused and considered submissions filed

Issues for determination

1. Whether the 1st Plaintiff herein lack *locus standi*?
2. Whether there is privity of contract between Plaintiff and 1st Defendant,
3. Whether Plaintiff qualify to access information on 2nd Defendant held by 1st Defendant,
4. Whether *ex parte* order for discoveries granted on the 18th October 2017 should be set aside,

It is not disputed that the 1st Plaintiff is a Director of the 2nd Defendant. This is confirmed by paragraph 5 of the *Plaint*. Paragraph 6 of the *Plaint* indicate that the 1st Plaintiff holds 15% shareholding while the second Defendant the remaining 85%. That fact is not disputed by the 1st Defendant.

Paragraph 10 of the *Plaint* indicate that the 2nd Defendant applied for SMS lottery for purposes of raising money on behalf of the 2nd Plaintiff a charitable organization which authorized the 2nd Defendant to use its name.

Plaint further stated that, the two lottery applications were given a personal guarantee by the 1st Plaintiff to ensure that terms and conditions of the licence were complied.

The Plaintiff alleges breach and negligence on part of the 1st Defendant while opening the accounts for the 2nd Defendant by failing to comply with know your customer principle. He alleged that being a 2nd Director and shareholder of the 2nd Defendant, the 1st Plaintiff should have executed company resolution for opening the account and the account opening forms. The 1st Plaintiff in paragraph 107 of the *Plaint* indicate that the 2nd Defendant regularly opened an account with equity bank in which he has always been a signatory.

At this stage of the trial, the 1st Plaintiff is seeking documents for opening account and statements held by the 1st Defendant. It is not disputed that the 2nd Defendant has two Directors and that the 1st Plaintiff is one of the two Directors. Particulars of fraud have been set out in the *Plaint* against the second Director of the 2nd Defendant and the 1st Defendant has been accused of failing to exercise due diligence while opening an account for the 2nd Defendant and during operation of the said account thus aiding the 2nd Director to defraud the Plaintiffs

herein. The 1st Defendant has indicated that there is no privity of contract between 1st Plaintiff and 1st Defendant.

It is evident that the 1st Plaintiff being one of the Directors of the 2nd Defendant sought the said documents before seeking Courts assistance this is evidenced by paragraph 48 of the Plaint. He there complied with the principle laid down in the case of **Charles Omanga & 8 Others Vs. Attorney General & Anor. [2014] eKLR** which obligate the Court to satisfy itself that a request was made to the relevant agency and either ignored or rejected.

The 1st Defendant has indicated that the 1st Plaintiff being a Director should have sought the documents. It is evident that the Plaintiff made a request. The bank (1st Defendant) has cited Bank/client confidentiality but has not denied the fact that the 1st Plaintiff is a shareholder and Director of the 2nd Defendant and the fact that he is not a signatory of the account. The process of opening and operating the account held by the 1st Defendant for the 2nd Defendant having been questioned by a party who is a shareholder and Director of the account holder it would be in the interest of justice to allow the 1st Plaintiff access to documents in respect of opening and operation of the said account.

On the issue of derivative suit Section 239 of the Companies Act provides as follows:-

“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...”

The question that arises is, at what stage of the trial should a member or shareholder apply for permission to continue a derivative claim?

The above question was answered in the case of **Altaf Abdulrasul Dadani & Another v Amin Akeberali Manji & 3 others [2004] eKLR** and **Kuldeep Singh Sehra & Another v Bullion Bank Ltd & 2 Others. [2014] eKLR**, where the High Court decided that leave of the Court can be granted after a derivative action has already been commenced. In the above case Mwera J. (as he then was) directed that the proper procedure for a derivative action is to file suit and then seek the leave of the Court.

I agree with the position held in the above case and find that the issue of derivative suit can therefore be dealt with at a later stage. I therefore dismiss the 1st Defendants argument that the 1st Plaintiff lacks *loci standi* to seek the orders sought herein.

FINAL ORDERS

The 1st Plaintiff’s application dated 10th October 2017 is hereby allowed.

The 1st Defendant’s application dated 3rd November 2017 is dismissed.

Costs in the cause.

Dated and Delivered at Nairobi this 13th day of July, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE: COURT ASSISTANT

MWEKE: COUNSEL FOR 1ST DEFENDANT/RESPONDENT

MS MISERE H/B FOR OMBWOYO: COUNSEL FOR PLAINTIFF