



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 24 OF 2018

HONESTY KANYUA MANYARA & KIOGORA MUTAI(Suing as

the Legal Representative of the Estate of

STEPHEN MUTAI M' IMANYARA).....PLAINTIFFS/APPLICANTS

-VS-

FARMERS CENTRE LIMITED.....1ST DEFENDANT

KOTNIS LIMITED.....2ND DEFENDANT

GILBERT M KITHENDU.....3RD DEFENDANT

RULING

1. Before me are three applications filled by the plaintiffs, the defendants and the interested party, respectively. The 1st application by the plaintiffs is dated 19th September 2018, seeking, *inter alia*, an order to freeze Account Number 1217812687 KCB Meru Branch, belonging to the 1st defendant. The application was based on the grounds set out on the face of the Motion and the affidavit sworn **by Honesty Kanyua Manyara**.

2. She deposed that, her husband Stephen Mutai M'Imanyara (deceased), died on 11th January 2018. That the deceased co-owned the 1st and 2nd defendant (hereinafter "the said companies") with the 3rd defendant. That the 3rd defendant was now the only surviving director for the said companies which he has been running alone since the demise of the co-director on 11th January, 2018. That the estate of the deceased's co-director had been kept in the dark over the dealings of the said companies by the 3rd defendant despite requests and protests. The plaintiffs therefore sought an order for a forensic audit of the said companies for the period between January, 2018 to-date, the appointment of an arbitrator and an order to freeze the 1st defendant's account as aforesaid.

3. That application was opposed by the defendants through a replying affidavit of Gilbert M. Kithendu sworn on 25th September, 2018. He deposed that he has been the managing director of the 1st defendant even when the deceased was alive. That although they were the two signatories to the subject account, he was the one running the affairs of the 1st defendant as the deceased was busy employed elsewhere. That the applicants had failed to make full disclosure to this court when they came *ex-parte*.

4. He denied the allegation that he had kept the estate in darkness but that he had called for two meetings with the plaintiffs in March and April, 2018. Those meetings were unsuccessful because of the plaintiffs' intransigence as they did not want him in the said companies. That he had therefore decided to regularize the management of the companies by communicating with the Registrar of Companies and made the Companies compliant with the Companies Act, 2015. That the 1st defendant had financial obligations which it had to meet and the continued freezing of the said account would affect it negatively.

5. The 2nd application is by the defendants. The same is dated 24th September 2018, in which they seek to set aside, vary, discharge or vacate the *ex-parte* order made on 21st September 2018. The application was based on the grounds set out on the face of the Motion and the affidavit of Gilbert Kithendu, the 3rd defendant, sworn on 24th September, 2018.

6. He swore that the offending order was made in the absence of the defendants which froze the 1st defendant's subject account. That the order was draconian as it had the effect of choking the company and bring it on its knees, since it could not run without accessing funds in its account.

7. There was no replying affidavit in opposition to the said application.

8. The 3rd application was dated 25th September 2018, in which the interested party Lee Kimathi Njue sought to be enjoined as a party in this suit. The application was supported by an affidavit sworn by the interested party. He alleged that he was one of the sons of the deceased and had an interest in the deceased's estate. That the subject matter in this suit was part of that estate and that it was therefore in the interests of justice that he be enjoined in the suit.

9. The application was opposed through the replying affidavit of Honesty Kanyua Manyara. She deposed that the intention of the applicant was to prolong the litigation. That the applicant needed first to obtain a grant before he could apply to be enjoined in these proceedings. That her intention was to have the deceased's estate preserved. She therefore urged that the application be dismissed.

10. When the matter came up for hearing on 26th September 2018, the court consolidated all the applications and directed that the same be canvassed by way of written submissions. All the parties filed their respective submissions which I have carefully considered.

11. Since the applications dated 19th September, 2018 and 24th September, 2018 are related, I will consider them together. In their application dated 19th September 2018, the applicants sought an order to freeze account number 1217812687 KCB Meru Branch belonging to the 1st defendant. They also sought for orders for a forensic audit of the said companies and appointment of an arbitrator. The prayer for a freezing order was granted which provoked the defendant's application dated 24th September, 2018 to set it aside.

12. It was submitted for the plaintiffs that, it was common ground that the deceased was a co-director with the 3rd defendant in the 1st and 2nd defendant as at the time of his demise. That the 3rd defendant continued to run the businesses of the said companies as if the death of his co-director had no consequence or at all. That the family of the deceased had not been kept abreast of the dealings and transactions of the said companies.

13. It was further submitted that the Memorandum and Articles of Association of the 1st defendant stipulated that there would be no less than two directors to run the business of the company. That the 3rd defendant had taken advantage of the deceased's death and did not rise up against his strong personal interest to exploit the opportunity by passing himself as the sole director.

14. Mr. Mwanzia for the plaintiffs urged the court to strike a balance between the interests of the deceased's estate and the defendants. That since the plaintiffs were legal representatives of the deceased's estate, they were properly before court and maintaining the freezing order would be the most commendable thing to do.

15. On the other hand, it was submitted for the defendants that the plaintiffs' application was incompetent, premature and incurably defective. That it was in contravention of the mandatory provisions of the Companies Act 2015, which required leave of the court to be sought before such an application can be entertained. That since the plaintiffs' claim was that of entitlement as heirs to the shares of the deceased, theirs should be a derivative action under part IX of the Companies Act. It was urged that the application should be dismissed in the circumstances.

16. Though the plaintiffs contended that vide the Memorandum and Articles of Association of the 1st defendant and in particular clause 13 thereof, the number of directors should not be less than two, a copy of that Memorandum and Articles of Association was not annexed to the application. It is therefore not possible to vouch for the veracity of that contention. That allegation therefore fails.

17. On the other hand, the defendants contended, and it was not denied, that after two meetings called by the 3rd defendant in March and April, 2018 failed to reach a settlement on the estate's representation in the said companies, he notified the Registrar of Companies of the demise of the deceased and the resolution that the said companies had adopted the Companies Act, 2015. That in effect cured the defect of single directorship in the said companies. The said notifications and the confirmation by the registrar were produced as "GMK 1a-h".

18. From the pleadings on record, the plaintiffs' claim is on the shares of the deceased in the said companies. The prayers in the application under consideration touch on the property belonging to the said companies. The said companies are limited liability companies with separate and distinct personality. The plaintiffs seek to protect their own personal interests in the subject shares as opposed to those of the companies. It is their contention that the 3rd defendant is acting in a manner oppressive to them.

19. However, the averments of the plaintiffs in paragraphs 11 to 14 of the plaint suggest that the 3rd defendant is acting illegally, against the law and to the detriment of the said companies. A close examination of the allegations would show that the plaintiff's claim is made for the benefit of the said companies. The declarations sought in the prayers are for the benefit of the said companies and no one else.

20. To my mind, due to the principle of legal personality of a company, there can be no argument that the proper plaintiff or claimant in any proceedings or action in respect of a wrong done to a company, is the company itself. See *Foss vs. Harbottle (1843) 67 ER 189* where the "the rule in *Foss v. Harbottle*" was enunciated. That rule was restated by Jenkins L. J. in the case of

Edwards vs. Halliwell (1950) All ER 1064 as follows:-

"The rule in Foss-v-Harbottle, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of

what has been done, then cadit quaestio; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

21. In the case of Arthi Highway Developers Ltd vs. Westend Butchery Ltd & 6 Others Civil Appeal No. 246 of 2013, the Court of Appeal stated:-

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle (1843) 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue.”

22. From the foregoing, it is clear that with the allegations made by the plaintiffs’, the plaintiffs ought to have initiated a derivative action. They would in such a case have to show that they have requested the 3rd defendant to call a meeting which he has declined. That they themselves have requisitioned for one and the same has also been declined. That the companies are being wronged by the actions of the sole director. It is then that they would have sought leave to commence such an action. That was not done and the present action remains still borne in so far as it seeks remedies in favour of the companies.

23. That being the case, and there being no derivative action before court, the orders sought in the application dated 19th September, 2018 cannot issue. Accordingly, the application is without merit and the same is accordingly dismissed with costs to the defendants.

24. Having found that the plaintiffs application is without merit, it follows as a matter of course that the defendants’ application dated 24th September, 2018 is meritorious and the same is hereby allowed as prayed. Accordingly, the orders made on 26th September 2018, are hereby vacated forthwith.

25. The third application is dated 25th September 2018. In it, the interested party sought to be enjoined as a party to this suit on the grounds that he is a son of the deceased. The plaintiffs opposed the application on the grounds, *inter alia*, that the interested party had no grant either limited, temporary or confirmed and that without a grant, he had no capacity to bring the application.

26. It is evident from the pleadings that the interested party seeks to protect his own personal interests as opposed to those of the companies. I have already found that the said companies are separate and distinct legal entities with legal personality from that of the deceased or interested party. In light of the above the interested party’s application must as well fail and the same is hereby dismissed with no order as to costs.

DATED and DELIVERED at Meru this 8th day of October, 2018.

A. MABEYA

JUDGE