



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
CIVIL CASE NO.472 OF 2017

ROYAL APARTMENTS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

VRAJBHUSHAN D. SHAH.....1ST DEFENDANT

SAPNA V.SHAH.....2ND DEFENDANT

R U L I N G

This is a ruling on the Defendant's application dated 8th December 2017. It seeks to strike out the Plaintiff's Complaint dated 20th November 2017 and Defendant be granted costs of the application and the suit.

Grounds on the face of the application are that the suit is mischievous, unprocedural and misconceived as one Arul Selvaraj Mudliar a member of the Plaintiff Company attempt to institute a derivative claim through the back door.

That Section 238 and 239 of the Companies Act are clear on the statutory prerequisites for institution of suit for institution as a derivative suit.

That it is mandatory under Section 239(1) of the Companies Act 2015 for leave of this Court to be obtained before filing suit and that the said Arul Selvaraj Mudliar has not sought leave or permission to commence or continue a derivative suit on behalf of the Company.

That no resolution was obtained from the Board of Directors before the Plaintiff filed this suit in its own name neither did the Company herein did appoint the Advocate.

That the person who has filed this suit has no interest in the Company's affairs, as he is not a member, shareholder or director

That the suit is an abuse of the Court process and should be dismissed with costs to the Defendant.

The application is supported by Affidavit sworn by VRAJBHUSHAN D. SHAH.

He averred that the Verifying Affidavit accompanying the Complaint is sworn by Arul Selvaraj Mudliar who is a member of the Plaintiff Company. He attached the Company's Certificate of Incorporation. He restated grounds on the face of the application.

In response, the Respondent/Plaintiff denied that this is a derivative suit.

That the 1st and 2nd Defendants who are Co-Directors of the Company authorized Mr. Arul Selvaraj Mudliar to answer and/or execute any or all documents required in connection with any claim and/or Court proceedings commence by or against the Company.

That the said Arul Selvaraj Mudliar is a member and Director of Plaintiff Company together with Defendants having taken over the Company from its founders Mr. Suresh Vrajlal Ghaghada and Mrs. Beena Suresh Ghaghada; that the allegation that he is not a member and has no authority to execute documents are untrue, dishonest and purely calculated to mislead the Court.

The Respondent urged the Court to look at the history of this matter as set out in paragraph 7 of the Complaint. That the Complaint indicates that the Plaintiff entered into an agreement with the two Defendants to sublease 3 apartments in Parkland Numbers 201, 202 and 302 Parklands Royal Apartments situated on LR NO.1870/1/380 at total price including interest was kshs 87,606,219.87 as at 31st January 2017.

That the Defendants failed to pay prompting the Plaintiff to instruct the firm of Oyatta & Associates to institute this suit to claim the said amount.

The Respondent contend that the Defendants purchased the apartments in their individual capacity not on behalf of the Plaintiff; that the Defendants have not denied entering into a sale agreement with the Plaintiff and their subsequent breach or refusal to pay purchase price is not denied.

The issue that arise is whether this suit is a derivative suit.

Derivative suit is defined under Section 238 of Companies Act 2015 as hereunder:-

“Derivative claim” means proceedings by a member of a Company-

- (a) In respect of a cause of action vested in the Company;
- (b) Seeking relief on behalf of the Company.

From pleadings and averments herein, there is no doubt that the suit has been filed on behalf of the Company. Arul Selvaraj Mudliar avers that the intention of filing this suit is to protect the interest of the Company. Under Section 238 of the Companies Act as seen above, a member of a Company, shareholder or Director can file a suit on behalf of the Company.

Despite the fact that the Applicant indicates on the averments in the Affidavit in support of application further confirm that Arul Selvaraj Mudliar is not a member of the Company, in the averments in support of the application confirm that he is a member. The Plaintiff alleges default or breach of contract by the Defendants to the Plaintiff and relief is sought on behalf of the Company.

There is therefore no doubt that this is a derivative suit.

The issue that follow is whether failure to seek leave or permission to institute or continue this suit is fatal.

The Section talks of leave/permission to institute or continue suit.

I refer to the case of **Isaiah Waweru Ngumi & 2 others vs Muturi Ndungu [2016] eKLR** where the Court held as follows:-

“... Does the fact that the Applicants herein filed the suit without leave of the Court render the suit fatally defective? I would think that the answer is in the negative. The answer is provided by both the plain reading of the statute as as jurisprudence on the matter

...First the statute uses the word continue not commence in Section 239.”

I do agree with findings in the above decision that failure to seek leave at commencement of the suit is not fatal. My view is that the intention of Section 239 of the Companies Act is to guard against members who may for personal gain file for frivolous claims on behalf of the Company occasioning the companies unnecessary expense.

From the foregoing, I find that it will be in the interest of justice for this suit to allow this suit proceed.

FINAL ORDER

Application dated 8th December 2017 is hereby dismissed.

Ruling Delivered, Dated and Signed at Nairobi this 11th day of December, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

Langat: **COURT ASSISTANT**

Ondari: **COUNSEL FOR PLAINTIFF/RESPONDENT**

Osudwa: **COUNSEL FOR DEFENDANT/APPLICANT**