



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.557 OF 2015

EVANSON THIONG'O MACHARIA

PETER GAKUNGA GITHIOMI

ROSE NJERI MUNORU.....PLAINTIFFS

-VERSUS-

THUO MATHENGE & 6 OTHERS.....DEFENDANTS

RULING

1. The Plaintiffs herein moved the Court vide the application dated **30th October 2015** for orders that they be granted leave to institute a representative suit on behalf of themselves and other shareholders of **Mbo-I-Kamiti Farmers Company Ltd** and that pending the hearing and determination of the suit, the 1st to 6th Defendants their agents, servants or any other person under their instructions, consent, authority and control be restrained by an interim injunction from selling, charging, disposing of or in any other manner dealing with any assets of **Mbo-I-Kamiti Farmers Company Ltd**. The application is expressed to have been filed under **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 1 Rule 8, Order 5 rule 17 and Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010**. It was supported by the affidavits annexed thereto sworn by the 1st Plaintiff, **Evanson Thiong'o Macharia**, annexed thereto, sworn on **30th October 2015**.

2. In response to the application, the 1st to 6th Defendants filed the Notice of Preliminary Objection dated **7th April 2016**, raising the following points for the consideration of the Court:-

- 1. That the suit discloses no cause of action or no reasonable cause of action against the Defendants.**
- 2. That the purported causes of action as impleaded are statute barred.**
- 3. That the matters impleaded by the Plaintiffs are Res judicata and offend the provisions of Section 6 and 7 of the Civil Procedure Act, having been directly and substantially in issue and determined in myriad cases including but not limited to:**

[a] HCCC No. 781 of 2004: **Twiga Men and Women Squatters vs Karume Investments**

Ltd & Mbo-I- Kamiti Farmers Company Ltd;

[b] HCMC. No. 142 of 2001: Ex Parte Mbo-I-Kamiti Farmers Co. Ltd;

[c] HCMC. No. 1642 of 2004: Ex Parte Harrison Gicharu & Others;

[d] HCCC No. 605 of 2004: Joseph Gitau & 2 Others vs Mbo-I-Kamiti Farmers Co. Ltd;

[e] HCMC No. 258 of 2009: Mbo-I-Kamiti Farmers Co. Ltd vs. Hon Attorney General, incorporating HCMC No. 127 and 333 of 2009;

[f] HCCC No. 646 of 2009: Mbo-I-Kamiti Farmers Ltd vs National Bank Ltd;

[g] HCCC No. 487 of 2010: William Chege & Others vs. Mbo-I-Kamiti Farmers Co. Ltd;

[h] HCCC No. 170 of 2010: Mbo-I-Kamiti Farmers Co. Ltd vs. Simon Charagu;

[i] HC.PET. No. 57 of 2012: Municipal Council of Ruiru vs. Mbo-I-Kamiti Farmers Co. Ltd;

[j] HC.PET. No. 144 of 2012; David Mwathi Kibe vs. Municipal Council of Ruiru.

4. That the Plaintiff is incompetent and misconceived for want of leave and for violation of the provisions of Order 1 Rule 13 (2) of the Civil Procedure Rules and for non-disclosure in the verifying affidavit.

5. That the Plaintiff is incompetent and misconceived for non-joinder of the subject company Mbo-I-Kamiti Farmers Co. Ltd against whom the eventual reliefs sought by the Plaintiffs will impact, and that this negates the doctrine of Natural Justice.

6. That there are clear available alternative remedial procedures that have not been invoked and/or exhausted by the Plaintiffs.

3. The Defendants' preliminary objection was prosecuted by way of written submissions. The Plaintiffs filed their written submissions on **25th July 2016**, while the 1st to 6th Defendants filed their submissions on **11th August 2016**. The 7th Defendant opted to file no submissions in respect of the Preliminary Objection and were content in supporting the position taken by the 1st to 6th Defendants. Having considered the Grounds of Objection raised and the submissions filed, my view is as hereunder:

On whether the suit discloses no cause of action

4. It was submitted on behalf of the Defendants that the suit herein discloses no cause of action in that at paragraph 2, the 1st to 6th Defendants are alleged to hold themselves out as directors of **Mbo-I-Kamiti Farmers Co. Ltd** (the Company), yet in the rest of the Plaintiff, and in Prayers 1 and 2 in particular, the 1st to 6th Defendants are being asked to render true and proper accounts of the Company. It was further the contention of the 1st to 6th Defendants that if, as posited by the Plaintiffs, they are not directors of the Company, then there would be no basis for them to be required to provide the accounts and statements of the Company. It was further contended that it was not clear from the Plaintiff what actual wrong the said Defendants, who have been sued in their personal capacity, committed and the remedies sought against them.

5. It is noteworthy that though the Plaintiffs did not address this ground in their written submissions, **Order 1 Rule 8(1) of the Civil Procedure Rules** recognizes that:

"Where numerous persons have the same interest in any proceedings, the proceedings may be

commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

6. A perusal of the Plaintiff shows that at Paragraph 4 it has been pleaded that the Plaintiffs have brought this suit on their own behalf and on behalf of other members of the **Mbo-I-Kamiti Welfare Group** which, according to them, was formed for purposes of championing its members' rights and welfare. At Paragraphs 5 to 7 the Plaintiffs traced the history of the Company and laid bare the circumstances under which they got to learn, in 2010, that some of the pieces of land belonging to the Company had been charged to the 7th Defendant; and that the 7th Defendant had initiated the process of selling those assets.

7. The Plaintiffs also accused the 1st Defendant of having placed a newspaper advertisement whose content gave the impression that there was an intention to repeat the exercise of share allocation and a winding up of the company, which if done would lock out genuine shareholders who had already been allocated the same piece of land at the **Twiga Estate** in Ruiru. It was further alleged in the Plaintiff that the 1st to 6th Defendants had been selling shares of the Company to outsiders contrary to a resolution made in **1985** closing the shareholding of the Company. The Plaintiffs further contended that the said Defendants had never rendered to the shareholders any accounts of the assets of the company for the last 30 years. Their prayer therefore was that the Defendants herein be ordered to render true and proper accounts to them and the Court of all dealings and current status of the Company assets; that they be allowed to carry out and inspection of the Register of Members and be provided with the copies thereof.

8. Whereas it cannot be said that the foregoing are idle averments, it is evident that they are matters involving shareholders of the Company *inter se*. In the premises, the proper Plaintiff ought to have been the company itself, in accord with the principle laid down in the case of **Foss vs. Harbottle [1843] 67 ER 189**, which rule was restated by **Jenkins, LJ** in the case of **Edwards vs. Halliwell [1950] All ER 1064** thus:

"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 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."

9. And in the case of **Dadani vs. Manji & 3 Others [2004] eKLR** by **Mwera, J** (as he then was) expounded on the above principle thus:

"It is a cardinal principle in company law that it is for the company and not an individual shareholder to enforce rights of actions vested in the company and to sue for wrongs done to it. It is also cardinal that in absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters...All this is in deference to the self- regulation the law allows corporations and thus limits the interference by courts in the running of such bodies on their own. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such shareholder can bring an action by way of a derivative suit."

10. Whereas there appears to be a valid cause for complaint on the part of the Plaintiffs, the best cause would have been for them to bring a derivative suit, for which leave would be required. It is still permissible for leave to continue this suit as a derivative suit to be applied for and obtained. In the case of **Manji vs. Dadani [2015] eKLR**, the Court acknowledged this when it that:

"Leave of court shall be obtained before filing a derivative suit, but may also be obtained to continue with the 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 is entitled to the intended relief and that the action falls within any of the exceptions to the rule in Foss vs. Harbottle."

11. Accordingly, this omission does not necessarily bring the Plaintiff's suit to a dead end. Indeed, it is now trite that as far as possible, parties should be given an opportunity to present their cases for a determination on the merits as was expounded in the case of D.T Dobie & Company (Kenya) Limited Vs Muchina [1982] KLR 1.

On Limitation of time

12. On limitation, it was the Defendants' posturing that the facts impleaded herein by the Plaintiffs relate to the years between **1972 to 2010**; and that though the pleadings are not clear as to the specific cause of action, the only logical assumption to draw therefrom is that it is based on tort for which the limitation period is three years. It was thus their contention that since, as shareholders of the Company, the Plaintiffs were all along possessed of all the facts and yet took no action, there should be no reprieve for them as the law does not aid the indolent.

13. The Plaintiffs were however of the opposing argument that the issues raised about the pleadings being statute barred are misplaced and ought not to be entertained. Their contention was that the relief sought in this case by the shareholders is that the 1st to 6th Defendants be required to render true accounts of the dealings of certain assets of the company, which the shareholders fear they may have mismanaged. The Plaintiffs relied on the case of Rawal vs Rawal [1990] KLR 275 as to the object of the **Limitation of Actions Act**, namely, to prevent a Plaintiff from prosecuting stale claims and protect a defendant from being disturbed after a long lapse of time; and that it is not intended to extinguish claims.

14. Granted that the relief sought by the Plaintiffs in their Complaint and application is for the 1st to 6th Defendants to render true and proper accounts of their dealings in respect of certain properties of the Company, the cause of action is deemed to have arisen as at the time of the filing of the suit. Accordingly, the argument that the claim is based on tort or is time barred is clearly untenable, and I would have no hesitation in rejecting the same

On Res Judicata

15. The 1st to 6th Defendants hinged their objection on the fact that there have been no less than 10 suits and applications that have been instituted involving the Company whose particulars have been set out in the Notice of Preliminary Objection. It was thus their contention that the cases involved, inter alia, the issue of directorship and election of directors, sale of various properties of the Company, the issue of shareholding, or claim to the Company's property by way of adverse possession; and that if the Court were to allow the present suit to proceed, it would be tantamount to rehearing matters that have already been decided by the Courts of competent jurisdiction. Copies of some of the decisions were attached to the Defendant's written submissions for the Court's perusal.

16. The Plaintiffs readily conceded in their written submissions that there have been numerous legal battles involving the Company in Courts for a long period of time and in different cases; but posited that the parties and the subject matter have not been the same as alleged by the 1st to 6th Defendants. They then proceeded to provide specific particulars and status update pertaining to some of the Court cases cited by the Defendants in their Notice of Preliminary Objection to demonstrate that this suit is markedly different.

17. **Section 7 of the Civil Procedure Act** provides that:

"No court shall try any suit or issue in which the matter directly and substantially in issue

has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

18. The above provisions were restated in the case of **Bernard Mugo Ndegwa –v- James Nderitu Githae and 2 others [2010] eKLR** where the Court held that the applicant alleging *res judicata*, must show that:

- (a) The matter in issue is identical in both suits,
- (b) that the parties in the suit are substantially the same,
- (c) there is a concurrence of jurisdiction of the court
- (d) That the subject matter is the same and finally,
- (e) that there is a final determination as far as the previous decision is concerned.

19. Having perused the cases referred to by the Defendants it is evident that the parties therein were not similar to the parties in the present case, neither were the issues raised therein similar to the issues at hand. The issue of rendering true and proper accounts which is the main prayer in the Complaint and the orders sought in the Plaintiffs’ application are not issues that were dealt with in the matters mentioned by the Defendants herein. Accordingly, it is not the case that this suit is *res judicata* as was alleged by the Defendants.

On Non-disclosure in the verifying affidavit and violation of the provisions of Order 1 rule 13 (2) of the Civil Procedure Rules

20. **Order 1 rule 13 (1)** of the **Civil Procedure Rules** requires that where there are more Plaintiffs than one and in like manner where there are more Defendants than one, any one or more of them may be authorised by the others to appear, plead or act for such others in any proceeding. Further subrule 2 of the said Order provides that such authorization has to be in writing, signed by the party giving it and has to be filed in the case. In the present pleadings, the Plaintiffs did not attach such an authorisation. However it was their contention that they had filed the suit on their own behalf and on behalf of the members of **Mbo-I-Kamiti Welfare Group**, the list of whom was attached to the Complaint.

21. Having found that the Plaintiffs ought to have filed a derivative suit, and that there still exists a window of opportunity for the Plaintiffs to seek and obtain leave to continue this suit as a derivative suit, this ground cannot stand. In any event, the Plaintiffs have, in their application dated **30th October 2015**, sought leave to institute a representative suit on their behalf and on behalf of the other members. I therefore find no merit in this argument. I would come to the same conclusion in respect of the allegation of non-joinder of the subject company, **Mbo-I-Kamiti Farmers Co. Ltd.**

22. With regard to the issue of non-disclosure in the verifying affidavit, the Defendants’ case was that the Plaintiffs had failed to disclose that there had been numerous other cases between the parties herein over the same subject matter. This Court having established that the present suit and application are not *res judicata* this issue of non-disclosure in the verifying affidavit as raised by the Defendants is similarly untenable.

On Alternative Remedies

23. It was the Defendants’ contention that there were clear available alternative remedial procedures that had not been invoked and/or exhausted by the Plaintiff; and that if indeed the Plaintiffs are shareholders of the Company, then they have a right as shareholders to raise the matters complained of at the Shareholder's meetings of the Company. Whereas the **Companies Act** does provide for the procedures to

be followed by the shareholders therein to hold the directors of the company to account or to seek answers to queries they may have relative to the assets of the company; such shareholders, if they are in the minority, also have the right to seek the court's intervention through a derivative suit. Having ruled that the Plaintiff's are in order in seeking relief from the Court, not much turns on this argument.

24. Besides, the question of whether or not the Plaintiffs herein pursued and/or exhausted the available remedies to them either under the Companies Act or the Articles of association is an evidentiary matter best dealt with at the trial. In the circumstances the said issue cannot be properly determined *in limine*. In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Company Limited, (1969) E.A. 696** the Court held that:

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion...” (underlining supplied)

25. In view of the foregoing, it is my resultant finding that the 1st to 6th Defendants' Notice of Preliminary Objection dated 7th April 2016 is unmeritorious and is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2017

OLGA SEWE

JUDGE