



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 97 OF 2016

LAWRENCE MWANGI WAMBOOH.....1ST PLAINTIFF/APPLICANT
REV. SAMMY NJIRI GITOGO..... 2ND PLAINTIFF/APPLICANT
GEORGE MBURU NJOROGE.....3RD PLAINTIFF/APPLICANT
JOHN MWAURA.....4TH PLAINTIFF/APPLICANT
GEOFFREY MUCHERU KAGOTHO.....5TH PLAINTIFF/APPLICANT
BRUNO KIMANI KARANJA.....6TH PLAINTIFF/APPLICANT
PETER WIANAINA GATUNGU..... 7TH PLAINTIFF/APPLICANT
GLADYS GATHONI WANDATI..... 8TH PLAINTIFF/APPLICANT

VERSUS

FRANCIS WAINAINA MUGO.....1ST DEFENDANT/RESPONDENT
PETER M. NJOROGE..... 2ND DEFENDANT/RESPONDENT
CHARLES MOMO MAINA..... 3RD DEFENDANT/RESPONDENT
STANLEY KABACHA.....4TH DEFENDANT/RESPONDENT
MICHAEL THIONGO.....5TH DEFENDANT/RESPONDENT
DANIEL KIMANI KIBE.....6TH DEFENDANT/RESPONDENT
DAVID MANYARA KARANJA.....7TH DEFENDANT/RESPONDENT
JOHN KAMAU KUBAI..... 8TH DEFENDANT/RESPONDENT
LAWRENCE MUNGAI NGETHE..... 9TH DEFENDANT/RESPONDENT
REGISTRAR OF COMPANIES.....10TH DEFENDANT/RESPONDENT

RULING

1. The plaintiffs are members and shareholders of Nyandarua Progressive Agencies. They filed this suit against the nine defendants, who from the pleadings appear to be also members and shareholders of the said company.

Their claim is that the defendants unlawfully called for an illegal meeting whereof they retired the then directors and elected themselves as directors of the company. This was on the 25th October 2016.

The plaintiffs therefore seek a permanent injunction to restrain the said defendants (1st - 9th) from being recognised and registered as directors of the company while an order is sought against the Registrar of Companies the 10th defendant from registering the defendants as directors.

2. Together with the plaint a Notice of Motion application dated 4th November 2016 was filed under the provisions of order **40 Rule 1,2,3 & 4 and Order 51 of Civil Procedure Rules** together with Section 135 of the Companies Act.

Their prayers are in terms of the reliefs sought and stated in the plaint that:

1. Spent

2. Spent

3. That the Honourable Court be pleased to restrain the 1st-9th Respondent by themselves their servants, agents and/or authorised employees from registering themselves or being registered as directors of Nyandarua Progressive Agencies pending the hearing and determination of this suit or further orders of the court.

Grounds upon which the application is made appear on the face of the application and is further supported by the Affidavit of the 1st Applicant, Lawrence Mwangi Wamboi sworn on the 4th November 2016.

3. The Respondents/Defendants upon being served filed a Notice of Preliminary Objection stating that:

(1) The plaintiffs have no locus standi to institute the suit as reliefs sought are in respect of a company that is not joined as a party whereas it is a corporate body capable of suing on its own:

(2) there is no company resolution to institute the suit.

(3) if a wrong is committed to and done against the company, the company itself is the proper party to institute court proceedings.

(4) the minority shareholders may bring derivative action but only by leave of court, which is not the case here

(5) mere irregularities in the management of a company cannot be a basis for a derivative action to be filed.

4. Before the Application dated 4th November 2016 could be heard, the plaintiffs by a Chamber Summons dated 18th November 2016 and filed on the 22nd November 2016 sought leave of the court to enjoin Nyandarua Progressive Agencies as an interested party in the suit. The basis upon which the application was filed is that the Respondents purport to be the current directors of the company and hence the company ought to be so enjoined.

The Honourable The Attorney General appeared for the 10th Defendant. Unlike the 8th-9th Defendants it

has not filed a defence.

5. On the 22nd November 2016, parties agreed to have the preliminary objection argued together with the two applications.

The applicants and the Respondents have filed their respective submissions and authorities.

6. As a matter of procedure, the preliminary objection ought to be interrogated first, having in mind that the plaintiffs, upon being served with the Preliminary Objection filed their application to enjoin the company as an interested party.

In support of his Preliminary Objection, Mr. Karanja for the Respondents relied heavily on his authorities, and the statement of defence that no cause of action to the plaintiffs has been demonstrated, as the suit is instituted by individuals in their personal capacity without leave of court, and that it is the company that has that right to enforce or protect its interests, and further that the company did not authorise the plaintiffs by way of resolution of the General Meeting for the institution of the suit, among other grounds stated in the defence.

7. To support his submissions, the cases of **Timau Farmers Company Ltd & Another -vs- John Gathogo & 6 Others (2016) e KLR**, **David Langat -vs- St. Lukes Orthopaedic and Trauma Hospital Ltd and 2 Others (3013) e KLR** and **Altaf Abdulrasul Dadarui -vs- Amini Akberazi Manji & 3 Others** became handy.

In all the above cases, the general thread running through is that it is only a company and not individual shareholders that can bring actions to enforce rights and to sue for wrongs done to it, but if the shareholders wish to sue, then they can do so only through a derivative suit with leave of the court whereupon the shareholders must demonstrate that the company is entitled to the relief sought and that the action falls under the exceptions that:

a) the actions complained are ultra-vires

b) Personal rights are about to be infringed

c) the acts complained of require special or extra ordinary resolution and it is alleged that they have not been variably passed.

d) when the interest of justice requires that the general rule should be disregarded.

8. On the other hand the plaintiffs submissions by Mr. Gai Advocate urge that there are exceptions to the general rule and on the interest of justice submit that if wrongs are done against the individual shareholders they ought to be allowed to file suit. He denies that a derivative suit is the solution.

In a rejoinder, the defendant stated that the benefit of the suit as stated in the plaint is for the company and not for the shareholders.

9. I have considered the rival submissions.

To be able to determine whether the suit is competently filed or not, I have perused the plaint. The plaintiffs are shareholders of the company. They allege that the defendants have elected themselves in a meeting called by themselves and outvoted the then directors. Looking at the allegations and reliefs sought, there is no doubt that they filed the suit for the benefit of the company. However, it is evident that the company did not authorise them by way of a resolution nor did they obtain leave of court to file the suit as a derivative action in accordance with Section **259 of the Companies Act 2015**. They have not sought leave to continue the suit as a derivative action even after the preliminary objection was raised.

10. In the case **Timau Farmers Co.Ltd -vs- John Githogo (2016) e KLR** the court faced with similar circumstances held that a decision to sue by a company or shareholders must be decided by the majority of the shareholders in a general meeting and quoting Justice Mwera (as he then was) in **Dadani -vs- Masiji & 3 Others (2004) e KLR** held that:

“it is a cardinal principle in company law that it is for the company and not an individual shareholder to enforce right 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 present the bringing of an action in relation to such matter. All that is in defence 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 derivative action.”

11. In my considered view, the above passage captures very vividly the law on how and when an individual may bring suits for the benefit of himself and the company, by way of derivative action.

A derivative action is a claim brought by individual shareholders in their names but on behalf of the company. This is so because the minority shareholder may not be in a position to say that the claim is brought in the name of the company itself to enforce the company's rights See **David Langat case** (Supra) where the above principles were followed.

12. The plaintiffs had an option to bring an application to seek leave to continue the suit as a derivative action. This was not done. What the plaintiffs brought by their Chamber Summons dated 18th November 2016 is that leave be granted to enjoin Nyandarua progressive Agencies Ltd as an Interested party in the suit.

13. What then is the position of an interested party in a suit? The interests of the company in the suit as stated is that the defendants purport to be directors of the company and therefore ought to be enjoined in the suit. In my view, that application cannot be substituted with an application for leave to continue the suit as a derivative action.

In their supporting affidavit sworn by Eliud Samuel Maina Waweru, a director, it is confirmed that indeed the plaintiffs claim is for the benefit of the company and not for the minority shareholders.

14. Whenever substantive legal provisions and legislation is available, parties to a suit should desist to invoke the provisions of **Article 1A, 1B and 3A of the Civil Procedure Act**.

Granted, the said provisions enjoin the court to facilitate the just, expeditious and proportionate and affordable resolution of the civil disputes, and to handle all matters before the court for the purpose of attaining the just, determination of the court proceedings efficiently (the oxygen principles). The Companies Act is one legislation that is self contained, and should not be ignored by invoking the oxygen principles entirely. From the above, what comments to me is that there is no competent suit filed as the plaintiffs have no legal capacity to sue for the benefit the company. For that, the suit as filed is incompetent, and the applicant cannot be enjoined in an incompetent suit as interested parties.

I am not persuaded that the plaintiffs have demonstrated any *prima facie* case against the defendants.

15. As the plaintiffs have failed to apply for leave to continue the suit as a derivative action, it is my conclusion that the entire suit is incompetent and ought to be struck out. It would not make any legal sense or at all to enjoin a party to proceedings that are incompetent.

For those reasons, the Preliminary Objection brought by the defendants and filed on 22nd November 2016 is upheld. The plaintiffs suit is therefore struck out with costs to the defendants.

Dated, Signed and Delivered this 2nd Day of March 2017

J.N. MULWA

JUDGE