



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 258 OF 2016

JOHN MUTURI NYAGA.....APPLICANT

VERSUS

GRAHAM ALEXANDER WALSH.....1ST RESPONDENT

MARK RENE MESDAG2ND RESPONDENT

ERIC SCOTT EDGAR3RD RESPONDENT

AVRO LEASING LIMITED.....4TH RESPONDENT

RULING

1. This is a Motion dated 14th September, 2016 for Orders that this suit be struck out in its entirety. The Motion which is brought by the Defendants also seeks cost, not only for the Application, but of the main suit.
2. The matters leading to this Application cannot be contested.
3. Through a Miscellaneous Application dated 27th June, 2016 and filed on the same day being (HCC. Milimani Commercial & Admiralty Court Miscellaneous Application No. 317 of 2016, John Muturi Nyaga vs. Graham Alexander Walsh, Mark Rene Mesdang, Eric Scott Edgar and Avro Leasing Limited(hereafter theApplication for Leave) John Muturi Nyaga (hereafter Nyaga) sought leave of Court to commence a Derivative action against the 1st, 2nd and 3rd Respondents.
4. That Application came before Justice Nzioka on 26th July 2016 but the Judge declined to issue Orders on the grounds that the current suit had already been filed and was before Justice Tuiyott. Indeed this Suit had been filed on 1st July, 2016 and come up for hearing of Nyaga's Notice of Motion dated 1st July, 2016 for Injunction on 6th July, 2016.
5. Although the Respondents now state that this Court granted exparte Orders on that day, the Court Record would show beyond any peradventure the Court made orders after being addressed by Mr. Wanyanga for Nyaga and Ms. Wairimu for the Respondents.
6. Anyhow, the Respondents' Counsel asserts that on 29th July, 2016 he chanced upon the Application for Leave.

7. A complaint by the Respondents is that Nyaga had failed to disclose to this Court that he had filled the said Application when it approached this Court for the equitable Relief in the nature of an Injunction. The Respondents, through their Advocates, believe that there was a deliberate act of omission on the part of Nyaga and his Advocates not to serve them with Notice of the proceedings for Leave.

8. In addition, it is argued by the Respondents that this matter is subjudice as the issues are directly and substantially in issue in the application for Leave and the parties in both proceedings are one and the same.

9. The Application for striking out is resisted by Nyaga who in a Replying Affidavit of 23rd September 2016 explains himself. Nyaga depones that the Application for Leave came up for hearing before Justice Nzioka who directed that it be heard on 5th July 2016. On 5th July 2016, the Judge was unable to hear it and adjourned it to 14th July 2016.

10. In paragraph 8 of his Affidavit Nyaga states,

“That the failure by the duty Judge Justice Grace Nzioka to appreciate to Urgency of the Application for Leave to file a derivative action against the 1st, 2nd and 3rd Defendants/Applicants prompted the Plaintiff/Respondent in an effort to safeguard his interest against the prejudicial and unfair conduct of the 1st, 2nd and 3rd Defendant/applicant to approach and move the Honourable Court by way of an Application dated 1st July 2016 which was grounded on Section 780(1) of the Companies Act which empowered the Plaintiff/Respondent to request for relief against wrongdoings of the Company”.

This deposition is critical as it reveals the reason why he moved Court in the present suit. It may well be a confession.

11. As to why he did not serve the Application for Leave, Nyaga stated that as a matter of practice Applications of that nature are Exparte and that an application for Leave can be defeated if served on delinquent Directors because they could use all means to avoid liability.

12. This Court has considered both the written and oral submissions of Counsel. The Court is of the view that it needs to determine the following issues.

(i) Is this suit a Derivative Action or an Action brought under the Provisions of Section 780 of The Companies Act (Act No.12 of 2015)?

(ii) Is this matter res subjudice the Application for Leave or otherwise an abuse of Court process?

(iii) Was Nyaga guilty of material non-disclosure when he sought the orders of Injunction on 6th July 2016?

(iv) Should this Suit be struck out?

13. There is a confession by Nyaga, in his Replying Affidavit, that he intended to bring a cause of Action against the Respondents by way of a Derivative Action. He explains that there was a change of heart as he was unable to obtain the permission to commence the Derivative Action as quickly as he would have wished and so as to approach the Court for immediate protective Orders he commenced these proceedings under Section 780(1) of The Companies Act.

14. Section 780(1) of The Companies Act provides as follows:-

(1) A member of a company may apply to the Court by application for an order under section 782 on the ground—

(a) that the company's affairs are being or have been conducted in a manner that is oppressive

or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.

(2) In this section, "member", in relation to a company, includes a person who is not a member of the company but is a person to whom shares of the company —

(a) have been transferred; or

(b) have been transmitted by operation of law.

The Application may be brought against Company Directors or the Company.

15. In this matter the Cause of Action is against the 1st, 2nd and 3rd Respondents as Directors/Shareholders of the Company and The Company (the 4th Respondent). Without going into any detail, Nyaga accuses the 1st, 2nd and 3rd Defendants of committing certain acts of fraud which has prejudiced his interests as a Shareholder. In addition, that he has been shut out of the conduct of the affairs of the Company yet he is a Shareholder and Director. The prayers he seeks are as follows:-

a) An injunction restraining the 1st, 2nd and 3rd Defendants/Respondents from dealing, disposing of or in any way interfering with the assets of the 4th Defendant/Respondent pending the hearing and determination of this application or further orders of this Honourable Court.

b) A declaration that the Plaintiff has a right under the Articles of Association of the Company to take part in its management, be present and to vote at the meeting of the Board of Directors.

c) An order directing the 1st, 2nd and 3rd Defendants to make full disclosure to the Plaintiff of the financial transactions at I & M Bank Limited operated in the name of the 4th Defendant and the extent of any liabilities incurred that may affect the Plaintiff as director/shareholder.

d) An order for Audited Accounts for the 4th Defendant for the period June 2015 to June 2016.

e) An order for the valuation of the assets of the 4th Defendant.

f) An Account for all sums received and due as dividends on the contracts for operations of 5YBXT and 5YCBI aircrafts from the Defendants to the Plaintiff.

g) An order for payment by the Defendants to the Plaintiff of all sums found due from the Defendants to the Plaintiff on taking of the account under (1) and (2) above.

h) Directors remuneration in the total sum of USD 27,000.00 at the rate of USD 3000.00 per month.

i) Maintenance fees in the total sum of USD 28,000.00 (at the rate of USD 4000.00 per month from December 2015 to June 2016).

j) An order directing the Defendants to pay the Plaintiff the sum of USD 890,035.00 being the estimated value of his share in the Company.

16. Clearly, Nyaga, whatever the merit of his grievances, is seeking the protection of Court against alleged oppressive conduct or unfair prejudice by the Respondents or at least the 1st, 2nd and 3rd Respondents. On the face of it the current proceedings are proper proceedings under Section 780 of

The Companies Act.

17. But before considering the other issues it may be appropriate to make a detour so as to make a few comments on the procedure of Section 780 proceedings.

18. The opening words of Section 780(1) talks of a member applying to Court by Application. Our Section 780(1) borrows heavily from Section 994(1) of The English Companies Act 2006 which provides as follows:-

“(1)A member of a company may apply to the court by petition for an order under this Part on the ground—

(a)that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b)that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial”.

Unlike the Kenyan situation, the English Law is that a Section 994 Application requires a Petition. The Grounds on which the Petition is presented and the nature of relief must be specified in the Petition.

19. But looking at the Provisions of Section 780 and the provisions on remedies under Section 782, the Application under Section 780 must be substantive in nature. Section 782 provides:-

“(1) If, on the hearing of an application made in relation to a company under section 780 or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.

(2) In making such an order, the Court may do all or any of the following:

(a) regulate the conduct of the affairs of the company in the future;

(b) require the company-

(i) to refrain from doing or continuing an act complained of; or

(ii) to do an act that the applicant has complained it has omitted to do;

(c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court directs;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the Court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

(3) Subsection (2) does not limit the general effect of subsection (1).

(4) The company is entitled to be served with a copy of the application and to appear and be heard as respondent at the hearing of the application”.(*my emphasis*)

20. The Applicant will not only be required to specify the grounds upon which the Application is brought

but, in the words of Section 782(1), to substantiate them. To substantiate means to provide evidence to support or prove the truth of (12th Edition Concise Oxford English Dictionary). While it may be sufficient to provide that proof by way of Affidavit evidence, there would be instances where the leading of oral evidence may be necessary (e.g where alleged fraud is to be proved). It is the view of this Court that the procedure of a Section 780 Application must be one that allows and provides for a substantive interrogation of the Applicants grievances. In addition it must be a procedure within which a deserving Applicant can seek and obtain Interlocutory relief pending the substantive outcome. This Court very much doubts that the Application contemplated under Section 780 is in the nature of the typical application provided for under order 51 of The Civil Procedure Rules. I prefer to think that, just like Applications for Liquidation of Companies under the Insolvency Act (Act No.18 of 2015), a Section 780 Application should ideally be by way of Petition.

21. Nyaga choose to apply by way of Complaint. A Complaint may on occasion serve the same purpose as a Petition and vice versa. And because the Respondents do not question the procedure adopted by Nyaga, I will not fault it. What is important here is that the procedure provides an opportunity for specifying the Grounds of the oppressive conduct and/or unfair prejudice and of proving them through oral or affidavit evidence.

22. Having found that the matter before Court is a proper cause under Section 780 of The Act, the arguments made by the Respondents that Nyaga cannot institute a Derivative action for the protection of Company because he is not a minority Shareholder are not available for consideration.

23. Under Section 782 (2) (c) of The Act, one remedy available to an Applicant is authority to commence civil proceedings in the name of and on behalf of the Company on such terms as the Court may direct. Whilst an Applicant under Section 780 would usually be seeking a personal relief, it may turn out that the same set of circumstances giving rise to the personal grievance of a Shareholder also gives rise to a relief for the company. In the face of the remedy in Section 782(2)(c), the same set of facts can sometimes give rise to both a Section 780 Application and a Derivative Action.

24. However, to pursue both simultaneously, like Nyaga, would amount to an abuse of Court process. Having had a change of heart or having come to the decision that the route for a Derivative Action was not serving his purpose or yielding the desired result, Nyaga needed to first withdraw the Application for Leave before mounting this action.

25. Worse still, Nyaga failed to disclose the subsistence of the Application for Leave to both the Court and the Respondents in the Court session of 6th July 2016 where he managed to persuade the Court to grant him some Interim Orders. His Pleadings and Application were singularly silent on this. There was material non-disclosure on his part.

26. Having come to that conclusion, should this Court strike out the Plaintiff's suit entirely? A striking out Order is drastic and draconian. It brings an end to proceedings and must be a measure of last resort. As observed earlier Nyaga may well be entitled to a Section 780 Application but he is guilty of abusing the Court process. While striking out of the suit may be too punitive a censure, the existing state of affairs cannot be allowed to continue. In paragraph 13 of his affidavit in support of the Application, Mr. Singh for Respondents suggests an alternative. He proposes that these proceedings be stayed pending the hearing and determination of the Application for Leave. That is a sensible way of dealing with this situation as it is the application for Leave that came first in time and Nyaga must elect which action he wishes to pursue.

27. These now are the orders of the Court:-

27. 1. The Notice of Motion dated 14th September 2016 is allowed only to the extent that these proceedings are stayed pending the hearing and determination of Miscellaneous Application No. 317 of 2016 (John MuturiNyaga vs. Graham Alexander Walsh, Mark Rene Mesdang Eric Scott Edgar and Avro Leasing Limited).

27. 2. Costs of the Motion to the Respondents.

Dated, Signed and Delivered in Court at Nairobi this 15th day of June, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Machande h/b Onduso for Plaintiff/Respondent

Wairimu for Defendant/Applicant

Alex - Court clerk