



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 134 OF 2012

KWAME KARIUKI 1ST PLAINTIFF

NDEGE ROAD HOMES LIMITED 2ND PLAINTIFF

VERSUS

HASSCONSULT LIMITED 1ST DEFENDANT

MOHAMED HASSANALI 2ND DEFENDANT

FARHANA HASSANALI 3RD DEFENDANT

RULING

1. The Application before Court is the Defendants' Notice of Motion dated 2nd July 2013 seeking Orders that the Plaintiffs' suit as against them be struck out. The same is brought under the provisions of **Order 2 rule 15 (1) (b), (c) and (d)** of the *Civil Procedure Rules, 2010*. The Application is brought on the following grounds:

“a) The suit is incompetent as there was no resolution of the board of the 2nd plaintiff to institute proceedings and incur liability in costs in its name.

b) The 1st Plaintiff has no right to sue using the name of the 2nd plaintiff save pursuant to a resolution of the board.

c) The failure of the 1st plaintiff to obtain a resolution before filing this suit on behalf of the 2nd plaintiff company is a fatal omission on the part of the 1st Plaintiff.

d) The 3rd Defendant being a Manager/employee of the 1st defendant cannot be sued in her personal capacity.

e) There is no cause of action disclosed by the plaint between the 2nd plaintiff and against all the Defendants.

f) The internal dispute of directors of the 2nd Plaintiff can be resolved by the meeting of the Board of Directors of the second Plaintiff.

g) In the alternative and without prejudice to the foregoing, the leave of court has not been sought to pursue the suit as a derivative suit.

h) Hence, the suit herein is incompetent, frivolous, vexatious and is otherwise an abuse of court process”.

2. The Application was supported by the Affidavit of the second Defendant **Mohamed Hassanalli** sworn on even date. The deponent stated that he and the Plaintiff had incorporated the second Plaintiff company on 25th October 2007 for the purposes of undertaking a gated community development project in Karen. The deponent went into detail of what he termed the “unresolved problems” as between the shareholders as regards the development and the financing thereof. He had been advised by the advocates on record for the Defendants that there was no Board resolution of the second Plaintiff to bring this suit and that the second Defendant, being an employee of the first Defendant, could not be sued in her personal capacity. He also believed that there was no cause of action disclosed by the Plaint as between the second Plaintiff and all the Defendants. He further believed that that any of the disputes as regards the project could be resolved within the Board of Directors of the second Plaintiff without recourse to this Court.
3. The Plaintiffs’ Replying Affidavit was sworn by the first Plaintiff on 28th August 2013. He deponed that the Application before the Court was based on a preliminary objection which had already been dealt with by the Court. The first Plaintiff also maintained that that there had been privity of contract between him on the one hand and the Defendants on the other. He referred to an agreement entered into to this end but failed to annex a copy of the same to his Replying Affidavit. He had also detailed that no rule was required by him to institute proceedings as against the three Defendants and, as a result, the suit was not defective.
4. When counsel for the parties appeared before this Court on 20th November 2013, it was agreed that the Defendants’ said Application would be disposed of by way of written submissions. Those of the Defendants were filed on 25th November 2013. The Defendants maintained that the common ground between them and the first Plaintiff was as follows:

“i) That both the 1st Plaintiff and the 2nd Defendant are directors and major shareholders of the 2nd Plaintiff herein.

ii) There was no resolution by the 2nd Plaintiff to sue Defendants and or incur liability in terms of costs in this suit.

iii) Without such resolution, the 2nd Plaintiff cannot and should not have instituted legal proceedings against the Defendants herein.

iv) Without such resolution, the suit on behalf of the 2nd Plaintiff is incurably defective.

v) The 3rd Defendant being an employee of 1st Defendant cannot be enjoined in a suit for breach of contract against her employer. If Plaintiffs have any cause of action it is against the 1st Defendant and not against 3rd Defendant.

vi) That leaves the case of the 1st Plaintiff vis-à-vis the Defendants. In the first instance, there was no leave of court sought by the 1st Plaintiff as a minority shareholder to institute a derivative suit against the 1st Defendant.

vii) In any event, the present suit is not instituted as a derivative suit”.

The Defendants cited the following cases in support of their Application namely **D. T. Dobie v Muchina (1982) KLR 1, Nitin Properties Ltd v Kalsi (1995-98) 2 EA 257, Civil Appeal No. 37 of 1978 (unreported) Mitsubishi Corporation Ltd v Anthony Massawa as well as Wenlock v**

Moloney & Ors (1965) 1 WLR 1238.

5. The Plaintiffs filed their submissions in response to the Defendants' said application on 5th December 2013. They opened by noting that the Plaintiffs had detailed a prayer in the Plaint seeking the release of a number of copies of documents as per paragraph 19 thereof. They also noted that on 3rd April 2012, the Defendants had filed a Notice of Preliminary Objection dated 2nd April 2012 alongside their Defence on even date, on the following grounds:

- “1. The suit is frivolous as leave of court was not sought by the 1st Plaintiff to use the name of the 2nd Plaintiff in this suit.**
- 2. The 1st Plaintiff and the 2nd Defendant are both directors and shareholders of the 2nd Plaintiff and hence the Plaintiff was required to obtain resolution of the directors before filing suit.**
- 3. The 3rd Defendant being a director of the 1st Defendant and also its Managing Director cannot be suit in her personal capacity.**
- 4. There is no cause of action disclosed by the facts in the Plaint between the 2nd Plaintiff and all the Defendants.**
- 5. The internal disputes of directors put forward can be resolved by the meeting of the Board of Directors of the 2nd Plaintiff.**
- 6. The suit has not complied with the requirements of a derivative suit”.**

The Plaintiffs then made the submission that the Preliminary Objection had been conclusively dealt with by this Court in proceedings before it dated 23rd March 2012, 27th September 2012 and 24th October 2012. I have carefully perused the record of this Court. There were no proceedings before it on 23rd March 2012. There were proceedings on 27th September 2012 in which Mr. Ndambiri appeared for the Plaintiff *ex parte*. Those proceedings were in relation to pre-trial directions and did not touch upon the issues raised in the Preliminary Objection. Further, there is no record of any proceedings before this Court on 24th October 2012. It would seem that counsel for the Plaintiff is imagining things!

6. The Plaintiffs' submissions then set out what they considered to be the issues for determination before this Court which were very much along the lines of the issues raised by the said Preliminary Objection of 2nd April 2012. The Plaintiffs then considered whether the first Plaintiff had the right to sue and make claim against the Defendants herein. This Court was referred to the provisions of Article 50 (1) of the Constitution which detailed that every person has the right to have a dispute, which can be resolved by the application of law, decided in a fair and public hearing before a court. The Plaintiffs maintained that the Plaint clearly set out the Plaintiffs' claim as against the Defendants and whether the first Plaintiff could use the name of the second Plaintiff to sue and make a claim against the Defendants herein. They maintained that the third Defendant could be sued in her personal capacity by the Plaintiffs. They also submitted that there was a cause of action disclosed in the Plaint in relation to the investment project for which the second Plaintiff had been incorporated. They denied that the suit was incompetent, frivolous, vexatious or an abuse of the Court process. As regards whether the suit ought to be struck out, the Plaintiffs referred this Court to the ruling of Lady Justice **Gacheche** in the case of **Apidi v Shabir & Anor. (2003) KLR 595** quoting the learned Judge but failing to attach a copy of the case cited to the submissions.
7. To my mind what the Defendants have done is to bring before Court by way of their Application dated 2nd July 2013 the same points as they raised in their Preliminary Objection dated 2nd April 2012. I see no difficulty in that apart from the fact that Preliminary Objections are decided on points of law rather than on evidence put before the Court (see **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd (1969) EA 696**). In the Supporting Affidavit to the

Application, the Defendants have indicated that the first Plaintiff herein was in fact a minority shareholder of the second Plaintiff. This fact would seem to be borne out by the letter dated 30th June 2008 being document no. 9 in the Plaintiffs' list and bundle of documents as filed together with the Plaintiffs' application. It is shown that the first Plaintiff holds 40 ordinary shares of Shs. 1000/- in the second Plaintiff company whilst the second Defendant also holds 40 ordinary shares alongside one Haimida Hassanali who also owns 40 ordinary shares. This would make the first Plaintiff a one third shareholder.

8. In my view, the submission of the Defendants that the first Plaintiff has no locus to bring this suit before Court in the name of the second Plaintiff is correct. There was no resolution by the second Plaintiff company to bring this action as against all three Defendants and, without such resolution, the second Plaintiff could not and should not have instituted these proceedings. **Order 4 Rule 5** of the *Civil Procedure* reads:

“The plaintiff shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff’s demand.”

Further, **Order 1 Rule 5** reads;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

An interpretation of the two proviso under the Civil Procedure Rules i.e. **Order 1 Rule 10 (2)** and read with **Order 4 Rule 5** of the *Civil Procedure Rules*, would be as regards an improperly joined party to a suit and the general provisions as regards the contents of allegations in a Plaint. To my mind, the Plaint herein is about the second Plaintiff company and the disputes with regard thereto. As itself, there is no cause of action brought against the Defendants and, as a result, I order that the second Plaintiff be struck out from this suit.

9. The Defendants' Application before Court is brought under the provisions of **Order 2 Rule 15 (1) (a)** of the *Civil Procedure Rules*. The same reads:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a. **it discloses no reasonable cause of action or defence in law; or**
- b. **it is scandalous, frivolous or vexatious; or**
- c. **it may prejudice, embarrass or delay the fair trial of the action; or**
- d. **it is otherwise an abuse of the process of the court,**

and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be.”

I have perused the Plaint more particularly the allegations therein as brought against the first and third Defendants. There is no doubt in my mind as regards the documentation that the first Plaintiff himself has placed before this Court, that the agreement to develop the project in Karen was as between him and the second Defendant. The series of minutes of Board meetings of the second Plaintiff company contained in the Plaintiffs' List and bundle of documents as filed with the Plaint, makes it quite clear that there is no part of the agreement between the first Plaintiff and the second Defendant that involves the first and third Defendant and the particulars of breach therefore, would be pegged upon

the 2nd Defendant in this instant.

10. The same conclusion was arrived at by the Court in **Elizabeth Njeri v Housing Finance & Co. (K) Ltd & 2 Others** (supra) where Koome, J (as she then was) held inter alia:

“It is not in dispute that there was no contract between the 3rd Defendant and the Plaintiff. It is trite that a contract affects only the parties to it and cannot be enforced by or against a person who is not a party. There existed no direct contract between the Plaintiff and the 3rd Defendant thus there is no cause of action against the 3rd Defendant...The Plaintiff does not disclose any cause of action against the 3rd Defendant.”

Also, in **P. K Langat & Another v Raphael M. A Juma** Civil Appeal No. 138 of 2001 the Court of Appeal held that:

“It is trite that directors are in the eyes of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors. Hence, where directors make a contract in the name or purporting to bind the company- it is the company as the principal which is liable on it, not the directors; they are not personally liable unless they undertook personal liability.”

11. To my mind, the Plaintiff discloses no cause of action as against the first and third Defendants. It is no use for the first Plaintiff to say that the third Defendant was charged with the duty of holding the documentation in relation to the venture or that the first Defendant was responsible for managing the venture. The plain fact is that neither of those Defendants had any sort of contract with the first Plaintiff. But what is a cause of action? According to the Black's Law Dictionary, 9th Edition at pg. 251, cause of action is defined as:

“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”.

I would also refer to **Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure***, 2nd Edition, where at pg. 170 the author writes:

“What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be- (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunctions; or (c) it may be that there are doubts as to some duty or right, or the right be clouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property.”

A cause of action, therefore, in following the fore stated definitions, would be a set or group of facts that give rise to a claim or suit and that they clearly violate the rights of the Plaintiff, as per Edwin Bryant (sic). **Order 2 Rule 15 (2)** states that the application should be predicated upon facts, and that evidence may not be adduced in the first instance for its determination. In **Anderson v Bell Mobility Inc. (2008) NWTSC 85** it was held that;

“In an application to strike a statement of claim, the allegations of fact are accepted without evidence and the question is whether those allegations of fact disclose a cause of action... [T]hat a pleading will be struck only if it is “plain and obvious” that it discloses no reasonable claim.”

This was similar to the position by the Court of Appeal as held in **D.T Dobie & Co. (K) Ltd v**

Muchina & Another (supra) where Madan, J (as he then was), held *inter alia*:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment.”

12. Interestingly enough, it was not the Plaintiffs who put before Court precedent as to the striking out of pleadings but the Defendants. Has the first Plaintiff got a cause of action as against the second Defendant? Looking at the prayers in the Plaint dated 5th March 2012, I have already discounted the claims as against the first and third Defendants as above. Such would relieve those Defendants as regards prayers a) and b) of the Plaint. However, as I read the Plaint prayers c), d), e) as well as prayers f) and g) the same are also sought against the second Defendant. As I have found above, the contract, oral or otherwise, upon which this suit is based, was made between the first Plaintiff and the second Defendant. In my view, the second Defendant does have a case to answer. **Madan JA** (as he then was) in the **D. T. Dobie** case (supra) adopted the finding of **Sellers LJ** in **Wenlock v Moloney** (again supra) when the learned Judge had this to say:

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

Further and in the same case, **Danckwerts LJ** detailed:

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading”.

Madan JA (as he then was) in the **DT Dobie** case (as above) added his own view as to the matter with striking out:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it.”

I have considered the Plaint herein, as well as the detailed list and bundle of documents annexed thereto by the Plaintiffs. I consider that the first Plaintiff does have a cause of action as against the second Defendant.

13. Accordingly, I would dismiss the Defendants’ Application before Court only so far as the second Defendant is concerned. To sum up, I strike out the second Plaintiff as a party herein. I also strike out the Plaint as against the first and third Defendants. In all the circumstances, I would allow the Defendants the costs of their Application before Court. I direct the remaining parties being the first Plaintiff and the second Defendant to set down this matter for pre-trial conference on a date to be taken at the Registry. Orders accordingly.

DATED and delivered at Nairobi this 14th day of May, 2014.

J. B. HAVELOCK

JUDGE