



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 23 OF 2013

JAMES MWANIKI IMUNYO.....1ST PLAINTIFF

SAMUEL KAGIRI TIMOTHY.....2ND PLAINTIFF

-VERSUS-

CYRUS MUNUHE MWANIKI.....1ST DEFENDANT

LUCY WANGECI MBOGO.....2ND DEFENDANT

FLORENCE NJOKI KAGA.....3RD DEFENDANT

PAUL N. MATIRO.....4TH DEFENDANT

WILLIAM GATHECA NGUYO.....5TH DEFENDANT

STEPHEN NDUNG'U GITHINJI.....6TH DEFENDANT

DICKSON GITHINJI MURIITHI.....7TH DEFENDANT

RULING

The Plaintiffs have filed this suit as shareholders of Muhotetu Farmers Company Limited. They allege that the Defendants herein were elected to the Board of Directors of the company during an annual general meeting held on 30th September 2011. They claim that this election was irregular, unlawful and in contravention of the law for the reasons that the 1st - 4th Defendants were not shareholders at the time of the election and were in the circumstances ineligible to vie for elections and 5th - 7th Defendants were above the legal age of 70 years. In the suit they have sought a declaration that the election of the Defendants is null and void or, in the alternative, an order by the court compelling the 5th - 7th Defendants to retire.

The Defendants filed a joint defence to the suit and have in addition filed the Notice of Preliminary Objection dated 15th January 2014 which forms the subject of this ruling. They have asked the court to strike out the suit on the grounds that it does not disclose a cause of action, it is bad in law, incompetent untenable and otherwise an abuse of the court process and that the Plaintiffs lack *locus standi*.

The Preliminary Objection was argued before the court on 18th June 2014. The crux of the Defendants' objection was that the Plaintiffs lack *locus standi* to file this suit against the Defendants and base their argument primarily on the rule established in the old English case of **FOSS V. HARBOTTLE 2 Hare 461**. In that case, the court held that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such wrongs, it must be brought either by the company itself (through management) or by way of a derivative action.

Counsel therefore submitted that as the alleged wrongs by the Defendants are against the company, then any action could only be brought by the company. Accordingly, despite being shareholders of the company, the Plaintiffs could not file this suit without obtaining a special resolution from the company authorising them to act on its behalf.

Secondly, Counsel argued that this is not a derivative action which a shareholder may properly bring on behalf of the company where it has shown laxity or inability to bring forth the action. Even if it were then the company must be enjoined to the suit and failure to do so was fatal to the claim. Finally Counsel, submitted that the internal wrangles of a company ought to be resolved during the special general meeting and not by way of a suit in court. For these reasons, the suit herein is incompetent and ought to be struck out.

The Preliminary Objection was opposed. Counsel for the Plaintiffs commenced his submissions by referring to Order 2 Rule 15 of the Civil Procedure Rules which provides for grounds upon which a suit may be struck out. He contended that the arguments by the Defendants did not disclose any of these grounds and therefore did not establish sufficient cause to warrant the striking out of the suit. He argued that by filing a defence, the Defendants demonstrated that there was a reasonable cause of action disclosed in the Plaint which should be determined at the trial.

Counsel also contended that the Preliminary Objection is merely an afterthought meant to delay the final determination of the suit. Further, in filing the Preliminary Objection after filing their defence, the Defendants were in essence exposing the Plaintiff to double jeopardy as they were forced to argue the merits and demerits of the defence at this juncture and again at the trial. He therefore urged this court to uphold the overriding objective under Section 1A of the Civil Procedure Act and ultimately ensure that the ends of justice are met by determining the suit on its merits.

ISSUES FOR DETERMINATION

I have carefully considered rival arguments by Counsel and find that the sole issue for determination by this court is whether the Plaintiffs have *locus standi* to bring the suit herein.

ANALYSIS

It is clear that the Plaintiffs grievances relate to acts of commission or omission when filling the positions of Directorships of the subject Company.

The Plaintiff's in effect are shareholders who have filed suit to vent out their grievances but did not seek leave of the court to commence and institute the suit by way of a derivative action. The Respondent/Defendants are also aggrieved by the manner the suit was instituted and argue that the suit is not properly institute and should therefore be struck out.

The Respondents contend that is no Special Resolution giving these Shareholder/Plaintiffs the mandate to institute a suit.

This court is alive to the difficulty of shareholders getting the sitting directors to accede to the convening of an extra-ordinary general meeting to seek such a mandate allowing the aggrieved parties to institute such proceedings as these presents particularly when they are alleging wrong doings being done by incumbent directors.

In my view this court has had occasion to peruse the Plaint at length and and it is incumbent upon this court to do justice as envisaged by Article 159(2) and this court has to also consider whether the Plaintiffs have made out an arguable case as against the Defendants that meets the threshold set down in **Foss V. Harbottle (supra)**. Having perused the pleadings I am satisfied the Plaintiffs have demonstrated and have made out a *prima facie* case that would be beneficial to the company as against the wrongful acts of the directors.

This court makes reference to the provisions of **Order 9** of the **Civil Procedure Code** which provides that a suit can not be defeated by reason of non-joinder or misjoinder of a party. Reference is also made to the provisions of **Order 10** of the **Civil Procedure Code** that enables a party to apply to court to correct errors made by amending its pleadings.

It is apparent from the pleadings that there is misjoinder and non-joinder and that the Plaintiffs had in this instance put the cart before the horse and therefore this court is of the view that in order that justice may be done and seen to be done and also to enable the court to effectively and completely adjudicate upon and settle and determine all questions arising from the suit, the Plaintiffs ought to be given time to put their pleadings in order.

This can only be done by allowing them to obtain leave of the court to continue with these proceedings as a derivative action and also leave to amend and enjoin the subject company. This court is persuaded by the case of **Nita Ganatra suing as The Receiver Manager of Dawat Restaurant Ltd V. Shimmers Plaza Ltd and Anor., HCCC no. 1001 of 2001** where the court declined to strike out a suit that was not commenced in the name of the receiver manager of a company.

Still on the issue of whether the Plaintiffs are shareholders and have *locus standi* to initiate a derivative action or otherwise, this court is of the view that the issue of being shareholders can only be determined by way of documentary evidence. The threshold set down in **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd., [1969] EA 696** is that a Preliminary Objection consists of a pure point of law which when argued may dispose of a suit entirely. Therefore this court opines that the point of law raised as a preliminary objection is not pure and can be said to be blurred as it requires to be supported by evidence.

FINDINGS

The court finds that the issue of *locus standi* is curable and that this is not a suitable case that warrants the drastic action of striking out of the suit.

DETERMINATION

For the reasons stated above the Preliminary Objection is therefore overruled.

Each party shall bear their own costs.

Orders accordingly.

Dated Signed and Delivered at Nakuru this 10th day of November, 2014

A. MSHILA

JUDGE