



SHIAWASE LIMITED

FLORIELLO DAVIDE.....PLAINTIFFS

VERSUS

PIANESI GINO.....DEFENDANT

RULING

1. On 9th January, 2012 the defendant raised a Preliminary Objection to the plaintiff’s suit as a “nullity *ab initio* (which) ought to be struck out preliminarily”

The grounds of the objection are that:

- a. ***“The whole suit contravenes the mandatory procedure prescribed under the Companies Act Cap 486 Laws of Kenya***
- b. ***The suit violates the mandatory provisions of Order 4 Rule 1(4) of the Civil Procedure Rules 2010.***
- c. ***The suit contravenes the mandatory procedures of Order 9 Rule 2 (c) of the Civil Procedure Rules 2010.”***

1. It was agreed that the parties would dispose of the Preliminary Objection by way of written submissions. The matter was mentioned on 4th July, 2012 for the purpose. Only the defendant had filed submissions and the plaintiff was given time to reply. No submissions have been filed since.

2. Having considered the defendant’s submissions in respect of the Preliminary Objection, the pleadings on record and the authorities cited I take the following view:

There is a wealth of authorities for the proposition that the commencement of an action on behalf of a limited liability company must be authorized by a resolution of the said company. My decision in **Malindi HCC 29 of 2011 (OS) Royal Tulia Estate Ltd vs Davidson Matano & 4 others** is only one of such decisions. No authority to file suit has been filed in this case.

4. The parties in this suit are the company and director thereof as plaintiffs suing another disputed director shareholder as a defendant. In the treatise “Company Law” by John Joseph Ogola, cited by Mr. Kilonzo for the defendant, the author reproduced the rule in **Foss V Harbottle (1843)2 Hare 461**

“In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this and the only question can be whether the facts alleged in this case can justify departure, from the rule which, prima facie, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed (per vice-Chancellor Migram)”

In short, to redress any wrong done to the company or recover any moneys due to it, the action should be

brought by the company itself. The rationale behind the rule in **Foss and Harbottle** is that courts are reluctant to interfere with the internal management of companies acting within their power, and will interfere only where *ultra vires* or fraudulent acts not amenable to rectification are complained of.

5. In **Dadani v Manji & 3 others HCC No. 913 of 2002** Mwera J held *inter alia*:

“It is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights of action vested in the company and sue for wrongs done to it...that in the 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 matters. 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 a shareholder can bring an action by way of a derivative suit...(but) mere irregularity in the internal management of a company cannot be a basis for one to bring a derivative suit for such can be rectified by a vote/resolution at the company’s meeting...”

6. What has been presented before this court is a cross between an action by the company (1st plaintiff) albeit, unauthorized, and a derivative action by the 2nd plaintiff. The two actions are mutually exclusive by nature.

In view of the foregoing, I must uphold the Preliminary Objection. The plaintiff’s suit is accordingly struck out with costs.

Delivered and signed in the presence of Mr. Matata holding brief for Mr. Kilonzo for defendant, Mr. Otara for the plaintiff absent

C. W. Meoli
JUDGE
5-9-2012