



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 7 OF 2018

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS OR

FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE

3, 20, 21, 23, 25, 29 AND 40 OF THE CONSTITUTION

BETWEEN

SPENCER GELSTHORPE.....PETITIONER

VERSUS

VALENTINA BERTTONCELLI.....1ST RESPONDENT

LAWFORDS MANAGEMENT LIMITED.....2ND RESPONDENT

GLOBAL SERVICES AND MANAGEMENT LIMITED.....3RD RESPONDENT

RULING

1. By the Petition dated 18th April 2018 as filed herein on 19th April 2018, Spencer Gelthorpe, an adult male and a resident of Malindi prays for the following reliefs against the Respondents jointly and severally:-

- i) A declaration that the actions of the Respondents are in contravention of the fundamental rights of the Petitioner in Article 40 of the Constitution;***
- ii) A declaration that the Respondents are in contravention of the Petitioner's right in Article 29 of the Constitution not to be subjected to cruel, inhuman and degrading treatment;***
- iii) A declaration that the Petitioner has the right to information as a shareholder of Lawford Management Ltd and that he should be provided with proper quotations on the cost of replacing the Makuti roofing as requested;***
- iv) A permanent injunction restraining the Respondents, their agents, employees and/or servants from commencing the Makuti roofing replacement works on his apartment and disconnecting his water and electricity connections;***
- v) Any other relief deemed expedient in the circumstances.***

2. The facts giving rise to the Petition is the Petitioner's contention that he is the owner of a condominium, Apartment No. 504 in the North Wing of a series of apartments elected on Land Portion Nos. 697 and 10786 Malindi to which I will collectively refer to as the Lawford Apartments. As the owner of the said Apartment, he is a shareholder of Lawford Management Ltd (the 2nd Respondent) and pays service charge to the administration as required of him.

3. The Petitioner complains that despite the foregoing, the Respondents have continuously threatened and have at some point in time proceeded to disconnect electricity and water to his said Apartment No. 504 for no apparent reason. The threats for disconnection started

sometime in January 2018 after he refused to pay a fee to replace the makuti roof on the North Wing where he resides unless and until he was issued with a quotation of the requisite fees from at least two builders.

4. The Respondents have now inter alia ordered the Petitioner to remove furniture from his apartment as they intend to begin the makuti replacement work from his apartment even though he has not given his consent to have such repair works carried thereon. The Petitioner is now apprehensive that should the works commence his rights will be severely violated as he will be rendered homeless and his furniture and belongings stand to be destroyed by rain as he has nowhere else to store the same.

5. Together with the Petition, the Petitioner filed a Notice of Motion application also dated 18th April 2018 in which he sought temporary orders of injunction to restrain the Respondents from disconnecting electricity and water to his said apartment and from harassing him and/or replacing the makuti roof on his apartment.

6. The 1st and 3rd Respondents initially on 22nd May 2018 filed Grounds of Opposition herein together with a long detailed Replying Affidavit sworn by Valentina Bertonicelli (the 1st Defendant and Director of the 3rd Respondent) in which she dwelt on the history of the Lawford's Apartments and the genesis of the dispute with the Petitioner.

7. Subsequently by a Notice of Preliminary Objection dated and filed herein on 14th June 2018, the Respondents urged this Court to determine *in limine*, that the Petition herein is hopelessly misconceived, frivolous, totally devoid of merit and mala fides for the reasons inter alia, that:-

1. The said Petition is not in the interest of or of benefit to the 2nd Respondent;

2. The impugned act was authorized by the 2nd Respondent as provided for in Section 241(c) (i) of the Companies Act, 2015;

3. The said Petition has been brought in contravention of Sections 238(3) and 239(1) of the Companies Act, 2015.

8. At the trial herein, the parties agreed to first deal with the Preliminary Objection and they subsequently proceed to file written submissions in regard thereto. I have read and considered the said submissions as well as the detailed lists of authorities to which I was referred by the Learned Advocates for the parties.

9. Section 283(3) of the Companies Act, 2015 provides that:-

“(3) A derivative claim under this part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.”

10. On the other hand, Section 239(1) of the Companies Act, 2015 provides that:-

“(1) In order to continue a derivative claim brought under this part by a member, the member has to apply to the Court for permission to continue it.”

11. As I understood the submissions of Mr. Binyenya, Learned Counsel for the Respondents, it was their case that the Petition as filed herein is in the nature of a derivative suit brought by the Petitioner as a shareholder of the Lawford Management Ltd (the 2nd Respondent) on its behalf to enforce or defend a legal right or claim which the 2nd Respondent has failed to do.

12. It was further the Respondent's submissions that in spite of the claim being in the nature of a derivative suit, the Petitioner herein had failed to adhere to the mandatory procedure provided under the Companies Act, 2015 for pursuing such claims.

13. On the hand, Mr. Gicharu, Learned Counsel for the Petitioner submitted that even though the Petitioner was a shareholder of the 2nd Respondent Company, this Petition was not instituted on behalf of the 2nd Respondent. On the contrary, the Petition was solely related to the enforcement and protection of the Petitioner's Constitutional rights under Articles 3, 20, 21, 23, 29 and 40 of the Constitution which rights had been violated by the Respondents, including the 2nd Respondent.

14. It was accordingly the Petitioner's submissions that this Petition is not a derivative suit brought on behalf of the 2nd Respondent as stated in the instant Notice of Preliminary Objection.

15. As Lenaola J (as he then was) stated while citing the decision of the Court in ***Shirawuse Limited and Another –vs- Pianesi Gino(2012)eKL*** in the case of ***Jacob Juma –vs- Evans Kidero (2016) eKLR:-***

“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 derivative suit for such can be rectified by a vote/resolution at the company's meeting...”

16. From the material placed before me, it is not disputed that the 2nd Respondent was incorporated as a private limited liability company on 10th November 2015. Its main purpose is to carry out the business of a management company and in that regard to undertake or direct the management of the Lawfords Apartments.

17. Every owner of an apartment/villa erected at the Lawfords Apartment is entitled to be a member of the 2nd Respondent. The Petitioner acknowledges in his Petition that he is a member thereof and avers that he has previously enjoyed a cordial relationship with his fellow shareholders and the management of the 2nd Respondent.

18. From the Replying Affidavit of Valentina Bertocelli (1st Respondent) aforesaid, it is evident that by a contract dated 1st March 2015, the 2nd Respondent engaged the services of Global Services Management Ltd (the 3rd Respondent) to manage and operate the Lawfords Apartment.

19. The 1st Respondent is a director of the 3rd Respondent. All members of the 2nd Respondent are obliged under a Lease executed with the 2nd Respondent to settle the management expenses of running the said Apartments in two instalments payable on 15th February and 15th August of each year.

20. It is further evident that the Petitioner disagreed with a decision made by the 2nd Respondent in January 2018 when he refused to pay a fee to replace the makuti roof on the North Wing where his Apartment No. 504 is situated unless and until he was issued with a fee quotation from at least two different builders.

21. At paragraph 9 of her Replying Affidavit, the 1st Respondent explains that the decision to remake the roofs of the apartments arose from a resolution made on 5th January 2018 at the 2nd Respondent's annual general meeting where the shareholders present resolved to remake the same at a cost of Kshs 3,796,250/-. That amount was to be divided between the owners/shareholders of the North Wing and was to be paid together with the first instalment of service charge as provided on 15th February of 2018.

22. The Petitioner asserts that he had travelled to England in January 2018 and it is apparent that he did not agree with the decision made at the said meeting held on 5th January 2018. He now brings this Petition asserting that the decision taken by the Respondents amounts to a violation of his rights and that the threat to lock him out of his apartment to replace the makuti roof interferes with his right to use and enjoy property as protected under Article 40 of the Constitution.

23. I note however from Clause 1.7 of the Sub-Lease for Apartment No. 504 annexed to the Petitioner's Supporting Affidavit (Annexure "SG1") that the right to construct and maintain any easement or services upon over or under the said Apartment was reserved for the 2nd Respondent. Similarly, under clause 1.8 thereof, the right to execute any repairs or other works which the Sub-Lessor may consider necessary and for such purpose the right of reasonable access to the said Apartment were reserved to the Sub-Lessor and by extension the 2nd Respondent herein.

24. As Mwera J. (as he then was) stated in **Dadani –vs- Manji & 3 Others(2004) KLR:-**

“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 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 majority are entitled to present the bringing of an action in relation to such matter(see Foss –vs- Harbottle(1843) 2 Hake 461). All this is in deference to the self regulation the law allows corporations and thus limits the interference by the 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 a shareholder can bring an action by way of a derivative suit.”

25. Arising from the foregoing, I am persuaded by the submissions of the Respondent's Counsel that the Petitioner lacks the locus standi to bring this Petition. Having not attended a meeting of the 2nd Respondent where the decision to repair the makuti roofing at a certain cost was made, his only recourse lay in persuading his fellow members and shareholders to meet and overturn the decision arrived at on 5th January 2018 while he was away in England.

26. In the circumstances herein, I find merit in the Respondent's Preliminary Objection. The result is that I strike out the Petition dated 18th April 2018 as filed herein on 19th April 2018.

27. The Respondents shall have the costs of the Petition.

Dated, signed and delivered at Malindi this 28th day of March, 2019.

J.O. OLOLA

JUDGE