



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI MILIMANI LAW COURTS**

**ENVIRONMENT AND LAND DIVISION**

**ELC NO.1411 OF 2014**

**PHILOMENA NDANGA KARAJA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**NDANGA HOTEL LTD.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**KARANGI COFTEA LTD.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VS**

**EDWARD KAMAU MAINA.....DEFENDANT**

**RULING**

The matter coming up for determination is the Notice of Motion dated **21<sup>st</sup> November 2014**, brought by the 3<sup>rd</sup> Plaintiff herein, **Karangi Coftea Ltd**. The application is brought **under Order 2 Rules 15 (b), Order 1 Rule 10 (2) Order 51 Rule1** and all other enabling provisions of law. The applicant has sought for the following orders:

- i. ***The suit herein be struck out.***
- ii. ***In the alternative the name of Karangi Coftea Ltd as 3<sup>rd</sup> Plaintiff be struck out.***
- iii. ***The costs of the suit be borne by the 1<sup>st</sup> Plaintiff personally.***
- iv. ***The court to issue such further or other orders as it may deem appropriate.***

The application is premised on the grounds stated on the face of the application and also on the affidavit of **Thomas Kiarie Karanja**.

These grounds are:

- a. ***The suit was instituted in the name of the 3<sup>rd</sup> Plaintiff without the authority and/or consent of the 3<sup>rd</sup> Plaintiff.***
- b. ***The 3<sup>rd</sup> Plaintiff did not authorize the proceedings nor did it appoint J. M. Njenga Advocates***

*to represent it.*

c. *The proceedings are frivolous, vexatious and amount to abuse of process of court.*

d. *It is fair and just that orders do issue.*

In his Affidavit, **Thomas Kiarie Karanja** averred that he is one of the Directors of **Karangi Coftea Ltd**, together with **Lawrence Kibe Karanja** and **Philomena Ndanga Karanja**. He further averred that **Edward Kamau Maina** is the Chief Executive Officer of **Karangi Coftea Ltd**, duly retained and employed by the company. It was his contention that the suit herein was brought by **Philomena Ndanga Karanja**, without the knowledge, approval or consent of the company or its Board of Directors. Further, that the suit seeks to prevent the Defendant from carrying out its duties as an employee of the company and its institution in the name of the company which suit required the consent of the Company's Board of Directors, before it was filed. Again, that the Defendant **Edward Kamau Maina**, is an employee of the Company whose services have not been terminated. Therefore, on **1<sup>st</sup> November 2014**, the company resolved that the suit be terminated forthwith as per the attached resolution marked **TKK2**.

He also deposed that the suit is frivolous and vexatious as both the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have not in their own capacity made a justifiable claim against the Defendant to warrant sustenance of the suit herein. He further deposed that it is therefore in the interest of justice that this suit be struck out and costs be borne by the 1<sup>st</sup> Plaintiff personally.

The Notice of Motion is contested. **Philomena Ndanga Karanja**, filed her Replying Affidavit and averred that she is the 1<sup>st</sup> Plaintiff herein and the majority shareholder in the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff company and biological mother of **Thomas Kiarie Karanja**, the deponent of the affidavit in support of the application at hand. She further averred that her sons who are among minority shareholders in the companies and under the influence of the Defendant have mismanaged and embezzled from the Estate. Further that it was her desire to arrest such state of affairs in the 3<sup>rd</sup> Plaintiff company and its affiliate companies and its assets which prompted her to file the instant suit in an attempt to revert the Estates to its past profitable and smooth running. Further, that even if the Defendant alleges that he was employed by the 3<sup>rd</sup> Plaintiff Company, he has not annexed a copy of his letter of appointment.

She further deposed that she was unaware of any Board of Directors minutes/meeting that deliberated on the Defendant's appointment/ employment as an alleged Chief Executive Officer of the 3<sup>rd</sup> Plaintiff Company. Further, as a majority shareholder, she has the power to take any appropriate action as she deems fit for the benefit of the 3<sup>rd</sup> Plaintiff and such action includes filing of the instant suit to injunct the Defendant from acts complained of. She refuted the allegation that the 3<sup>rd</sup> Plaintiff has appointed **Njuguna & Partners Advocates** to act for it and the said **Njuguna advocate** is acting for the Defendant or her sons and not the 3<sup>rd</sup> Plaintiff herein. She therefore argued the Court to dismiss the instant application.

Parties herein consented to canvass the application by way of written submissions which I have carefully gone through. The Court has also carefully considered the pleadings in general, the annexures thereto, the written submissions and the relevant laws and makes the following findings;-

There is no doubt that the 1<sup>st</sup> Plaintiff herein **Philomena Ndanga Karanja** is a shareholder of **1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs** herein. The other Directors are her children **Thomas Kiarie Karanja**, the deponent to the Affidavit in support of this application and **Lawrence Kibe Karanja**.

There is also no doubt that the Defendant herein is an employee of **Karangi Coftea Ltd**. At one point, the 1<sup>st</sup> Plaintiff had allegedly terminated his service as evidenced by annexure **PK2**.

There is also no doubt that the 1<sup>st</sup> Plaintiff herein has filed the instant suit against the Defendant herein for alleged gross misconduct on the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs by the Defendant.

The other Directors have come to Court and alleged that the instant suit was filed without the resolution of the Board. The two other Directors have attached a Resolution of the Board of **Karangi Coftea Ltd** appointing **Njuguna & Ltd Partners Advocates** to represent the 3<sup>rd</sup> Plaintiff herein. Due to that regard, the 3<sup>rd</sup> Plaintiff has filed this instant application.

The 1<sup>st</sup> Plaintiff has contested the application and argued that as a majority shareholder, she could take any action to safeguard the interest of the company. However, the other Directors have argued that the 1<sup>st</sup> plaintiff is not a majority shareholder and even if she was, the resolution of the Board was necessary before the suit could be filed. They thus sought to have the suit struck out for having been fled without the authority of 3<sup>rd</sup> Plaintiffs.

I have considered the rival submissions, and it is obvious that the suit herein was filed without the resolution of the Board. The 1<sup>st</sup> Plaintiff has tried to justify that position. However, it is trite law that where a suit is to be instituted for and on behalf of a company, there should be a company resolution to that effect. See the case of **Assia pharmaceuticals Vs Nairobi Veterinary Centre ltd , Nairobi ( Milimani) High Court , Civil case No. 391 of 2000.**

The suit herein was filed without the resolution of the Board. That is contrary to the well settled law. Though the 1<sup>st</sup> Plaintiff stated that she was justified to bring the suit as a majority shareholder. I find that being a majority shareholder could not justify her to flout the well laid law. That position had been enunciated in the case of **Bugere Coffee Vs Sebaduke & Another (1970) EA 147**, where the Court held that:-

***“Authority to undertake proceedings of a company must be given by resolution of the members of Directors”***

In essence, the Directors of a company have authority to act for the company, however the majority of the members of the company are also entitled to decide even to the extent of overruling the Directors. The above position means that it is the **majority members** but not the member with the majority shareholding. See **R M Muthama and others Vs G P Waitthaka and another, Nairobi High Court Civil case No. 576 of 1991** where the Court held that;

***“ As regard litigation by an incorporated company , the Directors are as well the persons who have the authority to act for the company but in the absence of any contract to the contrary, the majority of the members of the company are entitles to decide even to the extent of overruling the Directors , whether an action in the name of the company should be commenced or allowed to proceed”.***

I will therefore concur with the applicant’s submissions that the 1<sup>st</sup> Plaintiff as a Director of 3<sup>rd</sup> plaintiff was not competent to file the suit on behalf of the company unless specific power is conferred on her as a suit on behalf of the Plaintiff company can only be filed by a person specifically empowered by the Board of Directors to file the suit.

It is evident that no resolution was passed by the Board of Directors herein authorizing the filing of the instant suit. Therefore the Company is not before the Court and this court will not hesitate to strike out the suit with costs to be borne by the 1<sup>st</sup> plaintiff personally.

From the annexure **TK1** , the 3<sup>rd</sup> Plaintiff has three Directors two of them passed a resolution that the firm of **Njuguna & Partners Advocates** be appointed to represent the company . I find that the firm of **Njuguna & Partners Advocates** was properly appointed by the resolution of the Board. Having now carefully considered the instant Notice of Motion, the Court finds that the Applicant’s Notice of Motion dated 21<sup>st</sup> November 2014, is merited. The same is allowed entirely in terms of prayers **No.1 and 3** herein.

The Court proceeds to strike out the entire suit and the interlocutory application filed on **6<sup>th</sup> November, 2014** with costs to be borne by the 1<sup>st</sup> Plaintiff personally.

It is so ordered.

Dated, Signed and delivered this **9<sup>th</sup> March day of 2015**

**L. GACHERU**

**JUDGE**

In the Presence of:-

Ms Randori for the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Respondents

Mr Njuguna for the 3<sup>rd</sup> Plaintiff/Applicant

Defendant in person

Kamau: Court Clerk

**L. GACHERU**

**JUDGE**

**Court:**

Ruling Read in open Court in the presence above counsels and the Defendant.

**L GACHERU**

**JUDGE**