NIC Bank Limited v Odhiambo & 2 others (Civil Appeal 278 of 2018)
[2025] KECA 347 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 347 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 278 OF 2018

F TUIYOTT, P NYAMWEYA & FA OCHIENG, JJA

FEBRUARY 28, 2025

BETWEEN

NIC BANK LIMITED ..... APPELLANT

AND

KENNEDY ODHIAMBO ..... 1ST RESPONDENT

THE LIONS HEART SELF HELP GROUP ..... 2ND RESPONDENT

AMAYA GAMING GROUP (K) LIMITED ..... 3RD RESPONDENT

(Being an appeal against the ruling of the High Court of Kenya at Nairobi, (R. Ngetich, J.) dated 13th July 2018 in HC Commercial Suit No. 419 of 2017)

JUDGMENT

1. The appellant herein, NIC Bank Limited was sued together with the 3rd respondent by the 1st and 2nd respondents. However, before the main suit could be set down for hearing, the 1st and 2nd respondents filed the application dated 10th October 2017 seeking an order to compel the appellant to provide them with documents to enable them to make the necessary preparations for the trial, and a mandatory injunction compelling the appellant to return Kshs. 150,000 paid to their advocates while pursuing the documents before filing the suit.

2. The appellant also filed the application dated 3rd November 2017 seeking a stay order of the ex parte order granted on 18th October 2017, and for the application to serve as opposition to the 1st and 2nd respondents' application.

3. Both applications were heard and determined by the impugned ruling. The trial court observed that the 1st respondent was the director of the 2nd respondent and he held 15% of the shares while the other director held the remaining 85%. The court noted from the plaint that the 2nd respondent had applied

for SMS lottery to raise funds with a guarantee by the 1st respondent to ensure that the terms and conditions of the licence were complied with.

4. The court further noted that the 1st and 2nd respondents alleged breach and negligence on the part of the appellant while opening the accounts for the 3rd respondent which failed to comply with the "know your customer" principle.

5. The court held that since the 1st respondent was one of the directors of the 3rd respondent and he had sought the documents before seeking the assistance of the court, the court was obligated to satisfy itself that a request was made to the relevant agency and it was either ignored or rejected.

6. The court went on to hold that despite the 1st respondent not being a signatory to the 3rd respondent's account, as the director and a shareholder, it was in the interest of justice he be allowed to access the documents used in the opening and operation of the said account.

7. On the issue of a derivative suit under Section 239 of the *Companies Act*, the court held that the same could be dealt with at a later stage while dismissing the appellant's argument that the 1st respondent did not have the locus standi to seek the orders sought.

8. Consequently, the 1st and 2nd respondents' application was allowed while the appellants' application was dismissed.

9. Being dissatisfied with the ruling of the High Court, the appellant vide the memorandum of appeal dated 10th August 2018 set out 13 grounds of appeal which can be summarized as follows:

    a) The learned Judge erred in granting a mandatoryinjunction at the interlocutory stage without thehearing and determination of the main suit, andawarding specific damages of Kshs. 150,000 whichwere not specifically proved.

    b) The learned Judge erred in failing to address the fundamental issue of the 1st respondent's locus standi to institute and sustain the suit.

    c) The learned Judge erred in failing to find that the suit was not sustainable as a derivative suit, and holding that leave to institute a derivative suit could be sought at a later stage even after the 1st and 2nd respondents indicated that they were litigating on their own behalf and not for the benefit of the company.

    d) The learned Judge erred in failing to find that there was no proper service of the notice of the hearing on 18th October 2017 upon the appellant.

    e) The learned Judge erred in failing to set aside theex parte orders of 18th October 2017 ex debitiojustitae, for breach of the rules of natural justice.

    f) The learned Judge erred in failing to be guided by theprinciple of company law that a corporator, even if heholds all the shares in the company, has no legal orequitable interest in the assets of the company.

    g) The learned Judge erred in condemning the 3rdrespondent unheard and without proof of service ofthe application dated 10th October 2017

    h) The learned Judge erred in failing to acknowledge theexecuted settlement agreement between the 2nd and3rd respondents.

    i) The learned Judge erred in failing to hold that the 1stand 2nd respondents were guilty of material non-disclosure.

j) The learned Judge erred in violating the principle ofbanker-client confidentiality by ordering the releaseof confidential information to a third party.

10. When the appeal came up for hearing on 23rd September 2024, Mr. Kigata, learned counsel appeared for the appellant, while Mr. Ombwayo, learned counsel appeared for the 1st and 2nd respondents. Despite being served with the hearing notice through substituted service, there was no appearance by the 3rd respondent. Counsel relied on their respective written submissions which they opted to briefly highlight.

11. Before the matter proceeded, Mr. Ombwayo brought to the attention of the court the notice of preliminary objection he had filed dated 24th June 2024, on the grounds that the notice of appeal was filed out of time, and that this was an appeal on an interlocutory application which required leave of court.

12. We note that this Court has no mandate to hear preliminary objections and therefore, if the 1st and 2nd respondents felt aggrieved by the delay in the filing of the notice of appeal, the right forum would have been to file an application to strike out the same as per Rule 86 of the Court of Appeal Rules, 2022.

13. Mr. Ombwayo questioned the legal existence of NIC Bank Limited, suggesting it may no longer exist as a legal person. Mr. Kigata clarified that he was appearing for NIC Bank Limited and that a successor to a party does not require a change in the character of the party. Counsel stated that the law provides that a successor to a party does not need to change character as the successor will take over the liabilities of that party, and therefore, there was no need to amend a party on appeal.

14. Counsel submitted that the ruling issuing ex parte orders was made in breach of the rules of natural justice and is liable to be set aside as of right.

15. Counsel pointed out that a shareholder or a director cannot sustain a suit in his own name for a wrong allegedly done to the company. Under Section 238 of the *Companies Act*, if a party wishes to institute a suit on behalf of a company, they have to file a derivative suit. In this case, the 1st and 2nd respondents sued the 3rd respondent in their own names. Therefore, the court ought to have first determined the capacity of the 1st and 2nd respondents to file the suit.

16. Counsel faulted the learned Judge for holding that a derivative suit can be raised at any stage. He submitted that the question on the locus of the person claiming to sue for the benefit of the company has to be determined first, before any other step in the suit.

17. The supplementary submissions filed by the appellant addressed the admissibility of illegally obtained evidence while making reference to Article 50(4) of *the Constitution*, which pertains to fair hearings. The appellant pointed out that on 19th October 2017, the court ordered the appellant to furnish documents to the respondents. The appellant sought legal advice before forwarding copies on 24th October 2017 and seeks to restrain the respondents from producing privileged information in any future proceedings.

18. The appellant submitted that Article 50(4) of *the Constitution* stipulates that any evidence obtained in violation of rights should be excluded if its admission would render a trial unfair or if the same was detrimental to justice. While relying on the Supreme Court case of Kenya Railways Corporation & 2 Others v. Okoti & 3 Others, [2023] eKLR the appellant submitted that the court held that illegally obtained information is detrimental to the administration of justice under Article 50(4)5. Therefore, allowing such documents is akin to sanctioning the violation of the right to privacy. In further support of that submission the appellant cited Okiya Omtatah Okoiti & 2 Others v. Attorney General & 4 Others [2020]eKLR.

19. The appellant was of the view that the respondents should be restrained from producing privileged communication and referred to Section 134 of the *Evidence Act* which renders privileged the advocate/ client communications. The appellant submitted that the court should protect the appellant's fundamental rights to privacy and restrain the respondents from using the documents shared via email on 24th October 2017.

20. The appellant made reference to Article 50(4) of *the Constitution*; and Halsbury's Laws of England, Volume 12A (2020) which states that litigation privilege applies to communications between a lawyer, their client, and a third party when prepared for the sole or dominant purpose of litigation.

21. The appellant in its written submissions submitted that it was not properly served with the application. It went on to state that the ex parte issuance of orders against the appellant violated Articles 50 and 25(c) of *the Constitution* of Kenya.

22. The appellant submitted that the 1st and 2nd respondents were allegedly guilty of material non-disclosure by not providing proper notice or pleadings to the 3rd respondent and that the orders made were in breach of the rules of natural justice and are liable to be set aside.

23. The appellant contends that the trial court erred in misconstruing the legal concepts related to a company being a separate legal entity from its shareholders. It submitted that the present suit does not meet the test for a derivative suit. The appellant argues that a contract cannot confer rights or impose obligations on a third party.

24. The appellant also submits that although *the Constitution* provides for the right to access information, the right is not absolute. Section 6 of the *Access to Information Act* outlines instances where disclosure can be limited, such as to protect privacy, confidentiality, or public interest. Therefore, the court must ensure that a request was made to the relevant agency and was either ignored or rejected, before the court could determine whether or not to issue orders.

25. The appellant submitted that mandatory injunctions are rarely granted at an interlocutory stage and that the special damages claimed under this head were not specifically pleaded or proven.

26. The learned Judges sought a clarification on whether leave was required to appeal the decision, particularly in relation to Order 51 rule 31. Mr. Ombwayo submitted that the appeal was against an order for discoveries under Section 22 of the *Civil Procedure Act*, making it an interlocutory appeal that required leave. Counsel submitted that the trial court exercised its discretion judicially ordering discoveries, as the documents sought were relevant to the issue of fraud.

27. Counsel submitted that his clients did not bring the suit as a derivative action but as a director and not with respect to what the company was entitled to. However, the appellant believes that the 1st respondent is still entitled to file a derivative suit or seek leave to sue through a derivative action.

28. The court also sought a clarification concerning the basis for the order to pay Kshs. 150, 000 to the respondents. Counsel conceded that there was no proof of that money ever having been paid as legal fees, and reiterated that the court was exercising its discretion.

29. In their written submissions, the 1st and 2nd respondents reiterated that the trial court judicially exercised discretion in arriving at the decision which compelled the appellant to discover and produce the remaining bank account opening documents for the 3rd respondent, pertaining to the alleged breach of contract, negligence, or fraud in opening bank accounts with strangers and aiding them to fleece the 1st and 2nd respondents.

30. The 1st and 2nd respondents submitted that the Honorable Judge exercised her discretion judicially and arrived at the right decision, asserting there is no legal basis for the appeal. They claim that the appeal violates obligations under Sections 1A and 1B of the *Civil Procedure Act* Cap 21, which aims to expedite trials. Regarding the court's discretion on compelling discovery and production of documents, they submitted that the court has discretion under Section 22 *Civil Procedure Act* to compel discovery, either upon application by a party or on its own motion. This includes the power to order discovery, inspection, production, impounding, and return of documents or other material objects producible as evidence. It can also issue summonses to persons required to give evidence or produce such objects and may also grant an order that any fact be proved by affidavit.

31. The 1st and 2nd respondents submitted that the documents sought were equally relevant to the issues that were to be determined at trial. They pointed out that the trial court found that the 1st respondent was a director of the 3rd respondent and had the right to seek the court's intervention for discoveries. The court rejected the appellant's defense of confidentiality or that an ex parte order for discoveries was without notice to the appellant.

32. The 1st and 2nd respondents submitted that the court satisfied itself that service had been effected, and the appellant did not challenge the said service. The said respondents asserted that upon being served, the appellant confirmed that it would fully comply by producing the documents. They submitted that the appellant's partial compliance resulted in the production of documents, even though the appellant was allegedly negligent in doing due diligence.

33. The 1st and 2nd respondents submitted that the appellant's justification to challenge the order given on 18th October 2017 lacked a legal foundation and was a cover-up for its partial compliance. The 1st respondent is still one of two directors of the 3rd respondent company, and the documents could not have been produced by him personally; to the exclusion of the 3rd respondent.

34. We have considered the appeal, the submissions by the respective counsel, the authorities cited, and the law. The primary issues for determination in this appeal are as follows:

    a. Whether the 1st respondent had locus standi to bring the suit in his personal capacity and whether the suit was improperly brought, by passing the requirement for a derivative suit under Section 239 of the *Companies Act*.

    b. Whether the trial court erred in granting a mandatory injunction at the interlocutory stage.

    c. Whether the trial court violated banker-client confidentiality by ordering the disclosure of confidential documents.

35. The appeal arises from a decision of the High Court made on an interlocutory application in the exercise of judicial discretion. The circumstances in which this Court can interfere with the exercise of discretion were succinctly laid down by the predecessor of this Court in Mbogo & Another v Shah [1968] EA 93 as follows:

> "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong conclusion."

36. To succeed in this appeal, the appellant must demonstrate that the court took into account matters that it should not have, or that it failed to take into account matters that it should have, or that the court's decision is clearly wrong.

37. The primary legal question revolves around whether the 1st respondent had the legal standing to pursue the case without following the process for filing a derivative suit under Section 239 of the *Companies Act*, which 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."

38. It is common ground that the 1st and 2nd respondents sued the appellant and the 3rd respondent and also filed an application for discovery of the opening statements of the 3rd respondent without filing a derivative suit. The appellant argues that the 1st and 2nd respondents lacked the legal standing to bring the suit on behalf of the company and that the proper procedure would have been to file a derivative action under Section 239 of the *Companies Act*.

39. As propounded in Foss v Harbottle [1943] 67 ER 189, a company is a separate and distinct entity from its shareholders, meaning that its assets do not belong to shareholders and only the company can sue in respect of any claim over its assets.

40. The appellant further contends that the suit should have been brought as a derivative action and that the 1st and 2nd respondents should have obtained leave to institute such an action. In the case of Titus Musyoki Nzioka v John Kimathi Maingi & another [2013] eKLR, this Court addressed itself as follows:

> "The issue was nonetheless raised as to whether the suit before the trial court is a derivative suit or not. In our view, we need to say something about that issue and more so because learned counsel for the applicant decided not to respond to it. If the suit in question is not a derivative action, then the appellant will not have the necessary locus standi to proceed with the same. A derivative suit, simply put, is a suit filed by a minority shareholder of a limited liability company to seek remedy for wrongs done to the company by the majority shareholders or directors."

41. It is trite that the trial court's discretion to determine whether a derivative action is appropriate is based on the circumstances of each case. It is common ground that the suit in question is not a derivative suit. The 1st respondent sought discovery in his capacity as a director and shareholder of the 3rd respondent. He was, however, not a signatory to the 3rd respondent's accounts with the appellant.

42. In the circumstances, we find that the 1st respondent could not have in his own capacity sought to access or the discovery on the 3rd respondent's accounts without a derivative suit.

43. The appellant contends that the trial court erred in granting a mandatory injunction at the interlocutory stage, a remedy typically reserved for cases where there is a clear and urgent need for intervention. It is trite that a mandatory injunction may only be granted where the applicant has demonstrated a clear right and where the refusal of the injunction would cause irreversible harm.

44. In the case of Kenya Breweries Limited & Another v Washington Okeyo [2002] eKLR, this Court adopted the test for granting a mandatory injunction as stated in volume 24, Halsbury's Laws of England, 4th Edition para 948 as follows:

> " A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff... a mandatory injunction will be granted on an interlocutory application."

45. In this case, the trial court found that the documents sought by the 1st and 2nd respondents were necessary for the preparation of their case. However, the court failed to show that there were any special circumstances to warrant the immediate award of Kshs. 150,000 to the 1st and 2nd respondents, even when those were sought as special damages. In any event, no receipts were produced to specifically prove that indeed the amount was paid, as rightly conceded to by Mr. Ombwayo, so that the matter could be summarily determined by the court.

46. In the case of Alex Wainaina t/a John Commercial Agencies v Johnson Mwangi Wanjihia [2015] eKLR, this Court held thus:

> " These principles have received full approval by the courts in this country, including:- Belle Maison Limited Vs. Yaya Towers Limited H.C.C.C. 2225 of 1992, per Bosire, J. (as he then was) , Ripples Limited Vs. Kamau Mucuha H.C.C.C. No. 4522 of 1992 per Mwera, J. and Magnate Ventures Limited vs Eng. Kenya Limited [2009] KLR 538 which summarized the principles thus:
>
> i. A mandatory injunction need not to be given at an interlocutory stage. It could be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it would not normally be granted. However, it would be granted if the case was:-
>
> a. Clear and one which the court thought it ought to be decided at once, or
>
> b. If the act done was a simple and summary one which could be easily remedied.
>
> c. Or if the defendant attempted to steal a match on the plaintiff.
>
> ii. The decision to grant a mandatory injunction at the interlocutory stage was a decision dependent on the discretion of a judge and each case had to be decided on the basis of its own peculiar facts and circumstances.'
>
> The consistent reiteration of those principles by the courts is an affirmation that the remedy of mandatory injunction is a drastic one which ought not to be granted mechanically but considered with caution."

47. In the present case, we find no special circumstances that would have necessitated the grant of a mandatory injunction at the interlocutory stage. The order for the payment of Kshs. 150,000 to the 1st and 2nd respondents did not, in our view, fall under exceptional circumstances.

48. The appellant argues that the trial court violated the principle of banker-client confidentiality by ordering the disclosure of certain documents. Banker-client confidentiality is a fundamental principle of banking law, protected under Section 40 of the *Banking Act*. However, the court has the authority to order the disclosure of documents if it determines that doing so is essential for the proper administration of justice. The trial court, in balancing the interests of confidentiality and justice, found that the documents sought were relevant to the case and did not grant an order that violated the principle of confidentiality. Nonetheless, the court must ensure that only documents which do not fall under legal privilege are disclosed.

49. It is trite that the court may order the discovery of documents upon an application being made, where those documents are related to the suit before it. As stated in Halsbury's Laws of England (Volume 85 (2012)) (online edition) at para 655;

> "Any party to a cause or matter may apply to the judge for an order directing any party, other than the proper officer of the Crown, to make discovery on oath of any documents which are or have been in his possession or power relating to any matter in question in the cause or matter. Thereupon the judge may make such order as he thinks fit, but discovery may not be ordered unless he is of opinion that it is necessary either for disposing fairly of the cause or for saving costs."

50. Orders for the production of documents fall under the purview of Section 22(a) of the *Civil Procedure Act* which provides that:

> " Power to order discovery and the like Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—
>
> (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;"

51. The appellant contends that the documents sought in discovery were covered by privilege, and that the disclosure of the same was in breach of banker-client confidentiality. We are persuaded that the 1st respondent, even as a director and shareholder of the 3rd respondent was not a signatory to the 3rd respondent's accounts with the appellant. In the circumstances, only the 3rd respondent could request the documents sought, and as we have established, the 1st and 2nd respondents could only approach the court to access documents relating to the 3rd respondent through a derivative suit on behalf of the 3rd respondent. Therefore, we find that the trial court had no judicial basis for ordering the discovery.

52. In the result, we find that the trial court did not properly exercise its discretion in allowing the 1st and 2nd respondents' application. Therefore, this is an appropriate matter for our intervention.

53. Consequently, we allow the appeal. We direct that the 1st and 2nd respondents be restrained from compelling the appellant to release any documents except those that are legally and properly obtainable. The costs thereof shall be borne by the 1st and 2nd respondents.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR