



Johemi East Africa Limited & another v Kariuki & 3 others (Commercial Case E358 of 2023) [2024] KEHC 10175 (KLR) (Commercial and Tax) (16 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E358 OF 2023**

**A MABEYA, J
AUGUST 16, 2024**

BETWEEN

JOHEMI EAST AFRICA LIMITED 1ST PLAINTIFF

ZIVA AGRIVENTURES LIMITED 2ND PLAINTIFF

AND

GEORGE MACHARIA KARIUKI 1ST DEFENDANT

SYRAFO LIMITED 2ND DEFENDANT

I&M BANK 3RD DEFENDANT

ABSA KENYA LIMITED 4TH DEFENDANT

RULING

1. This ruling determines the application dated 11/8/2023. The same was brought under sections 238, 239, 280(1), (2), (3), (4) and (5) of the [Companies Act](#), sections 1A, 2B, 3, 3A of the [Civil Procedure Act](#), Order 50 rule 1 of the [Civil Procedure Rules](#).
2. The applicants have sought leave to continue a derivative suit on behalf of the 2nd plaintiff for the acts and omissions by the 1st respondent's negligence, default, breach of duty and trust. That the draft plaint be deemed to have been duly filed. That leave be granted for the parties to convene an extraordinary meeting of the 2nd plaintiff.
3. The application was premised on the grounds set out on the face of the Motion and the supporting affidavit of Esther Wamuyu WaitthakA sworn on even date. It was averred that the 2nd plaintiff was a company incorporated for the purpose of carrying out the business of selling insecticides and agro-chemical products.



4. That the 2nd plaintiff had two directors who were locked in a stalemate conflict and therefore unable to hold a board of directors meeting. That in July 2023, the 1st and 2nd defendant misused their positions as directors and shareholders of the 2nd plaintiff and defrauded the 2nd plaintiff a sum of Kshs 1,323,900/-. That the 1st defendant had admitted to this fraud in HCCHRPET/ E045/2023.
5. It was the applicants position that receiving money as a director or shareholder was not permitted by the articles and memorandum of association. That the two shareholders are unable to conduct a special general meeting and the 1st defendant, being the sole administrator of the company's email, there is risk of it being misused and confidential customer information deleted. That it is in the interest of the 2nd plaintiff to be allowed to nominate a director to manage the affairs as the company's financial and management is in crisis.
6. The application was opposed by the 1st defendant George Macharia Kariuki in a replying affidavit he swore on 30/8/2023. He contended that the 2nd plaintiff was owned by the 1st plaintiff and the 2nd defendant on a ratio of 60% to 40%, respectively. That the 1st plaintiff would procure goods from third parties and sell them at a profit to the 2nd plaintiff without benefiting the defendants. That all the parties had agreed that every payment made to the 2nd plaintiff would be against a payment voucher approved by the 1st defendant but this was not adhered to by the 1st plaintiff.
7. That the 2nd plaintiff's director, Esther Wamuyu has not been willing to sit down and hold a meeting of the Company. That the defendants were willing to transfer their shares upon rendering proper accounts of the company.
8. The application was canvassed by way of written submissions which I have considered. The applicant submitted that the application was meant to protect the 2nd applicant in enforcing accountability in its governance and management. That the 2nd plaintiff's director had committed fraud against the company and thus the stalemate. It was further submitted that the 1st respondent ought to surrender all the administrator rights, privileges and passwords to the 2nd applicants official email address.
9. The respondents did not file submissions.
10. I have considered the pleadings and the submissions on record. the main issue for determination is whether this suit should be allowed to be continued as a derivative action.
11. The foundation for derivative claims stems from sections 238 to 239 of the [Companies Act](#) which stipulate as follows: -

“ 238

- (1) In this Part, "derivative claim" means proceedings by a member of a company —
 - (a) in respect of a cause of action vested in the company; and
 - (b) seeking relief on behalf of the company.
- (2) A derivative claim may be brought only —
 - (a) under this Part; or



- (b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
- (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.
- (4) A derivative claim may be brought against the director or another person, or both.
- (5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.
- (6) For the purposes of this Part-
 - (a) "director" includes a former director;
 - (b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law."

- 239 In order to continue a derivative claim brought under this Part by a member,
- (1) the member has to apply to the Court for permission to continue it.
 - (2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court-
 - (a) shall dismiss the application; and
 - (b) may make any consequential order it considers appropriate."

12. In *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another* [2017] eKLR, it was held that: -

“Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: see *Wallersteiner v Moir* (No.2) [1975] 1 All ER 849. 38.

Until 2015, in Kenya, the common law guided derivative actions in Kenya.

With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in *Foss v Harbottle* was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance”.



13. The plaintiffs instituted this suit as a derivative action on behalf of the 2nd plaintiff on the grounds that the two directors of the company were unable to convene a meeting and run the affairs of the company. It was averred that the stalemate was perpetuated by the fraudulent dealings of the 1st respondent who is a director of the 2nd plaintiff.
14. In an application for leave to institute a derivative claim the applicant must establish that he is a member of the company, there is a cause of action vested on the company and the reliefs sought are for the benefit of the company. The record shows that the 1st plaintiff is a member of the company and holds 6000 shares out of the 10,000 shares in the 2nd plaintiff.
15. On the second aspect, the applicant has contended that the directors of the company are unable to run the company since they have been unable to meet and discuss the affairs of the company. In a classic case of a derivative action, the alleged party who has harmed the company is the controller of the company and hence the need to have leave from court to sue on behalf of the company.
16. From the record, it is clear that the two directors have been unable to run the company amicably. The purpose of the application is to have the company choose another director, take up management of the company as well as its accounts. I note that the 1st plaintiff who has moved the court is still a director of the 2nd plaintiff.
17. The 2nd defendant has demonstrated his willingness to have a meeting and even go to the extent of selling his shares. The court finds that this is not a proper case of a derivative action as the 1st plaintiff wants to use the orders of the Court to remove the 2nd director. The 1st plaintiff is also a majority shareholder of the 2nd plaintiff.
18. Since the 2nd plaintiff has indicated his willingness to have a meeting concerning the company, the Court finds that the best recourse is to order a meeting between the directors in one month's time and report back to Court.
19. Accordingly, the Court gives directions that the directors do hold a meeting within 30 days of this order. In the meantime, the application is dismissed. I will make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE

