



REPUBLIC OF KENYA



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Majale v Muiru & another; Lemuma Pharmacy Limited (Affected Company) (Commercial Case 430 of 2017) [2024] KEHC 14724 (KLR) (Commercial and Tax) (22 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14724 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 430 OF 2017
FG MUGAMBI, J
NOVEMBER 22, 2024

BETWEEN

LEVIS OKELLO MAJALE PLAINTIFF

AND

DR BONIFACE KIBUNJA MUIRU 1ST DEFENDANT

NEW LEMUMA PHARMACY LIMITED 2ND DEFENDANT

AND

LEMUMA PHARMACY LIMITED AFFECTED COMPANY

RULING

Background and Introduction

1. For determination is the plaintiff's application dated 28/11/2023 seeking inter alia leave to bring a derivative claim against the defendants in regards to the affected company. The application is brought pursuant to section 239 of the [Companies Act](#) and order 40 rules 1, 2 and 3 of the Civil Procedure Rules.
2. The background to this application is that the plaintiff and the 1st defendant jointly established Lemuma Pharmacy Limited (hereinafter referred to as "the Company") in the year 2000. The Company was created to operate pharmacies and trade in various pharmaceutical products across the country. Both the plaintiff and the 1st defendant were directors and held equal ownership, with each owning 50% of the Company's shares. The plaintiff alleges that the 1st defendant, without his consent or a resolution from the Company's board of directors, fraudulently registered a new entity, New Lemuma Pharmacy Limited (the 2nd defendant).



3. The plaintiff further alleges that the 1st defendant unlawfully transferred the assets and trading goods of the Company to New Lemuma Pharmacy Limited without the authorization or approval of a resolution from the Company's board of directors. The plaintiff also claims that the 1st and 2nd defendants are exclusively benefiting from the profits generated by New Lemuma Pharmacy Limited, to the detriment of both the plaintiff and the Company.
4. The application is opposed. The 1st defendant filed a replying affidavit, sworn by himself on 23/1/2024, in which he acknowledges the incorporation of the Company and confirms that both he and the plaintiff served as its directors. He asserts that, after conducting business together for more than 10 years, differences arose between him and the plaintiff. As a result, they mutually agreed to part ways by equally sharing all profits, losses, assets, and branches of the Company.
5. According to the 1st defendant, it was further agreed that although they were parting ways and would each run their own individual businesses, both parties would retain the name "Lemuma" as part of their respective newly incorporated entities. The 1st defendant states that he subsequently registered a new company, New Lemuma Pharmacy, alongside other directors, namely Samuel Ongaro, Rosalind Wahu Gitaka, and Peter Wagura Muiru.
6. The 1st defendant asserts that Lemuma Pharmacy Limited and New Lemuma Pharmacy Limited are distinct entities with separate directors. He contends that all profits and benefits derived by New Lemuma Pharmacy Limited are lawfully earned. The 1st defendant further argues that the plaintiff's allegations of fraudulent registration of the 2nd defendant are baseless and misleading, as no report of fraud has ever been filed by the plaintiff, nor has any evidence been presented to support these claims. Based on these grounds, the 1st defendant maintains that the present application is misguided and constitutes an abuse of the court process.
7. The application is also opposed through a replying affidavit sworn on 23/1/2024 by Samuel Otieno Ongaro, a director of the 2nd defendant. He confirms that towards the end of 2010, the directors of the Company agreed to split and each director was to register their own pharmacy under a new name. He further confirms that the directors were free to incorporate the name "Lemuma" in their respective new entities and that each director would retain the staff assigned to their respective branches.
8. Mr. Ongaro reiterated that Lemuma Pharmacy Limited and New Lemuma Pharmacy Limited are distinct entities with separate directors. He further asserted that all profits and benefits enjoyed by New Lemuma Pharmacy Limited are rightfully its own. Additionally, he emphasized that the plaintiff has never been a director of New Lemuma Pharmacy Limited, holds no interest in the said pharmacy, and therefore has no basis to claim any profits, losses, or benefits accrued by New Lemuma Pharmacy Limited.

Analysis and determination

9. I have carefully considered the pleadings, written submissions, evidence and authorities cited by the parties in support of their respective positions. The cardinal issue for determination is whether the plaintiff has met the threshold for instituting a derivative claim on behalf of the Company.
10. Under Section 238(1) of the *Companies Act* 2015 (the Act), a derivative claim means proceedings by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company.



11. Section 238(2) of the Act states:

“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.”
12. Section 239(1) of the Act states:

“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.”
13. Section 239(4) of the Act continues:

“On hearing the application, the Court may—

 - (a) give permission to continue the claim on such terms as it considers appropriate;
 - (b) refuse permission and dismiss the claim; or
 - (c) adjourn the proceedings on the application and give such directions as it considers appropriate.”
14. The law on leave to file derivative claims along the legal provisions outlined above is well crystalized in judicial decisions as well. In *Mohamed & Another V Ibrahim Ismail Isaak & Another*, [2021] eKLR, the Court held:

“It is clear from the Act that the Court must first satisfy itself that there is a prima facie case on any of the causes of action set out under section 238(3) of the Act. If the evidence adduced in support of the application does not disclose a case for the giving of permission, the application is for dismissal. The importance of judicial approval under the Act, is therefore to screen out frivolous claims. The court will only allow meritorious claims to be litigated as derivative suits. In this regard, an applicant needs to establish, through evidence, that he has a prima facie case without the need to show that it will succeed.” (emphasis added)
15. Further, under paragraph 20 of the said authority, the court relied on the case of *Isaiah Waweru Njumi & 2 Others V Muturi Ndungu*, [2016] eKLR to establish the broad principles that ought to be considered in applications for permission, which are:
 - (a) Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors’ challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;
 - (b) Whether the Plaintiff has made any effort to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;
 - (c) Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of *Recchion v Kirby* 637 F. Supp. 1309 (W.D. Pa. 1986), for example, the Court declined to



let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in Plaintiff's personal lawsuit;

- (d) Whether the Plaintiff is acting in good faith;
 - (e) Whether the action taken by the Plaintiff is consistent with one of a faithful director acting in adherence to the duty to promote the success of the company would take;
 - (f) The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company – is likely to be authorized or ratified by the company in the future; and
 - (g) Whether the cause of action contemplated is one that the Plaintiff could bring directly as opposed to a derivative action.”
16. In the present case, the plaintiff's claim against the 1st defendant is premised on the way in which the 2nd defendant was incorporated and the alleged fraud by the 1st defendant in conveying the assets of the Company to the 2nd defendant.
17. The only evidence that is presented in support of the 1st defendant's averment that parties had agreed to go their separate ways is a copy of minutes between the directors of Lemuma Pharmacy and one of its former suppliers. The same is marked as “BMK-1” in the 1st defendant's replying affidavit. In the minutes, it was noted that the plaintiff and 1st defendant as directors of the company had agreed to run the company separately but under the same name and agreed to individually settle the debts accrued to them by Lemuma Pharmacy Limited.
18. The 1st defendant also produced a CR12 indicating the directors and shareholders of the 2nd defendant which include himself while the plaintiff is not one of them.
19. While the plaintiff has alleged that the 1st defendant fraudulently incorporated a new entity and transferred the Company's assets to it without the approval of the directors, he has failed to provide prima facie evidence to substantiate these allegations. Specifically, there is no evidence on record to demonstrate that the plaintiff made any formal demand for an explanation regarding the incorporation of the 2nd defendant or took any proactive steps to safeguard the Company's interests.
20. Such evidence, if produced, would have strengthened the plaintiff's case by demonstrating that his actions were in good faith and in furtherance of his fiduciary duty to protect the Company's best interests, as opposed to pursuing a personal grievance or vendetta against the 1st defendant.
21. On the contrary, the evidence on record suggests that the directors of Lemuma Pharmacy Limited mutually agreed to part ways, with each party subsequently operating under a new entity. This narrative remains unchallenged by the plaintiff, who has not adduced evidence to contradict the existence or validity of the agreement recorded in the minutes. I find that the plaintiff has failed to establish, on a prima facie level, any cause of action as set out under section 238(3) of the Act.

Disposition

22. Accordingly, the instant application lacks merit and is dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

F. MUGAMBI

JUDGE

