



REPUBLIC OF KENYA



Mureithi & 4 others v Gathondu & another; Satima Peak Farmers Limited (Interested Party) (Civil Case E002 of 2024) [2024] KEHC 16143 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE E002 OF 2024
MA ODERO, J
DECEMBER 20, 2024**

BETWEEN

**STEPHEN MAINA MUREITHI 1ST PLAINTIFF
MARGARET WANJIKU GIKUNJU 2ND PLAINTIFF
ANTONY WACHIRA MUCHEMI 3RD PLAINTIFF
DUNCAN MWANGI MUIGA 4TH PLAINTIFF
HENRY KARUCI KIBORO 5TH PLAINTIFF**

AND

**HARON MAINA GATHONDU 1ST DEFENDANT
CYRUS MURIITHI KINGORI 2ND DEFENDANT**

AND

SATIMA PEAK FARMERS LIMITED INTERESTED PARTY

RULING

1. Before this Court is the Notice of Motion dated 27th February 2024 by which the plaintiffs seek the following orders:-
 1. Spent
 2. That the Plaintiff do have leave to continue this suit as a derivative action on behalf of Satima Peak Farmers Limited.
 3. That indemnity be granted by the said Satima Peak Farmers Limited, the interested party, for all costs and expenses reasonably incurred in prosecuting this suit.



4. That the Defendants be restrained until further orders from serving as directors of Satima Peak Farmers Limited.
 5. That the 1st and 2nd Defendants be restrained from wasting the assets of Satima Peak Farmers Limited until further orders of this Honourable Court.
 6. That the 1st and 2nd Defendants be restrained from breaching their statutory, common law and equitable duties owed to the said Satima Peak Farmers Limited pending the hearing and determination of this suit.
 7. That Mr. Stephen Maina Mureithi be appointed a receiver manager of activities and transaction of Satima Peak Farmers Limited.
 8. That the costs of this application be provided for.”
2. The application was premised upon order 40 Rules 1, 3 and 10 order 51 Rules 1 and 2 of the Civil procedure Rules, Section 3 of the Judicature Act and Sections 238 of the Companies Act and was supported by the Affidavit of even date sworn by the 1st plaintiff Stephen Maina Mureithi.
 3. The Defendants Haron Maina Gathondu and Cyrus Muriithi Kingori opposed the application through a Replying Affidavit dated 27th March 2024 sworn by the 2nd Defendant.
 4. The matter was canvassed by way of written submissions. The plaintiffs filed the written submissions dated 3rd October 2024 whilst the Defendants relied upon their written submissions dated 9th September 2024.

Background

5. The plaintiffs claim an interest in Satima Peak Farmers Limited (the Interested Party) which company was registered on 17th June 1969 (hereinafter referred to as ‘the Company’)
6. The two Defendants are remaining Directors of the company. The other Directors Joseph Mwangi Muturi, Stanley Kuria Gathu and Duncan Ndiritu Kamau have all passed away. Copies of their Death Certificates have been annexed at Pages 40-42 of the Supporting Affidavit.
7. The Plaintiffs accuse the Directors of the company of having refused/failed to undertake their common law, statutory and equitable duties as follows:-
 - (a) Failing to call for an Annual General Meeting.
 - (b) Failing to present the Books of Account for inspection as required by the Memorandum of Association.
 - (c) Failing to appoint new Directors following the demise of three of the Directors of the company.
 - (d) Sabotaging the effort of the shareholders to revive the company.
 - (e) Adamantly continuing to run the affairs of the company despite the lapse of the Defendants’ tenure as for the Memorandum and Articles of Association.
8. The Plaintiffs now seek leave to file a derivative suit on behalf of the company. They seek orders to restrain the Defendants from continuing to act as Directors. They also seek orders to restrain the Defendants from continuing to run the company and from wasting its assets pending the hearing and determination of the suit.



9. The Defendants deny the accusations which have been levelled against them by the plaintiffs. They aver that the plaintiffs do not have authority of the other shareholders to bring this action.
10. The Defendants state that due to ongoing lengthy litigation between two factions in the company it has been impossible to call for an Annual General Meeting. That the company has not in recent times run a bank account so it has not been possible to present books of Account for inspection.
11. The Defendants deny having wasted and/or mismanaged the assets of the company. They claim that this suit is merely an attempt by the 1st Defendant to take over the company through the back door without the blessing of the other shareholders. They urge this court to dismiss the current application.

Analysis and Determination

12. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The issues which arise for determination are the following:-
 - (i) Whether leave to file a derivative suit ought to be granted.
 - (ii) Whether the interlocutory orders sought should be granted.

i. Derivative Suit

13. Blacks Law Dictionary 10th Edition defines a derivative Suit/action in the following manner;

“A suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary, especially a suit asserted by a shareholder on the corporations behalf against a third party (usually a corporate officer) because of the corporations failure to take some action against a third party”
14. The provisions relating to derivative suits are to be found in Section 238 to Section 242 of the Companies Act, Section 238 of the Companies Act provides as follows:-
 - “ 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 purpose 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.”
15. The case of *Foss -vs- Harbottle* 67 ALL ER 189 established the general rule that in any action in which a wrong is alleged to have been committed against a company, the proper claimant is the company itself. However there exist several important exceptions to this general rule. One such exception is a derivative suit by which a minority shareholder may bring a claim on behalf of the company.
16. The Court of Appeal of Kenya in *Grace Wanjiru Munyinyi & Another -vs- Gideon Waweru Githunguri & 5 Others* 2011 eKRL summarized the principle in *Foss -vs- Harbottle* as well as its exceptions thus:-
- “The classic definition of the rule in *Foss Vs Harbottle* is stated in the judgment of Jenkin LJ in *Edwards Vs Halliwell* [1950] 2 ALL ER 1064 at 1066 as follows;-
- (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation
 - (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter, because, if the majority confirms the transaction, caditquaetstio; or, if the simple majority challenges the transaction, there is no valid reason why the company should not sue.
 - (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority shareholders cannot confirm the transaction.
 - (4) There is also no room for the operation of the rules if the transaction complained of could be validly sanctioned only by a special resolution or the like because a simple majority cannot confront a transaction which requires the concurrence of a greater majority.
 - (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.”
17. In order to determine whether leave to file a derivative suit ought to be granted the court will be guided by two considerations;-



1. Whether the Applicant has established a prima facie case to warrant grant of such leave.
 2. Whether the application for leave has been brought in good faith.
18. Section 241(2) of the *Companies Act* 2015 provides as follows:-
- “(2) In considering whether to give permission, the Court shall take into account the following considerations:-
- a. whether the member is acting in good faith in seeking to continue the claim;
 - b. the importance that a person acting in accordance with Section 143 would attach to continuing it.
 - c. if the cause of action results from an act or omission that is yet to occur whether the act or omission could be and in the circumstances would be likely to be:-
 - i. Authorized by the Company before it occurs; or
 - ii. Ratified by the Company after it occurs;
 - d. If the cause of action arises from an act or omission that has already occurred – whether the act or omissions could be and in the circumstances would be likely to be ratified by the company.
 - e. Whether the company has decided not to pursue the claim.
 - f. Whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in the members’ own right rather than on behalf of the company.
 - g. In deciding whether to give permission, the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest/direct or indirect in the matter.”
19. Section 238 of the *Companies Act*, 2015 provides that for a party to succeed in a derivative suit, the party must demonstrate the following:
1. The party must be a member of the company which includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of the law;
 2. The proceedings must be seeking relief on behalf of the company;
 3. The proceedings must be for the protection of members against unfair prejudice brought under the *Companies Act*;
 4. The proceedings are 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.
20. Section 239(2) of the *Companies Act* requires that the court do refuse such applications where no prima facie case has been established. Therefore at this stage the court must consider two things. Firstly



whether the Applicant has disclosed a prima facie case and secondly whether there has been an act of omission by one or more of the directors of the company within the meaning of Section 283 of the Act.

21. In the case of *Isaiah Waweru Ngumi & 2 Others -vs- Muturi Ndungu*, 2016 eKLR, Hon. Justice Joel Ngugi set out the factors which the court ought to consider in determining whether or not a prima facie case meriting leave has been established, as follows:-
 - 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 efforts 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 America case of *Recchion Vs Kirby* 637 F. Supp. 1309 (W.D Pa. 986), 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 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 complainant 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”.
22. In considering this particular case, the court needed to have been clearly informed what interest the plaintiffs have in the company. The plaintiffs have not stated with clarity what position if any they hold in the company or what their interest is in the said company.
23. In the supporting Affidavit dated 27th February 2024 the 1st Plaintiff Stephen Maina Mureithi simply claims that he has the consent of the other plaintiffs to file suit on their behalf. Nowhere are the plaintiffs described as shareholders or members of the company.
24. The plaintiffs are therefore inviting the court to assume that they are minority shareholders in the company. The courts cannot make such an assumption in the absence of cogent evidence to prove that the plaintiffs are indeed shareholders in the company. On this basis alone their prayer would fail.
25. The plaintiffs further accuse the Defendants of failing to hold an AGM for the past twenty (20) years to the detriment of the company. However the plaintiffs have not told the court what if any steps they have themselves taken to have taken to ensure that an AGM is held. There is no letter written to the Defendants urging that an AGM be called.



26. The plaintiffs have in my view made vague and unsubstantiated claims against the Defendant. They have accused the Defendants of wasting company assets. No particulars of this allegation or wastage were supplied. Which assets were being wasted and in what manner?
27. The plaintiffs have also accused the Defendants of sabotaging efforts of the shareholders to revive the company what efforts were these and by which shareholders. Again the allegation is not supported by any particulars.
28. It is alleged that the Directors have been mismanaging the company to the detriment of the company itself and to other shareholders. Again this is a blanket allegation which is not supported by any particulars. In what manner has the company been mismanaged. What is the nature of loss financial or otherwise incurred by the company? These critical questions remain unanswered and this allegation is not supported by any cogent evidence.
29. All in all I find that the plaintiffs have failed to establish a prima facie case to warrant grant of leave to file a derivative suit. Accordingly this prayer is denied.

Interlocutory Orders

30. The plaintiffs have in their application prayed that the court issue orders restraining the Defendants from serving as Directors of the Company pending the hearing and determination of the suit. The plaintiffs were effectively seeking injunctive orders.
31. Order 40 Rule 1 of the Civil Procedure Rules 2010 provides as follows:-
 1. Where in any suit it is proved by affidavit or otherwise-
 - (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
32. The principles for grant of interlocutory injunctive orders were laid down in the celebrated case of *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358 where the court held that in order to qualify for an injunction;
 - (i) First the applicant must show a prima facie case with a probability of success.
 - (ii) Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
 - (iii) Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
33. At this point it has not been demonstrated by the plaintiffs that the Directors of the company have blatantly refused to act in accordance with their statutory or equitable duties in respect of the company. As stated earlier the allegations made by the plaintiffs though serious are wholly unsubstantiated.



34. On the limb of irreparable harm the plaintiffs have failed to show what loss they, the company or other shareholders are likely to suffer if the interim order is sought are not granted. I am not persuaded that the subject matter of the suit is likely to dissipate unless injunctive orders sought are granted.
35. Finally the plaintiffs have prayed that the court appoint a Receiver - Manager to run the affairs of the company. In my view this prayer is premature. It would have to abide the hearing of the main suit.
36. Finally I find no merit in the present application. The Notice of Motion dated 27th February 2024 is dismissed in its entirety. Costs to be met by the plaintiffs.

DATED IN NYERI THIS 20TH DAY OF DECEMBER 2024.

MAUREEN A. ODERO

JUDGE

