



Kariuki & another v Kariuki & 2 others; Ruiru Park Academy Limited (Affected Party) (Civil Case E023 of 2022) [2023] KEHC 18421 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE E023 OF 2022
PM MULWA, J
MAY 31, 2023**

BETWEEN

ISAAC NGUGI KARIUKI 1ST PLAINTIFF

PETER NJOROGE KARIUKI 2ND PLAINTIFF

AND

HARUN NJENGA KARIUKI 1ST DEFENDANT

SAMSOM MWAURA KARIUKI 2ND DEFENDANT

DAVID K KINYANJUI 3RD DEFENDANT

AND

RUIRU PARK ACADEMY LIMITED AFFECTED PARTY

RULING

1. This is a ruling on the Notice of Motion application dated August 26, 2022 and filed on October 12, 2022, brought under sections 238 and 239 of the [Companies Act](#), the Companies (General) Regulations, Order 51 Rule 1 of the [Civil Procedure Rules](#) and sections 1A, 2B, and 3A of the [Civil Procedure Act](#) and Article 159 (2) of the [Constitution of Kenya](#). It seeks the following orders.
 - i. Spent
 - ii. Permission to be granted to the applicant to continue with the derivative claim seeking relief on behalf of Ruiru Peak Academy Ltd for the acts and omissions of the respondents/defendants involving negligence, default, breach of duty and breach of trust in their capacity as director of the company.
 - iii. An order prohibiting any transaction on Equity Bank Account number xxxxxxxxxxxx without the approval of other directors.



- iv. An order compelling the defendants/respondents to produce the books of records, banking slips, audited financial accounts, and banks statement in their custody from 2011 to date.
 - v. An order restraining the Board from intimidating and threatening the 1st applicant/plaintiff.
 - vi. Costs be provided for.
2. The gist of the application is that the Affected Company is established under the Companies Act with the objective of establishing, maintaining and carrying on and setting up schools, secondary schools, colleges, typing and commercial colleges. The applicants are minority shareholders while the respondents are directors and majority shareholders who run the daily business of the affected company. The Company has completed several projects but the respondents have failed to convene a meeting since 2020, no profits and dividends have been declared and the respondents have presided over the pilferage of the Company's capital assets and resources for personal use, including withdrawing money from the account held with Equity Bank. Their acts of sabotaged continue to the detriment of the plaintiffs and the affected party.
 3. The application is supported by the annexed affidavit of Isaac Ngugi Kariuki sworn on August 25, 2022. He depones that the respondents have violated the fiduciary duty owed to the company. The respondents have created an unsanctioned Board of Management to replace and carry out the functions of the Board of Directors. The actions of the Respondents continue to occasion loss to plaintiff and the company.
 4. In response to the motion Harun Njenga Kariuki filed a Replying affidavit sworn on November 17, 2022. He depones he is a Director of the Affected Company with the Authority of the Board to swear the affidavit. The applicants have been actively involved in the running of the company including approving payments, he attached a copy of the payment voucher dated September 26, 2022. The withdrawals made from Equity Bank are made in good faith and with utmost transparency. Indeed, the applicant has been frustrating the daily running of the affected company by cancelling payments to suppliers and refusing to approve the budget. The company has convened meetings on November 19, 2021, April 14, 2022, and September 9, 2022 with the applicants in attendance, and attached copies of the minutes. He depones in the meetings of April 14, 2022 and September 9, 2022 the applicants left when the meetings were underway.
 5. Though the applicants had been duly notified they failed to attend the board meeting held on July 28, 2022. The company has declared profits as per the report and financial statements tabled at the board meeting, but the applicants have declined to sign the same. The 1st applicant is mostly at the school and runs the day-to-day activities of the school. The fiduciary duty has been observed and no amount of money has been withdrawn from the School's account for personal use. The directors are not salaried and only receive dividends when the company has reserves. The applicants have failed to meet the threshold to continue with the derivative claim against a company.
 6. Isaac Ngugi Kariuki in his supplementary affidavit sworn on December 22, 2022 depones the cheque cancellation was not based on malice or with the intention of sabotaging the company but he cancelled cheques not approved at the Board meetings. He maintains that the bank withdrawals are done frequently by only three directors as signatories yet there 5 signatories. The withdrawals are made using a secret chequebook unknown to the applicants contrary to the legitimate chequebook of the company.
 7. When the application came up for hearing the court directed that the application be heard by way of written submissions. The parties did comply with the orders.



Applicant's submissions

8. By the submissions filed on December 22, 2022, on behalf of the plaintiff counsel submitted on two issues as follows:
 - i. Whether the applicants have made out a case for the grant of permission to commence/continue derivative action
 - ii. Whether the applicants are entitled to the reliefs sought?
9. On the first issue counsel submits that the applicant's application meets the threshold of Section 238- 241 of the *Companies Act*. The applicants have demonstrated the fraudulent activities of the Respondent which include withdrawing monies for personal use from the company and the failure to convene board meetings which have and continue to cripple the day-to-day activities of the affected company. He relied on the case of *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & Anor* (2107) eKLR where the court stated

“...derivative actions are the pillar of corporate litigations. As I understand it, a derivative action is a mechanism which allows shareholders to litigate on behalf of the corporation often against an insider (whether 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 corporations.”
10. On the second issue counsel submits the applicants have met the threshold for granting interlocutory injunction orders as set out in the *Giella vs Cassman Brown and Co. Ltd* 1973 E.A. 360.
11. Counsel further submits the applicants have established a prima facie case with a probability of success, they have demonstrated how the respondent has mismanaged funds belonging to the affected company. The annexed minutes are a clear indication of the mismanagement of the company as they are signed by the Chairman and board of directors. That unless the injunctive orders are granted the company will continue to suffer in the hands of the respondent.
12. In conclusion counsel urged the court to allow the application as prayed.

Respondent's submissions

13. Counsel filed submissions dated March 14, 2023. It was submitted the application fails to meet the threshold as per sections 238- 242 of the *Companies Act*. The plaintiffs'/applicants' conduct in the management of the company is tainted and thus barred from pursuing a derivative claim. Before allowing the application, the court should be satisfied that the applicant is acting in good faith and in the best interest of the Company.
14. The applicants have failed to demonstrate any wrong suffered, loss or any injuries suffered by the company as a result of the actions of the respondents. According to counsel as the applicants are involved in the day-to-day activities of the company and can access the information requested, they have access to all audited accounts of the company and as such no need for a court order to exercise their rights.
15. The applicants have failed to demonstrate that the derivative suit is in the best interest of the company. The applicants have not called the respondents to remedy any wrong done to the company.



Analysis and determination

16. In due consideration of the application, the replying affidavit and the submissions in support of the parties' respective arguments, the issues for determination are:
- i. Whether the court should grant orders for the institution of a derivative suit?
 - ii. Whether injunctive orders should be granted?
 - iii. Who bears the costs?
17. The institution of derivative claims against a company is provided for under Section 238 of the Company Act. It provides

Section 238

- (1) of the Company Act defines a "derivative claim" to mean 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 the 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.
18. The wording of Section 238 of the *Companies Act* allows the applicants as directors of the company to institute a derivative claim on behalf of the company. The court is vested with the discretion to either allow or refuse to grant the orders of the institution of a derivative suit as per Section 239 of the *Companies Act*. The court should, however, be satisfied that the application is made in good faith, and in the best interest of the company.

Section 239 provides as follows;

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.



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.
 - (3) If the application is not dismissed under subsection (2), the Court—
 - (a) may give directions as to the evidence to be provided by the company; and may adjourn the proceedings to enable the evidence to be obtained.
 - (4) 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.
19. A party seeking to institute a derivative suit must seek the leave of the court as held in the Court of Appeal case in *Amin Akberali Manji & 2 others vs Altaf Abdulrasul Dadani* [2015] eKLR, the Court held that: -
- “Leave of court shall be obtained before filing a derivative suit, but may be obtained to continue with the suit once filed.... It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such action falls within any of the exceptions to the rule of Foss vs Harbottle”.
20. According to the applicants, the respondents have converted the capital assets of the company into their own use, and fraudulently withdrawn funds from the company without the authorisation of all directors. The respondent being majority shareholders have failed to convene a meeting since 2020 despite the company embarking on and completing multiple projects. The respondents have converted the capital of the company Ruiru Peak Academy Ltd into their personal use and they are intimidating the applicants who are the minority shareholders.
21. On the other hand, the respondents submit the applicants are involved in the day-to-day activities of the company, the 1st applicant has frustrated the operations of the company by cancelling payments to be made on behalf of the company thereby crippling the affairs of the company. The company has called and convened several meetings with the knowledge of the applicants.
22. I have considered the annexures in the Replying Affidavit filed by Harun Njenga Kariuki, the court notes the copies of notices inviting the Board of Directors for various meetings were taken out, and the notices were copied to all directors including the applicants. The court also notes that as per the minutes of the meetings held on November 19, 2021, April 14, 2022, and September 9, 2022 the applicants were present in the meetings. Despite being notified the applicants failed to attend the meeting on July 28, 2022 without an apology. The 1st applicant runs the day-to-day activities of the company and thus cannot allege to have been unaware of the meeting of July 28, 2022.



23. In light of the foregoing, the court finds that contrary to the assertion made by the applicants, the respondents have duly convened several meetings which discussed amongst other things the development and improvement of the company, the profits of the company and the financial statements of the company. The allegations therefore, that no meeting has been called since 2020 are misplaced.
24. The applicants have attached copies of notices they issued to the respondents convening the directors for a meeting, no minutes have been attached as evidence that the meetings were convened. The applicants wrote two letters to the Bank requiring their inclusion as signatories of the bank before any cheques are withdrawn by the respondent. The respondents have explained that the cheques drawn were used to pay for goods and services on behalf of the company and annexed the payment vouchers.
25. The Respondents contend that the 1st applicant is frustrating the running of the day-to-day activities of the affected party by the cancellation of cheques made for payments of goods and services obtained on behalf of the company. The 1st applicant admits to the cancellation of the cheques on the gist that the payments were not approved by the board of directors. The absence of the applicants in the meetings fails to inform them of the agendas discussed and passed in the meetings.
26. I find the cancellation by the 1st applicant marred with malice as the he failed to attend the company's meetings and at some point, walked out of the meetings when they were ongoing.
27. A party seeking the orders of the court to institute a derivative suit must come to court with clean hands, in good faith and in the best interest of the company. In the instant case, the hands of the applicants are tainted. I am not persuaded that the application is made in the best interest of the company the allegations made against the respondents have not been substantiated by evidence.
28. The applicants also base their arguments on the issue that the respondents have failed to file profits on behalf of Ruiru Peak Academy Limited. This position is not true as the Respondents have filed in their annexures the financial statements of the company which are pending the signature of the applicants.
29. In sum, I fail to find any cause of action arising from the negligent actions, or breach of duty of the respondents.
30. The next issue is whether the applicants have established the threshold for the court to grant injunctive reliefs. The conditions for granting injunctive reliefs are set out in the case of *Mrao vs First American Bank of Kenya Ltd and 2 others* 2003 KLR 125. An applicant must establish a 'prima facie' case with a probability of success that unless injunctive orders are granted the applicant will suffer irreparable harm which would not be adequately compensated for by damages and that if the court is in doubt, it will decide the matter on a balance of convenience.
31. In the circumstances this court finds that the failure to find any cause for a derivative suit, the injunctive reliefs as prayed fails.
32. The upshot is that the application dated August 26, 2022 lacks merit and the same is dismissed.
33. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 31ST DAY OF MAY, 2023.

P.M. MULWA

JUDGE

In the Presence of:



Kinyua/Duale – Court Assistants

Ms. Wanjiru h/b Mr. Mwangi - for applicants

N/A - for respondents

