



REPUBLIC OF KENYA



**Brickman Homes Limited & another v Mberia & 2 others (Civil Case E430 of 2022)  
[2023] KEHC 24703 (KLR) (Commercial and Tax) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24703 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E430 OF 2022  
DAS MAJANJA, J  
OCTOBER 31, 2023**

**BETWEEN**

**BRICKMAN HOMES LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
PURITY WANJIRU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MERCY KENDI MBERIA ..... 1<sup>ST</sup> DEFENDANT  
VINCENT NJENGA WAINAINA ..... 2<sup>ND</sup> DEFENDANT  
BRICKMAN PROPERTIES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction And Background**

1. On 02.11.2022 the Plaintiffs filed suit together with a Notice of Motion dated 31.10.2022 invoking, inter alia, sections 138 and 239 of the [Companies Act](#), 2015 seeking the following orders:
  1. Spent
  2. The Applicant be granted permission to continue the Derivative Claim seeking relief on behalf of the Brickman Homes Limited (herein after 1<sup>st</sup> Plaintiff) in respect of the acts and omissions by the Respondents particularly the 1<sup>st</sup> Respondents involving negligence, breach of duty and trust in her capacity as a director of the Brickman Homes Limited.
  3. Spent



4. Pending the hearing and determination of this suit a temporary injunction do issue restraining the defendants, their servants, agents, and or employees from selling, alienating, transferring, disposing, removing or in any manner whatsoever dealing with assets of the 1<sup>st</sup> Plaintiff.
  5. Pending the hearing and determination of this Application and thereafter this suit the honorable court be pleased to issue orders directing all the monies due from the 1<sup>st</sup> Plaintiff's clients to be paid into the 1<sup>st</sup> Plaintiff's official Co-Operative Bank account No.0119\*\*\*\*\*900.
  6. Spent
  7. Pending hearing and determination of the suit the Appointment of the Vincent Njenga Wainaina as a director of the 1<sup>st</sup> Plaintiff be suspended.
  8. Spent
  9. Pending the hearing and determination of the suit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be compelled to produce the books of records, banking slips, audited financial accounts, bank statements in their custody touching on all the dealings and transactions undertaken over the 1<sup>st</sup> Plaintiff's Assets and properties from 8<sup>th</sup> August, 2022 up to date.
  10. Pending the hearing and determination of the suit the 3<sup>rd</sup> Respondent be compelled to produce the banking slips and bank statements of Brickman Properties Limited Co-Operative Bank Account Numbers 0119\*\*\*\*\*2500 and 0210\*\*\*\*\*2500 being Accounts receiving payments due from sale of 1<sup>st</sup> Plaintiff's properties known as Ruiru East/Juja East Block 2/3704, Ruiru East/Juja fast Block 2/1165, Ruiru East/Juja Fast Block2/48357sub-divided into Phase 8,9,10,11 and 12 and make necessary public disclosures that may be necessary with auditing of the 1<sup>st</sup> Plaintiff.
  11. Any other Orders that the court may be pleased to grant in the circumstances.
  12. Cost of the Application be provided for.
2. The application is supported by the grounds on its face and affidavits of the 1<sup>st</sup> Plaintiff sworn on 31.10.2022 and 07.06.2023. It is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through the Grounds of Opposition dated 16.05.2023 and their replying affidavits sworn on the same date. The 3<sup>rd</sup> Defendant also opposes the application through the replying affidavit of its director Christine Nkirote Mwereria sworn on 16.05.2023. In addition to their pleadings, the parties have also filed written submissions.
  3. The facts giving rise to the instant application and suit can be gleaned from the parties' pleadings. The 1<sup>st</sup> Plaintiff ("the Company") was incorporated on 04.11.2020 by the 2<sup>nd</sup> Plaintiff ("Purity") and the 1<sup>st</sup> Defendant("Mercy") for the purpose of buying, selling and developing land. At the time of the Company's incorporation, it had a nominal share capital of 100,000 comprising of 100 shares of Kshs. 1,000.00 each with Purity and Mercy each holding 30 shares. The balance of the shares remained unissued.
  4. In its Plaint, Purity claims that on 24.08.2022, Mercy and the 2<sup>nd</sup> Defendant ("Vincent") incorporated the 3<sup>rd</sup> Defendant company ("Brickman Properties") as a vehicle for violating and infracting the Company and that Mercy and Vincent have now conspired to run the Company in a manner that is most unfair and unprocedural to it.
  5. Purity accuses Mercy of attempting to make a name change to Serene Gardens Realtors Limited, a company they had co-directed and she later learnt that Mercy had made fraudulent and unauthorized transactions on the Company including falsifying meetings of the Board of Directors on 08.08.2022



- purporting to allocate herself the unissued 40 ordinary shares and falsifying a meeting on 12.08.2022 purporting to appoint Vincent, a former employee of the Company, as a director of the Company. Purity claims that in both minutes, her signature/authorization was either forged or the electronic copy lifted and superimposed on the documents without her authority.
6. Purity states that she reported the unlawful activities to Kasarani Police Station vide OB.NO.59/08/22 and that on 19.08.2022, the Company, through an advocate wrote to the Registrar of Companies notifying it of the fraudulent transactions and activities in the Company and requested it to refrain from processing any activities of the Company until the dispute was resolved. That the Registrar of Companies corresponded with the parties and specifically asked Mercy to provide a response to the complaint. In less than one week after the aforesaid complaint where she specifically denounced Vincent's appointment, Mercy falsified a letter to the Company's Bank and added Vincent a signatory to the Bank Account. Purity claims that her signature in that letter was forged and the Company has since had the same proved by expert examinations.
  7. Purity further immediately thereafter, Mercy and Vincent signed payments amounting to over Kshs. 3 million in favour of the law firm of Mercy, K. Mberia & Partners Advocates, without any consultations, approval or resolution of the Company. Thereafter Brickman Properties was incorporated by Mercy and Vincent with the purpose of taking over the operations of the Company. That they instructed all the customers of the Company to make payments to Brickman Properties.
  8. Purity avers that Brickman Properties not a subsidiary of the Company but a rival in direct competition. That Mercy incorporated Brickman Properties in order to steal the assets of the Company by using a similar name to the Company for the sole purpose of hoodwinking customers of the Company into diverting their payments due the 3<sup>rd</sup> Defendant.
  9. Purity claims that Mercy has since prevented her from accessing the Company's Offices and to carry out her duties as the Sales Director of the Company. That she has been blocked from the Company Whatsapp group in manner that is intended to inhibit transparency and accountability. For these reasons, Purity claims that the interest of the Company and that of the shareholder have been prejudiced by the locking out of Purity from the operations of the Company.
  10. Purity avers that based on the facts pleaded, the Plaintiffs have established a case for the grant of orders sought in the application. She urges the court to grant her permission to continue the suit as a derivative suit seeking relief on behalf of the Company in respect of the acts and omissions by the Defendants particularly Mercy, involving negligence, breach of duty and trust in her capacity as a director of the Company. That the Company and the shareholder need immediate protection as the omissions and commissions of the Defendants are likely to expose the Company to liabilities and suits and that unless the Court grants the Orders sought, the Plaintiffs will suffer great prejudice.
  11. The Defendants oppose the application on the ground that it does not meet the legal threshold required for instituting a derivative suit. That it does not particularize the grounds upon which the intended derivative suit is brought, that the Defendants were not issued with a formal demand so as to respond to the alleged complaints, that Purity has not exhausted the internal dispute resolution mechanisms and that she is pursuing a private vendetta against Mercy and thus not acting in good faith. They aver that Purity is acting to promote her personal interests and not of the Company and that she is guilty of non-disclosure of material facts. They also urge that there is no company resolution filed to institute the suit.
  12. According to Mercy, at the time of formation of the Company, Purity and herself entered into a Shareholders Agreement dated 24.03.2021 which would guide the manner in which the Company was run including determining the issue of capital contribution and shareholding. That the Agreement



recognised that Mercy was associated with and had already incorporated three other companies under the Brickman name in 2014; Brickman Company Limited, Brickman Group Limited and Brickman Kenya Limited. That as at 24.03.2021, Mercy had contributed Kshs. 10,000,000.00 while Purity had contributed Kshs. 1,000,000.00 towards the capital of the Company and it was agreed that Purity would contribute another Kshs. 9,000,000.00 within one year of signing the Shareholders Agreement. That it was also agreed that Purity would transfer 21 shares out of her issued shares to the Mercy so that the shareholding ratio would be at 91 to 9 in favour of Mercy.

13. Mercy claims that Purity failed to make her contributions as agreed thus triggering clause 1.4 of the Shareholders Agreement and that on 08.08.2022, Purity and Mercy held a meeting where they resolved that pursuant to the Shareholders Agreement, the 40 unallotted shares would be allotted to Mercy and the said minutes were ratified and signed by both shareholders. That they held another meeting on 12.08.2022 where they resolved that Vincent would be appointed as a new director and the minutes of that day were ratified and signed by both shareholders. Mercy avers that Vincent executed a consent signifying his acceptance as a new director and the process of his formal incorporation into the Company was done.
14. Mercy avers that Purity initiated the changes on the e-Citizen platform with respect to the allotment of shares to herself and appointment of Vincent as a director hence it is surprising that she should now deny the same. That Purity and Mercy reached a further agreement that the Company would be split into two that each director/shareholder trade in their own preferential name and deal with their own clients independently. As it was becoming apparent that the two names, Brickman Homes Limited and Serene Gardens Limited were creating confusion amongst the clients, the parties reached an understanding that the Company would remain with Mercy and that Purity would incorporate a new company where her share of properties would be transferred into her new company or her name as she pleases.
15. Mercy claims that on 18.08.2022, the parties signed a Memorandum of Understanding in order to effect some of the decisions to part ways. Mercy states that under the Memorandum of, Purity would resign as a director of the Company and transfer all her remaining shares to Mercy, that Mercy would resign as a director of Serene Gardens Limited and transfer all her shares to Purity but only after effecting change of name of company and that Purity had already reserved the name Punac Properties Limited. Further, that upon execution of the Memorandum, Purity would not advertise or sell any property under the name of Brickman or Serene Gardens, that the two names, Brickman and Serene would be used by Mercy if she so wishes, that the properties of the Company would be shared between Purity and Mercy as proposed in the signed Memorandum, that Purity would not incorporate or trade in the name of Brickman Homes or any company containing the name Brickman, that Purity would incorporate a company of her own choosing, where her share of properties would be transferred to, that during the transition, parties were allowed to incorporate their own companies and Mercy was allowed to collect balances from the existing sales and sell the remaining plots of the Company using any existing or new incorporated company, that Purity was equally allowed to sell and collect the balances from the sales of all the resultants plots currently being purchased by Serene Gardens Realtors Limited, that parties agreed that the capital contributed by Purity towards the Company had already been compensated through the profit share received by Purity amounting to more than Kshs. 5,000,000.00 and that upon the execution of the Memorandum, Purity would have no claim on the profits and properties of the Company and shall cease to be a signatory of the Company. That Purity also agreed to the addition of Vincent as a signatory of the Cooperative Bank accounts. Mercy denies that that she started making decisions without involving Purity based on the aforementioned chronology of events and the fact that all the documents referred to were signed by all parties



16. Mercy avers that the Registrar of Companies issued a letter dated 09.11.2022 dismissing Purity's claims and confirmed that it was Purity who initiated the changes from her own account, and accordingly dismissed the complaint filed by Purity through her lawyers. That para. 10 of the Registrar's summary report states; "The application to appoint Mercy Kendi Mberia was lodged from Purity Wanjiru's account on 12<sup>th</sup> August, 2022 at 8:48am". Mercy reiterates that Purity executed all minutes and documents that were needed to effect necessary changes on the Company and that in the WhatsApp screenshots Purity has attached, it indicates that on 26.08.2023, she had a conversation with Mercy and nowhere has she raised an issue with Mercy concerning any suspicious activity. That further surprisingly, is that Purity has indicated that she wrote a complaint letter to the Registrar of Companies on 19.08.2022 but that from the screenshots of 26.08.2022, Purity has not raised such an issue with Mercy. That the email from the Registrar of Companies is dated 29.08.2022, which date is very far from the date on the complaint letter, being 19.08.2022 which is indicative of a suspect backdating of the letter to the Registrar. That curiously, Purity has not attached the email forwarding the complaint to the Registrar, in a bid to conceal the date.
17. Mercy avers that further from the WhatsApp screenshots, it is clear that Purity was to come to Mercy's office on 26.08.2022 so as to finalize on the memorandum of understanding signed by both parties but that the three messages that have been conveniently deleted from herscreenshot raises eyebrows as to what she does not want to be revealed to the court.
18. In light of the foregoing, Mercy urges that it is open for anyone to see that Purity purportedly lodged a complaint so as to lay a ground for the filing of this suit as an afterthought and that a close examination of the documents produced by the Plaintiffs show that the signatures of Purity are consistent even with the signature in the pleadings before court. That the Plaintiffs, through their advocates, have purportedly sought services of a handwriting expert, who they have paid to produce a biased report in their favour and that the said forensic expert is not a neutral party, and it is evident that he was acting at the behest of the Plaintiffs' instructions.
19. Mercy reiterates that the Plaintiffs wrote to the Registrar of Companies making the alleged complaints, but the Registrar did not find merit in their complaints and that the Plaintiffs have now come to court to continue dragging the Defendants on the basis of false allegations. That as an advocate, and given the security checks in place at the Business Registration Services on the ecitizen platform, it is unimaginable that Mercy would initiate a process with full knowledge that the BRS would have to confirm with the members of the company before approving any changes to a company. Mercy asserts that the decision to appoint Vincent as a director of the Company was a reasonable business decision arrived at by all parties, since Vincent had been an employee of the Company for a long time and he was in a good position to make decisions for the Company, as well as market the Company as a director and that his appointment had also been ratified by Mercy and Purity.
20. Mercy's further states that payments to the firm of K. Mberia & Partners Advocates were made in full awareness of Purity and these were payments made pursuant to clause 3.1 of the Memorandum and that Purity is now making allegations as an afterthought. That interestingly, there has been no complaint made to the bank to the effect that the payments were not authorized. Mercy states that Purity has attached a letter to the bank dated 22.08.2022 which she signed, allowing the new director, Vincent, access to the bank accounts and that she cannot now complain that she was not aware of the decision to appoint the new director and grant him access to the bank accounts. That Vincent was also allowed access to the Cooperative accounts as a signatory as per the signed Memorandum.
21. As regards the report made to Kasarani Police station, Mercy states that it is baseless and that neither summons nor investigations have been taken against Mercy and that Purity has not even attached the



- copy of the Occurrence Book or OB number referred to and thus her allegations should be treated as baseless. Further, that the draft memorandum of understanding produced by the Plaintiffs is intended to mislead the court and that there is indeed a signed Memorandum which binds Purity and Mercy.
22. In sum, Mercy depones that all the occurrences complained about by Purity are decisions which were of the common knowledge of the parties, and the accusations of forgery are urged to be ignored by the Court. That the dispute before the court is not real but imagined, that Purity is not acting in good faith so as to protect the interests of the Company, but is only using the court process to arm-twist the Defendants into negotiating a new Memorandum of Understanding and that as things stand, Purity has incorporated a new company by the name Superior Gardens Properties Limited, where she holds 60% shareholding.
  23. Mercy contends that even as things stand, the Company is a going concern, and there has never been complaints from its clients regarding any irregularities or illegalities in the manner in which the Company is run and that there has never been any formal demand written to Mercy as a director/shareholder of the Company to explain the occurrences complained about. That the only correspondence done by the Plaintiffs are letters to the Registrar of Companies and a letter to the forensics expert but that as pointed out earlier, not even the bank received a complaint in the nature of the one that is now before the Court. Mercy avers that Purity is being dishonest with Mercy and with the court by bringing the alleged complaints and is not acting in good faith. That since there is already a signed Memorandum of Understanding which allows Mercy to retain the Company, it cannot be said that the Purity is making these complaints in the best interest of the Company and that if Purity is so aggrieved as she claims, then the complaints she raises are in the nature which she can bring an action in her own personal capacity, as opposed to a derivative suit.
  24. Mercy states that the effect which this suit has is that it unnecessarily damages the reputation of the Company which is the company Mercy is supposed to be left running according to the signed Memorandum of Understanding and she thus urges the court to dismiss the application with costs.
  25. Vincent also opposes the application and avers that the process of his appointment was above board and strictly in compliance with the law and procedure and by agreement of both Mercy and Purity. He states that he has personally known Purity and Mercy as directors of the Company where he used to work as a sales and marketing agent. That he left the Company to pursue other endeavours but Mercy reached out to him and requested him to become a director of the Company as he was experienced in the real estate industry and has had a history of working for the Company.
  26. Vincent contends that on 12.08.2022, a decision was made that he be appointed as a director of the Company, a decision which he ratified by signing the minutes, as well as signing a consent. That Mercy proceeded to link his details on the eCitizen platform confirming that he is now a director of the Company, as evidenced by the company's new CR12 certificate. In addition, he was also allowed access to the Company's bank accounts since there was a Memorandum of Understanding requiring Purity to exit the Company. Vincent states that a letter dated 22.08.2022 signed by Purity and Mercy communicating the change was physically delivered to the Bank by Mercy and that this decision was reached to allow the bank signatories remain as any two directors in compliance with the Shareholders Agreement.
  27. Brickman Properties also opposes the application. It denies all the allegations made by Purity. Brickman Properties contends that its formation was pursuant to the Memorandum of Understanding signed between Purity and Mercy whose purpose was the regulation of the separation between them in terms of the management of the business and affairs of the Company. That pursuant to Clause 3.5. of the Memorandum, Brickman Properties was incorporated by Mercy while Purity proceeded to



incorporate her own company known as Superior Gardens Properties Limited on 25.08.2022 whose C12 is available at the Business Registration Service. That Purity has also been carrying on the business of land-buying and selling under the name of Superior Gardens Properties Limited registered in pursuance of the Memorandum and in light of the above evidence, it is surprising that Purity has decided to renege on the same and other documents and to bring the present application seeking to deny ever being part of the transactions and processes that led to the birth of Brickman Properties and the resultant activities.

28. Brickman Properties urges the court to reject the allegation that Purity did not sign the documents facilitating the activities of the Defendants as incorporation of Superior Gardens Properties Limited by Purity arise from the Memorandum of Understanding. That as a matter of fact, the signature contained in all the pleadings sworn by Purity is unwittingly similar to the one contained in all the other facilitating documents signed between Purity and Mercy including the Memorandum.
29. Brickman Properties attacks the handwriting expert's report presented by the Plaintiffs and urges the court to reject it on the ground that it was prepared by an expert paid by Purity for purposes of the suit to support her unfounded allegation of fraud. It thus urges the court to consider other evidence produced in this matter and other circumstances elucidated in its affidavit as it is trite law that while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.

### **Analysis and Determination**

30. Although the Defendants have raised some technical objections to the application, I propose to deal with the substance of the application since the parties have canvassed it in great detail. The Plaintiffs principally seek to continue this suit as a derivative claim on behalf of the Company. This determination will determine whether the court will grant the other prayers sought by Plaintiffs including whether to restrain the Defendants from dealing with assets of the Company, direct payment of monies into the Company's official Co-operative bank account, suspend the appointment of Vincent as a director, order production of books and documents of the Company as from 08.08.2022 and whether Brickman Properties should be directed to produce its bank statements and banking slips of its Co-operative Bank accounts.
31. Whether the court should grant permission to the Plaintiffs to proceed with this suit as a derivative suit is governed by sections 238 and 239 of the [Companies Act](#) which provides 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. Application for permission to continue derivative claim

- (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
  - (b) 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. [Emphasis mine]

32. The aforesaid provisions provide the framework for instituting claims by members of the Company on behalf of the Company. The parties are in agreement that prior to the enactment of the [Companies Act](#), such suits were governed by the rule in *Foss v Harbottle* [1843] 67 ER 189 which established the general principal that a wrong alleged to have been done to a company, can only be remedied by an action by the company itself. This position has now been put on a statutory footing by the [Companies Act](#), 2015 as explained by Onguto J., in *Ghelani Metals Limited and 3 Others v Elesh Ghelani Natwarlal and Another* ML HCCC No. 102 of 2017 [2017] eKLR as follows:

- 44. Statutory procedure is now the exclusive method of pursuing derivative claims. The Act sets out what sorts of company claims may be pursued and is also explicit that derivative claims may only be pursued under the Act. The question must only be the factors the court ought to consider before approving a derivative claim.
- 45. There appears, in my view, to exist a two stage process. The court must first satisfy itself that there is a prima facie case on any of the causes of action noted under s.238(3). S.239(2) of the Act provides that the application for permission will be dismissed if the evidence adduced in support “do not disclose a case” for giving of permission. The essence of judicial approval



under the Act is to screen out frivolous claims. The court is only to allow meritorious claims. All that the applicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed.

33. In considering whether to grant permission, the court is also guided by section 241 of the *Companies Act* which sets out circumstances under which the court shall refuse the application and the considerations the court shall take into account when granting permission to the applicant to continue the suit as a derivative suit. The section provides as follows:

241.

- (1) If a member of a company applies for permission under section 239 or 240, the Court shall refuse permission if satisfied—
  - (a) that a person acting in accordance with section 144 would not seek to continue the claim;
  - (b) if the cause of action arises from an act or omission that is yet to occur—that the act or omission has been authorized by the company;
  - (c) if the cause of action arises from an act or omission that has already occurred— that the act or omission—
    - (i) was authorised by the company before it occurred; or
    - (ii) has been ratified by the company since it occurred.
- (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) authorised 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 omission 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 member's own right rather than on behalf of the company.
- (3) 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. [Emphasis mine]



34. From the onset and based on the above provisions, I hold that Purity, being a member and director of the Company, is entitled apply for relief from this court to commence and continue this suit as a derivate suit and she does not require approval or ratification by the Company to do so, contrary to the averment by Mercy and Vincent. Such a requirement would negate the very purpose of a derivative suit which is designed to protect minority shareholders. Further, the requirement of a demand and a particularized set of pleaded facts against the proposed defendants is not mandatory but form some of the factors that bolster the applicant's case for a derivative claim. Thus, the absence of a demand or pleaded and particularized accusations does not mean that the applicant's application should not be considered or should be dismissed in limine.
35. From the facts I have outlined above, it is not in dispute that prior to the contested changes in the Company shareholding initiated at a meeting held on 12.08.2022, the parties, that is, Purity and Mercy held equal shares in the Company. Meaning that in the event of a dispute, there would be a deadlock in the management of the Company. The shareholders appear to have foreseen this eventuality hence the reason for entering into a Shareholders Agreement dated 24.03.2021. The substance of the agreement was to regulate the relationship between the parties including the management of the business and issue of capital contribution and shareholding.
36. The fact of the Shareholders Agreement is not in dispute. What is in dispute are the events following disagreement between the parties engendered by the change in shareholding. On the one hand, Purity disputes the fact the shareholders held various meetings in which a Memorandum of Understanding was executed to change the shareholding and directorship, the bank account signatories and transfer of money to one of the shareholders. On the other hand, Mercy takes the position that the parties reached an understanding duly recorded in the Memorandum of Understanding under which the parties proceeded with implementation of certain aspects of the Shareholders Agreement until Purity got cold feet and filed this suit.
37. Based on what is deponed by both parties, I do not think that this is a dispute that implicates the property of the Company, it is a dispute between the shareholders inter se which dispute is covered by the Shareholders Agreement. I say so because certain facts, though disputed, stand out because the Memorandum of Agreement was executed on 18.08.2022 and the parties did certain acts that are consistent with the Memorandum of Understanding, which executed copy, Purity has not disputed. For example, there is evidence that Purity is the one who initiated certain changes concerning the directorship of the Company with the Registrar of Companies and that Purity proceeded to incorporate Serene Gardens Properties Limited on 25.08.2022. There is also the acknowledgement that Mercy is the original owner of the name "Brickmann" and she was allowed to operate any other company using the same name, which explains the incorporation of the 3<sup>rd</sup> Defendant. As the Shareholders Agreement contains an arbitration clause and it is likely that the dispute will be resolved to another forum, I do not propose to enter into factual issues raised as this may prejudice the positions of the parties.
38. Since I have concluded that the dispute between the parties is a shareholder dispute, I think it is important to reprise what I stated in the ruling delivered on 13.04.2023 where I struck out the Defendants' application to stay the suit under section 6 of the [Arbitration Act](#). In that ruling, I stated as follows:

There is pending an application dated 31.10.2022 for permission by the Plaintiff to commence a derivative suit against the Defendants under section 138 and 239 of the [Companies Act](#), 2015. Since the court has not granted permission for the Plaintiffs to commence the suit, the Defendants' application for stay is premature.



In the meantime, the Defendant is entitled to commence arbitration proceeding in light of arbitration clause in the Agreement which provides for a mode of appointing an arbitrator. I do not see the dispute as to the validity of the agreement as an impediment since the arbitrator under the Kompetenz Kompetenz Rule has the right to determine the validity of the said agreement.

39. As I have declined to grant permission for the 2<sup>nd</sup> Plaintiff to proceed with this suit as a derivative suit on behalf of the Company, this suit comes to an end hence the parties are entitled to proceed to resolve the dispute either as a suit or through arbitration as the case may be.

**Disposition**

40. I now make the following dispositive orders:

**a.**

The Plaintiffs' application dated 31.10.2022 is dismissed.

- b. The Plaintiffs' suit be and is hereby struck out.

- c. Each party shall bear their own costs.

**SIGNED AT DUBAI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**

**A. MABEYA**

**JUDGE**

