



**Amaro v Mohamed; Enersense Solutions Limited (Interested Party) (Miscellaneous Application E273 of 2021) [2022] KEHC 22 (KLR) (Commercial and Tax) (28 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 22 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E273 OF 2021  
A MABEYA, J  
JANUARY 28, 2022  
IN THE MATTER OF ENERSENSE SOLUTIONS LIMITED  
AND  
IN THE MATTER OF THE COMPANIES ACT, 2015  
AND  
IN THE MATTER OF AN APPLICATION FOR  
LEAVE TO COMMENCE A DERIVATIVE ACTION**

**BETWEEN**

**HUSSEIN AILA AMARO ..... APPLICANT**

**AND**

**FARIDA IDRIS MOHAMED ..... DEFENDANT**

**AND**

**ENERSENSE SOLUTIONS LIMITED ..... INTERESTED PARTY**

**RULING**

1. Before Court is an application dated 16/4/2021. It was brought under Order sections 1A, 1B and 3A of the Civil Procedure Act, order 40, order 51 rule 1 of the Civil Procedure Rules and section 238 and 239 of the Companies Act.
2. The applicant sought leave to prosecute a derivative action on behalf of Enersense Solutions Ltd “the Company” against the respondent. That the leave, once granted, do operate as a restriction on the respondent from all operations and businesses of the Company.



3. The application was supported by the affidavit of the applicant sworn on 16/4/2021. The grounds were that the Company was incorporated on 20/9/2018 with both the applicant and respondent as directors each with 500 shares. That they invested in Engen Petrol Station whereby the applicant paid to Engen Kenya Limited Kshs. 12, 389,600/= and the respondent paid Kshs. 10,000,000/=.
4. The applicant contended that the respondent excluded him from the day to day running of the Company and held all documents including bank statements. That the respondent was misusing the Company's property and there was a real possibility that the said property might be dissipated by the respondent. That on 22/9/2020, the parties agreed to terminate the partnership and the applicant was to be compensated for his investment in the Company and the profits shared equally.
5. That the respondent instructed Clyde and Associates to carry out a business valuation of the Company which submitted the valuation dated 12/10/2020. That the valuation was manipulated to favour the respondent. That he subsequently instructed the firm of Eusebio & Associates who did a review of the valuation vide letter dated 14/10/2020. That since the respondent was in possession of all the Company documents, there was a possibility of her meddling with the operations of the Company.
6. That she issued death threats to the applicant on 14/7/2019. It was further alleged that any continued activities by the respondent in the operations of the Company was a violation of the law and would cause irreparable damage. That his attempts to have a special meeting to resolve the issues had failed.
7. The respondent opposed the application vide her replying affidavit sworn on 9/6/2021. She contended that the applicant had failed to disclose material facts which were essential. That he had unlawfully transferred her shares to one Dustan Ojonyi Majanja without the Company's or her consent and had lodged fraudulent minutes resolving to appoint the said Majanja as a director/shareholder. That they were engaged in HCC No. E249 of 2020 Enersense Solutions Limited & Farida Idris Mohamed vs. Dunstan Ingonyi Majanja & Hussein Alla Amaro challenging the transfer.
8. As regards the valuation report, she stated that the parties had jointly engaged Clyde and Associates after agreeing to terminate the partnership hence the applicant's allegations were false.
9. That the applicant had no legal standing to institute the suit as he was no longer a member of the Company either as director or shareholder. That the reliefs sought were not on behalf of the Company. That no cause of action had been demonstrated to be vested in the Company.
10. She further contended that the intended proceedings were not aimed at protecting any member of the Company and no negligence, breach of duty or breach of trust on the respondent's part had been demonstrated. That the application has thus not met the test for granting of the leave sought.
11. On the allegation that she had made death threats to the applicant through text messages, she stated that the matter was under investigations by the DCI as the applicant had lodged a criminal complaint.
12. I have considered the contentions of the parties and the entire record.
13. By dint of section 238 (1) of the Companies Act, 2015, a derivate claim is only that which is brought;
  - a) by a member of a company in respect of a cause of action vested in the company, and
  - b) seeking relief on behalf of the company".



14. These conditions are not independent of each other. An applicant must establish firstly, that he is a member of a company and that a cause of action is vested in the company and the reliefs sought are on behalf of the company, for its own benefit.
15. It was the respondent's case that the applicant had unlawfully transferred his shares to a third party. She contended that a search at the company's registry revealed that the applicant was not a member of the company. I have seen the search produced as "FIM-9". It reflects Dunstan Ingonyi Majanja and Farida Idris Mohamed as the only members of the company.
16. The respondent also explained and proved the circumstances under which the said transfer was concluded. There was the letter from Ojo & Company dated 1/7/2020 on behalf of Mr. Majanja informing him that the said Mr. Majanja had acquired the applicant's shares. The respondent had since taken steps to challenge the said transfer by filing HCC No. E249 of 2020 against the applicant and Mr. Majanja.
17. In view of the foregoing, it was clear that the applicant was not a member of the Company and had therefore failed the first test.
18. On whether there was a cause of action vested in the company, the answer is also in the negative. The application was heavily grounded on the valuation done by Clyde and Associates. The applicant appeared to have been dissatisfied with the valuation and the gist of the application revolves around this dissatisfaction.
19. Unfortunately, that dissatisfaction cannot be said to be a cause of action vested in the company. Further grounds included that the respondent had excluded the applicant from the day to day running of the business. Again, that was a shareholder's personal dispute and it did not establish a cause of action as against the company.
20. Consequently, and in consideration of the prayers sought, the application did not seek relief on behalf of the company, but on behalf of the applicant. The upshot is that the intended suit does not meet the definition of a derivative suit hence the application cannot be entertained beyond this point.
21. Even if the application had met the first two conditions, would it have survived others? As pointed out by Onguto J in *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another* [2017] eKLR, there is a two-stage process envisaged by the Act with regards to derivative suits. In the first stage, 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.
22. The application for permission will be dismissed if the evidence adduced in support "do not disclose a case" for giving of permission. The importance of judicial approval under the Act is to screen out frivolous claims. The court will only allow meritorious claims.
23. In the present case, the applicant alleged that the respondent held all the Company details hence there was a possibility that she would meddle with the operations of the Company. That the respondent continued to misuse the Company's property.
24. However, the applicant did not particularize those claims, to establish a prima facie case against the respondent. A possibility of meddling does not establish a prima facie case. Having failed to establish a prima facie case, the application has again failed the first stage.
25. Further, there was bad faith on the part of the applicant. He was guilty of material non-disclosure. He very well knew that he had transferred his shares in the Company, yet he did not disclose this fact in his affidavit in support.



26. The Court also takes cognizance that there is another ongoing case between the parties. The applicant thus has an alternative forum wherein he can raise his concerns and complaints about the valuation report submitted by Clyde & Associates.

27. The upshot is that the application is unmerited and the same is dismissed with costs to the respondent.

It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 28<sup>th</sup> day of January, 2022.

**A. MABEYA, FCI Arb**

**JUDGE**

