



REPUBLIC OF KENYA



**Kamau v Kinyanjui & 2 others (Miscellaneous Application E493 of 2019)
[2022] KEHC 166 (KLR) (Commercial and Tax) (25 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E493 OF 2019
A MSHILA, J
FEBRUARY 25, 2022**

BETWEEN

SAMUEL KABII KAMAU APPLICANT

AND

SAMSON MBUTHIA KINYANJUI 1ST RESPONDENT

JAMES MUIGAI KIBATHI 2ND RESPONDENT

TRIGENTULAR HOLDINGS LIMITED 3RD RESPONDENT

RULING

1. The Notice of Motion is dated 23rd October 2019 was brought under the provisions of Articles 48 and 159 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 142, 143 and 239(1) of the *Companies Act*. The applicant sought for orders that;
 - a. The applicant be granted leave to prosecute this suit as a derivative action on behalf of Yesbet Limited.
 - b. The court to issue an order for an injunction to restrain the respondent's either by themselves or through their agents, servants or in any other manner whatsoever from holding themselves out to be owners of bookmaker's license No. 0000085 and conducting any proceedings as or on behalf of Yesbet Limited.
2. The parties were directed to canvass the application by filing and exchanging written submissions; hereunder is a summary of the respective rival submissions;



Applicant's Case

3. The application was supported by the grounds on the face of it and the sworn Affidavit of Samuel Kabii Kamau; who stated that the 1st and 2nd respondents have clandestinely and for fraudulent purposes changed the physical address of the 3rd respondent and closed all avenues of communication with Yesbet Limited to defeat Yesbet's claim for profits realized at the various branches opened.
4. The applicant averred that the respondents had failed to remit profits realized under the joint venture and to provide Yesbet Limited with access to its accounts. Thus, the 1st and 2nd respondents had breached the duty to act within their powers and to promote the success of the company and unless restrained they intend to repeat the wrongful acts complained of above.
5. The applicant submitted that a derivative action may only be brought in respect to cause of action arising from an actual or proposed act or omission involving default, breach of duty or breach of trust by a director of the company and it is immaterial if the cause of action arose before or after someone has become a director.
6. Further, a derivative action may be brought against the director or another person, or both. It allows the shareholders to litigate on behalf of the corporation often against an insider or third party whose action has injured the Corporation. It ensures that redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation.
7. The acts and/or omissions of the respondents have prejudiced Yesbet Company Limited. They failed to remit Yesbet Limited taxes to KRA; engineered fraudulent transfer of 66% of shares to themselves purporting to become majority shareholders, taken money from people then changed offices without informing such persons; the alleged bankers cheque for Shs. 500, 000 was not addressed to the plaintiff/applicant but to the 2nd defendant/respondent.

Respondents' Case

8. The respondents filed a Replying Affidavit 18th November 2019 in response to the application and stated that the suit is not vested in the company nor does it seek a relief on behalf of Yesbet Limited. The claim has been lodged by the plaintiff/applicant in his personal capacity seeking personal reliefs.
9. In addition, the 1st and 2nd defendants/respondents have been wrongly joined in these proceedings. They are directors of the 3rd Defendant which is capable of being sued on its own behalf as a company and is a separate legal entity from its shareholders and directors.
10. The respondents submitted that the application does not satisfy the requirements for a derivative action. The suit is not vested in Yesbet Company nor does it seek relief on behalf of the company. The claim was lodged by the plaintiff/applicant in his personal capacity seeking personal reliefs as enumerated in the Plaint.
11. The applicant on a 'prima facie' basis has not established nor demonstrated the negligence, default or breach of duty or trust by a director of the company. No evidence has been presented before the court and it is in clear violation of Section 107 of the [Evidence Act](#) that he who alleges must prove.
12. The bookmaker's license 0000085 belongs to Yesbet Company and neither the applicant nor the respondents can hold out themselves as owners of the license since once the license is issued, it is not transferable as provided under Section 12 of the [Betting, Lotteries and Gaming Act](#).

Issues for Determination



13. Having considered the application, the response thereto and the written submissions by the respective parties. The issues framed for determination are;
 - a. Whether the applicant should be granted leave to institute and prosecute this suit as a derivative action on behalf of Yesbet Limited;
 - b. Whether the applicant has satisfied the conditions for an order of injunction;

Analysis

Whether the applicant should be granted leave to prosecute this suit as a derivative action on behalf of Yesbet Limited;

14. The applicant herein sought leave of court to institute this suit as a derivative action on behalf of Yesbet Limited. The applicant based his argument on the fact that the respondents have failed to remit profits realized under the joint venture and to provide Yesbet Limited with access to its accounts. Thus, the 1st and 2nd respondents have breached the duty to act within their powers and to promote the success of the company and the acts and/or omissions of the respondents have prejudiced Yesbet Company Limited.
15. It is undisputed that the applicant is a director of Yesbet Limited together with the 1st and 2nd defendants/ respondents. Therefore, the applicant should be granted leave to continue the derivative claim;
16. A derivative action is an action commenced by a shareholder and is an exception to the general rule laid out in *Foss vs. Harbottle (1843) 2 Hare 461* that a company is the only proper plaintiff to sue for wrongs done to it.
17. Where it is alleged that a wrong has been done to a company, prima facie the only proper plaintiff is the company itself. Members/shareholders of a company have a limited right to bring a derivative action on their own behalf and on behalf of the company. (See *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another [2017] eKLR*) where the Court held;

“Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a 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 tall wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation.”

18. In *Dadani vs Manji & 3 Others (2004)KLR* on derivative suits, the court stated that;

a. “It is a cardinal principle in Company Law that it is for the company and not an individual shareholder to enforce right of actions vested in the company and to sue for wrongs done to it. It is also cardinal that in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where majority are entitled to present the bringing of an action in relation to such matter (see *Foss vs Harbottle (1843) 2 Hake 461*). All this is in deference to the self-regulation the law allows corporations and thus limits the interference by the courts in the running of such bodies on their own. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot



bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit.”

19. The plaintiff/applicant has moved the court to be allowed to institute the claim herein as a derivative suit. In that regard, Section 238 (1) of the *Companies Act* No. 17 of 2015, defines “a derivative claim” as follows; Section 238 provides:

“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.”

20. A derivative claim should state the steps taken to bring the action in the name of the company and which steps failed on account of majority action. It was held by Harman J in *Birch v Sullivan and Another* [1958] 1 All ER 56 at page 58 - 59 that:

“It would be necessary to allege, as well as thereafter to prove, that the plaintiff could not, by reason of the first Defendant’s opposition, obtain the name of the company to issue proceedings: that he was in the position in which the minority shareholders were in the comparatively rare cases where such actions have been allowed.”

21. The provisions of Section 238 (2) to (5) further provide as follows;

“(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.”



22. However, before a derivative suit is instituted the procedure laid down must be followed. In that regard the provisions of; Section 239 of the Act 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.

23. The above mentioned provisions empower a member of the company to institute a derivative suit. The Court of Appeal in the case of; Rai & Others V. Rai and others [2002] 2 EA 537 upheld the Application of the rule in Foss V. Harbottle (supra), in Kenya and recognized four (4) exceptions to thereto as follows: -

- a. Firstly, where the directors or a shareholding majority use their control of the company to take actions which would be ultra vires *the constitution* of the company or are illegal.
- b. Secondly, if some special voting procedure would be necessary under the company's constitution or under the *Companies Act*, it would defeat both if they were to be sidestepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed (Edwards V. Halliwell [1950] 2 ALL ER 1064.
- c. Thirdly, where there is invasion of individual rights of the shareholder, such as voting rights (Pender V. Lushington [1877] 6 ChD 70)
- d. Fourthly, where a fraud on the minority is being committed.”

24. The applicant herein alleged that the respondents failed to remit Yesbet Limited taxes to KRA; engineered fraudulent transfer of 66% of shares to themselves purporting to become majority shareholders, taken money from people then changed offices without informing such persons; and



the alleged bankers cheque for Shs.500, 000 was not addressed to the plaintiff/applicant but to the 2nd defendant/respondent. According to the applicant the respondents' actions amount to fraud.

25. Given the circumstances, the applicant currently being a minority shareholder has established that he falls within exception (d) above and is found to have the requisite 'locus standi'; secondly, from the material placed before this court on the activities committed by the majority shareholders against the company has established a 'prima facie' case and a valid cause of action.
26. Accordingly, this court is satisfied that the applicant is therefore entitled to leave to file a derivative suit as sought.

Whether the applicant has satisfied the conditions for an order of injunction;

27. The next issue is whether the applicant has established a case for interim reliefs sought. The conditions for the grant of an interlocutory injunction are well settled as set out in *Giella v Cassman Brown and Co. Ltd 1973 E.A 360* and *Mrao v First American Bank of Kenya Ltd and 2 others 2003 KLR 125*.
28. These are that, 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.
29. The 1st and 2nd respondent produced documents showing that the applicant had agreed to transfer 66% of the shares to them. On the other hand, the applicant argued that when he received a copy of the agreement there were alterations to the effect that he had transferred 66% of the shares of the company to the respondents. The applicant produced a document examiners report which confirmed that the applicant's signatures were forged. The authenticity of the documentation is an issue that is best canvassed during the hearing of the main suit but nonetheless from the material placed before this court it is satisfied that the applicant has indeed established a 'prima facie' case with a probability of success;
30. The applicant did not go a step further to demonstrate in the submissions that irreparable harm would be occasioned if the order sought is not granted. The respondents have also not adduced any evidence to show that the applicant denied them the use of the bookmaker's license No. 0000085 as alleged. In this regard, this Court is called upon to balance between allowing the use of the bookmaker's license No. 0000085 and restraining the use of it until the issues raised herein are addressed.
31. It is this Court's considered view that the balance of convenience lies in granting the orders sought; also the applicant is a minority shareholder is at a greater disadvantage as compared to the respondents who are the majority shareholders and have also been accused of perpetrating fraud and this is ultimately detrimental to the business operations of the company; those reasons therefore tilt the balance of convenience in favour of the applicant.

Findings and Determination

32. In the light of the foregoing this court makes the following findings and determinations;
 - i. The application is found to be meritorious and it is hereby allowed.
 - ii. The applicant is hereby granted leave to institute and continue to prosecute this suit as a derivative action on behalf of Yesbet Limited.
 - iii. The applicant is found to have satisfied the conditions for the grant of injunctive orders; The 1st and 2nd respondents, by themselves, their agents,



servants and/or employees be and are hereby restrained by temporary injunction from holding themselves out to be owners of bookmaker's license No. 0000085 or in any other manner whatsoever from conducting any proceedings as or on behalf of Yesbet Limited pending the hearing and determination of the derivative suit.

- iv. The derivative suit be set down for hearing within 120 days.
- vi. Each party to bear their own costs of this application.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Mr. Ngetich Benson holding brief for Mr. Mungania for the Plaintiff/Applicant

Ms. Ms. Cuna for the three Defendants

Lucy-----Court Assistant

