



**Gituma v Gituma & another (Civil Case 023 of 2021)
[2022] KEHC 10365 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 023 OF 2021
PJO OTIENO, J
MAY 25, 2022**

BETWEEN

DAMARIS KAGWIRIA GITUMA PLAINTIFF

AND

ERASTUS GITUMA 1ST DEFENDANT

SCOLARS PLAZA CO. LIMITED 2ND DEFENDANT

RULING

1. The court is called upon to determine a notice of motion under certificate of urgency dated August 31, 2021 by the plaintiff, DKG, brought under articles 45, 40, 28, 21, 22, 23 of the Constitution, sections 4, 6, 7, 14, 17 of the Matrimonial Causes Act, sections 145, 148, 653, 1004, 1005 of the Companies Act and any other enabling laws of Kenya. In it, the plaintiff seeks;
 - a. That an order of temporary injunction do issue restraining the defendants, their agents, relatives, employees, servants, assigns, successors, appointees or any other person acting at their behest from selling, subdividing, transferring, damaging, excavating, appropriating, mismanaging or in any way dealing with Nyaki/kithoka/xxxx(fully developed apartments measuring 0.10 ha, Nyaki/kithoka/xxxx(fully developed apartments measuring 0.10 ha, Bustani villas shop Nos 3,4 & 9 situate in LR Noxxxxx/xxx Machakos district, Nairobi Block xxx/xx (Nyayo estate)(3 bedroom maisonette) matrimonial home, all the buildings and developments thereof and the income from all the properties, pending hearing and determination of this application and subsequent determination of the main suit.
 - b. That an order of inhibition do issue inhibiting any dealings with Nyaki/kithoka/xxxx(fully developed apartments measuring 0.10 ha, Nyaki/kithoka/xxxx(fully developed apartments measuring 0.10ha, Bustani villas shop Nos 3,4 & 9 situate in LR Noxxxxx/xxx Machakos district, Nairobi Block xxx/xx (Nyayo estate)(3 bedroom maisonette) matrimonial home, all



the buildings and developments thereof and the income from all the properties, pending hearing and determination of this application and subsequent determination of the main suit.

- c. That the honourable court do hereby issue an order to the effect that all the rental income from all the properties listed in prayers 2 & 3 above be paid into the 2nd defendant's account bearing the applicant as a mandatory signatory for and in all transactions for accountability purposes pending the hearing and determination of this suit.
 - d. That the applicant be paid arrears of her stipends since March 2020 to date and a further Ksh 200,000 per month for subsistence from the income of the properties herein pending hearing and determination of the suit.
 - e. That the applicant be and is hereby authorized to manage the properties within Meru county relating to this suit as she has been doing while the defendant continues to manage the properties outside Meru county as he has been doing pending the hearing and determination of the suit.
 - f. That the 1st defendant do produce and disclose all documents in relation to the properties subject to this suit particularly owned by the 2nd defendant.
 - g. That the land registrars in charge of Nairobi and Machakos land registries or the managers over Bustani villas shop Nos 3,4 & 9 situate in LR Noxxxx/xxx Machakos District and Nairobi Block xxx/xx(Nyayo Estate)(3 bedroom maisonette) do supply the applicant with green cards or land register or records detailing possession and ownership thereof.
 - h. That an order do issue directing the manager/ incharge I& M Bank Meru branch to provide the applicant with statement of account Noxxxxxxxxxxxxx for Scholars Plaza Limited, the 2nd defendant herein for the period January 2020 to August 2021.
 - i. That the cost of this application be provided for and the honourable court may issue any other orders it deems fit to meet the ends of justice in this matter.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the plaintiff sworn on even date in which it is contended that she lived with the 1st defendant as man and wife from 1990 until March 2020 when they separated and eventually divorced. During the subsistence of their marriage, she contends that they acquired a number of matrimonial properties and she agreed to resign from her teaching so that she could concentrate in the running and management of the family business. They jointly registered Scholars Plaza Limited, the 2nd defendant herein (henceforth called the company) in order to do real family business, that she used and contributed her income from her employment towards the acquisition, development and improvement of their matrimonial properties which were then transferred to the company as a joint concern. She then became dependent on the family properties for her subsistence following her resignation and prays for an order of support to be made urgently in the interim basis. The matrimonial properties allegedly agreed and transferred to the company are named as LR No Nyaki/kithoka/xxxx generating monthly rental income of Ksh 918,000, LR No Nyaki/kithoka/xxxx generating monthly rental income of Ksh 484,000, Shops Nos3, 4 & 9 Bustani villas Estate generating monthly rental income of Ksh 198,000 and shop Nos 3,4 & 9 situate in LR No xxx & xxx/Mavoko town Block 91 two houses generating monthly rental income of Ksh 60,000. That since March 2020, defendant stopped giving her monthly stipend of Ksh 50,000 from the income earned from the property for which reason she prays for the payment of the arrears of the same and its increment to Ksh 200,000 monthly. She laments that the defendant not only kicked her out of the matrimonial home but has also locked her out of the family company properties, which has fundamentally and materially reduced her to a homeless



beggar with no shelter, food, source of income or means of transport. She prays for the income from the investments and properties to be directed into one joint account, where she is a mandatory signatory, for accountability purposes. She contends that the defendant authorized the tenants to pay rent into his personal accounts, instead of the one owned by the company which income she alleges the defendant misappropriates and squanders to her detriment and the detriment of the company.

3. In her view, orders of inhibition and permanent injunction against all the properties listed hereinabove are very crucial to prevent any unauthorized dealings by the 1st defendant pending the hearing and determination of the main suit. She contends that she should be allowed to continue managing the properties in Meru as the 1st defendant manages those in Nairobi and all the income collected therefrom to be channeled into a joint account for accountability purposes pending the hearing of the main suit. She contends that her fundamental constitutional rights to human dignity, own and use property, protection of vulnerable group and to equal right in marriage under articles 45, 28, 40, 19 & 20 of the Constitution were violated and expresses apprehension that in the prevailing circumstances, the defendant will unlawfully deal with the matrimonial property to her detriment, as in 2020, the defendant sold one of their properties situated in Ngong Nairobi for Ksh 11,500,000, which he has not accounted for. When she tried to access the bank statements from I & M Bank for an account held by the company where the rental income was being deposited, she was informed that the 1st defendant had forbidden the bank from giving her that information, and at some point, the 1st defendant instructed tenants to be paying rent into his personal account. She further contends that the 1st defendant, as the managing director of the company, has refused to furnish her with any financial or assets report of the company, and as a result of his cunning and dishonest character, he is unfit to manage the suit properties. She wants the 1st defendant compelled to produce all documents, records and statement of account for all income from the company. She urges the court to allow the application, as the respondents will not suffer any prejudice.
4. The 1st defendant opposed the application through his replying affidavit sworn on September 14, 2021 which terms the application as being *sub judice, res judicata* and an abuse of the court process on the basis that there is Matrimonial Cause No xxx/2021 touching on the same subject matter, and the reliefs sought herein are actively being litigated there. He accuses the plaintiff of being on a forum shopping mission as the company is a distinct legal entity with its memorandum and articles of association, and thus cannot be construed as a matrimonial property. He also contends that the suit is a non-starter and the plaintiff lacks *locus standi* to institute the same whether on her own behalf or that of the company because the suit properties are owned by the company and there was no agreement to transfer them to the company as alleged by the plaintiff. He contends that the plaintiff was neither his employee nor that of the company to justify her request for a monthly stipend of Ksh 50,000 from the income generated therefrom. He contends that the plaintiff is still a director of the company, and her allegation that she was kicked out of the family business is thus false. According to to the 1st respondent, the plaintiff is mixing issues touching on the matrimonial property which are distinct from those of the company. He denies authorizing any tenant to pay rent into his personal account, as the company has its own bank accounts and urges the court not to intervene in matters of the company, by issuing the orders sought contrary to its constituting documents. He takes the position that if the plaintiff is unhappy with being a shareholder, she should resign and sell her shares in order to ensure the company continues to run.
5. On the allegations that a property was sold, he contends that the Ngong property was sold to offset loan arrears accrued when the plaintiff was managing the company. He adds that the company documents, records and statement of accounts are available for perusal at the company offices and with the company auditors. He avers that the entire suit offends the provisions of the Companies Act and as such, the



orders sought cannot issue and urges the court to dismiss the application for being incompetent, vexatious, an abuse of the court process and meritless.

6. The plaintiff in her supplementary affidavit sworn on October 28, 2021 fundamentally denies the averments made by the 1st defendant in his replying affidavit and asserts that the 1st defendant has put his personal businesses on all the ground floor business premises of the 5 storey apartment on Nyaki/kithoka/2909, to her detriment and that of the company, as he does not pay rent to the company. Due to the introduction of the alcohol business by the 1st defendant in a largely family residential apartment, the tenants with staunch christian foundation have started vacating the premises, which will monumentally affect the company. She urges the court to issue the orders sought in order to unearth and stop any fraud and illegality involving the running of the company. She avers that the 1st defendant, in utter disregard of the law and with the full knowledge of the existence of this case, instituted Nairobi CTCC No Exxx/2021 involving the same parties in a bid to frustrate her quest for justice. She faults the 1st defendant for operating an offshore account in the name and style of Muchui builders and timber suppliers, where he has been drawing the company's finances for his own use, without her knowledge. She avers that unless the orders sought are granted, she will continue to suffer as the company is unlawfully being exploited.
7. The 1st defendant in his further affidavit sworn on behalf of the company on December 15, 2021 reiterated the contents of his replying affidavit then contended that the entire suit as brought by the plaintiff was a non-starter, statute barred, incompetent and a breach of the mandatory provisions of the Companies Act on derivative actions. He contends that the plaintiff had been sued in Milimani Comm No xxx/2021 for swindling and embezzling the company's assets and finances and that the company has been operating within its constitution and the law and the plaintiff was free to inspect its books of account. He denies either operating any offshore account or fraudulently dealing with the company to warrant issuance of the orders sought. He urges the court to dismiss the application for being speculative as it was not supported by any cogent evidence at all.
8. The application was directed to be canvassed by written submissions which were duly filed by both parties. In the submissions the plaintiff takes the position that prayer Nos 4, 6, 7, 8, 9 and 10 being unopposed ought to be granted in the interim to preserve the substratum of the main suit. She submitted that the 1st defendant was on a rampage to unlawfully exploit the properties of the company, in clear violation of section 146 of the Companies Act for his personal gain to her detriment. She submitted that the company's assets were their sweat and blood and she should be paid some stipends from its income in order to fend for her livelihood. She concluded that since the 1st defendant could not be trusted to solely run the company, her application was merited.
9. The defendants were of the view that since there was neither a resolution nor leave from court authorizing the plaintiff to commence the suit on behalf of the company, the same was unmaintainable in law as the plaintiff had no *locus standi*. They relied on Rai & others v Rai & 13 others(2002)1 KLR 537, for the proposition that the exception to the rule in *Foss v Harbottle* could only be taken advantage of by minority shareholders if they can show fraud on a *prima facie* basis. They further relied on Altaf Abdulrasul Dadani v Amini Akberazi & 3 others(2004)1KLR 95 and Dr Jane Wambui Weru v Overseas Private Inv Corp & 3 others(2012)eKLR, where the court was categorical that leave must be sought to proceed with proceedings as derivative action and on Mohamedin Mohamed & anor v Ibrahim Ismail Isaak & anor(2021)eKLR, on the need for the court to first satisfy itself that there is a *prima facie* case on any of the causes of action set out under section 238(3) of the Act, in order to allow meritorious claims to be litigated as derivative suits. They submitted that the plaintiff had not sought leave to either commence or continue with this suit. The decision in Prudenzio Nicholas Gaitara v Patrick Kariuki Muiruri & 2 others(2014)eKLR, was cited for the position that where leave has not



been sought and granted to commence or continue a derivative action, the cause is incompetent and deserves dismissal.

10. The decision in *Giella v Cassman Brown & Co Ltd*(1973)EA 358 on the conditions to be satisfied before an interlocutory injunction could be issued with a stress that that the plaintiff had not demonstrated how any attempts had been made to deprive her of her shares and/or benefits from the company. The court was urged against interfering with the management, the internal operations and the day to day running of the company. Nyaki/kithoka/2889 & 2909 were said to have been originally owned by the 1st defendant who subsequently transferred them to the company. Reliance was then placed on *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & anor*(2017)eKLR, where the essence and requirement for judicial leave to commence a derivative action and the place and rights the minority shareholders can exercise on behalf of the company, were strengthened. They beseeched the court to refrain from issuing orders without supporting evidence to warrant the same with a conclusion that since the prayers sought herein were similar to those sought in the main suit, issuing them at an interlocutory stage would fundamentally and adversely preempt the main suit, and prayed for the dismissal of the application.

Analysis and Determination

11. As crafted drawn and filed, the application clearly targets only the 1st defendant by seeking that he be restrained from dealing with properties held by the company, for the preservation of the interests of the company. Those prayers on their face seeks to keep the company's property preserved for fear of alienation by the first defendant. I take the view that the plaintiff's cause must be limited to her interests as a shareholder and never as a former spouse seeking recovery of matrimonial property. Matrimonial property must not be admitted here to just muddle a pure commercial dispute over shareholders' rights. This I say well aware that there is indeed pending a substantive matrimonial property claim in Meru HCCC No Exxx of 2021(OS) in which conservatory orders were issued on August 12, 2021, pending the determination of the cause. In short the court take the view that this being a commercial dispute, any claim based on the past marriage between the parties must be removed from here and taken to the family dispute if not yet pleaded in the pending suit.
12. The law governing suits by shareholder for own behalf and for the interests of the company is no longer in doubt in our jurisdiction. One may only cite *Dadani v Manji & 3 others* (2004)KLR , where the court in considering the principles applicable had this to say:

“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 v 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.”



13. That is what in law is termed as a derivative action. In *Gbelani Metals Limited & 3 others v Elesb Gbelani Natwarlal & another* [2017] eKLR, the court explained these actions as follows: -

“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 all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation.”

14. those rules were in deed coded into our statute law under sections 238 of the *Companies Act*, 2015, which 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.”

15. I understand the law to permit a derivative suit to pursue a chose of action vested in the company for the good of the company and also to pursue a chose that seeks protection of a shareholder not able to marshal the enough support from the company to protect his interests. It is therefore permissible for a minority to sue on his/her own right 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 which injure a minority directly.

16. In so far as the plaintiff alleges exclusion from the management of the company, I do find that the right to participate in a company she admittedly has shares, is an infringement on her personally and that in that event her right to sue cannot be curtailed on the twin principles known as the proper plaintiff principle and the majority principle. This court thus find that the suit is properly before it for determination on the merits.

17. The next question is the effect of leave from the court having not been sought and obtained by the time the application was argued before the court. The trite law is that leave to commence or continue derivative actions can be sought either prior to the commencement of the suit or after the suit has been instituted. It is not fatal that so far no application for leave has been presented to court. That may however be a consideration by the court when it is ultimately made. That is the position of the law as



reiterated by the court of appeal in *Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another* [supra] where it held: -

“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, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in *Foss v Harbottle*.”

18. By a ruling dated October 14, 2021, in this suit and by the same court, at paragraph 12, the need for leave was indeed underscored but it appears, very unfortunately that, no heed was taken by the plaintiff and counsel. In that ruling the court held : -

“Having so found, and upon reading of sections 239 to 242 of the *Companies Act*, I take the learning that being a derivative action, permission to continue the action is imperative and not optional. The leave must be sought prior or after the suit is instituted. For that reason, the plaintiff and counsel have their liberties to move as appropriate. I thus disagree with the defendant that leave must be sought and obtained beforehand just as I disagree with the plaintiff that the leave is unnecessary or just optional.”

19. It is the view of this court that before leave is sought and obtained, the suit is not ripe to be dealt with by the court by way of determining the application before me. Such application remain premature. On account of that default, the court find that the premature application cannot be allowed. It is therefore struck out but with no orders as to costs.

20. Having come to that conclusion, the cause must be given directions and a way forward under the mandate of the court in case management. For that reason, this matter is stood over to the June 20, 2022. The purpose of the mention is to establish if the plaintiff shall have readied the matter for being processed by the court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Thangacia for the Plaintiff

No appearance for the Defendants

Court Assistant: Mwenda

