



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njihia v Njihia & 4 others (Civil Case E033 of 2021)  
[2022] KEHC 3220 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3220 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE E033 OF 2021  
HK CHEMITEI, J  
JUNE 23, 2022**

**BETWEEN**

**GEORGE MUIGAI NJIHIA ..... APPLICANT**

**AND**

**LUCY WAIRIMU NJIHIA ..... 1<sup>ST</sup> RESPONDENT**

**GLADYS WANGUI NJIHIA ..... 2<sup>ND</sup> RESPONDENT**

**PAUL NDUNGU NJIHIA ..... 3<sup>RD</sup> RESPONDENT**

**SAMUEL KAGOTHU NJIHIA ..... 4<sup>TH</sup> RESPONDENT**

**CARE GUEST INVESTMENT LTD ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant vide his Notice of Motion dated 3<sup>rd</sup> November 2021 has prayed for the following orders;
  - i. that pending the determination of this suit there be a temporary injunction restraining the respondents from dealing in any adverse manner with land parcel number Nakuru Municipality Block 5/227, Nakuru Municipality Block 5/68 Nakuru Municipality Block5/229 andLR No 209/525/15 Situated Along Dubois Road Nairobi City.
  - ii. pending the hearing and determination of this suit the court directs that an audit of the properties registered under Care Guest Investment Limited being Nakuru Municipality Block5/227, Nakuru Municipality Block5/68 Nakuru Municipality Block5/229 andLR No209/525/15.
  - iii. pending the hearing and determination of this suit the respondents do allow the applicant free access to the suit premises, bank records and or render a true and accurate account of all dealings in respect of Nakuru Municipality Blocks5/227,5/68 ,5/229 andLR No. 209/525/15



all registered under Care Guest Investment Limited including all income and or profits made by the said company from the year 2018 to date.

- iv. pending the hearing and determination of this suit an order be issued compelling the respondents and the company to pay the plaintiff all accrued dividends on his shares from earnings and or income by Care Guest Investment limited from the year 2018 to date.
  - v. pending the hearing and determination of the suit the respondents, their servants and or agents be restrained from making decisions, writing letters, notices resolutions and any other documents in the name of and or on behalf of Care Guest Investment limited without the consent and concurrence of the applicant.
  - vi. that the Land Registrar Nakuru county and the Land Registrar Nairobi be directed to issue the land search and green card in respect of the parcels namely Nakuru Municipality Blocks 5/227,5/229,5/68 and LR No 209/525/15 respectively all registered under Care Guest Investment limited.
  - vii. the applicant be granted leave to institute a derivative suit on behalf of and for the benefit of the 5<sup>th</sup> respondent.
2. The application is supported by his sworn affidavit dated the same date as well as the attachments thereon.
  3. The issues raised in the affidavit are easily discernible. The applicant as well as the 1<sup>st</sup> to 4<sup>th</sup> respondents are a family owning shares in the 5<sup>th</sup> defendant. The first respondent who is their mother owns 300 shares whereas the applicants and his siblings have each 50 shares and their late father had 400 shares.
  4. The 5<sup>th</sup> defendant owns the properties enumerated in the motion which are essentially going concerns and are generating daily and or monthly income. The applicants beef with his siblings is that he has been excluded from running the company completely and they have been running the same as personal property.
  5. That they have failed to hold general meetings, collecting rent and keeping the profits to themselves and have locked him out completely. He is therefore apprehensive that his rights and those of the company are in serious jeopardy and it is worth intervention by this court.
  6. He went on to state that his attempts to do searches and obtain green cards from the lands registry have been fruitless and he was informed by the lands office that the respective files cannot be traced.
  7. Consequently, he is seeking the intervention of this court so as to protect the interest of the company which according to him is seriously compromised against the provisions of the Companies Act 2015. He asked this court to allow the application and grant the reliefs sought.
  8. The 1<sup>st</sup> respondent on behalf of herself and the rest of the respondents opposed the application vide her replying affidavit dated 4<sup>th</sup> December 2021. She deponed that contrary to his allegations the company has been in good health which she exhibited through the payments of salaries, bills, loans and taxes. She said that save for property number Nakuru Municipality Block 5/299, which the company does not own the rest of the properties are safe and sound.
  9. She said that all the parties herein draw some monthly income from real estate developments on the properties including the applicant who gets Kshs. 200,000 per month from the rents in LR No. 209/525/15. The rest of his siblings get rents from the same parcel of developed property. The rest of the earnings goes towards the settlement of liabilities.



10. She stated that the company has been having meetings and it was only the applicant who left the what's up group which has all the shareholders and it was out of his own volition.
11. She accused the applicant of filing this suit as a decoy to distract them from the management of another company known as Jarika County Lodge Limited (hereinafter referred to as Jarika) which has a pending case, namely, Nakuru HCC No. E005 OF 2021. The court in the above case has issued orders against the applicant which he has failed to comply.
12. She went further to state that the applicant runs the Jarika company exclusively despite the rest of the family members having shares therein. She said that the applicant has been attending all the company's meetings till April 2021 when he left. Other than this the company was in good position and has been posting profits as per the accounts she attached to her affidavit.
13. She said that the applicant on the contrary has failed to activate Clause 33 of the Company's Memorandum of Association which seeks the parties to carry out arbitration exercise in the event of any disagreements.
14. Consequently, the respondents prayed that the application be disallowed as there was no evidence of mismanagement of the company.
15. When the matter came up for hearing the court directed the same to be determined by way of written submissions.

#### **Applicants submissions.**

16. The applicant reiterated the contents of his affidavit and stated that the respondents had breached the provisions of the *Companies Act* and the continuous running of the company will lead to its collapsed. He stated that being a minority shareholder he was entitled to seek derivative orders under the provisions of Section 238 of the Companies' Act.
17. To this end he relied on the case of *Isaiiah Waweru Njumi & 2 Others v. Muturi Ndungu* (2016) eKLR which set out the factors to be considered before the orders are granted. He argued that he had met all the orders enumerated therein.
18. On whether he had met the threshold of being granted the relief sought he relied on the grounds laid down in the famous and often quoted case of *Giella vs. Cassman Brown & Co ltd* 1973 EA 360.
19. He emphasised that he had established a prima facie case against the respondents and that he was deserving of the orders.

#### **Respondents submissions**

20. The respondent reiterated as well her affidavit and its contents. She submitted that the applicant was not entitled to the orders to institute a derivative suit on behalf of the 5<sup>th</sup> defendant as there was no evidence as provided under Section 241(2) of the *Companies Act* that he was entitled to such order.
21. The respondent as well relied on the case of *Isaiiah Waweru*(supra) and submitted that the applicant had failed to demonstrate the grounds therein.
22. She said that the company was being run well as demonstrated by its ability to pay the loans, salaries, utilities, taxes and all the outgoings expected of it. It was the applicant who had exited the what's up group on his own volition and he avoided dealing with the respondents and cannot argue that the company was being mismanaged.



23. Further she submitted that the applicant was running the Jarika county lodge exclusively and despite the court orders he has refused to comply and this suit is essentially an attempt to block the respondents from pursuing their claim in the Jarika company.
24. She said that the applicant has never been barred from accessing the company's records and bank accounts nor even carrying out a search at the lands office.
25. She therefore prayed that the application be disallowed as to grant it will make the company suffer serious loss and damage.

### **Analysis and determination.**

26. The issue herein is whether in light of the claim by the applicant he was entitled to the orders sought. The court proposes to address the issue of leave to the applicant to institute a derivative suit on behalf of the 5<sup>th</sup> respondent.
27. What is not in dispute is that all the parties herein are shareholders of the company. Their mother the 1<sup>st</sup> respondent, has the majority shares totalling 300. Their late father left 400 shares which it seems they have not been allotted.
28. The applicant claims that the company is being mismanaged or run down by the respondents and that there has never been a general meeting called contrary to the Companies' Act. That the properties which it owns cannot be ascertained as he has not been in a position to obtain the green cards.
29. At the same time, he said that the books of accounts are opaque and he cannot access even the bank accounts. That everything to him is shrouded in secrecy and he is afraid of what may befall the company.
30. The respondent on the contrary has stated that the applicant has been on the know as per the what's up messages she attached to her affidavit in reply. That it is the applicant who has absconded and that everything was being run optimally at the company.
31. The court has looked at the annexures to the replying affidavit by the 1<sup>st</sup> respondent. There is sufficient prove that the company is meeting its obligations as per the audited accounts, payments of bills, loans licenses as well as salaries. If by any chance, there was no such settlement of liabilities then the allegations by the applicant would have been plausible.
32. On the other hand, the applicant has not disputed that he receives kshs. 200,000 from the rental income in one of the properties in Nairobi namely LR No209/525/15. How then can the health of the company be in a crisis if indeed the applicant was to be believed?
33. Section 283(3) of the *Companies Act* No 17 of 2015 states as hereunder;  
(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."
34. Looking at the said law i do not find the respondents having acted negligently or in breach of duty or breach of trust as espoused.
35. It is as well worth quoting the case of Isaiah Waweru(supra) at this juncture.
36. The court held that;

‘a. Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors,



the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors' challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;

b. Whether the Plaintiff has made any efforts to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;

c. Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of *Recchion v Kirby* 637 F. Supp. 1309 (W.D. Pa. 1986), for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;

d. Whether the Plaintiff is acting in good faith;

e. Whether the action taken by the Plaintiff is consistent with one a faithful director acting in adherence to the duty to promote the success of the company would take;

f. The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company – is likely to be authorised or ratified by the company in the future; and

g. Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative action.”

37. In my view the applicant has brought this suit to pursue a vendetta against the respondents. The court is alive to the Jarika county lodge limited case no. HCCC E005 of 2021. In that matter the parties were admonished to pursue arbitration process. It appears that the assertion by the respondents that this suit was filed as a consequence of the Jarika case could be true.
38. Needless to state that this court does not find any reasons to grant the prayers for the applicant to bring a derivative claim. The reasons are inadequate for such a prayer to be granted.
39. On the issue of whether injunctive reliefs ought to be granted, I respectfully do not think so. There is no evidence that the company's assets are going to waste courtesy of mismanagement by the respondents. As a matter of fact, the applicant is enjoying monthly rent from one of them.
40. The running of the company and its assets for now is above board. Any attempt to curtail it may cause serious disruption. In any case there is no iota of evidence that he has been denied any enjoyment of his rights as a shareholder whether minority or not.
41. There is absolutely nothing to bar the applicant to seek arbitration as per the provisions in the Articles and Memorandum of Association if he thinks that he was being short-changed by the rest of the directors.
42. I think the court has stated so much to indicate that the application is not meritorious. The same is hereby disallowed with costs.

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 23RD DAY OF JUNE 2022.**

**H K CHEMITEI.**



**JUDGE**

