



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E429 OF 2020

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE A DERIVATIVE ACTION ON BEHALF OF ATHUSI
BAR AND RESTAURANT COMPANY LIMITED BETWEEN**

JOYCE NZISA MUTHAMA.....1ST APPLICANT

CONNIE MBITHE MUIA.....2ND APPLICANT

VERSUS

ATHUSI BAR AND RESTAURANT CO. LTD.....1ST RESPONDENT

JOHN MUTAKI.....2ND RESPONDENT

BEN MUKULA.....3RD RESPONDENT

NGONYO NZAI.....4TH RESPONDENT

RULING

1. Joyce Nzisa Muthama and Connie Mbithe Muia, being the 1st and 2nd applicants respectively took out the motion dated 15th October 2020 in which they sought for leave to file a derivative action on behalf of Athusi Bar and Restaurant Co. Ltd, the 1st respondent, against John Mutaki, Ben Mukula and Ngonyo Nzai, being the 2nd, 3rd and 4th respondents respectively. The motion is supported by the affidavit sworn by Joyce Nzisa Muthama.

2. When served with the motion, the respondents filed the replying affidavit sworn by John Mutaki to oppose the motion. Learned counsels appearing in this matter were invited to make oral submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. I have also considered the rival oral submissions. It is the submission of the applicants that the 1st respondent company was incorporated on 15th August 1969 and it initially had seven directors namely:

- a) William Mbolu Kiteki***
- b) Joseph Kabulunze Maluku***
- c) Benjamin Munyoki Mukula***
- d) Johnson Kinyulu Mulwa***
- e) Erasto Ngele Mulika***
- f) Wilson Mutua Kasinga***
- g) Mrs. Tabitha Joel Ngove***

4. It is stated that the initial directors resolved to sell shares of the company to the public and that the late George Mwangela became a shareholder of the 1st respondent by purchasing 681 shares. A share certificate issued to the late George Mwangela was exhibited in the supporting affidavit. The applicants averred that on 15.4.1995 the respondents transferred the deceased's shares to Mary Nthoki Mwangela, the applicants' mother without the same being transmitted to through succession process.
5. The applicants pointed out that George Mwangela died on 15.12.1977 leaving behind children including the applicants. The applicants aver that they filed a succession cause whereof they obtained letters of administration which was confirmed on 4th April 1997 and later rectified on 15.1.2011. In the rectified grant the 681 shares were distributed among the five beneficiaries with the applicants getting 22.4% and 14.4% respectively.
6. The applicants aver that in view of the above explanation, they have locus standi to institute the derivative action. The applicants have stated that over the years the 1st respondent has been engaging in the bar and restaurant businesses in Nairobi, Emali, Sultan, Mombasa and Jerusalem among other places. They further averred that over the years, the income earned from the aforesaid businesses was distributed to the shareholders in the form of dividends.
7. The applicants pointed out, that currently the 2nd, 3rd and 4th respondents run the operations of the 1st respondent jointly in their capacities as the chairman, secretary and treasurer respectively to the exclusion of other shareholders. The 2nd, 3rd and 4th respondents have been accused of opaquely running the company and for failing since 2014 to pay the shareholders their dividends. The respondents have also been accused of failing to file annual returns thus risking the company from being struck off from the register of Companies.
8. The respondents have further been accused of failing to file tax returns or pay land rates thus exposing the 1st respondent to punitive penalties and interest.
9. The 2nd, 3rd and 4th respondents were also accused of personalizing the operations of the 1st respondent to the exclusion of the other shareholders.
10. It is also claimed that the 2nd, 3rd and 4th respondents have personally enriched themselves, registered and operated other companies to the detriment of shareholders and that they have mismanaged the company using their positions as the directors of the 1st respondent to the detriment of the shareholders. For the above reasons the applicants urged this court to grant them leave to file a derivative action against the respondents.
11. The respondents on their part urged this court to dismiss the applicants' application arguing that the same lacks merit. It is pointed out that the applicants have made general complaints lacking in specificities.
12. The respondents also accused the applicants of being speculative and the material facts in the supporting affidavit are unverified and contradictory.
13. The respondents further argued that the applicants have raised issues which can best be dealt with within the mechanisms set out in the Companies Act, 2015 prior to commencement of litigation hence their motion is premature.
14. Having considered the rival submissions, the question which should be answered in this ruling is whether the applicants are entitled to be granted leave to institute a derivative action under Section 239 of the Companies Act, 2015.
15. In **Black's Law Dictionary 10th Ed. Bryan A. Garver**, a derivative actions is described as a suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary. It is also described as a suit asserted by a shareholder on a corporations behalf against a third party because of the corporation's failure to take some action against the third party.
16. Under **Section 238(1) of the Companies Act no. 17 of 2015**, a derivative claim may be brought by a member of the company in respect of a cause of action vested in the company and seeking relief on behalf of the company. In **Section 238(3) of the aforesaid Act**, it is stated that a derivative claim may be brought only in respect of cause of action arising out of an actual or proposed act or omission involving **negligence, default, breach of duty or breach of trust** by a director of the company.
17. In the application before this court, the applicants have alleged that the directors of the 1st respondent have breached their fiduciary duty to safeguard the interest of the company and its beneficiaries. The applicants have shown that the shares belonging to their late father were transmitted to them vide succession proceedings.
18. I am satisfied that the applicants' application meets the requirements prescribed under **Section 238 of the Companies Act, no. 17 of 2015**. The applicants are therefore entitled to be granted the orders sought. Consequently, I find the motion dated 15.10.2020 to be meritorious. It is allowed as prayed with each party meeting its own costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 8th day of January, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent