



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION NUMBER 481 OF 2019

JOSEPH KAMAU KINYANJUI1ST PLAINTIFF

ROBERT JEBURET KIPCHUMBA 2ND PLAINTIFF

SALINA CHEPTANUI KEMBOI..... 3RD PLAINTIFF

VS

DAVID MBURURE MWIKWABIRESPONDENT

AND

KALIMBULA INVESTMENT SQUATTERS CO. LTD.....AFFECTED PARTY

RULING

The application before me is the Notice of Motion dated 13th September, 2019 brought under **order 40 rule 1(1), 2, and 4 and order 51 (1) of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act as read with Section 238 and 239 of the Companies Act, 2015 and other enabling provisions of the law.**

The applicants seek orders: -

1. *Spent*
2. *That leave to prosecute the suit as a derivative action on behalf of Kalimbula Investment Squatters Co. Ltd Limited be granted to the applicants herein.*
3. *That having granted the hon. Court be pleased to issue a mandatory order compelling the affected party to convene an annual general meeting within a period of 21 days.*
4. *That the leave granted do further operate as interim measure of protection restricting the activities of the chairman, Kalimbula Investment Squatters Co. Ltd, specifically operations touching on over drawing the affected parties bank accounts and interfering with meetings.*
5. *That an order of indemnity by Kalimbula Investment Squatters Co. Ltd for the costs and expenses reasonably incurred in prosecuting the instant application.*

On the grounds; -

- (a) *THAT The respondent is the Chairman Kalimbula Investment Squatters Co. Ltd and being in that position has failed and or neglected to convene an annual general meeting from the years ending 31st December, 2004.*
- (b) *THAT the director has never allowed a forensic study of the Kalimbula Investment Squatters Co. Ltd for an annual audited financial statements and the companies several liabilities reveals unsupported financial claims running to KSHS 50,000,000/= thereby exposing the affected party to the loss of the said sums of money.*

(c) THAT the Respondent in his capacity as the chairman of Kalimbula Investment Squatters Co. Ltd has failed, neglected and refused to supply the registrar of companies with its annual audited financial statements and minutes from general meetings the year ending 31st December, 2004 and equally has failed to prepare the annual financial accounts for the stated period contrary to the provisions of section 635 of the Act.

(d) THAT the chairman has misappropriated funds of the Kalimbula Investment Squatters Co. Ltd thereby rendering and exposing the shareholders to eminent losses.

(e) THAT the members have continuously called for a general meeting to address the account and issue of the board of directors and subsequently a special general meeting was expected to be convened on the 13th of September, 2019 to make recommendations on the annual meetings and annual auditors report but in blatant violation of section 310 (1) of the Act the chairman through a lawyer wrote to the police to stop the same special meeting thereby affecting the rights of the applicants who are minority shareholders.

(f) THAT the afore stated conduct by the respondents is a manifestation of the illegalities and irregular acts of the respondents and a violation of the Company's Act (2015), the affected Party's Articles and Memorandum of Association, the rights and property investment of the shareholders, the operations and the legal status of Kalimbula Investment Squatters Co. Ltd hence exposing the company to severe fraud, embezzlement and irregular sales and disposal of its assets.

It is supported by the affidavit of JOSEPH KAMAU KINYANJUI sworn on 13th September, 2019 and annexures thereto. He reiterates the grounds on the face of the application and supports the same with documentary evidence.

The Respondent objects to the application vide his replying affidavit sworn on 17th October, 2019. He depones that he is a director appointed during an Annual General Meeting on 15th December, 2016 among ten (10) others and names submitted to Registrar of Companies and entered on 5th April, 2017. That however they found that there were eleven (11) different names replacing the eleven (11) directors and drew the attention of the Registrar to the same. That that issue led to the filing of Petition E001/2017 in which there is an order of status quo following an application dated 11th September, 2019 filed by the respondent.

Parties agreed to dispose of this application by way of written submissions.

I have perused the rival submissions.

The issues for determination is ***whether the application has any merit. Has the applicant demonstrated that there is action or proposed action or omission amounting to neglect, default, breach of duty or trust on the part of the respondent that would cause unfair prejudice on the shareholders to warrant the orders sought?***

Section 238 of the **Companies Act** states; -

Derivative claim means; - proceedings by a member of a company; -

1. 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 only be brought under the part and with leave of court “*in proceedings for protection of members against unfair prejudice brought under this Act*” That claim may be brought “*only in respect of action arising or proposed act on omission involving negligence, default, breach of duty or breach of trust by director of the company.*”

The claim may be brought against the director, or another person or both.

Section 239 is speaking about the permission “*to continue a derivative claim*” and the powers of the court thereto. **Section 241(2)** lays the grounds upon which a court may grant permission.

The issue then is, have the applicants satisfied the grounds upon which permission would be granted?

To answer this question, I am guided 1st by the fact that a derivative action is an exception to the rule, that a company being a legal person ought to sue to protect its own interest. See **FOSS VS HARBOTTLE 67 ALL CR 189** cited in **James Ndungu Gethenji Vs Fredrick Gitahi Gethenji & Another; Wagemu Limited (Interested Party) [2019] eKLR** the court held that;

“The general rule as established in the case of FOSS – VS- HARBOTTLE 67 All ER 189 is that in any action in which a wrong is alleged to have been done to a company, the proper claimant is company itself. However, there are several important exceptions to this general rule and one such exception is a “derivative action” which allows a minority shareholder to bring a claim on behalf of the company....”

See also the Court of Appeal Case of **Grace Wanjiku Munyinyi and Another vs Gideon Waweru Githunguri and 5 others (2011) eKLR.**

With the coming of the sections 238 to 241 of the **Companies Act** the conditions under which a derivative action could be brought were brought into statute, as laid out in **Isaiah Waweru Ngumi and 2 others vs Muturi Ndungu (2016) eKLR** the court held that;

“Counsel for the Respondent and Interested Parties suggested that the test is the substantive one whether the Applicants have made out a *prima facie* case. That test intuitively makes sense given the policy objectives of the requirement for leave I posited above. In making that determination, the Court is guided by the considerations stipulated in section 241(2) of the Companies Act. Among other things the court considers the following factors:

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 of 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 interest 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 or *Recchion vs Kirby* 637 F. Supp. 309 (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 authorized or ratified by the company in the future...;”

and in **Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarlal & another (2017) eKLR** in the court held that:

“Perhaps, I may add three factors. Firstly, the court should always also consider the seriousness of the alleged wrong-doing by conducting a cost -benefit analysis of the intended action. The court ought to satisfy itself that the litigation will not disrupt the company business and additionally that the cost of the intended litigation is not burden-some to the company. Likewise, the court ought to reflect on the reputational damage, if any, the company is likely to suffer in the event the claim fails. Secondly, I would hasten to add that of critical import is also the factor that the derivative suit ought to be allowed if it is in best interest of the company. This factor should be of the highest concern especially when ss. 143 and 144 of the Act are read into context. Both sections advocate the duty of the director to act in a way as to promote the success of the company for the benefit of its members.

Finally, the existence of alternative remedies and the view of independent members of the company where the court has invited such evidence pursuant to s.239 (4) & (5) of the Act ought to also be considered before granting or disallowing an application for permission to continue a derivative suit: see also s. 241 (3) of the Act...”

The actions complained about respondent relate to annual financial audit, failure to call Annual General Meeting (AGM), and the stopping of the meeting of 13th September, 2019, misappropriation of funds, abuse of power, exposing the shareholders to severe fraud, embezzlement irregular sale and disposal of assets, and failing to call AGM in 2004.

Weighing each and every complaint laid out by the applicant against the conditions set out in **Section 241 of the Act**, and the words of the judge in the GHELANI METALS case above.

The applicant relying on **Mrao Ltd v First American Bank of Kenya Ltd& 2 others [2003] eKLR** where the court stated **“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter,”** argues that it has established a prima facie case to warrant the orders sought.

I have carefully considered each of those complaints and the manner in which they have been expounded in the applicant’s submissions. The rider in this matter is that there are conditionality’s set out in law upon which the prima facie case must be founded. In my considered view none of those complaints set against the respondent answer to the conditions upon which permission can be granted.

For instance, the issue of the AGM in 2004, that has been overtaken by events and the company has dealt with that. The Company's accounts are not a secret and the same are available for scrutiny by shareholders. The 13th September, 2019 meeting was stopped from good reason, due to the pendency of a case before this court where the applicants were parties. None of the other allegations was established by way of evidence. There is no evidence that the applicants raised attempted to raise these issues with the directors before and the same were not addressed.

As to the particulars of alleged misuse of funds, abuse of power, exposure of the company to losses, none of these is substantiated with evidence to warrant the order of permission.

Is the derivative suit in the best interests of the company? This must be answered in light of the prayers sought should permission be granted.

The 1st prayer is a mandatory order to compel the company to hold an AGM. There is clear evidence that the respondent wanted to hold an AGM on 31st August, 2018 in which the company can still hold upon the hearing and determination of E001/20118.

The restrictive order against the respondent, regarding operations of the bank accounts and meetings, on this one, the respondent drew my attention to **Giella vs Cassman Brown** and the thresholds for interlocutory injunctions.

The applicant has not demonstrated a case Under **Section 238 of the Companies Act** to warrant permission under **Section 241**, hence, no prima facie case with a probability of success has been established.

Secondly, the applicants have not demonstrated what irreparable loss or harm they will suffer, hence in my view the balance of convenience falls in favour of the respondent. In the circumstance, the application is not merited and is dismissed with costs.

Dated, signed and delivered at Nakuru this 30th day of June 2020.

Mumbua T. Matheka

Judge

In the presence of VIA ZOOM

Court Assistant Edna

Munene Chege & Co. Advocates

Chege Kibathi & Co. Advocates

Ms. Kendi holding brief for Mr. Juma for the respondent