



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NUMBER 12 OF 2019**

**GEORGE MOGAKA ON BEHALF OF**

**KISII PRESTIGE SHUTTLE LIMITED.....PLAINTIFF**

**=VERSUS=**

**SHEM OYUGI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**HARUN SAISI MOGAKA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**R U L I N G**

1. There are three applications before me;

*1) Notice of Motion dated 30<sup>th</sup> January 2020 filed by Harun Saisi Mogaka.*

*2) Notice of Motion dated 24<sup>th</sup> September, 2019 filed by the same Harun Saisi Mogaka seeking the same orders sought in (1) above.*

*3) Notice of Motion dated 29<sup>th</sup> July 2019 filed by George Mogaka. It was agreed that the application dated 30<sup>th</sup> January 2020 was exactly the same as that of 24<sup>th</sup> September 2019 and the 24th application of September 2019 be dealt together with the one of 29<sup>th</sup> July 2019.*

2. The application dated 29<sup>th</sup> July 2019 was filed by the plaintiff following the plaint dated 10<sup>th</sup> April, 2019. In the plaint the applicant seeks orders;

*a) An Order restraining the Defendants, their agents, servants and/or any person whomsoever acting on behalf of the Defendants from Printing receipts, Collecting Revenue or money on behalf of Kisii Prestige Shuttle Ltd and/or opening Bank Accounts on behalf of the Kisii Prestige Shuttle Limited.*

*b) An Order directing the Respondent's to render a proper and accurate account of the Company and compensate for any loss incurred by the Company.*

*c) An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants to render an up to date and accurate book of account of the Company to the plaintiff.*

*d) An order directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to render an up to date and accurate book of account of the Company to the plaintiff.*

*e) Costs of the suit.*

*f) Any other relief that this Honourable Court may deem fit to grant.*

Against the defendants.

3. His claim is that as a director of Kisii Prestige Shuttle Limited he has been excluded since 2011 from the running of the company and the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

*...who are some of Directors behind the said Company and are responsible for its honest Management but they have fraudulently opened parallel accounts in other banks and have been and they are still collecting money from the Companies clients and/or members using receipts they have fraudulently made and banking the said money in their said accounts and/or pocketing the same to the Company and/or client and not disclosing how much money they have collected and banked in their accounts and/or pocketed for their use.*

4. In the Notice of Motion, he seeks orders;

1. *Spent*

2. *Spent*

3. *THAT pending the hearing and determination of this suit, the Defendants whether by themselves, their agents, servants or otherwise howsoever be restrained from acting and holding themselves as Directors of the Applicant/Plaintiff from taking decisions and making decisions, giving instructions, writing and/or signing letters on behalf of the Company and/or in any manner purporting to act and/or representing the Applicant Company until this suit is heard and determined.*

4. *THAT pending determination of this Suit the Honourable Court do order that the affairs of the Company be managed by the other Directors of the Company excluding the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*

5. *THAT pending determination of this Suit the Honourable Court do order that all the revenue collected and/or paid to the Company be banked at Family Bank Ltd Nakuru Branch A/C NO. 019000044454 and further that no withdrawal of monies from the said account unless it's through concurrence of the remaining Directors through a resolution.*

6. *THAT the County Commander Nakuru to supervise and effect compliance of Orders of this Honourable Court.*

7. *THAT the costs of the application be provided for.*

The grounds for the application are set out as;

a) *THAT the claim herein relates to breach of duty and fraud by the Defendants who are shareholders and directors of the Company (plaintiff)*

b) *THAT the Defendants/Respondents are running the affairs of the Company without regard to other Directors including the Applicant whom they have violently excluded from running and/or making enquiries as to the Management of the Company and its finances.*

c) *THAT the Defendants/Respondents are running the affairs of the Company without regard to other Directors including the Applicant whom they have violently excluded from running and/or making enquiries as to the Management of the Company and its finances.*

b) *THAT due to the above acts of the Respondents the Company has suffered loss of revenue.*

c) *THAT unless the Respondents are restrained from committing the aforesaid fraudulent acts, the Company will continue to suffer.*

d) *THAT the Defendant/Respondents have been sued in good faith for the benefit of the Company.*

and his supporting affidavit sworn on 29th July 2019 together with annexures.

The application is opposed via the Replying Affidavit of Harun Saisi Mogaka sworn on 6<sup>th</sup> September 2019 on his behalf and that of the 2<sup>nd</sup> respondent. It is denied that the applicant is a director of the company. That the applicant has not annexed any evidence to substantiate the claims made in his affidavit about the company business and in particular; that it was initially a Self Help Group with an account in Family Bank Limited Nakuru Branch, that the respondents were misusing the funds and failed to account to other directors, and that the company had lost millions of Kenya Shillings due to their fraudulent activities. It is denied that the applicant owns any motor vehicle under the flag of the company. It is contended that some annexures were manufactured to suit the suit and the application, especially **Annexure 4** on how the company allegedly operates. That **annexure 5**, alleged minutes of a meeting was a forgery and the same had been handed over to DCI for investigations. That the applicant was a nuisance to the company, and as a result had been charged with **Nakuru CMCR No. 3703 of 2019 Republic v George Mogaka**, and suspended by the County Government from accessing the company's business premises. That the application fell short of the conditions and principles set in **Giella vs Cassman Brown & Company Limited (1973) EA 358** for the grant of interlocutory/injunctive reliefs.

5. The application dated 24<sup>th</sup> September 2019 seeks orders;

(a) Spent

(b) Spent

(c) **THAT pending the hearing and determination of this suit, the Plaintiff/Respondent, its agents, servants, employees and/or any person acting under his authority, be temporarily restrained from accessing, trespassing into and/or interfering with the defendant/applicants operations, business and/or affairs under the entity KISII PRESTIGE SHUTTLE LIMITED and/or accessing, getting into and/or obstructing the offices of the said entity at Nakuru bus (main stage) terminus.**

d) **THAT the costs of this application be provided for.**

6. The grounds for the application are set on the face;

**1. THAT the Defendant/Applicants are directors and/or shareholders at KISII PRESTIGE SHUTTLE LIMITED.**

**2. THAT the respondent is also a director and/or shareholder at the said company.**

**3. THAT the respondent has been engaging in acts of illegalities, collecting monies from unsuspecting members of the public, and not accounting for the same, creating disturbance and anarchy within the offices of the KISII PRESTIGE SHUTTLE LIMITED and engaging in acts that border on criminality to the detriment of the other directors and/or shareholders.**

**4. THAT it is now imperative that the defendant/applicants herein be granted the reliefs herein to safeguard their business which are now at risk of losses due to the Plaintiff's incessant interference and blackmail.**

**5. THAT this application is made in the interest of justice devoid of any malice.**

**6. THAT the plaintiff will not suffer any prejudice if the orders sought herein are granted.**

It is also supported by his affidavit sworn on 24<sup>th</sup> September 2019, in which he depones that the respondent was removed as a director on 25<sup>th</sup> March 2019. He reiterates the facts in the affidavit in opposition of the respondent's application.

7. In the Replying Affidavit sworn on 28<sup>th</sup> November 2019 George Mogaka depones that this application is only intended to defeat his application of 29<sup>th</sup> July 2019 that he is a director of the company, that the applicants have been using the police to arrest, harass him to silence him for questioning their fraudulent activities.

8. The parties agreed to dispose of the two (2) applications by way of written submissions.

9. For the plaintiff it is argued that his claim is based on **Section 238 of the Companies Act 2015, Section 238 (i)** which defines a **"derivative claim"**

**"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."**

And the definition given by the Judge in **Ghelani Metals Limited & 3 Others v Elesh Ghelani Natwarlale Another [2017] eKLR;**

**"Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows a 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 Company. The action is designed as a tool of accountability to ensure redress is obtained against all wrong does in the form of a representative suit filed by a shareholder on behalf of the corporation."**

It is submitted that the defendants have not answered the plaintiff's concerns in his Notice of Motion. That the plaintiff has laid ground for an order for the defendants to account to other directions.

10. For the defendants it is argued that the plaintiff must establish that the application meets the threshold of the the principles of granting injunctions as be found in the case of **Giella –vs – Cassman Brown Co. Ltd 1973] EA 358** where it was held that in order to grant the injunction as prayed, the court must be satisfied that,

**a. The applicant has established a prima facie case with a probability of success;**

**b. The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and**

**c. If the court was in doubt, the application would be determined on a balance of convenience.**

And regarding he the establishment of a prima facie case, the defendants relied on the words of Lord Diplock in the case of **American Cyanamid – vs – Ethicon Limited [1975] AC 396** stated thus,

***“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to interlocutory relief.”***

11. That the prayer 2, 3, 4 cannot be granted at interlocutory stage because there is a process for removal and appointment of directors both in statute and in the company’s Articles and Memorandum of Association, that the alleged other directors are not party to this suit.

12. That the issue of the company’s account in relation to account of Kisii Nissan Self Help Group cannot be settled by way of an affidavit, as no nexus has been made between the two. That the alleged losses made by the company are made out of the plaintiff’s own personal calculations, and he being no expert in that area cannot purport that his handwritten documents is a financial report of the company. That orders sought will bring the company’s operations to a halt.

13. In contrast it is submitted that the defendants have invested in the company, taken out county licences, employed staff, and that their application is merited.

14. Has the applicant met the threshold for the granting of permission to bring a derivative suit? To answer this the grounds set out by the applicant must be held against the grounds set in the Act and in *Ghelani Metals vs E. Ghelani* above.

15. Starting with the application of 29<sup>th</sup> July 2019, the plaintiff has not established the nexus between Kisii Nissan Team Self Help Group and the company herein to warrant prayer number 4, it would be difficult for this court to act without such evidence as that may jeopardise the operations of the company.

16. It is evident that there are other directions of the company, but none of them is a party and nor have they sworn any affidavits to support the plaintiff’s claim against the two (2) defendants. That begs the question, why? yet he seeks to have those others take over the running of the company. Here I must agree with defendants that there is no evidence that, there is loss of money from the company or mismanagement, and that the other directors are in this with the plaintiff.

17. It appears to me that the plaintiff’s application was provoked by his removal as director, and that is the real issue, for him, because if it is true that he had been excluded since 2011, then, the question would be why wait till now. The defendants have deponed that he was removed in March, hence he has been part and parcel of the running of the company till his removal. Hence while it appears to me there is a dispute in the manner in which the company being run, and the plaintiff’s place in its running, it is evident from the response by the defendants and their application of 24<sup>th</sup> September, 2019, which in real terms is simply their response to the application, that there are issues that require to be heard and determined in a full hearing, where evidence of the alleged fraud, theft and mismanagement of the company can be placed before the court for determination. I am therefore not persuaded that on the material before me that the plaintiff has satisfied the requirements for the reliefs sought. Should there be a successful cause of action he can be compensated by way of an award for costs.

18. From the defendant’s application it is established that the plaintiff does not own a motor vehicle that runs under the flagship of the company and therefore shutting the company down would not lead to any losses on his part.

19. It is also established through the investigations by police the ODPP’s review of the police file that the plaintiff has involved himself in activities against the company or company staff that has led to his being charged with an offence, and suspended from the company offices by the County Government. Hence, the balance of convenience tilts in favour of the defendants, and their application is allowed in terms of prayer (3).

20. This matter ought to be heard on its merits so as to prevent this multiplicity of applications.

21. Each party will bear his own costs.

**Dated this 25<sup>th</sup> June 2020**

**Counsel notified but no appearance.**

**Signed and Delivered at Nakuru via email this 24<sup>th</sup> July 2020.**

**Mumbua T. Matheka**

**Judge**

Court Assistant: Edna

N/A for D. K. Otware & Co. Advocates

N/A for A. N. Geke & Co. Advocates