



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 146 OF 2002

JOSPHAT KIPCHIRCHIR SIGILAI.....PLAINTIFF

VERSUS

GOTAB SANIK ENTERPRISES LIMITED.....1ST DEFENDANT

KIPROTICH ARAP CHEPKWONY.....2ND DEFENDANT

SUSAN CHEMTAI CHEPKWONY.....3RD DEFENDANT

HENRY KIPKEMBOI CHEPKWONY.....4TH DEFENDANT

CLARA CHEPKOECH CHEPKWONY.....5TH DEFENDANT

JUDGMENT

[1] By his Complaint dated **1 August 2002**, the plaintiff herein, **Josphat Kipchirchir Sigilai**, sued the defendants jointly and severally for the following reliefs:

[a] A declaration that his shareholding in the 1st defendant is 50%.

[b] An order for rectification of the Company's Members' Register to register his 50% shareholding in the Company.

[c] An order for the payment of profits and/or dividends of the Company to the plaintiff from the year 1984 to date at the rate of 50%.

[d] A declaration that all allotments of shares to the 2nd, 3rd and 4th defendants were unlawful, fraudulent and therefore null and void.

[e] A declaration that the removal of the plaintiff from the Board of Directors was unlawful.

[f] An order of reinstatement of the plaintiff to the Company's Board of Directors.

[g] A declaration that the transfer of the plaintiff's shares to the 3rd, 4th and 5th defendants is unlawful and fraudulent; and an order that the transfer be cancelled.

[h] A declaration that the appointment of the 3rd and 4th defendant to the Board of Directors is unlawful and fraudulent; and an order for their removal therefrom.

[i] A declaration that the increase of the authorized share is only to the benefit of the Company and its two lawful shareholders; namely, the plaintiff and the 2nd defendant.

[j] An order that Africa Registrars Ltd be removed as Secretary of the 1st defendant.

[k] Costs of this suit.

[1] Any other and further relief that the Court may deem fit and proper to grant.

[2] In the alternative, the plaintiff prayed that the 1st defendant, **Gotab Sanik Enterprises Ltd**, be dissolved and wound up; and that all its assets be distributed between the plaintiff and the 2nd defendant to the exclusion of anyone else. The plaintiff averred in paragraph 7 of the Plaint dated **1 August 2002** that **Gotab Sanik Enterprises Ltd** (herein after, the Company) was incorporated on **19 October 1984** with a share capital of **Kshs. 100,000/=**; and that it had only two directors at incorporation, namely, the plaintiff and the 2nd defendant; each holding 50% of the Company's shares. He further averred that the day to day running of the Company was entrusted to the 2nd defendant who was also the secretary to the Board of Directors. The plaintiff also pleaded that, on diverse dates between **1984 and 1988**, he acted as a guarantor for the Company for various loans advanced to the Company by various financial institutions.

[3] The plaintiff's cause of action was that, on **31 July 1986**, the 2nd defendant unlawfully, fraudulently and without notice removed him from the Board of Directors and appointed his wife, **Susan Chemtai Chepkwony**, who is the 3rd defendant herein, in his place. He added that thereafter, the 2nd defendant resigned as the secretary of the 1st defendant and unilaterally appointed **African Registrars Ltd** to replace him without any resolution of the Board to that effect, purporting that he (the plaintiff) had resigned as a director of the 1st defendant. He further averred that the 1st defendant proceeded to appoint his own son, one **George Kipng'eno Chepkwony** as a member of the Company's Board of Directors, without any reference to him; and that together they allotted shares within their family.

[4] Thus, the plaintiff was aggrieved that on various dates between **1987 and 1996**, the 2nd defendant fraudulently transferred his (the plaintiff's) shareholding in the 1st defendant to members of his own family in utter disregard of his interest in the Company and failed to account for the profits made by the Company. Particulars of fraud on the part of the 1st and 2nd defendants were set out by the plaintiff at paragraph 22 of the Plaint. The Plaint was thereafter amended to introduce paragraph 23(a) by which the plaintiff averred that the defendants have continued to commit further acts of fraud against him whose particulars were, likewise, furnished in that paragraph. The plaintiff also sought for additional prayers against the 2nd, 3rd, 4th and 5th defendants, including general damages for fraud.

[5] The defendants denied the allegations against them and put in a Counterclaim against the plaintiff vide their Amended Statement of Defence and Counterclaim dated **5 May 2015**. They asserted that the plaintiff voluntarily resigned as a director of the 1st defendant on or about **31 July 1986**; and accordingly, he could not have acted as a guarantor for the 1st defendant thereafter. While conceding that he and the plaintiff subscribed to the Company's share capital in the ratio of 50% each, the 2nd defendant averred that the plaintiff's contribution in the Company diminished thereafter and was ultimately bought out on or about **29 May 1996**.

[6] It was further the averment of the defendants that the appointments of **African Registrars Ltd** as the secretary and **George Kipng'eno Chepkwony** as director of the 1st defendant were lawfully done and notice thereof duly given to the plaintiff. In the same vein, the defendants admitted that the 3rd, 4th and 5th defendants were invited to take up shares in the 1st defendant in line with the Company's Articles of Association; and that this was after the plaintiff voluntarily surrendered his shares. They accordingly denied the plaintiff's allegations of fraud and put him to strict proof thereof. They denied that the plaintiff is entitled to any of the reliefs sought by him and prayed for the dismissal of the suit with costs. They also raised the issue that the plaintiff's suit is time-barred and therefore should be struck out with costs.

[7] In their Counterclaim, the defendants averred that the 2nd defendant, who is a cousin to the plaintiff, started trading with the plaintiff in a hotel/local beer hall partnership business, which they complemented with commercial farming; and that in **1978** when the Government of Kenya banned the operation of local beer halls, the 2nd defendant abandoned the business and surrendered to the plaintiff all the assets in respect of the beer business worth **Kshs. 9,070,600/=** as listed in paragraph 29 of the Defence and Counterclaim. Thus, the 2nd defendant counter-claimed half of the value of the assets listed in paragraph 29 together with mesne profits, all in the sum of **Kshs. 6,695,300/=** together with interest thereon at the commercial rate of 20% per annum from the date of filing suit till payment in full.

[8] In support of his case, the plaintiff testified herein between **15 March 2011** and **24 May 2011**. He confirmed that the 2nd defendant is his cousin; and that they grew up together and became business partners. He further testified that they started off with *busaa* clubs which they closed in **1998**; and that in **1992**, they started a bakery business in **Kericho**. The partnership was thereafter converted into a limited liability company in **1984**, thereby creating the 1st defendant company in which he held a 50% stake. He made it clear that he left the day to day management of the company to the 2nd defendant; and that it was the 2nd defendant who, in the course of time, approached various financial institutions for financial assistance, for which they provided guarantees as directors of the Company.

[9] It was further the testimony of the plaintiff that he got to learn that he had been removed as a director of the 1st defendant on **31 July 1986**; and that when he made inquiries from the 2nd defendant, he was told that he had purportedly written a resignation letter dated **31 July 1986** to the 1st defendant, withdrawing from directorship. He however denied having written or signed the said letter. He similarly denied that he was involved in the changes that saw the 2nd defendant resign as the Company Secretary and his replacement by **African Registrars Ltd**; and added that he only got to know of those changes in **May 2002**. The plaintiff further told the Court that he did not know how the 3rd, 4th and 5th defendants became directors or shareholders as he was never informed thereof or invited to participate in those decisions.

[10] Regarding the alleged disposal of his shares, the plaintiff denied the assertion that he voluntarily sold his shares to the defendants, contending that he could not have sold his 50% stake in the Company for only **Kshs. 20/=** as the defendants would want the Court to believe. Thus, he testified that the alterations regarding his shareholding were entirely fraudulent. He produced several bundles of documents to demonstrate that the Company grew exponentially in terms of its business turnover and asset base; and therefore that he was entitled to a share of the profits earned over the years, from which he had been excluded. He dismissed the 2nd respondent's assertions in his Counterclaim as spurious and urged the Court to dismiss the same with costs.

[11] The plaintiff called **Paul Asava Vigedi (PW2)**, an employee of Barclays Bank of Kenya Ltd, Eldoret Branch, as a witness. **PW2**

testified that **Gotab Sanik Enterprises Ltd** (the 1st defendant herein) was one of the Bank's customers; and that it borrowed some money from the Bank for which the directors issued a guarantee dated **12 November 1986**. The witness was called to produce certain security documents whose copies appear at pages 31, 32 and 33 of the plaintiff's bundle of documents marked Volume I, but an objection was raised thereto by **Mr. Regeru**, counsel for the defendants; which objection was upheld by the Court (**Hon. Azangalala, J.**, as he then was). That marked the end of his testimony.

[12] The plaintiff's third witness was **Mwangi Nganga Giteru (PW3)**, an accountant and a former employee of the 1st defendant. His testimony was that he worked for the 1st defendant from **June 1998** to **April 2004** as the Company Accountant. In that capacity, he would prepare the Company's books of accounts for purposes of audit and management. He confirmed that he prepared the accounts documents exhibited as part of Volume IV of the plaintiff's documents and added that the Company was doing well financially. He further confirmed that the plaintiff was one of the directors of the Company along with the 2nd, 3rd and 4th defendants; while the 5th defendant was only a shareholder. It was also the evidence of **PW3** that he only came across the name of the plaintiff in the records of the Company, but never got to meet him before his court attendance.

[13] **PW3** further testified that although the Company realised profits during the period he was in its employ, no dividends were declared or paid; and that the directors, save for the plaintiff, would be paid on request from time to time. **PW3** was recalled later on **27 July 2018**, with the leave of the Court, to produce the Annual Accounts he prepared for the years 2001-2003. The said documents were marked the **Plaintiff's Exhibits 3A-D**.

[14] The plaintiff's last witness was **Antipas Nyanjwa (PW4)**. He was then working as a forensic document examiner, based at CID Headquarters, Nairobi. He testified that he received a request from **Onyinkwa & Company Advocates** on **17 November 2010** to analyse some disputed signatures in respect of **High Court Civil Case No. 146 of 2002**; and that the questioned documents were a transfer of shares marked **MFI 43** and a letter dated **31 July 1986** which he identified to be at page 11 of Volume V of the plaintiff's Bundle of Documents. He further stated that he examined and compared the signatures and could find no agreement. He prepared his report which he produced as **the Plaintiff's Exhibit No. 7** herein.

[15] On behalf of the defendants, the 2nd defendant, **Kiprotich Arap Chepkwony (DW1)** testified on **29 May 2019** and conceded that the plaintiff is indeed his cousin. It was however his evidence that the Company was his sole creation. He relied on and adopted his witness statement dated **5 October 2018** in which he stated that he is one of the directors of **Gotab Sanik Enterprises Ltd**; and that it served as its secretary until **31 May 1987**. He further confirmed that he was hitherto in partnership with the plaintiff and that they were engaged in farming while at the same time running several traditional liquor clubs and hotels in Eldoret, before relocating to Kericho.

[16] **DW1** also testified that in **1984**, he identified a business opportunity and proceeded to acquire a bakery business on credit from Electric Bakery which he renamed **Gotab Sanik Enterprises**. He then invited the plaintiff to join him only for purposes of converting the business into a limited liability company as advised by prospective financiers. Thus, the 1st defendant was incorporated, with him and the plaintiff as the founding shareholders, each having one share of **Kshs. 20/=**; but added that the running and funding the operations of the Company was his sole responsibility. He further testified that, since the Company was in dire need of working capital, he single-handedly approached several banks and financial institutions for support, including **Kenya Industrial Estate** and **Barclays Bank of Kenya Ltd**. It was thus the evidence of **DW1** that at no time did the plaintiff contribute capital or participate in the running of the Company; let alone repaying the debts owed by the Company.

[17] Thus, the 2nd defendant testified that he had to use his own personal resources to pay off substantial decretal amounts that had been awarded by various courts against the Company. He singled out, as examples, **Nairobi HCCC No. 9 of 2012: Premier Floor Mills Limited vs. Gotab Enterprises Ltd** and **Nairobi HCCC No. 11 of 2012: Atta (Kenya) Ltd vs. Gotab Sanik Enterprises Ltd** in which judgment was entered against the Company for **Kshs. 8,723,375/=** and **Kshs. 30,089,870/=**, respectively.

[18] **DW1** was categorical that the plaintiff resigned from the Company on **31 July 1986**, on the ground that he lacked the money to put into the bakery business. According to **DW1**, the plaintiff told him he preferred to engage in farming in Eldoret. Thus, **DW1** touted the letter dated **31 July 1986** as authentic proof of the plaintiff's resignation from directorship. He added that it was thereafter that his wife, **Susan Chemtai Chepkwony** (the 3rd defendant herein), was appointed as a director. **DW1** further testified that after the Company took a decision to expand its capital base, it invited the plaintiff to purchase 24,999 Ordinary Shares at **Kshs. 20/=** each, vide a letter dated **21 September 1987**; but that the plaintiff declined the offer. **DW1** concluded his testimony by asserting that the plaintiff, having resigned and sold of his share in **1996**, has no interest at all in the 1st defendant. He produced, as an exhibit, the Defendant's Bundle of Documents filed on **7 October 2008** in support of the defence case.

[19] The defendants also called **Henry Kipkemoi Chepkwony** (the 4th defendant herein) as their witness. He, likewise, adopted his witness statement dated **29 October 2019** as part of his testimony as **DW2**. He confirmed that he is one of the directors of **Gotab Sanik Enterprises Ltd** along with his father, the 2nd defendant; and that the plaintiff is his paternal uncle. He also mentioned that he is the director in charge of the Company's operations, including the day to day running of the business of the 1st defendant. He therefore assured the Court that he is well conversant with the facts and issues related to the Company's financial and secretarial matters and could confirm that all the requisite financial statements and returns were prepared and filed with the Registrar of Companies.

[20] **DW2** reiterated the evidence of **DW1** with regard to the assertion that the plaintiff resigned as a director of the Company vide his letter dated **31 July 1986** and was thereupon replaced by the 3rd defendant; and that the plaintiff declined to take up additional shares in the Company and thereafter opted out as a shareholder by transferring his one share valued at **Kshs. 20/=** on **29 May 1996** to the 2nd defendant. It was therefore the evidence of **DW2** that the changes in the Company's share capital and directorship are well reflected in the financial reports and annual returns filed with the Registrar of Companies. **DW2** disputed the plaintiff's version of the Company's financial reports exhibited as part of Volume IV, contending that they are a fabrication, and that they were not prepared by the Company's auditors. And, with that, the defendants closed their case.

[21] Directions were then given for the filing of written closing submissions; whereupon the plaintiff filed his written submissions on **19 July 2019** setting out a summary of the pleadings and the evidence adduced in respect thereof by the parties. On the basis thereof, **Mr. Onyinkwa** urged the Court to find that the plaintiff had proved his case on a balance of probabilities that:

- [a] the plaintiff was a founder member of the 1st defendant with 50% shareholding therein;
- [b] the 2nd defendant fraudulently removed the plaintiff as a director and shareholder of the 1st defendant;
- [c] strangers were brought to the Company by the 2nd defendant without the knowledge or consent of the plaintiff;
- [d] the 2nd defendant run the Company as his personal property and excluded the plaintiff from the Company's profits;
- [e] the Company had a lot of assets, including motor vehicles and parcels of land; and that between **2000** and **2003** the net profit was **Kshs. 10,972,905/=** on the average.

[22] Accordingly, **Mr. Onyinkwa** prayed that, in addition to the declaratory orders prayed for by the plaintiff, he be awarded general damages in the sum of **Kshs. 20,000,000/=** as compensation for the loss and damage suffered by him.

[23] On behalf of the defendants, written submissions were filed herein on **30 October 2019** by **Mr. Regeru** who also furnished a factual background of the dispute. He reiterated the issues as adopted by the parties and made his submissions along those lines. In particular, it was the submission of **Mr. Regeru** that the plaintiff's suit is hopelessly time-barred in so far as it pertains to events that took place between **1986** and **1996**. Counsel relied on **Section 4(1)(a)** of the **Limitation of Actions Act, Chapter 22** of the **Laws of Kenya; Abdirahman Affi Abdalla vs. Osupuko Service Station Ltd & Another** [2012] eKLR and **Haron Onyancha vs. National Police Service Commission & Another** [2017] eKLR to underscore his submission that the subject matter is hinged on contract; and therefore ought to have been filed within 6 years. In support of the proposition that the issue of limitation goes to the jurisdiction of the Court, counsel cited the case of **Bosire Ongero vs. Royal Media Services** [2015] eKLR.

[24] On whether the cessation of the plaintiff's directorship in the Company was lawful, **Mr. Regeru** relied on **Section 185(1)** of the **Companies Act, Chapter 486** of the **Laws of Kenya** (now repealed) to support his submission that the plaintiff's removal as director was by resignation in accordance with **Article 20(d)** of the Company's Articles of Association. He therefore took the stance that the resignation and subsequent removal of the plaintiff from the directorship of the Company was in compliance with both the Company's Articles of Association and the statutory regime in force at the material time. He discounted the plaintiff's contention that the said resignation letter was forged and invited the Court to take notice of the historical context in which the said letter dated **31 July 1986** was written.

[25] The court record shows that most of the exhibits were produced by consent of the parties; and that several issues were agreed and certain admissions made before **Hon. Ang'awa, J.** from which the following conclusions can safely be based:

- [a] By consent, the parties adopted the Statement of Agreed Issues filed by the plaintiff, marked A, in addition to Issues Nos. 1, 12, 13 and 14 of the defendant's Statement of Agreed Issues **marked B**.
- [b] The parties were in agreement that the 1st defendant was incorporated on **19 October 1984** by the plaintiff and the 2nd defendant; and that each had 50% shareholding. There is also no dispute that, at incorporation, the share capital of the Company was **Kshs. 100,000/=** divided into 5,000 shares of **Kshs. 20/=**.
- [c] While the defendants are of the assertion that the plaintiff voluntarily resigned from his position as a director and shareholder of the Company, the plaintiff contends that his removal was fraudulent; and therefore that his replacement by the 2nd defendant's son, **George Kipng'eno Chepkwony**, and the subsequent allotment of shares to members of the 2nd defendant's family were entirely irregular.

[26] Thus, the key issues presenting themselves for determination herein are:

- [a] Whether the plaintiff resigned as a director of the 1st defendant;
- [b] Whether the plaintiff's membership of the Company was lawfully terminated;
- [c] Whether the offering and taking up of shares by 3rd, 4th and 5th defendants was lawful; and,
- [d] Whether the plaintiff is entitled to the prayers sought in the Amended Plaintiff.
- [e] Whether there is any merit in the 2nd defendant's Counterclaim.

[27] It is manifest that the issues revolve around directorship as well as membership of a limited liability company. Indeed, counsel for the defendants raised two technical issues which touch on the jurisdiction of the Court and therefore need to be tackled upfront before a consideration of the merits of the suit; namely, the issue of limitation and whether the suit is competent from the standpoint of the repealed Companies Act and the rules thereunder. On limitation, it was the submission of counsel for the defendants that the cause of action herein is in contract; and that it arose on **31 July 1986** when the plaintiff wrote the letter of resignation; and at the latest on **29 May 1996** when the plaintiff relinquished his membership of the Company by failing to purchase 24,999 ordinary shares allotted to him.

[28] Needless to say that a company's Articles of Association amounts to a contract between the members and the company as well as a contract involving the members *inter se*. Hence, in urging the Court to find that the suit is time-barred, **Mr. Regeru** relied on **Section 4(1)(a)** of the **Limitation of Actions Act**, which stipulates that a cause of action founded on contract may not be brought after the end of six years. And, in **Gathoni vs. Kenya Co-operative Creameries Ltd** [1982] KLR 104, the point was aptly made thus:

“...The Law of Limitation of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

[29] In similar vein, it was held in **Mehta vs. Shah** [1965] EA 321 that:

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.” (see also **Abdirahaman Affi Abdalla vs. Osupuko Service Station Ltd & Another** (supra); **Haron Onyancha vs. National Police Service Commission & Another** (supra) and **Bosire Ongeru vs. Royal Media Services** (supra).

[30] Thus, given the prayers sought by the plaintiff, other than the alternative prayer for winding up, the inescapable conclusion to be drawn is that the plaintiff's suit is time barred. As for the prayer for winding up, the question to pose is whether it has been validly raised in this suit. The reliefs sought are reliefs, not so much against the 2nd, 3rd, 4th and 5th directors as individuals, but against or on behalf of the Company. It bears repeating that the plaintiff seeks:

[a] A declaration that his shareholding in the 1st defendant is 50%.

[b] An order for rectification of the Company's Members' Register to register his 50% shareholding in the Company.

[c] An order for the payment of profits and/or dividends of the Company to the plaintiff from the year 1984 to date at the rate of 50%.

[d] A declaration that all allotments of shares to the 2nd, 3rd and 4th defendants were unlawful, fraudulent and therefore null and void.

[e] A declaration that the removal of the plaintiff from the Board of Directors was unlawful.

[f] An order of reinstatement of the plaintiff to the Company's Board of Directors.

[g] A declaration that the transfer of the plaintiff's shares to the 3rd, 4th and 5th defendants is unlawful and fraudulent; and an order that the transfer be cancelled.

[h] A declaration that the appointment of the 3rd and 4th defendant to the Board of Directors is unlawful and fraudulent; and an order for their removal therefrom.

[i] A declaration that the increase of the authorized share is only to the benefit of the Company and its two lawful shareholders; namely, the plaintiff and the 2nd defendant.

[j] An order that Africa Registrars Ltd be removed as Secretary of the 1st defendant.

[k] Costs of this suit.

[l] Any other and further relief that the Court may deem fit and proper to grant.

[31] It is elementary that members of a company are bound by their Memorandum and Articles of Association to resolve any differences in the manner set out therein. It is also elementary that companies transact business through resolutions passed either at the meetings of the Board of Directors or of shareholders, in full recognition that a company is a separate entity with capacity to sue and be sued in its own name and right. That being the case, cognizance ought to have been taken, by the plaintiff herein, of the preemptory provisions of **Section 211** of the repealed **Companies Act**, which provided that:

“(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (2) of section 170, may make an application to the court by petition for an order under this section;

(2) If on any such petition the court is of the opinion

(a) that the company's affairs are being conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the fact would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, the court may, with a view of bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

[32] Moreover, Section 221(l) of the repealed Companies Act was explicit that:

"An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors, contributory or contributories, or by all or any of these parties together or separately..."

[33] It is therefore well settled that where an individual or minority shareholders feel constrained to sue in their own name on behalf of their company, such a suit can only be done with leave of the court as a derivative suit, as was well explicated in Foss vs. Harbottle [1843] 2 Hare 461. Thus, in Edwards vs. Halliwell [1950] ALLER 1064, the rule was restated thus:

"The rule in Foss v Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue."

[34] The point was reiterated in the case of Dadani vs. Manji & 3 Others [2004] eKLR, Hon. Mwera, J. (as he then was) as hereunder:

"It is a cardinal principle in company law that it is for the company and not an individual shareholder to enforce rights of actions vested in the company and to sue for wrongs done to it. It is also cardinal that in absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters...All this is in deference to the self-regulation the law allows corporations and thus limits the interference by courts in the running of such bodies on their own. However, if due to illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief on its own name, such shareholder can bring an action by way of a derivative suit."

[35] The decision was upheld on appeal in Manji vs. Dadani [2015] eKLR in which the Court of Appeal reiterated that:

"Leave of a court shall be obtained before filing a derivative suit, but may also be obtained to continue with the suit once filed...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 vs. Harbottle."

[36] Hence, in Ghelani Metals Limited & 3 Others vs. Elesh Ghelani Natwarla & Another [2017] eKLR Hon. Onguto, J. summarised the applicable law thus:

"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 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...Until 2015, in Kenya, the common law guided derivative actions in Kenya. Ordinarily under common law, one had to fall under the exceptions to the rule in Foss vs. Harbottle [1843] 2 Hare 461 that "a company is a separate legal personality and the company alone is the proper plaintiff to sue on a wrong suffered by it...A party seeking to bypass the company had, *in limine*, to show that he fell within the exceptions to the rule..."

[37] With the foregoing in mind, I have carefully perused the record herein and find no such leave. It would follow, then, that this suit is woefully incompetent. For that reason, it would be superfluous to engage in a merit consideration of the grounds raised and evidence adduced by the plaintiff in support of the prayers sought by him as to do so would not only be pointless, but also prejudicial should the plaintiff opt to file an insolvency cause. It is for the same reason that the 2nd defendant's Counterclaim must suffer the same fate.

[38] In the result, the orders that commend themselves to me, and which I make herein, are as hereunder:

[a] That the plaintiff's suit be and is hereby struck out;

[b] That the 2nd defendant's Counterclaim be and is hereby struck out;

[c] Each party shall bear own costs of the suit and of the Counterclaim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER, 2020

OLGA SEWE

JUDGE