



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION- MILIMANI**

**COMM CASE NO. 51 OF 2019**

**HOTSTAR INVESTMENTS LTD.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**PETER KURIA.....DEFENDANT/RESPONDENT**

**RULING**

By a notice of preliminary objection dated 8<sup>th</sup> March 2019, the 3<sup>rd</sup> Respondent raised a preliminary based on the grounds that;

- a) **The Applicants failed to obtain leave of court before filing the application dated 6<sup>th</sup> February 2019, which was a derivative suit.**
- b) **The allegations against the Respondent of breaking, entering and theft, are criminal in nature and hence the court lacks jurisdiction.**
- c) **The application is an abuse of court process and it seeks to address issues that have already been determined by the court and is therefore *res judicata* while others are still pending in court hence *sub judice* which create a risk of conflicting orders being issued.**
- d) **The evidence upon which the application dated 6<sup>th</sup> February 2019 is premised with regard to his directorship is time barred.**

**DEFENDANT'S WRITTEN SUBMISSIONS**

In the written submissions relating to the preliminary objection dated 15<sup>th</sup> March 2019, the Defendant sought to rely on only one ground which was that, **the leave of the court must be sought when applying for a derivative suit.** He relied on **Section 238 of the Companies Act** which provides;

***"(1) In this Part, "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.***

***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.***

***(6) For the purposes of this Part—***

***(a) "director" includes a former director";***

He claimed that based on the above provision of the law, it was apparent that one of the determining factors as to whether a claim was a derivative suit was, the nature of the dispute between the applicant and persons towards whom the claim was targeted.

The Defendant also relied on **Sections 239-241 of the Companies Act** that provides for the application for permission to continue a

derivative claim which forms the basis of the preliminary objection herein.

## **PLAINTIFF'S SUBMISSION**

In response, to the claim of failure to obtain leave of the court before filing the derivative suit, the Plaintiff's relied on the case of **Amin Akberali Manji & 2 Others vs Altaf Abdulrasul Dadani & Another [2015]eKLR** where the court held that;

*“Leave of court shall be obtained before filing a derivative suit, but may also be obtained to continue with the suit once filed. On this, the trial court was right in adopting the exposition of the procedure in the treatise “Minority Shareholders: Law, Practice and Procedure” by Joffe that “there is no approved pre-action protocol in relation to derivative action” and that “..after the claim form has been issued, the claimant is required to make an application - which must be supported by written evidence- for permission to continue with the claim.” 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.”*

## **DETERMINATION**

The court has considered the grounds of the preliminary objection raised by the Defendant and has established the main issue as; **whether the Plaintiff's sought leave before they applied for a derivative suit**. The court relies on the locus classicus case of **Mukhisa Biscuit Manufacturers Limited vs West End Distributors Ltd [1969] E.A. 696** which was reiterated in the case **Nitin Properties Limited –vs- Jagjit Singh Kalsi & Another** authority no. 5 in the Claimant's List of Authorities where the court held that;

*“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.”*

The defendant applicant raised in the Preliminary Objection 2 questions of law. The rests are facts which are the subject of the substantive hearing which this Court has not reached that stage yet. The 1<sup>st</sup> issue of law is that the Plaintiff's claim is a derivative suit and ought to have obtained leave from Court to file the instant mater.

The court gleans from the record that the application filed is by a member of the Company. The substance of the dispute is of books of account of the Company, documents of the Company and chattels of the Company that were carted away. It is alleged that the Defendant removed these items from the main office of the Company in Starehe House.

From the substance of the claim the suit and application filed are for the benefit of the Company. Hence, it is a derivative suit as defined in **Section 239 of the Companies Act 2015** which also mandates that leave of Court is sought.

A derivative suit is defined as proceedings lodged by a member (s) of the Company in respect of a cause of action vested in the Company or seeking relief on behalf of the Company or in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under the **Companies Act**.

From the definition and pleaded facts of Plaintiff's application, this Court is satisfied that there is a proper derivative suit in Court for hearing and determination. The leave sought is hereby granted and the suit is deemed to be properly filed and before Court.

The 2<sup>nd</sup> question raised was/is that this Court lacks jurisdiction to hear and determine the matter as the substantive matter discloses criminal acts/conduct which this Court lacks jurisdiction. Secondly, the matter in issue is *res judicata* and *subjudice*.

On whether the substantive issue discloses criminal conduct can only be determined after hearing of the matter. This court lacks jurisdiction to hear Criminal matters.

*Res judicata* is provided for under **Section 7 of the Civil Procedure Act** provides;

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

In **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** the court held:

*“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;*

- a) The suit or issue was directly and substantially in issue in the former suit.*
- b) That former suit was between the same parties or parties under whom they or any of them claim.*
- c) Those parties were litigating under the same title.*

d) *The issue was heard and finally determined in the former suit.*

e) *The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

Section 6 of the Civil Procedure Act provides as hereunder:

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

In Republic v Registrar of Societies - Kenya & 2 others Ex-Parte Moses Kirima & 2 others [2017] eKLR the court held that:

*“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”*

The defendant’s claim that the substantive claim filed by Plaintiffs, this Court is barred from hearing and determining the same as the subject was/has been determined by another Court with competent jurisdiction is not borne out by any proof availed to Court. There is no Court order, decree, judgment or ruling on the issue of removal of HotStar Company’s removal of its documents from its office. The part of the Preliminary Objection fails.

#### **DISPOSITION**

- 1) The court hereby partly upholds the preliminary objection on the question of Plaintiff seeking leave to file derivative suit.
- 2) The Court is satisfied there is a valid claim by and on behalf of the Company and leave is granted and the suit and application are now properly filed with leave of Court.
- 3) The Preliminary Objection part of *res judicata* and *sub judice* fail on lack of proof.
- 4) The Defendant to file Defence and Replying Affidavit to the Plaint and application.
- 5) The matter e processed in the normal manner for hearing and determination in the Registry.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16<sup>TH</sup> APRIL 2019

M.W.MUIGAI

JUDGE

**IN THE PRESENCE OF:**

MWAURA KELVIN KARUGA ADVOCATES FORTHE PLAINTIFF

PETER KURIA THE DEFENDANT IN PERSON

MS JASMINE COURT ASSISTANT