



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 162 OF 2018**

**HARON MICHAEL MWAURA.....PETITIONER/APPLICANT**

**VERSUS**

**MARGARET KARIMI MBAKA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SOKO BARGAIN STORES LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**NAIVASHA PEPPERCORN**

**HOLIDAY RESORT LTD.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. I have considered the subject application herein dated 26<sup>th</sup> April 2018, the grounds and the affidavit in support thereof and the annexures thereto. I have also read and considered the elaborate affidavit in reply, and the further affidavits by the parties. The submissions filed are also considered and the following issues arise there from;

- (a) Whether the Plaintiff has properly instituted this suit as a derivative action;*
- (b) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been wrongfully sued and/or joined in this matter as parties;*
- (c) Whether the subject motor vehicle Registration No. KCH 441M is also a subject of the Divorce Cause No. 290 of 2018;*
- (d) Whether, it is in the interest of justice to grant the orders sought.*

2. It suffices to note that, as this application while the application was still pending, the Court's knowledge has been drawn to another matter being Misc. Application No. 548 of 2018; where the Applicant herein, sought for under prayer (3) that, "the Hon Court do issue orders compelling the Respondent to return the Company's motor vehicle Registration No. KCH 441M that is used in pertinent Company operations hereto vide a notice of motion dated 12<sup>th</sup> June 2018."

3. It is therefore clear that, so far, the subject motor vehicle herein is a subject of litigation in three matters, that is Misc. Application 548 of 2018, this matter, and the Divorce Cause No. 290 of 2018.

4. Be that as it were, it is clear from the documents annexed to the Replying affidavit that, the Plaintiff and the 1<sup>st</sup> Respondent are involved in a Divorce Cause and as per the pleadings therein, they are not able to continue running the company as co-directors together. This is bound to continue so long as they are involved in the disputes in court. Therefore, interim orders in such a matter will serve no useful purpose. A court order cannot force directors to hold board meetings and run the company's day to day affairs smoothly. Indeed, that is why one of the grounds for winding up of a company is "just and equitable." This is usually where the directors cannot "see to eye" and conduct company business.

5. It will be in the interest of justice to deal with the main suit; and give interim protective measures. The solution eventually will be either the company is operational or it be wound up. I also note that, the Plaintiff/Applicant, states that, the suit is a "derivative action". The Respondent has extensively attacked the same on the ground that, the Applicant has not complied with the provisions of Section 239 of the

Company's Act 2015, and sought for leave to commence the suit as such. The Applicant did not respond to this argument. In that regard, unless the court has a competent suit before it, the application cannot stand. In the same vein, the court cannot strike out as sought for in the submissions. A formal application will be necessary.

6. In conclusion, I order the Plaintiff/Applicant to prosecute the main suit and/or the Respondents move the court accordingly and procedurally if they deem the suit to be incompetent.

7. In the circumstances, no orders are given on the subject application. Even then, the Respondent deposed that, she is not interfering with the affairs of the company or disposing off its assets. If that is so, there is no cause for alarm. There is no prejudice.

8. It is so ordered.

**Dated, delivered and signed in an open Court this 27<sup>th</sup> day of November 2018.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

No appearance for the Applicant

Ms. Mbanya for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents

Dennis -----Court Assistant