



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 560 OF 2016

FEMINA DAWOODIA.....APPLICANT

VERSUS

MUTHAIGA TRAVEL LIMITED.....1ST RESPONDENT

KLARISSA WILLS.....2ND RESPONDENT

JOY WANJIKU VOGT.....3RD RESPONDENT

MIRA HEMAL BID SHAH.....4TH RESPONDENT

RULING

1. The Applicant, **FEMINA DAWOODIA**, has sought leave of the court, to enable her commence a Derivative Action in the name of the 1st Respondent, **MUTHAIGA TRAVEL LIMITED**.
2. The Applicant states that she is a minority shareholder in the company, Muthaiga Travel Limited. It is her contention that the company and the 2nd Respondent, **KLARISSA WILLS**, had violated the Company's Articles of Association.
3. The alleged violation was said to have taken place when the 1st Respondent, who had been the Majority Shareholder, sold her 40,000 shares to the 2nd and 3rd Respondents, namely **JOY WANJIKU VOGT and MIRA HEMAL BID SHAH**, respectively.
4. It was the Applicant's case that the sale of those shares constituted the violation of Articles 4, 5 and 6 of the Company's Articles of Association, which had conferred preferential rights upon the Applicant.
5. The applicant intends to demonstrate that Joy Vogt and Mira Shah had acquired shares in the company, in illegal and irregular manner. Therefore, the Applicant hopes to challenge the decisions taken by the Company's Board of Directors, in which Joy and Mira participated.
6. According to the Applicant, she needs the leave of the court to bring the action against the current Directors, for the unlawful and unprocedural allocation of shares to Joy and Mira.
7. At all material times, the Company had issued a total of 100,000 shares. The Applicant held 5,000 shares, whilst Klarissa held 95,000 shares.

8. Out of the 95,000 shares, Klarissa sold 20,000 shares to Joy and another 20,000 shares to Mira. Consequently, Klarissa now held 55,000 shares.
9. It is common ground that Femina was, at one time, a Director of the Company. However, she ceased to be a Director on 24th April 2013.
10. In this case, Femina does not lay any claim to being a Director in the Company, Muthaiga Travel Limited. Her claim has been brought by her, in the capacity of a Minority Shareholder.
11. Femina's complaint was that the Directors had decided to pass resolutions which were detrimental to the company. In particular, the Directors had passed a resolution to award Bonuses to themselves.
12. According to Femina, the pay-out of such Bonuses would take from the Company, the sum of Kshs. 66 Million. Her concern was that the removal of such vast amounts of money from the company, would be detrimental to the shareholders.
13. It was for that reason and also because her pre-emptive rights were violated that Femina sought leave to bring the Derivative suit.
14. In answer to the application, the Respondents submitted that a party can only come to court if he had a cause of action. And the Respondents understanding is that a cause of action only accrued against a person who is alleged to have violated the right of the claimant or plaintiff.
15. In this case, the Respondents hold the view that the Applicant's claim is against the company.
16. But the company insists that it is the Applicant who had violated the rights of other shareholders, by setting up a rival company to carry out business which competes with Muthaiga Travel Limited.
17. The said Muthaiga Travel Limited complained that the Applicant's rival company was operating from the premises where Muthaiga Travel Limited used to operate from.
18. As a consequence, the Applicant was accused of deriving benefit from the goodwill which Muthaiga Travel Limited had built up.
19. The Applicant is accused of intending to rundown Muthaiga Travel Limited, until it collapses.
20. In the circumstances, Muthaiga Travel Limited submitted that the Applicant did not have its best interests at heart.
21. She was accused of harbouring the intention to kill the Company, instead of promoting it.
22. But the applicant countered that accusation by pointing out that the respondents had not adduced any evidence to the alleged rival company which she was running.
23. Pursuant to Section 238 (1) of the Companies Act, 2015;
“...‘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”.**
24. In this case, the Applicant has, to my understanding, made claims against the company and the directors of the company.
25. By virtue of Section 238 (4) of the Companies Act, a derivative action may be brought against a

director or another person, or both.

26. In view of the fact that a derivative claim is founded upon a cause of action vested in the company, the person seeking proceedings is deemed to be standing in the stead of the company.

27. A cause of action vested in the company cannot therefore be the basis for lodging a claim against the company itself.

28. In a strict sense, the action of the Board of Directors is deemed to the actions of the company. But the provisions of section 238 (4) of the Companies Act expressly authorises the institution of derivative claims against directors.

29. To the extent that the claim was against a director, it may be sustainable, provided that the applicant was bringing the claim for the benefit of the company.

30. The applicant pointed out that the claim she wishes to bring was pegged on the violation of the pre-emptive rights.

31. Who is alleged to have violated those pre-emptive rights?

32. The allegation is directed against Klarissa Wills, who was the sole Director at the material time. When she convened the meeting at which decisions were made, the said meeting was, effectively, the Board Meeting.

33. When the Board of Directors meets and passes resolutions, the company is said to have made resolutions. Therefore, when a person challenges the resolutions of a Board of Directors, that is tantamount to challenging the resolution of the company.

34. A cause of action cannot have vested in the company, to enable it challenge itself.

35. I hold the considered view that the claims by the applicant are intended for her own benefit as a shareholder. The said claims were not intended to be of benefit to the company.

36. The claims are capable of pursuit by the applicant in his own right, rather than on behalf of the company.

37. Therefore, I find that there is no justifiable reason in law or in fact, for granting leave to the Applicant to commence a Derivative suit against the respondents. Accordingly, the request for leave to commence a derivative suit is rejected.

38. However, the costs of the application dated 8th December 2016 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Applicant

Miss Akelo for Oyatsi for 1st to 4th Respondents

Collins Odhiambo – Court clerk.