



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT & LAND CASE NO. 122 OF 2013**

**RICHARD OTEINO**  
**MUGA.....PLAINITFF**

**VERSUS**

**GRACE WANGARI MUTHIRANIA.....1ST**  
**DEFENDANT**

**NELLIE KAGENDO MATE.....2ND**  
**DEFENDANT**

**SAMUEL OGINGA OKETCH.....3RD**  
**DEFENDANT**

**DANIEL MZIGO OMOTTO.....4TH**  
**DEFENDANT**

**THE ATTORNEY GENERAL.....5TH**  
**DEFENDANT**

**KASEDOMA ENTERPRISES LIMITED.....6TH**  
**DEFENDANT**

**RULING**

1. The plaintiff – **RICHARD OTIENO MUGA** – filed a Notice of Motion here on 31/5/2013 seeking various orders, one of which is to be granted leave to proceed with his suit by way of derivative action.
2. Both the plaintiffs suit and application are against 6 defendants - **GRACE WANGARI MUTHIRANIA** (1st defendant), **NELLIE KAGENDO MATE** (2nd defendant),  
**SAMUEL OGINGA OKETCH** (3rd defendant), **DANIEL MZIGO OMOTTO** (4th defendant), **THE ATTORNEY GENERAL** (5th defendant) and **KASEDOMA ENTERPRISES LIMITED** (6th defendant).
3. At this stage, the ruling concerns only the aspect of derivative action and it is well to give the background and highlight the circumstances giving rise to the application.
4. It is clear that the plaintiff and 4 others, who included the 1st and 2nd defendants formed a company - **KASEDOMA ENTERPRISES LIMITED** (6th defendant) – in which they held their

positions as subscribers in equal shares. From the records, it is clear that apart from the plaintiff and 1st & 2nd defendants, the two other persons who are not parties to the suit are **JOSEPH OMANYO** and **DORIS**

### **TABITHA ATIENO OJOO.**

5. After incorporation, the 6th defendant bought land parcel **No.18944 Kisumu**. But the 1st and 2nd defendants are said to have secretly and unlawfully sold this land parcel to 3rd and 4th defendants. The plaintiff is contesting this sale and wants to proceed by way of derivative claim. It appears clear that he is doing it for and on behalf of the company.
6. As things stand, the 1st and 2nd defendants, who are the critical players in the sale transaction, have not responded either to the filed suit or the application. That leaves the plaintiff, and the buyers – 3rd & 4th defendants – tussling it out in COURT.
7. The 3rd & 4th defendants filed a replying affidavit on 23/7/2013. According to them, the Land was sold to them by one **GEORGE ADADA NYAGOWA T/A MICHIGEN INVESTMENTS**. It would appear that it is **MICHIGEN INVESTMENTS** that had

bought the land from 1st and 2nd defendants. It in turn sold it to 3rd & 4th defendants.

8. But something needs to be brought out clearly. The formal and official transfer to 3rd and 4th defendants was done by 6th defendant. It appears clear that when 6th defendant sold the land to Michigan Investments, the formal transfer did not take place. The land continued being in the name of 6th defendant and when Michigan Investments sold it to 3rd & 4th defendants, the 6th defendant effected transfer to the new owners.
9. The court heard the application on 31/3/2014. The Applicant generally gave some background and highlighted the application. In addition, the decided case of

**DADANI VS MANJI & 3 others (2004) 1 KLR 95** was availed for guidance. It was not much different for 3rd & 4th defendants. The replying affidavit dated 23/7/2013 and grounds of opposition filed on 11/2/2014 were adopted. Further, it was averred that the 6th defendant was not served and that the wrong doing of the shareholders was not demonstrated. According to counsel for 3rd and 4th respondents, the 6th defendant articles of association required only two members to transact.

10. Also pointed out by counsel for 3rd & 4th defendants is that any differences or disagreements arising were supposed to be handled through arbitration, not through courts. What happened, it was argued, can be handled through internal mechanisms of the 6th defendant. The decided case of **SHIAWATSE LIMITED & another VS PIENESI GINO: HCC No 183/2011, MALINDI {2012} eKLR**, was availed for guidance.
11. In addition to the authorities already mentioned, both sides availed other material. The plaintiff availed an excerpt of Blacks Law Dictionary, specifically Page 763. I really do not know what the plaintiff intended by availing this as there is no information to be gleaned there concerning derivative action. In fact what the plaintiff has highlighted in Yellow ink is the word “illegal” and there was no contention at all about the meaning of that word.
12. The 3rd & 4th defendants counsel availed other decided cases on derivative action in addition to Shiwase case (Supra). The cases were **PETER M. NYAMBANE & 2 others VS JOSIAH ORINA NYABICHA & 5 others: ELC No.75/2012, Kisii**, **DAVID LANGAT VS ST LUKES ORTHO PACDIC & Truama Hospital LIMITED & 2 others: HCC No.468/2012, NAIROBI**, **THOMAS V ABEY VS AISHA MOHAMED RAHMATHULLA & 3 others: HCC No.311/09, Nairobi**, and finally, **DR. JANE**

**WAMBUI WERU VS Overseas Private Inv. Corp & 3 others: HCC No.83/2012, NAIROBI**. All these cases dealt with the issue of derivative action, with the cases being dismissed or struck out

because of non-compliance with Procedural requirements and/or because the situation did not warrant the filing of such claim.

13.I have considered the application, the responses made to it, the arguments advanced during hearing, and the written material availed by both sides in support of their respective positions.

14.I will start by stating the law. Ordinarily, no court will interfere with the internal management of companies and infact there is no jurisdiction to do so. In order to

redress any wrong done to the company the action or suit for such redress should be brought by the company itself (**see Stein VS Blake and others {1998} 1 ALL**

**E R 724**).

15.But it sometimes happens that the wrongs done to the company are perpetrated by majority shareholders, or persons with dominating influence in the company's affairs. These are the people who would ordinarily bring action for and on behalf of the company but would not do so because they are the perpetrators of the wrong and/or are conniving with perpetrators.

16. In a scenario like that, any of the minority shareholders can institute a suit against the wrongdoers in his own name for and on behalf of the company. The suit is not meant to be for the personal benefits of the one instituting it. It is solely for the benefit of the company and the outcome of the suit is supposed to benefit all theshareholders including the wrongdoers. The suit so instituted is what is called

**DERIVATIVE CLAIM. (See Dadani case supra).**

17.The procedure is simple. The suit is filed and is followed by an application seeking leave of court to proceed by way of derivative action. The suit and the application are then served on the defendants. The court then proceeds to hear the application to decide whether leave should be granted. Thereafter, the plaintiff is supposed to file yet another application seeking orders for indemnity as to costs from the company. The court entertains such application Ex PARTE.

18.The company (6th defendant) in this case seems to have 5 shareholders. The property was allegedly sold by two of them (1st & 2nd defendants). From the plaintiffs statement in the court file, he was the chairman while the two other shareholders who are not parties to this suit were treasurer and secretary. It is clear from the plaintiffs statement too that the five were the only shareholders of the company.

19. A question arises: Did 1st & 2nd defendants constitute majority shareholding in the company? The obvious answer is no. Another question: Did the 1st and 2nd defendant have the requisite dominating influence to cripple the company from instituting a suit in its own name? Again the answer to this seems to be No. The law is clear. The majority shareholders must be the stumbling block. Their influence must be such that the company cannot make a decision to institute a suit in its own name. So a more company-minding shareholder files the suit.

20.In this case, the plaintiff, the treasurer and the secretary are all shareholders and constitute the majority. This means that they can make a decision that the company can sue. It follows logically then that the company can sue in its own name. The 1st and 2nd defendants cannot successfully stand in the company's way as they are in the minority.

21.Another pertinent point was made by the 3rd and 4th defendants counsel. And the point was that the companies articles of association provides for arbitration as the preffered mode of resolving disputes and disagreements. Again it is important to remember the law. And the law here is that all things being equal, courts of law are unwilling to interfere with the internal affairs of a company and infact have no jurisdiction to do so. The courts prefer that a company would use its own internal mechanisms to settle its problems.

22. It is not demonstrated by the plaintiff that such mechanisms were resorted to before bringing the suit here. This is another thing that works against the plaintiff. The plaintiff needed to show that he has tried such mechanisms or could not, for good reasons, use the mechanisms.

23. I need to point out here that the plaintiff made a good attempt at complying with the laid down procedure for derivative action.

But the case, given what the court has said so far, is not one for such action. The upshot then is that the application herein is found unmeritorious and is dismissed with costs.

**HON. A.K. KANIARU**

**ENVIRONMENT & LAND – JUDGE**

**20/8/2015**