



REPUBLIC OF KENYA



**Yator v Komen & 8 others (Environment & Land Case E023 of 2022)  
[2022] KEELC 12630 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12630 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E023 OF 2022  
SM KIBUNJA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**PIUS YATOR ..... PLAINTIFF**

**AND**

**SUSAN KOMEN ..... 1<sup>ST</sup> DEFENDANT**

**ALEX KANGOGO KIPROTICH ..... 2<sup>ND</sup> DEFENDANT**

**BARNABA KIPRONO KIBOS ..... 3<sup>RD</sup> DEFENDANT**

**JAMES MALAKWEN CHEMJOR ..... 4<sup>TH</sup> DEFENDANT**

**WILLIAM VARTOO KANDIE ..... 5<sup>TH</sup> DEFENDANT**

**FRANCIS KIPLIMO KIPSAT ..... 6<sup>TH</sup> DEFENDANT**

**WILLIAM KIPLAGAT KIPTUM ..... 7<sup>TH</sup> DEFENDANT**

**ABRAHAM KIMOSOP ..... 8<sup>TH</sup> DEFENDANT**

**ALGEIYO BORDER FARMERS LTD ..... 9<sup>TH</sup> DEFENDANT**

**RULING**

1. The defendants herein moved the court vide the notice of preliminary objection dated the April 19, 2022 seeking for the dismissal of the plaintiff's case on the following five (5) grounds;
  - a) "The application and entire suit offend the provisions of section 238 and 239 of the *Companies Act*, 2015.
  - b) There is no suit properly filed before court for determination.



- c) The plaintiff lacks the *locus standi* to commence and pursue the suit and the entire plaintiff's pleadings are fatally defective.
  - d) This court is precluded from exercising its inherent powers conferred by sections 1A, and 3A of the [Civil Procedure Act](#) and it cannot override the mandatory terms stipulated in the [Companies Act](#).
  - e) The suit is bad in law and an abuse of the court process and ought to be struck out in the first instance with costs".
2. Through the directions issued on the April 21, 2022 the parties were directed to file their written submissions to canvass the preliminary objection. The learned counsel for the defendants and plaintiff filed their submissions dated the April 26, 2022 and May 31, 2022 respectively, summarized as follows:
- a) The defendants narrowed down their preliminary objection into two limbs of arguments along which they submitted on. That is first, whether the plaintiff has *locus standi* to institute and maintain the suit, and secondly, whether the preliminary objection raised is sustainable. While admitting that the plaintiff is a member/director of Elgeyo Boarder Investment Limited, the defendants submitted that he lacked the locus to institute and maintain this suit, in view of sections 238 and 239, as read together with sections 144 and 241 of the [Companies Act](#). It was their case therefore that the Act governing the business affairs of corporate entities is one that imposes a requirement of a party to seek leave for him/her to commence legal proceedings on behalf of the company. To the extent that the same had not been sought by the plaintiff, then he lacked locus to institute the suit herein. The defendants further submitted that the plaintiff, as a member of the said company, has not taken any internal remedial measures to address his problems, and in any case the pleadings reflect a person in pursuit of his own self-interest and not those of the company, hence this suit should be struck out as this court cannot come to the plaintiff's aid under its inherent jurisdictional powers conferred by the [Civil Procedure Act](#). The defendants further cited the decision in the case of [Ghelani Metal Ltd & 3 Others vs Elesh Ghelani Natwarlal & Another](#) [2017] eKLR, and submitted that the absence of leave, or application for leave to continue the suit as a derivative suit, was fatal to the suit and it should be dismissed. On whether the preliminary objection is sustainable, the defendants cited the cases of [Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd](#) (1969) EA 696 and [Quick Enterprise Ltd vs Kenya Railways Corporation](#), Kisumu HCC No 22 of 1999, and submitted that the preliminary objection raised herein is purely on points of law which is meritorious under the circumstances, and therefore the plaintiff suit should accordingly be dismissed and struck out with costs in its entirety.
  - b) The plaintiff submitted that the issue of whether or not this suit is a derivative action does not arise in this matter, as the plaintiff is neither a minority shareholder nor is he merely a member of the company. That in any case, evidence would need to be called to ascertain the above, which would mean the preliminary objection fails in view of the threshold set in the case of [Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd](#) (1969) EA 696. That the suit does not fall within the purview of a derivative action as per sections 238 and 239 of the [Companies Act](#) 2015, and that the amendment to the plaint seeking leave to proceed with the claim as a derivative was solely with a view of putting all materials facts before this court. He cited the case of [Eversweet Bakery Limited vs National Land Commission and 11 Others](#), ELC Petition No 4 of 2019, [Edwards and another vs Halliwell and Others](#) (1956) and [Foss vs Harbottle](#) (1843) (2 hare 461).
4. The following are the issues for the court's determinations:



- a) Whether the plaintiff has the locus to file and prosecute this suit.
  - b) Whether the preliminary objection raises a pure point of law capable of determining this suit.
  - c) Who pays the costs.
5. I have considered the grounds on the notice of preliminary objection, submissions by the counsel for both parties, superior courts decisions cited, the pleadings by both sides and come to the following determinations:

- a) That in determining whether the matters raised in the notice of preliminary objection constitute a preliminary objection, the court is guided by the decision in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Limited* (1969) E A 696 where it was 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 facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.”

The court further stated that;

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.”

That it is not disputed that the sum total in all the five grounds raised in the preliminary objection revolves around the question of the plaintiff's capacity to file and sustain this suit. It is also not contested that the issues raised for determination through the parties' pleadings have everything to do with Elgeyo Border Investment Limited, which is indisputably a limited company with a legal capacity to sue or be sued. The preliminary objection raised by the defendants is therefore without a doubt grounded on points of law, precisely the provisions of sections 238 and 239 of the *Companies Act* 2015, and if it is upheld, can dispose off the suit in its entirety for want of locus.

- b) Before determining whether the preliminary objection raised has merit, it is important to address the defendants apparent contention that this is not the rightful court to issue the relief sought herein as contemplated by section 3 of *Companies Act* of 2015. It was their contention in their submissions that the provisions of the section 3 of the *Companies Act* defined the court as the High Court, thereby excluding this court, and in their view the court lacked jurisdiction to consider the issues herein. To determine this issue, the starting point is obviously article 162 (2)(b) of the *Constitution* which provides that;

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to--

- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.”



In the case of *Republic vs Karisa Chengo & 2 others* Petition No 5 of 2015 where the Supreme Court was categorical that a judge appointed to the specialized courts or courts of equal status;

“undertakes to perform stewardship of the particular office in respect of which he or she takes the oath, and not of a different office.”

The Supreme Court went on to state that:

“...although the High Court and the specialized courts are of the same status, as stated, they are different courts. It also follows that the judges appointed to those courts exercise varying jurisdictions, depending upon the particular courts to which they were appointed. From a reading of the statutes regulating the specialized courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes.”

That the foregoing constitutional provision and the Supreme Court of Kenya edict on the issue leaves no doubt that the issues in this suit that touch on disputes in relation to land, squarely falls under the jurisdiction of this court, and any relief affordable to the court can if merited, be issued. Therefore, the defendants preposition that this court is precluded from the derivative action relief is unmerited and therefore fails.

- c) On whether the suit is a derivative action or not, it is trite law that a company has a legal personality separate from that of its owners through the seminal case of *Salmon vs Salmon & Co Limited* (1897) A C, where Lord Macnaghten at page 51 had this to say;

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act”.

“...When the memorandum is duly signed and registered though there be only seven shares taken, the subscribers are a body corporate “capable forthwith” to use the words of the enactments, “of assuming all the functions of an incorporated company”.

In the matter before the court, it is not in dispute that the plaintiff has brought this action on behalf of Elgeyo Boarder Investment Limited, to which he is a member of. The question that therefore arises is why is the said company, which is duly incorporated in Kenya and enjoys the character of a separate legal personality, not the plaintiff in this case, which the plaintiff has submitted that it is not a derivative action? I find no probable explanation to this question, and I am of the considered view that the suit herein is a derivative suit, contrary to the averments made by the plaintiff in his submissions.

- d) In the case of *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another* [2017] Eklr, the court held that;

“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 a 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: see *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849. 38. Until 2015, in Kenya, the common law guided derivative actions in Kenya. With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in *Foss v Harbottle* was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance”.

A scrutiny of the statutory legal framework governing company affairs provide guidance with which a derivative claim may be brought under sections 238 to 241 of the [Companies Act](#). Section 238 (1) to (3) of the said Act provide as follows: -

- “ 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.
- (2) A derivative claim may be brought only—
  - (a) under this Part; or
  - (b) in accordance with an order of the court in proceedings for protection of members against unfair prejudice brought under this Act.
- (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”.

The courts have set out the considerations to be observed before a derivative action is entertained by the Courts of law. In the case of *Isaiab Waweru Njumi & 2 Others v Muturi Ndungu* [2016] eKLR, the considerations were enumerated as follows;

- “ (a) Whether the plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors’ challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;
- (b) Whether the plaintiff has made any effort to bring about the action the plaintiff desires from the directors or from the shareholders. Our courts have developed this into a demand or futility requirement where a plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;



- (c) Whether the plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of *Recchion v Kirby* 637 F Supp 1309 (W D Pa 1986), for example, the court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;
- (d) Whether the plaintiff is acting in good faith;
- (e) Whether the action taken by the plaintiff is consistent with one of a faithful director acting in adherence to the duty to promote the success of the company would take;
- (f) The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company – is likely to be authorized or ratified by the company in the future; and
- (g) Whether the cause of action contemplated is one that the plaintiff could bring directly as opposed to a derivative action”.

In the case of *Sultan Hasham Lalji and 2 Others vs Ahmed Hasham Lalji and 4 Others* [2014] eKLR, it was held that;

“It is the minority shareholders that are availed to the protection by the exceptions since generally majority shareholders exercise powers of the Company and control its affairs.”

Going by the forgoing, if a wrongful action has been committed against the company, it should be quite easy for the shareholders/directors to convene a meeting to deliberate and pass a resolution as a remedial measure, as opposed to pursuing legal proceedings by individual directors/shareholders for the benefit of the company.

- e. In the present case, the plaintiff not only disputes that the matter before the court is a derivative suit, but equally failed to respond to whether he was a minority or a majority in the company. That had an application to continue with the suit as a derivative have been filed, the information on whether the plaintiff was in the minority or majority among others, that is vital would have been availed to guide this court on whether to grant leave to continue with the suit. The plaintiff ought to have tendered evidence as to the numbers of shares he holds as against his colleagues.
- f. Even if this suit was to succeed on account of proper application of discretion of this court, the court needed to be moved by way of an application demonstrating the existence of a *prima facie* case and served on the other parties for determination first, before commencement of the suit. The exercise of discretionary powers, as the rule of law requires, must be consistent with a variety of legal requirements and subject to judicial control. A reading of section 240 of the *Companies Act* ought to be a basis upon which the court will have exercised its discretion as it provides;
  - 240. Application to court for permission to continue claim as a derivative claim: how disposed of



- (1) If—
  - (a) a company has brought a claim; and
  - (b) the cause of action on which the claim is based could be pursued as a derivative claim under this part, a member of the company may apply to the Court for permission to continue the claim as a derivative claim on the ground specified in subsection (2).
- (2) The ground is that—
  - (a) the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court;
  - (b) the company has failed to prosecute the claim diligently; and
  - (c) it is appropriate for the member to continue the claim as a derivative claim.
- (3) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the court—
  - (a) shall dismiss the application; and
  - (b) may make any consequential order that it considers appropriate.
- (4) If the application is not dismissed under subsection (3), the court—
  - (a) may give directions as to the evidence to be provided by the company; and
  - (b) may adjourn the proceedings to enable the evidence to be obtained.
- (5) On hearing the application, the court may—
  - (a) give permission to continue the claim as a derivative claim on such terms as it considers appropriate;
  - (b) refuse permission and dismiss the application; or
  - (c) adjourn the proceedings on the application and give such directions as it considers appropriate”.

The legal need to have an application for leave at whatever stage was judicially restated by the Court of Appeal in the case of *Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another* [2015] eKLR where it 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.”



Corollary to the foregoing, it is very important that there be a proper application for leave, for the parties to canvass either orally or through submissions, for the benefit of the court to ascertain the evidential burden required by statute to allow a derivative claim to proceed. In the absence of such an application on record by the plaintiff, I find the preliminary objection meritorious.

- a) That as the defendants are victorious in the preliminary objection, the court finds that in accordance with section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, they are entitled to the costs.

6. In view of the foregoing, the court finds and orders as follows:

- a. That the defendants' preliminary objection vide the notice dated the April 19, 2022 has merit and is hereby upheld.
- b. That the plaintiff's suit commenced through the plaint dated the March 18, 2020 and filed in court on the March 18, 2022 be and is hereby struck out with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 23<sup>rd</sup> DAY OF SEPTEMBER, 2022.

S M KIBUNJA, J

Environment & Land Court - Eldoret

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: .....

DEFENDANTS: ..... Absent

COUNSEL: .....

COURT ASSISTANT: ONIALA

S M KIBUNJA, J

Environment & Land Court - Eldoret

