



**Fwamba (Derivatively on behalf of Trans Nzoia Investment Co) v Wekesa & 6 others; Trans-Nzoia Investment Co Ltd (Affected Party); Wafula (Derivatively on behalf of Trans-Nzoia Investment Co Ltd) (Applicant) (Environment & Land Case 74 of 2019) [2023] KEELC 17984 (KLR) (6 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17984 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 74 OF 2019**

**FO NYAGAKA, J**

**JUNE 6, 2023**

**BETWEEN**

**PETER WEKESA FWAMBA (DERIVATIVELY ON BEHALF OF TRANS NZOIA INVESTMENT CO) ..... PLAINTIFF**

**AND**

**PETER SIMIYU WEKESA ..... 1<sup>ST</sup> DEFENDANT**

**RONALD SAWENJA WALUBENGO ..... 2<sup>ND</sup> DEFENDANT**

**GEORGE IMBERA LUDISI ..... 3<sup>RD</sup> DEFENDANT**

**GEORGE IMBERA LUDISI ..... 4<sup>TH</sup> DEFENDANT**

**MUDEBE INVESTMENT CO LTD ..... 5<sup>TH</sup> DEFENDANT**

**VIPUL RATILAL DODHIA ..... 6<sup>TH</sup> DEFENDANT**

**CHERANGANI INVESTMENT CO LTD ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**TRANS-NZOIA INVESTMENT CO LTD ..... AFFECTED PARTY**

**AND**

**PASCAL WAFULA (DERIVATIVELY ON BEHALF OF TRANS-NZOIA INVESTMENT CO LTD) ..... APPLICANT**



## RULING

1. By a Notice of Motion dated February 17, 2023 and filed the same date, the Applicant herein moved this Court under Section 63(e) of the Civil Procedure Act and Order 24 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and (what he referred to as) all enabling provisions of the law. He sought the following prayers:-
  1. The Applicant be granted leave to substitute the Plaintiff herein as the Plaintiff since the original Plaintiff passed on during the pendency of this suit.
  2. The costs of this application.
2. The Application was based on the grounds that the Plaintiff died on November 29, 2022 and a Certificate of Death in that matter issued to the family on February 06, 2023. The other ground is that the Applicant too is a minority shareholder and desirous to pursue the suit in its logical conclusion, the application is made in the interest of justice and is brought without undue delay.
3. It was supported by the Affidavit of the Applicant which was sworn on February 17, 2023. The Affidavit reiterated the contents of the grounds save that to it was annexed and marked as PW-1 a copy of the Share Certificate of the Applicant as a member of Trans-Nzoia Investment Company Limited and PW-2 a copy of the Certificate of Death.
4. The Application was opposed by the 6<sup>th</sup> and 7<sup>th</sup> Defendants through an Affidavit sworn by the 6<sup>th</sup> Defendant, one Vipul Dodhia, on March 06, 2023. He deponed that the Application was a misconception, defective, incompetent and an abuse of the process of the court.
5. He deponed that the application was brought under the wrong provisions of law. He stated that the cause of action survives the deceased hence the rightful persons to be substituted are the legal representatives of the estate of the deceased. He deponed that the Applicant was a stranger to the estate of the deceased person for want of letters of administration. His further deposition was that the Applicant had a distinct claim as a shareholder and could not purport to continue with a claim brought by another shareholder.
6. He deponed further that the substitution on the grounds of death was not one of those contemplated under Section 242 of the Companies Act, Act No 17 of 2015.

### Submissions

7. The Application was disposed by written submissions. The Applicant submitted that Section 238 of the Companies Act which provides for derivative suits applied. He argued that even if the cause of action survived the death of the Plaintiff his personal representative could not step into his shoes in the claim except the shares of the deceased had been transferred upon confirmation of grant, and the succession process had not began at all. He deponed further that an executor or personal representative lacked standing to continue the derivative suit but the applicant sought permission to continue.
8. On whether the Application was anchored on wrong provisions of law and that the Applicant ought to file fresh suit, he stated that the provisions under which the Application was brought were not exhaustive. He resorted to the phrase “all enabling provisions of the law.” He relied on Section 242 of the Companies Act.



9. He argued that the 6<sup>th</sup> and 7<sup>th</sup> Defendants' application was 'clever' and intended to make the Plaintiff's claim fail on a technicality. He then submitted that in a derivative suit the right to continue with the claim vests not in the executor or personal representative of a deceased Plaintiff but in the surviving minority shareholders of the company being the persons interested in the case. He submitted that any of the minority shareholders had the right to apply to be substituted to continue with the claim.
10. He relied on the case of *Gbelani Metals Limited & 3 others v Elesb Gbelani Natwarlal & another* [2017] eKLR where the Court defined a derivative action and its procedure, and emphasized that the right to continue such as action was, by the enactment of the *Companies Act* of 2015, vested on judicial discretion. He argued that a strict application of Order 24 Rule 3 of the *Civil Procedure Rules* did not lie in the death of a Plaintiff who was a minority shareholder who brought the suit on behalf of others minority shareholders.
11. The 6<sup>th</sup> and 7<sup>th</sup> Respondents submitted by setting out a number of issues for determination. One was whether the application was tenable in law. On it they submitted that since the cause of action herein survived the death of the Plaintiff the rightful persons to be substituted were the legal representatives of him. They relied on Order 24 Rule 3 of the Civil Procedure Rules. Their submission was that the shares of a deceased person in a company that form part of the estate of the person and therefore any right that accrues on the shares can only be enforced by a legal representative of the deceased's estate. They submitted that the Applicant was a stranger to the estate of the deceased Plaintiff hence without letters of administration to his estate the application could not stand.
12. Again, they submitted that the applicant could not continue with a claim brought by a different shareholder, upon the demise of that shareholder. They stated that Section 242 of the *Companies Act*, which they reproduced, did not list death as one of the grounds of substitution. They summed it that the manner in which the proceedings by the applicant had been commenced or continued by the Claimant was an abuse of the process of the Court. They submitted that the claimant failed to prosecute the claim diligently and that "it is appropriate for the applicant to continue the claim as a derivative claim."
13. They stated that the procedure adopted by the applicant was alien in law. Further, they submitted that the applicant herein being also a minority shareholder could only enforce his right in a separate derivative claim under Part XI of the *Companies Act*, No 17 of 2015.

### **Issues, Analysis and Determination**

14. Having considered the Application, the supporting Affidavit, the Replying Affidavit, the law (both statutory and case law), the submissions of the Applicant and the 6<sup>th</sup> and 7<sup>th</sup> Respondent, I am of the view that the only issues for determination before me are whether a minority shareholder can continue with a derivative claim instituted by another upon the death of the shareholder who instituted the claim, whether the application is merited, and who to bear costs.
15. Beginning with the first issue, it is not disputed by both the Applicant and the Respondent that the instant suit is a derivative suit. It is also not in issue that the shareholder who instituted the suit has since died, having died on November 29, 2022. Lastly, it is undisputed that the suit survives the death of the minority shareholder. That being the case, the question left to this court is whether the applicant who too is a minority shareholder can so to say seize the unfortunate moment created by nature and continue with the suit.



16. Order 24 Rule 3(1) of the Civil Procedure Rules provides that:

“Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.”

17. The provision is clear that where there is one Plaintiff (using only the relevant part for the arguments in the instant application) who dies and the cause of action survives, an application may be made in that behalf to substitute the legal representative of the deceased Plaintiff who shall then proceed with the suit. In terms of Order 24 Rule 3(2) such an application should be made within one year, otherwise the suit will abate.

18. The bone of contention in this application is that the instant suit being a derivative claim is an exception to the Application of the Rule. That the substitution of the deceased with his personal representative or executor but any other minority shareholder.

19. The procedure of continuing derivative suits is now provided for by law in Kenya. The starting point is the legal understanding of what a derivative claim is. Section 238 (1) of the *Companies Act*, Act No 17 of 2015 defines it to mean proceedings by a member of a company in respect of a cause of action vested in the company, and seeking relief on behalf of the company (emphasis added by underlined italics). The law here is clear that the beneficiary of the proceedings commenced by derivative claims is the company and for that reason they are of the company and not the member(s) who bring(s) the action. Thus, in *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga v Eliud Timothy Mwamunga & Sagalla Ranchers Limited* [2017] eKLR, the learned judge held that:

“For a party to succeed in an action for derivation action, he or she must demonstrate the following:-... c. The proceedings must be seeking relief on behalf of the company; d. The proceedings must be for protection of members against unfair prejudice brought under the *Companies Act*...”

20. As to who these members are is not difficult to decipher: they are the minority, and for good reasons, simply put that their voice may never carry the day in the day today decisions of the company if left without this important tool. As was held in *Sultan Hasham Lalji & 2 Others vs Ahmed Hasham Lalji & 4 Others* [2014] eKLR, “It is the minority not the majority shareholders that are availed the protection by the exceptions since generally majority shareholders exercise powers of the company and control its affairs.”

21. While it is not important to dwell on explaining against whom the action may be commenced, I must state that once a member is given leave to either commence or proceed with a derivative suit it may be taken over from him/her by another member or members. Suffice it to say that a derivative suit is a device placed in the hands of shareholders to check against the actions and excesses of the company or improper corporate governance. In *Michelina Forino & another v Alfonso Forin & 4 others* [2020] eKLR, Nyakundi J defined such as claim as follows:-

“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...”

22. In *Prudential Assurance Co Ltd v Newman Industries Ltd and others* (No 2) [1982] Ch 204 at 210, the learned judges defined a derivative claim as follows:

“A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested.”

23. In *Christensen v Scott* [1996] 1 N.Z.L.R. 273, Thomas J said

“It may be accepted that the Court of Appeal was correct, however, in concluding that a member has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. Such claims can only be brought by the company itself or by a member in a derivative action under an exception to the rule in *Foss v. Harbottle* (1843) 2 Hare 461. But this is not necessarily to exclude a claim brought by a party, who may also be a member, to whom a separate duty is owed and who suffers a personal loss as a result of a breach of that duty.”

24. In the House of Lords case of *Johnson v Gore Wood & Co.* [2000] UKHL 65; [2001] 1 All ER 481; [2001] 2 WLR 72 (14th December, 2000), Lord Millett held as follows:-

“A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf.”

25. What is clear to me from the decisions above is that a derivative claim in company law is a company's own cleansing tool by which it examines itself using its own mirror to see that all is well as it subjects itself to an external confirmer - the court - for approval. While the majority shareholders struggle to hold the mirror into focal position the minority shareholders assist in fixing it into precision through the derivative claim device.

26. Then what if the minority shareholder who has been the sole holder of the mirror dies? Should the others be barred from taking over his position? Certainly not! The nerve centre of the point is that the sole minority shareholder did not hold the mirror for and on behalf of himself but that of the corporate minority. Deriving the reasoning from that of Lord Judge Millett (above) the company is a separate legal entity from the shareholders and its property is its own. This is not any different concept from the holding in the seminal case of *Salomon*. Thus, the minority shareholder does not, in the derivative claim, come to court in his own capacity. The proper Plaintiff in the circumstances is not the natural person bringing the suit but the company itself. If then he dies, the company's derivative suit continues and can be taken over by another member of the company. That would not require that he (the person proposing to take over the claim) be the legal representative of the estate of the deceased Plaintiff. The deceased was not acting in his interest so as to vest that interest in his estate.



27. In its deeper research on the subject, this Court came across a provision on derivative suits in the website of the Officer of the Revisor of Statutes titled 2022 Minnesota Statutes (<https://www.revisor.mn.gov/statutes/cite/322C.0903>) 3222C.0903 provides as follows:-

“Proper Plaintiff.

Subdivision 1. Member status required.

Except as otherwise provided in subdivision 2, a derivative action under section 322C.0902 may be maintained only by a person that is a member at the time the action is commenced and remains a member while the action continues.

Subd. 2. Effect of plaintiff death.

If the sole plaintiff in a derivative action dies while the action is pending, the court may permit another member of the limited liability company to be substituted as plaintiff.”

28. As it can be seen from the provision, the State of Minnesota has gone a step ahead to clearly codify the position. I could not agree more to such a position being the proper one in circumstances of death, and propose to and advise the Kenyan legislature to make things easier for its citizens also by legislating on such a simple but confusing aspect.

29. In *Gbelani Metals Limited and 3 Others v Elesh Gbelani Natwarlal and Another* ML HCCC No 102 of 2017 [2017] eKLR, Onguto J. in analyzing the shifting ground in Kenya from the previous common law principle applicable stated that the effect of the *Companies Act* was that:

“39. The rule in *Foss v Harbottle* along with its exceptions held sway locally as well: see *Rai & Others v Rai & Others* [2002] 2 EA 537. A party seeking to ‘by-pass’ the company had, in limine, to show that he fell within the exceptions to the rule: see *Murii v Murii & Another* [1999] 1 EA 212.

40. 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.”

30. The provisions of Section 242 of the *Companies Act*, 2015 relate to a situation where a claim that was instituted by a minority shareholder may be taken over or continued with by another minority shareholder. This may occur under the grounds that:

- “(a) the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of the Court;
- (b) the claimant has failed to prosecute the claim diligently; and
- (c) it is appropriate for the applicant to continue the claim as a derivative claim.”

31. Whereas death is not one of the grounds expressly stipulated, my finding is that the ground (c) can be broadly and holistically interpreted to include the case of death of a member or indeed any other incapacity. This is because, a derivative suit is basically not of the individual under whose name the suit is brought but of the company, basically.



32. The sum total of the analysis of the first issue as was before me is that in the instant application before me, and given the discretion this court has vide Section 3A of the *Civil Procedure Act*, I would not find the part of Order 24 Rule 3 with regard to the requirement for substitution of a deceased person with a representative of his/her estate applicable herein. Instead, I find that another minority shareholder, and therefore the applicant herein, could and should be substituted for the Plaintiff who died and continue with the claim in that behalf.
33. On the second issue as to whether the Application is merited or not, I am of the view that since I have found that the Applicant can be properly substituted for the Plaintiff, and given that the deceased died less than a year ago, the claim has not abated. Thus, the application is merited.
34. Regarding the third issue, being who to bear the costs of the Application, Section 27 of the *Civil Procedure Act* provides that while the court has the discretion to award costs, they always follow the event, and the court ought award them to the successful party unless for reasons to be recorded it thinks otherwise. In this instance I find none to make me decide otherwise. Therefore, the Applicant will be paid the costs of the application by the 6<sup>th</sup> and 7<sup>th</sup> Respondents who opposed the application.
35. The Applicant is given leave for fourteen (14) days to amend the Plaint accordingly, and serve it on all parties. This matter will be mentioned on June 20, 2022 to confirm compliance with these directions and give further directions.
36. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 6<sup>TH</sup> DAY OF JUNE, 2023**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

