



REPUBLIC OF KENYA



**Lenjo & 2 others v Lenjo & 2 others (Commercial Case E020 of 2020)
[2025] KEHC 4052 (KLR) (Commercial and Tax) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 4052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E020 OF 2020
F WANGARI, J
FEBRUARY 13, 2025**

BETWEEN

**ALPHONCE MKALA LENJO 1ST PLAINTIFF
PERPETUA KHALID ABDESSALAAM 2ND PLAINTIFF
TAITA RANCHING COMPANY LIMITED 3RD PLAINTIFF**

AND

**EVEREST MATOLO LENJO 1ST DEFENDANT
DOMINY LENJO MUSAMALI 2ND DEFENDANT
ANCHOR SECRETARIES & REGISTRARS 3RD DEFENDANT**

RULING

1. The Applicants herein filed the Notice of Motion dated 02/5/2024 seeking the following orders:
 - a. Spent.
 - b. That the Plaintiffs/Applicants be granted permission/leave to continue the Derivative Claim seeking relief on behalf of Taita Ranching Company Limited in respect of acts and omissions by the Defendants/Respondents involving negligence, breach of duty and breach of trust in their capacities as directors of Taita Ranching Company Limited.
 - c. That pending the hearing and determination of this application a temporary injunction do issue restraining the Defendants/Respondents, their servants, agents and/or employees from selling, alienating, transferring, charging, disposing, removing or in any way manner whatsoever dealing with the assets of the 3rd Plaintiff/Applicant.



- d. That pending the hearing and determination of this suit a temporary injunction do issue restraining the Defendants/Respondents, their servants, agents and/or employees from selling, alienating, transferring, charging, disposing, removing or in any way manner whatsoever dealing with the assets of the 3rd Plaintiff/Applicant.
 - e. That pending the hearing and determination of the derivative claim the Defendants/Respondents be compelled to produce the books of records, shareholders register, banking slips, audited financial accounts, bank statements of the 3rd Plaintiff/Applicant company in their custody from 2018 to date.
 - f. That pending the hearing and determination of this application the Defendants/Respondents be and are hereby restrained from operating and dealing in any manner whatsoever with the following bank accounts of the 3rd Plaintiff/Applicant:
 - i. KCB 11xxxxxx INO Taita Ranching Company Limited
 - ii. ABSA 20xxxxx INO Taita Ranching Company Limited
 - iii. ABSA 05xxxxxx INO Taita Ranching Company Limited
 - g. That Honourable Court be pleased to issue orders restraining the Board from intimidating and threatening the Plaintiffs/Applicants and shareholders of the 3rd Plaintiff/Applicant.
 - h. That pending the hearing and determination of this application a temporary injunction do issue restraining the Defendants/Respondents, their servants, agents and/or employee from utilizing the following cadastral maps, mining licences in any part of the 3rd Plaintiff/Applicant's properties:
 - i. Application No. 4627
 - ii. Application No. 4628
 - iii. Application No. 4629
 - iv. Application No. 4767
 - v. Application No. 5143
 - vi. Application No. 5213
 - vii. Application No. 5143
 - viii. Application No. 5144
 - i. That the costs of this application be provided for.
2. The application is supported by Affidavit of Alphonse Mkala Lenjo, the 1st Plaintiff/Applicant herein sworn on 02/05/2024 and a further affidavit dated 25/06/2024. The 1st and 2nd Defendants/Respondents filed the Replying Affidavit dated 05/06/2024 sworn by the 1st Respondent. The 3rd Defendant/Respondent filed its Replying Affidavit dated 05/06/2024 sworn by Andrew Ouma Onguka.
 3. Directions were taken and the application was to be canvassed by way of written submissions. Both parties complied with the directions.



4. The Applicants deponed that the 3rd Respondent's directors were acting in ways that are detrimental to the shareholders. That in several occasions they have acted in total disregard of good governance practices due to their disregard of the best interests of the company by applying for licences in their personal names for their own personal gain. They have also been operating company business without seeking approval of the shareholders and even acquired facilities against the company assets.
5. Further the directors are said to have refused to call for meetings thus failing to protect the shareholders' interests and instead, they have been publishing false audit reports. There are also accused of withdrawing large quantities of money from the company accounts for their own personal gains, and which amounts they were unable to account for. It is for these reasons they sought leave to sustain the derivative action on behalf of the 3rd Plaintiff/ Applicant.
6. For the Defendants/Respondents, they deponed that the Plaintiffs were only concerned with their brothers, the 1st and 2nd Defendants/Respondents, who were elected among the Board of Directors of the 3rd Plaintiff. They did not sue the entire board, but sued only the two Directors. The Applicants did not ask for any of the documents they claim they had not been supplied with, and there was no proof of publication of false reports, hence the filing of this suit which coincided with their Annual General Meeting (AGM).
7. Elections of Board Members was conducted during the AGM in which the Applicants lost with the 1st and 2nd Respondents being re-elected, together with the majority of the former Board Members. Had the majority of the shareholders been disappointed with their performance, they would not have been re-elected. The whole issue revolved around Bachuma Industrial Park Limited which was allocated 6,000 acres for non-ranching activities which wasn't supported by the 1st and 2nd Respondents.
8. The Respondents further deponed that the 2 companies (Rock Sprinters Limited and LEM Resources Company Limited) that acquired the mining licences were owned by 3rd Applicant, the family of the Applicants and 1st and 2nd Respondents respectively. Since the suit herein involves mining, this court has no jurisdiction to determine the same. Therefore, this application and suit had not been brought in good faith, but intended to settle scores by siblings thus pure abuse of the court process. They prayed to have the application be dismissed with costs.

Issues for determination and analysis

9. This Court has carefully considered the pleadings, the responses and submissions made herein and the only issue for determination is;
 - a. Whether this Court should grant permission to the Applicants to proceed with this suit as a derivative suit.
10. Section 238(1) of the *Companies Act* provides 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.
11. It ought to be noted that derivative suits are meant to protect the legal interests of the company by seeking to redress a wrong done to the company. Therefore, a derivative action is an exception to the rule established under *Foss vs Harbottle* [1843] 2 Hare 462 that a corporation should sue in its own name and in its corporate character or in the name of the person appointed by the law to be its representative.



12. The Courts have thus held that these requirements are not independent of each other. The objective of derivative claims was well explained in *Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwaral & Another*, [2017] eKLR where the Court held as follows:

“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 a corporation”.

13. Further, under Section 239(1) of the Act, a person intending to sue on behalf of the company is required to seek leave of the Court. In the case of *Amin Akberali Manji & 2 Others v Altaf Abdulrasul Dadani*, [2015] eKLR the Court of Appeal held as follows:

“Leave of court shall be obtained before filing a derivative suit, but may be obtained to continue with the suit once filed.... It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such action falls within any of the exceptions to the rule of *Foss vs Harbottle*.”

14. The spirit of judicial approval under the Act is to screen out frivolous claims and the court is only to allow meritorious claims as was held in *Ghelani Metals Limited* (supra). In reaching a determination on leave to proceed with the derivative action, the Court is guided by the considerations stipulated in Section 241(2) of the Act which were well articulated by the Court in the case of *Isaiah Waweru Njumi & 2 Others Muturi Ndungu*, [2016] eKLR. The Court set out the following factors to be considered in such an application:

- a. Whether the Plaintiffs have pleaded particularized facts which plausibly reveal a cause of action against the proposed Defendants;
- b. 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;
- c. Whether the Plaintiffs have 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 Plaintiffs are required to either demonstrate that they made a demand on the board of directors or such a demand is excused;
- d. Whether the Plaintiffs 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. A good example is the American case of *Recchion v Kirby* 637 F Supp 1309 (W D Pa 1986) where 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;
- e. Whether the Plaintiffs are acting in good faith;



- f. Whether the actions taken by the Plaintiffs are consistent with one of faithful shareholders acting in adherence to the duty to promote the success of the company would take;
 - g. 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
 - h. Whether the cause of action contemplated is one that the Plaintiffs could bring as a director as opposed to a derivative action.
15. Going back to the case of Ghelani Metals Limited (supra), the Court held that this is a two-stage enquiry process envisaged by the Act where in the first stage, the court must first satisfy itself that there is a prima facie case on any of the causes of action noted under Section 238(3) of the Act. On the first stage, Applicants only need to establish through evidence, that they have a prima facie case without the need to show that it will succeed. For this see the case of *Mrao Limited vs First American Bank of Kenya Ltd & 2 Others*, [2003] eKLR).
 16. Against this background and on the face of it, the Applicants have particularized their claim of breach against the Respondents in their Plaint and for avoidance of doubt, the breach is said to be as follows:
 - a. That the Defendants are guilty of dereliction of duty to protect the interests of the shareholders, they are guilty of abuse of office by electing to apply for licences in their personal names and beginning to prospect for the said minerals at the company's property/ranch without approval of the shareholders thereby unjustly enriching themselves.
 - b. That the Defendants have shown utter disrespect to the stakeholders by publishing false audit reports which failed to disclose the debenture aforementioned thereby necessitating urgent intervention for a forensic audit to be carried out.
 - c. That the Defendants have been abusing their position and have withdrawn large sums of money in their personal capacities from the company's bank account. And unless this Honourable Court intervened, they will continue to embezzle the funds without accounting to the shareholders.
 - d. That the 3rd Plaintiff has been receiving huge sums of money on account of carbon credit paid by multinationals due to the vast land that comprises of the ranch which amounts are in excess of Kshs.80,000,000/= but the directors do not account for the same.
 - e. That the Defendants have been working in cohorts with the company secretary appointed by the company M/S Anchor Secretaries & Registrars who have acted with impunity towards the shareholders to the extent of disowning the shareholders.
 17. The above particulars disclose sufficient cause to demonstrate that a right belonging to one party has been breached and which should be subjected to the examination.
 18. Having triumphed this first enquiry stage, Section 241(2) sets in, that is to establish whether the Applicants can sustain the claims raised in the Plaint by a derivative action. It is not disputed that the 1st and 2nd Applicants are shareholders of the 3rd Applicant by dint of Sections 238(6) and 239(1) of the Act.
 19. A cursory look at the record confirms that the 1st and 2nd Respondents have been re-elected as part of the Directors of the 3rd Applicant. The Applicants have not denied they failed to be elected as the 3rd



Applicant's Directors, though they have demonstrated in their pleadings that they raised the issues of irregularities which they continue to complain of in the pleadings herein.

20. In the American decision of Recchion, *Westinghouse Elec. Corp. v Kirby*, 637 F. Supp. 1309, 1313 (W.D. Pa. 1986), the Court was faced with an almost similar situation and it dismissed an application for leave to institute a derivative suit noting that:

“Recchion participated in the alleged improper accounting practices at the direction of his supervisor, although he knew that they were in violation of generally accepted accounting principles.”
21. Being Directors, the 1st and 2nd Respondents owed the company fiduciary duties of good faith and loyalty and also owed a duty of care and skill in the discharge of their duties and which they are alleged to have failed. This court further notes that the Applicants seek injunctive orders against Respondents to stop being the Directors and Company Secretary of the 3rd Applicant.
22. In *Careplus Limited vs Ndugire* (Miscellaneous Application E832 of 2021), [2022] KEHC 225 (KLR) (Mwita J), the court pronounced itself on the question regarding removal of Directors of a company.
23. This, together with the dispute regarding the Applicants shareholding are matters that they ought to pursue in their/its personal capacity which may be more efficacious than a derivative suit. This the Court notes that the 1st and 2nd Respondents were re-elected back as Directors of 3rd Applicant, while the 1st and 2nd Applicants failed to be re-elected by the shareholders during the shareholders meeting.
24. There is also the right procedure to be followed for the removal of 1st and 2nd Respondents as Directors which the Applicants have not followed, and noting that the company reserves the right to ratify their removal from office means that the dispute herein is not fit for derivative action.
25. Finally, noting the facts as per the entire pleadings, it is doubtful that the suit that the Applicants seeks to institute will be for the benefit of the company as stated but for the Applicants own benefits, possibly for purposes of settling family scores.
26. While the reliefs will benefit the company nominally, it is this Court's view that the true beneficiaries will be the 1st and 2nd Applicants, hence the suit is being brought in bad faith. It is for reasons started above that this court declines to grant leave to the Plaintiffs to continue with this suit as a derivative action. This Court thus finds and holds that the Applicants have failed to substantiate their claim under Sections 238, 239 and 241 of the *Companies Act*.
27. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. Considering that the 1st & 2nd Applicants, and the 1st & 2nd Respondent are siblings, each party to bear its own costs.

Determination

28. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. The application dated 02/05/2024 lacks merit and is hereby dismissed.
 - b. Each party to bear its own costs.

Orders accordingly.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF FEBRUARY, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Kado Advocate h/b for Mr. Kounah Advocate for the Applicants

Mr. Odongo Advocate for the Respondents

M/S Salwa, Court Assistant

