



**Bhanji & another v Minaret Developments Limited & another (Commercial Suit E256 of 2023) [2024] KEHC 753 (KLR) (Commercial and Tax) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 753 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E256 OF 2023  
MN MWANGI, J  
JANUARY 19, 2024**

**BETWEEN**

**MOYEZ SADRUDIN BHANJI ..... 1<sup>ST</sup> PLAINTIFF**

**GREENWOODS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MINARET DEVELOPMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL KAIRU KIARAHO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 8<sup>th</sup> June, 2023, the 1<sup>st</sup> plaintiff/applicant filed a suit simultaneously with a Notice of Motion application of the same date under a certificate of urgency. The said application was brought under Sections 238 and 239 of the *Companies Act*, Cap 486 Laws of Kenya (sic), Order 40 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Sections 1A, 3A and 3B of the *Civil Procedure Act* and all other enabling provisions of the law. The applicant seeks the following orders:
  - i. Spent
  - ii. That leave be granted to the 1st plaintiff/applicant to continue the instant suit as a derivative action;
  - iii. Spent;
  - iv. That pending the hearing and determination of this suit this Honourable Court be pleased to issue a temporary injunction restraining the defendants either by themselves, their servants and/or agents from execution of the resolution passed on 16th March, 2023 to remove the 1st plaintiff as a Director of the 2nd plaintiff;



- v. That pending the hearing and determination of this suit this Honourable Court be pleased to issue and order of maintaining the status quo (sic) in regards to the running of the affairs of the 2nd plaintiff as it were as of 15th March, 2023; and
- vi. That the costs of this application be borne by the defendants.
2. The thrust of the application is that the 1<sup>st</sup> plaintiff intends to bring the suit on his own behalf and on behalf of the 2<sup>nd</sup> plaintiff, Greenwoods Limited (herein referred to as the company). The 1<sup>st</sup> plaintiff, Moyez Sadrudin Bhanji states that he is a Director of the 2<sup>nd</sup> plaintiff with a shareholding of 499 shares, while the 1<sup>st</sup> defendant has 500 shares and the 2<sup>nd</sup> defendant has 1 share. That by a notice dated 22<sup>nd</sup> February, 2023, the Secretary issued a notice for the meeting to be held on 16<sup>th</sup> March, 2023, where the agenda of the meeting stipulated the issue of removal of the 1<sup>st</sup> plaintiff as a Director was tabled at the meeting. He alleges that he was not accorded an opportunity to make his case and a resolution was passed by the defendant who held the majority votes to remove the 1<sup>st</sup> plaintiff.
3. The plaintiff contended that the intention of the defendants was ill-intended and not for the benefit of the 2<sup>nd</sup> plaintiff and that the action was illegal, un-procedural and prejudicial to the day-to-day running of the company as he has been solely in charge of the affairs of the 2<sup>nd</sup> plaintiff, with the 2<sup>nd</sup> plaintiff's affairs being curtailed. He stated that as a shareholder, he seeks leave to bring a derivative suit on behalf of Greenwoods Limited. The application is supported by the affidavit of the plaintiff sworn on 8<sup>th</sup> June, 2023 reiterating the grounds on the application.
4. In opposing the Notice of Motion, the defendants filed their replying affidavits separately, though they made the same averments. The 2<sup>nd</sup> defendant, Daniel Kairu Kiaraho swore a replying affidavit on 30<sup>th</sup> June, 2023, whereas Iqbal Dhanji swore a replying affidavit on 4<sup>th</sup> July, 2023 on behalf of the 1<sup>st</sup> defendant. They deposed that Greenwoods Limited at inception had 3 fully paid up ordinary shares, with 3 directors comprising Abdul Mehdi Mohamed, Farid Mehdi Mohamed and Moyez Bhanji (1<sup>st</sup> plaintiff), each having one (1) ordinary share. That by an agreement dated 16<sup>th</sup> April, 2008, the plaintiff sold his one share together with the attached privileges to the 2<sup>nd</sup> defendant and Samuel Mirii Gachathi (deceased).
5. The defendants contended that after the sale of his one (1) share, the plaintiff automatically and immediately ceased being a Director of the company. Both the defendants stated that any subsequent meetings held and chaired by the 1<sup>st</sup> plaintiff were illegal and un-procedural and any resolutions passed were a nullity and more specifically, the new allotment of 997 shares by the 1<sup>st</sup> plaintiff on 15<sup>th</sup> December, 2009.
6. The defendants averred that the AGM held on 16<sup>th</sup> March, 2023 followed the proper procedure as notices and a circular containing the issues to be discussed were circulated and the appropriate resolutions were passed removing the 1<sup>st</sup> plaintiff as a Director and the 2<sup>nd</sup> defendant was appointed a Director. They stated that an injunction cannot be issued as the applicant has not established an action for a derivative suit as he brings the suit for his own interest rather than the for the interest of the company. The plaintiffs contended that the 1<sup>st</sup> plaintiff is neither a shareholder nor a Director of the company.
7. It was stated that by the judgment of this Court delivered on 22<sup>nd</sup> November, 2016, the 1<sup>st</sup> plaintiff was forced to transfer the shares to the purchasers. It was argued that the 1<sup>st</sup> plaintiff has not demonstrated the irreparable harm that he has suffered by his removal from being a Director, and that the balance of convenience tilts in favour of the company which is at an advanced stage of investment with other investors. It was contended that the 1<sup>st</sup> plaintiff intends to frustrate the company's investments.



8. In a rejoinder, the 1<sup>st</sup> plaintiff filed a supplementary affidavit sworn on 11<sup>th</sup> July, 2023. He averred that the defendants have distorted the facts and misguided the Court on the facts of this matter and more specifically, on the issue of shareholding. He stated that he holds 499 shares with Greenwoods Company Limited as evidenced by the last CR-12. He averred that at the inception of the company there were only 3 ordinary shares but the shareholding subsequently changed with the full consent and involvement of the 1<sup>st</sup> defendant. He stated that the judgment of the Court only granted the 2<sup>nd</sup> defendant another 1 share which was duly transferred. He denied Having ceased to be Director of the company and that the Companies Act allows for the removal of Directors but not arbitrarily and with intent to adversely affect the affairs of the company.
9. He averred that the meeting of 15<sup>th</sup> December, 2009 was proper and that the defendants are trying to illegally justify their ill-intended conduct. He denied that he will make any financial gain from the suit and stated that the issue of the sale of the shares having been determined by another Court, this Court lacks the jurisdiction to entertain the same. He averred that the sale of the 1 share was concluded by a Court order in the year 2016 when the 2<sup>nd</sup> defendant completed the payment. The 1<sup>st</sup> plaintiff maintained that he still holds 499 shares in the company. He denied having any ill motives for the company, and more specifically to stall the investments of the company as alleged by the defendants.
10. As per the directions given by this Court, the application was heard by way of written submission. The parties complied with the filing of their respective submissions.

#### **1st Plaintiff's submissions**

11. The 1<sup>st</sup> plaintiff filed submissions dated 11<sup>th</sup> July, 2023. Mr. Mwachofi, the learned Counsel for the 1<sup>st</sup> plaintiff raised 4 issues for determination. These are-
  - i. Whether leave ought to be granted to the 1<sup>st</sup> plaintiff to continue the instant suit as a derivative action;
  - ii. Whether the 1<sup>st</sup> plaintiff has made out a case for the grant of a temporary injunction;
  - iii. Whether this Court should issue an order for status quo in relation to the running of the affairs of the 2<sup>nd</sup> plaintiff; and
  - iv. What orders this Court should make.
12. On the 1<sup>st</sup> issue, Mr. Mwachofi submitted that the application is grounded on the provisions of Sections 238 and 239 of the Companies Act which provide for the institution and continuation of derivative claims. Counsel averred that the 1<sup>st</sup> plaintiff has met the factors that are considered when a party is filing a derivative suit as was held in the case of Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another [2017] eKLR.
13. Counsel submitted the 1<sup>st</sup> plaintiff has demonstrated that he is a member of the company according to the CR-12 of the 2<sup>nd</sup> plaintiff, as a shareholder having 499 shares. He contended that the claim has been brought against the defendants who are Directors of the company, and that the acts and omissions of the defendants demonstrate negligence and breach of trust and jeopardize the company.

He stated that the actions of the defendants by removing the 1<sup>st</sup> plaintiff as a Director without an opportunity to present his case left him with no choice but to seek remedy from this Court.
14. Mr. Mwachofi submitted that the claim is aimed at protecting the interest of the shareholders, and that the 1<sup>st</sup> plaintiff has acted in good faith in bringing the instant suit before this Court. He argued that the 1<sup>st</sup> plaintiff has proved that the actions taken could be taken by a faithful Director of a company.



He urged this Court to look at the defendant's replies that establish the intent and ill motive of their decision. Counsel stated that the 1<sup>st</sup> plaintiff is acting in the best interest of the company. He urged this Court to find that the conditions set for instituting a derivative suit have been met and allow the prayers sought.

15. On the second issue, Counsel submitted that the 1<sup>st</sup> plaintiff has brought out a case for being granted an injunction as set out in Order 40 Rule 1 of the *Civil Procedure Rules*, 2010. He submitted that the 1<sup>st</sup> plaintiff has demonstrated that there is a prima facie case with a high probability of success and that the interests of the defendants are geared towards removing him as a Director of the company. He contended that the defendants are not interested in the interests of the company.
16. Counsel submitted the 1<sup>st</sup> plaintiff will suffer irreparable loss and damage as he has been curtailed from running the operations of the 2<sup>nd</sup> plaintiff which he has done solely, and if the injunctive orders are not granted, the 2<sup>nd</sup> plaintiff's operations will be crippled and it will even expose the 2<sup>nd</sup> plaintiff to litigation due to agreements arising from its services and operations. Counsel contended that the damage incurred cannot be compensated by an award of damages. He also contended that the shareholders and Directors of the 2<sup>nd</sup> plaintiff will equally suffer loss and damage if an injunctive order is not issued.
17. Counsel submitted that the balance of convenience tilts in favour of the 1<sup>st</sup> plaintiff in that if the injunctive orders are not granted, as the defendants will continue to pass resolutions that will cripple the company, and that in the event the suit succeeds, it will be an exercise in futility. Mr. Mwachofi argued the defendants had not raised any issue on the management of the company and as such, damage will be suffered. Counsel urged this Court to allow the application as prayed.

#### **Defendants' submissions**

18. Mr. Munyalo, learned Counsel for the defendants filed submissions dated 18<sup>th</sup> July, 2023. He submitted that there are four issues for determination, which he outlined as follows-
  - i. Whether the 1<sup>st</sup> plaintiff has made a case for a grant of leave to continue this suit as a derivative claim;
  - ii. Whether the 1<sup>st</sup> plaintiff has established a prima facie case with a probability of success to warrant a grant of temporary injunction;
  - iii. Whether the 1<sup>st</sup> plaintiff will suffer irreparable harm which cannot be compensated by damages if a temporary injunction is not granted; and
  - iv. Whether the applicant is favoured by the balance of convenience.
19. On the first issue, Counsel submitted that the plaintiff's prayers relate to the applicant's removal as a Director/shareholder of the company and not his total shareholding in the company. It was submitted that the 1<sup>st</sup> plaintiff must be a shareholder and member of the company, and in order for the Court to grant leave to him to commence a derivative suit, he ought to show that there is a cause of action vesting in the company and that the member is seeking relief on behalf of the company. Further, that he is aimed at protecting the members against unfair prejudice, negligence, default, breach of duty or breach of trust by a Director of a company. He relied on the case of *Paul Wanyoike Ngugi & 9 others v Joseph Gachanja & 5 others* [2020] eKLR, where the Court stated thus:

“There appears, in my view, to exist a two-stage process. 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). Section 239(2) of the Act provides that the application for permission will be dismissed if



the evidence adduced in support does not disclose a case for giving permission. The essence of judicial approval under the act is to screen out frivolous claims. The Court is only to allow meritorious claims. All that the applicant needs to establish through evidence is a prima facie case without the need to show that it will succeed.”

20. Counsel argued that the 1<sup>st</sup> plaintiff's removal from directorship cannot form the basis for being granted leave to file a derivative suit. He submitted that the key issue by the 1<sup>st</sup> plaintiff is the house erected on LR. No. 1/152 (original No.1/12/3), which partly houses the Caretaker of the 2<sup>nd</sup> plaintiff, and that since the removal of the 1<sup>st</sup> plaintiff from office, the defendants have continued to manage the property and pay the Caretaker. It was stated that the 1<sup>st</sup> plaintiff has failed to table evidence before the Court to show that the defendants have abdicated their duties to the 2<sup>nd</sup> plaintiff.
21. Counsel submitted that the prayers sought in the plaint are a clear indication that the 1<sup>st</sup> plaintiff intends to advance a personal claim disguised as a claim against the company.
22. On the second issue, Counsel submitted that the 1<sup>st</sup> plaintiff had failed to establish a *prima facie* case as laid down in *Giella v Cassman Brown* (1973) EA 358. He stated that the 1<sup>st</sup> plaintiff has not been expelled from the company and that he is misleading the Court. He maintained that the procedure followed in removal of the 1<sup>st</sup> plaintiff as a Director was legal and proper since a notice was served on him. Counsel stated that the removal of the 1<sup>st</sup> plaintiff as a Director was under Article 13 of the company's Articles of Association which states as follows-

“Until otherwise determined the number of directors shall not be less than two and not more than seven. The names of the first directors shall be determined in writing by the subscribers of the Memorandum of Association or a majority of them and until such determination, the Signatories to the memorandum of association shall be the first directors, and the directors must be shareholders.”
23. Mr. Munyalo explained his understanding of the above provisions as being that if one ceases to be a shareholder, he ceases to be a Director of the company. He submitted that Clause 6(e) of the agreement for sale dated 16<sup>th</sup> April, 2008 provides that-

“the vendor shall deliver to the purchaser a signed letter of resignation from office by the vendor as a director of the company with a written acknowledgement from him that he has no claim whatsoever against the company.”
24. He stated that parties were bound by their contract and that the defendants have a contractual right to insist that the 1<sup>st</sup> plaintiff ceases from being a Director.
25. In respect to the third issue, Counsel submitted that there is no irreparable loss to be suffered by the 1<sup>st</sup> plaintiff which cannot be remedied by an award of damages. He stated that the 2<sup>nd</sup> plaintiff does not undertake businesses, and no evidence had been availed on the harm to be suffered.
26. He contended that in the absence of a prima facie case and the irreparable damage to be suffered, there was no need to weigh the balance of convenience between the parties. He argued that there is no basis for the Court to be invited to interfere with the management of the 2<sup>nd</sup> plaintiff. He urged the Court to dismiss the application with costs to the defendants.



## Analysis And Determination.

27. I have considered the application, the affidavits in support and in opposition to the instant application. I have also considered the submissions filed by the learned Counsel for the parties. The issues for determination are-
- i. Whether leave should be granted to the 1<sup>st</sup> plaintiff to continue with the suit between him and the defendants herein as a derivative action on behalf of the company;
  - ii. Whether a temporary injunction should be issued restraining the defendants from effecting the resolutions passed on 16<sup>th</sup> March, 2023; and
  - iii. What orders should this Court issue?
28. The provisions governing derivative actions are stipulated in Sections 238 and 239 of the Companies Act. They 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) by an order of the Court in proceedings for the 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.
  - (4) A derivative claim may be brought against the director another person, or both.
  - (5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company
  - (6) For the purposes of this Part-
    - (a) "director" includes a former director;
    - (b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law."
- (1) In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.
  - (2) 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 it considers appropriate.
  - (3) If the application is not dismissed under subsection (2), 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.
- (4) On hearing the application, the Court may-
- (a) permit to continue the claim on such terms as it considers appropriate;
  - (b) refuse permission and dismiss the claim; or
  - (c) adjourn the proceedings on the application and give such directions as it considers appropriate.”
29. In this instance, the applicant who is the 1<sup>st</sup> plaintiff filed the suit in issue which was accompanied by the present application in which he seeks leave to continue with a derivative suit on behalf of the 2<sup>nd</sup> plaintiff (Greenwoods Limited). He stated that he is a Director of the 2<sup>nd</sup> plaintiff with a shareholding of 499 shares, and in comparison, the 1<sup>st</sup> defendant has 500 shares. That in a meeting held on 16<sup>th</sup> March, 2023, he was removed from being a Director of the company without being accorded an opportunity to present his case. That he is apprehensive that the affairs of the company will be curtailed, as he solely used to run the company's affairs.
30. Opposing the application, the defendants contend that the 1<sup>st</sup> plaintiff has failed to meet the threshold for being granted leave to continue with a derivative suit as the issues complained of are personal vendetta and not brought in the interest of the company. That the 1<sup>st</sup> plaintiff has not demonstrated that the defendants have failed to carry out their duties as Directors.
31. Both parties agree that the 1<sup>st</sup> plaintiff is a member and a former Director of the company. It is therefore clear that the applicant under the provisions of Section 238 of the *Companies Act* is eligible to institute a derivative suit on behalf of Green Woods Limited. The question that follows is whether the applicant has brought the instant suit on behalf of the company and for the interest of the company.
32. The threshold as set out in Section 238 of the *Companies Act* was echoed in the decision in *Joseph Munyoki Nzioka v Raindrops Limited and 3 Others* [2019] eKLR wherein it was held that in order for a person to succeed in an application for leave to institute a derivative action-
- i. He must be a member of the company.
  - ii. The proceedings must be in respect to a cause of action vested in the company.
  - iii. The applicant must seek leave to act on behalf of the company.
  - iv. The proceedings must be for the protection of members against unfair prejudice brought under the *Companies Act*; and
  - v. The proceedings are 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.
33. From the allegations presented, by the 1<sup>st</sup> plaintiff's main contention is his removal as a Director of the company. He asserts that the company will be prejudiced by his removal which was done in bad faith. He has however failed to demonstrate how the suit has been brought in the best interest of the company. I thus find the application for leave to continue the suit as a derivative suit is unmerited.



34. Order 40 Rule 1 of the Civil Procedure Rules provides the factors for consideration before granting a temporary injunction. In *Giella v Cassman Brown & Company Limited* (1973) EA 358, the Court held as follows-

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

35. From the foregoing provisions, the 1<sup>st</sup> plaintiff must show that the company is in the process of being wasted away if a temporary injunction is not issued. He seeks to restrain the defendants from executing the resolution passed on 16<sup>th</sup> March, 2023 removing him as a company Director. No evidence has however been adduced on how the said removal will affect the affairs of the company. I am not satisfied that the applicant has made out a *prima facie* case. The 1<sup>st</sup> plaintiff has not demonstrated the harm to be suffered by the company if the temporary injunction is not granted.

36. In the upshot, I am persuaded that the 1<sup>st</sup> plaintiff has not made a case for the grant of the injunctive orders. His application dated 8<sup>th</sup> June, 2023 is bereft of merit. The same is dismissed with costs to the defendants/respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Mwachofi for the 1<sup>st</sup> plaintiff/applicant

No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> defendants/respondents

Ms B. Wokabi – Court Assistant.

