Kevian Kenya Limited (on behalf of Kirinyaga Seeds Limited) v IPM Potato Group Kenya Limited & 5 others; Kirinyaga Seeds Limited (Affected Company) (Civil Suit E528 of 2023) [2024] KEHC 127 (KLR) (Commercial and Tax) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 127 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E528 OF 2023

A MABEYA, J

JANUARY 17, 2024

BETWEEN

KEVIAN KENYA LIMITED (ON BEHALF OF KIRINYAGA SEEDS LIMITED) .... PLAINTIFF

AND

IPM POTATO GROUP KENYA LIMITED .... 1ST DEFENDANT

IPM GROUP LIMITED .... 2ND DEFENDANT

IAN IRELAND .... 3RD DEFENDANT

MARCEL DE SOUSA .... 4TH DEFENDANT

PADRAIC ROBERT LENEHAN .... 5TH DEFENDANT

HENDERIKUS APPELDOOREN .... 6TH DEFENDANT

AND

KIRINYAGA SEEDS LIMITED .... AFFECTED COMPANY

RULING

1. In 2017, the Plaintiff and the 2nd Defendant teamed up to incorporate the Affected Company “The Company”. The main objective was to produce and sell certified quality seed potatoes. The Plaintiff held 49 shares while the 2nd Defendant held 51 shares out of the 100 issues. Each party produced 2 directors to the management of the company.

2. In pursuance thereof, the company acquired a property known as Ngusishi/Settlement Scheme/3013 ("the suit property"), wherein construction of cold stores, offices and other necessary infrastructure was undertaken for the business of the company. Things worked well until sometimes in early 2023 when things began to go south as far as the management of the company was concerned. This resulted in the Plaintiff lodging this suit vide a plaint dated 1/11/2023.

3. Simultaneously, with the plaint the Plaintiff took out a Motion of Notice dated the same date. The same was expressed to be brought under various provisions of the Companies Act ("The Act") and the *Civil Procedure Act*. The same sought various prayers but the crucial ones being leave to continue the suit as a derivative suit in the name and on behalf of the company; an order to restrain the Defendants from dealing with the property of the company, an order to restrain the 3rd and 4th Defendants from dealing with the property of the company, an order to restrain the 3rd and 4th Defendants from convening and/or holding a meeting of the company in the absence of the Plaintiff's representatives and finally an order to restrain the 5th and 6th Defendants from holding themselves out as officers of the company.

4. The motion was supported by the affidavit of Richard Kimani Rugendo sworn on 1/11/2023. It was contended that the Defendants had acted in breach of their duty of care and loyalty to the company; that they had incorporated the 1st Defendant and divested the company's resources including the suit property for the benefit of the 1st Defendant. That they had created a fraudulent lease in favour of the 1st Defendant backdated to March, 2023 and frustrated the carrying out of a statutory audit of the company. That they had issued a redundancy notice to the employees of the company without the knowledge and approval of the board with a view to take over those employees and deploy them to work for the 1st Defendant.

5. The Defendants opposed the application vide the replying affidavit of Marcel De Sousa sworn on 11/12/2023. They denied the allegations of the Plaintiff and stated that no resolution had been made to authorize the suit. That the 2nd Defendant had at all times acted in accordance with the constitutional documents of the company. That the suit was brought for a collateral purpose of forcing the 2nd Defendant to buy out the Plaintiff. That the Plaintiff had acted in a disinterested manner towards the company and had stopped funding it since 2021.

6. It was contended that in July, 2022, the parties had agreed that the Plaintiff do buy the 2nd Defendants 51% shareholding at Kshs. 110,687,546/=. That with the impending sale of its shares, the 2nd Defendant incorporated the 1st Defendant to continue with its endeavors. That the sale was scuttled by the Plaintiff's insistence of audit. It was contended that the board had approved the liquidation of the company and the redundancy of its employees. That the issue of redundancy was not in the jurisdiction of this court.

7. As regards the lease of the property of the company to the 1st Defendant, it was contended that the same was for a short period of 1 year upto March, 2024 to pay the employees. The Defendants accused the Plaintiff of bad faith in entering into a venture with Kenya Agricultural and Livestock Research Organization (KALRO) which was in competition with the company; had stopped funding the company and had refused to be bought out.

8. It was further contended that the Plaintiff should have brought the suit under sections 780 and 782 of the *Companies Act* for oppressive conduct rather than as a derivative action. That there was no evidence of mismanagement had been produced and the reliefs sought were not for the benefit of the company. They urged the court to dismiss the applications.

9. Both parties filed their respective submissions. The Plaintiff's submissions were dated 28/12/2023 while those of the Defendants were dated 9/1/2024. I have considered those submissions alongside the opposing affidavits and the authorities relied on.

10. This is an application for leave to continue a suit as a derivative action and for injunction. The principles for interlocutory injunction are well known as set out in the *Giella-vs-Cassman Brown*. But before considering them, the court has to consider if a case to continue the suit as a derivative action has been made.

11. The jurisdiction to bring a derivative suit is to be found in section 230 of the *Companies Act*. The same provides:-

> " 1) in this part, 'derivative claim' means proceedings by a member of a company in respect of a cause of action vested in the company, seeking relief on behalf of the company.
>
> ...
>
> 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."

12. The right to a derivative claim having been underpinned in statute, the holding in the case of *Altaf Abdulrasul Dadani –v- A. Mini Akberazi Manji & 3 others* [2004] eKLR is no longer good law. The same was determined before the coming into force of the 2015 Companies Act. That authority is therefore not applicable as it sought to limit the right to a derivative claim.

13. Decisions determined post 2015, have tried to lay down the principles under which a derivative claim can be mounted. In Isaiah Waweru Njumi & 2 others – vs- Muturi Ndengu [2016] eKLR, it was held:-

> " Among other things, the court considers the following factors:-
>
> 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 efforts to bring about the action the Plaintiff desires from the directors as from the shareholders. ...
>
> c. Whether the Plaintiff fairly and adequately represents the interests of the shareholder 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....
>
> d. Whether the Plaintiff is acting in good faith.
>
> e. Whether the action taken by the Plaintiff is consistent with one 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 of, …is likely to be authorized by the company in the future, and

g. Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative suit.”

14. In Ghelani Metals Ltd & 3 others –vs- Elesh Ghelani Nathearal & another [2017] eKLR, the court held:-

> “ Firstly, the court should always also consider the seriousness of the alleged wrongdoing by conducting a cost benefit of the intended action. The court ought to satisfy itself that the litigation will not disrupt the company business ….. Likewise, the court ought to reflect on the reputational damage, if any, the company is likely to suffer in the event the claim fails.
>
> Secondly, I would hasten to add that a critical import is also the factor that the derivative suit ought to be allowed if it is in the best interest of the company. This factor should of the highest concern especially when sections 143 and 144 of the Act are read into context. Both sections advocate the duty of the director to act in a way as to promote the success of the company for the benefit of its members.
>
> Finally, the existence of alternative remedies …”

15. In Mohamed in Mohamed & another –vs- Ibrahim Ismail Isaak & another [2021] eKLR, the court held:-

> “ It is clear from the Act that, the court must satisfy itself that there is a prima facie case on any of the causes of action set out under section 238 (3) of the Act. If the evidence adduced in support of the application do not disclose a case for the giving of permission, the application is for dismissal. The importance of judicial approval under the Act, is therefore to screen frivolous claims. The court will only allow meritorious claims to be litigated as derivative suits. In this regard, an applicant ought to establish, through evidence, that he has a prima facie case without the need to show that it will succeed.
>
> At the second stage, the court will put into consideration statutory provisions and factors which ordinarily guide judicial discretion, albeit in the realm of derivative action. In view of the clear provision of part xi of the Act, the court determines applications for permission in exercise of discretion.”

16. No doubt, the courts primary coercion in a derivative action is to ascertain if the suit is brought for the benefit of the company. This is only discernible from the prayers in the plaint. There are 9 prayers in the plaint. The main ones are nos. 1, 2, 3, 4, 8 and 9. Prayer nos. 5, 6 and 7 are only corollary to the main prayers.

17. From a reading of those prayers, prayer nos. 2, 8 and 9 are but for the benefit of the Plaintiff and not the company. However, prayer nos. 1, 3 and 4 are directly beneficial to the company. The question is, where the reliefs sought, such as in this case, are equally beneficial to the Plaintiff and the company, should the court allow a derivative suit to be continued or should it rebuff a Plaintiff and direct hi to bring a suit for oppressive conduct?

18. My opinion is that where the reliefs are 50-50, such as I this case, the court should exercise its discretion in favour of permitting the suit to be pursued as a derivative claim. This is because, in requiring a Plaintiff to pursue the claim under sections 780 and 782 of the Companies Act, the reliefs therein

would not benefit the company but the oppressed shareholder. If however, the reliefs, and therefore, benefit is more to an oppressed shareholder than the company, the best cause would be to let such a Plaintiff to proceed under sections 780 and 782 of the Act and not 238.

19. Accordingly, I find that the suit is majorly for the benefit of the company.

20. In the present case, the question is whether the Plaintiff has proved the causes of action in section 238 of the Act. It is alleged and not denied that the 2nd Defendant has incorporated the e1st Defendant which is now engaged in activities that are in direct competition with the company. That the 3rd and 4th Defendants who are directors of the company are also directors in the 1st Defendant. It was also alleged and not denied that the resources of the company are being divested and applied for the benefit of the 1st Defendant.

21. The answer to that serious allegations are that; the 2nd Defendant incorporated the 1st Defendant with a view to continue its activities with the impending sale of its shareholding in the company to the Plaintiff. That the Plaintiff had also entered into a joint venture with KALRO which is in direct competition with the company.

22. With due respect, a wrong does not become a right because the opposite party has committed a similar wrong. In any event, there was no evidence of the joint venture between the Plaintiff and the alleged KALRO. No evidence of protest by the 2nd Defendant after leaving of the alleged joint venture. As regards the impeding buy out, the moment the same never fell through, the continued existence of the 1st Defendant and the 3rd and 4th Defendants sitting in both boards became foul and actionable.

23. There was also the allegation that a lease was created and fraudulently backdated to March, 2023 and payment made to begin in October, 2023. The answer to that was that the lease was meant to raise funds to pay the employees of the company. Firstly, it was not denied that the lease was back dated to March, 2023. Secondly, if it was meant to pay the employees of the company, why was it necessary that the 1st Defendant was to commence payment for the lease in October, 2023 yet a redundancy notice of 30 days was issued on 7/10/2023? The mere fact that the 1st Defendant was enjoying the resources of the company without approval of the company's board of directors is to say the least fraudulent.

24. As regards the minutes produced by the Defendants, it is worthy to note that they are all not signed. The only ones signed was the one of 1/8/2023 (Ms-07) by 2 directors on 3/10/2023. The chairman of the board did not sign them, which is very unusual. To my mind, the said minutes were made in order to counter the Plaintiff's protestation that there had been no resolution to declare the employees of the company redundant. It was suggested that this court has no jurisdiction to look into the issue of redundancy of the company's employees. With due respect, this is the company court which has jurisdiction over companies and anything that affects the company is subject to the scrutiny by this court.

25. In my view, the foregoing is clear that the 2nd, 3rd and 4th Defendant, have acted in a manner contrary to the interests of the company. They have propelled the 1st Defendant to defraud the company. The 3rd and 4th Defendant are acting in conflict of interest by sitting in the board of the 1st Defendant which is in direct competition with the company. They have divested the resources of the company to the 1st Defendant to the extreme prejudice of the company.

26. On the issue of the buy outs by either party, paragraphs 30 and 49 of the Defendant's replying affidavit leaves a lot to be desired. If the Plaintiffs shareholding is 49 shares in the company why should it be bought at Kshs. 57,688,470/= while the 2nd Defendant's 51 shares (only 2 shares more) be pegged at

Kshs. 110,687,546/= nearly double that of the Plaintiff? Doesn't that alone justify the insistence of the Plaintiff for an audit and probably valuation of the company?

27. From the foregoing, I have come to the irresistible conclusion that the permission to continue the suit as a derivative suit is merited and hereby issues.

28. The next issue is whether the injunctive orders should issue. The principles of prima facie case with a probability of success, irreparable loss and damage and balance of convenience come to play.

29. On prima facie, I have already found that it is fraudulent for the 2nd, 3rd and 4th Defendant to have incorporated the 1st Defendant and divested the resources of the company to its benefit. The 3rd and 4th Defendant continue to be conflicted so long as they sit on the boards of the 1st Defendant and the company. The 5th and 6th Defendants' loyalty to the company is likewise questionable. It is clear that if the status quo continues, the company will be stripped of its assets and by the time the suit is determined there will be no company to talk about. A prima facie case with a probability of success has been established.

30. As to irreparable loss and damage; it was contended that since the plaintiffs claim has been computed or assessed and estimated at Kshs. 89 Million, the loss is quantifiable and can be compensated with due respect, it is not the loss to be suffered by the plaintiff, but the company itself. If the orders sought are not granted, there will be no company to talk about as at the time the suit is determined. Such a loss in my view cannot be compensated by an award of damages. It is irreparable.

31. As to the balance of convenience, the same lies in calling the defendants to order and by protecting the company and its assets. It tilts in favour of granting the orders of injunction sought.

32. Accordingly, I allow the application in terms of prayer Nos. 7, 9, 10, 11,12 and 14. Prayer Nos. 9, 10,11 and 12 are to last until the hearing and determination of this suit.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb, EBS

JUDGE