



**Bunde & another v Muchuma (Civil Suit E480 of 2022)
[2024] KEHC 4598 (KLR) (Commercial & Admiralty) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL SUIT E480 OF 2022
JWW MONG'ARE, J
APRIL 15, 2024**

BETWEEN

JOY LINDA BUNDE 1ST PLAINTIFF

EDU PLU S AFRICA LTD 2ND PLAINTIFF

AND

HUMPHREY MUCHUMA RESPONDENT

RULING

1. Before the court is the 1st Applicant's Notice of Motion application dated 2nd December, 2022. It is brought under Sections 238 and 239 of the *Companies Act* 2015, Order 51 Rule 1, Order 40 Rules 1,2,3, and 4 of the *Civil Procedure Act*, Sections 1A, 1B, 3, 3A, 63(c) and 63(e) of the *Civil Procedure Act* and Article 159 (2) of *the Constitution* of Kenya and all other enabling provisions of the Law.
2. The Applicant seeks the following orders:-
 - i. spent
 - ii. That the 1st Applicant/Plaintiff be granted leave to continue the derivative Claim and or action herein seeking relief on behalf of Edu Plus Africa Limited, the 2nd Plaintiff herein, in respect of the acts and omissions on the part of the Respondent, his duly authorized agents, servants, employees assigns and/or personal representatives involving default, breach of duty and trust, negligent and fraud in his capacity as director of Edu plus Africa Ltd on such term as this honourable court may deem fit to grant.
 - iii. That a temporary injunction do issue to restrain the Defendant, his duly authorized agents, servants, employees assignees and/or personal representatives from alienating selling, transferring, charging, disposing of, removing and or in any other manner whatsoever dealing



with the assets and finances of the 2nd Plaintiff company pending the hearing and determination of this application, proceedings, suit further court orders and or directions.

- iv. That the Respondent/Defendant be compelled to produce the books of record, books of accounts, banking slips, Bank statements and audited financial accounts of the 2nd Applicant/Plaintiff in his custody from July 2019 to date.
 - v. That the Respondent/Defendant be restrained by a temporary injunction or restraining orders from threatening and/or intimidating the 1st Applicant/Plaintiff pending the hearing and determination of this application, proceeding, suit, further court orders and/or directions.
 - vi. That the Respondent/Defendant be condemned to bear the costs of this application.
3. The application was premised on the grounds set on the face of the application as well as on the supporting affidavit and further affidavit sworn by Joy Linda Bunde one of the Co-directors of the 2nd Plaintiff on 2nd December, 2022 and 27th June 2023 respectively.
4. In response, the defendant filed a Replying Affidavit sworn by Humphrey Muchuma Kasembeli, on 12th May, 2023 together with the Notice of Preliminary Objection dated 12th April, 2023 in which he raises the following grounds:-
- i. That the entire claim is incompetent, bad in law and does not lie as the court lacks jurisdiction to hear the same.
 - ii. That the Applicants failed to obtain leave of court as required under Sections 239 and 240 of the *Companies Act* before filing the plaint dated 2nd December, 2022 which is a derivative suit.
 - iii. This Honourable court therefore lacks jurisdiction to hear and determine the application and the plaint dated 2nd December, 2022 as against the Respondent.
5. The application and the Preliminary Objection were dispensed by way of written submissions. The Respondent filed submissions dated 12th May 2023, while the 1st Plaintiff filed submissions dated 27th June, 2023.

Analysis and Determination

6. I have carefully considered the pleadings, oral and written submissions and evidence placed before the court by the rival parties. To my mind, the following issues arise for determination:-
- i. Whether this court should grant leave to the 1st Applicant to proceed with this suit as a derivative suit.
 - ii. Whether a temporary injunction should be issued against the Defendant restraining the transfer and removing the company assets.
7. The operative law is Sections 238 and 239 of the *Companies Act*. Section 238(1) states that a derivative claim is a proceeding by a member of a company brought in respect of a cause of action vested in the company, seeking relief on behalf of the company.
8. Section 238 stipulates that a derivative suit is brought on behalf of the company to protect it from the illegal actions done to it. A derivative suit is an exception to the rule in the English case of *Foss vs Harbottle*, 2 Hare 461, 67 ER 189 that a company should sue and be sued in its own name. In the instant suit, Joy Linda Bunde filed the suit therein to protect the interest of Edu Plus Ltd from the fraudulent actions of the Respondent.



9. The Applicant submits that she has satisfied the legal threshold of bringing a derivative suit as spelt out in Section 238(4) of the [Companies Act](#) which allows for a derivative claim to be brought against directors whose actions constitute negligence, default, breach of duty or trust.
10. It is trite law that for a person to bring a suit on behalf of the Company, leave from the court must be sought, either to institute or continue with the suit as a derivative suit. For the Court to grant such leave, it must be satisfied that a Party has established a prima facie case.
11. However, this court agrees with the Defendant that the court is not to allow frivolous claims but only meritorious claims. The Defendant avers the suit is filed is frivolous as the issues arising out of a marriage gone sour and the Applicant intends to get back at the Respondent and therefore there is no legal basis on the cause of action.
12. The Applicant avers the actions of the Defendant in side-lining the 1st Applicant from conducting the affairs of the Company, amounts to the Defendant abusing his position in the Company, to the extent of utilising his position in the Company to move assets and employees from the Company to the affiliate company known as INUA AI Solutions.
13. The Applicant avers that bringing the derivative suit is aimed at protecting the interest of the Company and not her own interests in the Company. She has established that she is a member of the Company through being one of the directors and shareholders who seeks to protect the interest of the Company from the illegal actions of the Defendant.
14. On the other hand, the Defendant opposes the application as the same was not filed during the institution of the suit and urged the court to dismiss the application as filed. The Defendant submits the Applicant only seeks to guard her own interest and not the interest of the company and thus the application is not brought in good faith. The Defendant contends that the Applicant is not entitled to the orders sought as she is a co-director of the Company with equal shareholding with the Defendant and not a minority shareholder. The Defendant placed reliance on the holding in the case of Sultan Hashem Lalji & 2 others Vs Ahmed Hasham Lalji & 4 others (2014) eKLR where the court held “it is the minority shareholders that are availed the protection by the exceptions since generally majority shareholders exercise the power of the company and control its affairs.”
15. It is my considered view and worth noting that I find no bar in the law that requires that leave has to be sought to continue or institute a derivative suit. It is not true that the Applicant must first seek to file a derivative suit before filing a suit. It is trite law that a party can first file the suit and then seek leave from the court to proceed with the suit as a derivative suit.
16. In determining whether to grant leave to continue or file a derivative suit the court must be satisfied there is a prima facie case. This position was established by the Court of Appeal in the decision in Amin Manji & 2 Others v Altaf Abdulrasul Dadani & Another [2015] eKLR, where the court held:

“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.”
17. In her submissions the 1st Applicant has demonstrated she has a prima facie case to warrant the prayers sought, and she has also demonstrated the damages to be suffered by her if leave is not granted to bring the derivative suit as prayed.



18. Conversely, the defendant while opposing the application cited the case of *Isaiah Waweru Njumi & 2 others vs Muturi Ndungu (2016) eKLR*, argued that the 1st Applicant has failed to establish a prima facie case on any of the causes of actions arising from actual or proposed acts or omissions involving negligence, default, breach of duty breach of trust by a director thus leading to frivolous application.
19. The Respondent further argued that the issue of the transfer of the company assets is untrue as the property referred by the Applicant is solely owned by the Defendant. The Defendants submit the instant application cannot be used to cure the plaint as per the provisions of Section 239(1) of the Company Act. According to the Defendant, the company is undergoing a voluntary winding up and urged the court to stay the application suo moto.
20. Section 239 (4) of the Company's Act provides the reliefs the court may administer after hearing an application to continue a derivative suit. I reproduce the section here below:-
 4. On hearing the application, the Court may—
 - (a) give permission 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.
21. The Applicant having established that Defendant has transferred the property of the Company these are issues to be well-ventilated at the main hearing and the court is of the opinion that the property of the Company ought to be protected. In the circumstances, I do find that it is in the interest of justice that the Applicant be allowed leave to continue with a derivative suit.

Whether a temporary injunction should be issued against the Defendant restraining the transfer and removing the company assets and compel the Defendant to submit the Defendant's books of accounts
22. The court was urged to grant the injunctions sought. It is submitted that the prayer for the production of books of accounts and financial records will allow the Plaintiffs to have a clear picture of the financial position of the company.
23. Following the grant of leave to continue with the derivative suit I find that it is in the interest of justice that the Defendant be restrained from interfering with the company and more specifically be restrained from alienating selling, transferring, charging, disposing of, removing and or in any other manner whatsoever dealing with the assets and finances of the 2nd Plaintiff company.
24. The Defendants submit the documents sought by the Applicant have been adduced in the Affidavit at annexure HM5, and caution the court against issuing orders that are sought in the substantive suit at the interim stage.
25. The Applicant intends that the Company's books of accounts are submitted for the court to satisfy that indeed there is no fraud or mismanagement of the Company's fund. The court agrees that the same is paramount in determining the issue in dispute between the parties.



26. The 1st Applicant submits there is no defence filed and therefore the Preliminary Objection lacks a legal basis. Counsel relied on the case of Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others, ELC Case No. 14 of 2022 [2020] eKLR. where the court stated as follows:-

“In the matter at hand, the 1st – 4th defendants have not filed a defence. The issues raised in the preliminary objection are instead raised in the response to the interlocutory application that came with the suit. It would have made sense if the issue as raised later in the notice was directed to the application. But the notice is directed to the suit, not the application, and given the holding in Achola’s case (supra), the approach taken was wrong. A defence should have been filed and in that defence the intention to raise the objection should have been expressed.”

27. Guided by the above authority I find the Defendant’s Preliminary Objection dated 12th April 2023 lacks merit and the same is dismissed. In the circumstances, the court allows the Applicant’s application dated 2nd December, 2022 and issues the following orders:-

- a. Leave is hereby granted to continue the suit as a derivative claim.
- b. The Defendant is hereby restrained from interfering with the company and more specifically be restrained from alienating selling, transferring, charging, disposing of, removing and or in any other manner whatsoever dealing with the assets and finances of the 2nd Plaintiff company pending hearing and determination of the suit.
- c. An order do hereby issue compelling the Defendant to produce the books of record, books of accounts, banking slips, Bank statements and audited financial accounts of the 2nd Applicant/ Plaintiff in his custody from July 2019 to date.
- d. Costs are in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF APRIL, 2024.

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

1. Ms. Joy Linda the Plaintiff acting in person.
2. Mr. Nyamwaro for the Defendant.
3. Amos - Court Assistant

