



**Maina v Gichimu (Civil Case E032 of 2021) [2024] KEHC 4631 (KLR) (16 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4631 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE E032 OF 2021  
SM MOHOCHI, J  
APRIL 16, 2024**

**BETWEEN**

**JEREMIAH MWANGI MAINA ..... APPLICANT**

**AND**

**MARGARET NJERI GICHIMU ..... RESPONDENT**

**RULING**

**Introduction**

1. Before Court for determination is the Notice of Motion Application dated July 12, 2023 pursuant to Sections 1A, 3A, and 3B of the *Civil Procedure Act*, Sections 238 and 239 of the *Company Act* and Articles 159 (2) of the *Constitution* seeking:
  - i. That on such terms it deems fit, the Honourable Court be pleased to Grant leave to the Applicant, a director and minority shareholder, to file maintain and continue a derivative claim/suit seeking various reliefs on behalf of Zanjeema Enterprises Limited in respect of various breaches, violations and acts and omissions on the part of the Respondent, a director and majority shareholder.
  - ii. That such leave once and/or if granted as prayed the suit herein be marked as withdrawn and costs therefore do abide the outcome of the intended derivative claim/suit.
  - iii. That in the alternative upon grant of such leave as prayed, the Honourable Court be please, on such terms it deems fit, grant leave to the Applicant to amend the Plaintiff filed herein and such amended Plaintiff be deemed to be properly filed
2. The grounds upon which the Application was predicated upon were set out in the body of the Motion and the Supporting Affidavit of Jeremiah Mwangi Maina sworn on June 12, 2023. He deponed that; he is the proprietor, minority shareholder and the brains behind Zanjeema Enterprises Limited which was incorporated on June 27, 2018. That the Company runs a hardware business and that the Respondent



is tasked with the day to day running of the business. That owing to his busy schedule as a teacher, he invited the Respondent and offered her majority shareholding trusting her to manage and operate the business. That he personally sourced the starting capital to set up the business from bank and Sacco loans savings, soft loans and sale of property.

3. He averred that he fell seriously ill in 2019 and admitted in various hospitals for long time. That during that period, the Respondent in an attempt to edge out the Applicant, opened and operated a separate account by channeling sale proceeds of the business and continues to do so to date without involving the Applicant. He deposes that the Respondent has failed to remit funds in the company account rendering the company almost obsolete, has exposed the company to legal and economic consequences by failing to honour tax obligations, declined to keep accurate and current records of accounts and that she has also refused to allow the Applicant install modern accounting and book keeping systems.
4. The Applicant further contended that the Application is intended to protect the company and for the Respondent to answer for negligence and breach of contract.
5. He stated that he filed the suit without first seeking leave of Court as a minority shareholder, a legal requirement that escaped his attention something which also escaped the Respondent's attention together with her advocate as well as the Court without any issues raised. He therefore seeks to rectify the error through this Application. He added that the Respondent will not suffer any prejudice beyond an award for costs and justice will have been done.
6. The Application was opposed vide a Replying Affidavit sworn by the Respondent on July 28, 2023. She swore and contended that she is the majority shareholder with 700 shares out of 1000 with the Applicant owning the rest 300. That the company was incorporated as agreed by both parties and shares allocated according to contribution of each party. She contended that it was not practical for the Applicant, a learned person to give majority shares while being the sole contributor and the brains behind the business. She also averred that the Applicant could have employed her like any other employee. It was the Respondent's averment that she has always shown her contribution as per the annexed audit report dated February 21, 2022.
7. The Respondent stated that the Respondent refunded himself the monies he invested by filling cheques in his favour and collecting blank cheques to allocate himself funds. She added that she would transfer money to the Applicant and to the Company account. She deposed that the Applicant took over her parcel of land and exchanged it without her knowledge in order to refund himself the money spent. That the property is registered in her name but occupied by a third party as per the annexed agreement and search.
8. The Respondent also averred that she took loans and still does to run the business since the Applicant told her in the year 2021 that he did not want any involvement in the business and wanted to sell his shares. That she is one who took care of the Applicant and even paid the Applicant's hospital bills through company proceeds.
9. The Respondent denied opening a separate company account. she deposed that only the Applicant can withdraw from the business bank account and the paybill number and has further declined to have the accounts operated by both parties. She contended further that the Applicant was the one who did the company's PIN registration to which he provided his mobile contacts and has refused to share passwords and details needed to file returns and the same can be corrected once the Applicant shares the passwords.



10. The Respondent averred that the Applicant has not demonstrated how the company was defrauded and it is the Applicant who has left the accounts dry to the extent of cheques being issued by herself being dishonoured.
11. According to the Respondent, she has always kept proper records and books and the auditors in filing their report relied on the said books. That the Applicant moved to Court on his own behalf and since he has not shown that the Respondent's actions have aggrieved the company, no derivative suite can ensue. She also contended that she will suffer prejudice since the Applicant has been withdrawing money from the business as well as carrying items from the business without paying.
12. That the Application is set to delay the matter since the Court had set it down for hearing and did not see the need for leave. That the Applicant is the biggest aggressor of the company, he has been going to the business to disrupt peace, threatened to close the business and threatened to fire employing necessitating the intervention of the police. That, that assertion has been brought to the attention of Court before.
13. That Pursuant to the Ruling of January 5, 2023 by the Court directing the parties to work together, the Respondent's advocates reached out to the Applicant to attempt a sit down with their letter getting no response. That the Applicant has not shown he is entitled to the prayers sought, that he wants to see the company wound up and further has approached Court in bad faith. She prayed for the Application to be dismissed with costs.
14. The Respondent filed Further Affidavit sworn on August 25, 2023 in response to the Respondent's Replying affidavit. He denied the averments by the Respondent to wit the shareholding and that it was not based on contribution, that the Respondent has been keeping records or filing returns which has exposed the company. He also denied that the Respondent paid his medical bills. He stated that he has a legal duty to champion the company's interest as minority shareholder. He added that the Respondent uses her private mobile number to transfer money from the company.

### **Submissions.**

15. The Court on July 17, 2023 directed that the parties do file written submissions. The Applicant filed his written submissions on August 8, 2023 and the Respondent's submissions are not on record.

### **Applicant's Submissions**

16. The Applicant submitted that it was upon noticing an error on procedure as to the manner in which the suit was instituted that the Application was filed to rectify it. He relied on Article 159 (2) of the Constitution and urged Court not to pay attention to procedural requirements at the expense of substantive justice.
17. It was also submitted that the Applicant is entitled to bring a derivative suit his minority shareholding notwithstanding. Reliance was placed in the decisions in Sultan Hasbeem Lalji & 2 Others v Ahmed Hasham Lalji & 4 Others (2014) eKLR as well as Ghalani Metals Limited & 3 Others v Elesb Ghelani Natwarlallr & Another, (2017) eKLR.
18. It was further submitted that Sections 238 and 239 of the Companies Act provide an avenue that grants a minority shareholder an opportunity to sue on behalf of the company against a fellow Director or third party. That the process to institute a derivative suit is twofold as prescribed in the Companies Act and as was held in Ghalani Metals Limited & 3 Others v Elesb Ghelani Natwarlallr & Another (*supra*).



19. The Applicant relied on the Court of Appeal pronouncement in *Amin Manji & 2 Others v Altaf Abdulrasul Dadani & Another* (2015) eKLR as regards protocol in seeking leave in relation to filing a derivative action and that the Applicant has aptly established a *prima facie* case warranting the Court to exercise its discretion in his favour.

### Analysis and Determination

20. The Court has carefully considered the depositions and submissions on record. And the only issue for this Court is to determine whether the Applicant has basis for grant of leave to maintain a derivative action.?
21. This is an application for permission to continue a derivative suit. In *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another* [2017] eKLR, the Court explained: -

“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 the corporation: see *Wallersteiner v Moir* (No.2) [1975] 1 All ER 849. 38.

Until 2015, in Kenya, the common law guided derivative actions in Kenya. 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”.

22. The Court must first 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 out frivolous claims. The Court will only allow meritorious claims to be litigated as derivative suits. In this regard, an Applicant needs to establish, through evidence, that he has a *prima facie* case without the need to show that it will succeed.
23. The causes of action set-out in Section 238(3) of the *Act* include an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
24. The very failure to initiate and convene any meetings of directors to approve company actions and provide overall policy directions is telling and in this instance reeks of Unitarianism on the part of the Respondent and before this Court this would constitute a breach of trust.
25. Companies are regulated by the *Companies Act* and it is the intention of the law that they are then massaged and run in compliance with the law and a cursory look here reveals the Respondent runs the company from her own personal band account and the exhibited audited reports are unsigned.
26. In the premises, I find that the Applicants have pleaded sufficient material to permit the derivative suit to proceed. Leave is, therefore, hereby granted to the Applicant to file maintain and continue a derivative claim/suit seeking various reliefs on behalf of Zanjeema Enterprises Limited in respect of various breaches, violations and acts and omissions on the part of the Respondent, a director and majority shareholder.



27. The suit herein be marked as withdrawn and costs therefore do abide the outcome of the intended derivative claim/suit.

It is so ordered.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 16<sup>TH</sup> APRIL 2024**

**MOHOCHI S.M**

**JUDGE**

