



REPUBLIC OF KENYA



Baringo Progressive Company Limited v Chemngorem & 5 others (Miscellaneous Civil Suit 209 of 2018) [2024] KEHC 5691 (KLR) (13 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL SUIT 209 OF 2018
SM MOHOCHI, J
MAY 13, 2024**

BETWEEN

BARINGO PROGRESIVE COMPANY LIMITED PLAINTIFF

AND

STANLEY CHEMNGOREM 1ST DEFENDANT

JOEL MARINDICH 2ND DEFENDANT

MATHEW KIPCHENGER 3RD DEFENDANT

ANDREW CHELIMO 4TH DEFENDANT

MUSA YATOR 5TH DEFENDANT

GRACE OGELAL CHESUUT 6TH DEFENDANT

RULING

1. The application before me is a Notice of Motion filed by the Applicant (Japeth Kagongo Sirwa) filed pursuant to Article 159 (1) (d) of [the constitution](#). Part IX Section 238 of the [Companies Act](#) 2015 Section 3A, 1B and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 and 15 of [Civil Procedure Rules](#).
2. This application was filed on 16th August, 2018 and is dated 15th August, 2018 and its hearing on the 8th May, 2024 was as a result of insistence by the Court, while the Applicant was reluctant to prosecute his case.
3. The Applicant in making oral submission through Mr. Cheluget Advocate relied on the Certificate of urgency, Chamber summons, Notice of Motion, supporting affidavit by Japheth Kagongo and its annexures, a supplementary affidavit 19th February, 2020 and list of authority dated 20th February, 2020.
4. Applicant submitted that, the application is seeking leave to commence a derivative claim by the company against director.



5. Reference was made to the case of *Wallersteiner v Moir* (No 2) [1975] QB 373 where Lord Denning said;

“if a company is defrauded the majority shareholders, it is company that is victim.

That the nature of this claim is such they would not sign a resolution to sue themselves.

That the law should allow company to sue its majority shareholders’ directors to remedy situation”.
6. That the Legal Provision enshrined under Section 238 of *Company Act* 2015 provides two instances in respect of a cause of action vested in the company and seeking relief on behalf of the company.
7. That under Section 238 (2) – a derivative claim may be brought under the Act. Reference is made to the case of – *Isaiab Waweru Ngumi & 2 others v Mururi Ndungu* of 2016 eKLR where Court enumerated factors to consider:
 - i. Plaintiff has particularized facts revealing a cause of action against defendant attachment of draft plaint done;
 - ii. Consider efforts made to bring the action through other means - exhaustion of local remedy.
 - iii. Consider applicants represent the interests of other shareholders.
 - iv. Acting in good faith.
 - v. Whether action by the applicant is adhering to a director actions in the best interest of company.
 - vi. Whether the cause of action could be brought as a suit or derivative action.
8. The Applicant urged the Court to consider all other authorities and the Affidavit by Japeth Kagongo at paragraph 3 that particularizes transgression on the company, the Draft plaint page 56 of bundle marked as Annexure (4):
 - i. Significant breach of Article of association.
 - ii. Breach of rights of minority members.
 - iii. Breach of directors’ obligation to act (ultra vires)
 - iv. Breach of duty on director to promote success of company.
 - v. Breach of duty to exercise reasonable care, skill and diligence.
9. That if the Court considers the above, it will find breaches and basis for further inquiry as a Court and there is basis for further scrutiny.
10. That the Applicant has showcased and annexed 90 pages of communications and serious fraudulent activities of company, irregular inclusion of members of a company.
11. That there is a clear requirement in Article of Association only executor or personal representative will replace deceased shareholder.



12. That the 1st defendant is in control of the company and that the 1st annexure are annual returns by company dated as 2010 and when asked by the Court the Applicant responded that he is unsure if annual returns have not been done since 2010 and have not engaged with the company's registrar.

Respondents Case

13. The Respondents filed written submissions as directed by Ngugi on 19th February, 2020 and served Applicant urging that, that issues being raised could have been resolved alternatively.
14. Reference is made to the Case of *GhelaMi Metal Ltd & 3 others v Elash Gbelani* where Justice Onguto outlines factors to consider.

Whether there has been exhaustion of alternative means – company meeting?

15. The Respondents submit that, throughout there is no suggestion of attempting alternative resolution.

Is applicant acting for common good for other shareholders or simply pursuing personal vendetta?

16. The Respondents submit that, the replying affidavit and submissions is indicative of an applicant not acting in best interest of company and that the Applicant Mr. Kagongo struggled to wrestle control of company directors validly elected and when he failed decided to come to Court.
17. The Respondents have detailed all the instances.

Thirdly, the applicant is not acting in “good faith.”

18. The Respondents submit that, the Applicant is not keen on success of company and is a defeatist Applicant and that they had highlighted instances that negate “good faith” on part of the applicant.
19. The Respondents submit that, Court considers the seriousness of alleged transgression, do costs benefit analysis of intended action and best interest of company.
20. That the motion does not support best interest of company from a cursory look at prayers that:
- a. Applicant seeks freezing of accounts (Prof. Ngugi disagreed).
 - b. The Notice of Motion and plaint and that is not an allegation and failing to file annual returns.
 - c. The allegations are too generalized (need to plead with particularized detail).
21. That at page 60 of the Applicants bundle paragraph 20 the allegation of irregular appointment of firm of auditors from 1991 (that the Applicant was aware all along as he had served as a director).
22. That the application was filed in 2018 and is now 2024 – 6 years.
23. The Respondents pose questions:
- i. Is it true that the respondents are still in control of affairs of company?
 - ii. Secondly, a lapse of time 6 years, a number of AGMs have been held, have the issues raised in this application been addressed?
 - iii. Are the 2018 issues live and active controversies for consideration of the Court? Or are they moot.
24. Reference of mootness is made to the cases of:



- i. *Wanjiru Gikonyo & 2 others v National Assembly & 4 others* (2016) eKLR. Petition No. 453 of 2015.
 - ii. *Jesse Kamau & 25 Others v. A.G.* Misc. Appl. 890 of 2004. and
 - iii. *Patrick Ouma Onyango & 12 others v A.G & Others* Mis. App. 677 of 2005.
25. The Respondents submit that, the issues are moot, that Applicant had approached 1st Respondent and some agreement arrived at and that the Disagreement is on who becomes Managing Director of the company without allowing company to make decisions on its own.
 26. The Respondents urge the Court to consider the issue of appointment of auditors, is there possibility that some or all the issues were authorized either before or otherwise through ratification in company AGM.
 27. The Respondents submit that, most of issues were ratified in AGM's; therefore, the application has no merit and urge the Court to see through and disallow the same.

Analysis and Determination

28. It is noteworthy that the same has for the last 6 years not been prosecuted, but this Court notes interlocutory order dated 18th October, 2018 by Justice Joel Ngugi, interlocutory order dated 5th December, 2018 by Justice Joel Ngugi and interlocutory order dated 15th October, 2018 whose net effect was to freeze company accounts, and elect interim directors.
29. This Court has considered the lengthy affidavit in support by Mr. Kagongo dated 15th August, 2018 and all its annexures, of important note is annexure JKS7, which is the proposed plaint whereby the reliefs sought only seek to change directors and not to unearth fraud and obtaining a protective related relief.
30. The broad principles to be applied in considering applications for permission was well enunciated in the case of *Isaiah Waweru Njumi & 2 Others -v- Muturi Ndungu* [2016] eKLR, the Court set out the factors to be considered in such an application thus: -
 - 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 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 a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;
 - c. Whether the Plaintiff 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. In the American case of *Recchion v Kirby* 637 F. Supp. 1309 (W.D. Pa. 1986), for example, the 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;

- d. Whether the Plaintiff is acting in good faith;
- e. Whether the action taken by the Plaintiff is consistent with one of 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 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
- g. Whether the cause of action contemplated is one that the Plaintiff could bring directly as opposed to a derivative action”.

- 31. The Applicant has not demonstrated what irreparable harm the company or a minority shareholding group shall suffer if the Motion is not allowed.
- 32. The Court notes the palpable difference between Mr. Kagongo a former director and the current director his bona fides is doubtful and there exists lack of clarity if he proposes to initiate the action on behalf of minorities including himself or the company itself.
- 33. While I do find a *prima facie* case, the same is indicative of an internal wrangle that can ably be addressed by in built companies' regulation without need for derivative action.
- 34. In the case of *Abouraya v Sigmund* [2014] EWHC 227 The Canadian Supreme Court held that:

“The fraud on the minority” exception applies to (a) cases of actual fraud, ie deliberate and dishonest breaches of duty; or (b) in the absence of actual fraud, the alleged wrongdoing must have resulted in loss to the company (LLP in this instance) and personal gain by the wrongdoers”.
- 35. This Court is persuaded in exercise of its discretion that the motion fails for the following reasons: -
 - i. The transgressions as alleged have not benefited the majoritarian directors to the disadvantage of the minority.
 - ii. The ultimate relief sought is the removal of current directors and not blatant breach of fiduciary trust resulting to any known loss.
 - iii. The maladministration complained of was and is subject to ratification by the majority.
 - iv. The fraudulent activities by the respondents' fizzles on the ultimate derivative action sought.
- 36. This Court has thus found this application to be without merit and the same is dismissed.
- 37. Costs of this application shall be payable by Japheth C. Kagongo to the Respondents.
- 38. All prior injunctions and interlocutory orders made herein are hereby lifted.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU

ON THIS 13TH DAY OF MAY, 2024



MOHOCHI S.M
JUDGE

