



Waweru v Karoki; County to County Choma Grill Limited (Interested Party) (Civil Suit E025 of 2023) [2024] KEHC 5358 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E025 OF 2023
FG MUGAMBI, J
MAY 14, 2024**

BETWEEN

HENRY MWAURA WAWERU PLAINTIFF

AND

SAMSON NJOROGE KAROKI DEFENDANT

AND

COUNTY TO COUNTY CHOMA GRILL LIMITED INTERESTED PARTY

RULING

1. The plaintiff filed this suit vide a plaint dated 24th April 2023 and amended on 9th June 2023 in which he seeks a permanent injunction restraining the defendant from maliciously interfering with the management, control and running of the company's bank and business accounts.
2. Alongside the plaint the plaintiff also filed an application dated 24th April 2023, seeking leave to prosecute a derivative action on behalf of the affected party, County To County Choma Grill Limited. The application further seeks injunctive relief against the defendant, from operating the restaurant and interfering with the management, control and running of the company's bank and business accounts.
3. The said application is brought under section 1A, 1B and 3A of the *Civil Procedure Act*, sections 238(3) and 239(1) of the *Companies Act*, 2015 and Order 51 rule 1 of the *Civil Procedure Act*. It is supported by the affidavit and further affidavit both sworn by Henry Mwaura Waweru, the plaintiff, on 24th April and 27th September 2023 respectively.
4. The plaintiff's claim is premised on his shareholding and directorship of the affected party, with the defendant. The plaintiff accuses the defendant of unilaterally taking control of the interested party's



Mpesa till number 5017311. This has led to continuous loss of income by the plaintiff, who further claims that he has been sidelined from the running of the business.

5. The application is opposed by the defendant, vide a replying affidavit sworn by the defendant, Samson Njoroge Karoki, on 1st July 2023. The defendant denies the claims made by the plaintiff and states that he ceased operating the interested party's business with the plaintiff. He further denies that he has any control over the said Mpesa till number or the bank accounts of the interested party. The defendant confirms that he has incorporated his own company known as County To County Smoke Grill Limited.

Analysis

6. I have carefully considered the pleadings, responses and submissions made by rival parties. Whether the Court should grant permission to the plaintiff to proceed with this suit as a derivative suit is governed by sections 238 and 239 of the *Act*. By dint of section 238 (1) of the *Act*, a derivative claim is that which is brought by a member of a Company in respect of a cause of action vested in the Company, seeking relief on behalf of the Company.
7. It is important to note that derivative suits are meant to protect the legal interests of a Company by seeking to redress a wrong done to the Company. A derivative action is therefore an exception to the rule established under *Foss v Harbottle*, (1843) 2 Hare 462 that a corporation should sue in its own name and in its corporate character or in the name of the person appointed by the law to be its representative.
8. Under section 238 (1) of the Act, an applicant must establish that he is a member of a Company, that the cause of action is vested in the Company and, that the reliefs sought must be on behalf of the Company for its own benefit and not for personal gain or benefit. This Court has previously held that these requirements are not independent of each other.
9. The objective of derivative claims was well explained in *Ghelani Metals Limited & 3 Others v Elesh Ghelani Natwaral & Another*, [2017] eKLR. The Court held that:

“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 a corporation.”
10. Under section 239(1) of the *Act*, a person intending to sue on behalf of the Company is required to seek leave of the Court. The Court of Appeal held in the case of *Amin Akberali Manji & 2 Others v Altaf Abdulrasul Dadani*, [2015] eKLR as follows:

“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.”
11. The essence of judicial approval under the Act is to screen out frivolous claims. The court is only to allow meritorious claims as was held in Ghelani Metals Limited. In reaching a determination on leave to proceed with the derivative action, the Court is guided by the considerations stipulated in section 241(2) of the *Act*. These were articulated by the Court quite comprehensively in *Isaiab Waweru Njumi*



ġ 2 Others v Muturi Ndungu, [2016] eKLR. The Court set out the following factors to be considered in such an application:

- i. Whether the plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants;
 - ii. 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;
 - iii. 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;
 - iv. 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;
 - v. Whether the Plaintiff is acting in good faith;
 - vi. 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;
 - vii. 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
 - viii. Whether the cause of action contemplated is one that the Plaintiff could bring as a director as opposed to a derivative action.”
12. In *Ghelani Metals Limited (supra)*, the Court held that this is a two-stage enquiry process envisaged by the Act. In the first stage, 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) of the *Act*. To surmount the first stage, an applicant only needs to establish through evidence, that he has a prima facie case without the need to show that it will succeed. (See *Mrao Limited V First American Bank of Kenya Ltd ġ 2 Others*, [2003] eKLR).
13. Against this background, the plaintiff has particularized his claim against the defendant in his amended plaint. The plaintiff has also attached to his application, a CR12 which confirms that the plaintiff and the defendant are the shareholders and directors to the interested party as at 27th September 2022. No evidence has been presented to this Court by the defendant evidencing his resignation from the Company.
14. Be that as it may, the plaintiff has failed to establish by way of evidence, the specific operations of the said Mpesa till number even prior to the defendant allegedly taking over its control. This would have helped the Court to appreciate who acquired the till number, confirm that the same was for use by the Company and how the same was managed so as to explain the circumstances under which one director could keep the other director from accessing the account. Moreover, the plaintiff has also not established that he had made efforts to bring this alleged breach to the attention of the defendant.



15. Finally, and from the totality of all that I have said, I am left doubtful that the suit that the plaintiff seeks to institute will be for the benefit of the Company. This Court has held time and again that derivative claims should not be used as a means of settling scores between directors and shareholders

Determination

16. For all the reasons that I have stated, I decline to grant leave to the plaintiff to continue with this suit as a derivative action. I find and hold that the applicant has failed to substantiate his claim under sections 238, 239 and 241 of the *Companies Act*. The application dated 24th April 2023 is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

