



**Alambo & another v Nakamoto & 4 others (Commercial Case E453 of 2022)
[2024] KEHC 13518 (KLR) (Commercial and Tax) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13518 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E453 OF 2022
MN MWANGI, J
OCTOBER 22, 2024**

BETWEEN

FELIX OORO ALAMBO 1ST PLAINTIFF

CARI MOTOR LIMITED 2ND PLAINTIFF

AND

TOKIO NAKAMOTO 1ST DEFENDANT

HENRY KEVIN MBUGUA 2ND DEFENDANT

KOJI TOKIDA 3RD DEFENDANT

REGISTRAR OF COMPANIES 4TH DEFENDANT

NATIONAL TRANSPORT & SAFETY AUTHORITY 5TH DEFENDANT

RULING

1. The plaintiffs/applicants filed a Notice of Motion application dated 17th November 2022 pursuant to the provisions of Sections 238-241, 782, 1004, & part X of the *Companies Act* 2015, the Companies (General) Regulations 2015, Order 51 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act*, and all the enabling provisions of the law, seeking an order that leave be granted to the 1st plaintiff to institute and prosecute this suit as a derivative action against the 1st, 2nd & 3rd defendants/respondents on behalf of the 2nd plaintiff, and for the avoidance of doubt, the said leave to operate as authority to the 1st plaintiff to institute and prosecute the derivative suit herein.
2. The application is premised on the grounds on the face of the Motion, and is supported by an affidavit sworn on the same day by Felix Ooro Alambo, the 1st plaintiff herein, and a Director of the 2nd plaintiff. Mr. Alambo averred that he established the 2nd plaintiff company in 2021 with the goal of engaging in



- the importation and sale of motor vehicles. He stated that his co-shareholder, the 1st defendant, is based in Japan. He claimed to have managed the company's affairs successfully adhering to its Articles and Memorandum of Association, until sometime in September 2022 when the 1st defendant and its agents began obstructing the 2nd plaintiff's operations by appointing unknown agents who were instructed to take control of, and sell the motor vehicles that were being held by a storage agent at the Port.
3. The applicant deposed that on 23rd September 2022, he filed HCCOMM No. E365 of 2022: Carii Motor Limited v Stanmore Holdings Ltd & Another, seeking a Court order to prevent any dealings with or transfer of ownership of the motor vehicles, which are assets of the 2nd plaintiff. That during the pendency of the said suit, the 1st defendant initiated the current proceedings seeking to prevent the 1st plaintiff from interfering with the 2nd plaintiff's assets, including leases and licenses. He stated that on 9th November 2022, he discovered that the 1st defendant had secretly filed an application with the 4th defendant through the Business Registration Services (BRS) to alter the company's structure.
 4. He further stated that the application introduced three new directors without his consent, who were unknown to him. Additionally, he noted through the 2nd plaintiff's E-citizen account that a meeting was held on 20th September, 2022 during which it was resolved to appoint the 2nd & 3rd defendants, along with one Esther Ndegi Njiru, as Directors of the 2nd plaintiff. He claimed that these newly appointed Directors have since removed him from the 2nd plaintiff's NTSA portal, disregarded ongoing transactions with third parties, and are managing the company's affairs in a manner that is unfair, exploitative, and detrimental to his position as the rightful Director and Shareholder of the 2nd plaintiff.
 5. In opposition thereto, the 1st defendant filed a replying affidavit sworn on 23rd January 2022 by Tokio Nakamoto, the 1st defendant herein. He averred that upon the incorporation of the 2nd plaintiff, he became the majority shareholder with 990 shares, while the 1st plaintiff held 10 shares and took on the role of the sole Director of the 2nd plaintiff as he resides in Kenya. He explained that the 2nd plaintiff is engaged in the business of importing and selling second-hand motor vehicles, auto parts, heavy machinery, and other products shipped to the region, in partnership with SBI Africa Ltd. Co as an agent. He deposed that the 2nd plaintiff holds leases over properties L.R No. 3734/999 and L.R No. 1/235, which are used for the storage, display, and sale of the imported vehicles. He further deposed that the 2nd plaintiff opened two bank accounts at Diamond Trust Bank Lavington, with account numbers 0736704002 (USD) and 0736704001 (KES), and appointed the 1st plaintiff as the sole signatory.
 6. The 1st defendant stated that he was granted access to the online banking platform through login rights, allowing him to monitor and initiate transactions in the said accounts. He further stated that the 1st plaintiff was the registered owner of mobile phone number 0798100900, which was linked to the 2nd plaintiff's National Transport & Safety Authority (NTSA) account on the Transport Integrated Management System. The 1st defendant contended that between September and December 2021, SBIA shipped a total of 118 motor vehicles to Kenya, valued at approximately Kshs. 195,670,000/=, for the 2nd plaintiff to sell as the consignee. The 1st defendant averred that while the 2nd plaintiff successfully sold 16 vehicles, he noticed that by around May 2022, the 1st plaintiff begun to deliberately and systematically exclude him from the business by interalia, revoking his login rights to the online banking platform. He stated that as a result, he no longer has supervisory access to the bank accounts and he is unable to monitor ongoing transactions.
 7. He further stated that due to the 1st plaintiff's actions, the whereabouts of 102 motor vehicles remain unknown to him, and as a result, as the majority Shareholder of the 2nd plaintiff, he called for an Extraordinary General Meeting, that was held on 20th September 2022. That the said meeting was



- attended by the 1st plaintiff and the 1st defendant, and it was resolved that the 2nd & 3rd defendants be appointed as Directors of the 2nd plaintiff, with Esther Ndegi Njiru being appointed as the Company Secretary. He stated that when he attempted to file the said resolutions with the 4th defendant, he discovered that the 1st plaintiff had without any resolutions or supporting documents, removed him as a Shareholder of the 2nd plaintiff, and fraudulently transferred his 990 shares to himself. The 1st defendant indicated that a search at the Companies' Registry confirmed that as at 12th September 2022, the 1st plaintiff had become the sole Director and Shareholder of the 2nd plaintiff, following an alleged meeting on that date where it was resolved to remove him as a Shareholder.
8. That as a result, the 1st defendant's Advocates by a letter dated 21st September 2022 notified the 4th defendant of the aforesaid irregularities and requested a correction of the Register. The 1st defendant averred that the 4th defendant investigated the matter and gave the 1st plaintiff an opportunity to respond to the allegations, but he did not do so. Consequently, the 4th defendant reinstated the 1st defendant's shares. Following this, the 2nd plaintiff's Company Secretary, Esther Ndegi Njiru, filed the necessary documents to appoint the 2nd & 3rd defendants as Directors of the 2nd plaintiff, in line with the resolution passed on 20th September 2022. He claimed that without his knowledge, the 1st plaintiff while asserting himself as the sole Director and Shareholder of the 2nd plaintiff, filed HCCOMM No. E365 of 2022 on 23rd September 2022 seeking release of over 50 motor vehicles shipped by SBIA and held at the Port in Mombasa.
 9. He averred that the 1st plaintiff also successfully obtained interim injunctive orders, which prevented SBIA's partner companies including the 2nd & 3rd defendants, from dealing with, disposing of, or transferring ownership of the vehicles shipped by SBIA and being held at the Port in Mombasa. That during a meeting held on 15th November 2022, the 2nd plaintiff passed a resolution and instructed the law firm Muriu Mungai & Company Advocates to represent it in HCCOMM No. E365 of 2022 and withdraw the said suit. However, before the suit could be withdrawn, the 1st plaintiff served Court orders from this suit which prohibited the 2nd plaintiff from holding any meetings or passing any resolutions, and withdrawing HCCOMM No. E365 of 2022.
 10. The 1st defendant argued that the 1st plaintiff could not have filed this suit in the best interests of the 2nd plaintiff as he continues to deplete the 2nd plaintiff's assets. He averred that the 1st plaintiff has transferred all the funds from the 2nd plaintiff's bank account at Diamond Trust Bank Limited and relocated the 2nd plaintiff's motor vehicles to unknown locations with the intent to fraudulently dispose of them. He further averred that this suit violates the doctrine of exhaustion, as the 1st plaintiff has already filed a complaint with the 4th defendant, challenging the appointment of the 2nd & 3rd defendants as Directors of the 2nd plaintiff, and the 4th defendant has yet to complete its investigation in the matter.
 11. The 2nd defendant, Kevin Mbugua, filed a replying affidavit sworn by himself on 25th January 2023, as a Director of the 2nd plaintiff company. He associated himself with the contents of the 1st defendant's replying affidavit and confirmed that during a meeting held on 20th September 2022, he and the 3rd defendant were properly appointed as co-directors of the 2nd plaintiff. That following the said changes, the 1st plaintiff filed a complaint with the 4th defendant challenging the legitimacy of their appointment. The 2nd defendant then instructed the law firm of Muriu Mungai & Company Advocates to respond to the complaint, which was done.
 12. He claimed that without his knowledge, the 1st plaintiff while asserting himself as the sole Director of the 2nd plaintiff filed HCCOMM No. E365 of 2022 in the name of the 2nd plaintiff, seeking the release of over 50 motor vehicles shipped by SBIA. The 1st plaintiff also obtained interim injunctive orders



- preventing SBIA's partner companies from dealing with, disposing of, or transferring ownership of the vehicles. He averred that on 15th November 2022, the 2nd plaintiff passed a resolution instructing the law firm of Muriu Mungai & Company Advocates to represent the 2nd plaintiff in the suit and withdraw it, but before the suit could be withdrawn, the 1st plaintiff served the Court orders issued in this case.
13. The 3rd defendant, Koji Tokida, filed a replying affidavit sworn by himself on 23rd January 2023, as a Director of the 2nd plaintiff. The 3rd defendant's averments are similar to those of the 2nd defendant. He associated himself with the contents of the 1st defendant's replying affidavit and averred that the 1st plaintiff has transferred all the monies from the 2nd plaintiff's bank account and has moved the 2nd plaintiff's motor vehicles to unknown locations with the intent of fraudulently disposing the same. He further averred that the 1st plaintiff has come before this Court with unclean hands having initially fraudulently transferred the 1st defendant's shares to himself. The 3rd defendant asserted that the instant application does not meet the threshold for being granted leave to institute a derivative suit since the 1st plaintiff cannot account for the 2nd plaintiff's assets, and his actions are riddled with dishonesty intended to benefit only him.
 14. In opposition to the instant application, the 4th defendant filed a Notice of Preliminary Objection dated 20th January 2023 raising the following issues –
 - i. The application and suit offend the doctrine of exhaustion as in the first instance the Registrar of Companies has the power to rectify the Register in line with Section 862 of the *Companies Act* No. 17 of 2015; and
 - ii. The application and suit be struck out with costs.
 15. The 4th defendant also filed a replying affidavit sworn on 3rd February 2023 by Eric Walala, a Senior Assistant Registrar of Companies. He confirmed that their records show that the 2nd plaintiff was incorporated on 7th November 2021, with the 1st plaintiff and the 1st defendant as the only Shareholders, and the 1st plaintiff as the sole Director. That on 14th September 2022, the 1st plaintiff submitted an application to remove the 1st defendant as a Shareholder and transfer the 1st defendant's 990 shares to himself, based on a resolution allegedly passed during a meeting held on 12th September 2022. He averred that in support of the application for shares transfer, the 1st plaintiff provided the minutes of a meeting, an affidavit sworn by the 1st defendant on 12th September 2022 prepared by Advocate Alexander Mose Onyancha, and commissioned by Advocate Hillary Orina.
 16. Mr. Walala contended that on 21st September 2022, the 4th defendant received a complaint from the law firm MMC Asafo Advocates on behalf of the 1st defendant, challenging his removal as a Shareholder of the 2nd plaintiff, and requested for an investigation into the circumstances under which various documents were filed at the 4th defendant's Registry. That as a result, the 4th defendant sent a letter dated 28th September 2022 to the 1st plaintiff, and Advocates Hillary Orina & Alexander Mose Onyancha, requesting a response to the 1st defendant's complaint within fourteen (14) days, but the said letter elicited no response hence the 4th defendant sent a reminder to the 1st plaintiff asking for a reply within seven (7) days. He contended that Advocate Hillary Orina responded to them stating that the signature on the share transfer form and affidavit, as well as the Commissioner for Oaths stamp did not belong to him, and that the parties had never appeared before him. Mr. Walala deposed that the 1st plaintiff did not respond to the complaint or comment on the responses received by the 4th defendant.
 17. Additionally, Mr. Walala averred that the 4th defendant discovered that Advocate Alexander Mose Onyancha who supposedly prepared the affidavit, had passed away in 2018, making it impossible for



him to have drafted the affidavit. Mr. Walala stated that the 4th defendant also discovered that before processing the application, a CR-7 form which is a notification of change of particulars for Directors (such as email, telephone, or postal address) had been filed on 12th September 2022 to change the 1st defendant's email address. He stated that the application was submitted through the 1st defendant's e-visitors' account on the e-Citizen platform, but the payment was made via a third party's mobile M-Pesa account, and attempts to contact this third party were unsuccessful. That based on the said findings, the 4th defendant concluded that the decision to remove the 1st defendant and transfer his shares to the 1st plaintiff was not authorized by either the 2nd plaintiff or the 1st defendant.

18. Mr. Walala averred that the documents filed by the 1st plaintiff were removed from the record, and the 2nd plaintiff's status was restored to its original position at the time of incorporation. Mr. Walala acknowledged that applications were filed by Esther N. Njiru appointing the 1st, 2nd & 3rd defendants as Directors of the 2nd plaintiff based on minutes that also appointed her as the 2nd plaintiff's Company Secretary. He added that an application to transfer shares was lodged on 15th December 2022, but it remains pending due to this case. He also stated that in a letter dated 18th November 2022, the 1st plaintiff's Counsel filed a complaint objecting to the appointment of the 1st, 2nd & 3rd defendants, arguing that their appointment occurred without his involvement hence the directorship of the 2nd plaintiff should be restored to its original status at the time of incorporation.
19. The instant application was canvassed by way of written submissions. The plaintiffs' submissions were filed by the law firm of Odero & Partners Advocates on 23rd August 2023 & the 1st, 2nd & 3rd defendants' submissions were filed on 12th December 2023 by the law firm of Muriu, Mungai & Co. Advocates LLP. On 13th December 2023, Mr. Akoth, learned Counsel for the 4th defendant indicated that the 4th defendant would not be filing any written submissions, and it would rely on its replying affidavit.
20. Mr. Miiri, learned Counsel for the plaintiffs relied on the case of *Giella v Cassman Brown & Co. Ltd* [1973] (CAK). Spry VP and submitted that the plaintiffs have made out a case warrant being granted of the orders sought in the instant application
21. Mr. Kenneth Wilson, learned Counsel for the 1st, 2nd & 3rd defendants relied on the Court of Appeal cases of *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, and *Speaker of National Assembly v Karume* [1992] KLR 21, and submitted that the 1st plaintiff is required to exhaust other remedies provided by law prior to invoking this Court's jurisdiction. He further submitted that the 1st plaintiff lodged a complaint with the 4th defendant challenging the appointment of the 1st, 2nd & 3rd defendants as the 2nd plaintiff's Directors, and that the 4th defendant has since conducted its investigations culminating in a recommendation dated 7th July 2023 dismissing the 1st plaintiff's complaint.
22. Counsel contended that if the 1st plaintiff is aggrieved by the 4th defendant's decision being an administrative action, he should challenge it in the appropriate forum as this is not the correct forum to do so. He cited the Court of Appeal case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, and stated that the 1st plaintiff did not disclose to this Court that at all material times, he was the one in control of the 2nd plaintiff and that he cannot account for the 2nd plaintiff's assets such as monies in the bank accounts and over 102 motor vehicles.

Analysis and Determination.

23. I have considered the application filed herein, and the affidavit filed in support thereof. I have also considered the replying affidavits filed by the 1st, 2nd, 3rd & 4th defendants and the written submissions by Counsel for parties. The issues that arise for determination are -



- i. Whether the plaintiff's Preliminary Objection is valid; and
- ii. Whether the 1st plaintiff should be granted leave to prosecute this suit as a derivative action.

Whether the plaintiff's Preliminary Objection is Valid.

24. In the case of *Mukisa Biscuits Manufacturing Ltd v Westend Distributors Ltd* [1969] E.A at page 700, the Court defined what a Preliminary Objection is, and how it operates. The Court stated as follows-

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

25. The Supreme Court of Kenya weighed in on the issue of Preliminary Objections in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others* [2015] eKLR and stated that -

... Thus, a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

26. The 1st, 2nd & 3rd defendants' Preliminary Objection is based on the ground that the suit between the parties herein, and the instant application offend the doctrine of exhaustion. The said doctrine is defined in the *Black's Law Dictionary* 10th Edition as follows –

Exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.

27. The Court of Appeal in the case of *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd* [2011] eKLR, while speaking to the doctrine of exhaustion made the following observation -

...Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...

28. Under the provisions of Section 862 of the *Companies Act*, the Registrar of Companies has been mandated to rectify the Register on application by a company or any other person who appears to



the said Registrar to have a legitimate interest in making such an application. Further, pursuant to the provisions of Section 863 of the *Companies Act*, Courts have also been granted the power to rectify the Register. I am therefore not persuaded that this suit offends the doctrine of exhaustion pursuant to the provisions of Section 862 of the *Companies Act*.

29. The above notwithstanding, vide a letter dated 18th November 2022, the 1st plaintiff lodged a complaint with the 4th defendant challenging the appointment of the 1st, 2nd & 3rd defendants arguing that their appointment occurred without his involvement, hence the directorship of the 2nd plaintiff should be restored to its original status at the time of incorporation. This suit on the other hand was filed vide a plaint dated 17th November 2022 also challenging the appointment of the 1st, 2nd & 3rd defendants and the subsequent resolutions passed after their appointment. In the spirit of coherence, and to avoid issuing conflicting decisions, this Court gave the 4th defendant an opportunity to file its report on the complaint lodged by the 1st plaintiff before the hearing and determination of this application and the suit.
30. In a letter dated 3rd March 2023 addressed to the 2nd plaintiff by the 4th defendant, the latter noted of the existence of this suit and Misc. No. 714 of 2022 and stated that it is unable to address the complaint lodged by the 1st plaintiff. The 4th defendant further noted that it would be sub judice to delve into the matter and advised the parties to have the issue determined in a Court of law with a view to resolving the dispute. In the premise, this Court finds that the instant application and this suit do not offend the doctrine of exhaustion.

Whether the 1st plaintiff should be granted leave to prosecute this suit as a derivative action.

31. Derivative claims are provided for under Sections 238-241 of the *Companies Act*, 2015. Section 238 defines a derivative claim as hereunder -
 1. In this Part, "derivative claim" means proceedings by a member of a company-
 - a. in respect of a cause of action vested in the company; and
 - b. seeking relief on behalf of the company.
 2. A derivative claim may be brought only-
 - a. under this Part; or
 - b. in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
 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 of the company.
32. In *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] eKLR, the Court made the following observation with regard to a derivative action -

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.

33. Part XI of the *Companies Act*, 2015 grants this Court the discretion to grant leave to a company's minority shareholder to proceed with a suit as a derivative action. It is well settled that in dealing with such an application, the Court must first satisfy itself that the applicant has established a prima facie case with high chances of success. In the case of *Isaiah Waweru Ngumi & 2 others v Muturi Ndungu* [2016] eKLR, the Court set out some of the factors to be considered in such an application as hereunder -
- 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.
34. From the documentation availed before this Court, the 2nd plaintiff has two Shareholders being the 1st plaintiff and the 1st defendant. The 1st defendant holds 990 shares, whereas the 1st plaintiff holds 10 shares, thus the 1st defendant is the majority Shareholder and the 1st plaintiff is the minority Shareholder. The 1st plaintiff contended that without his consent and/or approval, the 1st defendant brought the 2nd & 3rd defendants on board as the 2nd plaintiff's Directors, and one Esther N. Njiru to act as the Company Secretary. The 1st plaintiff contended that the said parties have been holding meetings



in his absence and passing resolutions that undermine his directorship with the aim of removing him as a Director of the 2nd plaintiff.

35. The 1st defendant averred that the resolution to onboard the 2nd & 3rd defendants as the 2nd plaintiff's Directors, and one Esther N. Njiru to act as the Company Secretary was passed in an Extraordinary General Meeting called by the 1st defendant and attended virtually on google meet by the 1st defendant and the 1st plaintiff on 20th September 2022. In support of this allegation, the 1st defendant produced a copy of the Shareholder's resolutions annexed to his replying affidavit as annexure No. TN-10. Notably, the 1st plaintiff has not filed a further affidavit to dispute having attended the said meeting and/or the authenticity of the Shareholder's resolutions produced by the 1st defendant.
36. I note that the 1st plaintiff has not particularized the 1st, 2nd & 3rd defendant's actions that are detrimental to the 2nd plaintiff. To the contrary, the 4th defendant has demonstrated how the 1st plaintiff fraudulently removed the 1st defendant as a Shareholder of the 2nd plaintiff and transferred his shares to himself. Further, when called to respond to the allegations raised by the 1st and 4th defendants, the 1st plaintiff did not respond to the 4th defendant nor deny the 1st defendant's allegations. It is worthy of note that the 1st defendant has demonstrated vide annexure No. TN-8 that a representative and/or employee of Diamond Trust Bank informed him that the 1st plaintiff initiated the deletion of his internet banking profile. These allegations have not been disputed by the 1st plaintiff by way of a further affidavit or otherwise.
37. Furthermore, the 1st plaintiff has also been accused of moving the 2nd plaintiff's motor vehicles to an unknown location and emptying the 2nd plaintiff's bank accounts held at the Diamond Trust Bank Lavington Branch, but he has not bothered to deny and/or respond to the said allegations. In the case of *Altaf Abdulrasul Dadani v Amini Akberazi & 3 others, Nairobi (Milimani) HCCC No. 913 of 2002 [2004] 1 KLR 95*, it was held that -

By derivative suits, the minority shareholders(s) feeling that wrongs have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company, come to court as agents of the 'wronged' company to seek reliefs or relief for the company itself, all the shareholders including the wrong doers, and not for the personal benefit of the suing minority shareholders (s)..... it is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights and actions vested in the company to sue for the wrongs done to it and in the absence of illegality a shareholder cannot bring these proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters.... However if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such shareholder can bring an action by way of derivative action... mere irregularity in internal running of a company cannot be a basis for one to bring a derivative suit for such can be rectified by a vote/resolution at the company's meetings and if a shareholder contemplates using a personal claim of infringement of his rights then a derivative suit will not avail as the relief must be for the benefit of the company..."

38. In light of the applicable law, and the authorities I have cited in this ruling, I am not persuaded that the 1st plaintiff has filed the application herein in good faith and/or made out a case to warrant this Court to interfere with the 2nd plaintiff's corporate personality as was held by the Court in the case



of Salomon v Salomon [1897] A.C. 22. The reliefs sought by the 1st plaintiff in this suit are geared to protect his personal interests rather than those of the 2nd plaintiff.

39. In the end, this Court finds that the 1st plaintiff has not demonstrated that the 1st, 2nd & 3rd defendants in their capacities as Directors of the 2nd plaintiff have engaged in acts and/or omissions to the detriment of the 2nd plaintiff and its shareholders. Consequently, it has not made out a case to warrant being granted an order for leave to proceed with this suit as a derivative action.
40. The upshot is that the instant application is devoid of merits. It is hereby dismissed with costs to the 1st, 2nd, 3rd & 4th defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF OCTOBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the plaintiffs/applicants

Mr. Kenneth Wilson for the 1st, 2nd and 3rd defendants/respondents

No appearance for the 4th defendant

No appearance for the 5th defendant

Ms. B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

