



REPUBLIC OF KENYA



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Njau v Wairimu & another; NCBA Bank (Interested Party) (Civil Case E061 of 2022) [2023] KEHC 2145 (KLR) (Civ) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE E061 OF 2022**

**JN MULWA, J
MARCH 10, 2023**

BETWEEN

KING KARASHA NJAU PLAINTIFF

AND

CHRISTINE WAIRIMU 1ST RESPONDENT

ALLFINDERS COMPANY LIMITED 2ND RESPONDENT

AND

NCBA BANK INTERESTED PARTY

RULING

1. There are two applications before the court for determination dated: 12th April 2022 and 5th May 2022
2. The application dated 12th April 2022 is brought by the Plaintiff King Karasha Njau by which he seeks numerous orders inter alia:
 1. Spent
 2. That pending hearing and determination of this application and the suit, the Honourable court be pleased to grant the plaintiff leave to institute derivative suit on behalf of the 2nd Defendant herein.

There are other nine prayers which in my view are dependent on whether the court grants the above prayer, for leave being granted to the Plaintiff to institute a derivative suit on behalf of the 2nd Respondent herein, Allfinders Company Limited.



3. However, on the 14th of April 2022 upon being moved under a certificate of urgency, the court granted prayer number 1 and 3 of the said application in the interim, pending hearing and determination of the application.

Prayer number 3 granted and issued a preservative order directed to the Manager of NCBA Bank Kilimani Branch (1st Interested Party) to preserve funds held in the 1st Defendant's names (Christine W Kariuki Accounts as stated thereof and in the 2nd Defendant's names.
4. Upon service of the application and the interim court orders, the 1st Defendant Christine Wairimu on the 5th of May 2022 filed an application seeking orders for review, variation, setting aside and or discharging the orders of 14th April 2022.
5. The court therefore directed that the two applications be heard together and extended the interim orders of preservation of the subject money in dispute between the parties in the suit.
6. The application dated 12th April 2022 is supported by an affidavit sworn by the Plaintiff on even date, and a further affidavit sworn on the 11th of May 2022 as well as a replying affidavit to the application dated 5th May 2022 and written submissions dated 6th June 2022 filed by his Advocates; Alosa Advocates LLP.
7. The 1st defendant filed a replying affidavit sworn on the 5th of May 2022 as well as submissions on both applications. The interested party NCBA Bank filed its responses to both applications as well as submissions on the 16th of June 2022.
8. The Plaintiff/Applicant and the 1st Respondent were at all material times were/are directors of the 2nd Defendant Allfinders Company Limited, which Company was a customer to the bank, as an account holder at Account Number 3256080017, and Money Market Funds (MMF) Account Number 14972; whereof both were authorized to transact in the said accounts.
9. The 2nd Respondent in its corporate identity has not filed responses to the two applications nor submissions.

The Applications

10. Whether the Plaintiff should be granted leave to bring a derivative action on behalf of Allfinders Company Limited, the 2nd Defendant.

The Applicant /Plaintiff and the 1st Respondent are the only directors of the 2nd Respondent, as well as being husband and wife, but now estranged as evidenced by a Divorce Cause Number E197 of 2022 pending before the Chief Magistrate's Court at Milimani. This has caused the operations of the company obsolete due to the matrimonial disputes and alleged illegal transfers from the Company's Bank Accounts held at the interested party, NCBA by the 1st Respondent.
11. It is alleged by the Applicant that the Co-director, wife and shareholder has fraudulently withdrawn and transferred money in the sum of Kshs. 701,000/- on various dates to her personal accounts held at NCBA to the detriment of the company hence seeks leave to bring a derivative suit on behalf of the company to safeguard the company's interests.
12. In response to the application dated 12th April 2022, the 1st Respondent filed a Motion dated 5th May 2022 seeking an order to review, set aside, vary or discharge the conservatory orders issued on the 21st April 2022 (granted on 14th April 2022) on grounds that the Applicant (Plaintiff) did not disclose material facts to the court that both parties were husband and wife, and the pending divorce proceedings in the Chief Magistrate's Court, that there is no evidence tendered before the court that



funds were transferred from the company accounts to the 1st Respondent's accounts and that the affairs of the company are being managed as was from inception in 2014, and that it is the Plaintiff who withdrew all the funds in the accounts in the sum of Kshs 350,000/- as at 23rd February 2022; and that the freeze order of her accounts is only meant to punish her, is malicious and the court is being used as a bullying tool. She therefore has urged the court to discharge the preservative orders.

13. The Plaintiff in rejoinder to the 1st Defendant's application filed a further affidavit sworn on the 11th May 2022 in which he depones that the two parties agreed that the 1st Defendant runs the company for their mutual benefit while he offered support other than the daily running of the Company, but again reiterates that he was denied and blocked from engaging in the operation of the company, including relocating the company business premises to an unknown location as there is no communication between them, but again urges that it is possible for a resolution of the dispute including division of the properties and shares between them as to safeguard the commercial interests of the company.
14. I have considered the Plaintiff's submissions dated 6th June 2022 and the Interested Party's dated 19th January 2023.
The 1st Defendant has not filed her submissions as at 15th February 2023.
15. The issues that arise for determination of the two applications are well captured by the Plaintiff and the interested party thus:
 - i. Whether the application as filed by the Plaintiff meets the legal threshold of a derivative action.
 - ii. Whether the Applicant (Plaintiff) has established a prima facie case against the interested party.
 - iii. Whether the preservation orders dated 14th April 2022 issued by the court on the 21st of April 2022 should be discharged.

Analysis and Determination

16. It is trite that a company operates through its Board of Directors, in this case its two directors and the only shareholders, a man and his wife who have since severed their relationship as clearly evidenced by divorce proceedings before the Chief Magistrates Court. Without a doubt, there exists communication barriers that have affected the smooth running of the Company's affairs as each of the directors accuse the other of operating and siphoning the company's funds to themselves without authority of the other.
17. In the first instance, the Plaintiff admits having left the operations of the company, the 2nd Defendant to the 1st Defendant. The Interested Party, NCBA where the company Accounts are held depones in its affidavit and submissions that in the MMF Account 14972, an Investment Money Markets Fund Account, the funds held therein were withdrawn on the 23rd February 2022 leaving a NIL balance; by the 1st Defendant upon instructions by either the 1st Applicant or 1st Respondent in regard to the transactions relating to the accounts of the 2nd Defendant.
18. The Interested Party has submitted that Account Numbers 100267496 and MMF Account Number 14968 are run and controlled by Christine Wairimu as Personal Accounts as per instructions it holds in respect of the said accounts, and per instructions issued by the said Christine Wairimu, the 1st Defendant.



19. That being the case, and those facts having been withheld from the court at the time of filing the suit and the application dated 12th April 2022, the court hereby finds and holds that the following accounts held at NCBA are Personal Accounts of the 1st Respondent Christine Wairimu:

1. Account Number 100267496
2. MMF Account No.14968

20. The Company's (2nd Defendant/Respondent) accounts held at NCBA as seen from the affidavits are:

1. A/C No.3256080017 and,
2. MMF Account No. 14972

The court orders dated 14th April 2022 and issued on the 21st of April 2022 in respect of the Bank Account held at NCBA are hereby forthwith discharged.

To that extent, the application dated 5th May 2022 is hereby allowed, but with on orders as to costs.

The above resolves issue numbers (ii) and (iii) as well as dismissing the Plaintiff's prayer number 3 in the Motion dated 12th April 2022.

21. Left for determination is number prayer number 2 in the Plaintiff's application dated 12th April 2022.

I have considered the submissions filed by the Plaintiff in respect of the above issue; whether to grant leave to the Plaintiff to bring a derivative suit on behalf of the 2nd Defendant Company.

22. The 1st Defendant is stated to be the majority shareholder holding 60% of the shares and the Plaintiff the minority, holding 40%.

By his own admission, the Plaintiff left the operations of the company to his wife, the 1st Defendant. He cannot now come to court complaining that the 1st Defendant has taken over total control of the company including possession of all company documents.

As to the allegation that she transferred all company money to her personal accounts, it is only upon trial and evidence tendered to prove the said allegation that will determine the truth of the said allegation. It is not a matter for an interlocutory application.

23. The court is minded of the Principles of Company Law as set out in the celebrated case *Salmon Vs Salmon Company Limited* (1895-99) ALL ER 33 that a company acquires its own property, rights and liabilities separate from the members upon incorporation.

These principles have been used and reiterated within our jurisdiction in numerous Superior Courts' Decisions notably; *Rai & Others Vs Rai & Others* (2002) 2 EA 537; *Grace Wanjiru Munyinyi & Another Vs Gedion Waweru Githunguri & 5 Others* (2011) e KLR among many others.

24. By the parties' averments, there is no doubt that there is a deadlock within the Board of Directors that has crippled the operations of the company.

It is also not in doubt that the company cannot sue in its own name to redress what it alleges to be wrongs committed by the directors/shareholders themselves as to redress the same wrongs.

25. A derivative action is described at Section 238 of the Companies Act, as a proceeding by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company.



26. Section 238 (3) provides that a derivative claim 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.
27. In the case *Gbelani Metals Limited & 3 others Vs Elesh V, Glesh Gbelani Natwaral & another* (2017) e KLR, the court held: -
- “Derivative actions are the pillars of corporate litigants. As I understand it, a derivative action is a mechanism which allows shareholders to litigate on behalf of the corporation often against an insider (whether 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 wrong doers, in the form of a representative suit filed by a shareholder on behalf of a corporation”
28. Further in an earlier case *Dedani Vs Mangi & 3 others* KLR 95 stated:
- “It is a cardinal principle in company law that it is for the company and not an individual shareholder to enforce rights of actions vested in the company and to sue for wrong done to it.”
29. Thus the mechanism of a derivative action may only be brought upon the Applicant establishing that he is a member of the company and a bonafide cause of action that a company has failed, refused or neglected to pursue for and on behalf of the company.
- Secondly, the Applicant must establish a prima facie case that the affected company may not have authorized and that it has caused damage and loss to the company, either fraudulently or by forgery of company documents.
30. A prima facie was defined in the case of *Mrao Limited Vs First American Bank of Kenya Limited & 2 others* (2003) e KLR to be one where on the material presented before the court, a tribunal upon properly directing itself will conclude that a right belonging to one party has been breached requiring an explanation by the opposite party – see *Arnold Kipkirui Langat Vs Atticom Limited & 6 Others; Linkit limited (affected company)* 2021 e KLR.
31. The Plaintiff/Applicant has already filed this suit against his co-director for various alleged fraud and fraudulent conversion and breach of trust, that, it is claimed to have caused losses and damage to the company in the sum of Kshs 18,341,900/- in terms of lost stock; and loss of Kshs 701,000/- all within the period January 2018 and 31st March 2022.
32. The plaint is dated 12th April 2022 and seeks re-imbusement of the above sum – Kshs19,042,900/- to the 2nd Defendant. Other prayers sought in the plaint are that the shares held by the Plaintiff being 40% of the value of the company be liquidated and the Plaintiff be compensated in full for the market value of his shares in the company.
33. It is therefore clear that the Plaintiff/Applicant has established a prima facie case to warrant grant of the orders sought for leave to institute a derivative action. This is so because, as stated above, the two parties are the only shareholders and directors of the company. Due to their marital dispute, they cannot call for a board meeting; even if they did, they would not agree or authorize themselves or one of them to sue their company, in essence sue themselves.
34. In situations as obtaining in this case, some means must be found for the company to sue, so as to safeguard the company’s interests. The above scenario was well explained in the *Rai & others Vs Rai and*



Others (Supra) when the court cited the case of *Prudential Assurance Company Limited Vs Newman Industrial Limited & Others* (1982)/ALL ER at page 375 and observed that:

- a. “There is no room for the operation of the rule of law if the alleged wrong is ultra vires the corporation, because the majority shareholders cannot confirm the transaction;
 - b. There is no room for the operation of the rule if the transaction complained of could be validly sanctioned only by a special resolution or the like because a simple majority cannot confront a transaction which requires the concurrence of a greater majority; and
 - c. There is an exception to rule where what has been done amounts to fraud and the wrong doers are themselves in control of the company”.
35. For the above, this court finds that the 2nd Defendant’s woes can only be resolved through a derivative suit.
- The Plaintiff/Applicant though not sought an order for leave to continue this suit as a derivative suit, I am of the considered view that there would be no need to file a fresh suit when what is on record would suffice.
- In the circumstances, upon the court’s inherent powers donated vide Section 1A, 1B, and 3A of the civil Procedure Act, I am persuaded to allow the instant suit to be continued as a derivative action against the Defendants or as the Applicant may deem fit.
36. NCBA Bank is cited as the interested party in the suit. In my view, it has made out a case for its removal as a party from the suit and in effect to the derivative suit.

Disposition

37. The Application dated 12th April 2022 filed by the Plaintiff against the two Defendants and NCBA as an Interested Party is hereby allowed in the following manner: -
- a. The Applicant/Plaintiff is hereby granted leave to continue this instant suit as a derivative suit on behalf of the 2nd defendant company herein.
 - b. The 1st Interested Party, NCBA Bank is hereby removed from this suit, as the court finds it as an unnecessary party in the derivative suit.
 - c. That the preservative orders dated 14th April 2022 and issued by the court on the 21st April 2022 are hereby discharged.
 - d. The Plaintiff is condemned to pay costs of this application to NCBA Bank only.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

J. N. MULWA

JUDGE

