



**Njenga & 2 others v Ecobank (K) Limited & another (Civil Suit E484 of 2022)
[2023] KEHC 17448 (KLR) (Commercial & Admiralty) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL SUIT E484 OF 2022**

A MABEYA, J

MAY 17, 2023

BETWEEN

MAINA STEPHEN NJENGA 1ST PLAINTIFF

FELIX RANTUU LEKISHE 2ND PLAINTIFF

SOLOMON JOSEPH MAINA 3RD PLAINTIFF

AND

ECOBANK (K) LIMITED DEFENDANT

AND

KIWIPAY (K) LIMITED NOMINAL DEFENDANT

RULING

1. Before court is the plaintiff's application dated 5/12/2022. It was brought under articles 48 and 50(1) of the Constitution, sections 238 of the Companies Act, sections 1A, 1B & 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules.
2. The application sought orders that the plaintiffs be granted leave to continue the suit filed herein as a derivative action on behalf of the nominal defendant. The application also sought orders that the defendant be directed to provide banks statements of the nominal defendant's bank account being 6682003058, 6682003059 and 6682003378.
3. The grounds for the application were set out on the face of the Motion and in the supporting affidavit of Maina Stephen Njenga sworn on 5/12/2022. It was contended that the suit was brought on behalf of the nominal defendant as against the defendant whose actions or omissions had caused the nominal company financial loss and damage.



4. That the defendant had deliberately breached the banker-customer relationship between it and the nominal defendant by inter alia permitting the majority shareholder of the nominal company to single-handedly transact monies amounting to USD 10 million in the bank on the basis of a purported resolution passed on 25/6/2021. That the bank maintained that the resolution permitted such transaction via internet banking yet the nominal defendant had not passed such a resolution authorizing internet banking.
5. That despite demands, the defendant had failed to provide the plaintiffs with the bank statements to conceal the financial loss suffered as the monies held in those accounts was not for personal use but property of the nominal defendant.
6. That the plaintiffs were minority shareholders in the nominal company. That vide a consent order recorded in court on 14/11/2022 in Nairobi HCCC Petition E010 of 2022, it was settled that the bank accounts in the defendant be operated in accordance with the prior existing instructions between the nominal defendant and the defendant or as the nominal defendant shall instruct the defendant. That the registrar of companies was also directed to revert and restore the plaintiffs' directorships and shareholding in the nominal defendant.
7. That a resolution of 15/9/2022 together with minutes by which the plaintiffs were added as joint signatories to the accounts of the nominal defendant had been given to the defendant bank. The bank had disregarded the same and still permitted the majority shareholder to single-handedly transact the nominal defendant's accounts. That the bank was cherry picking which resolutions it was to comply with. It had paid itself USD 1.8 million and GM Gamma Advocates USD 930,000 as instructions fee.
8. The application was opposed vide the replying affidavit sworn by Gregory Schmidt on 13/2/2023 on behalf of the nominal defendant. He was the director of KiwiPay PTE Limited, the majority shareholder of the nominal defendant. He denied any breach of the banker-customer relationship on the part of the bank.
9. That until the consent order of 14/11/2022, the plaintiffs were not directors or shareholders in the nominal defendant and could not make any resolutions or enforce obligations on the defendant bank.
10. That the resolution of 15/9/2022 was unknown to him and on that date, the plaintiffs were not directors nor shareholders. That the defendant simply complied with prior instructions by permitting transactions. That there was no valid cause of action to bring a derivative suit on behalf of the nominal defendant and the claim as framed was personal to the plaintiffs as it did not seek a redress for the nominal defendant.
11. That the reliefs sought were not on behalf of the nominal defendant and the information sought was accessible internally by virtue of the plaintiffs being shareholders. That request for that information was not made to the defendant and the application was premature and ought to be dismissed.
12. Though the defendant filed submissions dated 28/2/2023 and highlighted the same in court on 10/5/2023, there was no record of its replying affidavit in the court's e-filing system. All that was available was the notice of appointment and the written submissions.
13. The application was canvassed by way of written submissions which were highlighted on 10/5/2023. This court has considered the submissions and pleadings before it. This is an application to bring a derivative suit on behalf of the nominal defendant.



14. By dint of section 238 (1) of the Act, a derivative claim is only that which is brought;
“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.”
15. These conditions are not independent of each other. An applicant must establish that he is a member of a company, that the cause of action is vested in the company and, the reliefs sought must be on behalf of the company for its own benefit.
16. The plaintiff’s case was that by dint of a consent order made on 16/11/2022 in Petition E010 of 2022, the registrar of companies was directed to revert and restore their directorship and shareholding in the nominal defendant. That though the registrar was yet to comply, the orders were valid and in existence thus the plaintiffs were valid directors and shareholders.
17. Counsel for the nominal defendant on his part submitted that the plaintiffs passed the resolution of 15/10/2022 when they were not members of the nominal defendant thus the resolution was not binding on the bank.
18. It is trite that equity treats as done that which ought to be done. See the Court of Appeal case of *Willy Kimutai Kitilit vs Michael Kibet* (2018) eKLR. Upon adoption of the Order on 14/11/2022, the plaintiff shareholding and directorship was restored. All that was left was to effect the same. There is no evidence that the said order has been set aside. The first condition has therefore been met.
19. The second condition is whether the cause of action vests in the company and that the claim is on its behalf. The answer to this can only be found in the plaint dated 5/12/2022. The claim is brought as against the defendant for alleged breach of its duties to the nominal defendant. That it permitted transactions which are alleged to have been irregular and fraudulent thereby causing financial loss to the nominal defendant.
20. The bank is also faulted for failing to allow the accounts of the nominal defendant to be transacted as per the mandate given and failing to avail the bank statements to the shareholders and directors of the nominal defendant.
21. As regards the reliefs sought, there is a declaration directing the defendant to operate and maintain the nominal defendant’s bank accounts in accordance with the resolution of 15/9/2022 or as per the instructions of the nominal company. The defendant is sought to refund to the nominal defendant all monies irregularly paid from the subject accounts between 14/11/2022 to date. There is also a prayer for damages to be paid to the nominal defendant on account of the alleged breach of contract, duties and fraud against the nominal defendant.
22. The conclusion from the above is that the claim is brought for and on behalf of the nominal defendant. If the suit is successful, the reliefs will benefit the nominal defendant. Though the plaintiffs will also benefit from such success, the true beneficiary of the reliefs is the nominal defendant.
23. Consequently, the finding of this Court is that the suit meets the requirements of a derivative action.
24. As concerns the other tests to be applied in granting orders to commence and continue derivative suits, I find the holding in *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another* [2017] eKLR, to be apt. In that case, Onguto J. held that there is a two-stage process envisaged by the Act with regards to derivative suits.



25. 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 s.238(3). S.239(2) of the *Companies Act*. However, the application for permission will be dismissed if the evidence adduced in support “do not disclose a case” for giving of permission.
26. The importance of judicial approval under the Act is to screen out frivolous claims. All that the applicant needs to establish, through evidence, is that he has a prima facie case without the need to show that it will succeed.
27. In the present case, I have found that the plaintiffs’ have established a prima facie case. This is that the defendant may have permitted the operation of the accounts of the nominal defendant in a manner detrimental to it. The plaintiffs have therefore passed the first stage.
28. The second stage entails a consideration of statutory provisions and factors which ordinarily guide judicial discretion albeit in the realm of derivative action.
29. In *Isaiab Waweru Njumi & 2 others v Muturi Ndungu* [2016]eKLR, the court set out some of the factors to be considered as follows: -
- 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 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 as a director as opposed to a derivative action.”
30. In the present case, the plaintiffs claim that the mandate given was that they were as joint signatories to the nominal defendant’s bank accounts and that transactions were to be by way of cheques or over the counter withdrawals. Despite as such, the defendant still permitted transactions through internet banking thereby allowing the majority shareholder to singlehandedly transact over USD 10 million from the nominal defendant’s accounts.



31. It was thus pleaded that the defendant was allegedly in breach of the bank-customer relationship and had committed fraud against it. This cause of action as against the defendant was successfully pleaded, particularized and established by the plaintiffs in the plaint dated 5/12/2022.
32. As to whether the plaintiffs are acting in good faith and in a manner consistent with a faithful director acting in adherence to the duty to promote the success of the company, the answer is in the affirmative. I am satisfied that the plaintiffs are acting in good faith.
33. I take into consideration the seriousness of the allegations more-so the colossal amounts involved and the future management of the nominal defendant's bank accounts. It would be in the best interest of the nominal defendant to allow the plaintiffs to continue with the claim as a derivative action on its behalf which has become a victim of multiple suits that have been filed at its expense.
34. The upshot is that the application is meritorious and is allowed as prayed. The bank statements be provided within 7 days of the date of this ruling. The costs shall be in the suit.
35. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

