



REPUBLIC OF KENYA



**Rashi v Ecobank Kenya Limited & 4 others (Commercial Case E469 of 2022)
[2023] KEHC 17534 (KLR) (Commercial and Tax) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E469 OF 2022**

A MABEYA, J

MAY 17, 2023

BETWEEN

MONTHIDA RASHI PLAINTIFF

AND

ECOBANK KENYA LIMITED 1ST DEFENDANT

KIWIPAY PTE LIMITED 2ND DEFENDANT

GREGORY SCHIMDT 3RD DEFENDANT

PAYGRAM COMPANY LIMITED 4TH DEFENDANT

KIWIPAY KENYA LIMITED 5TH DEFENDANT

RULING

1. This is a ruling on an application dated November 28, 2022 by the plaintiff. It was brought under Sections 238 and 239 of the *Companies Act*, Order 5 Rules 21, 22, 25 and 27 of the *Civil Procedure Rules* and Sections 1A, 2B, 3 and 3A of the *Civil Procedure Act*.
2. The plaintiff sought leave to continue the suit as a derivative claim on behalf of the 5th defendant against the acts of the defendants which were a calculated systematic fleece of its finances.
3. She also sought to restrain the defendants from transferring or dealing in any way with the money in the 5th defendant's account held with the 1st defendant bank. The application also sought leave to be granted to the plaintiff to serve the 2nd and 3rd defendant out of the jurisdiction.
4. The grounds for the application were set out on the face of the Motion and in the supporting affidavits sworn by Monthida Rashi on November 28, 2022 and January 23, 2023, respectively. It was contended that there was a systematic fleecing of the 5th defendant's accounts held by the 1st defendant amounting



to USD 11,134,831.2 transferred to various parties under the aegis of the 2nd and 3rd defendant who are in control of the 5th defendant.

5. That there was a prima facie case that the 5th defendant was suffering loss and damage due to the 2nd and 3rd defendant's serial breaches of their duties to it. That upon incorporating the 5th defendant in June 2020, it opened three accounts with the 1st defendant being USD Accounts; 6682003059, 6682003378 and 6682003058.
6. That the plaintiff was the initial director and shareholder and later on nominated Stephen Njenga, Felix Rantuu Lekishe, Solomon Joseph Maina Karimoni and Robert Lemerketo as directors and shareholders.
7. That several changes to the shareholding were made leaving the director and shareholders as the plaintiff and 3rd defendant as well as one Victor Ngure Githua as director. The nominal directors were paid Kshs 100,000/- each for their role as nominal directors and resigned.
8. That the three bank accounts were frozen by the Anti-corruption and Economic Crimes Court on suspected money laundering but the same was withdrawn on October 26, 2022. Consequently, the former directors Stephen, Felix and Solomon commenced proceedings for unfair prejudice to the manner in which they had voluntarily resigned. That the matter was settled and it was agreed that the accounts were to be operated as per existing bank mandate before the freezing orders were made or as per new instructions from the 5th defendant.
9. That the 3rd defendant had appointed lawyers to represent the 2nd and 5th defendant and signed a resolution authorizing himself to act on behalf of the 5th defendant. That the resolution has a rubber stamp and not the 5th defendant's seal which is in the plaintiff's possession. That the 3rd defendant also relied on a resolution allegedly passed by the plaintiff and Stephen on June 25, 2021 restricting their mandate in the 5th defendant's bank accounts to USD 2000 per month while giving him an unlimited mandate.
10. That the signature appearing on the resolution did not belong to the plaintiff and was forged. That the plaintiff later signed a resolution giving mandate of the 5th defendant's accounts to herself and Stephen who was not a director having resigned on April 25, 2022 and transferred his shares to the plaintiff.
11. That on October 28, 2022, November 16, 2022 and November 17, 2022, unauthorized transactions were carried out on the 5th defendant's accounts without the plaintiff's knowledge yet she was to sign any transaction together with Stephen. That many other unauthorized transactions have been made fraudulently. That by a resolution passed on November 9, 2022, the 2nd defendant notified the plaintiff that she had been removed as a director by the board of the 5th defendant.
12. The 2nd, 3rd and 5th defendant opposed the application vide grounds of opposition dated December 9, 2022. It was contended that the application did not meet the required threshold for granting of the prayers sought. That the allegations of fraud and forgery were not supported by evidence. That the plaintiff signed the resolution granting the 2nd defendant who was the majority shareholder the mandate to carry out transactions of unlimited value in the 5th defendant's accounts.
13. That any fraud on the 5th defendant was committed by other parties and not the defendants and that the 3rd defendant was wrongly joined in the suit as he is the 2nd defendant's director.
14. The 3rd defendant also opposed the application vide the replying affidavit sworn by Gregory Schmidt on January 18, 2023. He deposed that the prior existing instructions which were effected on June 25, 2021 by a resolution of the 5th defendant and signed by the plaintiff gave him full access and powers



- to operate the 5th defendant's accounts. That he therefore had authority to transact the 5th defendant's accounts for unlimited value whereas the plaintiff was limited to USD 2000 per month.
15. That the plaintiff personally delivered the above-mentioned resolution and she cannot therefore claim to have been unaware of the instructions. That the purported resolution between the plaintiff and Victor Ngure was irregular as it failed to meet the threshold of calling a meeting as per the articles of association which called for service of notice. That such notice was not served and Victor was not a shareholder to constitute majority shareholding in the meeting.
 16. Though the 1st defendant filed written submissions, there was no replying affidavit in the court's e-filing system thus the 1st defendant did not respond to the application. As such, its submissions were not based on any pleadings.
 17. The parties filed the respective submissions which Learned Counsel hi-lighted on May 8, 2023. The plaintiff opted to submit orally. The Court considered those submissions alongside the pleadings and evidence before Court.
 18. This is an application to continue the suit as a derivative suit. By dint of section 238 (1) of the Act, a derivate 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.”
 19. These conditions are not independent of each other. An applicant must establish that he is a member of a company, that a cause of action is vested in the company and that the reliefs sought are on behalf of the company for its own benefit.
 20. The plaintiff's case was that she incorporated the 5th defendant in 2020 and was the initial shareholder/ director before nominating others. That a series of changes to the directorship took place ending with the plaintiff, 3rd defendant and one Victor Ngure Githua as directors. The plaintiff produced evidence indicating these changes and the Cr12 from the companies' registry.
 21. From the evidence on record, it is not in dispute that the plaintiff is a member of the Company. She continues to hold 16700 shares in the Company. That satisfies the first condition under section 238 of the *Companies Act*.
 22. As to the cause of action, I have looked at the plaint dated November 28, 2022. It is alleged and not denied that the Company holds and operates three accounts with the 1st defendant. That a mandate on their operation was given to the 2nd defendant. That however, the 1st defendant ha disregarded the said mandate and had permitted the said accounts to be operated in a fraudulent manner as a result of which large sums of monies amounting to US&11,134,831/20 had been paid out to unauthorized persons.
 23. There is also allegations that the 2nd and 3rd defendant had breached their fiduciary duty with the Company. Those duties as set out in sections 142 to 150 of the *Companies Act* were pleaded. It is alleged that the same were breached by the said defendants as a result of which the Company had suffered loss.
 24. From the foregoing, the Court is satisfied that a cause of action has been established against the defendants. The 1st defendant is accused of breaching its banker-customer relationship with the Company whilst the 2nd and 3rd defendant are accused of being in breach of their fiduciary relationship with the Company as directors. As regards the 4th defendant, it is accused of receiving funds belonging to the Company irregularly. A claim for money had and received is made against it.
 25. Accordingly, a cause of action vested in the Company has been established.



26. As to the reliefs, the plaint is clear that all the prayers therein are for the benefit of the Company. The sum totaling US\$11,134, 831/20 is claimed for the Company.
27. In this regard, I am satisfied that a case for a derivative suit has been made.
28. As concerns the other tests to be applied in granting orders to commence and continue a derivative suit, the holding in *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarlal & another* [2017] eKLR, is at hand. In that case, the court held that there is a two-stage process envisaged by the Act with regards to derivative suits.
29. 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.
30. The importance of judicial approval under the Act is to screen out frivolous claims. The Court will only allow meritorious claims. Therefore, the applicant only needs to establish, through evidence, that he has a prima facie case without the need to show that it will succeed.
31. In the present case, I have found that the plaintiff has established a prima facie case. This is to the effect that the 1st defendant may have breached its banker-customer relationship with the Company, the 2nd and 3rd defendant may have breached their fiduciary duty to the Company and the 4th defendant unlawfully benefited from the funds belonging to the Company. The finding thus is that the plaintiffs have passed the first stage.
32. The second stage entails a consideration of statutory provisions and factors which ordinarily guide judicial discretion albeit in the realm of derivative action.
33. 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.”

34. In the present case, not only have the cause of action pleaded but the breaches have been particularized against each defendant in the plaint.
35. As to whether the plaintiff is 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 would take, the answer is in the affirmative. The plaintiff is seeking to recover funds lost by the Company. I am also satisfied that she is acting in good faith.
36. In the end, this Court finds the application dated November 28, 2022 to be merited and allows the same as prayed.
- 37 It is so ordered.

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

A. MABEYA, FCIArb

JUDGE

