



**Jenar Company Limited v Maple Management Limited & 3 others (Commercial Case 022 of 2023) [2023] KEHC 24548 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24548 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 022 OF 2023  
MN MWANGI, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**JENAR COMPANY LIMITED ..... PLAINTIFF**

**AND**

**MAPLE MANAGEMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**RUKIA SALIM ..... 2<sup>ND</sup> DEFENDANT**

**ROY NDERITU WACHIRA ..... 3<sup>RD</sup> DEFENDANT**

**ANIL KUMAR SAINI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated 30<sup>th</sup> September, 2021 brought under the provisions of Sections 238 to 241, 780, 782, 1004 and Part X of the *Companies Act*, 2015, the Companies (General) Regulations, 2015, Order 51 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The plaintiff/applicant seeks the following orders-
  - i. Spent;
  - ii. That the Honourable Court do record, order and grant leave to the plaintiff/applicant that the suit filed herein, do proceed, be heard and determined as a derivative suit brought by the plaintiff/applicant on behalf of the 1<sup>st</sup> defendant/respondent company and further give the said plaintiff/applicant authority to continue prosecuting the suit herein as a derivative suit for and on behalf of the 1<sup>st</sup> defendant/respondent company;
  - iii. That the leave so granted does operate as protection, restricting all activities of the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants/respondents and the current Board of Directors specifically operations touching



on the drawing of funds from the 1<sup>st</sup> defendant/applicant's bank accounts where service charge for Connaught apartments is remitted;

- iv. Spent;
- v. That pending the hearing and determination of the suit herein –
  - a. This Honourable Court be pleased to issue an order compelling the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants/respondents to requisition, organize and convene an Annual General Meeting of the 1<sup>st</sup> defendant/applicant within 30 days;
  - b. This Honourable Court be pleased to issue an order compelling the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants/respondents to authorize and commence the repair of the plaintiff/applicant's apartment No. RH01 at Connaught apartments;
  - c. This Honourable Court be pleased to issue an order prohibiting the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants/respondents, their agents, proxies, nominees, employees, servants and/or relatives from transferring, withdrawing and/or utilizing the funds in the 1<sup>st</sup> defendant's/respondent's bank account No. 007001043 at M Oriental Bank, Westlands branch in any manner without leave from this Honourable Court; and
  - d. This Honourable Court be pleased to issue an order barring the defendants/respondents from requisitioning from the plaintiff/applicant, the monthly service charge payable in respect of the plaintiff/applicant's apartment No. RH01 at Connaught apartments.
    - i. That this Honourable Court be pleased to give such further orders and/or directions that it deems fit, necessary, equitable, fair and just in light of the circumstances of the case; and
    - ii. That the fees and legal costs incurred by the applicant herein in filing, prosecuting, handling and continuing with the suit herein be authorized by the Honourable Court to be charged to, be indemnified by and paid by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants/respondents jointly and severally.
2. The application has been brought on the grounds on the face of the Motion and is supported by affidavits sworn on 30<sup>th</sup> September, 2021 and 22<sup>nd</sup> October, 2021 by Jeanne Wanjiku Gacheche, a director of the plaintiff company. In opposition thereto, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants filed a replying affidavit sworn on 13<sup>th</sup> October, 2021 by Rukia Salim the 2<sup>nd</sup> defendant and also a director of the 1<sup>st</sup> defendant company.
3. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Kisoo Mutua & Associates Advocates, whereas the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants' submissions were filed by the law firm of Kinuthia Anthony & Company Advocates.
4. Mr. Rao, learned Counsel for the plaintiff submitted that the plaintiff is the current registered owner of apartment No. RH01 at Connaught apartments erected on L.R. No. 1870/VI/85 and a shareholder holding 170 shares in the 1<sup>st</sup> defendant pursuant to purchasing the aforementioned property and subscribing to the 1<sup>st</sup> defendant's memorandum and articles of association in the year 2010. He further submitted that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants are in breach of their duty to the 1<sup>st</sup> defendant company thus the plaintiff seeks to institute this derivative suit in which it seeks legal redress against the inequitable and total breach of trust and breach of duty on the part of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants against the



- 1<sup>st</sup> defendant and its shareholders. Counsel stated that in their response, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants had admitted to several of the issues raised by the plaintiff, and they had attempted to explain away the said admissions by offering excuses, but they had ignored and failed to address a number of the other issues raised, thus pointing to their guilt.
5. Mr. Rao stated that the cause of action giving rise to this suit and the instant application falls within the definition of Section 238 of the *Companies Act*, 2015 and invited this Court to exercise its inherent powers provided for under Section 239 of the *Companies Act*, 2015. He also stated that the actions and inactions complained of by the plaintiff as against the defendants primarily affect the property of the 1<sup>st</sup> defendant and the plaintiff. In submitting that it is not possible for a suit to be brought against the parties responsible for the 1<sup>st</sup> defendant, Counsel relied on the holding by Lord Denning MR in the case of *Moir v Wallerstainer* [1975] 1All ER 849 which was cited by the Court in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR.
  6. Mr. Rao stated that in this case, the 1<sup>st</sup> defendant is not in a position to file any suit against the other defendants since the said defendants are charged with the responsibility of executing certain duties in favour of the 1<sup>st</sup> defendant company, as mandated by the 1<sup>st</sup> defendant's memorandum and articles of association and the *Companies Act*, 2015. Mr. Rao submitted that one of the acts complained of is the lack of disclosure by the defendants of information such as minutes of the alleged AGMs and audited financial statements, which information should be readily available to all shareholders of the company, but the said information was not.
  7. Mr. Rao submitted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants' reliance and interpretation of Section 241 of the *Companies Act* seeks to absolve the directors of omissions they had admitted to. Further, that the nature of the cause of action giving rise to this suit and the instant application warrant that both the interests of the plaintiff as a shareholder of the 1<sup>st</sup> defendant, and that of the 1<sup>st</sup> defendant be tackled together in a single suit as it would go a long way into saving precious judicial time by reducing a multiplicity of suits.
  8. Counsel for the plaintiff relied on the case of *Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another* [2015] eKLR quoted by the Court in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* (supra) which laid out the prerequisites to filing a suit on behalf of a company. He contended that the persistent plumbing issue of Connaught Apartments is not an individual shareholder's problem as it greatly affects the 1<sup>st</sup> defendant's primary asset and the object of which the 1<sup>st</sup> defendant exists as shown at clauses 6, 8 & 11 of its articles of association. Counsel stated that the plaintiff has met the requirements for grant of the orders sought in the instant application as articulated in the case of *Joseph Munyoki Nzioka v Raindrops Limited & 3 others* [2019] eKLR.
  9. Mr. Rao submitted that there is an undisputed apprehension by the plaintiff that the respondents have been misusing the funds paid into the account at M Oriental Bank Westlands branch but they had refused to disclose or present the audited statements of accounts to dispute this notion, hence it is necessary for this Court to offer protection to the 1<sup>st</sup> defendant's accounts to curtail the improper use of funds paid into the said account. He stated that the minutes of the alleged meetings of the 1<sup>st</sup> defendant reflect a lack of oversight on the preparation of the 1<sup>st</sup> defendant's accounts which are prepared and audited by the same entity contrary to best practice. Counsel asserted that the 1<sup>st</sup> defendant's inability to undertake necessary plumbing repairs which have been identified as structural and chronic, has been attributed to the financial struggles of the 1<sup>st</sup> defendant caused by the defendants' financial mismanagement and failure to adequately collect outstanding debt owed to the company.



10. Mr. Rao stated that the defendants are also debtors to the 1<sup>st</sup> defendant as per the attached statement of outstanding debtors of the company which explains why no action has been taken to collect the said debt.
11. He further stated that the defendants failed to convene proper meetings of the company hence the decisions of the Board of Management of the 1<sup>st</sup> defendant are in effect decisions of the 2<sup>nd</sup> & 3<sup>rd</sup> defendants.
12. He submitted that the prayers sought by the plaintiff herein are founded on the provisions of Sections 780 and 782 of the [Companies Act](#), 2015 and that this Court is empowered by Section 1004 of the said Act to issue injunctions compelling the offending party who is in breach of the provisions of the [Companies Act](#) to comply with the said provisions. He stated that in any event, the defendants had not demonstrated what prejudice they would suffer if the application herein is allowed. Mr. Rao stated that the plaintiff had established that it has a prima facie case against the defendants with a high chance of success hence the instant application should be allowed.
13. Mr. Kinuthia, learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants cited the provisions of Section 241 of the [Companies Act](#) and submitted that the allegations by the plaintiff are devoid of any basis, are biased and actuated by malice on the part of the plaintiff. He also submitted that in as much as the plaintiff's allegations emanate from acts and alleged omissions by the directors of the 1<sup>st</sup> defendant over the last six years, no cogent explanation has been given why this period is in issue and why the plaintiff has been silent for all these years. He contended that Section 238(6) of the [Companies Act](#) contemplates that a derivative action against a director should include former directors but in this case, the plaintiff does not seek to hold all the directors who served at the 1<sup>st</sup> defendant company during the six years' period liable but has instead chosen to have a derivative suit commenced against three persons only.
14. He contended that if the plaintiff's grievances had been necessitated by any lawful inclinations as opposed to bias and vendetta, then all directors of the 1<sup>st</sup> defendant company who served during the relevant period would have been parties in this case. He stated that it is trite law that current directors cannot be held solely and personally liable for the actions and omissions of all the past directors. Mr. Kinuthia urged this Court to exercise its powers under Section 241(2)(a) of the [Companies Act](#) by refusing to grant the leave sought by the plaintiff in view of the obvious bias and lack of good faith. He relied on the case of *Altaf Abdulrasul Dadani v Amini Akberazi & 3 others* [2004] 1KLR 95 cited in *Joseph Munyoki Nzioka v Raindrops Limited & 3 others* [2019] eKLR and stated that a derivative suit can only be allowed to commence if the wrongs alleged by the minority shareholder cannot be rectified by internal mechanisms of the company. He contended that mere irregularity in the internal running of a company cannot form the basis of a derivative suit since these are matters that can be rectified at company meetings.
15. Counsel also relied on the case of *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] eKLR with regard to the threshold for grant of leave to file a derivative suit. He submitted that the alleged wrongs complained of by the plaintiff are mostly fabricated and untrue as the 1<sup>st</sup> to 3<sup>rd</sup> defendants have substantiated the said allegations in their replying affidavit. He further submitted that the plaintiff had not accorded the 1<sup>st</sup> defendant an opportunity to ratify the fact that an Annual General Meeting (AGM) was not conducted in the year 2020 in view of the Covid-19 pandemic, in the next Annual General Meeting as contemplated under Section 241 (2) (d) of the [Companies Act](#). In view of the above, Mr. Kinuthia stated that the issues raised by the plaintiff in the instant application do not meet the threshold for institution of a derivative suit and urged this Court to take note of the provisions of Section 241(3) of the [Companies Act](#). He contended that the other



members of the 1<sup>st</sup> defendant company have always lauded their directorship and at no point has any of them including the plaintiff, raised any complaint against them.

16. Mr. Kinuthia submitted that no evidence has been tendered in support of the allegations that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants have embezzled and mismanaged funds of the 1<sup>st</sup> defendant, therefore if the orders sought by the plaintiff are granted, it will amount to a gross overstep into the management of the 1<sup>st</sup> defendant company's affairs which would have the effect of completely shutting down the company's financial affairs, thereby subjecting all other members to undue hardship since the company's management will be unable to conduct its affairs. Counsel stated that the accounts of the 1<sup>st</sup> defendant have always been disclosed to the members and have routinely been adopted. He cited the case of *Isaiah Waweru Ngumi & 2 others v Muturi Ndungu* [2016] eKLR and stated that the intended derivative suit is not motivated by the need to promote the interest of the company, but rather, it is motivated by personal interest since the plaintiff wants the defendants to be compelled to authorize and commence repairs in its apartment using the 1<sup>st</sup> defendant's funds and for that reason, the instant application should be dismissed with costs to the defendants.
17. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants stated that the plaintiff's apartment cannot constitute a common area for which the 1<sup>st</sup> defendant is mandated to maintain and/or repair, further, if the 1<sup>st</sup> defendant was to authorize such repairs for its members, it would deplete the entire service charge collection and be rendered impecunious and unable to meet its authorized obligations. Mr. Kinuthia contended that utilizing the service charge to repair the plaintiff's apartment would be unlawful as it would contravene express resolutions made and adhered to by the 1<sup>st</sup> defendant's other members, and it would also be unfair and inequitable to the other members of the 1<sup>st</sup> defendant who have complied with the said resolutions and repaired their apartments at their own costs.
18. He stated that the plumbing issues alluded to by the plaintiff were deliberated on by members of the 1<sup>st</sup> defendant and a resolution was passed that repairs be undertaken in respect of piping and the same be expensed separately from the service charge collection. He added that the 1<sup>st</sup> defendant's members also resolved that each home owner meets the costs of overhauling their bathtubs which were causing leakages. He stated that should the plaintiff be of the view that any upper apartment is the cause of any alleged damage to its apartment, it may pursue a claim in its own right against the owners of such apartments as envisaged under Section 241(2)(f) of the *Companies Act, 2015*. Mr. Kinuthia concluded his submissions by stating that the plumbing issue does not merit the institution of a derivative suit against select directors.

### **Analysis And Determination.**

19. I have considered the application filed herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit filed by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants and the written submissions filed by Counsel for the parties. The issues that arise for determination are-
  - i. Whether the plaintiff should be granted leave to prosecute this suit as a derivative action against the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants;
  - ii. Whether the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants should be compelled to organize and convene an Annual General Meeting or an Extra Ordinary General Meeting of the 1<sup>st</sup> defendant within 30 days;
  - iii. Whether the defendants and the current Board of Directors should be restrained from drawing funds from the 1<sup>st</sup> defendant's bank accounts where service charge for Connaught Apartments is remitted;



- iv. Whether the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants should be compelled to authorize and commence repairs of the plaintiff's apartment No. RH01 at Connaught Apartments; and
  - v. Whether the defendants should be barred from requisitioning from the plaintiff the monthly service charge payable in respect of its apartment No. RH01 Connaught Apartments.
20. In the affidavit filed by the plaintiff it deposed that it is the current registered proprietor of apartment No. RH01 Connaught Apartments erected on L.R. No. 1870/VI/85 and a shareholder, holding 170 shares in the 1<sup>st</sup> defendant. The plaintiff's director averred that the 1<sup>st</sup> defendant's records have not been updated for years and any record generated from the Registrar of Companies is misleading to the general public as to the company's state of affairs as the CR-12 generated reflects members and directors who are not members of the company.
  21. The plaintiff further averred that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants are the existing directors of the 1<sup>st</sup> defendant and are complicit in the mismanagement, misappropriation and misuse of the 1<sup>st</sup> defendant's financial resources thus resulting in the 1<sup>st</sup> defendant's inability to carry out its basic obligations to the shareholders of the company who happen to reside at Connaught Apartments.
  22. It was stated by the plaintiff that apartment No. RH01 at Connaught Apartments among other areas has fallen into a state of disrepair on account of sewer leakages arising from plumbing defects from upper apartments in the building which complaints have been raised to the defendants several times but no action has been taken by them to rectify the situation. The plaintiff deposed that the said apartment has become inhabitable as it exhibits huge cracks on the walls, foul odour and peeling of the ceiling.
  23. The plaintiff stated that the dilapidation of several apartments is one example of lack of action on the part of the 1<sup>st</sup> defendant's directors who have failed to hold any Annual General Meetings or Special General Meetings for several years. It was stated that the said directors have also failed to publish or disclose to the shareholders of the 1<sup>st</sup> defendant upon request, the audited accounts and financial statements of the company.
  24. The plaintiff contended that the lack of general meetings has meant that the mismanagement overseen by the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants cannot be interrogated or dealt with, whereas the lack of audited financial statements coupled with the inability of the 1<sup>st</sup> defendant to perform its primary objective of maintaining the common areas of Connaught Apartments is an indication that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants have been misappropriating the company's finances.
  25. It averred that failure to file proper annual returns, publish audited accounts and hold Annual General Meetings are clear statutory violations whose continued violation expose the 1<sup>st</sup> defendant to penal consequences. The plaintiff deposed that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants have decided to run the affairs of the 1<sup>st</sup> defendant as their own personal property with little to no regard for the rights of all shareholders of the company and to the detriment of all shareholders.
  26. The plaintiff also averred that the 1<sup>st</sup> defendant should be the party responsible for suing to enforce its rights which are being violated by the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants but it cannot do so since the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants are in total and absolute control over it, thus they will not sanction such a suicidal case against themselves. The plaintiff deposed that as a shareholder of the 1<sup>st</sup> defendant, it has been denied its right to properly govern the administration of the 1<sup>st</sup> defendant whose effect is that it has no say in the management of its investment.
  27. The plaintiff further deposed that the instant application has been filed timeously, in good faith and in the interest of equity and justice hence it is merited in law.



28. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants in their replying affidavit deposed that the 1<sup>st</sup> defendant has had challenges in effecting the resignation of the 4<sup>th</sup> defendant, Maina Gacheche & Najmudeen Jiwa as directors of the 1<sup>st</sup> defendant at the Registrar of Companies despite the fact that their resignation was adopted by members in an Annual General Meeting held on 28<sup>th</sup> July, 2018 since most of its members have despite constant reminders failed and/or ignored to furnish pertinent information and/or documents required by the Registrar of Companies in order to enable the linking of the 1<sup>st</sup> defendant to the e-citizen service delivery portal. The defendants stated that as a result, the three remain on the 1<sup>st</sup> defendant's CR-12 but are no longer directors.
29. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants averred that the plaintiff is not acting in good faith as the instant application is not meant to pursue any legitimate concerns on behalf of the 1<sup>st</sup> defendant but is intended to strong arm the 1<sup>st</sup> defendant into financing the repair of the plaintiff's personal property being apartment No. RH01 at Connaught Apartments, a matter that has been previously deliberated upon by the members of the 1<sup>st</sup> defendant in its general meetings.
30. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants further averred that the 1<sup>st</sup> defendant is not a profit-making business venture, as it only collects funds which are contributed by its members as service charge and merely utilizes the same for purposes agreed on by its members. They averred that its directors are merely Trustees of the said funds and cannot be intimidated into channeling the management funds to one member at the expense of other members.
31. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants contended that it is peculiar that the plaintiff did not join Mr. Maina Gacheche, who is one of the directors of the plaintiff company as a party to this suit despite the fact that he resigned from the directorship of the 1<sup>st</sup> defendant together with the 4<sup>th</sup> defendant on 28<sup>th</sup> July, 2018. They stated that the only reasonable inference that can be drawn from the said non-inclusion is that the instant application is a disguised attempt at pursuing a vendetta targeted against specific persons. They urged this Court to note the plaintiff's omission as evidence of lack of good faith.
32. It was stated by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants that the 1<sup>st</sup> defendant has always dutifully convened Annual General Meetings and in the minutes of the Annual General Meeting held on 11<sup>th</sup> April, 2015, the deponent of the plaintiff's supporting affidavit was in attendance and she also confirmed minutes for the previous AGM. They deposed that in the minutes of the Special General Meeting held on 29<sup>th</sup> August, 2015, the said deponent was also present and she personally confirmed the minutes of the previous Annual General Meeting (AGM). They stated that in the said meeting, it was noted that a costing quotation had been issued for the repairs but only seven members had paid their shares.
33. They further stated that in the minutes of the AGM held on 13<sup>th</sup> May, 2017 and 28<sup>th</sup> July, 2018, the annual report of accounts for the years 2016 and 2017 was read and adopted unanimously by the members of the 1<sup>st</sup> defendant. That the minutes of the AGM held on 28<sup>th</sup> September, 2019, the annual report of accounts for the years 2018 and 2019 were compared and adopted unanimously by the members of the 1<sup>st</sup> defendant. In regard to the meeting of 28<sup>th</sup> July, 2018, it was noted that replacement of the main pipe had been done and the plumbing problem was resolved but there was still an issue emanating from two apartments whose owners had refused to overhaul their bathtubs at their own costs, despite a previous resolution on the same.
34. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants contended that it is only in the year 2020 when the 1<sup>st</sup> respondent failed to convene an AGM owing to the severity of the Covid-19 Pandemic and that the year's audited accounts were available. They asserted that the 1<sup>st</sup> defendant has been in the process of scheduling an AGM in order to discuss among other issues, the cash flow problems that the 1<sup>st</sup> defendant company was facing



- since several of its members were in service charge arrears from the year 2020, to the tune of Kshs. 4,778,804.00, thereby substantially crippling the company's operations.
35. The plaintiff in its supplementary affidavit deposed that the shortcomings, failures and indolence of the defendants herein in execution of their mandate as prescribed by the *Companies Act*, 2015 as well as the 1<sup>st</sup> defendant's memorandum and articles of association, are clear from the pleadings.
  36. It averred that at every juncture, the defendants must be reminded to execute their duty as they only ever inform the shareholders when prompted by the plaintiff or its agents as evidenced by the dates when the emails were allegedly sent. It stated that no evidence of communication beyond general emails to the membership allegedly seeking compliance by shareholders has been presented in this matter. It also contended that the allegation that the plaintiff is not acting in good faith and it seeks to strong arm the respondents into fixing its personal property is a false narrative.
  37. It was stated by the plaintiff that its complaint which evidences dereliction of duty by the defendants in so far as the plumbing issue is concerned is founded on clauses 6, 8 & 11 of the 1<sup>st</sup> defendant's articles of association thus the plaintiff's call to have the defendants repair structural issues of the building cannot be touted as being an agenda to have the defendants repair its personal property.
  38. The plaintiff deposed that the defendants acknowledged the plumbing issue as being structural, visited the plaintiff's apartment, assessed the damage and undertook to repair the same. That during one of the visits to the plaintiff's apartment the 3<sup>rd</sup> defendant acknowledged there was a problem with the sewer line and the waste pipes, an issue that was never presented in any of the alleged Annual General Meetings (AGMs).
  39. It also deposed that the minutes of the alleged AGMs of the 1<sup>st</sup> defendant annexed to the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants replying affidavit show that the plumbing issue was chronic and was termed as structural, and that it falls within the realms of duties and obligations to be dealt with by the defendants on account of the issue being of the common areas.
  40. The plaintiff averred that the defendants do not circulate or share notices of the AGMs or the agenda, which is evidenced by the fact that no notices have been attached to the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants' replying affidavit. The plaintiff stated that the meetings attended by the plaintiff and its representative have been possible out of prudence after being alerted at the last minute. In addition, the record of the alleged meetings highlights a lack of voting or taking of a vote count to ascertain decision making during the exercise. It contended that the said meetings can be termed as illegal.
  41. It was stated by the plaintiff that in the AGM held on 11<sup>th</sup> April, 2015, the alleged Company Accountant clearly stated at Min 06/2015 that he was unable to prepare the report for the previous financial year, and as such, the same could not have been discussed in the said meeting since the said report did not exist. It was averred that in the AGM held on 13<sup>th</sup> May, 2017, there was no mention of the alleged accounts having been audited and there was also no record of when the firm of M. Kamau & Associates was appointed as the 1<sup>st</sup> defendant's Auditors to warrant their being retained under Min 06/2017. The plaintiff deposed that the same was particularly strange since there was no AGM in the year 2016 and in the AGM that was held on 11<sup>th</sup> April, 2015 and subsequent Special General Meeting, Tride & Associates were the appointed Auditors of the 1<sup>st</sup> defendant.
  42. The plaintiff deposed that since the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants have freely produced the alleged minutes of the 1<sup>st</sup> defendant's meetings, nothing would be simpler than for the audited financial accounts to be produced as well. It averred that the 1<sup>st</sup> defendant's management is complicit in financial management and the inability to interrogate the 1<sup>st</sup> defendant's audited financial statements lies central to this issue.



43. It was stated by the plaintiff that the statement of arrears of service charge highlight the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as being party to persons who are in arrears thus crippling the 1<sup>st</sup> defendant's ability to dispense service to its shareholders. The plaintiff stated that for this reason and other issues already highlighted, the plaintiff should be allowed to proceed with this suit as a derivative action since the current directors have conflict of interest in pursuing defaulters owing the 1<sup>st</sup> defendant money

**Whether the plaintiff should be granted leave to prosecute this suit as a derivative action against the defendants.**

44. 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.”

45. In *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] eKLR, the Court made the following observation with regard to derivative actions -

“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”.

46. Pursuant to the provisions of Part XI of the [Companies Act](#), 2015 this Court has the discretion to either allow or disallow an application for leave to proceed with a suit as a derivative action. When considering such an application, the Court must at first satisfy itself that the applicant has established a prima facie case with a probability 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.” (emphasis added).

47. The plaintiff’s case is that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants are in breach of their duty of care to the 1<sup>st</sup> defendant company. The plaintiff contended that the defendants have not called for, or held any general meetings and in the event that they call for meetings, no formal notice meeting the requirements of the *Companies Act*, 2015 and the 1<sup>st</sup> defendant’s articles and memorandum of association are sent to members. The plaintiff alleged that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants have failed to maintain an up to date register of the members and shareholders of the 1<sup>st</sup> defendant, they have failed to file annual returns with the Registrar of Companies for several years, they have refused to publish the 1<sup>st</sup> defendant’s audited statement of accounts upon several requests by shareholders, and they have failed to uphold and carry out the functions of the 1<sup>st</sup> defendant for the benefit of all shareholders.

48. In response thereto, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants averred that they have had challenges effecting changes in the membership and shareholding of the 1<sup>st</sup> defendant at the Registrar of Companies since most of its members have failed to furnish pertinent information and/or documents required by the Registrar of Companies so that the 1<sup>st</sup> defendant can be linked to the e-citizen service delivery portal. They further averred that the instant application has not been made in good faith since the plaintiff is using this



suit to strong arm the 1<sup>st</sup> defendant into financing repairs of its personal property, a matter that has previously been deliberated on by the 1<sup>st</sup> defendant's members in its general meetings.

49. The instant application is grounded on the contention that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants are in total and absolute control of the 1<sup>st</sup> defendant, therefore the 1<sup>st</sup> defendant cannot bring this suit on its own. The CR-12 dated 12<sup>th</sup> April, 2021 annexed to the plaintiff's affidavit in support of the application herein indicates that the 1<sup>st</sup> defendant has a total of 32 shareholders and five directors. It is evident from the said CR-12 that the plaintiff is one of the shareholders with 170 ordinary shares. The other shareholders have either 315, 305, 170, 165, 158, 130, 105 or 75 shares. In the case of Sultan Hasham Lalji and 2 others v Ahmed Hasham Lalji and 4 others [2014] eKLR, it was held as follows-

“It is the minority shareholders that are availed to the protection by the exceptions since generally majority shareholders exercise powers of the Company and control its affairs.”

50. Further, in *Altaf Abdulrasul Dadani v Amini Akberazi & 3 others* [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...” (emphasis added).

51. The plaintiff contends that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants have not called for or held any AGMs for some years and major decisions seem to be done by them in informal and clandestine meetings to the exclusion of other shareholders. In response to this allegation, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants annexed to their replying affidavit copies of the minutes of AGMs of the members of the 1<sup>st</sup> defendant. On perusal of the said minutes, it is evident that the deponent of the plaintiff's supporting affidavit attended several of the said meetings save for the one held on 29<sup>th</sup> September, 2012. It is however evident that no meetings were called in the years 2020 and 2021.
52. The plaintiff averred that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants have failed to maintain an up to date register of the members and shareholders of the 1<sup>st</sup> defendant. In response thereto, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants stated that they have had challenges effecting changes in the membership and shareholding of the 1<sup>st</sup> defendant at the Registrar of Companies since most of its members have failed to furnish pertinent documents required by the said Registry so that the 1<sup>st</sup> defendant can be linked to the e-citizen service delivery portal. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants produced e-mail communication between the 1<sup>st</sup> defendant and some of its shareholders, the latest one being for 12<sup>th</sup> October, 2021 as proof of the fact that



they had asked for information from the 1<sup>st</sup> defendant's shareholders, which information they had not received from most of them, thus making it impossible to effect changes in the membership and shareholding of the 1<sup>st</sup> defendant at the Registrar of Companies. Based on the foregoing, this Court finds that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants cannot be faulted for failing to effect changes in the membership and shareholding of the 1<sup>st</sup> defendant at the Companies' Registry, when its shareholders have been uncooperative, thereby frustrating the process.

53. The plaintiff's allegation that the defendants have failed to file annual returns with the Registrar of Companies for several years is neither here nor there as the plaintiff has not tendered any evidence in support of this allegation such as a letter from the Registrar of Companies confirming that indeed the 1<sup>st</sup> defendant has not filed its returns for several years.
54. It is noteworthy that one of the pertinent issues in the plaintiff's pleadings is the defendants' alleged failure to repair plumbing problems at Connaught Apartments. It was stated by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants that the said problems have been discussed by the 1<sup>st</sup> defendant's members at its AGMs and it was resolved that each home owner needs to meet the costs of overhauling their bathtubs which were causing leakages.
55. To put matters into perspective, I must refer at length to the minutes of the meetings held by members of the 1<sup>st</sup> defendant. In an Extra Ordinary General Meeting held on 2<sup>nd</sup> July, 2011 and Annual General Meetings held on 19<sup>th</sup> July, 2014, 28<sup>th</sup> July, 2018 and 28<sup>th</sup> September, 2019, the issue of leaking pipes was deliberated on. In the meeting of 11<sup>th</sup> April, 2015, members agreed that the pipes needed to be changed urgently since the plumbing system was causing havoc. Members then unanimously agreed that the charges were to be paid separately from the service charge and it would be apportioned as per the size of each house.
56. In the minutes of the special General Meeting held on 29<sup>th</sup> August, 2015, the issue of plumbing was discussed and Management raised concern that only seven members had paid for plumbing renovations despite the fact that costing had been done and a quotation from Engineers given to all members. In the said meeting, it was noted that some members were really suffering as they were directly affected by leakages and it was unanimously agreed by the members that payment should be done by members who had not paid and they were to do so as a matter of urgency, so that the renovation could commence immediately.
57. In an Annual General Meeting held on 13<sup>th</sup> May, 2017, the issue of plumbing was still discussed and it was brought to the attention of the members that the plumbing problem was a structural issue and since the building was an old one, the problem would persist. The members were also informed that the plumbing that was carried out could not cover everything in the individual apartments and members were informed that the pipes under the bath-tubs needed to be changed individually and at the owner's cost and further adjustments made to stop leaking. In the said meeting, some members raised concern about the apartments that had leakage problems that were affecting other apartments, yet the owners of the apartments with the problems were not in a position to pay the huge sum of money to have the issue sorted out. It was agreed by the members that a kitty would be set aside to deal with such emergencies and once the repairs were done, the owner of the apartment with a problem was to be given the bill which he would be required to settle in agreed instalments. Members also mandated the Board to form a sub-committee to deal with such incidents and once the sub-committee was set up, the owner of the apartment affecting the other was to be talked to in order to chart the way forward on how the problem could be sorted out.
58. In an Annual General Meeting held on 28<sup>th</sup> July, 2018, members raised concern that the plumbing problem still persisted and they were informed by the Board that it was a structural issue since the



building is an old one. The Board further informed the members that the pipes that lead water to the building had been changed in and Wing “A” had already been worked on and finalized. The members were also informed that the plumbing that was carried out could not cover everything in individual apartments and the pipes under the bath-tubs needed to be changed individually and at the owner’s cost and further adjustments made to prevent leakages. Members were also informed that the problem with Wing “B” had been identified and it was the waste pipe which was being worked on. Some members raised concern about paint peeling off inside the apartments but they were informed that the Board could not cater for that but it was upon the owners of the apartment affected to deal.

59. In the minutes of the Annual General Meeting held on 28<sup>th</sup> September, 2019, the issue of plumbing was once again discussed and the Manager reported that replacement of the main pipe to which the members had made monetary contribution was completed and the problem was resolved. He continued to say that there was still an issue emanating from two apartments, though it had been agreed that each home owner should overhaul their bath tubs at their own cost, this having been identified as the main cause of the leakage in the system, the two were yet to comply, with one going to the extent of refusing to pay service charge unless the management sorted the problem themselves, while the other owner locked up the house thus making it inaccessible.
60. From the above extracts of the meetings of members of the 1<sup>st</sup> defendant, it is evident that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants took the necessary action to repair and replace the pipes that were leaking and left the issue of repairing the peeling walls and overhauling bath-tubs which were the cause of leakages in some apartments, to individual owners. It is also evident that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants had also taken action to have the waste pipe that was leaking repaired.
61. It cannot therefore be claimed by the plaintiff that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants had failed to discharged their duties. This then boils down to the fact that the plaintiff should have repaired its apartment and if the owner of the apartment above the said apartment was the cause of the leakage that was affecting its apartment it should have sued the owner of the said apartment. The foregoing minute extracts are proof that the issue of plumbing was deliberated on, in several meetings and the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants can therefore not be taken to have failed in their duty of care to the plaintiff.
62. I therefore agree with Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants that if the plaintiff is of the view that any of the apartments located on the upper floors is the cause of any alleged damage to its apartment, it may pursue a claim in its own right against the owner(s) of such apartments. It is evident that the plaintiff’s complaint is personal to itself but it has not adequately demonstrated how it has been made on behalf of the 1<sup>st</sup> defendant and the benefit that will accrue to the 1<sup>st</sup> defendant if leave is granted to the plaintiff to continue with this suit as a derivative action.
63. The issue of publishing audited financial accounts and/or circulating them to the 1<sup>st</sup> defendant’s shareholders is an issue that can be resolved and/or rectified by a vote/resolution at the 1<sup>st</sup> defendant’s meetings since it amounts to an irregularity in the internal running of the 1<sup>st</sup> defendant which cannot form the basis of a derivative suit.
64. In light of the foregoing analysis, this Court finds that the plaintiff has not demonstrated that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants in their capacities as directors of the 1<sup>st</sup> defendant have engaged in acts and/or omissions to the detriment of the 1<sup>st</sup> defendant and its shareholders. It has therefore not established a prima facie case with a probability of success against the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants to warrant grant of an order for leave to proceed with this suit as a derivative action.



**Whether the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants should be compelled to organize and convene an Annual General Meeting or an Extra Ordinary General Meeting of the 1<sup>st</sup> defendant within 30 days.**

65. Having found no fault on the part of the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants on how they have carried out their duties and obligations in their capacities as directors of the 1<sup>st</sup> defendant, there is no reason for this Court to compel them to organize and convene an Annual General Meeting or an Extra Ordinary General Meeting. In any event, it is evident from the record that an AGM was scheduled for 4<sup>th</sup> December, 2021. The prayer sought in that regard has as such been overtaken by events. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants also explained that an AGM could not be held in the year 2020 due to the Covid-19 Pandemic. That explanation according to me, is a plausible reason for not having held a meeting in the said year.

**Whether the defendants and the current Board of Directors should be restrained from drawing funds from the 1<sup>st</sup> defendant's bank accounts where service charge for Connaught Apartments is remitted.**

66. On this issue, my finding is that the plaintiff has not tendered any evidence in support of the allegation that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants have mismanaged and/or misappropriated funds of the 1<sup>st</sup> defendant company. The provisions of Section 107 of the Evidence Act come to play, in that whoever alleges must prove. In the absence of proof, restraining the 1<sup>st</sup> defendant's directors from drawing funds from the 1<sup>st</sup> defendant's bank accounts where service charge for Connaught Apartments is remitted is tantamount to interfering with the internal running of the 1<sup>st</sup> defendant's affairs, whose consequences would be dire, as the basic services that are covered under service charge will not be rendered to the occupants of Connaught Apartments, as no monies will be availed for the said services.

67. On Issue No. iv, on whether the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants should be compelled to authorize and commence repairs of the plaintiff's apartment No. RH01 at Connaught Apartments, the said issue cannot be determined in the plaintiff's favour as it has been shown from the minutes of the AGM held on 28<sup>th</sup> July, 2018, and in the minutes of subsequent meetings, that each apartment owner(s) was/were to cater for the cost of overhauling their bathtubs. This Court cannot therefore compel the defendants to undertake the said repairs.

68. In regard to issue No. v, on whether the defendants should be barred from requisitioning from the plaintiff the monthly service charge payable in respect of its apartment No. RH01 Connaught Apartments, it would be illegal to give the plaintiff preferential treatment by making an order restraining it from paying service charge to the 1<sup>st</sup> defendant, as it has failed to demonstrate that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are in breach of rendering the services required as Trustees of 1<sup>st</sup> defendant.

69. In the premise, I find that the application dated 30<sup>th</sup> September, 2021 is not merited. I hereby dismiss it with costs to the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

No appearance for the plaintiff/applicant



Mr. Kinuthia for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants

Ms B. Wokabi – Court Assistant.

