



REPUBLIC OF KENYA



KENYA LAW
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**Chudasama v Chudasama & 7 others (Civil Case E239 of 2020)
[2023] KEHC 23541 (KLR) (Commercial and Tax) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E239 OF 2020
JWW MONG'ARE, J
OCTOBER 9, 2023**

BETWEEN

SHASHIKANT HARILAL CHUDASAMA APPLICANT

AND

JASWANT HARILAL CHUDASAMA 1ST RESPONDENT

RAMESH HARILAL CHUDASAMA 2ND RESPONDENT

HASMUKH HARILAL CHUDASAMA 3RD RESPONDENT

AZAD AUTOMOBILE TRIMMINGS LIMITED 4TH RESPONDENT

MRS RENUKA HASMUKH CHUDASAMA 5TH RESPONDENT

BHAVEET RAMESH CHUDASAMA 6TH RESPONDENT

LEENISH JASWANT CHUDASAMA 7TH RESPONDENT

JEVIN HASMUKH CHUDASAMA 8TH RESPONDENT

RULING

1. Before this honourable court is the plaintiff's application dated June 6, 2020 brought under sections 238 to 242 of the *Companies Act*, section 3 of the *Judicature Act*, order 40 rule 1 to 3 and 10, order 41 rule 1 to 5 and order 51 rule 1 to 3 of the *Civil Procedure Rules* seeking *inter-alia* the following orders:-
 - a. That leave be granted to the plaintiff/applicant to continue this suit as a derivative action on behalf of Azad Cushion Makers Limited (the company) and an indemnity be granted by the company for all costs and expenses reasonably incurred in prosecuting this suit.



- b. That this honourable court be pleased to appoint Mr George Kiragu Mwangi as a receiver of the Company, the 4th defendants and LR No 209/2584, Monrovia Street, Nairobi and further fix the remuneration of the said receiver.
 - c. That this honourable court do issue injunctive orders restraining the defendants from essentially dealing with assets of the company pending the hearing and determination of the proposed suit.
2. The application is supported by the grounds on its face and the supporting affidavit sworn by the plaintiff, Shashikant Harilal Chaudasama, on July 6, 2020 and a further affidavit on December 2, 2020. The defendants oppose the application and have filed a replying affidavit sworn August 17, 2020 of Jaswant Harilal Chaudasama and on October 9, 2020 sworn by Ramesh Harilal Chaudasama.

Analysis and Determination

3. I have considered at length the rival arguments by the parties. Ostensibly I note that the plaintiff is seeking the leave of the court to bring a derivative suit for an on behalf of Azad Cushion Makers Limited (“the company”). It is not lost on me that this is a family business started many years in 1982 and has over the years been managed by various family members. All the shareholders are related. The plaintiff and the defendants are members of one family. The suit having been filed and the current application being premised under sections 238 and 242 of the *Companies Act*, the court must then determine that the same meets the threshold set out in the *Companies Act* for a derivative suit to be filed.
4. Section 238 (1) and (2) provides the following on the filing of a derivative suit:-
 - “ 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”,
5. Section 238(3) of the *Companies Act* provides as “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.”

Both parties have filed detailed authorities which I have also considered. Some of the authorities that I found very useful are the case of *Mahesh Meghji Shah v Jewel Holdings Limited & 2 others* (2017) eKLR which details the reasons as to why leave of the court is necessary to bringing a derivative suit. The case of *Gbelani Metals Limited & 3 others v Elesh Gbelani Natwarial & Another* (2017)eKLR and The case of *Joseph Munyoki Nzioka v Raindrops Limited & 3 other* (2019)eKLR. All these cases speaking to the purpose and process of bringing a derivative suit.
6. The plaintiff argues that the defendants who are his brothers have benefitted from the business and have excluded him from the management and affairs of the company where he served previously as an accountant and was receiving a stipend for doing the company accounts.



7. The plaintiff further argues that this position he held part time while employed but became full time when he retired. He submits that it is upon him questioning the affairs of the 4th defendant that he was asked to stop coming to the company to work as an accountant. He also questions the decisions of the defendants' refusal to employ his two sons while offering their own children employment at the company.
8. Further, the plaintiff alleges that while engaged as directors of the company, the defendants utilised profits from the business to purchase for themselves personal properties, one such property is LR No 209/2584, which the company had previously occupied as tenants, which they purchased in their personal names and started to charge rent to the business.
9. The plaintiff further argues that in 1997 the 3rd defendants purchased LR No 209/10354/33 and registered it in own name and has continued to occupy the same since then for his benefit and that of the family. The plaintiff argues that the same was purchased using proceeds from the company and should be returned to the company as part of its assets. The plaintiff further took issue with the incorporation of the 4th defendants, Azad Automobile Trimmings Limited, which he argues he was not given shares to and argues that the same was formed using the capital and equipment of the company and hence the shareholders in the said company hold the shares in trust for the shareholders of the company.
10. The plaintiff accused the defendants of failing to pay up dividends of the company and the 4th defendants which he submitted were to the tune of Kshs 5 million and Kshs 20 million for the 4th defendants since both companies were incorporated. The plaintiff urged the court to appoint a receiver to manage the affairs of the company and restrain the defendants from dealing with the asset of the company or at all.
11. The defendants in urging the court to dismiss the suit before it have submitted that at a meeting of the company held on July 29, 2019, the company resolved to pursue a voluntary winding up of the same and pay up the liabilities of the company and distribute the assets of the company to the shareholders and even appointed the 3rd defendant to deal with the customers of the company. The defendants have produced the minutes and a resolution of the said meeting as evidence of the said meeting to that effect.
12. The defendants aver that the plaintiff was present at the said meeting when the decision was reached and did not raise any objections to the said decision or at all. The defendants have further submitted that the twin issue of the succession of their late father's estate and the ownership of LR No 209/3384 are already matters before the courts and subject of litigation in the High Court in succession cause No 89 of 2018 and ELC suit No1394 of 2016 as consolidated with ELC Suit No 249 of 2019. The said cases have been instituted by the plaintiff and are yet to be determined.
13. The defendants argue that the plaintiff is bringing the current suit to settle personal vendettas and the suit herein as filed is not for the benefit of the company as envisioned by the *Companies Act*. The defendants accuse the plaintiff of forum shopping by filing various cases on the same issues in different courts. All these facts have not been controverted by the plaintiff.
14. In their submissions the defendants placed reliance on various court decisions which I have considered. The defendants cited the following cases which I found useful in the arriving at the decision herein. The case of *Gbelani Metals Limited & 3 others v Elesh Gbelani Natrwalal & another* (2017)eKLR also cited by the plaintiff on the factors to consider when granting leave to a party to bring a derivative suit. The case of *John Waimiri & 7 others v Francesco Lepri & another; Sunny Management & Consulting Limited & Another (interested Party); Jobari Villas Management Limited (affected Party)*(2020)eKLR, where the court considered that before approving a derivative suit that there is established a *prima facie* on any of the causes of action. The defendants also cited the case



of *Nextgen Office Suites Ltd & another v. Netcom Investments Ltd & another; Shah Minaksah Navichandra(Interested Party)*(2021)eKLR where the court observed that an applicant needs to establish good faith when seeking leave to commence a derivative claim. All these decisions were useful in assisting the court arrive at a decision in the current suit.

15. Having therefore considered the submissions as filed by the parties, the law and the authorities emanating from the courts. The applicant, in my view, seems to be personally aggrieved and has already taken action in the suits he has filed both in the High Court and the Land Court. I find no correlation in the matter before me and the company. The grounds adduced by the plaintiff appear personal to him and not in any way, issues affecting the company as an entity. I am therefore persuaded that the plaintiff has brought this suit to pursue his own personal interest and for his benefit alone. The suit therefore fails the derivative suit test that is set out under section 238 of the *Companies Act* which require that the suit must be brought for the benefit of the company alone and not the member. It is clear in mind that in bringing this suit, the plaintiff is pursuing his personal interest and not of the company as required by the law. The application is therefore without merit. This therefore means that the court will not seek to determine the rest of the prayers for a grant of injunctive relief and appointment of a receiver manager as the same are premature at this stage.
16. The upshot of the above finding is that the application as filed lacks merit and is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF OCTOBER 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence Of:-

Mr. Mwenda holding brief for Gibson Kamau Kuria, SC, for the Plaintiff/Applicant.

Mr. Onyango for the 2nd, 3rd, 5th, 7th & 8th Defendants/Respondents.

Ms. Mwaniki for the 1st, 4th, & 6th Defendants/Respondents.

Amos - Court Assistant

