



**Adhiambo v Reuben & 4 others (Miscellaneous Application E604 of 2021)
[2022] KEHC 100 (KLR) (Commercial and Tax) (11 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 100 (KLR)

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

MISCELLANEOUS APPLICATION E604 OF 2021

A MABEYA, J

FEBRUARY 11, 2022

IN THE MATTER OF SHEMIKE TRAINING INSTITUTE LIMITED

AND

IN THE MATTER OF: COMPANIES ACT NO. 17 OF 2015

BETWEEN

BRENDA ADHIAMBO APPLICANT

AND

PETER GATHII REUBEN 1ST RESPONDENT

NICHOLAS WAINAINA MBUGUA 2ND RESPONDENT

NATIONAL INDUSTRIAL TRAINING AUTHORITY 3RD RESPONDENT

KENASHI INTERNATIONAL LTD 4TH RESPONDENT

SHEMIKE TRAINING INSTITUTE LTD 5TH RESPONDENT

RULING

1. Before Court is an application dated 27/5/2021. It was brought under section 3, 3A of the *Civil Procedure Act*, and sections 139-158, 238, 780 and 782 of the *Companies Act*.
2. The application sought orders that leave be granted to the applicant to commence and continue a derivative claim on behalf of the 5th respondent (the Company). It also sought orders that the leave once granted do operate as an injunction restraining the 4th respondent and its agents from dealing with the assets of the 5th respondent to conduct training on behalf of the 4th respondent at Muguga/ Muguga/2460, 2461, 2462, 2463, 2464, 2465 and 2466 near Kikuyu along Nairobi - Nakuru Highway (the suit property).



3. It also sought orders that the leave once granted to operate as an injunction against the 1st and 2nd respondents, their agents, servants, proxies and/or associates from surrendering to third parties all the properties movable and immovable assets of the 5th respondent.
4. The application was supported by the affidavit of Brenda Adhiambo sworn on 27/5/2021. The grounds upon which it was premised were that the applicant, the 1st and 2nd respondents were directors of the Company. The Company had been registered by the 3rd respondent as a Homecare training provider at the suit property. The applicant had invested heavily in the Company including a part payment subscription fee of Kshs. 600,000/= earning her 30% shares, loan of Kshs. 400,000/= to the company, marketing, training, and various purchases for the benefit of the company.
5. Later, on 12/4/2021, the 1st and 2nd respondent incorporated the 4th respondent on 12th April 2021 and the same was registered by the 3rd respondent to similarly conduct Homecare training on the same suit property where the Company was registered to offer training.
6. Vide a letter dated 22/4/2021, the 1st and 2nd respondent misrepresented to the 3rd respondent that the Company had suspended its operations. In the premises, the 4th respondent was therefore registered and was advertising for May 2021 intake in direct competition with the Company and admitted 450 trainees in the suit property. That the 4th respondent was utilizing the moveable and immoveable property of the Company some of which were acquired by the applicant.
7. It was alleged that the 2nd respondent periodically collected fee in cash directly from agents and pocketed Kshs. 2,500,000/= which belonged to the Company. It was further alleged that the 1st and 2nd respondent had prevented the auditing of the Company and delayed preparation of the financial statements and filing of annual returns.
8. It was the applicant's case that, the 1st and 2nd respondent were guilty of conflict of interest without declaring the same when incorporating the 4th respondent. That they were at a risk of transferring, alienating and putting to waste the assets of the company. That their actions amounted to fraud, breach of duty and breach of trust by a director of the Company.
9. The respondents opposed the application vide the 1st respondent's replying affidavit sworn on 18/6/2021. He began by admitting that he was a director of both the 4th and 5th respondent. That the applicant had not brought the application in good faith as she had failed to first address the issues with the co-directors and that she declined to attend a meeting to discuss post-Covid business recovery solutions.
10. He stated that the applicant joined the Company few weeks after it was registered hence did not participate in its creation. The Company already had all the required movable and immovable equipment hence it was false that the applicant invested time and equipment in its start-up stage.
11. It was contended that the suit property was jointly owned with one Josephine Gathii and the 1st respondent and that it had not been pledged as part of his contribution at no rent as claimed by the applicant. That the Kshs. 400,000/= which the applicant loaned the Company had been repaid at Kshs. 480,000/=.
12. He deposed that the 3rd respondent withdrew the Company's license pursuant to the termination of lease between the Company and its landlord. That the Company had collapsed due to liabilities contributed to by the applicant's balance of Kshs. 1,400,000/=. It was admitted that the 4th respondent was equally a Homecare training provider and had been training people since its incorporation.



13. I have considered the parties pleadings, evidence and submissions. I also take judicial notice of the application dated 4/11/2021 which was unopposed and allowed as prayed for on 11/11/2021. The effect was that the 5th respondent's Equity Bank Account No. 0010xxxx, demand letter to Equity Bank dated 7/9/2021 and Central Police Station OB No. 91 of 10/8/2021 annexed in the supporting affidavit dated 4/11/2021 were admitted for the purpose of the application.
14. The main issue for determination is whether the applicant ought to be allowed to commence and continue a derivative suit on behalf of the Company. The other issue is whether the leave once granted ought to act as an injunction.
15. By dint of section 238 (1) of the Companies Act ("the Act"), a derivative claim is that which is brought;
 - a) by a member of a company in respect of a cause of action vested in the company, and
 - b) seeking relief on behalf of the company.
16. These conditions are not independent of each other. An applicant must establish that he is a member of a company and that a cause of action is vested in the company. In addition, he must demonstrate that the reliefs sought are on behalf of the company, for its own benefit.
17. The applicant attached the company's CR12 as "BA-1" which reflects her as a member of the Company. As to whether there was a cause of action vested in the Company, she swore that the 1st and 2nd respondent had incorporated the 4th respondent for the purpose of conducting business which was in direct competition with the Company, an action which amounted to a conflict of interest.
18. This allegation was admitted by the 1st respondent in his replying affidavit of 18/6/2021. There were also allegations of conversion of the Company's funds, unlawful suspension of the Company's operations, misappropriation of the Company's assets amongst other allegations. It is obvious that all these disclosed a cause action vested in the Company.
19. As to whether the reliefs sought were on behalf of the company, the answer is in the affirmative. The applicant sought injunctive relief to protect and preserve both the moveable and immovable assets of the Company. The reliefs were not personal in nature and were intended for the benefit of the Company. The application thus survives the first test.
20. As concerns the other tests to be applied in granting orders to commence and continue derivative suits, it was held in *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another [2017] Eklr*, that there is a two-stage process envisaged by the Act with regards to derivative suits.
21. 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 sections 238(3) and 239(2) of the Act. However, the application for permission will be dismissed if the evidence adduced in support "do not disclose a case" for giving of permission. The importance of judicial approval under the Act, hence, is to screen out frivolous claims. The court will only allow meritorious claims.
22. In this regard, to surmount the first stage, an applicant only needs to establish through evidence, that he has a prima facie case without the need to show that it will succeed.
23. The second stage entails a consideration of statutory provisions and factors which ordinarily guide judicial discretion albeit in the realm of derivative act. In *Isaiah Waweru Njumi & 2 Others -v- Muturi*



Ndungu [2016]eKLR, the court set out some of the considerations to be taken into account 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 authorised 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 direct as opposed to a derivative action.

24. In the present case, the applicant demonstrated that the 1st and 2nd respondent had incorporated the 4th respondent and were part of its directors. That the 4th respondent conducted the exact same business as the Company; that of Homecare training, and had already admitted 450 trainees since its incorporation. It was also alleged that the 1st and 2nd respondent were operating the 4th respondent's business in the same premises whereby the Company conducted its business. These facts were admitted by the 1st respondent.

25. It was further alleged that the 4th respondent was operating using the moveable and immovable property of the Company. That the 2nd respondent had pocketed Kshs. 2,500,000/= belonging to the Company an allegation that was not denied. It was also demonstrated that the 1st and 2nd respondent had unlawfully passed a resolution to close the company's bank account at Equity Bank and open one for the 4th respondent. It was also established that the 1st and 2nd respondents transferred the funds in that account to the 1st respondent's personal account.



26. It is undoubted that not only did the applicant establish a prima facie case against the respondents, she also particularized facts which revealed a cause of action against the 1st and 2nd respondent. The application was not a mere personal vendetta as against the respondent. The cause of action would be better brought as a derivative action as opposed to a direct suit brought by the applicant, as the cause of action and reliefs sought are greatly vested in the Company herein.
27. This Court takes into consideration the seriousness of the allegations, more-so the continued operation of competing business by the 1st and 2nd respondent, unlawful closure of the Company's account and transfer of the funds therein into the personal account of the 1st respondent. It would be in the best interest of the Company to allow the application as prayed to not only preserve the company's assets, but restrict any further action that would prejudice the Company and its assets.
28. The upshot is that I find the application to be meritorious and I allow the same as prayed. The applicant will have the costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCI Arb

JUDGE

