



**Owino v Ouko & 4 others; Ekaa Afrika Limited (Nominal Defendant) (Civil Suit E210 of 2023)  
[2024] KEHC 14683 (KLR) (Commercial and Tax) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14683 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E210 OF 2023  
FG MUGAMBI, J  
NOVEMBER 15, 2024**

**BETWEEN**

**DAVIS OTIENO OWINO ..... PLAINTIFF**

**AND**

**CHRISTINE OCHIENG OUKO ..... 1<sup>ST</sup> DEFENDANT**

**DENNIS MUGO ..... 2<sup>ND</sup> DEFENDANT**

**MORRIS WETINDI ..... 3<sup>RD</sup> DEFENDANT**

**UTILITY CAPITAL MANAGEMENT LTD ..... 4<sup>TH</sup> DEFENDANT**

**EQUITY BANK (KENYA) LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**AND**

**EKAA AFRIKA LIMITED ..... NOMINAL DEFENDANT**

**RULING**

**Background and introduction**

1. For determination is the plaintiff's application dated 15<sup>th</sup> May 2023 in which he seeks leave to continue the instant suit as a derivative action on behalf of the nominal defendant (hereinafter the Company). The application is supported by an affidavit sworn by the applicant on even date.
2. The applicant confirms that he, along with the 1<sup>st</sup> to 3<sup>rd</sup> defendants, is a shareholder and director in the Company, though he holds a minority stake. This suit arises from final orders issued in the judgment delivered on 11<sup>th</sup> August 2021 in *Utility Capital Management Ltd V Ekaa Afrika Limited & 3 Others, Nairobi HCCC No. 269 of 2016* (hereinafter the Judgment). In that case, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants,



along with the Company, were sued by the 4<sup>th</sup> defendant herein. For clarity, the applicant was not a party to that suit.

3. In the said judgment, this Court (Odero, J) awarded the Company USD 380,368.18, along with USD 4,979.80 as special damages, plus interest on both amounts at the court rate from the date of filing until full payment. The Court further directed that:

“In order to realize the judgment Equity Bank Limited be and is hereby directed to wire the funds held in the Defendant’s Account Number 1470264273433 held at Kilimani Branch to Andalila and Company (Client Account); Kenya Commercial Page 6 of 16 Bank (KCB), Head Office (Kencom), Account Number 1223167585.”

4. The applicant contends that despite writing to the 4<sup>th</sup> and 5<sup>th</sup> defendants regarding compliance with the judgment and final orders, he has not received any response. Consequently, he served a notice of a special board meeting upon the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants, as co-directors of the Company. The purpose of the meeting was to have the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, who were in control of the bank account referenced in Nairobi HCCC No. 269 of 2016, update the board of directors on the management and operations of the account.
5. The plaintiff asserts that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were the sole signatories of the account on behalf of the Company. He further claims that this Court, in its judgment, found the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants liable for their conduct in handling the transaction between the Company and the 4<sup>th</sup> defendant, which led to the Company’s liability to the 4<sup>th</sup> defendant.
6. The applicant accuses the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants of colluding and acting in a manner detrimental to him as a director and shareholder, and contrary to the best interests of the Company and its members, thereby prompting this suit.
7. Despite numerous opportunities, the defendants did not file any response to the application.

### **Analysis and determination**

8. I have reviewed the application and the evidence presented to this Court in its support, but I have not found any submissions filed by the applicant.
9. Whether the Court should grant permission to the applicant to proceed with this suit as a derivative suit is governed by sections 238 and 239 of the *Companies Act* (hereinafter the Act). By dint of section 238 (1), a derivative claim is that which is brought by a member of a Company in respect of a cause of action vested in the Company, seeking relief on behalf of the Company.
10. Derivative suits are meant to protect the legal interests of the Company by seeking to redress a wrong done to the Company often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. A derivative action is therefore an exception to the rule established under *Foss V Harbottle*, (1843) 2 Hare 462 that a corporation should sue in its own name and in its corporate character or in the name of the person appointed by the law to be its representative.
11. Under section 238 (1) of the Act, an applicant must establish that he is a member of a Company, that the cause of action is vested in the Company and, the reliefs sought must be on behalf of the Company for its benefit and not for personal gain or benefit. This Court has previously held that these requirements are not independent of each other. See for instance: *Ghelani Metals Limited & 3 Others V Elesh Ghelani Natwaral & Another*, [2017] eKLR.



12. Turning to the evidence before me, the CR12 dated 25<sup>th</sup> July 2014, submitted by the applicant, confirms his standing to bring this suit as a director and shareholder of the Company.
13. I have also carefully reviewed the judgment issued by this Court in connection with a Master Receivables Purchase Agreement between the 4<sup>th</sup> defendant and the Company. This Court found the Company liable to the 4<sup>th</sup> defendant and also held the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants liable to the 4<sup>th</sup> defendant based on the guarantees they had signed. An amended decree issued on 30<sup>th</sup> August 2021 confirms the applicant's account of this Court's judgment.
14. It is clear that a letter dated 9<sup>th</sup> December 2022 inquiring about compliance with the Court orders was sent to the 4<sup>th</sup> defendant through Nelson Ndalila & Company Advocates. A similar letter, dated 28<sup>th</sup> September 2022 was sent to the 5<sup>th</sup> defendant through its Director of Legal Services. No responses to either letter have been provided.
15. The applicant has also provided a notice for a special board meeting, dated 20<sup>th</sup> December 2022, calling for a meeting on 22<sup>nd</sup> December 2022 at 2pm. The agenda for the meeting was to discuss compliance with the orders issued in Nairobi HCCC No. 269 of 2016 and to consider measures to protect the Company and reduce its exposure to liability.
16. From the foregoing, I am satisfied that the defendants' failure to disclose the status of compliance with the Court orders, as well as the full extent of the Company's exposure, has put the Company and its members at significant risk. By withholding this crucial information, the defendants have acted in a manner detrimental to the Company's financial and legal standing. Their conduct exposes the Company to potential liability, including the possibility of substantial financial penalties and enforcement actions, arising from non-compliance with the orders issued in Nairobi HCCC No. 269 of 2016.
17. I have also reviewed the plaint and note that the reliefs sought are designed to protect the Company as a whole, not merely to advance the applicant's personal interests. The goal of this suit is to prevent the Company from incurring further financial exposure and legal consequences due to the defendants' failure to act in accordance with the Court's directives.
18. The defendants' decision to ignore this application, rather than clarifying the issues raised by the applicant have deprived the Company's membership of vital information needed to mitigate risk, safeguard the Company's assets, and ensure compliance with legal obligations.

### **Disposition**

19. Accordingly, the application dated 15<sup>th</sup> May 2023 is allowed. Leave is hereby granted to the applicant to proceed with this suit as a derivative action on behalf of, and for the benefit of, the nominal defendant. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

