



REPUBLIC OF KENYA



**Aceton Investment Limited & 2 others v Ochieng (Commercial Case E219 of 2024)
[2024] KEHC 15609 (KLR) (Commercial and Tax) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E219 OF 2024**

PM MULWA, J

DECEMBER 5, 2024

BETWEEN

ACETON INVESTMENT LIMITED 1ST PLAINTIFF

ACE BETS LTD 2ND PLAINTIFF

ERIC WANYOIKE NGUNJIRI 3RD PLAINTIFF

AND

JOSEPH NYOTURU OCHIENG DEFENDANT

RULING

1. Vide a plaint dated 24th April 2024, the plaintiffs instituted the present suit against the defendant. Their case was that the defendant, as one of the directors of the 1st and 2nd plaintiffs, unlawfully changed the shareholding of the 1st plaintiff and the bank signatories of the two companies without the consent or knowledge of the other directors.
2. The plaintiffs argued that the actions of the defendant are highly prejudicial to the affairs of the 1st and 2nd plaintiffs and prayed for an order, inter alia, to declare that the defendant breached the provisions of Sections 22 and 285 of the Companies Act in regards to the transfer of shares and amendments of bank signatories.
3. In addition to the plaint, the plaintiffs filed an application dated 24th April 2024 seeking leave to continue and prosecute this suit as a derivative action against the defendant.
4. The defendant filed a preliminary objection (PO) dated 14th May 2024 in opposition to the entire suit, in which he prays to have it struck out with costs on the grounds that it offends Section 238 of the Companies Act. What is before the court for determination is the preliminary objection.



Analysis and determination

5. The court directed the parties to file written submissions on the P.O, however at the time of writing this ruling only the plaintiffs had complied.
6. I have considered the pleadings and submission filed herein. The issue for determination is whether the suit ought to be struck out on the basis that it violates Section 238 of the *Companies Act*.
7. Section 238 of the *Companies Act* describes what a derivative claim entails and how it may be filed.
8. Subsections 1, 2 and 3 of the said section states:
 - (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.
9. As noted above, the defendant did not file his submissions to support his P.O despite the fact that such directions were given in the presence of his counsel on 24th June 2024. The defendant was also served through their advocates with the ruling notice dated 18th September 2024 as evidenced by the affidavit of service sworn on even date.
10. The court therefore does not have the opportunity to understand why the defendant pleaded that the suit herein violates Section 238 of the *Companies Act*.
11. Be that as it may, the plaint reveals to this court that the plaintiffs, particularly the 3rd plaintiff who is a director and shareholder of the 1st and 2nd plaintiffs, seeks to institute a derivative claim against the defendant who is also a director and member of the company on the basis that he unlawfully changed the shareholding of the 1st plaintiff and the bank signatories of the two companies without the consent or knowledge of the other directors.
12. The cause of action as set out in the plaint is therefore in accordance with section 238 of the *Companies Act* and I do not see any reason why the defendant stated that the suit is in breach of the said provision.
13. The upshot of the foregoing is that the P.O lacks merit and is hereby dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF DECEMBER 2024.

P.M. MULWA

JUDGE

In the presence of:

Mr. Odhiambo for Plaintiffs



N/A for Defendant

Court Assistant: Carlos

