



Ng'ang'a & 2 others v Ng'ang'a; Bennandira Company (Affected Company) (Miscellaneous Civil Application E065 of 2024) [2024] KEHC 15536 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS CIVIL APPLICATION E065 OF 2024**

**WM MUSYOKA, J
DECEMBER 6, 2024**

BETWEEN

MIRIAM WACUKA NG'ANG'A 1ST APPLICANT

PAULINE WANJERI NG'ANG'A 2ND APPLICANT

MARGARET WANGOI NG'ANG'A 3RD APPLICANT

AND

JAMES NDIRANGU NG'ANG'A RESPONDENT

AND

BENNANDIRA COMPANY AFFECTED COMPANY

RULING

1. The cause herein is for leave to institute a derivative action, on behalf of Bennandira Limited. It is by way of a Motion, dated 28th May 2024, brought at the instance of Miriam Wacuka Ng'ang'a, Pauline Wanjeri Ng'ang'a and Margaret Wangoi Ng'ang'a, who I shall refer to hereinafter as the applicants.
2. The background to the Motion is set out in the grounds on the face of the Motion, and in the joint affidavit of the applicants, sworn on 28th May 2024. They aver to be shareholders of Bennandira Limited, the Affected Company, and that the 3rd applicant was a director of the Affected Company, who had been recently appointed by James Ndirangu Ng'ang'a, the respondent herein, as a director of the Affected Company, without her consent. A director of the Affected Company, known as Benson Ng'ang'a, had died on 1st January 2024, to be hereafter referred to as the deceased, after which the respondent began to act recklessly, negligently and in breach of trust as a director of the Affected Company, by increasing the number of directors of the Affected Company, beyond the number provided for under the Articles of Association of the Affected Company, and without an ordinary resolution being passed at a general meeting, contrary to clause 45 of the Articles of Association. It is



- further averred that the respondent has appointed a Stephen Ombune Omukowa, a non-shareholder in the Affected Company, a director of the Company, contrary to clause 49 of the Articles of Association. The respondent is accused of withdrawal sums of money from a bank account of the Affected Company, without accounting for the same, and, thereby, misusing Affected Company funds, which amounts to a breach of trust. There are also allegations that employees have been dismissed by the respondent, without justifiable cause and without being afforded a fair hearing; and the respondent is accused of having become arrogant, bossy and unwilling to cooperate after the demise of the deceased.
3. A number of documents are annexed to the affidavit of the applicants. A letter, dated 22nd April 2020, names the shareholders and directors of the Affected Company, as at that date, to be the deceased and the respondent, both holding 50,000 shares. A certificate of death, dated 22nd January 2024, serial number 1617711, indicates that the deceased died on 1st January 2024. There is a warrant of attachment of movable goods, issued in Busia CMCCC No. E142 of 2022, on 21st May 2024, between persons who are not parties in this cause. Articles of Association, in respect of the Affected Company, dated 22nd April 2020. A document from the Business Registration Service, Registrar of Companies, dated 8th May 2024, indicating that the applicants, Lillian Wanjiku Ng'ang'a and Stephen Ombune Omukowa had become shareholders of the Affected Company, each holding 2,500 shares, except for the latter, who holds no shares. A consent to act as a director, executed by Stephen Ombune Omukowa, dated 8th March 2024. A Board resolution, executed by the respondent, on an undisclosed date, indicating that the Board of the Affected Company had resolved, on 5th March 2024, to appoint Stephen Ombune Omukowa as a director, following the demise of the deceased.
 4. The respondent reacted to the Motion, by filing grounds of opposition, dated 15th July 2024. He avers that any issue relating to the affairs of the Affected Company ought to be referred to arbitration, the action was premature as none of the applicants had called a meeting to deliberate on the issues, the Affected Company constitution provided for arbitration and that mode of dispute resolution had not been exhausted, the action by the applicants was not in the best interests of the Affected Company and could cause instability of the Affected Company, and the parties should be given time to sit and deliberate on the affairs of the Affected Company following the demise of the deceased.
 5. He also filed a replying affidavit, sworn on 10th July 2024. He cites Article 100 of the Articles of Association, to argue that the matter was premature, and violated that provision, which provided for mediation in the first instance, followed by arbitration, and argues that the court is being invited to re-write the Articles of Association. He avers that the dispute herein originated from efforts by the applicants, who were not shareholders at the time, of interfering with the business of the Affected Company, by attempting to evict tenants, who had allegedly not paid rent, collecting rent from them, which they did not remit to the Affected Company. He states that, although the applicants were asserting themselves to be shareholders, they had not provided proof of it. He further asserts that he was the largest shareholder in the Affected Company, and allowing the Affected Company to go under would not be in the best interests of the Affected Company and himself. He claims that, although the applicants have attacked him for appointing the 3rd applicant as a shareholder, they were pressurising him to appoint them as directors. He argues that the Affected Company is what he describes as a family company, and that the 3rd applicant, as administratrix of the estate of the deceased director, was the most suited for appointment as director.
 6. He further avers that Article 45 of the Articles of Association was not in mandatory terms, as it allowed increase of directors, through an ordinary resolution, which a director in office could effect through Article 75. He avers that the 2nd director, I suppose Stephen Ombune Omukowa, was appointed through a director's resolution passed on 5th March 2024, pursuant to Article 72, and he was an alternate director, in terms of Article 67, and he was in the process of purchasing floating shares. He



- cites Article 66, to argue that a continuing director could increase the number of directors, for the purpose of quorum, or summoning of a general meeting. He states that no proof had been provided, with respect to the allegations of recklessness and mismanagement, adding that the money withdrawn, was utilised for the purpose of carrying out repairs on Benna Plaza, owned by the Affected Company. He argues that, should the applicants be dissatisfied with the appointment of the 3rd applicant as director, they should apply to the Registrar of Companies, for her removal as such.
7. He asserts that there was bad faith in the application, driven by succession issues, as between the 2 houses of the deceased. He argues that no demand has been made against the director. He further alleges that the issues raised do not point to fraud, which should be the basis for a derivative action. He argues that it should be for the Affected Company to enforce rights or actions, vested in the Affected Company, for wrongs done to it, in negligence, breach of trust, default and breach of duty, and that that did not fall on the shoulders of shareholders, driven by individuals dissatisfaction. He further argues that the applicants did not seek information, from the directors, on the use of the funds that had been withdrawn from the accounts of the Affected Company, and that they had come to court with wild speculations. He further argues that the issue of unfair dismissal of employers lay elsewhere, for the High Court did not have jurisdiction over it.
 8. Attached to that affidavit are several documents. An extract from the Articles of Association, bearing Article 100. Copy of a Board resolution of 5th March 2024, appointing Stephen Ombune Omukowa, to substitute the deceased. A bundle of receipts..
 9. The respondent followed that up with a supplementary replying affidavit, sworn on 7th October 2024. He avers that he had undertaken his duties in the best interests of the Affected Company, and that that was what was causing trouble between him and the applicants. He asserts that the applicants do not recognise the Affected Company, and have denounced it, and, therefore, they lack locus to bring the application. On allegations of recklessness and financial mismanagement, the respondent argues that the same was not supported by any evidence, and that the money had been withdrawn for the purpose of effecting repairs on the Benna Plaza, owned by the Affected Company, to make it more habitable.
 10. He has attached an affidavit that the 3rd applicant has filed in the succession proceedings in the estate of the deceased, Busia HCSC No. E065 of 2024, as evidence of the denouncement of the Affected Company. There is a bundle of receipts, with respect to the repairs deposed to in the affidavit.
 11. The 3rd applicant filed a supplementary affidavit, sworn on 12th September 2024. She introduces herself as the administratrix of the estate of the deceased, who was her husband, and in respect of whom she had filed a succession cause in Busia HCSC No. E065 of 2024. She avers that after the burial of the deceased, the family sat, to agree on the distribution of his assets. Among the assets discussed were Busia/Municipality/532, 533 and 535, on which stand the Benna Plaza and the Equity Bank building. It was agreed that she would be appointed the administratrix of the estate of the deceased, and that the rental income from the assets of the estate would be paid into an account to be operated by her.
 12. Their then Advocates thereafter excluded the 3 properties from the schedule of assets of estate of the deceased, whereupon she discovered that the Affected Company had been fraudulently formed, using forged signatures, at a purported family meeting which never took place. The meeting allegedly happened on 4th February 2022, while the documents were forged on 22nd April 2020. Several other documents were alleged to have been forged on 4th February 2024, 15th February 2022 and 14th March 2024. It is asserted that the incorporation of the Affected Company was null and void, and so was its existence and the transactions that it engaged in. It is averred that the deceased suffered ill-health, at about the time of the incorporation of the Affected Company, and that the forgeries were part of a scheme to divert his assets. It is averred that the forgeries and fraud affecting the Affected Company



were already subject to criminal investigations, and an order had been obtained from court, to have the lands and companies registries avail certain documents to the investigators. She prays that a declaration be made that the incorporation of the Affected Company was null and void.

13. The 3rd applicant goes on to state that on 16th March 2022, there was a fraudulent transfer of the asset generating rental income, being Busia/Municipality/533, from the name of the deceased to that of the Affected Company. It is further stated that the respondent thereafter began to withdraw funds from the accounts of the Affected Company, and started forcing tenants to start paying rents directly to him. She avers that the respondent solely ran the bank account of the Affected Company, and had prohibited her from managing the properties of the estate. It is averred that that she is sickly, and her exclusion from running the accounts exposed her medically, as she had no resources for medication.
14. Several documents are attached to that supplementary affidavit. There is a certificate of death, in respect of the deceased. There is a copy of a grant of letters of administration, appointing the 3rd applicant administratrix of the estate of the deceased. There are minutes of a meeting, allegedly held on 6th February 2024, by the family of the deceased. There are documents from the registry of companies, bearing the signatures of the deceased, which the 3rd applicant claims are forged. There is also a forensic report of a document examiner, concluding that certain signatures, on the Affected Company documents, purported to be of the deceased were forged. There are documents, dated 4th February 2022, through which the deceased allegedly transferred shares in the Affected Company to the 3 applicants and Lillian Wanjiku Ng'ang'a. There are minutes of the Board of the Affected Company, carrying the resolution to give shares to the 3 applicants and Lilian Wanjiku Ng'ang'a. There is a consent executed by the 3rd applicant, accepting to act as a director of the Affected Company. There is a notice of change of address by the deceased. There is a notice of appointment of the 3rd applicant as director. There is also a statement of nominal capital of the Affected Company. There is a medical report on the condition of the deceased, dated 11th October 2022. There are documents, which are barely legible, but appear to be on transfer of land. There is a bundle of medical treatment notes on the 3rd applicant. Finally, there is a court order, with respect to investigations into various bank accounts operated by the Affected Company, land documents relating to the lands referred to hereabove, registration documents relating to the Affected Company, and payment of rents by tenants.
15. The application was canvassed orally, on 17th September 2024. The applicants placed on record a decision in *Kebenei vs. African Grain Care Equipment Limited & 2 others* [2024] KEHC 6193 (KLR) (Wananda J).
16. Mr. Gatundu, for the applicants submitted that the application was founded on sections 238, 239 and 240 of the *Companies Act*. He argued that a derivative suit could not be brought without leave of court, in circumstances where there was lack of accountability, or harm, or illegalities pertaining to a member of the Affected Company, or operations of the company, or the company itself. He submitted that the application was founded on illegalities and acts of fraud. He stated that an applicant is required to demonstrate the substantive prayers that they are going to plead at the substantive suit. He said that it ought to be demonstrated, prima facie, that there was a case worth adjourning to a main substantive suit.
17. He submitted that the applicants were shareholders of the Affected Company, with the 3rd applicant being a director against her will. He argued that the Affected Company was not supposed to be carrying out any business, as there was a pending criminal case, whose orders were likely to expose the directors to very serious criminal accountability and culpability, if it was established that corporate crime had been committed. He submitted that the applicants were likely to be found to be criminally liable. He explained that the respondent was facing 11 counts of forgery and another 11 counts of uttering



- false documents. He submitted that the deceased died, leaving the respondent as the sole director of the Affected Company, who, thereafter, acted in breach of trust and in violation of the articles and memorandum of association of the Affected Company, contrary to Article 45 of the Articles. He submitted that the respondent had appointed a director, who was a non-shareholder, without a resolution, and in violation of Article 49 of the Articles. On accountability, he submitted that the respondent, after the demise of the deceased, had withdrawn money belonging to the Affected Company, without accounting for it, .
18. He further submitted the court was not called upon to consider the merits of the case, but to look at the materials exhibited or pleaded as laying basis for leave. He argued that the 3rd applicant had denounced the meeting where the family had allegedly sat to agree on the formation of the Affected Company. He asserted that the Affected Company was never incorporated, as its alleged incorporation was founded on forged documents. He further submitted that the alleged meeting of the Board never happened, and that the minutes were forged. He said that the alleged incorporation of the Affected Company was criminal, fraudulent and illegal. He argued that the respondent took advantage of the ill-health of the deceased to perpetrate the forgeries and illegalities.
 19. He submitted that their main prayer was for a declaration that the incorporation of the Affected Company was null and void, and for an order to nullify the said incorporation. He submitted that there was no process, under the *Companies Act*, for nullification of a certificate of incorporation, and that the only route was through a derivative suit. He submitted that no harm would be suffered in dissolving the Affected Company, nullifying its certificate, and reverting its assets to the estate.
 20. Mr. Otieno, for the respondent, first submitted on whether cancellation, or revocation, or nullification of the certificate of incorporation would be in the best interest of the Affected Company, arguing that it would not be, for it would destroy the Affected Company, and, therefore, the same ought not to be allowed. He submitted that the intent of the 3rd applicant was not preservation of the Affected Company, but her own personal interest. He argued that she had complained that she had been reduced to a beggar, and wanted to access the rental income generated by the assets of the Affected Company, to take care of herself. He asserted that that was not in the interest of the Affected Company. He submitted that an application, under sections 238 to 241 of the *Companies Act*, ought to be by members of the Affected Company. He argued that since the case by the applicants was that the Affected Company did not exist legally, they could not, at the same time claim that it was a duly incorporated. He argued that the applicants were running away from the Affected Company, while at the same time, they were with the Affected Company. He cited *Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwarlal & another* [2017] eKLR (Onguto, J), to submit that given that the membership of the applicants was unquestionable, they would lack locus to bring the application.
 21. On the elements of an application for leave, he cited *Isaiah Waweru Njumi & 2 others vs. Muturi Ndung'u* [2016] eKLR (J. Ngugi, J). He submitted that particularisation of the alleged facts of fraud was a prerequisite, and so was efforts to bring the attention of the director of what they claim, whether the applicants represented the interest of the Affected Company. He submitted that the applicants had not made an effort to address the respondent on the Affected Company. He asserted that the applicants were pursuing their own interests, and not the interests of the Affected Company. A copy of the charge sheet, in a criminal matter in which the respondent had been charged at Kakamega, was placed on record, for the argument that the charges suggested that the applicants did not have the interests of the Affected Company at heart, for they held the view that the Affected Company did not exist. He submitted that there had been various attempts to stop the operations of the Affected Company. He cited a number of cases to support that, and to submit that the applicants not only intended to do away with the Affected Company, they also wished to paralyse its operations. He argued that even in the face



- of litigation, the activities of the Affected Company ought not be hampered, and cited *Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwarlal & another* [2017] eKLR (Onguto, J).
22. Mr. Otieno also cited Article 100 of the Articles of Association to argue that the applicants were barred from moving to court before exhausting the alternative dispute resolution mechanisms set out in that provision. He stated that what was provided for was mediation first, followed by arbitration. He argued that the applicants had not provided evidence that they had taken advantage of the provision, and sought mediation and arbitration, before they came to court.
 23. On the forgeries, he suggested that the 3rd applicant herself had no clean hands, for one of her purported signatures, in the court papers, did not appear to be hers. He submitted that, although the respondent had been accused of several things, no facts had been presented to illustrate them. On recklessness, he submitted that it was not demonstrated in which ways he was reckless. On breach of trust, he argued that no evidence of trust was presented, and it was not even clear whose trust had been breached, for the Affected Company itself was not lamenting. He submitted that it could not be the trust of the applicants, for they were claiming that the Affected Company did not exist, and they were keen on walking away from it. He asserted that the respondent was not duty-bound to earn the trust of non-members. On fraud, it was argued that none of it was proved, not even by illustration.
 24. On his part, Mr. Omeri for the Affected Company, submitted that there were conditions to be satisfied before leave, to initiate a derivative action against directors, on behalf of the Affected Company, was granted. He argued that it should be proved that there was negligence, default, breach of trust and of duty. He asserted that he had not seen any proof of any of them. He also submitted that the cause of action must be particularised, on the issues raised, and he relied on *Isaiah Waweru Njumi & 2 others vs. Muturi Ndung'u* [2016] eKLR (J. Ngugi, J). He asserted that there were no particulars. He also submitted that the threshold of exhaustion was not met. He cited Article 100, on what the parties ought to have done, before they came to court. He argued that the application was not in good faith, not in the interests of the Affected Company, for the interests of the Affected Company would have required that wrangles about its affairs ought to be resolved within the Affected Company. He asserted that the affidavit of the 3rd applicant only highlighted personal interest.
 25. The application before me seeks leave to institute a derivative action on behalf of the Affected Company.
 26. What is the law on that? Derivative actions are provided for under Part XI. Section 238 interprets the derivative action, to mean “proceedings by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company.” Under section 238(3) such an action “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.” Section 238(2)(b) states the other circumstance for a derivative action, as “in accordance with an order of the Court in proceedings for protection of members against unfair prejudice.” Under section 238(4) a derivative suit “may be brought against the director or another person, or both.”
 27. Section 239 provides for permission to continue derivative actions. The provision is framed in a manner which suggests that the claim is filed first, and after that leave or permission is sought to continue the claim. In the words of section 239(1), a member of the company “has to apply to the Court for permission to continue it.” Section 239(2) states that the court may dismiss the application, or “make any consequential order it considers appropriate ... if satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission.” The effect of section 238(2) is that the applicant has to adduce evidence to support his application, to the satisfaction of the court. Section 238(3) deals with what the court may order, in circumstances where



- it decides not to dismiss the application. It “may give directions as to the evidence to be provided by the company; and may adjourn the proceedings to enable the evidence to be obtained,” to bring the application within the threshold.
28. Section 240 covers permission to continue a claim as a derivative action, that is a claim which had not been initiated as a derivative claim, but as an ordinary claim. It would be a claim by the company, whose cause of action could provide basis for it to be continued as a derivative action, a member of the company could apply for it to be continued as a derivative claim, on grounds that “the manner in which the company commenced or continued the claim amounts to an abuse of the process of the Court; ... the company has failed to prosecute the claim diligently; and ... it is appropriate for the member to continue the claim as a derivative claim.”
 29. Section 241 deals with the factors that the court will take into account, in declining to grant permission, or in granting permission. Section 241(1) covers circumstances where permission may be denied, and it will be rebuffed where the court is satisfied “ ... that a person acting in accordance with section 144 would not seek to continue the claim; ... if the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company; or ... if the cause of action arises from an act or omission that has already occurred, that the act or omission ... was authorised by the company before it occurred; or ... has been ratified by the company since it occurred.” Section 144 states the duty of a director to exercise independent judgment, and it provides that that duty would not be infringed, where the director acts in accordance with an agreement entered into by the company, limiting the future exercise of discretion by its directors; or the director acts in a way authorised by *the constitution* of the company.
 30. Permission would be granted on the basis of the factors or considerations stated in section 241(2), being whether the member is acting in good faith in seeking to continue the claim; the importance that a person acting in accordance with section 143 would attach to continuing it; if the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and, in the circumstances, would be likely to be authorised by the company before it occurs, or is ratified by the company after it occurs; if the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company; whether the company has decided not to pursue the claim; and whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in the member’s own right rather than on behalf of the company.
 31. Section 143 states the duty of a director to “act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole.” The provision sets out what such a director should take into account, which include, the long term consequences of any decision of the directors; the interests of the employees of the company; the need to foster the company’s business relationships with suppliers, customers and others; the impact of the operations of the company on the community and the environment; the desirability of the company to maintain a reputation for high standards of business conduct; and the need to act fairly as between the directors and the members of the company.
 32. Section 241(2) expects that a court, deciding on whether or not to give permission, will pay particular regard “to any evidence before it as to the views of members of the company who have no personal interest (direct or indirect) in the matter.”
 33. The final provision, section 242 is on permission to continue a derivative claim brought by another member. That would cover claims that had been brought by the company and continued by a member as a derivative claim, or had been initiated by a member as a derivative claim, or like situations. The



grounds for takeover under this provision would be that the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of the Court; the claimant has failed to prosecute the claim diligently; and it is appropriate for the applicant to continue the claim as a derivative claim. The court may deal with the application in much the same way as it would with the rest, discussed above.

34. The courts have had occasion to consider and explain the concept of derivative action, particularly in view of recent law reform in company law, and to determine what ought to be taken into account in deciding applications to initiate or continue such actions.
35. In *Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwarlal & another* [2017] eKLR (Onguto, J), the court sought to define derivative suits, and to put them into new perspective, following the coming into force of the new *Companies Act*, in 2015. Such an action was defined as a mechanism for allowing shareholders to litigate on behalf of the company, and often against company insiders, such as directors, shareholders or other officers, whose actions would have caused harm to the company. It was described as an accountability tool, designed to ensure that redress was obtained against all wrongdoers, and especially those within the company itself. It was explained that the new *Companies Act* had changed the Common Law approach to derivative actions, stated in *Foss vs. Harbottle* [1843] 2 Hare 461 (Wigram, VC), by replacing it with judicial discretion to grant permission to continue derivative action.
36. In *Ayim vs. Multitrade Industrial Supplies Limited & 2 others; African Banking Corporation (Interested Party)* [2022] KEHC 16231 (KLR)(Mwita, J), the court stated:

“

“ 16. A derivative action is a claim brought or continued by a shareholder on behalf of the company in relation to a breach of duty by a director. This action is taken where the majority shareholders or directors wrongfully prevent the company from bringing or proceeding with such a claim itself and the claim is usually brought for the benefit of the company. This procedure is necessary as a director owes a duty to the company and not to the shareholders.

17 ...

18. Section 238 of the Act defines what a derivative action is and who may bring a derivative action. According to section 238(1), it is proceedings by a member of the company in respect of a cause of action vested in a company and is seeking relief on behalf of the company. Sub section (3) requires that the claim 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.

19. The section makes it plain that a derivative action is brought on behalf of the company and the relief sought is for the benefit of the company. In essence, a derivative action cannot be brought for the benefit of a plaintiff claiming to bring the suit as a derivative claim.

20. The questions then that arise for determination are, whether the company should have been named as a defendant and whether this is a derivative suit.

21 ...



22. The defendants and interested party have also argued that this is not a derivative suit because the relief sought will benefit the plaintiff and not the company. As already adverted to, it is the requirement of law that a derivative action be brought on behalf of and for the benefit of the corporation. Since the action is by a shareholder against officers or directors of a company, it is brought on behalf of the corporation and the shareholder sues and acts only as a representative plaintiff for the corporation. The objective of the suit is to stop actions of directors or shareholders that are destructive to the corporation's affairs. Any damages recovered in the suit belong to the corporation and not the plaintiff as a person. In other words, the shareholder would only indirectly benefit as one of the owners of the company.
23. It is in this regard, that section 238(3) decrees that a derivative claim 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." A derivative action will have been brought on behalf of and for the benefit of the corporation if the relief sought will be for benefit of the company. It is again for that reason that section 241(2)(a) demands that the court be satisfied that the member is acting in good faith in seeking to continue the derivative claim on behalf of the company."
37. In *Ooko & 4 others vs. Muruthi & 4 others* [2024] KEHC 1588 (KLR)(Wananda, J), it was said:
- "... a derivative action is a mechanism by which the law allows a member of a company to institute an action on behalf of the company. This arises where the company is 'unwilling', through the majority shareholder(s) or management to institute a suit for the benefit of the company. A derivative suit can therefore only be brought by a member of the company and for the benefit of the company or its members. It is an action to 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. All that one has to establish is that, he is a member of the company and then establish a bona fide cause of action in favour of the company which the management has failed, refused or neglected to pursue for and on behalf of the company."
38. In *Kebenei vs. African Grain Care Equipment Limited & 2 others* [2024] KEHC 6193 (KLR) (Wananda, J), the court also sought to explain what derivative suits or actions are about, where it was said:
- "... derivative action connotes an action to save a company from fraudulent or deliberate actions by a director calculated to fleece the company for personal gain or serious acts of negligence or breach of duty or breach of trust by a director resulting into damage or losses to the company. It is an action, not for the benefit of the applicant-director, but for the benefit of the company in general. It is also not meant to act as an avenue for curing irregularities in the conduct of the of the company's affairs."
39. In *Isaiah Waweru Njumi & 2 others vs. Muturi Ndungu* [2016] eKLR (J. Ngugi, J), the court identified the factors to be considered in such an application. The first would be whether the applicant has provided particularised facts, which would reveal a cause of action against the respondent, and sufficient particulars ought to be pleaded to create a reasonable doubt that the challenged actions of the



Board or directors would deserve protection under the business judgment rule, in determining whether or not they breached their duty of care or loyalty. Secondly, whether the applicant has made an effort to demand action from the directors, before filing suit, or whether such demand would be excused. Thirdly, the applicant fairly and accurately represented the interests of other members of the company, or whether the claim is driven by personal vendetta or private claim. Fourthly, whether the applicant was acting in good faith. Fifthly, whether the action taken by the applicant was consistent with one by of a faithful director, acting in adherence to the duty to promote the success of the company. Sixthly, whether the action complained of, if it is one of lack of authority by the shareholders or the company, is likely to be authorised or ratified by the company in future. The seventh, and final, consideration would be whether the cause of action contemplated is one that the applicant could bring directly, as opposed to a derivative action.

40. Similar considerations were set out in *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga vs. Eliud Timothy Mwamunga & Sagalla Ranchers Limited* [2017] KEHC 2856 (KLR)(J. Kamau, J) where the court stated:

“For a party to succeed in an action for derivation action, he or she must demonstrate the following:-

- a. He or she must be a member of the company and includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law;
- b. The proceedings must be in respect of a cause of action vested in the company;
- c. The proceedings must be seeking relief on behalf of the company;
- d. The proceedings must be for protection of members against unfair prejudice brought under the *Companies Act*.
- e. The proceedings are 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 ...”

41. I shall not re-invent the wheel, in terms of discussing what derivative actions entail, and the considerations for determining whether to allow permission to commence or continue one, for my colleagues have very ably defined the scope of derivative actions, and the matters to be taken into account in determining whether leave to initiate or continue derivative actions ought to be granted.
42. Perhaps, I could start by saying something about initiation of such actions. The applicants have sought leave to initiate one. My reading of Part XI does not reveal any provision which allows leave for initiation of such actions. What is provided for is permission or leave to continue claims as derivative actions. That presupposes that permission or leave is granted after the claim or action has been commenced, and leave is sought to continue the pending action as a derivative suit. No suit has been filed here, and the leave is to commence one. Anyhow, the courts have ruled that that is neither here nor there, for the case, that the applicant proposes to initiate, can be, and usually is, presented in the application, in affidavit form.
43. One of the issues, to be considered in the instant matter, is whether a case has been made out for permission to be granted to the applicants to bring a derivative action, on behalf of the Affected Company, against the respondent. Whether permission ought to be granted will depend on whether the applicants have made out such a case. They can only make out such a case by bringing themselves within the considerations that my colleagues have discussed in the cases that I have cited above.



44. So, what is the case by the applicants? The applicants have presented 2 cases in 1. The first case is that set out in the supporting affidavit of the applicants, sworn on 28th May 2024. The case there is that the respondent had mismanaged the Affected Company, after the demise of the deceased director, and that he had occasioned loss and damage to the Affected Company, and that there was breach of trust. The issues flagged, as pointing to that mismanagement, include her appointment as director without her consent, appointment of a non-shareholder as a director without following due process, reckless withdrawal of funds from the bank accounts of the Affected Company without accounting for the same, termination of employment contracts of certain employees, and lack of cooperation from the respondent.
45. The second case is presented through the supplementary affidavit of the 3rd applicant, sworn on 12th September 2024. The case here is that the Affected Company was a fraud, for it was incorporated using forged documents, and the assets, that are said to be owned by it, were fraudulently transferred to it. There is a forensic report on record, of a document examiner, designed to demonstrate that the signatures of the deceased director, used for the purpose of the incorporation of the Affected Company, were forged. The respondent has since been charged, in Kakamega CMCCRC No. 1943 of 2024, of forgery and uttering false documents, with respect to the documents that were used for the purposes of incorporation of the Affected Company. Ultimately, in that supplementary affidavit, the 3rd applicant pitches for a declaration that the Affected Company was null and void, and for nullification of its certificate of incorporation.
46. The 2 cases are totally different, and, I dare say, mutually exclusive. The first case, in time, could fit the bill for derivative action. It calls the respondent to account, with regard to the manner of conduct of the affairs of the Affected Company, in terms of how directors have been appointed, how the number of directors has been increased, how the financial and human resources of the Affected Company have been handled, and how the respondent has conducted himself as a director vis-à-vis the other directors and shareholders. These would be issues that would be addressed in a derivative action, subject to such limitations as are imposed by the provisions of Part XI, with respect to the judgment of the respondent as a director, and the latitude given to him, as director, regarding the affairs of the Affected Company. There is also the possibility of the acts or conduct complained of being ratified later by the other directors or shareholders at an appropriate meeting. See section 241(1)(2), Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwarlal & another [2017] eKLR (Onguto, J) and Kebenei vs. African Grain Care Equipment Limited & 2 others [2024] KEHC 6193 (KLR)(Wananda, J). The second case does not call for accountability. It is more radical. It argues that the Affected Company is a nullity, as it was incorporated using forged documents, and was a fraud, designed to siphon off property from the deceased director, with a view of benefitting a section of his family. By its nature, the second case would not be a subject of a derivative action.
47. I have said above, that the 2 cases are mutually exclusive, and I should explain that. The first case presupposes that the Affected Company is a valid entity, properly incorporated and existing, and that the only issue relates to management, and the intended proceedings are meant to get accountability with respect to that. The second case is that the Affected Company does not exist, for it was a fraud from inception. Under the second case, the applicants are not seeking accountability, but the nullification of the incorporation of the Affected Company, leading to its dissolution.
48. The issue then would be, which of these cases is intended to be prosecuted through the derivative action? When the parties argued the Motion, dated 28th May 2024, before me, on 17th October 2024, the case presented was that the Affected Company was not supposed to be carrying on business, on account of criminal responsibility and culpability. I was pointed to the pending criminal proceedings against the respondent. The final pitch, on behalf of the applicants, was that they were seeking



dissolution of the Affected Company, or nullification of its certificate of incorporation. The case for accountability by the respondent was secondary. There is a sense in which the applicants have deviated from their original case, that filed in May 2024, when the instant cause was initiated, to that set out in September 2024. I note that there was a change of Advocates, and that could explain it. The sense I get is that the applicants abandoned the first case, on accountability, and are now pushing the second case, for dissolution of the Affected Company.

49. I have stated above, that the second case would not be an appropriate subject for a derivative action. Why? I believe that should be found in the remarks in *Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwarlal & another* [2017] eKLR (Onguto, J), that:

“Derivative actions are the pillars of corporate litigation...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.”

50. The scope of the provisions on derivative suits is not broad enough to cover actions by shareholders, and others, for the dissolution or winding up of the company. According to section 238, the derivative action should be about “a cause of action vested in the company,” and “seeking relief on behalf of the company.” My understanding of this is that the derivative action is prosecution of a cause of action that has accrued to the company, and it is conducted on behalf of the company. The courts have construed that to mean that the derivative action is for the benefit of the company. See *Ayim vs. Multitrade Industrial Supplies Limited & 2 others; African Banking Corporation (Interested Party)* [2022] KEHC 16231 (KLR)(Mwita, J) and *Ooko & 4 others vs. Muruthi & 4 others* [2024] KEHC 1588 (KLR)(Wananda, J). The courts have also construed that to mean derivative action is intended to redress conduct of the business of the company, where the same has been done in a manner that is injurious or destructive to it. See *Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwarlal & another* [2017] eKLR (Onguto, J), *Ayim vs. Multitrade Industrial Supplies Limited & 2 others; African Banking Corporation (Interested Party)* [2022] KEHC 16231 (KLR)(Mwita, J) and *Kebenei vs. African Grain Care Equipment Limited & 2 others* [2024] KEHC 6193 (KLR)(Wananda, J).
51. The derivative action is brought for and on behalf of the company, for the benefit and interest of the company. It is not a suit against the company. The language, in the provisions in Part XI, which I discussed above, is that such actions are limited to obtaining accountability from the management and leadership of the company. Those issues were ably discussed, along those lines, in *Ayim vs. Multitrade Industrial Supplies Limited & 2 others; African Banking Corporation (Interested Party)* [2022] KEHC 16231 (KLR)(Mwita, J), in the paragraphs that I have recited above. They are not about the winding-up or dissolution of the company. They are not geared to destroy the company, but to promote its success. A derivative action is meant to address a breach of duty, with a view of righting the same, but not destroying the company in the process. See *Isaiah Waweru Njumi & 2 others vs. Muturi Ndung'u* [2016] eKLR (J. Ngugi, J). The derivative action is intended to be corrective, not destructive, and, therefore, it cannot be brought for the purpose of the winding up, or dissolution, or liquidation of the company. Where a member feels that the conduct complained of is such as should provide basis for winding up, or dissolution, or liquidation of the company, the proper cause of action ought to be to initiate proceedings for such action. Such proceedings can be initiated directly by members, not through derivative action.



52. It would be inconceivable, that a company would approach the court, for its own dissolution, on grounds that it was a fraud, as it was incorporated through a process that lacked integrity, and with a criminal intent. The foundation for the derivative action is the fact that the cause of action vests in or belongs to the company. So, what would be the cause of action there? Against who? For the company would, literally, be coming to court, through the derivative action, claiming that it was a fraud, and a criminal enterprise, and inviting the court for its winding up on that basis. That is not what derivative action is about. Would such action, for winding up or dissolution, be for the benefit of the company, or for corrective purposes? I am not persuaded that that would be a corrective measure, neither would it be for the benefit of the company.
53. Should I grant orders, based on the first case? Whether I should do so should depend on whether the case satisfies the tests set by the courts in the cases discussed above. That evaluation, however, cannot be done in ignorance of the second case. The 2 will have to be considered together, for they jointly present the background. The primary consideration should be whether there would be a cause of action, vesting in the Affected Company, in the intended derivative action. Regarding the first case, it would appear that there could be, but not for the second case. Would the intended derivative suit be on behalf of the Affected Company? When the 2 cases are taken together, the proposed derivative suit would not be on behalf of and for the benefit of the Affected Company. Would the applicants be acting in good faith, in bringing a suit for and on behalf of the company? I do not believe, from the facts and arguments presented, they would be. Would the contemplated cause of action, in the proposed derivative suit, be one that the applicants could found basis for the applicants to bring an action directly? I believe it would. The reasons given, for seeking dissolution of the Affected Company, would not be reasons that the Affected Company itself would advance, for they can only be pleaded by the applicants personally.
54. There are several factors, that would inform the considerations above. The first would be the arguments that the Affected Company was a fraud, for it came into existence as part of a larger fraudulent scheme; and that it was an illegality, for its incorporation was procured on the basis of forged documents. The second would be the claim that the assets of the Affected Company were fraudulently transferred to it, suggesting the Affected Company ought to cede them to their rightful owner, the estate of the deceased director. The third would be that the intended derivative suit would seek destruction of the Affected Company, not its preservation, as it would seek its dissolution, nullification of its certificate of incorporation, and to be stripped of its assets. The fourth would be the criminal proceedings that have been initiated against the respondent, on forgery of documents, and uttering of the forged documents, with respect to the incorporation of the Affected Company, and other matters relating to it, which could lead to the destruction of the Affected Company, should the prosecution be successful.
55. Fifthly, there would be the personal and private interests of the 3rd applicant, for she expressed that she required funds, from the resources controlled by the Affected Company, to meet her medical bills, which would not be an interest or a benefit on the Affected Company, yet it is one of the factors driving the instant application. Sixthly, and finally, would be the highly contentious litigation, between the applicants and the respondent, over the Affected Company and its assets, both at the criminal and probate courts, geared to demonstrate that the said assets do not belong to the Affected Company, but to the estate of the deceased director of the Affected Company. That vicious legal battle is the context within which these proceedings have been brought, not for the benefit of the estate, but as part of that larger legal battle over the assets of the estate of the deceased director of the Affected Company, between the persons who survived him.
56. I do not think I should say more. The facts, presented in this cause, when considered against the governing statutory provisions, and the relevant case law, would militate against grant of permission



- to commence a derivative suit, on behalf of the Affected Company, for the same would be one where the Affected Company would not have a cause of action, and the suit would not be for the benefit of the Affected Company. The applicants, as clearly emerges from the facts, and the arguments advanced, have no faith and belief, in the existence of the Affected Company, as they believe it to be a vehicle tailored to deprive them of their inheritance. The contemplated derivative suit, therefore, would not be for the benefit of the Affected Company, but that of the applicants. The way out, for them, should not be in a derivative action, but, perhaps, in a suit for the dissolution or winding up of the Affected Company, for a derivative suit would not take them to their intended destination.
57. I note that the pending criminal case against the respondent turns largely on the same facts and grounds as advanced in this case, that the Affected Company was a fraud from inception. That being the case, a prosecution of a suit in a civil court, over the same issues, as are now pending before the criminal court, would be duplicitous, and, should the 2 courts handle the 2 cases to their logical conclusion, there would be a chance or spectre of conflicting results. Although the law does not expressly bar parallel prosecution of matters, pending in both the civil and criminal courts, founded on the same facts and arguments, prudence ought to guard against it. Conflicting conclusions, in such a scenario, would be to the eternal embarrassment of the 2 courts, and the Judiciary at large. The standard of proof, for the case in the criminal process, would be higher, and the outcome from that process ought to carry more weight. The civil court ought not insist on proceeding to conduct a parallel enquiry, even where the law permits it, and it should defer to that other court.
58. Section 241(2), of the *Companies Act*, requires that the court considers any evidence before it, of the views of other members of the company, who have no personal interest in the matter. This is because the derivative suit is representative, for the plaintiffs in it would be acting in a representative capacity, for the company, and ought to represent the views and interests of other minority shareholders. Lillian Wanjiku Ng'ang'a appears to be a minority shareholder, just like the applicants. Yet, the papers filed by the applicants have not purported to present her case. Indeed, the applicants have not attempted to demonstrate where she stands in the whole matter, in terms of whether they speak for her too. Lack of inclusion, of other minority shareholders, by not being made parties to the matter, or by non-presentation of their views, one way or the other, for consumption by the court, for the purposes of section 241(2), could be construed negatively, against the applicants.
59. The issues raised by the applicants are not idle, for members are entitled to answers, where it would appear that the company is not headed in the right direction. However, not all these issues are for addressing through a derivative suit. There are other avenues, through which members can directly intervene. There are remedies, for example, under Part XXIX of the *Companies Act*, where members can move the court under sections 780, 781 and 782, for their protection against oppressive conduct and unfair prejudice. There is also Part XXX of the *Companies Act*, in which members may directly apply for investigations into the affairs of the company, under sections 786 and 787.
60. Issues were raised about mediation and arbitration, on the basis that *the constitution* of the Affected Company made the 2 the first port of call, before litigation could be mounted, and that the applicants ought to have exhausted these 2 remedies before they moved the court. I would hold that it would be unnecessary for me to get into determination of that question, given my conclusions above. Moreover, going by *Ghelani Metals Limited & 3 others vs. Elesh Ghelani Natwarlal & another* [2017] eKLR (Onguto, J), a clause in *the constitution* of a company, for mediation or arbitration, as the first port of call, before litigation can be contemplated, does not suspend, substitute, displace, oust or take away the right to take derivative action, neither does it diminish, restrict nor delay its application.
61. My final word is that the Motion, dated 28th March 2024, stood a chance, as initially conceived and framed. That chance was, however, thwarted and destroyed, when, or at the moment, the applicants



made the subsequent filings, in September 2024, whose effect was to completely change the context of the intended action, and to put the Motion on a totally different trajectory.

62. In view of everything said above, I am not persuaded that the Motion, dated 28th March 2024, is merited. I hereby dismiss it. This is a dispute within the family, and I shall, accordingly, not burden the applicants with the costs. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 6TH DAY OF DECEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Alex Gatundu, instructed by Gatundu & Company, Advocates for the applicants.

Mr. Tyson Otieno, instructed by Masiga Wainaina & Company, Advocates for the respondent.

Mr. Tony Omeri, instructed by Omeri & Associates, Advocates for the Affected Company.

