



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 119 OF 2016**

**BETWEEN**

**SAMUEL MBURU GITERE.....1<sup>ST</sup> PLAINTIFF**

**ANNE WANJIRU GITERE.....2<sup>ND</sup> PLAINTIFF**

**BOTH SUING ON BEHALF OF**

**GITERE KAHURA INVESTMENTS LIMITED**

**AND**

**KENNETH KIMARI GITERE.....1<sup>ST</sup> DEFENDANT**

**DAVID WAKANGU GITERE.....2<sup>ND</sup> DEFENDANT**

**NATIONAL BANK OF KENYA.....3<sup>RD</sup> DEFENDANT**

**CHABRIN AGENCIES LIMITED.....4<sup>TH</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LIMITED.....5<sup>TH</sup> DEFENDANT**

**LUCAS WAITHAKA GITERE.....6<sup>TH</sup> DEFENDANT**

**RULING NO. 3**

1. Although the Defendants have raised several technical objections to the application before the court, I propose to deal with the substance of the matter which is whether I should grant the Plaintiffs permission to proceed with this matter as a derivative suit under **section 238** of the *Companies Act*. The Plaintiffs seek other reliefs including injunctions and the appointment of a receiver over the Company. The grant of additional orders is predicated on this court granting the permission.

2. The application for consideration is the Plaintiffs' Amended Notice of Motion dated 11<sup>th</sup> June 2018. The Plaintiffs' cause of action is set out in the Amended Plaint dated 11<sup>th</sup> June 2018. Since the summons to enter appearance have not been issued and no defences filed, leave to amend the Plaint is not necessary under **Order 8 rule 1** of the *Civil Procedure Rules*. For purposes of the application, I will consider the facts raised in the Amended Plaint as to true and correct in order to resolve the issue at hand.

3. The application is supported by the 2<sup>nd</sup> Plaintiff's affidavits sworn on 18<sup>th</sup> March 2016 and 11<sup>th</sup> June 2018. The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants through the replying affidavit sworn on 24<sup>th</sup> September 2020 by the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Defendant has opposed application through the replying affidavit of its Manager, Remedial and Recoveries, Rhoda Sirma, sworn on 18<sup>th</sup> September 2020. The parties have filed written submissions in support of their respective positions.

4. This matter concerns Gitere Kahura Investments Limited ("the Company") which was incorporated in 1977 by Gitere Kahura and his wife Mary Nyokabi Kahura as shareholders with one share each. Mary Nyokabi Kahura died in 2001 while Gitere Kahura died in 2008. They had

12 children among them the Plaintiffs, 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants and 7 other siblings. A grant of representation was issued in **NRB HC Succession Cause No. 265 of 2009** in respect of the Estate of Gitere Kahura (Deceased) and in **NRB HC Succession Cause No. 373 of 2016** in respect of the Estate of Mary Nyokabi Kahura (Deceased). The two grants were confirmed by Musyoka J., in a ruling dated 18<sup>th</sup> May 2018 where he ordered that:

*(a) That the shares held by the two deceased persons in Gitere Kahura Investments Limited shall be shared equally between or amongst all the twelve survivors of the deceased in the terms of the consent order of 28<sup>th</sup> February 2018;*

*(b) That there shall be partial confirmation of the grants in the two causes in those terms;*

5. In the Amended Plaint and depositions, the Plaintiffs have raised various issues for which they seek relief. The thrust of their case is that the shareholding and management of the Company has never been fully and properly constituted. They contend that according to the Memorandum and Articles of Association of Company, the quorum of the Board of Directors was to be fixed, but until that was done, the quorum was of two Directors who were the two subscribers but when Mary Nyokabi died in 2001, the Board of Directors could not realise a quorum, unless or until a person was appointed a legal representative and served in the Board as a Director representing the estate of the deceased. The Plaintiffs state that between 2001 and 2008, Gitere Kahura (Deceased), ran the company illegally assisted by the 2<sup>nd</sup> Defendant who could not be appointed to serve as a co-director as he was not the legal representative of Mary Nyokabi (Deceased).

6. In light of this deficiency, the Plaintiffs seek, inter alia, a declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants have since 2009 transacted the Company's business when it had only one shareholder contrary to **section 33 of the Companies Act (Repealed)** and that they be directed to meet all liabilities of the Company from 2009. The Plaintiffs pray that the court annuls the borrowing contracts including charges, debentures and other securities entered into by the Company and the 3<sup>rd</sup> Defendant to construct housing units on LR No. 21070. In particular, the Plaintiffs impugn financial accommodation amounting to Kshs. 350,000,000.00 extended to the Company by the 3<sup>rd</sup> Defendant secured by a Further Charge over LR No. 21070. The Plaintiffs also accuse the 3<sup>rd</sup> Defendant of breaching his duty as a director by giving the Company financial and investment advice in the construction of housing units on LR No. 21070.

7. There is no dispute regarding the law applicable to this case. The Plaintiffs submit that as held in the **Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & Another NRB CA Civil Appeal No. 101 of 2004 [2015] eKLR** a shareholder has a right to bring a derivative action on behalf of a company, whose management is misappropriating or wasting its assets or destroying it completely and who have no incentive in instituting proceedings to protect the company's investments. The Plaintiffs submits that the Defendants have jointly committed and continue to commit acts which are aimed at depriving the Company of its assets and resources fraudulently.

8. The 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants contend that they have not acted in any way that would harm the Company's operations or committed any fraud towards the Plaintiffs or the Company. They contend that the actions complained of were carried out to benefit the Company as a whole. The Defendant also contest the claim that the Plaintiffs are minority shareholders.

9. The 3<sup>rd</sup> Defendant supports the position taken by the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants to the extent that the Plaintiffs have not made out a case warranting permission to continue with the suit as a derivative suit. In respect of the securities granted by the 3<sup>rd</sup> Defendant to the Company, it contends that the advances to the Company were duly authorized by its Board of Directors and are therefore binding on it.

10. Whether the court should grant permission to the Plaintiffs to proceed with this suit as a derivative suit is governed by **sections 238 and 239 of the Companies Act** which provides as follows:

*238 (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.*

*(4) A derivative claim may be brought against the director or another person, or both.*

*(5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.*

*(6) For the purposes of this Part—*

*(a) "director" includes a former director;*

(b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

239. Application for permission to continue derivative claim

(1) in order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.

(2) 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 Court—

(a) shall dismiss the application; and

(b) may make any consequential order it considers appropriate,

(3) If the application is not dismissed under subsection (2), the Court—

(a) may give directions as to the evidence to be provided by the company; and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(4) On hearing the application, the Court may—

(a) give permission to continue the claim on such terms as it considers appropriate;

(b) refuse permission and dismiss the claim; or

(c) adjourn the proceedings on the application and give such directions as it considers appropriate. [Emphasis mine]

11. The aforesaid provisions provide the framework for instituting claims by members of the Company on behalf of the Company. Prior to the enactment of the **Companies Act**, such suits were governed by the rule in **Foss v Harbottle [1843] 67 ER 189** which established the general principle that a wrong alleged to have been done to a company, can only be remedied by an action by the company itself. However, several exceptions to the rule developed including the derivative action which allowed a minority shareholder to bring a claim on behalf of the Company.

12. Onguto J., in **Ghelani Metals Limited and 3 Others v Elesh Ghelani Natwarlal and Another ML HCCC No. 102 of 2017 [2017] eKLR** explained the effect of the **Companies Act** on the common law rule in **Foss v Harbottle (Supra)** as follows:

44. *Statutory procedure is now the exclusive method of pursuing derivative claims. The Act sets out what sorts of company claims may be pursued and is also explicit that derivative claims may only be pursued under the Act. The question must only be the factors the court ought to consider before approving a derivative claim.*

45. *There appears, in my view, to exist a two stage process. The court must first satisfy itself that there is a prima facie case on any of the causes of action noted under s.238(3). S.239(2) of the Act provides that the application for permission will be dismissed if the evidence adduced in support “do not disclose a case” for giving of permission. The essence of judicial approval under the Act is to screen out frivolous claims. The court is only to allow meritorious claims. All that the applicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed.*

13. In considering whether to grant permission, the court is also guided by **section 241** of the **Companies Act** which sets out circumstances under which the court shall refuse the application and the considerations the court shall take into account when granting permission to the applicant to continue the suit as a derivative suit. The section provides as follows:

241. (1) *If a member of a company applies for permission under section 239 or 240, the Court shall refuse permission if satisfied—*

(a) *that a person acting in accordance with section 144 would not seek to continue the claim;*

(b) *if the cause of action arises from an act or omission that is yet to occur—that the act or omission has been authorized by the company;*

(c) *if the cause of action arises from an act or omission that has already occurred — that the act or omission—*

(i) *was authorised by the company before it occurred; or*

(ii) *has been ratified by the company since it occurred.*

(2) *In considering whether to give permission, the Court shall take into account the following considerations:*

- (a) whether the member is acting in good faith in seeking to continue the claim;
- (b) the importance that a person acting in accordance with section 143 would attach to continuing it;
- (c) 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—
  - (i) authorised by the company before it occurs; or
  - (ii) ratified by the company after it occurs;
- (d) 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
- (e) whether the company has decided not to pursue the claim;
- (f) 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.

(3) In deciding whether to give permission, the Court shall have 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. [Emphasis mine]

14. In *Isaiah Waweru Njumi & 2 Others v Muturi Ndungu KBU HCCC No. 6 of 2016 [2016] eKLR, Ngugi J.*, summarised some of the factors to be considered granting permission to commence to continue a derivative action as follows:

[21]...Among other things, the Court considers the following factors:

- (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 efforts 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.

15. The 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants submitted that the Plaintiffs did not prove that they members of the Company entitled to bring the application. This objection is dealt with by **section 238(6)(b)** of the **Companies Act** which provides that, “a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.” In reference to the aforesaid provision, Tuiyott J., in *Nilkunj Ratilal Dodhia v Shashikant Mepa Shah and 5 Others ML Misc. Appl. No. 245 of 2018 [2018] eKLR* observed as follows:

[16] Now returning back to the provisions of subsection (6) of Section 238 of the current Companies Act and relating it to the matter at hand, a person for purposes of a Derivative Action, is considered to be a member if shares have been transferred or transmitted to him by operation of law notwithstanding that he is not yet a registered member. In terms of shares of the Deceased member, those shares are deemed as transferred or transmitted to a person once the Document of Transfer of the Shares has been executed by the Deceased member's Executor or Administrator in favour of the Transferee and presented to the Company. At that point the Transferee is deemed to a member and is capable of bringing a Derivative Action even before the formal step of entering the person's name into the Register of members has been completed. In other words, the Transfer need not have been perfected by the entry of the Transferee's name into the Register of Members.

16. In this case, the Plaintiffs are beneficiaries of the deceased's shares following confirmation of the grant in respect of their parents' estate. By operation of law they are entitled to their respective shareholding notwithstanding that shares have not been transmitted to them. The

Plaintiffs fall within **section 238(6)(b)** of the *Companies Act* and are entitled to apply for relief from this court.

17. The acts complained of by the Plaintiffs have already take place. The impugned borrowing in order to finance real estate development are matters that fall within the management of the Company and as such may be ratified by the Company. Likewise, any breaches of director's duties may be ratified by the members of the company. In *Ghelani Metals Limited and 3 Others v Elesh Ghelani Natwarlal and Another (Supra)*, the court held that:

*[63] ..... Shareholders of a company at a general meeting may ratify acts or omissions by directors including an unauthorized allotment of shares. The meeting ratifying the act or omission must however be a properly convened meeting attended by the shareholders.*

18. It is not disputed as a result of the confirmation of the grant of representation of the estates of the deceased shareholders, the Company now has 12 shareholders who are known. Apart from the Plaintiffs and three Defendants, there remain 7 other shareholders who must have a say in the matter. They, in fact, constitute a majority of the shareholders. If all the allegations made by the Plaintiffs are put to them, they may elect to ratify not only the borrowing but also other alleged breaches by the directors. In sum, the matters complained of by the Plaintiffs' can be ratified at a meeting of the members of the Company.

19. *One of the factors the court may consider in granting permission is whether the Plaintiffs have made any efforts to bring about the action the Plaintiffs desires from the directors or from the shareholders. As the court held in Isaiah Waweru Njumi & 2 Others v Muturi Ndungu (Supra), an applicant seeking permission is required to either demonstrate that he made a demand on the Board of Directors or such a demand is excused.* The Plaintiffs alluded to the fact that the Company has not held meetings for some time. They did not demonstrate that they have attempted to requisition a meeting to resolve their grievances or invoke **section 280** of the *Companies Act* to seek appropriate relief in that regard.

20. In conclusion, I find and hold that the acts complained of by the Plaintiffs are capable of being ratified by the Company. The majority shareholders of the Company have a right to be given an opportunity to weigh in on the allegations. In line with **section 241(2)(d)** of the *Companies Act*, I am not satisfied that a case has been made out for the grant of permission to proceed with the suit as a derivative action.

21. The net result of my findings is that the Amended Notice of Motion dated 11<sup>th</sup> June 2018 is dismissed. The result is that the suit is therefore struck out with costs to the Defendants.

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> day of FEBRUARY 2021.**

**D. S. MAJANJA**

**JUDGE**

Mr Gacheru instructed by Gacheru Ng'ang'a and Company Advocates for the Plaintiffs.

Ms Nyabuto instructed by A. G. N. Kamau Advocates for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants.

Mr Mutua instructed by Mutua Waweru and Company Advocates for the 3<sup>rd</sup> Defendant.