



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

CIVIL CASE NO. 116 OF 2019

GEORGE NICHOLAS GHINES.....PLAINTIFF

VERSUS

ALEXANDRA VAPORIDIS.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff George Nicholas Ghines took out a motion dated 3/6/2019 brought pursuant to Article 50 and 159 of the Constitution of Kenya 2010 and Sections 238 of the Companies Act 2015 seeking;

a. Spent

b. That there be an order prohibiting the respondent from making unilateral decisions on all matters concerning Santorini Limited during the pendency of this suit

c. Spent

d. That the respondents whether by herself, agents, servants or otherwise howsoever be restrained from assessing the Company's Bank Accounts (Santorini Limited) pending the hearing and determination of this suit.

e. That leave be granted to the applicant to continue with the suit for the benefit of Santorini Limited as a derivative action

f. That this honorable court be pleased to issue an order directing that Santorini limited holds its annual general meeting within 21 days from the date of this order and direct that the respondent present profit and loss account, balance sheet, relevant information on the assets and operations of the company and such status reported

g. That an independent financial auditor be appointed to carry out a valuation of the company business to establish the company's worth and such report be presented before this honorable court.

h. That the company accountant for Santorini limited and the accountants who handle matters concerning Santorini limited whether by themselves, agents, servants or otherwise whomsoever present all statements of accounts before this honorable court and be restrained from handling the company's account until the determination of this suit.

i. That this honorable court directs the parties to appoint an independent manager who shall oversee the affairs of the company's business and report to both directors of the said company.

j. That costs for the application be awarded to the applicant.

2. The application is based on the grounds set out on the face of it and the facts deponed in the supporting affidavit of the applicant who stated that together with the respondent they are the only directors of Santorini Limited with equal shares.

3. The said company runs a Greek restaurant business at village market. He averred that he appointed Ms. Catherine Kariuki as his agent to oversee operations on his behalf but the respondent dismissed her without cause. That upon her dismissal his numerous attempts to acquire financial information of the company have failed and his attempts to manage the company has been frustrated. This went so far as KCB Bank denying him access to the company's statements. The applicant has tried to call for an AGM and has since been denied. It was therefore his contention that he has invested a lot of resources towards the company which need to be protected from misappropriation by the respondent

4. The application is opposed by Alexandra Vaporidis who filed a replying affidavit dated 3/7/2019 where she admitted that together with the applicant they agreed to open a Santorini Limited a Greek Delicatessen where they equally made their investment.

5. It is her argument however that the application herein was not made in good faith since the applicant has not pleaded any facts that reveal any cause of action. It is her further contention that the applicant has not provided proof that he requested for an AGM and that the request was denied and therefore the court cannot interfere with the internal management of companies acting within their powers.

6. On the issue of company records the applicant has received the financial reports through emails dated 11/9/2018 and 15/3/2019. She further added that she has no authority nor power to restrict the applicant from receiving statements because he is a signatory of the company account and therefore has access.

7. On the subject of Ms. Catherine Kariuki it was her averment that, on her own resolve decided to leave employment because of the rising tensions between the respondent, herself and the applicant.

8. I have carefully examined the application, the differing affidavits, submissions and the record in its entirety and the issues that have arisen for determination are as follows;

a. Whether there is a cause of action against the respondent?

b. Whether failure to seek leave before filing a derivative suit disentitles the applicant from the reliefs sought?

c. Whether to grant the injunctive reliefs as sought?

9. On the first and second issues, the principles governing the conditions to be fulfilled by a plaintiff who wishes to succeed in an action for a derivative suit as contained in Sections 238 and 239 of the Act are provided in the decision in **Joseph Munyoki Nzioka v Raindrops Limited and 3 Others [2019] eKLR** wherein it was held: -

i. He must be a member of the company.

ii. The proceedings must be in respect to a cause of action vested in the company.

iii. The applicant must seek leave to act on behalf of the company.

iv. The proceedings must be for protection of members against unfair prejudice brought under the Companies Act; and

v. 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.

10. There is no provision in the Act allowing a party to commence a derivative suit without the leave of court and later seek such leave retrospectively. In **Nilkunj Ratilal Dodhia v Shashikant Mepa Shah & 5 Others [2018] eKLR** where the court held: -

“19. Part XI of the Companies Act is dedicated to provisions on Derivative Actions. It mainstreams the concept of a Derivative Claim into Statute. An enduring feature of a Derivative Claim is that it can only be commenced or continued with the express sanction of the court.”

11. Reference is also made to the decision in **Ghelani Metals Limited & 3 Others v Elesh Ghelani Natwarlal & Another [2017] eKLR** where Onguto J. held: -

“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 be pursued under the Act.”

12. The Judge further broke down the derivative suits into a two-stage process. He stated that: -

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 Section 238(3) 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 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 need to establish, through evidence, is a prima facie case without the need to show that it will succeed.

46. The second stage entails a consideration of statutory provisions and factors which ordinarily guide judicial discretion albeit in the realm of derivative action.”

13. Sections 238 and 239 of the act stipulates as follows: -

(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. (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."

14. On perusal of the record, I note that the derivative suit was filed without the leave of the court which is an anomaly, however courts have held that leave may be obtained to continue with a suit that has already been filed. This is the finding that was made by the Court of Appeal in **Amin Manji & 2 Others v Altaf Abdulrasul Dadani & Another [2015] eKLR** where the Court of Appeal held as follows: -

"Leave of the court shall be obtained before filing of a derivative suit but may also be obtained to continue with the suit once filed. On this the court was right in adopting the exposition of the treatise "Minority shareholders"; Law, Practice and Procedure" by Joffe that "there is no approved pre-action protocol in relation to the derivative action" and that after the claim form has been issued, the claimant is required to make an application which must be supported with written evidence for permission to continue with the claim". It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such an action, the company is entitled to the intended relief and the action falls within any of the exceptions of the rule in Foss vs Harbottle."

15. From the above cited decision, it is clear that the court has the discretion to grant leave to continue the suit herein as a derivative claim depending on whether or not the case meets the exceptions to the rule in **Foss v Harbottle [1843] 2 Hare 461**.

16. The court discussed the exceptions to the rule in **Foss v Harbottle (supra)** in derivative actions in **Grace Wanjiru Munyinyi and Another v Gideon Waweru Githunguri and 5 Others [2011] eKLR** as follows:

“There is also another remedy arising from the English Legal precedent on corporate law which continues to apply in Kenya more than 160 years since it was decided: Foss vs Harbottle (supra). As stated earlier, in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. This is the rule in Foss v Harbottle. But there are four exceptions to that rule which appear in the leading case itself but also in subsequent decisions on the subject.

17. Firstly, where the directors or a majority use their control of the company to paper over actions which would be ultra vires the company or illegal.

18. Secondly, if some special voting procedure would be necessary under the company’s constitution or under the company’s Act, it would defeat both if they could be side stepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed (**Edwards v Halliwell [1950] 2 ALL ER 1064**)

19. Thirdly, where there is invasion of individual rights, such as voting rights (**Pender vs Lushington [1887] 6 ch D 70**).

20. Fourthly, where a fraud on the minority is being committed. In all those cases, a **“derivative action”** could be brought before the court on behalf of the company where the wrongdoer is in control of the company or by the shareholder where his personal rights are violated.

21. Bearing the above in mind it is my view that the applicant falls within the exceptions to the rule in **Foss v Harbottle**, I find that he is capable of proceeding with the suit on behalf of the company.

22. I further find that failure to enjoin the company to the suit cannot in the circumstances of the case be said to be fatal as the company may still be enjoined as a party in the suit through an amendment, should it be deemed necessary. For the above reasons, I find that the application for leave to continue the suit is merited and I therefore allow it.

23. On the final issue, the conditions for consideration in granting an injunction were settled in the case of **Giella v Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

24. It is the applicant’s argument that it is not in doubt that the applicant and respondent are equal shareholders/directors of Santorini limited. It was however their claim that the respondent has opted to manage and operate the company by herself subsequently leaving out the applicant.

25. However, on examination of the record, the applicant did not attach any document to support his claim and therefore they remain as mere allegations at this point. I find that the applicant has not met the ingredients for granting injunctive order and therefore the prayer for an injunction fails.

26. In light of the above, I am not satisfied that the application meets the threshold of the conditions set for the granting of orders of injunction.

i. The motion is dismissed save for prayer (e). Consequently, leave is granted to the plaintiff/applicant to continue with the suit for the benefit of Satorini Limited as a derivative action.

ii. Costs shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF MARCH, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

..... for the Defendant