



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC.CIVIL APPLN. NO. E148 OF 2021

IN THE MATTER OF THE COMPANIES ACT 2015

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE DERIVATIVE ACTION ON BEHALF OF LINKIT LIMITED

BETWEEN

ARNOLD KIPKIRUI LANGAT.....APPLICANT

AND

ATTICON LIMITED1st RESPONDENT

FRANKLIN MITHIKA LINTURI2nd RESPONDENT

EMILY NKIROTE BUANTAI3rd RESPONDENT

BRENDA MITHIKA.....4th RESPONDENT

FAMILY BANK LIMITED 5th RESPONDENT

LAND REGISTRAR, MERU6th RESPONDENT

REGISTRAR OF COMPANIES7th RESPONDENT

AND

LINKIT LIMITEDAFFECTED COMPANY

R U L I N G

1. Before Court is a Motion on Notice dated 25/2/2021 brought under *sections 238, 239 and 240 of the Companies Act, 2015 and Order 40 Rule 1 of the Civil Procedure Rules*. The applicant sought leave to institute and continue a derivative action on behalf of **Linkit Limited** (“the Affected Company”) against the respondents.

2. The grounds upon which the application was predicated upon were set out in the body of the Motion and the supporting affidavit of **Anold Kipkirui Langat** sworn on 25/2/2021. These include; that the applicant and the 4th respondent are the only directors and equal shareholders of the Affected company; the Affected Company is the registered proprietor of the parcel of land known as **LR. Number Ntima/Igoki/4432** (the “the Suit Property”).

3. That a Charge dated 26/6/2017 was created by the 5th respondent against the suit property to secure a loan of Kshs. 7,200,000/= advanced to the 1st respondent. Further, the 2nd respondent has been in occupation of the suit property since August, 2017 and uses the same as the Office of the Senator, Meru County without payment of any rent.

4. That at the time of the registration of the Charge in favour of the 1st respondent, the applicant and the 4th respondent were not available therefore they did not execute the same for and on behalf of the Affected Company. That their signatures were therefore forged making the Charge a forgery, illegal and fraudulent.

5. The applicant further contended that the 2nd respondent continues to exploit his father-daughter relationship with the 4th respondent to defeat attempts by the Affected company to seek the Court's nullification of the fraudulent Charge. That the 4th respondent has violated her fiduciary duty to the Affected Company to act in good faith and in its best interest.

6. The applicant is apprehensive that the 1st respondent may default in the loan repayment and the 5th respondent may thereby proceed to realize the security to the detriment of the Affected Company.

7. The application was opposed vide a replying affidavit sworn by the 4th respondent on 15/3/2021. She swore on her own behalf and on behalf of the 1st, 2nd and 3rd respondent. She contended that the application offends the mandatory procedural requirements for derivative proceedings under *the Companies Act, 2015*.

8. That no prima facie case had been disclosed to warrant the grant of leave to continue a derivative action; that the applicant is neither a bona fide shareholder nor a director of the Affected Company and therefore lacks the *locus* to bring the application. It was further contended that the applicant had withheld material facts in order to obtain unwarranted leave to institute a sham derivative action on behalf of the Affected Company; that it was an attempt by the applicant to secure, through the backdoor, a judicial endorsement of the fraud that had led to his purported shareholding and directorship in the Affected Company.

9. It was contended that the applicant has grossly abused the court process by filing and withdrawing multiple suits raising the same dispute. That he is keen on obtaining the court's imprimatur to the fraudulent changes that he effected on the Register of Companies relating to the Affected Company's shareholding and directorship. That the applicant and his mother forged documents that purported to make him a director and shareholder of the Affected Company.

10. The deponent further stated that the respondents' advocates had on 2/10/2020, written to the Registrar of Companies requesting him to reverse the fraudulent changes made to the Affected Company's directorship and shareholding on grounds that the applicant had lost all litigation challenging his purported shareholding in the Affected Company. That consequent thereto, the Registrar had directed the applicant to respond to the complaints of fraudulent change of the Affected Company's shareholding and directorship.

11. The application was further opposed vide the replying affidavit of **Ensune Mithika** sworn on 15/3/2021. He contended that he was one of the *bonafide* shareholders and directors of the Affected Company. He reiterated the averments of the 4th respondent.

12. The Court has carefully considered the depositions and submissions on record. This is an application for leave to institute and continue a derivative action claim by the applicant. In **section 238 of the Companies Act**, a "derivative claim" is described as 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.

13. Further, **section 238(3)** provide that a derivative claim 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*.

14. In **Ghelani Metals Limited & 3 Others v, Elesh Ghelani Natwaral & Another [2017] Eklr**, the court held: -

“Derivative actions are the pillars of corporate litigation. As I understand it, 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 a corporation”.

15. Then in **Dadani v. Manji & 3 Others [2004] KLR 95**, the court held: -

“It is a cardinal principle in Company Law that it is for the Company and not an individual shareholder to enforce rights of actions vested in the company and to sue for wrongs done to it. ... However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit”.

16. From the foregoing, it is clear that, 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.

17. A derivative suit can 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 establishes 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.

18. In the present case, the applicant averred on oath that he is a 50% shareholder and director of the Affected Company with the 4th respondent. He produced Form CR12 as “AKL1” from the Registrar of Companies dated 2/2/2021 in support of that contention.

19. In opposition, the respondents alleged that the applicant was not a bona fide member of the Affected Company. That he and his mother allegedly forged minutes and other relevant documents in 2016 and falsified the records at the Registrar of Companies to make him a shareholder and director of that company. That the applicant was a vexatious person who had filed and withdrawn cases against the respondents. That the present suit is meant to sanitize his fraudulent take-over of the Affected Company.

20. It is the cardinal principle of the law of evidence that he who alleges must prove. That is what **sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya** provide. The CR12, like the one produced by the applicant, is an official document from the relevant government department that keeps company records. It is a prima facie evidence of the company records.

21. In this regard, as at 2/2/2021 and the hearing of the application, the government records show and attest that the applicant is 50% shareholder and director of the Affected Company. The allegations of having fraudulently obtained such state of affairs were not proved.

22. It was alleged that the fraud occurred in 2016. Firstly, there was no evidence of any such fraud. Secondly, there was nothing to show that if there was any such fraud, the respondents had reported the matter to the authorities. There was no Occurrence Book number that was produced to show that any such fraud, if and when discovered, was ever reported to the Police and the outcome of any investigations. All that the respondents were content with was to produce two letters written in 2019 and 2020, respectively to the Registrar alluding to some fraud. Fraud is a serious charge that requires cogent and satisfactory evidence. It must be proved on a standard that is higher than a balance of probability.

23. In any event, when the applicant misadvisedly attempted to challenge the actions of the respondents in the Chief Magistrate's Court at Meru, in Civil Case No. 39 of 2019 the documents of and presentations by the respondents were that, that suit was between shareholders and directors of the Affected Company and should have been referred to arbitration in terms of the Memorandum and Articles of Association of the Affected Company. That court agreed with the respondents and dismissed that suit.

24. How then can it now lie in the mouth of the respondents that the applicant is not a member of the Affected Company? Does the status of the applicant in relation to the Affected Company change depending on the court he is in? I don't think so. To this court's mind, the evidence on record prima facie point towards the applicant being a member of the Affected Company and has *locus standi* to bring a derivative suit under **section 239 of the Companies Act, 2015**. There have been no proceedings by the respondents to remove him as a shareholder and director of the Affected Company.

25. The next issue is whether the applicant has established a prima facie case for a derivative suit. The applicant's case is that the 2nd, 3rd and 5th respondent wrongfully created a charge over a property known as **LR. No. Ntima/Igoki/4432 ("the suit property")** belonging to the Affected Company.

26. The charge was to secure a facility of Kshs.7,200,000/- by the 5th respondent to the 1st respondent for no consideration whatsoever to the Affected Company. That neither the applicant nor the 4th respondent, as directors of the Affected Company, executed the said Charge. That were the 1st respondent to default, the 5th respondent may exercise its statutory power of sale and dispose off the suit property to the detriment of the Affected Company.

27. The creation of the Charge is not denied. It is also not denied that the same was not executed by the known directors of the Affected Company, in terms of the CR12 that is before Court. All that was averred was that the Charge was not a forgery. That it was legally created. That since the applicant had allegedly fraudulently gained the shareholding and directorship of the Affected Company, the Charge cannot be challenged.

28. I have already found that there was no proof of any fraudulent shareholding or directorship of the applicant in the Affected Company. To that extent, at least there is a prima facie case that the Affected Company may not have authorized the creation of the Charge. In any event, those are matters that have to be proved at the trial of the intended case.

29. Prima Facie case was defined in the case of **Mrao Limited v. First American Bank of Kenya Ltd & 2 Others [2003] Eklr.**, to be a case where on the material presented to court, a tribunal properly directing itself will conclude that a right belonging to one party has been breached requiring an explanation by the opposite party.

30. In the present case, the material on record, as established by averments on oath; indicate that the Affected Company owns the suit property, that on the basis of the CR12 on record, its directors and shareholders are the applicant and the 4th respondent, that a Charge was created by the 5th respondent over the said property by other persons other than the known directors of the Affected Company, that the applicant called the 4th respondent to a meeting to decide the fate of the said Charge but she declined to attend. That in the event the 1st respondent defaults in repaying the facility secured by the Charge, the 5th respondent may sell the suit property to the detriment of the Affected Company. A prima facie case has been established. The material is sufficient to allow the matters to be inquired into by way of a derivative suit.

31. There was a contention that the application was defective because the applicant should have filed the suit first then seek leave. That contention has no basis. Nowhere in **sections 238 and 239 of the Companies Act** is such a requirement. An application for leave can be filed either before the filing of a derivative suit or after its filing, to continue such a suit. See **Kuldeep Singh Sehra & Another v. Bullion Bank Ltd & 2 Others [2004] Eklr.**

32. In view of the foregoing, I am satisfied that the application has merit and I allow the same. The costs will be in the Cause. In terms of **section 239 of the Companies Act**, the intended suit is to be lodged within 14 days of this ruling failing of which the leave so granted shall lapse.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 8th day of April, 2021.

A. MABEYA, FCI Arb

JUDGE