



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. E005 OF 2021

LUCY WAIRIMU NJIHIA.....PLAINTIFF/ APPLICANT

VERSUS

JARIKA COUNTY LODGE LIMITED.....1ST DEFENDANT/RESPONDENT

GEORGE MUIGAI NJIHIA.....2ND DEFENDANT /RESPONDENT

RULING

1. The applicants **Notice of Motion dated 1st of March 2021** prays for the following reliefs;

- a) **The plaintiff be granted leave to prosecute this derivative action on behalf of and for the benefit of the 1st defendant /respondent and its creditors.**
- b) **Pending the hearing and determination of this suit this honourable court be pleased to grant leave to the plaintiff /applicant to enter and reposes the company's premises and or any other property that belongs to the company.**
- c) **Pending the hearing and determination of this suit the court be pleased to grant a temporary injunction restraining the second respondent by himself, his servants and or agents and employees from destroying, tampering with, removing, falsifying or in any manner interfering with the company's books of accounts, records and or assets.**
- d) **Pending the hearing and determination of this suit the 2nd respondent whether by himself or his associates, servants, agents be restrained from further breaching, renegeing on and or acting in self-serving manner in any way so as to undermine and or violate the express provisions of the Articles of Association of the 1st defendant and the law.**
- e) **The plaintiff be indemnified by the 1st defendant /respondent for all costs and expenses reasonably incurred in prosecuting this suit.**

2. The application is supported by the grounds on the face thereof and the sworn affidavits of the applicant, **Grace Njeri Njihia, Peter Njoroge Njihia, and Samuel Kagotho Njihia** all dated **1st March 2021** as well as the supplementary affidavit of the applicant sworn on **30th June 2021**.

3. The second respondent on the other hand opposed the application through the grounds of opposition dated **14th June 2021** as well as the replying affidavit dated the same date.

4. The issues bedevilling the parties herein are clear and easy to understand as they can be deduced from their respective affidavits. The applicant is the mother to the 2nd respondent as well as a holder of 250 ordinary shares of the 1st respondent company. The 2nd respondent as well as his siblings hold 50 ordinary shares at the company and their late father James Njihia Gachoka held 400 ordinary shares.

5. The company runs an hotel or a restaurant under the said name situated within Nakuru town. It appears from the affidavit of the applicant and the rest of the deponents that the said investment was run jointly between the said shareholders till the year 2020 when the 2nd respondent kicked out the rest of the shareholders especially the applicant and began running it alone.

6. It was the contention by the applicant that as a result of the said illegal action by the 2nd respondent the hotel has incurred massive losses including the threat to cut off the utilities like water and electricity, withdrawal of the trading licence, non-payment of tax arrears to the

Kenya Revenue Authority among many others. That the creditors are at the verge of taking adverse action against the company.

7. That the company is no longer generating any meaningful income as opposed to when she was involved in its daily affairs. She went on to state that the 2nd defendant has gone ahead to change the till number of the company from **Jarika County Lodge till No 980597** to his personal number namely **J accommodation till No. 6506085** without the express authority of the rest of the shareholders.

8. In the premises the applicant deponed that the breach by the 2nd respondent is so fundamental as he has shut her out of the business with the aim of gaining exclusive control of the company which is a total violation of the Articles of Association of the company. By failing to pay the statutory obligations of the company and failing to settle what is owed to the creditors the company is at risk of being wound up in a nutshell.

9. The applicant has attached various annexures to her affidavit indicating the malfeasants by the 2nd respondent. The rest of the shareholders in their supporting affidavits reiterated what the applicant has said and prayed that the application ought to be allowed as prayed.

10. They stated that the applicant has become very hostile to **Paul Ndungu Njihia** who is one of their brothers. That since the hostile takeover by the applicant the hotel has completely failed to generate any income. They prayed that the applicant and Paul Ndungu Njihia should be handed over back the control of the business.

11. In his replying affidavit the 2nd respondent denied the applicants allegations as well as those of the other shareholders. He said that his presence in singularly managing the company was approved by the rest of the shareholders as they were also benefiting from the properties held by a company called **Care Guest house Limited** which they all have shares.

12. He went on to state that the applicants have not reached out to him as regards the operation of the company. It was not true that the company had ceased operations and that the request to have Paul Ndungu Njihia to be involved in the operation of the company is not anchored in law and that the whole scheme is to have him excluded from the company.

13. He went on to state that the bills that accumulated was during the period when Paul was in control of the company and that none of the creditors or statutory bodies mentioned have threatened any action against the company or at all. He said that since he took over the affairs of the company he has been single handedly settling the bills save that the operations of the company went down due to the effect of Covid 19 pandemic.

14. His beef with the applicants and the rest of his siblings was that they were enjoying exclusive use of properties owned by the Care Guest Investment limited which he has never benefited. He disputed some cheques allegedly paid for by the applicant which were attached to her affidavit as he was not a signatory to the said account.

15. His preliminary objection essentially prayed that the suit was defective as it runs contrary to **Section 238 and 239 of the Companies Act**. In other words, the dispute ought to have been initiated as a derivative suit and in any case there was nothing to trigger such a suit.

16. In her supplementary affidavit the applicant maintained that the 2nd respondent forcefully gained entry into the company's premises and assumed its control. That Care Guest House Limited was a separate entity and it should not be confused with the 1st defendant herein and if there are any issues relating to it should be litigated separately and independently.

17. She said that contrary to the 2nd respondent's assertion the bills never accumulated during the period Paul Ndungu Njihia was running the business but when the 2nd respondent took over. If there were any issues the same ought to have been dealt with through the available channel and not through forceful takeover.

18. When the matter came up for hearing the court directed that the same be determined by way of written submissions which the parties have complied.

APPLICANTS SUBMISSIONS.

19. The applicant identified three issues and dwelt on them extensively, namely the preliminary objection, whether the application was meritorious and the issue of costs.

20. On the first issue of the preliminary objection she submitted that the same could not stand as it was evident that it run contrary to the authorities established especially **MUKISA BISCUIT MANUFACTURES LTD V. WEST END DISTRIBUTORS (1969) E A 696** which stated that;

21. In essence she submitted that going by the said objection the court would be required to carry out further investigation of the issues especially on the suit being initiated as a derivative. In other words, the same ought to be discernible without any inquiry.

22. She submitted that prayer 2 of the application was clear namely that the suit was by way of a derivative and the preliminary objection was not merited.

23. On the second limb it was her submission that the applicant ought to be granted leave to commence a derivative suit as clearly envisaged under Section 238 of the Companies Act. She relied on the case of **GHELANI METALS LIMITED & 3 OTHERS V. ELESH GHELANI NATWARLAL & ANOTHER (2017) eKLR.**

24. That as it stands out the 2nd respondent's behaviour was contrary to the spirit and Articles of Association of the company and it thus called for the applicant being a shareholder to protect the interest of the 1st defendant company. The 2nd defendant's action was injurious to the company who forcefully took it over without the blessings of the rest of the shareholders.

25. She submitted that based on the old authority of **GIELLA V. CASSMAN BROWN AND CO. LTD 1973 E. A. 360** she had met the ingredients to be granted injunctive relief. That unless the same is granted the company shall suffer irreparable loss and damage.

26. On the issue of costs, she prayed that she was entitled to under the auspices of **Section 27 of the Civil Procedure Act** where it's clear that the costs follow the events.

2ND RESPONDENTS SUBMISSIONS.

27. On his part the 2nd respondent identified as well the question of derivative suit and whether the applicant had met the threshold of a prima facie case and thus capable of being granted the orders sought.

28. On the issue of derivative suit, the respondent pleaded **Sections 238 and 239 of the Companies Act** and in particular the case of **ISAIAH WAWER NJUMI & 2 OTHERS V. MUTURI NDUNGU (2016) EKLK** where the court set out some of the factors to be considered in granting or not the prayers for a derivative suit. The court, the respondent submitted must be satisfied that there was a prima facie case in support of the application. The screening by the court was to weed out any frivolous claims and therefore it is necessary that the same must be clear on the face of the application without any further evidence or inquiry.

29. In this regard the applicant submitted that there was no evidence of such grounds as the applicant has all along acted in bad faith and that she has not demonstrated what action she has taken prior to the filing of this suit. That she has failed to comply with **Clause 33 and 34** of the 1st defendants Articles of Association dealing with indemnity and arbitration.

30. The applicant, the respondent submitted has not attempted to settle the issues amicably by way of arbitration or any other way prior to filing this suit. He submitted that all that he has done was to act in good faith and there was no evidence that he intended to kick the applicant from the company.

31. He submitted that there was no evidence that he had wasted the company's assets, falsified books or destroyed anything owned by it or at all. In essence therefore the prayers for leave for the suit to continue as a derivative suit ought to be dismissed.

32. On the second limb of the prayers, he submitted that there was no evidence that the applicant had established any prima facie case against him. He said that the plaintiff had failed to show what injury she stands to suffer if the injunctive orders are not granted. There has not been any prove that the assets of the company have been wasted or diverted or salaries have not been paid.

33. He said that it was not for the applicant to conclude that she had absolute rights in the company since the applicant as well has the same rights. He submitted that the applicant and the rest of the shareholders benefited from Care Guest House limited to the exclusion of the respondent a fact which he was to counterclaim.

34. On the issue of costs, he submitted that the Articles of Association of the company indemnified him from such and that he was therefore not liable. He prayed that the application be disallowed.

ANALYSIS AND DETERMINATION.

35. The applicant as well as the 2nd respondent are shareholders at the 1st defendant company. There is no doubt that the same was and is still a family concern. The affidavits evidence on how the 2nd respondent took over the company is not controverted. The 2nd respondent took over the running of the company forcefully and he has not refuted this and his basic reason being that he had been locked out of the company by the shareholders who were enjoying the fruits thereof as well as those of the other company known as Care Guest House limited.

36. It was his contention that he has been running the company well after the said take over and he has not incurred any loss, failed to settle any claim especially the creditors or any other statutory liabilities.

37. On her part the applicant has refuted the same. She said that the takeover was hostile and aggressive and without any laid down legal procedures and that the company is at risk of being sued by the creditors or defaulting in its statutory obligations. She said that she had met all the requirements of this claim proceeding as a derivative suit.

38. There are two issues herein, namely, **whether the applicant has met the threshold for this claim to proceed as a derivative suit and whether she was entitled to the reliefs of temporary injunction.**

39. **Section 238 of the Companies Act** is worth reproducing here. The same states that;

"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.

41. Sub section three which I have underlined clearly spells out when such action can be taken which in this case speaks of “*...from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.*”

42. In the light of the affidavit evidence on record can one conclude that there have been above outlined breaches by the 2nd respondent? I think the answer is in the affirmative. This is simply for the reason that the takeover of the company was not lawful but forceful. There was no evidence that there was such an agreement by the shareholders whether the 2nd respondent conceded or not that he should take over the running of the hotel business.

43. The payment of the bills or not, the settlement of statutory obligations, and the payments of salaries are all expected of whoever is running the business. To argue that he has done well after taking over is not to say that it was lawfully sanctioned.

44. There is no evidence that he attempted to exert his rights at the company and he was denied. Whether Paul Ndungu Njihia and the applicant operated at a loss did not mean that he was to take over forcefully. More importantly whether he had been short-changed or sidelined in the operation of Care Guest House limited by the rest of the shareholders did not entitle him to the action he did.

45. The sum total of the above findings is that there has been breach of trust as envisaged under **Subsection 3 of Section 238 of the Companies Act.**

46. The case of **ISAIAH WAWERU NJUMI & 2 OTHERS V. MUTURI NDUNGU (2016) eKLR** spelt out some of the factors to be considered and which I think finds place in the matter at hand. The learned judge went on to state that;

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 effort 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 of 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 authorized or ratified by the company in the future; and

g) Whether the cause of action contemplated is one that the Plaintiff could bring directly as opposed to a derivative action”.

47. I find that the applicant's application has been brought in good faith so as to protect the interest of the company. Although there is no evidence as clearly submitted by the respondent of any action taken by the applicant to resolve the issue especially by way of arbitration, there was as well no evidence that before the forceful entry and takeover by the respondent he sought any opportunity to resolve the issues amicably. Clearly there is a total and absolute breach of trust on both sides.

48. This in my humble view therefore qualifies the grounds to have the matter proceed by way of a derivative suits. The interest of the company is at the heart.

49. On the second limb of whether a prima facie case has been established by the applicant, the reasoning above in my view demonstrate that there is need to protect both the interest of the company as well as the shareholders who in this case includes the 2nd respondent. With the forceful take over by the respondent it is obvious that the rest of the shareholders rights must be protected as well. It is not sufficient for the respondent to state that he has been, making profits despite the hard economic times thanks to Covid 19. The rest of the shareholders ought to

be involved. What happens for instance if he makes losses and the company is injured? Is he going to indemnify the rest of the shareholders and by extension the 1st respondent? I doubt.

50. Before making a decision whether to grant this prayer or not **Clause 34 of the Articles of Association** of the 1st respondent is worth reproducing here. The same states that;

“ Whenever any differences arise between the company on one hand and any of the members ,their executors ,administrators or assigns on the other hand ,touching the true intent or construction ,or the incidents ,or consequences of these articles or of the statutes or touching anything then or thereafter do ,executed ,committed or suffered in pursuance of these articles ,or any claim or account of any such breach ,or alleged or otherwise relating to the premises or these articles or to any statutes affecting the company or to any of the affairs of the company ,every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference ,or if they cannot agree upon a single a director to the decision of the two arbitrators ,or whom one shall be appointed by each of the parties in difference.”

51. As found earlier above the parties have failed to apply the above clause. This clause was meant to protect the company and amicably resolved any outstanding issues as it can be deduced. This court finds that it shall be in the interest of the parties and the 1st respondent that they should explore the arbitration option first as that in any event was their original intention when they committed to sign the Articles of the company. Being a family company it is equitable in the interim period that they should attempt some compromise under the auspices and directions of the court. None should be able to steal a match from the other as they are all legally equal.

52. For the foregoing reasons the court makes the following orders and directions.

- a) **The applicant is hereby granted leave to prosecute this derivative action on behalf of and for the benefit of the 1st respondent/defendant.**
- b) **The applicant and the respondent within 30 days from the date herein shall initiate arbitration proceedings in line with clause 34 of the Articles of Association of the 1st defendant and report to this court within 45 days of the progress thereof.**
- c) **The applicant, Lucy Wairimu Njihia, Paul Ndungu Njihia and the 2nd respondent George Muigai Njihia for and on behalf of the 1st defendant and the rest of the shareholders are to run and manage the 1st respondent forthwith and not later than three days from the delivery of this ruling.**
- d) **The 2nd respondent shall immediately and not later than three days from the delivery of this ruling hand over to the above two shareholders all the books of accounts and any other necessary instruments to ensure compliant with the above order and shall allow them free access to the premises, suppliers, books of accounts and bank records and statements without any let or hindrance.**
- e) **Each party be at liberty to apply.**
- f) **Costs shall await the outcome of the suit.**

Dated signed and delivered via video link at Nakuru this 4th day of October 2021.

H K CHEMITEI

JUDGE