



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**MISC. CIVIL APPLICATION NO. 46 OF 2020**  
**IN THE MATTER OF THE COMPANIES ACT, 2015**  
**AND**  
**IN THE MATTER ON AN APPLICATION FOR LEAVE TO**  
**INSTITUTE DERIVATIVE ACTION ON BEHALF OF NISSI**  
**CIVIL ENGINEERING & BUILDING CONTRACTORS COMPANY LTD**  
**BETWEEN**  
**SARAH KATHURE.....PLAINTIFF/APPLICANT**  
**VERSUS**  
**NISSI CIVIL ENGINEERING & BUILDING**  
**CONSTRUCTORS CO. LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**  
**JEPITHER GITONGA MAUTA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**  
**JEDIEL MUTURA MAUTA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**  
**R U L I N G**

1. SARAH KATHURE (“the applicant”) lodged a notice of motion dated 28/4/2020 under *section 239 of the Companies Act, and 2015, Order 40 Rule 1 of the Civil Procedure Rules*. She sought orders, *inter alia*, leave to file a derivative action on behalf of NISSI CIVIL ENGINEERING & BUILDING CONSTRUCTORS CO. LTD (“the company”) against her fellow directors and shareholders, the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

2. The applicant also sought other orders including an injunction to freeze an account belonging to the 1<sup>st</sup> respondent and an order for the matter to be referred to arbitration.

3. The grounds upon which the application was grounded upon were set out in the body of the Motion and in her supporting and further affidavit sworn on 28/4/2020 and 22/5/2020 respectively. These were, *inter alia*, that she and the 1<sup>st</sup> and 2<sup>nd</sup> respondent are shareholders and directors in the 1<sup>st</sup> respondent. That there has been deep differences between her and them leading to her and the 2<sup>nd</sup> respondent being divorced.

4. It was further contended that, due to the differences aforesaid, the other directors had started misusing the funds belonging to the Company for their own personal affairs. That there were funds that were expected to be paid by the County Government of Meru which might be misused. That according to the Memorandum and Articles of Association of the Company, any differences between the shareholders are supposed to be referred to arbitration. The applicant has urged the 2<sup>nd</sup> and 3<sup>rd</sup> respondent to refer the matter to arbitration but they have declined.

5. The application was served upon the respondents who appointed **Ms. Ngunjiri Michael & Company Advocates** to appear for them. The said Advocates filed their Notice of Appointment on 13/5/2020. On 18/5/2020, when the matter came up for hearing, **Mr. Ngunjiri**,

**Advocate** applied for more time to enable him file a response to the application. The leave was granted and the Court directed that the parties do file and exchange their written submissions by 21/5/2020.

6. Notwithstanding as aforesaid, the respondents did not file any replying affidavit to the application or any submissions. On record are the submissions of the applicant filed on 13/5/2020 which the Court has carefully considered.

7. In view of the foregoing, the application is unopposed. I have seen the Memorandum and Articles of Association of the Company. The applicant holds 450 shares in the company and she is also listed as a director. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent are listed as shareholders with 450 and 100 shares, respectively.

8. The said document is not proof of such shareholding and directorship since the best evidence would have been a search from the Registry of Companies. However, the Court will accept the same as prima facie evidence of that information since the matters deponed to therein have not been controverted.

9. *Section 239 of the Companies Act, 2015* provides: -

***“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.***

10. Several decisions on the subject were determined under the repealed *Companies Act, Cap 486*. In the case of **Dadani vs Manji & 3 others [2004] Eklr**, the court held: -

***“It is also cardinal that in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters (see Foss v Harbottle (1843) 2 Hare 461). All this is in deference to the self-regulation the law allows corporations and thus limits the interference by courts in the running of such bodies on their own. 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 derivative suit.”***

11. Further, in the case of **Amin Akberali Manji & 2 Others vs Altaf Abdulrasul Dadani [2015] Eklr**, the Court of Appeal held that: -

***“Leave of court shall be obtained before filing a derivative suit, but may be obtained to continue with the suit once filed.... 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 action falls within any of the exceptions to the rule of Foss vs Harbottle.”***

12. In the present case, the applicant exhibited correspondence that she wrote to her aforesaid fellow directors shareholders which have not been replied to. They disclose the existence of deep rooted differences between them. There is also a bank statement from the KCB Bank, Makutano Branch showing various withdrawals which the applicant has contended were unauthorized and were not for the benefit of the Company. That obviously is an illegality.

13. In view thereof, I am satisfied that the Company cannot authorize the filing of a suit on its behalf as the majority shareholders and directors are acting against the interests of the Company. They cannot authorize the filing of a suit against themselves.

14. Accordingly, I am satisfied that the applicant is entitled to bring a derivative suit on behalf of the Company, **NISSI CIVIL ENGINEERING & BUILDING CONSTRUCTORS CO. LTD.**

15. The applicant did pray for other prayers in her Motion on Notice under consideration. Save for the prayer for injunction, the others cannot be considered in this proceedings. They can only be considered in the derivative suit itself once it has been filed. As for the injunction, this Court had granted the same on an interim basis to protect the funds in the subject account. I think the same should be continued until the suit is filed when a proper injunctive prayer can be considered in that suit.

16. Accordingly, I allow the Motion dated 28/4/2020 in the following terms: -

**a) Leave is granted for the applicant to lodge and continue a derivative suit on behalf of the Company, NISSI CIVIL ENGINEERING & BUILDING CONSTRUCTORS CO. LTD.**

**b) The said suit be filed within seven days from the date of this Ruling.**

**c) Pending the filing of the derivative suit as aforesaid, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are hereby restrained from in any way operating and/or transacting the 1<sup>st</sup> respondent's bank account No. 1146763972 at KCB Bank Ltd, Makutano Branch.**

**d) Costs to be in the derivative suit.**

It is so ordered.

**DATED AND DELIVERED AT MERU THIS 4TH DAY OF JUNE, 2020.**

**A. MABEYA**

**JUDGE**