



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 8 OF 2020

JOHN WAIMIRI & EMMA MUTHONI 1ST PLAINTIFF/APPLICANT

JULIUS NJUGUNA NJOROGE 2ND PLAINTIFF/APPLICANT

EUGENIO FIORAVANTI 3RD PLAINTIFF/APPLICANT

DE MARTINO MELAKE 4TH PLAINTIFF/APPLICANT

ROBERT OCHOKI NYAMORI/SIRIO LTD 5TH PLAINTIFF/APPLICANT

CARLA TARZALLI 6TH PLAINTIFF/APPLICANT

ALEM DIRAR 7TH PLAINTIFF/APPLICANT

VERSUS

FRANCESCO LEPRI 1ST DEFENDANT/ RESPONDENT

DEVIS RUZZINI 2ND DEFENDANT/ RESPONDENT

SUNNY MANAGEMENT &

CONSULTING LIMITED INTERESTED PARTY

AND

JOHARI VILLAS MANAGEMENT LIMITED AFFECTED PARTY

Coram: Hon. Justice R. Nyakundi

Mutuma Gichuru Advocates for the Applicants

Donald B. Kipkorir Advocates for the respondents & The Interested Party

RULING

Introduction

The Applicants instituted proceedings against the Respondents vide Notice of Motion dated 16.03.2020 and filed on 23.06.2020 seeking the following orders *inter alia*:

1. THAT this Honorable court be pleased to grant leave to the Applicants to continue the derivative action herein on behalf of Johari Villas Management Ltd against the respondents Francesco Lepri and Devis Ruzzini.

2. THAT this Honorable court be pleased to issue an order of temporary injunction restraining the respondents/Interested Party by themselves, servants, employees assigns, proxies, agents or anyone acting on their behalf from re-entry and termination of Applicants' leases or in any other manner dealing with the Applicants' villas in a manner detrimental to the Applicants' use of their respective Villas being Villa Nos. 16, 7, 14, 11, 1, 13 and Plot Block C erected on plot No. 1371 within Malindi pending the hearing and determination of this application and the main suit.

3. THAT this Honorable court be pleased to issue orders restraining the Board of Directors from intimidating the Applicants' during the General Meetings of Johari Villas Management Ltd.

The application is premised on the grounds (i) – (x) on the face of the application. It is further supported by supporting affidavit of **John Waimiri** dated 16th March 2020.

The Respondents opposed the application and in so doing filed a Notice of Preliminary Objection dated 16.04.2020 as well as a Statement of Grounds of Opposition dated 23rd June 2020 by **Francesco Lepri, Devis Ruzzini and Sunny Management & Consulting Limited** as well as on the following grounds:

- 1. THAT no leave was sought to commence the Derivative Action.**
- 2. THAT the Plaintiffs have no locus standi to institute this Derivative Action.**
- 3. THAT there is no substratum to the application as no Suit has been filed as Suits are begun by way of Complaint and Summons which this matter doesn't have.**
- 4. THAT the exhibits in support of the application demonstrates ex-facie that the Company was in full compliance with the law in all its decisions and operations.**
- 5. THAT the Application doesn't establish a legal and factual basis for the reliefs sought.**
- 6. THAT the Application doesn't establish more than an arguable case for the reliefs sought to be granted.**
- 7. THAT the orders sought undermines the material Leases and The Companies Act.**
- 8. THAT to grant the Orders sought will engender anarchy and chaos in the Property Market in Kenya.**
- 9. THAT the Applicants are motivated by reasons other than the law in instituting the Derivative action.**
- 10. THAT the Application is scandalous, frivolous and vexatious.**
- 11. THAT the Application is a gross abuse of the Court process.**
- 12. THAT the Application doesn't establish any or any reasonable cause of action.**

The Ruling herein is based on that Notice of Motion application filed by the Applicants as well as the Preliminary Objection and Grounds of Opposition filed by the Respondents.

Applicant's Written Submissions

The Applicant through its Advocate on record, **Mr. Elius Mutuma of Mutuma Gichuru & Associates Advocates**, in their submissions dated 14th April 2020, submitted that the Applicants are shareholders of **Johari Villas Management Ltd**, a limited liability company incorporate in 2012, by virtue of being owners and occupiers of the houses known as **Johari Villas**. The main objective of said company was to carry on the business of the direct management of houses known as **Johari Villas** erected on plot No. 1371 within Malindi which are owned by the Applicants. He further submitted that the defendants/respondents are the current directors of the said company who ought to be involved in the direct day to day running of the affairs of the company. He submitted that the said directors had been guilty of negligence, illegalities, default, neglect and breach of duty to the detriment of the shareholders. On the particulars of negligence, illegalities, default, neglect and breach of duty complained of Counsel submitted that the Respondents/Defendants did not effectively discharge their duties in the management company as they were all foreigners who are at all material times are based outside the country in Italy thus either unavailable to directly run the daily affairs of the company or within reach to address and or resolve the concerns of the shareholders. Further he submitted that the said directors illegally and irregularly through stage-managed managed meetings surrender their duties to third parties known as **Global Services & Management Company and Sunny Management & Consulting Limited** which said companies have now assumed the role of the Board of Directors meant for the 1st and 2nd defendants. Further the mode, manner and nature of issuance of notices and general conduct of the proceedings during the Annual General Meetings (AGM) are not in tandem with the Company's Memorandum of Understanding which requires that such notices and meetings be chaired and presided over by the Board of Directors or duly appointed shareholder acting in the capacity of the Chairman, whereas the defendants had illegally allowed such notices to be issued by strangers and singlehanded and or through stage-managed shareholder meetings and without proper following or any bidding and procurement procedures made direct sourcing of **Sunny Management & Consulting Ltd** as the management company to whom all managerial duties have been illegally surrendered to.

Counsel contends that the Respondents have been involved in the wanton waste of corporate assets and finances through meaningless and

unwarranted as well as irregular procurement and outsourcing of management services from expensive service providers while sidelining and defranchising the shareholders by conducting the business of the said AGM in a foreign language i.e. Italian to the detriment of non-Italian shareholders.

It is Counsel's submission that, his clients had fastidiously raised the issues of concern that they wanted addressed by the directors but the defendants have failed to have them addressed and resolved and instead had resorted to the use of intimidation and harassment hence the necessity of the suit and that the defendants had made it clear that they will as a result proceed to exercise the option of re-entry and termination of the Plaintiff's leases.

In his submissions in support of the orders sought, Counsel stated that there is need for the Court to issue a temporary injunction as prayed by the Applicants. He submitted that the Applicants/Plaintiffs had established sufficient ground to qualify for leave to bring this derivative action. He further submitted that the Defendants had made it clear, in a unilateral and illegal notice, that upon re-entry the Plaintiff/Applicants will lose their Villas/Houses and will not be allowed to enter the compound including unwarranted suspension of essential services like electricity, water and drainage aimed at making the houses inhabitable.

For these submissions **Mr. Mutuma** relied on the cases of **Amin Akberali Manji & 2 Others v Altaf Abdulrasul & Another, Isaiah Waweru Ngumi & 2 Others v Muturi Ndung'u [2016] eKLR, Bidco Oil Refineries Ltd v Attorney General & 3 Others [2012] eKLR, Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR, and Giella v Cassman Brown Co. Ltd [1973] EA 358.**

Respondent's Written Submissions

The Respondent through its Advocate on record, **Mr. Donald B. Kipkorir** of KTK Advocates filed submissions dated 30th June 2020, submitted that the Application is for dismissal as; no Complaint was filed or served on the Respondents, the Annual General Meeting was lawful and valid as set out in its minutes, the Plaintiffs did not deliberately attach their material Leases thus denying the court the opportunity to examine their obligations and duties on the property and as such cannot prove proprietary claim, the Plaintiffs seek leave to continue the derivative action when they ought to have sought leave to institute, the fact that the Defendants are foreigners is irrelevant as there is no law stopping foreigners from being Directors of a company in Kenya, the Plaintiffs had not established that the Respondents though foreigners do not live in Kenya and the AGM minutes show that the Respondents were indeed present for the meeting. Counsel further submitted that the issue of the Company Secretary for a Private Company was not founded in law and that the allegations against the Respondents aren't established at all. Counsel also submitted that the application did not establish a prima facie case against the Respondents and in the absence of a Complaint it was impossible to tell if there was a reasonable cause of action.

Finally, Counsel submitted that the application as scandalous, frivolous and vexatious as well as an abuse of the court process. They asked the court to dismiss the application with costs as the injunctive orders cannot issue to the Plaintiffs.

For these submissions Counsel relied on the cases of; **Giella v Casman Brown Co. Ltd 1973 E.A. 358, Samson Mukeku Mutuku v David Kioko HC Misc Civil Application No. 314 of 2019 (unreported) (Pages 1-10), Timau Farmers Co Ltd & Anor v John Gathogo and Others HCC No. 7 of 2015 (unreported) (Pages 11-18), Ghelani Metals Limited & Others V Natwarlal & Others Nairobi HCC No. 102 of 2017 (unreported) (Pages 19-38) , Prudensio Nicholas Gaitara V Patrick Kariuki Muiruri & Others Nairobi ELC Suit No. 1400 of 2013 (unreported) (Pages 39-51) and Lucy Wangui Gathara V Okemba Lore Malindi Civil Appeal No.4 of 2015 (unreported) (Pages 57-66).**

Further Applicant's Written Submissions

The Applicant through its Advocate on record, **Mr. Elias Mutuma** of Mutuma Gichuru & Associates Advocates, in their further submissions dated 29th June 2020, submitted that the Respondents had been served but had chosen to file grounds of opposition instead of a Replying Affidavit and as such the court should find that all the factual allegations contained in the Applicants Supporting Affidavit are uncontroverted.

Counsel submitted that leave to commence a derivative suit was sought vide the Notice of Motion dated 16.03.2020 which the Respondents have filed Grounds of Opposition against. He further submitted that Defendants/ Respondents were expected to file a Replying Affidavit to the application indicating why the orders sought and in this respect the leave should not be granted, which they have not done. Further he submitted that the Defendants/Respondents were duly served by a licensed court process server and they proceeded to enter appearance and as such could not argue that the suit lacked substratum for lack of a Complaint and summons to enter appearance.

Counsel submitted that the matter before the court was not an ordinary suit as governed by the Civil Procedure Act but rather a sui generis suit whose special procedure is set out under section 238 and 239 of the companies Act and that the leave can be sought either before or after filing a complaint/derivative suit. As such he submitted that this cannot be a ground for dismissing the suit.

Finally he submitted that the Respondents had not disputed that the Applicants are shareholders in the company neither have they brought to this court any evidence to controvert the allegations of negligence, illegalities, default, neglect and breach of duty by the Directors of the said company. He urged the court to find that the Application seeking leave and conservatory orders is merited and pray that the same be allowed on the basis of the Grounds as set out in the said Notice of Motion and supporting Affidavit alongside the Plaintiffs submissions dated 14th April 2020.

For these submissions **Mr. Mutuma** relied on the cases of **Amin Akberali Manji & 2 Others v Altaf Abdulrasul & Another [2004] eKLR, Kuldeep Singh Sehra & Another v Bullion Bank Ltd & 2 Others [2014] eKLR and Isaiah Waweru Ngumi & 2 Others v Muturi Ndung'u [2016] eKLR.**

Issues For Determination

I have considered the Notice of Motion, affidavits, preliminary objection, Grounds of Opposition and brief submissions. I find that there are only two issues for determination in this cause of action:

1. *Are the Plaintiffs/Applicants entitled to permission to continue the derivative action and, if so, on what terms"?*
2. *Are the Plaintiffs/Applicants entitled to an interim measure of protection pending the determination of the Plaintiff?*

Legal Analysis

In the case of **Mukisa Biscuits Manufacturing company Limited v West End Distributors Limited [1969] EA 696**, the Court of Appeal defined a Preliminary Objection as follows:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

In the most recent case of **Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga v Eliud Timothy Mwamunga & Sagalla Ranchers Limited {2017} eKLR para 44-47** the court stated that;

“The multiple filing of suits and seeking to strike out matters on technicalities ought to stop forthwith so as to get to the root of the dispute between the parties herein. In the same breathe, dismissing the action herein in limine suit herein will have denied this court the opportunity of hearing and determining the real issues that are in dispute or in controversy over the parties....Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application....Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”

In view of the foregoing it is my humble opinion that there are weighty matters that need to be addressed in this suit and as such the grounds adduced by the Defendants/Respondents' Preliminary Objection cannot stand. Consequently, I dismiss it the costs shall be in the cause.

- a. *Are the Plaintiffs/Applicants entitled to permission to continue the derivative action and, if so, on what terms"?*

The rule in the rule in **Foss –v- Harbottle [1843] 2 Hare 461** was that:

“a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it”.

In common law the derivative action would have to fall under the exceptions to the rule in **Foss –v- Harbottle [Supra]**. The exceptions to the rule in were mainly where there was fraud on a minority caused by majority shareholder(s). The action to be commenced had to be in the best interest of the company and without any ulterior motive (**Nurcombe v Nurcombe {1985} 1 ALL ER 65**). The Companies Act has fundamentally changed this law as the requirement to fall under the exceptions to the rule in **Foss v Harbottle** was replaced with judicial discretion to grant permission to continue a derivative action without limit but with statutory guidance (**See Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & Another {2017} eKLR**). 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 the corporation (**Ibid**). Members/shareholders of a company have a limited right to bring a derivative action on the Plaintiffs own behalf and on behalf of the company (**See Rai & Others v Rai & Others {2002} 2 EA page 537**). Sections 143 & 144 of the Companies Act impose a duty on the directors of a Company to act in a way as to promote the success of the company for the benefit of its members.

Statutory procedure is now the exclusive method of pursuing derivative claims. Part XI of the Act (ss. 238-241) stipulates as follows

“238.

Interpretation: Part XI

(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.

240.

Application to Court for permission to continue claim as a derivative claim: how disposed of

(1) If—

(a) a company has brought a claim; and

(b) the cause of action on which the claim is based could be pursued as a derivative claim under this Part, a member of the company may apply to the Court for permission to continue the claim as a derivative claim on the ground specified in subsection(2).

(2) The ground is that—

(a) the manner in which the company commenced or continued the claim amounts to an abuse of the process of the Court;

(b) the company has failed to prosecute the claim diligently; and

(c) it is appropriate for the member to continue the claim as a derivative claim.

(3) 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 that it considers appropriate.

(4) If the application is not dismissed under subsection (3), 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.

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

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

(b) refuse permission and dismiss the application; or

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

241.

Application for permission to continue claim as a derivative action

(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.

242.

Application for permission to continue derivative claim brought by another member

(1) If a derivative claim—

(a) has been brought by a member of a company;

(a) Was brought by a company and is continued by a member of the company as a derivative claim; or

(c) has been continued by a member of the company as a derivative claim, another member of the company may apply to the Court for permission to continue a derivative claim to which this section applies on the ground specified in subsection (2).

(2), The ground is that—

(a) the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of the Court;

(b) the claimant has failed to prosecute the claim diligently; and

(c) it is appropriate for the applicant to continue the claim as a derivative claim.

(3) If it appears to the Court that the application and the evidence provided by the applicant in support of it does not disclose a case for giving permission or leave, the Court—

(a) shall dismiss the application; and

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

(4) If the application is not dismissed under subsection (3), 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.

(5) 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 application; and

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

The factors the court ought to consider before approving a derivative claim are:

I. 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 Companies Act provides that the application for leave will only be granted if the evidence adduced in support of it discloses a case that is a meritorious claim. This is to screen out frivolous claims. All that the applicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed.

II. Consideration of statutory provisions and factors which guide judicial discretion in the realm of derivative action.

In essence it would be prudent for the Court to establish whether the suit is in consortium with Part IX of the Companies Act 2015. The statutory provisions to be met include the requirement under Section 238(3) of the Companies Act that the derivative action be commenced only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty, breach of trust by a director of the company. It is also necessary to establish that the claimant is a member of the company.

Once both factors are considered the court must then decide whether the Leave sought ought to be granted and on what terms. However, leave will not be granted where the suit is not in the interest of or of benefit to the company or where the proposed act has been authorized by the company or the impugned act has been ratified by the company.

However, the Court cannot be reluctant to intervene in the company's decision making process as wrong doing on the part of directors must be checked in order to promote good corporate governance.

Further, in the case of *Isaiah Waweru Njumi & 2 Others –v- Muturi Ndungu [2016] eKLR*, captured some of the factors to be considered 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.

In a derivative action as envisaged in this application, the conduct complained about must be one that arises from an act or omission involving negligence, breach of duty or breach of trust by a director of the company, and the plaintiff ordinarily would be the company save that the name of the company could not be used because the company is unwilling through its directors to enforce the action against the company.

A derivative claim should aver the steps taken to bring the action in the name of the company and which steps failed on account of majority action. It was held by Harman J in *Birch v Sullivan and Another [1958] 1 All ER 56* at page 58 - 59 that:

“It would be necessary to allege, as well as thereafter to prove, that the plaintiff could not, by reason of the first Defendant's opposition, obtain the name of the company to issue proceedings: that he was in the position in which the minority shareholders were in the comparatively rare cases where such actions have been allowed.”

It is now a well settled principle as seen in both *Altaf Abdulrasul Dadani & Another v Amin Akeberali Manji & 3 others [2004] Eklr* and *Kuldeep Singh Sehra & Another v Bullion Bank Ltd & 2 Others [2014] eKLR*, that leave of the court can be granted after a derivative action has already been commenced. Consequently, I place no basis on Counsel for the Defendants/Respondents submission that the Plaintiff/Applicants should have sought leave before they filed suit.

It is further not disputed that the Plaintiffs/Applicants are shareholders of the said **Johari Villas Management Limited** and that they own Villas within the Affected Party's Property. As such from the evidence adduced before this court it is clear that the Plaintiffs/Applicants do have *locus standi* to institute the derivative action in this suit.

a. Are the Plaintiffs/Applicants entitled to an interim measure of protection pending the determination of the Plaintiff?

Having determined from the foregoing that the Plaintiff/Applicants do have the *locus standi* to commence the derivative suit I shall now turn my mind to the issue of whether or not an interim measure of protection should be granted.

The issue of granting an injunction is now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

"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."

The test for granting of an interlocutory injunction was also considered in the American case of **Cyanamid Co. vs Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely:

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

The circumstances for consideration before granting a temporary injunction under **order 40 Rule 1 of the Civil Procedure Rules** requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situation enjoined to grant a temporary injunction to restrain such acts.

i. There must be a serious/fair issue to be tried

I have considered the arguments advanced by both sides and I find that in view of the rival positions taken by both sides, the same can only be determined and resolved after full hearing as the issues cannot be determined at the interlocutory stage. This may therefore call for the court in the interest of doing substantive justice to issue conservatory orders to ensure that the status quo is preserved until the suit is heard and determined by this Court. I am further satisfied that on the strength of the documents produced in this application by the Plaintiffs/Applicants there is established a prima facie case with a probability of success.

ii. Damages are not an adequate remedy

The Plaintiffs/Applicants contend that if injunction orders are not granted they stand to suffer irreparable injury pending the hearing and determination of this case. This is evidenced by the attached evidence of the letters sent by the Respondents to the Applicants. It is their contention, if injunction orders are denied they will stand to lose the suit property and such loss cannot be adequately compensated by way of damages. The Applicant has demonstrated through production of documents on record that the Directors of the said Company have threatened them with re-entry into said suit premises.

I find that if injunction pending hearing and determination of this suit is denied, the Applicant shall not only risk losing the suit property but also render the proceedings nugatory before this court has had an opportunity to hear the dispute and thus infringing its rights in the lease before a full hearing and determination of the plaint.

iii. The balance of convenience lies in favour of granting or refusing the application.

In the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue on balance of convenience expressed itself thus: -

"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. "

I have considered and weighed the conflicting parties' interest as regards the balance of convenience and in which position the same tilts to as regard granting or rejecting the application for injunction. I have considered all the facts of this application as regards which party stands to suffer the greater harm following the decision of this motion. I have to consider amongst the two parties which party have a stronger case on the merit and on whether there is irreparable harm, if I decide the motion in a particular manner, which in my view may influence the

balance in favour of granting or rejecting to grant the injunction. I have in considering the application for the Applicants on the strength of the documents submitted to the court found that the applicant has a stronger case unlike the Respondent.

In view of the above it is my considered opinion that the Applicants stand to suffer greater harm if the application for injunction is dismissed. The Respondents on the other hand will suffer no harm if the injunction is granted, as in the event that it is successful in the suit it will be at liberty to exercise its rights as per the Lease agreement.

Decision

Having carefully considered the application and submissions by learned counsel I now proceed to make the following orders;

1. THAT leave is hereby granted to the Applicants to continue the derivative action herein on behalf of JOHARI VILLAS MANAGEMENT LTD against the respondents FRANCESCO LEPRI and DEVIS RUZZINI.

2. THAT an order of temporary injunction is hereby issued restraining the respondents/Interested Party by themselves, servants, employees assigns, proxies, agents or anyone acting on their behalf from re-entry and termination of Applicants' leases or in any other manner dealing with the Applicants' villas in a manner detrimental to the Applicants' use of their respective Villas being Villa Nos. 16, 7, 14, 11, 1, 13 and Plot Block C erected on plot No. 1371 within Malindi pending the hearing and determination of the main suit.

3. THAT an order restraining the Board of Directors from intimidating the Applicants' during the General Meetings of JOHARI VILLAS MANAGEMENT LTD is hereby issued.

4. THAT Costs of this application be awarded to the Plaintiffs/Applicants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY 2020

R. NYAKUNDI

JUDGE

This ruling has been delivered in terms of Article 48 and 159 (D) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic. (See *Gazette Notice No. 3137 of 17.4.2020*)