



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CIVIL APPLICATION NO. 273 OF 2018

GEORGE MOGAKA ON BEHALF OF

KISII PRESTIGE SHUTTLE LTD.....APPELLANT

VERSUS

SHEM OYUGI.....1ST DEFENDANT/1ST RESPONDENT

HARUN SAISI MOGAKA.....2ND DEFENDANT/2ND RESPONDENT

RULING

1. The Companies Act, 2015 at Section 238 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.

2. In the present case, the Applicant is a one of the directors and shareholders of Kisii Prestige Shuttle Ltd. He states in his pleadings that the company runs the business of managing clients' commercial passenger moto vehicles at Nakuru Town Main Bus Park. The Applicant is apprehensive that the Respondents are stealing company's money for their own benefit but that the Company through its directors has failed to bring an action against them. The Applicant is, therefore, desirous to bring a suit against the Respondents. In other words, the Applicant seeks to bring a derivative lawsuit against the Respondents.

3. For a party to succeed in an action for derivation action, he or she must demonstrate the following:-

- a. He or she must be a member of the company and includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law;*
- b. The proceedings must be in respect of a cause of action vested in the company;*
- c. The proceedings must be seeking relief on behalf of the company;*
- d. The proceedings must be for protection of members against unfair prejudice brought under the Companies Act.*
- e. 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.*

4. From the material placed before me, I am satisfied that the Applicant has satisfied all the requirements for bringing a derivative law suit in this case. I therefore grant leave to the Applicant to commence a derivative action against the 1st and 2nd Respondents as prayed. Costs will be in the cause.

5. Orders accordingly.

Dated and delivered at Nakuru this 13th day of March, 2019

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JOEL NGUGI

JUDGE