



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 318 OF 2017

ELESH GHEEWALAAPPELLANT/APPLICANT

- V E R S U S -

BEATRICE MUIRIGO MWAURA.....1ST RESPONDENT

HOUSING SCHEME LIMITED.....2ND RRESPONDENT

RULING

1) Elesh Gheewala the applicant herein has taken out the notice of motion dated 27.07.2017 in which it sought for the following orders.

1. spent

2. This Honourable Court be pleased to grant leave to the applicant to continue the derivative action ads filed.

3. This honourable court be pleased to grant order that a general meeting be convened by Housing schemed Limited for purposes of electing additional directors to facilitate management of the company business.

4. This honourable court be pleased to direct that in the event only one member of the company is preset at the meeting, that member shall be regarded as constituting a quorum.

5. Any other orders this honourable court may give which it deems just and considers appropriate.

6. Costs of this application be in the cause.

2)The motion is supported by the affidavit of Elesh Gheewala.

When served, the 1st respondent filed its grounds of opposition to resist the motion.

When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submission. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and the grounds of opposition against the motion. I have also considered the rival written submissions.

4) The applicant aver that it has been difficult to hold general meetings due to wrangles in the management of the company. That the 1st respondent has frustrated the calling and holding of both directors and members meetings, citing non issuance of notice of meetings and the quorum of the members and as a result failed to convene the requested meeting to the detriment of the company and its stake holders. Therefore there has been a stalemate in the operations of the company making it impractical to comply with the mandatory statutory obligations.

5.)The 1st respondent opposed the motion arguing that the applicant has not filed a proper derivative action claim and therefore none exists. Further that the applicant has not established a prima facie case for leave to proceed with a derivative action. Lastly that the applicant is not acting in good faith and is coming to this court with unclean hands which disentitles him to any equitable relief.

6.) The factors to consider in such an application are as follows;

Under Section 238 of the Companies Act it is stated 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.

7. 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;

Section 239 of the Companies Act provides that at the time of considering whether or not to grant an applicant leave to continue with a derivative action, a court has the discretion of adjourning the proceedings to give such an applicant to adduce evidence to demonstrate that he or she has a cause of derivative action.

8) The applicant submits that failure to hold general meetings as per the company's memorandum and articles of association is a means to abolish the individual rights of members. The applicant avers that as a director and share holder he has the right to file the derivative suit to solve the stalemate in the management and running of the company's businesses to save the company from plunging into difficulties.

The respondent on the other hand submits that the applicants application is for his own benefit in that there was no meeting convened to pass a resolution approving one share holder to sue, the application to sue for the benefit of the company. The respondent states that the application is misconceived in law. and cited the case of **Samuel Mwangi Gichanga –vs- Makarios Tillyndes 75 othesr (2015)eKLR** among other cases.

9) After a careful consideration of the matters raised and arguments presented in support of the application, it has become abundantly clear that the applicant's complain revolves around the question relating to meetings of the company which are totally distinct from derivative actions. When it comes to company meetings, the provisions of Section 131, 132, 134 and 135 of Companies Act, Cap 486 Laws of Kenya come into play. I therefore find the applicant's motion dated 27.7.2017 to be misplaced hence incompetent.

10) The motion is ordered dismissed with each party bearing its own costs.

Dated, Signed and Delivered in open court this 2nd day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent