REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 366 OF 2015

MORRIS AND COMPANY (2004) LIMITED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK .....1ST DEFENDANT

KELBROOK LIMITED.....2ND DEFENDANT

DIAMOND HASHAM LALJI.....3RD DEFENDANT

PRAKASH SANAS.....4TH DEFENDANT

AND

MARIGU INVESTMENT LIMITED.....APPLICANT

RULING

1. This Court is yet again asked to grant leave to a shareholder to bring a Derivative action on behalf of a Company in which he owes shares. Marigu Investment Limited (Marigu**)** has through a Notice of Motion dated 12th September 2018 requested this Court for permission to continue this suit as a Derivative action on behalf of Morris and Company (2004) Limited (Morris or the Company**).**

2. The Company was incorporated on 2nd March 2004. Then, its issued share Capital was the sum of Kshs. 10,000,000 divided into 10,000 ordinary shares of Kshs 1,000 each. Marigu held 4,500 ordinary shares while Kelbrook Limited (Kelbrook) had 5,500 ordinary shares. That shareholding has changed so that whilst Marigu continues to hold 4,500 the shares of Kelbrook have increased very substantially to 195,000 shares. Marigu has taken the position that this change of shareholding was obtained fraudulently and has through Nairobi HCC No 263 of 2018 - Marigu Investment vs. Kelbrook Ltd and 2 Others, sought to reverse the shareholding. That is a matter outside the scope of these proceedings.

3. The Company is the owner of a valuable parcel of Land described as L. R. No. 209/8201 (the suit property). Marigu is aware that the property was charged in favour of Diamond Trust Bank (DTB) to secure payment of a sum of Kshs 330,000,000 and USD 2,000,000. The Charge having been registered on 31st March 2015. It is the averment of Marigu that the because of non-performance of the facilities, DTB sought to exercise its Statutory remedy by issuing a Notice dated 26th May 2017 given under the auspices of section 92 of the Land Act. A further Notice was to follow on 4th October 2017. On this occasion under section 96 (3) of the Land Act.

4. Marigu says that given the distress faced by the Company it was surprised when it learned that the property had been further encumbered by the following securities;

i. A second further charge for Kshs 937,000,000 registered on 18th August 2017;

ii. A third further charge for Ksh 983,000,000 registered on 18th August 2017;

iii. A further charge for Kshs 100,000,000 registered on 29th December 2017.

Marigu takes issue with this state of affairs and asks the Court to notice that the further charges were taken up even after the Statutory

Notices had been issued on 26th May 2017 and 4th October 2017

5. The contention by Marigu is that DTB is reckless, irresponsible, and has breached the provisions of the Banking Act Cap 488 and the prudential guidelines made thereunder. The Applicant gives the following particulars of breach;

a. Advancing amounts far beyond the value of the Plaintiff's assets and the security for the facilities thereby making the Plaintiff insolvent;

b. Failing to undertake enquiries upon the Plaintiff by assessing its financial status, taking into consideration the Company's debt repayment history for credit and its financial means to repay the debt;

c. Failing to establish whether there was a reasonable basis/purpose for the advance to conclude that there was a commercial purpose for the facility which may prove to be successful;

d. Failing to establish the purpose of the advance to ensure that the monies advanced were for the purpose intended and for benefit of the company;

e. Failing to consider that by entering into the credit agreement the Company would be over-indebted and that repayment would not be feasible; and

f. Despite issuing the Company with a Statutory Notice of sale dated 26th May, 2017 and another notice dated 4th October 2017, it further registered the second Further Charge and the Third Further Charge dated 18th August, 2017 and a Fourth Further Charge dated 29th December 2017.

6. Marigu asserts that a scheme has been contrived between the Bank, Kelbrook (the 2nd Defendant), Diamond Hasham Lalji (the 3rd Defendant) and Prakash Sanas (the 4th Defendant) to fraudulently dissipate the suit property which is the substantial asset of the Company. Lalji and Sanas are directors of the Company representing the interest of Kelbrook.

7. This is how Marigu sees the ruse playing out. The suit property has been charged to a sum that far outstrips its value. It is alleged that it has been charged to secure a total advancement of Kshs 2,620,000,000 which is almost three times its value. This has been done when the Company was already in default of a much smaller sum and so the repayment of the further advances is not feasible. Because default continues, the Defendants have made arrangements to sell the said property to an entity known as DPL Festive limited through private treaty for a sum of Kshs 780,000,000. Marigu alleges this to be much less than the value of the property.

8. It is on these allegation that Marigu has brought this suit in the name of the Company and prays the intervention of the Court as follows:-

a. A declaration that the registration of charges against the Plaintiff's property, L. R. No. 209/8201 was reckless, imprudent, irresponsible, unlawful and irregular and therefore unenforceable;

b. In the alternative to (a) above, a declaration that the 2nd, 3rd and 4th Defendants are liable for the repayment of loans advanced;

c. An order directing the 1st Defendant to execute all necessary documents to have the charges registered against the Plaintiff's property L. R. No. 209/8201 discharged forthwith;

d. Costs of the suit.

9. In defence,a not too dissimilar position is taken by DTB, Kelbrook, Lalji and Sanas. Lalji sets out his version of how the shareholding of Kelbrook ballooned to its current position. Abridged, following financial distress that the Company was undergoing, the Directors of the Company called an extraordinary meeting of members on 10th January 2007 in which Mr. Manga Mugwe was chairing. It is of some significance that Mugwe is the proxy of Marigu. In that meeting members noted that the Company was technically insolvent and resolved to take corrective action by increasing the issued and paid-up share capital of the Company so as to inject more funds into the Company. The resolution was to increase the ordinary shares by creation of an additional 190,000 ordinary shares. This was to be achieved by way of a Rights Issue and where the shareholders declined or did not take up their full entitlement in the Rights Issue then the same would be taken up by the remaining shareholders at the same price in proportion to their holdings and then to any other party at the same price.

10. The position of Kelbrook is that Marigu failed to take up its entitlement and literally abandoned the Company. Eventually Kelbrook took up its entitlement and those of Marigu and hence its strengthened position.

11. In respect to the borrowings, Kelbrook and its Directors assert that Marigu is well aware of them. DTB gives further details in that respect. This is contained in an affidavit of Tarminder Umesh sworn on 11th October 2018. I would think that there is no controversy about the facilities of Kshs 330,000,000 and the USD 2,000,000. Those are conceded by Marigu as properly taken. The same would be in respect to a further facility of an overdraft of Kshs 70,000,000 extended by the Bank and accepted by the Company through a letter of offer dated 14th January 2015.

12. Umesh talks of default of the facilities that eventually led to the issuance of the Statutory Notices already alluded to. That on 21st August 2017, Marigu through its lawyers Kaplan & Stratton indicated the desire of preserving the suit property and proposed a meeting between the Banks representatives and the directors of Kelbrook.

13. On 14th June 2018 DPL Festive Limited offered to buy the suit property at Kshs 720,000,000. Reacting to that offer the Bank's Advocates through a letter of 21st June 2018 informed the Bank that it had no objection to the offer but on condition that it was duly sanctioned by a Board Resolution.

14. Although there was intention of holding of an extra-ordinary meeting of the Company on 14th August 2018 to discuss the offer for purchase of the property, the same aborted for lack of quorum.

15. In respect to the three contentious further charges, DTB through its representatives depones that the first further charge was for Kshs 83,000,000 and not Kshs983,000,000. As for the second further charge it was for Kshs 937,000,000 to secure money advanced to Raffia Bags where the Company is merely a Chargor.

16. It is against this background, on which some facts are not agreed, that the Application for leave to continue the action as a derivative suit is sought and resisted. The Court has had the benefit of the written submissions filed by Counsel and begins by setting out its understanding of the principles governing the grant or refusal of permission.

17. The concept of a Derivative claim is fully embedded in statute. Part XI of the Companies Act is dedicated to provisions on Derivative actions. A Derivative claim is proceedings by a member of a Company in respect of an action vested in the Company and seeking relief on behalf of the Company (Section 238 (1)). That action can be brought against a Director of a Company or another person or both.

18. An enduring feature of this type of action is that it can only be commenced or continued with the express sanction of the Court. Where like here, the Applicant first files the action and later seeks permission to continue with it, then, it is good practice that the permission is sought very early in the proceedings. Whilst there is no time prescribed within which leave should be sought, the practice of an early plea avoids an argument that no substantive motions or steps can be taken in the proceedings before leave is granted.

19. The relevant provisions in respect to an application for permission to continue a Derivative claim are to be found in sections 239 and 241.

20. The provisions of section 241 are singularly critical in this type of application as it sets out the consideration that the Court must have in granting or refusing permission. It provides:-

> "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 authorised by the company; or
>
> (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."

21. To be noted however, is that the factors set out by section 241 are not a closed list and other factors applicable in similar common law tradition can be applied in the exercise of the discretion of Court as to whether or not to grant leave. The caution always being that these factors should not be inconsistent with the express provisions of Statute. In this regard this Court supports the view of Onguto J. in Commercial & Tax Division Case No. 102 of 2017 Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarlal & Another (2017) eKLR, he stated :-

> "47. I must point out that the exercise of discretion in the circumstances would be more than adjudication, in view of the rather clear provisions of Part XI of the Act. I also observe that it is not feasible for the legislature to draw an exhaustive list of factors to be considered in the exercise of judicial discretion. In these respects, there must be something new through statute, something old through factors which guided common law exceptions to the rule in Foss v Harbottle and something borrowed from various decisions in the United Kingdom which have interpreted and applied the Companies Act 2006 (UK) especially ss. 260-264 which are pari materia ss. 238-242 of the Act, 2015".

22. This Court is further indebted to the elaboration of some of the factors set out in section 241 (2) by Ngugi J. in Isaiah Waweru Ngumi & 2 Others vs Muturi Ndung'u (2016) eKLR where he held that :-

> "21. Counsel for the Respondent and Interested Parties suggested that the test is the substantive one whether the Applicants have made out a prima facie case. That test intuitively makes sense given the policy objectives of the requirement for leave I posited above. In making that determination, the Court is guided by the considerations stipulated in section 241(2) of the Companies Act. 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".

23. In HCCC No. 130 of 2018, Lucy Kawira Mbuba (suing on behalf of Survo General Works Limited –vs- Mrs. Mercy Muthoni Mbuba & Others; I sought to add my voice in respect to one particular factor that may be of relevance to the matter at hand. This is where a claim brought as a derivative action can give raise to a cause of action that a member can pursue in his own right rather than on behalf of a company. I observed;

> "31.To the observations made in the decisions of Ghelani Metals Limited (supra) and Isaiah Waweru Nyungi (supra), I make a contribution. The existence of an alternative remedy which a member can pursue in his own right rather than on behalf of the Company should not, as a singular factor, dissuade a Court from granting permission. In this regard, Part XXIX of the Companies Act has a raft of Provisions for the protection of members of a Company against Oppressive Conduct and Unfair Prejudice. Once satisfied that the grounds of an Oppressive Conduct and/or Unfair Prejudice are substantiated, the Court may make such orders in respect of the Company as it considers appropriate (Section 782(1). Section 782(2) then provides:-
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> "In making such an order, the Court may do all or any of the following:
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> (a) regulate the conduct of the affairs of the company in the future;
>
> (b) require the company—

(i) to refrain from doing or continuing an act complained of; or

(ii) to do an act that the applicant has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court directs;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the Court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.(my emphasis)

32. An authority granted under Section 782(2)(c) is an authority to commence another category of a Derivative Action (other than that of part XI of the Act). It is an acknowledgement that a Cause of Action can inhere on both the Member qua Member and the Company. For example, an unlawful and substantial wastage of the assets of a Company can lead to a devaluation of the value of the Company with a consequential diminution of the worth of a Member's shares. The loss will not only be to the Company but to the Member as well. Where both remedies are available to the member then a Court may wish to consider the other factors before declining permission merely because of existence of an alternative and effective remedy."

24. On the threshold to be reached by the suitor for permission, the Court in Ghelani (supra) held that the application needed to demonstrate through evidence that there was a prima facie case without the need to show that it would necessarily succeed if leave was granted. Section 239 (2) may have something to say on the threshold and it reads:-

"(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."

Reading this provisions from the converse perspective the Court will grant permission if it is satisfied that the application and evidence adduced by the Applicant does not fall within the grounds for refusal under section 241 (1) and discloses the factors set out in section 241 (2).

25. If then the Applicant is simply required to disclose its case on a Prima facie basis then it is neither necessary nor desirable for the Court to carry out a mini trial by examining in detail evidence that has not been tested by way of cross-examination. In addition the Court should desist from drawing firm conclusions. That is the preserve of the Trial Court if leave is granted and findings at this interlocutory stage should not be allowed to be a source of embarrassment.

26. The complaint by Marigu is that the Defendants herein have colluded to wrongfully commit the Company to reckless borrowing and exposure in the full knowledge that the Company is already ailing financially. Is this a frivolous claim?

27. There is evidence, and it is not a contested position, that following its inability to service some facilities granted to it by DTB, DTB issued two Statutory Notices to the Company. The Notices of 26th May 2017and 4th October 2017 were issued under the provisions of The Land Act 2012 and required the Company to remedy the default or suffer the sale of the suit property. There is no evidence that the Company remedied the situation. To the contrary all the Defendants acknowledge that the financial distress of the Company persisted. Hear, for example what DTB says through the affidavit of Mr. Umesh;

"Further, I know of my own knowledge that presently, the Plaintiff has halted operations and is therefore not earning any revenue. As such it is evident that the Plaintiff does not have any capacity to make payments on the outstanding loans owed to the Bank. A derivative suit in this case would only serve to further burden the Plaintiff with Court laws and huge costs."

28. On 18th August 2017, a date after the first Statutory Notice, two further charges were registered over the suit Land in favour of DTB, for Kshs 937,000,000 and 83,000,000(not Kshs 983,000,000 as asserted by Marigu). Then again after the giving of the second notice a further charge for Kshs 100,000,000 was registered in favour of DTB. The Defendants explain that the charge of Kshs 937,000,000 was a third party charge where the borrower was Raffia Bags (East Africa) Limited. So was the charge of Kshs 83,000,000 where the Company stood as guarantor to a borrowing by Maize Milling Company Limited. In respect to these two, resolutions of the Board have been shown. Well and good! The Resolutions are dated 21st September 2016, a date before the Statutory Notices.

29. The further charge of Kshs 100,000,000 has not been explained. Again the Board resolution sanctioning its borrowing is not shown.

30. In respect to these three charges, Marigu complains that it was kept in the dark and not involved. Whilst the Board Resolutions (in respect to two further Charges) have been shown to the Court, there is no evidence of the notices calling the Board meeting. Perhaps then the allegation by Marigu that the financial arrangements or commitments (which involved the three further charges) were done behind their back is not a trifle.

31. Anything curious about those arrangements? It has to be remembered that as at 27th May 2017, DTB, the Company and all the

Defendants were fully aware that the financial position of the Company was fragile. This position had not changed even at the time of registration of all the three further charges. While an argument put up by the Defendants is that two of the charges were taken up where the Company simply stood surety for other borrowers and it did not endanger the Company, is it not a truism that a surety can be called upon to meet the obligation of the principal borrower in the event of default? And it would not matter if the security was to cover old borrowings that predated the Notices because the obligation on the Company was placed on the Company on the date the further Charges were registered. And in respect to the third further charge of Kshs 100,000,000, it bears repeating, that no sufficient explanation was given as to why it was taken up.

32. One other feature of these arrangements may call for further inquiry. The Bank has sanctioned the sale of the suit property at Kshs. 730,000,000/- to DPL Festive Limited. The 2nd, 3rd and 4th Defendants think this to be a good bargain because the market price stands at Kshs. 900,000,000/-. There is therefore some consensus that the market price of the suit property could be Kshs 900,000,000/-. Before the registration of the 3 further charges, the property was charged to a total sum of Kshs. 330,000,000 plus USD 2,000,000/-. This was within the value of the property. The three further charges aggregate to a sum of Kshs. 1,120,000,000/- which by themselves surpass the value of the property. This of course may be well explained by the Defendants but it seems that the propriety of the arrangements should be interrogated because they were made against the backdrop that the owner of the property was already technically insolvent.

33. The conclusion I reach is that the allegation that these arrangements imperils the Company and its assets is not a trifle and a suit brought to protect the property of the Company is a suit brought for the benefit of the Company. It is also a suit in respect of which a cause of action vests in the Company.

34. The prayers sought in the Plaint are as follows;-

> a) A declaration that the registration of charges against the Plaintiff's property, L. R. No. 209/8201 was reckless, imprudent, irresponsible, unlawful and irregular and therefore unenforceable;
>
> b) In the alternative to (a) above, a declaration that the 2nd, 3rd and 4th Defendants are liable for the repayment of loans advanced;
>
> c) An order directing the 1st Defendant to execute all necessary documents to have the charges registered against the Plaintiff's property L. R. No. 209/8201 discharged forthwith;
>
> d) Costs of the suit.

These no doubt are reliefs on behalf of the Company.

35. But this Court is told that Marigu is not acting in good faith. That the Company had abandoned ship and merely intends to collapse the intended sale of the suit property without providing a viable alternative as to how the Company will keep afloat. That this infact will worsen the position of the Company. Looking at the entire plaint and the prayers sought, I do not understand Marigu to be doubting the power of the Company to sale the suit property, and if it did then it would be standing on quicksand. What Marigu questions is what it sees as a scheme to overburden the Company and then place it in a position where its assets must be sold. Having found that the allegations by Marigu are not frivolous, I am not able to see that it is acting in bad faith.

36. There is however a caution sounded by the lawyer for the 2nd, 3rd and 4th Defendants. That this Court should pay heed to the provisions of section 241(1) which are again reproduced:-

> "(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 authorised by the company; or
>
> (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."

37. These were called the " Compulsory Refusal" by Onguto J. If an application does not get past these tests, then it cannot go any further and it should not even be subjected to the considerations set out in subsection (2). It is argued that the cause of action herein arises from an act which has already occurred and was authorized by the Company before it occurred. The Defendants point to the Board resolutions.

38. Although not addressed in any detail by Counsel, I would understand the provisions of section 241 (1) (b) and (c) to be protecting only acts or omissions which are properly authorized or ratified by the Company. The authorization and ratification must be of acts or omissions which the Company can lawfully authorize or ratify. In addition the authorization or ratification must be in a process which adheres to the law and the Memorandum and Articles of the Company. For example, in a properly convened Board meeting.

39. Marigu seems to posit that the acts complained are in themselves unlawful and so can never be properly authorized or ratified and secondly the Board meetings were improperly convened. The application gets past the refusal test.

40. Has the Company decided not to pursue the claim? While the applicant should ordinarily first make a demand to the Company to pursue the claim, a Court will excuse that demand where it would be futile and moot to first make a demand. In *Lucy Kawari Mbuba (supra)* this Court observed:

> "51. The Provisions of Section 241 (2)(e) requires that I inquire whether the Company had decided not to pursue the Claim. A member would be jumping the gun by commencing a Derivative Suit in respect to a Claim that the Company would be willing to take up if requested by the member. It is for this reason that the Plaintiff is required to either demonstrate that it has made a demand on the Board of Directors to attend to the claim and pursue it or that the circumstances or exigencies of the matter are so urgent that such a demand is excused. In other instances, the Board of Directors would have taken an unequivocal stand against pursuing the Claim that it would be futile and moot to make a Demand. In that event the futility requirement may excuse the demand".

41. In the matter before Court, the persons in the majority have made it clear that they infact oppose the suit. It would be to no avail to make a demand.

42. It is contended by the 2nd, 3rd and 4th Defendants that these proceedings are a significant replica of *HCCC No. 263 of 2018, Marigu Investment vs KeLbrook Limited & Others (HCC No. 263 of 2018)*. If this were to be so then the Court would decline to grant leave because the member has already chosen to pursue his right qua member rather than on behalf of the Company (section 241 (2) (f)).

43. This Court has acquainted itself with the pleadings in HCC No. 263 of 2018. It is to be observed that the suit is a complaint about the manner in which Kelbrook acquired its enhanced shareholding. Marigu seeks to have the acquisition of 190,000 shares by Kelbrook declared as fraudulent, null and void. In effect Marigu seeks that the position of shareholding reverts ante the share offer issue. It is nevertheless true that in an application dated 31st July 2018 (later withdrawn), Marigu had sought to restrain the holding of an Extra-ordinary General Meeting of the 14th August 2018, whose principal agenda was to discuss the sale of the suit land in that suit. Marigu was questioning the process from the perspective that it would be sanctioned by an unlawfully constituted membership and Board. That was the plea of a member who felt that it was the victim of oppressive conduct and/or unfair prejudice. A plea that is available under the auspices of part XXIX of the Companies Act.

44. The further Charges and facilities involving DTB are not the subject matter in HCC 263 of 2018. DTB is not a party therein. And this Court has already found that as framed, and on the basis of the material before Court, the applicant has made out a prima facie case that the cause of action is to the benefit of the Company. This Court does not find that the Proceedings herein are a replica of HCC No. 263 of 2018.

45. The Court has ticked the boxes on the tests and considerations applicable to applications of this nature. All are in favour of the Applicant and this Court is satisfied that it should grant the permission sought. The Notice of Motion dated 17th September 2018 is allowed with costs.

Dated, Signed and Delivered in Court at Nairobi this 9th day of November, 2018.

F. TUIYOTT

JUDGE

PRESENT;

Musyoka for the Plaintiff

Rimui for 1st Defendant

Simiyu for Owino for 2nd, 3rd and 4th Defendants

Nixon - Court Assistant