REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISC. CIVIL APPLICATION NO. 391 OF 2016

IN THE MATTER OF THE COMPANIES ACT, 2015

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

A DERIVATIVE ACTION ON BEHALF OF JEWEL HOLDINGS LTD

BETWEEN

MAHESH MEGHJI SHAH.....APPLICANT

AND

JEWEL HOLDINGS LIMITED.....1ST RESPONDENT

JAYANTILAL MEGHJI SHAH.....2ND RESPONDENT

VENICHAND MEGHJI SHAH.....3RD RESPONDENT

RULING

[1] The Notice of Motion dated **9 August 2016** was filed herein by **Mahesh Meghji Shah**, the Applicant, pursuant to **Sections 1A, 1B, 3A** and **63(e**) of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya,** and **Order 40 Rules 1, 2, 3** and **4** of the **Civil Procedure Rules**, **2010**, for the following orders:

[a] Spent

[b] Spent

[c] That an interim measure of protection by way of interlocutory injunction be issued restraining the 2nd and 3rd Respondents, their servants, employees and/or agents or otherwise howsoever from interfering in any manner with, advertising for sale, or disposing of, the 1st Respondent's assets, pending the hearing and determination of this suit;

[d] That the Applicant be granted leave to file a derivative action against the 2nd and 3rd

Respondents on behalf of the 1st Respondent; and

[e] That costs of the application be borne by the 2nd and 3rd Respondents.

[2] The application is supported by the Affidavit annexed thereto, sworn by the Applicant on **10 August 2016**, wherein he deposed that he is one of the shareholders of the 1st Respondent, **Jewel Holdings Limited** (the Company); and that, as shareholders, they had appointed the 2nd and 3rd Respondent along with **Rameshchandra Meghji Shah** (who is now deceased) as directors of the Company. It was further contended that the said directors have mismanaged the Company and caused its shares to be transferred to their children to the detriment of the shareholders. It was further averred that there has never been a general meeting held by the company since they purchased shares or for the purpose of appointing a replacement of the deceased director; and that any attempts on the part of the Applicant to call for a general meeting or extra ordinary general meeting have all been frustrated by the 2nd and 3rd Respondents.

[3] The Applicant further averred that he asked for the audited books of account from the Company's Board of Directors, but that the requests have been roundly ignored; and that the failure by the Board of Directors to account to the Company's membership has exposed the members to immense losses. He accordingly urged the Court to grant him leave to file a derivative suit on behalf of the Company and the minority shareholders with a view of stemming the mismanagement and breach of trust orchestrated against the Company by the current directors.

[4] The Respondents opposed the application and relied on the Grounds of Opposition dated **26 October 2016**, namely:

[a] That the Court is not clothed with the jurisdiction to issue orders in the nature of interim injunction in the absence of a suit, as such to grant the same would be an absurdity;

[b] That for the Court to grant an interlocutory injunction, the Applicant must show that he has a prima facie case with a probability of success as set out in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358;** which finding cannot be made in the absence of a Plaint;

[c] That Prayer No. 4 of the application, which seeks for leave to file a derivative suit, is procedurally incompetent, and is an abuse of the process of the Court because it offends **Section 239** of the **Companies Act, No. 17** of **2015;**

[d] That without a Plaint, the Applicant is unable to demonstrate that he falls within the exception to “the Proper Plaintiff Rule” as set out in the case of **Foss vs. Harbottle [1843] 2 Hare 461**.

Accordingly, the Respondents urged for the dismissal of the application.

[5] Having given due consideration to the Application, the grounds raised in support thereof and the averments in the parties' respective affidavits, in the light of the written submissions filed herein, it is unquestionable that the disputants are all shareholders of the 1st Respondent, a company that is also the majority shareholder or holding company for **Megvel Cartons Limited**. It is apparent that the 2nd and 3rd Respondents have all along, since the incorporation of the 1st Respondent, been the directors thereof. The Applicant now contends that while the Company was successful for a significant period of time, it ran into headwinds courtesy of the manipulations orchestrated by the 2nd and 3rd Respondents, who he alleges to have transferred the shares held by the Company in **Megvel Cartons Limited** to their children and nephews without the knowledge or approval of the shareholders. The Applicant's cause of action is that in spite of protestations, the 2nd and 3rd Respondents have declined and/or neglected to follow the laid down procedure in resolving the dispute.

[6] The Respondents having attacked the application on the grounds of competence, contending that

without a Plaint, it cannot be ascertained whether the standards set in **Giella vs Cassman Brown**, or **Foss vs. Harbottle** have been met; the issues to resolve herein, as I see them, are:

> **[a] Whether an interlocutory injunction would lie, as sought herein, in the absence of a Plaint;**
>
> **[b] Whether the Applicant is entitled to leave to commence a derivative suit as prayed.**

[7] The application was filed pursuant to **Sections 1A, 1B, 3A** and **63(e)** of the **Civil Procedure Act** and **Order 40 Rules 1, 2, 3,** and **4** of the **Civil Procedure Rules** for an interim measure of protection by way of an interlocutory injunction, and for leave to commence a derivative suit. Accordingly, it was incumbent upon the Applicant to demonstrate a prima facie case with probability of success; and that that he stands suffer irreparable harm if the injunction is not granted, which harm cannot be adequately compensated in damages; and that the balance of convenience is in his favour.(**see Giella v. Cassman Brown, supra**)

[8] It was the submission of the Applicant that has satisfied the conditions aforestated. He relied on the cases of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** and **Samson Khasiani Amusibwa vs. Alphonse Musotsi Ambali & 2 Others [2005] eKLR** to support the contention that a prima facie case has been established on the basis of the averments in the Applicant's Supporting Affidavit. The case of **Waithaka vs. Industrial and Commercial Development Corporation [2001] eKLR** was cited to support the proposition that it is not always the case that an interlocutory injunction would be refused where damages would be an adequate remedy. It was also posited by the Applicant that the balance of convenience would be in favour of granting the injunction so as to preserve the assets of the Company; and in support of this contention reliance was placed on **Central Bank of Kenya & Another vs. Uhuru Highway Development Ltd & 4 Others [2000] KLR 382**.

[9] The Respondents, on the other hand, were of the posturing that since the application seeks relief, in Prayer 3 thereof, pending the hearing of the suit, and there being no such suit as envisaged by **Section 19 of the Civil Procedure Act** as read with **Order 3 Rule 1 of the Civil Procedure Rules,** the application is misconceived. Counsel for the Respondent cited the cases of **Kitur vs. Standard Chartered Bank & 2 Others and Geoffrey Bogonko Nyarienga & 3 Others vs. Joseph Nyagaka & 2 Others [2004] eKLR** in support of their arguments.

[10] I have perused the authorities cited by Counsel for the Respondents to support the argument that an application for injunction cannot stand in the absence of a suit. It is noteworthy however that the Applicant, in addition to **Order 40 Rules 1, 2, 3** and **4** of the **Civil Procedure Rules,** also invoked the provisions of **Sections 1A, 1B, 3A** and **63(e)** of the **Civil Procedure Rules**. Accordingly, the paramount consideration would be, whether sufficient cause has been shown for the Court's intervention, granted that the thrust of the application is the prayer for leave to institute a derivative suit. In this respect, I find succour in the expressions of **Nyamu, J.** (as he then was) in **Giant Holdings Limited vs Kenya Airports authority [2004] eKLR** thus:

> **"...should this court fold its hands in the circumstances of this case where it has been challenged under S 3A and S 63(e) of the Civil Procedure Act to do justice to ensure that its process is not abused and justice is done by having issues ventilated on merit. Where an injunction application is being pursued diligently and without delay, it would not be an act of good faith for one of the parties to derail the process ... The situation is not provided for and therefore this court is clearly entitled to invoke its inherent powers and S 63(c) and (e) of the Civil Procedure Act in order to meet the ends of justice. Failure to do so would render the application superfluous. Courts of law and equity should never agree to be moved in vain or its process defeated by a step of one party which conveniently tries to take advantage of a mistake in the court process. The hand of justice is never too short or too long. It adjusts to all situations. Section 63(e) of the Civil Procedure Act is aimed at supplementing court's power to do justice."**

[11] There is no gainsaying that the question as to whether the Applicant has a *prima facie* case is a question that can only be answered on the basis of the parties' pleadings; and although in the Supporting Affidavit the Applicant has endeavoured to set out the gist of his complaint; there appears to be no suit, as matters stand. Accordingly, and on the face of it, I would agree with the submissions of Counsel for the Respondents that the prayer for interlocutory injunction **"...pending the *inter partes* hearing and determination of this suit..."** as set out in Paragraph 3 of the Applicant's Notice of Motion, is accordingly misconceived.

[12] Accordingly, I would take the view that no *prima facie* case has been made out to warrant the issuance of an interlocutory injunction in the circumstances. In the premises, it would be unnecessary to determine whether the Applicant stands to suffer irreparable harm or whether the balance of convenience is in his favour. This conclusion is premised on the Court of Appeal's pronouncement in **Nguruman Limited Vs Jan Bonde Nielsen & Others [2014] eKLR** that:

> **"It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially…if prima facie case is not established, then irreparable injury and balance of convenience need no consideration…"**

[13] As to whether a good case has been made out by the Applicant for the grant of leave to institute a derivative suit, again, the Respondents took issue with the procedure adopted herein. Their argument was that there ought to be a suit in place, brought by way of Plaint upon which an application for leave would be premised, as this is the purport of **Section 239** of the **Companies Act**, **2015**, under which the instant applications was brought. That provision states that:

> **(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.**

[14] In support of the foregoing posturing, the Respondents relied on the case of **Dadani vs. Manji [2004] eKLR** and **Isaiah Waweru Ngumi & 2 Others vs. Muturi Ndung'u [2016] eKLR** for the holding that the proper procedure for a derivative action is to file suit and then seek leave of the Court to continue the suit; and that since there is no suit to be continued, the application is misconceived.

[15] The Applicant was however of the stance that their application is properly before the Court for consideration and ought therefore to be allowed. It was submitted by his Counsel that the purpose of a derivative action is to provide an exception to any stakeholder who feels that the people entrusted with the day to day management of a company do so in the interests of the company and its members; and that when they fail to discharge that duty, a member would be entitled to do so on behalf of the company. Counsel also relied on the case of **Foss vs. Harbottle** (supra) and **Dadani vs. Manji** (supra).

[15] It is now trite that companies transact business through resolutions passed either at the meetings of the Board of Directors, or of shareholders at Annual or Special General Meetings. This practice is premised on the principles laid down in the case of **Salomon vs. Salomon Co. Ltd [1895-99] All ER 33** and **Foss vs. Harbottle** (supra) that a company is a legal personality in its own right, with its own corporate identity, separate and distinct from the Directors or Shareholders, including the capacity to sue or be sued in its own name. Accordingly, the proper Plaintiffs, in a case of this nature, where a wrong is alleged against the Directors of the 1st Respondent, ought to have been the by the Company. In the case of **Edwards vs. Halliwell [1950] All ER 1064** the **Foss vs. Harbottle Rule** was restated by **Jenkins LJ** thus:

"The rule in Foss-v-Harbottle, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue."

[16] However, there are recognized exceptions to that Rule, one of which being illegality. Thus, in the case of **Dadani vs. Manji & 3 Others [2004] eKLR** by **Mwera, J**. (as he then was) expressed the view that:

"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 vs. 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 a derivative suit."

[17] The Learned Judge took the view that the proper procedure to be followed in such matters is for a suit to be filed by way of Plaint, and for permission to be sought therein to continue with the action before any other action can be taken towards progressing the suit. This holding was followed in the case of **Isaiah Ngumi & 2 Others vs Muturi Ndungu [2016] eKLR** with particular reference to **Section 239** of the **Companies Act, 2015**. It is however instructive that in the appeal arising from the **Dadani vs. Manji case**, namely, **Amin Akberali Manji & 2 Others vs. Altaf Abdulrasul Dadani [2015] eKLR,** the Court of Appeal was of the view that:

"Leave of court shall be obtained before filing a derivative suit, but may also 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, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in Foss vs. Harbottle."

[18] Accordingly, since **Section 238(5)** of the **Companies Act, 2015,** also recognizes that a member may **"seek to bring"** or **"to continue"** a derivative suit under that part, I take the view that the Applicant's application for leave before filing his suit is indeed tenable in the circumstances, and that the only issue remaining for consideration is whether he has established that he falls within falls within the recognized exceptions to the **Foss. vs. Harbottle Rule** as well explicated by the Court of Appeal in the case of **Manji vs. Dadani**, namely:

a) where the alleged wrong is *ultra vires* the corporation because the majority shareholders cannot confirm the transaction;

b) where the transaction complained of could be validly sanctioned only by special resolution because a simple majority cannot confront a transaction which requires the concurrence of a greater majority;

c) Where what has been done amounts to fraud and the wrongdoers are themselves in control of the company;

d) where it is alleged that the personal rights (including right to attend meetings and to insist on strict observance of the legal rules; statutory provisions in the Memorandum and Articles) of the

plaintiff shareholder have been or are about to be infringed; and,

(e) any other case where the interests of justice require that the general rule, requiring suit by the company, should be disregarded.

[19] In the instant matter, the Applicant has not only alleged fraud, but has also taken issue with matters relating to statutory compliance by the Company, including a complaint that his personal interests are in jeopardy, granted his contention that no meetings have been called by the directors as expected. The letters marked **MMS5** per the Applicant's Supporting Affidavit confirm that the Applicant has indeed been requesting for details of annual returns for the last ten years as well as, Minutes of the Companies' Annual General Meetings and details pertaining to the Company's assets and liabilities but that these have not been forthcoming. Accordingly, I am satisfied that he has established that he falls within exceptions (c) and (d) above and is therefore entitled to leave to file a derivative suit as sought.

[20] In the result, **Prayer (4)** of the Notice of Motion dated **9 August 2016** is hereby allowed and orders granted to the effect that:

[a] Leave be and is hereby granted to the Applicant herein to file a derivative suit against the 2nd and 3rd Respondents on behalf of the 1st Respondent;

[b] Costs of the application be borne by the 2nd and 3rd Respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2017

OLGA SEWE

JUDGE