REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KITALE

LAND CASE NO. 74 OF 2019

PETER WEKESA FWAMBA

(Derivatively on behalf of

TRANS NZOIA INVESTMENT CO. LTD).....PLAINTIFF

VERSUS

RONALD SAWENJA WALUBENGO.....1ST DEFENDANT

PAUL SIMIYU WEKESA.....2ND DEFENDANT

GEORGE IMBERA LUDISA.....3RD DEFENDANT

KALORI ISOSO.....4TH DEFENDANT

MUNDEBE INVESTMENT CO. LTD.....5TH DEFENDANT

VIPUL RATILAL DODHIA.....6TH DEFENDANT

CHERANGANI INVESTMENTS CO. LTD.....7TH DEFENDANT

AND

TRANS NZOIA INVESTMENTS CO LTD.....AFFECTED PARTY

RULING

1. By a Plaint dated **17th December 2019** filed in court on **18th December 2019**, alongside a Notice of Motion of the even date, the Plaintiff herein sought for orders as stated in the plaint and/or application. In a nutshell, the plaintiff/applicant through the application dated **17/12/2019** is seeking leave to continue this suit as a derivative action on behalf of Trans-Nzoia Company Limited (The affected party). The said application is supported by an affidavit sworn by the Applicant.

2. On **10/1/2020**, the 3rd and 4th Defendants/Respondents filed a replying affidavit sworn on **8/1/2020** which appears to support the application. They have indicated that they have no objection to the suit filed with the application being continued as they are interested to see that the dispute disclosed in the suit is heard and determined on merits.

3. The 1st Respondent filed his response to the application on **15/1/2020**. His case is that the instant application seeks to abuse the court by calling upon the said court to sit and give orders as a criminal court; that no evidence has been tendered to show that the allegations made herein warrant the court to issue the orders sought; that any action that was taken by the management board including the 1 st respondent was not only done procedurally but with the consent of all persons whose consent was needed; that the applicant herein is a minority shareholder and has no right to make the instant application.

4. The 6th Respondent filed Replying Affidavit on **27/2/20202** in which he contended that the Plaintiff's intended suit and the application offends the mandatory provisions of **Sections 4(1)(a) &7** of the **Limitation** of **Actions Act** and thus is time barred; that the suit also offends the mandatory provisions of **Section 7** of the **Civil Procedure Act** as it raises the same issues which were directly and substantially in contention with **Kakamega HCCC No. 20 of 1995** which was determined by courts of competent jurisdiction and ownership of the suit

property was conclusively settled; that the application does not meet the threshold set out in **Section 238** of the **Companies Act** to merit the grant of permission to continue with the purported derivative claim.

5. The 6th and 7th respondents filed grounds of opposition to the Plaintiff's application which document is a replica of the Replying Affidavit sworn by the 6th Respondent.

6. This court then directed that the matter proceed by way of written submissions which all the respective parties' advocates subsequently filed and exchanged. I have considered the same.

ISSUES FOR DETERMINATION

7. From the outline of the parties' submissions, the following issues emerged for determination.

> ***(a) Whether the*** **matters pleaded by the Plaintiff are Res judicata and offend the provisions of Section 6 and 7 of the Civil Procedure Act, having been directly and substantially in issue and determined in *Kakamega HCCC No. 20 of 1995.***
>
> ***(b) Whether the applicant has established a prima facie case sufficient to be given leave to bring a derivative suit?***

(a) Whether the matters pleaded by the plaintiff are res judicata and offend the provisions of Section 6 and 7 of the Civil Procedure Act, having been directly and substantially in issue and determination in Kakamega HCCC No. 20 of 1995

8. The doctrine of *res judicata* is provided for in our jurisprudence by dint of **Section 7 of the Civil Procedure Act** which provides as follows:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

9. The Court of Appeal remarked as follows in the recent appeal decision in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR:**

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."***

10. The provisions in **Section 7** of the **Civil Procedure Act** were also restated in the case of **Bernard Mugo Ndegwa -v- James Nderitu Githae and 2 others [2010] eKLR** where in summary the Court held that the applicant alleging *res judicata*, must show that:

> **(a) The matter in issue is identical in both suits,**
>
> **(b) That the parties in the suit are substantially the same.**
>
> **(c) There is a concurrence of jurisdiction of the court**
>
> **(d) That the subject matter is the same and finally,**
>
> **(e) That there is a final determination as far as the previous decision is concerned.**

11. I have carefully perused the case referred to by the 6th Defendant/Respondent that is **Kakamega HCC No. 20 of 1995**, and I do not think that the issue of *res judicata* should arise in the instant suit since it has not been demonstrated that the matter has been adjudicated to its conclusion and the issue(s) in dispute finally determined.

12. Accordingly, I decline to declare this suit is *res judicata* as was alleged by the 6th Defendant.

(b) Whether the applicant has established a prima facie case sufficient to be given leave to bring a derivative suit?

13. Section 238 of the **Companies Act, No. 15 of 2017** defines a "*derivative claim*" in **Part XI** in the following manner-

> ***"(1) In this part, "derivative claim" means proceedings by a member of the 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."

14. In summary, the provisions of **Section 248** of the **Companies Act** are to the effect that a derivative suit can be brought by a member of the company and the cause of action must be vested in a company and for the benefit of a company when there are issues of negligence, default, breach of duty or breach of trust through commission or omission.

15. The plaintiff in the Plaint he filed on **18/12/2019** at **paragraph 1** states that he is a minority shareholder in the affected company and he goes ahead at **paragraphs 5** to **20** of the same plaint to show the relationship between himself, the defendants and the affected party.

16. The 3rd and 4th Defendants in their replying affidavit filed in court on **19/1/2020** have indicated that they have been sued as directors of the affected party and that they have no objection to the application filed by the applicant. In fact, they contend that they are interested to see that the dispute disclosed in the suit is heard and determined on merits.

17. In **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another (2017) eKLR** where the court held that:-

"A derivative action is a mechanism which allows shareholders 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 was designed as a tool of accountability to ensure that redress was obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation."

18. It was further held in the same decision cited above that:

"44. Statutory procedure is now the exclusive method of pursuing derivative claims. The Act sets out what sorts of company claims may be pursued and is also explicit that derivative claims may only be pursued under the Act. The question must only be the factors the court ought to consider before approving a derivative claim.

45. There appears, in my view, to exist a two stage process. 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 Act provides that the application for permission will be dismissed if the evidence adduced in support "do not disclose a case" for giving of permission. The essence of judicial approval under the Act is to screen out frivolous claims. The court is only to allow meritorious claims. All that the applicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed

46. The second stage entails a consideration of statutory provisions and factors which ordinarily guide judicial discretion albeit in the realm of derivative action.

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.

48. The statutory provisions to be met include the requirement under s. 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."

19. Upon carefully considering the issues, the application before me and the substantive suit and being persuaded by the above decision, I am satisfied that the applicant has established a *prima facie* case sufficient to be granted leave to bring a derivative suit.

20. The notice of Motion dated **17th December 2019** is therefore granted in terms of **prayer No. (2).** Further the plaint filed herein shall be served upon the defendants within **15 days** for them to file their response in accordance with the **Civil Procedure Rules**. The costs of this application shall be in the cause. Parties shall fully comply with the rules within **30 days**. This matter shall be mentioned on **2/11/2020** to

ascertain compliance by the parties and to issue a hearing date for the main suit.

Dated, signed and delivered at Kitale via electronic mail on this 1st day of October, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.