



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 311 of 2009

THOMAS V. ABEY PLAINTIFF

VERSUS

AISHA MOHAMED RAHMATHULLA 1ST DEFENDANT

MUMTAHINA AHMED MAHFUDH JEIZAN 2ND DEFENDANT

SHAIK MOHAMED RAHMATHULLAH 3RD DEFENDANT

SATYAM INDUSTRIES KENYA LTD. 4TH DEFENDANT

R U L I N G

Notice of Motion brought under **Order 39 (1) (2) and (7) Civil Procedure Code** and **Section 3A and 63 (e) of Civil Procedure Act**. The application is dated 5/5/09. The applicant is seeking orders to enable him to enter the premises of the 4th defendant to seize and inspect all books, statement of accounts, computers and other equipment which contain or could contain information on the operations of the 4th defendant, its products produced and/or sold, all purchases and sales records for the past one year and such other items of whatever nature which constitute or could constitute evidence necessary to substantiate its cause of action and preserve the same.

That the defendant, its agents be restrained from withdrawing money and/or operating account No.1210100107 at Fina Bank, Account No.0292458028 at Equity bank and Account No.0072100331 at Bank of Baroda.

That the defendant be restrained from carrying on the operations of the 4th defendant and/or accessing the said 4th defendant's premises pending the hearing and determination of this court or further order of this court, on the ground that the applicant is a shareholder and one of the directors but which company is now exclusively run by the defendants. And that since the year 2008, the defendants have by all means blocked and locked out the plaintiff/applicant from the operations of the company, 4th defendant.

The application is supported by affidavit of Thamos V. Abey of Nairobi. It is sworn that the 4th defendant is a registered company. The 3rd defendant has taken over the running of the affairs of the company to the exclusion of the plaintiff. That the 3rd defendant opened bank accounts with Fina Bank, Equity Bank, Kenya Shillings account and Dollar account. Furthermore, are running bank accounts in secrecy and have incorporated other companies which are carrying on business in competition with 4th defendant and using the 4th defendant's funds.

The 3rd defendant has failed to make annual returns and annual general meetings have never been held. Furthermore, the 1st, 2nd and 3rd defendants have diverted the products, materials of the 4th defendant. The applicant seeks **Antony Pillows Orders** to prevent the defendants from mismanaging the affairs of the 4th defendant.

There is a replying affidavit sworn by the 2nd defendant in this suit. The annexures thereof indicates that the plaintiff was appointed a signatory of the bank, Fina Bank, Industrial Area branch by 8/10/2007. Other annexures indicate that the plaintiff has been participating in the affairs of the 4th defendant. And that by document dated 25/11/2008, the plaintiff nominated and authorized Mr. Shaik Mohamed Rahmathulla to be representing him and signing all documents on his behalf.

The parties have cited on authorities: **Dadani vs. Manji & 3 others** – the suit to redress wrongs done to a company. The court considered the nature of procedure for a derivative action. In this suit the plaintiff shareholder and director is complaining against 1st, 2nd and 3rd defendants on the ground that they were committing wrongs against the company as stated in supporting affidavit. The court held that:-

“It is a cardinal principle of company law that it is for the company and not an individual shareholder to enforce rights of action vested in the company and to sue for wrongs done to it. And that in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of internal affairs in the circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters.”

However, if due to an illegality a shareholder perceives the company is put to loss and damage but cannot bring an action in its name, such a shareholder can bring an action by way of a derivative suit. Derivative suit is not available where a shareholder contemplates using a personal claim infringement on his rights. A derivative claim is began with filing the suit by plaint followed by an application on whether the derivative claim should continue.

The plaintiff should demonstrate a *prima facie* case against the wrong doing directors. In this case, the majority directors were in control of the company and the plaintiff was locked out of the affairs of the company. Before the application was filed, the plaintiff did file a notice of motion with plaint under **Section 3A Civil Procedure Act, Order 50 Rule 1** with prayers that plaintiff be granted leave to prosecute this derivative action on behalf of and for the benefit of 4th defendant and its creditors. That the plaintiffs be indemnified by the 4th defendant company for all costs and expenses reasonably incurred in prosecuting this suit.

In the present plaint dated 5/5/09 accompanied by a plaint verifying affidavit, notice of motion (this application) and certificate of urgency. An application for leave to continue and for indemnity as indicated in the case referred above is not filed. It is clear therefore that the proper procedure is not followed and therefore this application is not competent.

The application is dismissed with costs to the respondent.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 4th day of November, 2009.

JOYCE N. KHAMINWA

JUDGE