Raindrops Limited & 3 others v Nzioka (Civil Appeal E054 of 2022)
[2025] KECA 1570 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1570 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E054 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

OCTOBER 3, 2025

BETWEEN

RAINDROPS LIMITED ..... 1ST APPELLANT

MUHAMMAD ABDULMUTALIB AZZINJIBARI ..... 2ND APPELLANT

AZZA NZARA NASSARO ..... 3RD APPELLANT

JOSEPH KINGWAGU ..... 4TH APPELLANT

AND

JOSEPH MUNYOKI NZIOKA ..... RESPONDENT

(An appeal against the Ruling and Order of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 8th February, 2019 and the Ruling and order of the High Court of Kenya at Mombasa (D. Chepkwony, J.) dated 22nd October, 2019 in Mombasa HCCC No. 53 of 2017)

JUDGMENT

1. This appeal arises from the Ruling and Order of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 8th February, 2019 and the Ruling and order of the High Court of Kenya at Mombasa (D. Chepkwony, J.) dated 22nd October, 2019. The impugned rulings and orders were made in a suit filed by the Respondent, Joseph Munyoki Nzioka against the Appellants, wherein the Respondent sought the following orders:

> "a) A declaration that the Appellants' actions jointly and severally amount to oppression of the Respondent, shareholder and management of the affairs of 1st Appellant company by the 2nd to 4th Appellants, controlling shareholders and directors to the detriment of the Respondent.

b. A declaration that the 2nd to 4th Appellants actions complained of jointly and severally were a breach of fiduciary duty owed by the 2nd to 4th Appellants as the controlling shareholders and directors of the 1st Appellant company to and against the interests of the Respondent.

c. An order to compel the Appellants to pay the Respondent a monthly allowance of Kshs.262,000 and arrears amounting to Kshs.2,600,000.

d. An order to compel the Appellants to avail to the Respondent a financial report of the 1st Appellant company from 28th March 2014 to date including all the income expenditure and withdrawal from 1st Appellant company's A/C No. 0198094684005 and A/C No. 0198094684003 held at Chase Bank Limited Malindi Branch.

e. An order of injunction to restrain the defendants jointly and severally, whether by themselves, their servants, employees, proxies, agents, Successors, assigns, representatives or any other persons acting under " them or deriving authority from them, from conducting the affair of the business of the 1st Appellant company informally.

f. Damages for breach of fiduciary duty owed by the Appellants to the Respondent.

g. Costs and interest."

2. The Respondent's case was that he is a Shareholder and Director of the 1st Appellant Company where he holds 150 shares, and is in charge of operations and received certain allowances by virtue of the office he held. He claimed that his relationship with Mr. Shaib, the Chief Executive Officer of the 1st Appellant company, had soured leading to multiple civil and criminal cases filed against him; that the Appellants' nominees namely, Mr. Shaib Hamis Mtuwa - the Chief Executive Officer, Willy Baraka Mtengo - the General Manager, and Abdalla Ali Taib – the Chairman, had become hostile towards him and excluded him from the business, affairs and decisions of the 1st Appellant company. He further claimed that the nominees have removed him from office and declined to give him his allowances and a share of the company's profits. He further asserted that the 2nd to 4th Appellants and their nominees were making large cash withdrawals from the 1st Appellant Company's account, and were diverting the company's cash for their personal use. He contended that the Appellants and their nominee's actions towards him were oppressive and unfairly prejudicial to his rights and interest in the 1st Appellant company.

3. In a defence and counterclaim filed in response, the 2nd to 4th Appellants denied the claim and contended that the dispute concerned Director's pay, which is a matter for the Employment and Labour Relations Court; that the suit does not meet the requirements set out in Section 238 of the *Companies Act*; and that the claim is not a derivative suit as it was filed against the company as the 1st Defendant, and not on behalf of the company.

4. In their counterclaim, the Appellants claimed Kshs. 23,462,850 as at 31st May, 2017 being 15% of the fixed capital and working capital from the Respondent, being the consideration owed for the issuance of 150 shares in the 1st Appellant Company to him.

5. The Appellants further filed a Notice of Preliminary Objection (PO) dated 15th August, 2018 under Article 162(2) of *the Constitution*, Section 12 of the *Employment and Labour Relations Court Act* and

Sections 238 and 239 (1) of the *Companies Act*, seeking to have the suit dismissed in its entirety for reason that:

> "(i) The court lacks jurisdiction to hear and determine the application as its jurisdiction to hear the suit has been challenged;
>
> (ii) The court lacks jurisdiction to hear and determine this suit for the following reasons:-(a) It is primarily an Employment and Labour dispute; and (b) There is no trigger to activate the court's jurisdiction under derivative actions as this is not a derivative suit as paraded by the plaintiff."

6. In dismissing the Preliminary Objection, the trial Judge held:

> "I am satisfied that the suit herein save for the paragraphs in the plaint that refer to payment of the plaintiff's allowances, meets the test of a derivative suit. This court granted leave to the plaintiff to file a derivative suit but as it turned out, the plaint and the application seeking leave were filed contemporaneously. That being the case, the plaintiff's Counsel should have specifically sought for orders to continue with a derivative suit as it had already been filed as at the time the application seeking leave to file the same was made. The foregoing procedural technicality is curable under the provisions of Article 159(2)(d) of *the Constitution* of Kenya. The derivative suit filed by the plaintiff is deemed as having been properly filed and the plaintiff can continue with prosecution of the same."

7. Subsequent thereto, the Respondent filed a Notice of Motion dated 10th April 2018 seeking orders that, pending hearing and determination of the main suit, the court be pleased to join Shaib Hamisi Mtiuwa, Ramt Abdhallan Awadh and Abdalia Ali Taib as the 5th, 6th and 7th Defendants in the suit, and that leave be granted to the Respondent to amend the Plaint and all applications pending hearing and determination of the main suit, to join the intended 5th, 6th and 7th Defendants, which application was allowed by the trial court.

8. The 2nd to 4th Appellants were aggrieved by the two rulings and filed an appeal to this Court on the grounds that, in the ruling dated 8th February 2019, the Learned Judge was in error:

> i. in dismissing the Appellants' Preliminary Objection dated 15th August 2018;
>
> ii. in holding that filing of a derivative suit before Leave is granted by the Court is a procedural technicality curable under article 159 of *the Constitution*;
>
> iii. in holding that the Respondent satisfied the requirements for the High Court to grant leave for the filing of a derivative suit;
>
> iv. in holding that the parent Company who the Respondent purports to protect can be sued in Derivative suit and as 1st Defendant; and
>
> v. that, in the ruling dated 22nd October 2019, the learned Judge was in error in allowing the Notice of Motion dated 10th April 2018, which sought to join parties to the suit before they were served with the said application.

9. The Appellants and the Respondent filed written submissions. When the appeal came up for hearing on the Court's virtual platform, learned counsel, Mr. Odipo for the Appellants begun by submitting that the appeal was concerned with two rulings of the trial court, a Ruling dated 8th February, 2019 and a Ruling dated 22nd October, 2019.

10. Counsel submitted that, in respect of the Preliminary Objection, the law on derivative suits is guided by Section 238 of the *Companies Act*, which allows claim by a minority shareholder to be brought only where a cause of action arose from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by the majority directors and shareholders of the company. It was submitted that a consideration of the plaint disclosed that the prayers and reliefs sought in the suit were not to or for the benefit of the company; that the only reason raised was misuse of funds by the other directors and shareholders; that there were no averments as to the nature of the misuse by the directors; and that the allegations concerned the general withdrawal of money from the 1st Appellant company's accounts, which did not in itself amount to misuse.

11. It was further submitted regarding the Notice of Motion dated 10th April 2018 that the trial Judge was in error in allowing the joinder of the intended 5th, 6th and 7th Defendants, yet they were not afforded an opportunity to be heard; that their right to be heard was contravened when the court granted the application that allowed them to be joined as parties; that, further, a derivative suit being a suit against directors, a party cannot be joined if, before leave is granted, the party was not and is not a director of the 1st Appellant company.

12. In response, learned counsel, Mr. Bwire for the Respondent, submitted that, in the Plaint dated 16th May 2017, the Respondent clearly pleaded that he is a shareholder holding upto 150 shares in the 1st Appellant company and that, therefore, he was a member of the company and rightly entitled by law to bring a derivative action against the 1st Appellant company and its directors.

13. Counsel submitted that the trial court rightly held that it had jurisdiction in the matter, and that the Appellants assertion that the matter is primarily the preserve of the Employment and Labour Relations Court was a misapprehension of the law.

14. Counsel also submitted that it is not disputed that the Respondent is a member of the 1st Appellant company, and that it was not also disputed that, in the Plaint, the Respondent had alleged fraud and breach of fiduciary duty by the 2nd to 4th Appellants who are members of the 1st Appellant company, the particulars of which are set out at paragraph 23 of the Plaint; that it is also not in dispute that the prayers sought in the Plaint included orders seeking accounts and declarations on behalf of the 1st Appellant company; that, since leave to institute the suit was allowed pursuant to the court's orders issued on 29th May, 2017, the claim amounted to a derivative action within the meaning of Section 238 of the Act; and that it was rightly before the High Court.

15. Counsel concluded that the determination on whether a suit is a derivative claim or not is a matter of the court's discretion and that, therefore, the application cannot be the basis of a preliminary objection. See Mukisa Biscuits Manufacturing Company vs West End Distributors Ltd [1969] EA. 696

16. This is a first appeal. The duty of this Court on a first appeal is to re- evaluate all the evidence on record before arriving at its own independent conclusion. This was aptly stated in the case of Selle vs Associates Motor Boat & Co. Ltd [1968] EA 123 where the predecessor of this Court stated as follows:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or

if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif-vs-Ali Mohamed Sholan [1955], 22 E.A.C.A.270)."

17. Further, in the case of Ramji Ratna and Company Limited vs Wood Products (Kenya Limited) , Civil Appeal No. 117 of 2001 this Court stated that, in a first appeal, it will interfere with the decision of the trial Judge only where it is based on no evidence or on a misapprehension of the evidence, or the Judge is shown obviously to have acted on wrong principles in reaching the findings he did.

18. Having considered the pleadings and the parties' written submissions, it can be discerned that this appeal arises out of a ruling dated 8th February 2019 in respect of a Preliminary Objection, and a Ruling dated 22nd October 2019 in respect of a Notice of Motion dated 10th April 2018 where the issues that fall for determination are:

    i) whether the suit was an Employment and Labour dispute;

    ii. whether the Respondent was eligible to file a derivative suit; iii) whether the 1st Appellant company could be sued so as to constitute a derivative suit; and iv) whether the learned Judge rightly allowed the Notice of motion dated 10th April 2018 joining the third parties to the suit.

19. In determining whether the suit fell within the remit of the Employment and Labour Relations Court or the High Court, we consider it efficacious to begin with the question of whether or not the suit is a derivative suit. Section 238 of the *Companies Act*, defines a "derivative claim" in Part XI in the following terms:

> "(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."

20. In effect, a derivative action is provided for under the *Companies Act*. The provision allows shareholder(s) to bring suits on behalf of the corporate entity often against an insider (whether a director, majority shareholder or other officer) or a third party, whose actions are detrimental to the corporate entity, and for which the majority have failed or neglected to seek redress against the wrongdoers. It is brought by way of a representative suit filed by a minority shareholder on behalf of the corporation: see Wallersteiner vs Moir (No.2) [1975] 1 All ER 849.

21. The interpretation provisions, Part XI - *Companies Act*, 2015 specify that a "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". Section 238 (2) to (5) of the *Companies Act* is concerned with derivative claims and the manner in which they may be brought. The provisions specify that:

> " (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.
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> 6. For the purposes of this Part-
>
> a. "director" includes a former director:
>
> b. a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law."

22. This Court in the case of Titus Musyoki Nzioka vs John Kimathi Maingi & another [2013] KECA 32 (KLR) held that:

> " A derivative suit, simply put, is a suit filed by a minority shareholder of a limited liability company to seek remedy for wrongs done to the company by the majority shareholders or directors."

23. And citing the case of Edwards vs Halliwell [1950] All ER 1064, the Court went on to observe that:

> " 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 of persons 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."

24. This Court in the case of Rai & Others vs Rai and others [2002] 2 EA 537 upheld the application of the rule in Foss vs Harbottle [1943] 67 ER 189 and recognized four (4) exceptions that can pave way for filing of a derivative suit as follows:

> " a) Firstly, where the directors or a shareholding majority use their control of the company to take actions which would be ultra vires *the constitution* of the company or are illegal.
>
> b. Secondly, if some special voting procedure would be necessary under the company's constitution or under the *Companies Act*, it would defeat both if they were to be sidestepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed Edwards V. Halliwell [1950] 2 ALL ER 1064.
>
> c. Thirdly, where there is invasion of individual rights of the shareholder; Fourthly, where a fraud on the minority is being committed."

25. In the case of Lalji vs Diamond Hasham Lalji & 2 others [2023] KECA 853 (KLR) this Court held:

> " Accordingly, derivative actions in Kenya had to fall within the exceptions to the rule in Foss vs Harbottle where there was fraud on a minority caused by majority shareholder(s); and the action to be commenced had to be in the best interest of the company, and without any ulterior motive (see also Hawes v Oakland 104 U.S 450 [1881]); and Nurcombe vs Nurcombe [1985] 1 All ER 65.
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> 56. We find it necessary to highlight current judicial decisions on the matter, and do so with profound respect for the learned Judge. We cite with approval the decision of Onguto, J in Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarlal & another [2017] eKLR where the learned Judge observed:
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> > " With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in Foss v Harbottle was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance.
> >
> > 45. 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.
> >
> > 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."

26 Further citing the case of Isaiah Waweru Njumi & 2 Others vs Muturi Ndungu [2016] eKLR in Lalji vs Diamond Hasham Lalji (supra) this Court went on to observe other factors that a court should consider thus:

> "a) 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;
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> 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 (WD 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;
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> d. Whether the Plaintiff is acting in good faith;
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> 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".

27 The Respondent in the instant case owned 150 shares in the 1st Appellant company and serves as the Director in charge of operations of the company where he was receiving certain benefits by virtue of his position as director. It was alleged that his relationship with other members of the company's management degenerated, and that they turned against him. It was his further contention that the 2nd to 3rd Appellants were taking sizable sums of money out of the 1st Appellant's accounts for their own purposes which caused his rights and that of the 1st Appellant company to be unjustly threatened.

28 The foregoing is clear that the Respondent, being a member of the company, and who had sued other members of the company, meant that he had the necessary locus standi as a shareholder to bring the suit. In addition, he alleges that the directors and shareholders of the company have embarked on acts that are to the detriment of both himself and the 1st Appellant Company. On these premises, it cannot be doubted that it was established that the suit was prima facie a derivative suit. In so finding, we are satisfied that the trial Judge rightly exercised his discretion to grant leave to the Respondent to file the derivative suit. We find that this ground is without merit.

29 That said, the pleadings are clear that the Respondent filed the suit in his capacity as a minority shareholder of the 1st Appellant Company and, save for the prayer for allowances that he was receiving from the company, the rest of the prayers were in the interest of and for the benefit of the company.

30. With this in mind, was the suit an Employment and Labour dispute? In the plaint the Respondent sought for: a declaration that the Appellants' action complained jointly and severally amounted to oppression of the Respondent shareholders and management of the affairs of the 1st Appellant company by the 2nd to 4th Appellants as controlling shareholders and directors to the detriment of the Respondent; and a declaration that their actions amount to breach of their fiduciary duty owed as the controlling shareholders and directors were against the interests of the 1st Appellant company and the Respondent. Also sought was an order to compel the Appellants to avail to the Respondent a financial report of the 1st Appellant company from 28th March 2014 to date, including all the income expenditure and withdrawal A/C No. 0198094684005 and A/C No. 0198094684003-held at Chase Bank Limited Malindi Branch, and an order of injunction to restrain the Appellants jointly and severally from conducting the affairs of the 1st Appellant company informally.

31. Our consideration of the pleadings does not disclose that the suit was brought as an employment dispute between an employer and an employee. Instead, given our conclusions above, there can be no question that the suit was brought as a derivative action in accordance with Section 238 of the *Companies Act* by the Respondent as a member and shareholder of the 1st Appellant company. In the circumstances, clearly, it could not have been an employee and employer dispute arising under the Employment and *Labour Relations Act*. As such, just as did the learned Judge, we too find that the suit was rightly before the trial Judge of the High Court who has jurisdiction to determine the suit, and not the Employment and Labour Relations Court.

32. With regard to the contention that leave to file the derivative claim was not obtained prior to commencement of the suit contrary to the requirements of Section 239 of the *Companies Act*. As stated above, it is trite that a member of the company should seek permission from the court in order to bring a derivative claim. The provision is also clear that it is an exercise of discretion by the trial judge whether or not to grant such permission, having regard to the circumstances of the case.

33. In the case of Amin Akberali Manji & 2 others vs Altaf Abdulrasul Dadani & another [2015] KECA 356 [KLR], this Court held that the procedure for filing of derivative suits remains the English common law position in that, at whatever stage, leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he or she has locus standi to institute such action; that 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 (supra). In so holding, this Court observed:

> "Where no application for leave is filed or where one is filed long after the suit is filed, different considerations would, of course, apply. The application for leave to continue with the suit filed in this matter was not made long after the suit was filed. Both were filed contemporaneously and were placed before a judge on the same day under a 'certificate of

urgency'. In the circumstances of this case, we find no impropriety in the procedure. It is correct to say, as it is the procedure under common law and the trial Judge found as much, that such application ought to be heard inter partes. But he heard and granted it ex parte as it was under certificate of urgency. In his view, the matter lay in the discretion of the court and equitable principles were applicable. It is indeed so, that the matter lies in the discretion of the court which ought to be exercised judiciously and in the circumstances of this case the discretion was justifiable on the basis that the case was prima facie a derivative one and it was necessary to come to the rescue of the company if it was truly in the distress portrayed in the application for leave".

34. In the instant suit, the court granted the Respondent leave to file a derivative suit notwithstanding that the plaint and the application seeking leave were filed contemporaneously and, as stated above, where no application for leave is filed or where one is filed long after the suit is filed, provided that locus standi to institute such action has been established that 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 (supra), the court was entitled to exercise its discretion to grant the reliefs sought. Given the rationale set out above, we are satisfied that the learned Judge rightly concluded that leave having been sought contemporaneously, no impropriety arose. In deeming leave to file the suit as having been properly obtained, we find that the Judge was right in so concluding. Accordingly, this ground is without basis.

35. Concerning the issue as to whether the Respondent ought not to have sued the 1st Appellant company as a defendant in the first instance, as stated above, in bringing such a suit, a party must demonstrate that the relief(s) sought are consistent with the objects of the company, and for the benefit of the shareholders so that, ordinarily, the company would be considered a co-plaintiff or an interested or beneficial party.

36. In this case, the Respondent was seeking to ensure that the company was joined in the suit so that the Judgement or orders of the court could be enforced against the directors, in this case the 2nd to 4th Appellants. See the case of Spokes vs Grosvenor Hotel [1897] 2QB 124.

37. Having said that, Order 1 Rule 9 of the Civil Procedure Rules (2010) now Order 1 Rule 9 of the Civil Procedure Rules make it patently clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. It provides that:

> " No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

38. This position was emphasized by this Court in the case of William Kiprono Towett & 1597 Others vs Farmland Aviation Ltd & 2 Others [2016] eKLR it was held that:

> " Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit."

39. Applying the above authorities to the circumstances of this case, in the event that the 1st Appellant Company was improperly joined as a defendant, this did not render the suit incompetent or so hopeless as to warrant a dismissal. In our view, it is capable of being salvaged by an amendment of the pleadings, which can be done at any time before judgment.

4.0 Similarly, on the application of joinder of the other third parties pursuant to the ruling dated 22nd October 2019, Order 1 Rule 10 (2) of the Civil Procedure Rules clearly specifies regarding joinder of parties that:

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

41. In the case of Pravin Bowry vs John Ward & another [2015] KECA 215 (KLR) this Court held that:

> " Order I rule 10 of the Civil Procedure Rules provides for substitution and addition of parties to suits. Under rule 2 thereof the court may at any stage of proceedings either upon or without the application of either party and on such terms that may appear to the court to be just order that the name of any party improperly joined whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to be added. Rule 4 provides for the manner in which the plaint is to be amended where a defendant has been added to the suit.
>
> There is no requirement under the said provisions for a draft of the pleading to be amended be included as is the procedure in an ordinary application for amendment of pleadings. There is no requirement as there is in an ordinary application to join a third party for leave of the court to be sought. An applicant need only file the application, and there is no requirement to serve that application upon the party intended to be joined as a co-defendant. Indeed, the court itself may add such a party to the suit so that such addition will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit."

42. The above cited authority is clear that, at the time of filing an application to join a party as a co-defendant to the suit, Order 1 Rule 10 does not make it a requirement for such party to be served with the application. As a consequence, this ground is likewise without merit.

43. In view of the foregoing, we find that that the appeal lacks merit and is hereby dismissed with costs to the Respondent. The Ruling and Order of the High Court of Kenya (Njoki Mwangi, J.) dated 8th February, 2019 and the Ruling and order of the High Court of Kenya at Mombasa (D. Chepkwony, J.) dated 22nd October, 2019 are hereby upheld.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF OCTOBER, 2025.

A.K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR