



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 105 OF 2018**

**PANGAEA DEVELOPMENT HOLDINGS LIMITED(FOR AND ON BEHALF OF**

**HACIENDA DEVELOPMENT HOLDINGS LIMITED.....PLAINTIFF**

**-VERSUS-**

**HACIENDA DEVELOPMENT LIMITED.....1<sup>ST</sup> DEFENDANT**

**ADAM TULLER.....2<sup>ND</sup> DEFENDANT**

**AND**

**REGISTRAR OF TITLES, MOMBASA CENTRAL REGISTRY....INTERESTED PARTY**

**RULING**

1. The plaintiff herein filed the application dated 3<sup>rd</sup> May 2018 under the provisions of section 3A of the Civil Procedure Act and section 239 of the Companies Act 2015 for orders that:

**i. The Court be pleased to grant leave allowing for the continuation of the plaintiff's derivative action herein.**

2. Before the application could be heard on its merit, the 1<sup>st</sup> and 2<sup>nd</sup> defendant raised a preliminary objection that the Environment and Land Court lacks jurisdiction to determine an application for permission to file or continue a derivative action under section 239 of the Companies Act, 2015.

3. The preliminary objection was argued by way of oral submissions. Mr Kinyua advocate for the defendants submitted that the parties in this suit are similar to the parties in HCC 800 of 2009. Secondly that the Judge in the High Court case referred that case for arbitration which arbitral award is annexed to the present application. That at page 24 is also annexed a voluntary winding up which is a preserve of the High Court. That the applicant has other choses in action that are existing from which he can get a remedy i.e. winding cause No 23 of 2011, HCC 800 OF 2009 and Miscellaneous application No 230 of 2017. He urged the Court to allow the preliminary objection. Mr Makuto for the Interested Party associated himself with Mr Kinyua's submissions.

4. Mr Kubo for the applicant submitted that section 238 defines what a derivated action is. That paragraph 5 of the plaint sets out what reliefs the applicant is seeking. He relied on the decisions of inter alia **Republic vs Karisa Chengo & 2 others (2017) eKLR** and **Susan Achieng & 4 others vs Redhill Heights Investments Ltd & Another (2016) eKLR**. That section 239 (1) provides what the Court should do at this stage. Counsel further cited the case law of **Lydia Nyambura vs DTB Ltd & Another (2018) eKLR** and **Luo Council of Elders & Others vs County Government of Bomet (2018) eKLR**. That he did not know whether HCC 800 of 2009 was still active. He urged the Court to disallow the preliminary objection as the pre dominant issue before the Court is land. In response, Mr Makuto stated that the issue of predominant test does not apply in an application for leave to file a derivative action. That as per section 3 (1) of the Companies Act, the power is given to the High Court to deal with applications such as this.

5. I have read the provisions of section 3 (1) of the Companies Act which defines Court to mean High Court unless the Act specifically provides otherwise. Section 239 deals with application for permission to continue a derivative suit/claim. 239 (1) provides thus; "*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*" 239 (2), "*if satisfied that the application does not disclose a case for giving permission, the Court:-*

a. Shall dismiss the application and

b. May make any consequential order it considers appropriate.

Section 239 (3) & (4) also refers to orders the Court can give.

6. Section 239 makes reference only to the word "Court". Therefore the Court under this part can only be inferred to mean High Court. I have also considered the case law cited by the plaintiff. They all refer to instances where there is already an existing suit and the Court in determining whether it has jurisdiction while dealing with a multi-facet claim would consider what is the predominant purpose and or subject matter. However what is currently before me is request for permission to bring a claim. I therefore find the case laws cited are not applicable to the present application. I am satisfied the preliminary objection is merited and hereby held that this application ought to have been filed in the High Court and not before this Court. Accordingly I order it struck out with costs to the defendants and the Interested Party.

**Dated, signed & delivered at Mombasa this 28<sup>th</sup> February 2019**

**A. OMOLLO**

**JUDGE**