Ooko & 4 others v Muruthi & 4 others (Civil Case E003 of 2022)
[2024] KEHC 1588 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE E003 OF 2022

JRA WANANDA, J

FEBRUARY 23, 2024

BETWEEN

JULIUS MARTIN OOKO ..... 1ST APPLICANT

PETER WANJIKU MIGWI ..... 2ND APPLICANT

TITUS MWANGI CHEGE ..... 3RD APPLICANT

CHEBII KIMUTAI DENNIS ..... 4TH APPLICANT

STEPHEN TOROITICH KOSGEI ..... 5TH APPLICANT

AND

CHARLES MURIGO MURUTHI ..... 1ST RESPONDENT

ALFRED MAINA MBUTHIA ..... 2ND RESPONDENT

JOHN KARANJA KAGUKU ..... 3RD RESPONDENT

KABIRU WAWERU ..... 4TH RESPONDENT

PAUL GITONGA NGUGI ..... 5TH RESPONDENT

RULING

1. The Applicant approached this Court vide the Notice of Motion dated 16/02/2022 and filed on the same date through Messrs Adongo & Co. Advocates. It seeks the following orders;

   i. [.....] Spent

   ii. That the Applicant be granted leave to proceed with this matter as a derivative suit.

   iii. [.....] Spent

iv. That an interlocutory injunction do issue against the Respondents restraining them whether by themselves or their agents from taking over office as directors/officials of West Farmers Company Limited pending the hearing and determination of this suit.

v. That an interlocutory injunction do issue against the Respondents restraining them whether by themselves or their agents from interfering, running and management of the affairs of West Farmers Company Limited.

vi. That a declaration be made the elections leading to the appointment of the respondents as directors/officials of West Farmers Company Ltd was unlawful and therefore void.

vii. That the costs of this Application be provided borne by the respondents.

2. The Application is expressed to brought under the provisions of Section 239 and 281 of the *Companies Act*, Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63(6) of the *Civil Procedure Act* and "all other enabling provisions of the law". The Application is then premised on the grounds set out on the face thereon and the Supporting Affidavit sworn by the 1st Applicant, Julius Martin Ooko.

3. In the supporting affidavit, the 1st Applicant deponed that he is a member and shareholder at West Farmers Company Limited (hereinafter "the company"), that the company's main function is to acquire land and transfer shares to its members, that the directors of the company were Ngugi Gitonga, Joseph Njuku Mwaniki and David Ng'ethe Munge who have all since passed on, that following their demise, the company has since been unable to perform its various functions due to the gap left and there is no authorized signatory on its behalf, that on 14/01/2022 or thereabouts, a notice was published in the Daily Nation Newspaper notifying members of a general meeting to be held on 29/01/2022, that the meeting was purported to be called by members but the same was not sufficient as it did not comply with the mandatory 21 days' notice as stipulated in Section 281 of the *Companies Act*.

4. He deponed further that additionally, the notice was not sent out to each member of the company and neither was a hard copy or electronic notice availed to members notifying them of the meeting and the business thereof as per Sections 282, 284 and 285 of the *Companies Act*, that the meeting was attended by about 125 members and therefore did not meet the quorum for such a meeting as required under Section 292 of the Act, that on attending the meeting, it was presided over by the District Officer who is not a member or shareholder of the company and was not elected by members to preside over the meeting as required under Section 293 of the Act, that the District Officer fronted the Respondents as the eligible candidates to be elected to the position of directors/officials of the company to fill the vacancies and asked members to vote for them, that among the people who voted for them were their family members whom they had brought to the meeting and who are not members/shareholders and neither are they entitled to a vote at the meeting and that in addition, the manner in which the meeting and elections were conducted was unprocedural and unlawful and the meeting was therefore void.

5. The 1st Applicant contended further that he raised his concerns during the course of the meeting and was supported by some members but unfortunately, the resolutions to elect the Respondents as directors/officials was passed, that the resolution was inconsistent with Section 277(6) of the Act, that the officials may now take office anytime which will be illegal and unlawful and the members are strongly opposed to the same, that he therefore seeks to protect the welfare and assets of the company from misuse, loss and mismanagement by the Respondents which if not done immediately, the company will suffer loss, that damages shall not be an adequate remedy and that based on these reasons, he has a prima facie with a high probability of success and that the balance of convenience tilts in favour of the Applicants.

Response

6. Although from the Submissions filed herein, it is evident that the Respondent did file a Replying Affidavit, I did not find the same in the Court file. I directed that the Respondent's Advocates be contacted and directed to forward a copy thereof but up to the time of concluding this Ruling, the Replying Affidavit had not been supplied.

Hearing of the Appeal

7. It was then directed that the Application be canvassed by way of written Submissions. Pursuant thereto, Submissions for the Applicants were filed on 27/06/2023 while Submissions for the Respondent were filed on 11/10/2023.

Applicants' Submissions

8. On the nature and definition of a derivative action, Counsel for the Applicants cited the case of Wallersteiner v Moir [No. 2] [1975] 1 ALL ER 849 and also Section 238(4) of the *Companies Act*. He submitted that Section 238(4) aforesaid authorizes members to sue any person that is acting negligently against the interest of the company and members. He also cited Section 240-242 and submitted that these provisions state what the Court will consider in granting or disallowing the Application, that the Respondents have taken advantage that the directors' office is vacant and have started disposing parcels of land belonging to the company without the consent of the members for their own personal benefit and interest, that there is no provision in the *Companies Act* that requires leave for bringing a derivative suit to be sought through a Miscellaneous Application and that therefore, this cannot be a ground upon which the Application is considered as falling short, and that the Applicants have, through their Affidavit, shown sufficient reasons why they have chosen to institute this suit.

9. On the conditions applicable in grant or denial of interlocutory injunctions, Counsel cited the case of Giella v Cassman Brown and Co. Ltd 1973 E.A 360 and also Mrao v First American Bank of Kenya Ltd and 2 Others [2003] KLR 125. He submitted that these conditions are that an Applicant must establish a prima facie case with a probability of success, that unless injunctive orders are granted, he will suffer irreparable harm which would not be adequately compensated for by damages and that if the Court is in doubt, it should decide the matter on a balance of convenience. He contended that the Applicants' interest as members/shareholders are at risk of being mismanaged and even lost if the Respondents are allowed to keep acting the way they are, that the Applicants are not disputing the fact that the original directors have all passed on and the company needs to continue its operations, but that there is a procedure for that which is all inclusive. He added that the Applicants seek to have the actions of the Respondents restrained so that they do not hide behind the law to commit unlawful actions that will prejudice the rights and interests of the members/shareholders resulting to irreparable harm, that Section 1004 of the Act is the provision that governs the granting of injunction orders for aggrieved parties, that from his reading of the Section, nothing bars the Applicants from approaching Court the way they have. In conclusion, Counsel cited the case of Mohammed Mohammed and Another vs Ibrahim Ismael Isaack and Another [2021] eKLR.

Respondent's Submissions

10. On his part, Counsel for the Respondents submitted that the present Application relates to a meeting convened by members of the company on 29/01/2022 with the proponent of the meeting being shareholders through their Organizing Secretary, Mr. Waweru Kabiru, that the members present were as per the book of records with members appending their signatures in the book of register, that

through the meeting, members agreed to elect new officials bearing the fact that most of the officials had passed on, that members also discussed other pertinent issues in relation to the group and adjourned the meeting, that the Applicants purchased various portions of land from some registered members to which the Applicants seem to have an issue. He contended that the Applicants have either filed their grievance in a wrong forum or have invoked wrong provisions of the law.

11. Counsel submitted further that in basic terms, shareholders are owners of company shares as entered between a company and a shareholder through shareholder agreements and Articles of Association, that shareholders' agreements are, as the name suggests, agreements between shareholders in a company, that they are used in addition to the Articles of Association to provide rules to govern running of the company, that shareholders agreements are a product of negotiations between the shareholders and may contain such further clauses as the parties and circumstances require as a means to properly organize relationship between shareholders. He submitted that the Applicants are claiming to be shareholders of the company but they have not tabled any Articles of Association or shareholders' agreement to back up their claim, that the Applicants were sold land by some of the shareholders and they ought to pursue the matter with the particular shareholders who have contributed share capital in the company but the Applicants by themselves cannot purport to be shareholders or members in the company just by virtue of being sold land by individual shareholders. He cited the case of Affordable Homes Africa Ltd vs Henderson & 2 Others where Njagi J relied on the case of Salmon vs Salmon 1867 A.C 22 to show that shareholders are distinct from a company. He also cited Section 92 of the *Companies Act* which he submitted, details how persons become members of a company and contended that as per the Register of members of the company, none of the Applicants appears.

12. Counsel then cited Section 281(4) of the *Companies Act* and argued that from the averments filed, it is clear that a super majority of members agreed with the shorter notice of 16 days bearing the fact that it had been inordinately long since a meeting had been convened thus occasioning a halt to the companies' affairs, that the same can be read with Section 277 of the Act on right of members to require directions to convene a general meeting, that on the issue of quorum, the same can be addressed via Section 292 and which reads in summary, that a company limited by shares or guarantee and having only one member, one qualifying person present at a meeting constitutes a quorum and in any other case, subject to articles of the company, two qualifying persons present at a meeting are a quorum. On the issue of the person who presided over the meeting as envisaged in Section 293, members present chose Kabiru Waweru to preside over the meeting facts which can be confirmed by minutes of the general meeting. On the issue of the person who presided over the meeting as envisaged in Section 293, the members present chose Kabiru Waweru to preside over the meeting facts which can be confirmed by minutes of the general meeting.

13. On whether the derivative suit is properly before Court, Counsel submitted that Section 238 defines a "derivative action" as proceedings by a member of a company in respect to a cause of action vested in the company and seeking relief on behalf of the company". He contended that as seen from the provisions of Section 238, for the Applicant to succeed in an action for a derivative action, he must be a member of the company and this includes a person who is not a member of the company but to whom shares in the company have been transferred or transmitted by operation of the law, that the proceeding must be in respect to a cause of action vested in the company, that he proceedings must be seeking a relief on behalf of the company, that the proceedings must be for protection of members against unfair prejudice brought under the Company Act and that the proceedings are in respect of a cause of action arising from actual or proposed act or omission involving negligence, default, breach of trust by director of a company.

14. Counsel submitted further that in the case of Ghelans Metals Limited & 3 others v Elesh Natwarlal & another [2017] eKLR the Court settled the procedural aspect of pursuing a derivative action. He stated that it affirmed that a derivative action is pursued as a two-stage process, that in the first stage, the Court would first consider whether the action pleaded disclosed the existence of a case on the face of it and that frivolous claims will be denied judicial approval and struck out, that in the second stage, the Court will then go into depth it will consider statutory provisions and factors which would ordinarily guide judicial discretion in the realm of derivative action.

15. He also submitted that in the same case, the Court further held that a derivative action can be commenced only in respect of causes of action arising from an actual or proposed act or omission involving negligence, default or breach of duty breach of trust by a director of the company, that three other factors that the Court ought to consider are first, seriousness of the alleged wrong by conducting a case benefit analysis of the intended action, that a derivative claimant would need to know the intended litigation should not disrupt the company's business, the cost of the intended litigation should not be burdensome and that issues of reputational damage will also be considered. He submitted that the second factor to be considered is that a derivative action ought to be allowed if it was only in the interest of the company, that the third factor is that alternative remedies must have been explored and considered and it should be the last result option. He cited the case of Isaiah Waweru Ngumi & 2 Others vs Muturi Ndungu 2016] eKLR.

16. Counsel further submitted that the Applicant in all angles have not met the minimum threshold to bring a derivative action. He also contended that the Applicant has not included the company as a party to the suit and as such, fatally defective, that it also not in contestation that the company has not held meetings for the last 15 years and the meeting called on 29/01/2022 was aimed at reviving the company and as such an act of good faith and due diligence from members, that the elections of the new officials was above board, transparent, free and fair and only awaits registration by Register of Companies as envisaged under Section 295(1) of the *Companies Act*.

Analysis & Determination

17. Upon examination of the Pleadings, Affidavits, Submissions and the entire Record, I find the issues that arise for determination in this matter to be as follows:

    i. Whether the Applicants have demonstrated that leave to institute and continue derivative action ought to be granted.

    ii. Whether the Applicants have demonstrated that a temporary injunction ought to be granted restraining the Respondents from taking over office as directors/officials of the company and from interfering with running and management of the affairs of the company pending the hearing and determination of this suit.

18. There is also prayer (vi) which seeks that this Court, at this stage, make a declaration that elections leading to the appointment of the Respondents as directors/officials of the company was unlawful and therefore void. The prayer is at this stage definitely misplaced. By entertaining the prayer, I shall technically be pre-judging issues shall be pending for determination before the derivative suit Court should this Court grant leave to commence it. This will be tantamount to usurping that Court's mandate. I have therefore deliberately left it out as an issue for determination herein.

19. I now proceed to determine the said issues.

i. Whether leave to file a derivative suit should be granted

20. In determining this issue, I have to be cautious not to dwell too much in dissecting the Applicants' intended suit before the Court that will eventually handle the substantive suit should this Court grant leave for file the suit. I will therefore refrain from making conclusive or final determinations.

21. Derivative suits are governed by the Sections 238 of the *Companies Act* which states as follows;

    1. In this Part, "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.

    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.

    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. The procedure for instituting a derivative suit is then provided for under Section 239 as follows:

    239. Application for permission to continue derivative claim

    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.

    3. If the Application is not dismissed under subsection (2), the Court—

        a. may give directions as to the evidence to be provided by the company; and

        b. may adjourn the proceedings to enable the evidence to be obtained.

    4. On hearing the Application, the Court may—

        (a) give permission to continue the claim on such terms as it considers appropriate;

(b) refuse permission and dismiss the claim; or

(c) adjourn the proceedings on the Application and give such directions as it considers appropriate."

23. Further, in Dadani v Manji & 3 Others [2004] KLR 95, Hon. Justice Mwera (as he then was) stated as follows:

> " It is a cardinal principle in Company Law that it is for the company and not an individual shareholder to enforce right of actions vested in the company and to sue for wrongs done to it. 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 majority are entitled to present the bringing of an action in relation to such matter (see Foss –vs- Harbottle (1843) 2 Hake 461). All this is in deference to the self regulation the law allows corporations and thus limits the interference by the 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."

24. In Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another [2017] eKLR, the late Onguto J explained the following:

> " 36. It may be apposite to spare a few paragraphs on derivative actions in view of the fact that the flight path for such actions was diverted with the advent of the *Companies Act*, No 17 of 2015 ("the Act").
>
> 37. Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) 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 is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: see Wallersteiner v Moir (No.2) [1975] 1 All ER 849.
>
> 38. Until 2015, in Kenya, the common law guided derivative actions in Kenya. Ordinarily under common law, one had to fall under the exceptions to the rule in Foss v Harbottle [1843] 2 Hare 461 that "a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it": see also Hawes v Oakland 104 U.S 450 [1881]. The exceptions to the rule in Foss v Harbottle were mainly where there was fraud on a minority caused by majority shareholder(s). The action to be commenced had also to be in the best interest of the company and without any ulterior motive: see Nurcombe v Nurcombe [1985] 1 All ER 65.
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> 39. The rule in Foss v Harbottle along with its exceptions held sway locally as well: see Rai & Others v Rai & Others [2002] 2 EA 537. A party seeking to 'by-pass' the company had, in limine, to show that he fell within the exceptions to the rule: see Murii v Murii & Another [1999] 1 EA 212.

40. 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.

25. In the same case of Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal (supra), the late Onguto J stated further that that a derivative action is a two-tier process. He remarked as follows:

> " 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."

26. It is therefore apparent that, as stated by Mabeya J in the case of Arnold Kipkirui Langat v Atticon Limited & 6 others; Linkit Limited (Affected Company) [2021] eKLR, a derivative action is a mechanism by which the law allows a member of a company to institute an action on behalf of the company. This arises where the company is 'unwilling', through the majority shareholder(s) or management to institute a suit for the benefit of the company. A derivative suit can therefore only be brought by a member of the company and for the benefit of the company or its members. It is an action to 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. All that one has to establish is that, he is a member of the company and then establish a bona fide cause of action in favour of the company which the management has failed, refused or neglected to pursue for and on behalf of the company.

27. The first port of call in determining this Application is therefore to establish whether the Applicants have demonstrated their membership or shareholding in the company.

28. It is trite law that he who alleges must prove. Further, Section 107 of the *Evidence Act* provides as follows:

> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

29. The burden of proving their membership or shareholding is therefore on the Applicants. Unfortunately, they have not presented any evidence to demonstrate this fact. The Affidavit in support of the Application merely alleges that the Applicants are members and shareholders of the company with nothing to corroborate the same produced. The relevant provisions of the *Companies Act* succinctly stipulate that one must be a member of a company to bring a derivative suit. In the absence of demonstration of membership, it is my considered view that the Applicants have not established their locus to institute a derivative suit.

30. As the Applicants have failed to demonstrate their locus to institute the derivative suit, it follows that the Application lacks merit as it does not adhere to the requirements set out in law. Consequently, this deals the Application a fatal blow as the Applicants cannot proceed any further.

31. However, even on other grounds, the Applicants will still fail. For instance, although the Applicant's contend that the Respondents have mismanaged and misdirected the company and its resources culminating into heavy financial loss, that the Respondents have started disposing parcels of land belonging to the company without the consent of the members for their own personal benefit and interest and that the company's business has ground to a halt due to the rampant mismanagement and misuse by the Respondents, they have produced absolutely no evidence of any kind to support these allegations.

32. According to the Respondents, the Applicants are claiming to be shareholders of the company but they have not tabled any Articles of Association or shareholders agreements to back up their claim, that the Applicants were sold land by some of the shareholders and as such they ought to pursue the matter with those particular shareholders but they cannot themselves purport to be shareholders or members in the company just by virtue of being sold land by individual shareholders.

33. The Applicants have also challenged the process and procedure in which the elections that saw the Respondents come into office were conducted. I however wonder how such grievance would fall under the realm of a "derivate action". Challenging of the election of officials of a company cannot be an action instituted for or on behalf of or for the benefit of the company but is clearly a personal action. Challenging the election of officials of a company is not an action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director as envisaged under Section 239(3) of the *Companies Act*. Such cannot therefore amount to proceedings in respect to a cause of action vested in the company, and cannot be deemed to be seeking any relief on behalf of the company.

34. It is also evident that despite the company being a separate entity in law capable of suing and being sued in its own name and capacity, the Applicants have not joined it into this action as a Respondent. To me, this looks like a substantial omission. Without the company being a party, and assuming that the Court grants the orders sought herein, who would then implement such orders?

35. The above findings are sufficient to dispose of this matter with the result that the Application is declined. Nevertheless, I will still analyze the second issue, if only for purposes of completeness of the record.

ii. Whether an injunction should be granted restraining the Respondents from dealing with the assets of the company or from taking over as directors/officials and from interfering with

the running and management of the affairs of the company, pending the hearing and determination of the derivative suit

36. The conditions for the grant of an interlocutory injunction are well known as was set out in the oft-cited case of Giella v Cassman Brown and Co. Ltd, 1973 E.A 360 and reiterated in Mrao v First American Bank of Kenya Ltd and 2 others 2003 KLR 125 as follows.

> " These are that, an applicant must establish a prima facie case with a probability of success, that unless injunctive orders are granted, he will suffer irreparable harm which would not be adequately compensated for by damages and that if the court is doubt, it will decide the matter on a balance of convenience."

37. I have already made a finding that the Applicants have failed to demonstrate that they are members or shareholders of the company and also that the they have not supported the allegations of mismanagement of the company or wanton sale of assets by the Respondents. I have also found that challenging of the election of officials of the company does not fall within the realm of "derivative actions" as envisaged under the *Companies Act*.

38. The upshot of the above is that the Applicants have failed to establish a prima facie case justifying grant of an interlocutory injunction.

39. Even if therefore the Applicants had established that leave to commence a derivative suit should be granted, on the issue of interlocutory injunction I would still find that the evidence presented before this Court falls short of the threshold required to establish the existence of a prima facie case to justify grant of an interlocutory injunction.

40. Having found that no prima facie case has been established, it is no longer necessary to consider the second and third limbs of the rule in Giella vs Cassman Brown. For this position, I refer to the case of In Nguruman Limited v Jane Bonde Nielsen and 2 Others, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, where the Court of Appeal reiterated as follows:

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. 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. (See Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] Vol. 1 EA 86). ..... If prima facie case is not established, then irreparable injury and balance of convenience need no consideration ....."

41. Nevertheless, suffice to mention that even on these other two limbs, I would still rule against the Applicants. This is because, first, having failed to establish their membership and by extension, their locus, the Applicants cannot allege to suffer any prejudice or any damage, leave alone suffering irreparably.

42. On the balance of convenience, it is not disputed that either majority or all of the company officials had died and as a result the company had become paralyzed. Before the meeting called on 29/01/2022, the company had as a result of the said paralysis, not held any meeting for 15 years. This was even against the law. I therefore agree that there was need for someone to take charge and commence efforts to put life back into the company. It is clearly from this context that the meeting of 29/01/2022 was convened and with it, at least some stability has been achieved. The public interest would therefore tilt towards allowing the Respondents to continue managing the company at least for now even if only for the purposes of ensuring some level of direction for the company.

43. If the Applicants are aggrieved by the manner in which the process of electing the Respondents was conducted, then they still have various proper channels to invoke rather than pursuing the procedure of a derivative action. Of course, this will be as long as they can prove their membership of the company. Any mismanagement by the Respondents can also be questioned and arrested through many other available mechanisms including, but not limited, to reporting the grievances to the Registrar of Companies who may then investigate and take action.

44. For the above reasons, I find that the Applicants have not satisfied the principles guiding the grant of interlocutory injunctions. The Application therefore fails.

Final Orders

45. In the premises, the Application dated 16/02/2022 is dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF FEBRUARY 2024

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WANANDA J.R. ANURO

JUDGE