



**Kebenei v African Grain Care Equipment Limited & 2 others (Miscellaneous Civil Application E183 of 2022) [2024] KEHC 6193 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6193 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION E183 OF 2022  
JRA WANANDA, J  
MAY 31, 2024  
IN THE MATTER OF SECTION 238 OF THE  
COMPANIES ACT NO. 17 OF 2015 LAWS OF KENYA**

**BETWEEN**

**MICHAEL KIBET KEBENEI ..... APPLICANT**

**AND**

**AFRICAN GRAIN CARE EQUIPMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**WILLIE KIBET MAINDIO ..... 2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF COMPANIES ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. On 17/11/2023, I delivered a Ruling herein dismissing a Preliminary Objection filed by the 2<sup>nd</sup> Respondent. The Objection was to the effect that this Cause is incompetent for having being instituted by way of Miscellaneous Application instead of a Plaint. In my said Ruling, I stated as follows:

“In the circumstances, I am willing to give the Applicant the benefit of doubt and wait for substantive hearing of the full Motion before making final determinations on whether the prayers made can properly be heard and determined in this Miscellaneous Cause. I therefore find that on the facts of this case and its circumstances, it is premature to shut out the Applicant at this stage before considering the Affidavits.”

2. Pursuant to the said Ruling, I now proceed to determine this matter on merits. The action was commenced vide the Application brought by way of the Notice of Motion dated 15/12/2022 and filed through Messrs Ngethe & Co. Advocates. The Application is expressed to be brought under Sections 238 and 239 of the *Companies' Act*, Order 51, Sections 1A, 1B and 3A of the *Civil Procedure Act* 2010 and “all other enabling provisions of the law”. It then seeks orders as follows:



- i. [.....] Spent.
  - ii. That the Honourable Court do issue an Order directing the 3<sup>rd</sup> Respondent to effect the removal of the 2<sup>nd</sup> Respondent as a director of the 1<sup>st</sup> Respondent in adherence to the resolutions passed at the company director's meeting held on 19/08/2022 wherein the directors/shareholders voluntarily resolved that the 2<sup>nd</sup> Respondent ceased to be a company director/shareholder effective 16/07/2022.
  - iii. That the Honourable Court do issue an Order directing that the 2<sup>nd</sup> Respondent grants the 1<sup>st</sup> Respondent the financial autonomy to operate by ceasing to be a bank signatory to the 1<sup>st</sup> Respondent's bank accounts effective 16<sup>th</sup> July 2022.
  - iv. That the Honourable Court do issue an Order directing that the 2<sup>nd</sup> Respondent submit its valuation report of the company completed by its independent valuer within 14 days to determine his entitlements in the company for settlement.
  - v. That the Honourable Court direct that the 2<sup>nd</sup> Respondent shall cater for the continued accrued interest from the facilities held by the 1<sup>st</sup> Respondent as a result of his inordinate delay to facilitate the shareholder separation process.
  - vi. That Honourable Court do issue an Order directing the 3<sup>rd</sup> Respondent to effect the changes agreed upon by the Directors of the 1<sup>st</sup> Respondent during the Special General Meeting held on the 19<sup>th</sup> August, 2022 subject to settlement of the 2<sup>nd</sup> Respondent's entitlements in the 1<sup>st</sup> Respondent by the Applicant.
  - vii. That the Court do issue such Directions as may be necessary to facilitate the accessing of the 1<sup>st</sup> Respondent's Company Accounts held and do direct the notation of the Applicant as the sole signatory of the said accounts so as to allow optimal operation of the activities of the 1<sup>st</sup> Respondent;
  - viii. That the Honourable Court do issue a restraining order as against the 2<sup>nd</sup> Respondent and/or his agents, servants and assigns from contacting the 1<sup>st</sup> Respondent's employees, suppliers, bankers and any other individuals regarding the 1<sup>st</sup> Respondent's affairs and operations effective 16<sup>th</sup> July 2022.
  - ix. That further to and consequent to the grant of prayers (1) and (2) and as a result of the urgency involved herein this Honourable Court be pleased to grant leave/permission to the Applicant to commence and prosecute the present action as a Derivative Action.
  - x. That further to the foregoing and so as not to render this Action nugatory the Honourable Court do issue such further, ancillary or consequential orders as the Court may deem just and expedient and to give effect to the orders sought herein.
3. The Application is supported by the Affidavit sworn by the Applicant, Michael Kibet Kebenei who deponed that he instituted this derivative action as a director/shareholder of the 1<sup>st</sup> Respondent company, that the 2<sup>nd</sup> Respondent in breach of his fiduciary duty, engaged in conflicted transactions within the 1<sup>st</sup> Respondent by colluding with staff to issue an LPO to the 1<sup>st</sup> Respondent's supplier Alloytech on 12/03/2021 wherein goods were diverted for delivery to the 2<sup>nd</sup> Respondent instead of the 1<sup>st</sup> Respondent and intentionally sought to sabotage the company operations through non-attendance of company meetings or attendance to the company offices to execute his duties as a director, that the 2<sup>nd</sup> Respondent held the 1<sup>st</sup> Respondent ransom through placing demands to process



- legal company payments by demanding payment of two weeks advance payments and salary, and that the 2<sup>nd</sup> Respondent issued threats to the 1<sup>st</sup> Respondent's staff in execution of their mandates as well as wrote to its bankers to recall the 1<sup>st</sup> Respondent's transactions in a bid to cripple it,
4. He deponed further that he raised the acts and omissions of the 2<sup>nd</sup> Respondent in a bid to facilitate the 2<sup>nd</sup> Respondent engage in the company operations to facilitate continued company operations, that on 19/08/2022, the 2<sup>nd</sup> Respondent obliged and the 1<sup>st</sup> Respondent convened a Special General Meeting (SGM) of its Members in a bid to formulate a Memorandum of Understanding on return to normalcy of its operations, that in the said SGM, it was voluntarily resolved that the 2<sup>nd</sup> Respondent's directorship and shareholding in the 1<sup>st</sup> Respondent ceased effective 16/07/2022 subject to identification of assets and liabilities to determine the 2<sup>nd</sup> Respondent's entitlement in the 1<sup>st</sup> Respondent to facilitate the shareholder separation exercise, and that the Applicant and the 2<sup>nd</sup> Respondent resolved to nominate Auditors to identify all the 1<sup>st</sup> Respondent's assets, liabilities and ongoing projects to determine the respective shareholder entitlements.
  5. He added that the Applicant and the 2<sup>nd</sup> Respondent also held a further SGM on 14/10/2022 wherein the Applicant's Auditors presented their Report indicating the shareholder's stake but on his part, the 2<sup>nd</sup> Respondent did not present a Report as agreed, yet he insisted that a valuation of all the 1<sup>st</sup> Respondent's assets be undertaken to determine the accuracy of the financial statements to inform the respective shareholder entitlements in the shareholder separation exercise, that the 1<sup>st</sup> Respondent has numerous obligations to deliver including execution of customer contracts, bank facilities and letters of credit, that at the instance, the 1<sup>st</sup> Respondent's bank accounts held at the Co-operative Bank of Kenya are in an overdrawn status to a tune of Kshs 37,667,752.16 yet the 2<sup>nd</sup> Respondent is not interested in furthering the 1<sup>st</sup> Respondent's operations despite the continued accrual of interest in the account, and that the 1<sup>st</sup> Respondent has pending projects/contracts to implement and stands the risk of litigation due to no-performance as a result of its crippled state of affairs.
  6. The Applicant deponed further that the 2<sup>nd</sup> Respondent registered a rival firm, engaging in the same nature of business and in direct competition with the 1<sup>st</sup> Respondent trading as Mechtech Installers Ltd registered on 3/08/2022, that the resolved shareholder separation is yet to be effected within 1<sup>st</sup> Respondent as a result of the ongoing discussions on the separation modalities which the 2<sup>nd</sup> Respondent has intentionally delayed through his tactics evidenced by the continued reluctance to complete the separation exercise through a wild goose chase by his Advocates' queries that have no end, that as such, the 1<sup>st</sup> Respondent is unable to optimally operate as access to its bank accounts/operations remains the preserve of the Applicant and the 2<sup>nd</sup> Respondent despite the resolution by the directors/shareholders that the 2<sup>nd</sup> Respondent ceased being a director/shareholder in the 1<sup>st</sup> Respondent effective 16/07/2022.

## **2nd Respondent's Replying Affidavit**

7. The 2<sup>nd</sup> Respondent opposed the Application by swearing the Replying Affidavit filed on 28/12/2022. He deponed that the Application is a conglomeration of lies, half-truths and concealment of true facts, that due to mismanagement of the 1<sup>st</sup> Respondent by the Applicant and owing to irreparable working relationship between him and the Applicant, and in furtherance to facilitating the 1<sup>st</sup> Respondent to continue to operate with minimal interference, the two called a mutual meeting on 19/08/2022 wherein they agreed on a myriad of issues among which a mutual separation process of the directors and shareholders of the 1<sup>st</sup> Respondent was agreed upon, that it was agreed that the separation was the only solution to end the wrangling within the company, that the shareholders do nominate representatives to conduct the entirety of the value of the 1<sup>st</sup> Respondent and that the Advocates for the respective



directors/shareholders do prepare the terms of reference that would guide the separation process. He added that, it was also agreed that to cushion the financial challenges of the company during the period of separation, all payments be loaded online for approval by the 2<sup>nd</sup> Respondent and that all the Advocates representing the respective directors/shareholders be copied for purposes of accountability and timely processing of approvals, and that all payments due to the 2<sup>nd</sup> Respondent that he incurred whilst in Mombasa be paid.

8. He deponed further that he has never received any request for payment approvals, that his payment has never been effected to date, that the Applicant violated the resolutions of the aforesaid meetings and continues to violate the same, that the Applicant cannot therefore come to Court seeking a myriad of reliefs of similar nature as the resolutions agreed upon while on the other hand, refusing to effect the resolutions. He added that in compliance with the Resolutions, the parties each appointed auditors to undertake the process of separation and which process is still ongoing valuation and is completed save for a few items not disclosed by the Applicant, that the same can be resolved without the need for a protracted legal tussle, that the reason for the delay has all along been occasioned by the Applicant who has been reluctant to comply with some resolutions, that it was agreed that the issue of financial autonomy and single signatory to the accounts shall be undertaken once the valuation process is complete and the parties have agreed on their respective entitlements.
9. The 2<sup>nd</sup> Respondent then denied that he was in breach of his fiduciary duty, or guilty of full disclosure or that the 1<sup>st</sup> Respondent's operations are in jeopardy. He deponed he has all along visited the company offices and undertaken his duties as a director and denied that he has delayed finalization of the separation process. He stated that it is in fact the Applicant who has made efforts to scuttle the separation process by failing to effect timely and full disclosures, that the bank facilities will be paid as soon as the contracts currently undertaken are due and payment effected, and that the Applicant has diverted funds from some clients to Equity Bank instead of through the Co-Operative Bank for purposes of satisfying the bank facilities.

### **Applicant's Supplementary Affidavit**

10. The Applicant filed a Supplementary Affidavit on 26/03/2023. The same however basically reiterates matters already deponed upon and denies the allegations made in the Replying Affidavit. In the circumstances, I will not recount the contents.

### **Hearing of the Appeal**

11. It was then agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Applicant filed his Submissions on 21/12/2022 while the Respondent filed on 29/12/2022. The Applicant also filed Supplementary Submissions on 6/04/2023.

### **Applicant's Submissions**

12. In his Submissions, the Applicant's Counsel submitted that the 2<sup>nd</sup> Respondent has numerously breached the duty to act within his powers and to promote the success of the company and that his acts and/omissions have prejudiced the 1<sup>st</sup> Respondent. He cited the case of *Monamedin Mohamed & Hish Company Limited vs. Hirabim Imail Isaak & another* [2021] eKLR relied on in *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] eKLR and also Sections 238-241 of the *Company's Act*. She contended that from the actions of the 2<sup>nd</sup> Respondent cited above, it is evident that the Applicant has established a *prima facie* case to support the cause of action and also cited the case of *Isaiyah Waweru Njumi & 2 Others -v- Muturi Ndungu* [2016] eKLR. On the definition of a "fiduciary duty", she cited the definition stated in the Black's Law Dictionary and also in *Gower's*



*Principles of Modern Company Law* (4<sup>th</sup> Ed.) Also cited was the case of Guth V Loft, A.2d 503,510 (Del. 1939) on the position that “corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.”

13. Counsel submitted further that in addition to the breach of loyalty, the 2<sup>nd</sup> Respondent has also breached the duty of good faith to the 1<sup>st</sup> Respondent and cited the case of re The Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006). Regarding the SGM held on 19/08/2022, Counsel submitted that the same was properly constituted and resolutions reached therein binding upon the members. It was her further contention that the Applicant has established a case for preliminary reliefs sought to facilitate the operations of the 1<sup>st</sup> Respondent, that from the current situation, in the absence of grant of the orders sought to protect the 1<sup>st</sup> Respondent’s, the damage within the 1<sup>st</sup> Respondent continues to be insurmountable and cannot be compensated by the 2<sup>nd</sup> Respondent and that the 1<sup>st</sup> Respondent will suffer irreparable harm that will send it to its deathbed. She urged the Court to preserve the company assets and promote continuity of business for the 1<sup>st</sup> Respondent and cited the case of *Kamau v Kinyanjui & 2 others (Miscellaneous Application* E493 of 2019) [2022] KEHC 166 (KLR) (Commercial and Tax).
14. As aforesaid, the Applicant also filed Supplementary Submissions. The same however merely fortifies or reiterates the matters already submitted upon hereinabove.

## **2nd Respondent’s Submissions**

15. The 2<sup>nd</sup> Respondent’s Counsel’s Submissions addressed both the Preliminary Objection now already determined as well the substantive Application itself.
16. Regarding the substantive Application, Counsel cited the case of *Isiah Waweru Njumi & 2 Others v Muturi Ndungu* [2016] eKLR and submitted that the Applicant has not met the threshold for grant of the substantive orders sought, that there are no facts pleaded or particularized in the Application in support of the prayers made, that the company operations are continuing as evidenced by the contents of the Replying Affidavit, that the 2<sup>nd</sup> Respondent has not in any manner whatsoever breached his duties as a director, that the Application is brought in good faith as all the allegations made are malicious and whose only aim is to scuttle the separation process of the company. He urged the Court to allow the company to operate as is the vide the resolutions made by the directors.

## **Determination**

17. Upon considering the Application, the Affidavits and Submissions filed, I find the issues that arise for determination to be as follows:
  - i. Whether the prayers made in the Application can all be conveniently canvassed in this Miscellaneous Application.
  - ii. Whether the Applicant has demonstrated that leave to institute and continue with this matter as a derivative suit ought to be granted.
  - iii. Whether the Court should grant the restraining orders sought against the 2<sup>nd</sup> Respondent
18. I now proceed to analyze and determine the said issues.
  - i. Whether the prayers made in the Application can all be conveniently canvassed in this Miscellaneous Cause



19. My understanding of the process of applying for leave to institute a derivative action is simply to satisfy the Court that there is a merited suit to be prosecuted. One may at that stage bring the Application for leave in terms of a Miscellaneous Application. Once the Application is allowed, the Applicant then proceeds to file the substantive suit in the ordinary manner by way of Plaintiff. This is the correct and widely accepted procedure. The alternative procedure, whose acceptance is however still debated and therefore unsafe, an Applicant right away files the suit by way of a Plaintiff but together with the Plaintiff also files an Application seeking leave that the Court ratifies it or allows the Applicant to proceed with the already filed suit as a derivative action.
20. In the present case, the Applicant has filed a Miscellaneous Application and has prayed for the same substantive prayers that would ordinarily be made in the main suit once leave has been granted. He has then also included a prayer seeking leave to proceed with the action as a derivative suit. Although in my earlier Ruling, I declined the invitation to strike out the suit on the ground of this procedure adopted as I found that the procedure alone was not a sufficient ground for striking out the suit, I also indicated my observation that the substantive prayers sought herein can only be appropriately canvassed in a full substantive suit where evidence may even need to be taken from witnesses. That obviously cannot be appropriately or conveniently be done in a Miscellaneous Cause. Regarding this issue, the following is what I stated:
14. It is the 2<sup>nd</sup> Respondent's contention that the Application is incompetent for having being instituted by way of Miscellaneous Application instead of a Plaintiff. It is true that as a general rule, a suit is to be instituted by way of a Plaintiff unless the rules prescribe any other manner. This is as provided under Order 3 Rule 1 of the [Civil Procedure Rules](#) which stipulates that:
- “Every suit shall be instituted by presenting a plaintiff to the court, or in such other manner as may be prescribed.”
15. On its part, Section 19 of the [Civil Procedure Act](#) provides that:
- “Every suit shall be instituted in such manner as may be prescribed by rules.”
16. However, there are various instances where it is agreed and accepted that an action can validly be commenced by way of Miscellaneous Application. In relation thereto, in the case of [Joseph Kibowen Chemjor vs William C. Kasera](#) (2013) eKLR, Munyao J. held as follows:
- “It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the [Civil Procedure Rules](#) do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings”.



- .....
19. Looking at the prayers made in the Motion as set out hereinabove, it is clear that the main substantive one is prayer (ix) which seeks leave to “commence and prosecute the present action as a derivative action”. The rest of the prayers, save for perhaps one or two which may appear to be about substantive rights, and although the Applicant’s Advocates may also have been a little bit too enthusiastic in drafting some of them, appear to basically be interim in nature or constitute incidental or ancillary reliefs meant to act as preservative or restraining orders or those meant to ensure smooth operations and running of the company pending, final determination of the matters in dispute herein.
  20. In the circumstances, I am willing to give the Applicant the benefit of doubt and wait for substantive hearing of the full Motion before making final determinations on whether the prayers made can properly be heard and determined in this Miscellaneous Cause. I therefore find that on the facts of this case and its circumstances, it is premature to shut out the Applicant at this stage before considering the Affidavits.”
  21. In view of the foregoing and after now considering the rival Affidavits, I hold and find that the only prayers that this Court can entertain at this stage in this Miscellaneous Cause are prayers 8, 9 and 10 as follows:
    8. That the Honourable Court do issue a restraining order as against the 2<sup>nd</sup> Respondent and/or his agents, servants and assigns from contacting the 1<sup>st</sup> Respondent’s employees, suppliers, bankers and any other individuals regarding the 1<sup>st</sup> Respondent’s affairs and operations effective 16<sup>th</sup> July 2022.
    9. That further to and consequent to the grant of prayers (1) and (2) and as a result of the urgency involved herein this Honourable Court be pleased to grant leave/permission to the Applicant to commence and prosecute the present action as a Derivative Action.
    10. That further to the foregoing and so as not to render this Action nugatory the Honourable Court do issue such further, ancillary or consequential orders as the Court may deem just and expedient and to give effect to the orders sought herein.
      - ii. Whether the Applicant has demonstrated that leave to institute and continue derivative action ought to be granted
  22. Regarding derivative suits, Section 238(3) of the *Companies Act*, 2015 provides as follows:
    - (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.”
  23. On its part, Section 239(1) of the *Companies Act*, 2015 provides that:
    - (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.”
  24. 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.”

25. In *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] eKLR, 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.
  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.
26. Applying the above principles to the facts of this case, my view is that it is important in such an Application to clearly describe to the Court the specific prayers that the Applicant wishes to present before the substantive Court that shall hear the derivative suit should leave be granted. It may even be advisable to present to the Court a sample or draft of the intended Plaintiff that the Applicant wishes to file in the derivative action. In this case, the Applicant having filed this Miscellaneous Cause as the substantive suit, has not therefore presented a draft Plaintiff. However, from the substantive prayers made herein, the reliefs that the Applicant shall be seeking in the substantive suit are evident.



27. Regarding the merits of the prayer for leave, the Applicant (holding 500 shares) and the 2<sup>nd</sup> Respondent (holding 400 shares) are the two directors of the 1<sup>st</sup> Respondent company. They incorporated the company in the year 2017 and seem to have operated it quite well as a successful business. Along the way however, cracks emerged and there appears to have arisen irreparable differences between the two partners leading to a serious fallout between them. After deliberations with each other, they agreed to enter into a separation process *vide* which the 2<sup>nd</sup> Respondent was to exit the company as from 16/07/2022 upon performance of some conditions by both parties. However, this separation process has itself met headwinds since the parties accuse each other of refusing or failing to perform his part of the conditions agreed. There are therefore accusations and counter-accusations flying across the table against each other bordering on claims breach of fiduciary duties and mismanagement, and even embezzlement of company funds by either director.
28. Logically, derivative action connotes an action to save a company from fraudulent or deliberate actions by a director calculated to fleece the company for personal gain or serious acts of negligence or breach of duty or breach of trust by a director resulting into damage or losses to the company. It is an action, not for the benefit of the applicant- director, but for the benefit of the company in general. It is also not meant to act as an avenue for curing irregularities in the conduct of the company's internal affairs.
29. In this regard, Lenaola J (as he then was), in the case of *Jacob Juma –vs- Evans Kidero* (2016) eKLR, while citing the decision of the Court in *Shirawuse Limited and Another –vs- Pianesi Gino* (2012) eKLR stated the following:
- “It is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights of action vested in the company and sue for wrongs done to it .... 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 the majority are entitled to present the bringing of an action in relation to such matters. 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.... (but) mere irregularity in the internal management of a company cannot be a basis for one to bring derivative suit for such can be rectified by a vote/resolution at the company's meeting...”
30. This dispute may appear to be a “personality clash” between the two directors over management and control of the company and as an action aimed at enforcing the separation agreement executed between the two directors whereof the 2<sup>nd</sup> Respondent was to exit the company on the conditions set. From that angle, questions may be raised on whether the action fully meets the threshold of a derivative action. However, there are also allegations made against the 2<sup>nd</sup> Respondent for financial mismanagement, diversion of company funds for personal use, incorporation of a rival company to compete with the 2<sup>nd</sup> Respondent and deliberate actions to frustrate the company from paying off its loans. Granted, the 2<sup>nd</sup> Respondent has vehemently denied these allegations. However, at this stage, it is not the duty of this Court to make substantive findings. In view of such serious allegations made against the 2<sup>nd</sup> Respondent and documents produced, I am satisfied that the Applicant's case discloses a *prima facie* case meriting to be more closely interrogated in a derivative suit. Needless to state, whether the Applicant shall succeed in such suit is not for this Court to speculate. I will therefore grant such leave
- iii. Whether the Court should grant the restraining orders sought against the 2<sup>nd</sup> Respondent



31. As already set out, in prayer No. 9 of the Application, the Applicant has urged this Court do issue a restraining order against the 2<sup>nd</sup> Respondent and/or his agents, servants and assigns from contacting the 1<sup>st</sup> Respondent's employees, suppliers, bankers and any other individuals regarding the 1<sup>st</sup> Respondent's affairs and operations effective 16/07/2022.
32. The conditions for the grant of an interlocutory injunction are well known as was set out in *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.”
33. I have already made a finding that the Applicants have established a prima facie case justifying grant of leave to the Applicants to commence a derivative suit against the Respondents. Regarding this further prayer for injunction, it may be logical for one to argue that once this Court grants such leave, it becomes *functus officio* and that any consequential matters should be placed before the Court before which the derivative suit shall be filed. However, I may also mention that I do not know of any express provision that bars this Court from issuing, at this stage of seeking leave, any further orders subsequent to granting leave. Be that as it may, considering the nature and extent of the allegations made herein, I feel that, by issuing the injunction orders, I shall technically be pre-judging issues that shall be pending for determination before the derivative suit Court. This will be tantamount to usurping that Court's mandate,
34. Further, by issuing injunction orders at this stage, this Court may later be called upon to enforce the orders. Since the derivative suit may have been filed by such time, the litigants may then be placed in a complicated situation where there may be two parallel proceedings touching on the same subject matter before different Courts.
35. In any event, I am not convinced that the Applicant has sufficiently demonstrated the “substantial loss” that he will suffer in the interim if that order is not granted at this stage. In my view, the Court that shall be fully seized of the derivative suit shall be the one in a better position to determine whether any substantial loss may be suffered and whether the balance of convenience will favour granting of the restraining orders.
36. For the above reasons, my finding is that the Applicant ought to place the prayers for interlocutory injunction before the Court that will be properly seized of the derivative suit. Accordingly, I opt to limit myself to only granting the leave to commence the derivative action. I therefore decline to issue the injunctive orders sought by the Applicant at this stage and leave that to the derivative suit Court.

### **Final Orders**

37. In light of the above findings, the Notice of Motion dated 15/12/2022 only partially succeeds and I make the following orders:
- i. Prayer 9 thereof is hereby allowed to the extent that the Applicant is granted leave to commence, continue and/or file a derivative suit against the 2<sup>nd</sup> Respondent seeking relief on behalf of the 1<sup>st</sup> Respondent in respect to the acts and/or omissions alleged against the 2<sup>nd</sup> Respondent.



- ii. The intended derivative suit shall be lodged, instituted and/or filed within forty-five (45) days from the date of delivery of this Ruling.
- iii. The rest of the prayers made in the Application would be best handled by the Court that shall be seized of the substantive derivative suit intended to be filed. The same may therefore be sought, renewed and/or placed before that Court for determination.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 31<sup>ST</sup> DAY OF MAY 2024**

.....

**WANANDA J. R. ANURO**

**JUDGE**

**Delivered in the Presence of:**

**Ms. Ngethe for Applicant**

**Mwangi h/b for Mutri for 2<sup>nd</sup> Respondent**

