



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL SUIT NO 12 OF 2017**

**UDALI GROUP LIMITED.....PLAINTIFF**

**Versus**

**UMBERTO RTCCARDO DELLAVALE.....1<sup>ST</sup> DEFENDANT**

**FIESQUIS MARINA MARIAM CISSE MBOISSEME.....2<sup>ND</sup> DEFENDANT**

**DECI GROUP LIMITED.....3<sup>RD</sup> DEFENDANT**

**ELDAMA RAVINE STONES LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

**Preliminary objection**

[1] In a Notice dated 19<sup>th</sup> July 2017, the 1<sup>st</sup> Defendant took out two points as Preliminary Objection, to wit:-

- (a) That that his suit should be addressed as derivative action as it has been initiated by a shareholder of the 4<sup>th</sup> Defendant company; and*
- (b) That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are wrongly enjoined in this suit as they are mere directors of the 3<sup>rd</sup> Defendant which is a shareholder of the 4<sup>th</sup> Defendant; these two are separate entities.*

For good reason as it will become clear, I will invert these objections and start with the second one. But first let me set pout the legal threshold in determining whether a point taken as is truly a preliminary objection.

**Legal test**

[2] As was stated in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD vs. WEST END DISTRIBUTORS LTD (1969) EA 696**asPer Law JA:

*“A preliminary objection consists of a point of law which has been pleaded or by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”*

As per Sir Charles Newbold P:

***“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

J.B Ojwang J. (as he then was) succinctly put it in the case of **ORARO vs. MBAJA (2005) eKLR:**

***“...A preliminary objection as correctly understood is... identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence”.***

### **Misjoinder of parties**

[3] Misjoinder of parties will ordinarily call for probing of evidence to prove. And such, is not, as a matter of legal principle, a true preliminary objection. For instance, in this case, the court needs to investigate facts alleged against the two directors of the 3<sup>rd</sup> Defendant Company. In any case, a derivative claim under Part XI of the Companies Act may be brought where a cause of action arises from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company or another person. This reality of the law and the substantial submissions filed by the 3<sup>rd</sup> Defendant and the Plaintiff on this question attest to the fact that this is a contested matter which will require in-depth examination of evidence. However, the less I say about joinder of parties the better for I have already made my decision, and I do not wish any prejudice to the case or any party in light of the ultimate decision hereunder. The 2<sup>nd</sup> point of objection, therefore, fails.

### **Of whether this is derivative suit**

[4] Whether these proceedings are in the nature of derivative action or not is a matter of law which should be readily discernible by merely perusing the cause of action as pleaded. The Plaintiff is a shareholder of and holding 50% shareholding in the 4<sup>th</sup> Defendant. Likewise, the 3<sup>rd</sup> Defendant is a shareholder of and holding 50% shareholding in the 4<sup>th</sup> Defendant. These are the only two shareholders. In the amended plaint, the Plaintiff seeks sought *inter alia* accounts for the business conducted by Eldama Ravine Stores Limited (4<sup>th</sup> Defendant) between 1<sup>st</sup> May 2015 and 22<sup>nd</sup> August 2016 and a share of the profit which in the sum of Kshs 29,125,000. The plaintiff further seeks for delivery to the Plaintiff of account for income derived in the 4<sup>th</sup> Defendant’s business. See also interim application dated 29<sup>th</sup> June 2017, seeking inter alia an order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to deliver up all records of income of the 4<sup>th</sup> defendant from the sales of stone in the sum of Kshs 58,250,000 pending *inter partes* hearing. Particulars of breach of trust by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been specified in paragraph 22 of the Amended Plaint. In addition, paragraph 23 thereof lists particulars of fraud by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. Other complaints include; the 4<sup>th</sup> Defendant conducted its business at the exclusion of the Plaintiff as if it is a sole proprietorship; entered into a joint venture agreement with Consolata Hospital, Nkubu without disclosing of the Plaintiff’s shareholding; made sales without accounting, failed to remit to the Plaintiff half of the income it made, etc.

[5] The foregoing recapitulation of facts brings me to ask: What does the law say of derivative action?The law on derivative actions is to be found in Part IX of the Companies Act 2015 which provides as follows;

### **PART XI — DERIVATIVE ACTIONS**

#### **238. Interpretation: Part XI**

**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.*

*c. 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.*

*d. A derivative claim may be brought against the director or another person, or both.*

*e. 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.*

*f. 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.*

[6] On the above provision of the Companies Act, Onguto J stated in **GHELANI METALS LIMITED & 3 OTHERS Vs ELESH GHELANI NATWARLAL & ANOTHER [2017] eKLR**, that;

*“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. 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. 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. 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.*

[7] Looking at the claims herein, they relate to claims in respect of breach of duty owed to and fraud by some of the shareholders or their directors upon the 4<sup>th</sup> Defendant Company. Such are claims in respect of a cause of action vested in a company except that some of the directors or shareholders are not willing to act as per the Memorandum and Articles of Association of the 4<sup>th</sup> Defendant. Matters of running the company or of accounts or of declaring and sharing of profits of the company are governed by the

Memorandum and Articles of Association of the company and as such should be regulated by the internal mechanisms provided thereto. Any claim arising therefrom is therefore a derivative claim which should be brought under Part XI of the Companies Act especially if it is; (1) 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; and (2) against a shareholder or directors of one of the shareholder or both on matters of the company. As Onguto J sated in the case of **GHELANI METALS LIMITED**[supra] the scope of derivative claims and suits is governed by the Companies Act, 2015 and:

*“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”.*

[8] And whereas the decision by Mwera J (as he then was) in **DADANI vs. MASIJI & 3 OTHERS(2004) eKLR** was rendered before the enactment of the Companies Act, 2015, it is still good law to the extent that a derivative suit is special proceedings initiated in deference to self-regulation of corporations; but also providing limited interference by courts in the running of corporate bodies where wrongs have been committed against the company but the persons making decisions or running the company are unwilling or are deliberately sabotaging redress thereof. It is clear that these shareholders and directors are strangling the 4<sup>th</sup> Defendant due to their disagreements. It seems from the proceedings and orders already obtained from courts, that the 4<sup>th</sup> Defendant’s business and operations have been stalled; equipment are stalled. Nonetheless, there are pertinent issues raised in these proceedings on the operations of the company by some of the shareholders and their directors, whose resolution should benefit the company. Accordingly, I declare these to be derivative proceedings and hereby grant the Plaintiff to continue with them as such. Given those orders, under the Companies Act, the court may order the kind of evidence the company or party should provide. Again, the operation and running of the company may be in focus as is the case here. Now, therefore, as the company is being affected negatively the parties should inform the court on how the operations of the company will be conducted as these proceedings are pending in court. I will also give such other directions as are appropriate and after hearing the parties. It is so ordered. Accordingly Objection filed in Court on 19<sup>th</sup> July 2017 succeeds partially as stated above. I will make no orders as to costs.

**Dated, signed and delivered in open court at Meru this 30<sup>th</sup> day of November, 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Mwiti advocate for Ajaa Advocate for Plaintiff

Mr. Okonkwo advocate for Plaintiff

Mr. Moseto advocate for defendant – absent

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**F. GIKONYO**

**JUDGE**