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Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Daniel Kiio Musinga
Citation:	IN THE MATTER OF CMC HOLDINGS LIMITED[2012]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
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History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Miscellaneous Civil Case 273 of 2012

IN THE MATTER OF CMC HOLDINGS LIMITED

AND

IN THE MATTER OF COMPANIES ACT, CAP 486 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE DERIVATIVE ACTION

RULING

A. THE APPLICANTS' APPLICATION

1. The applicants in this application are CMC Holdings Limited, hereinafter referred to as "**the company**" as well as the company's several directors named in paragraph 3 hereunder, hereinafter referred to as "**the directors**". The applicants' application dated 28th May, 2012 seeks the following orders:

"1. That this Honourable Court be pleased to discharge and/or set aside the leave issued ex parte on 10th May 2012.

2. That this Honourable Court be pleased to strike out HCCC No. 307 of 2012 which was filed pursuant to the leave granted on 10th May 2012.

3. That in the alternative to prayer 2 above, this Honourable Court be pleased to stay all proceedings in HCCC No. 307 of 2012 pending the hearing and determination of High Court Petition Number 216 of 2011, HCCC No. 149 of 2012 and HCCC No. 154 of 2012.

4. That the costs of this application be provided for."

2. The application was brought under **Article 47** as read together with **Article 50** of the **Constitution, Section 1A, 1B** and **3A** of the **Civil Procedure Act, Order 51 Rule 3** of the **Civil Procedure Rules**, the inherent powers of the Court and all other enabling provisions of the law.

3. The application was supported by affidavits sworn by **William Lay** (dated 28th May, 2012 and 29th June, 2012), the defendant's Chief Executive Officer and Group Managing Director, having the authority of Mary w. Ngige, Paul Wanderi Ndungu, Joel Kamau Kibe, Ashok K. Shah and Andrew P. Hamilton (the Directors herein).

B. THE APPLICANTS' DEPOSITIONS

4. Mr. Lay deposed, *inter alia*, that:

- **The applicants are aggrieved by the orders made ex-parte on 10th May 2012.**
- **The applicants had a right to be heard in the motion seeking leave to commence the derivative action and that it was improper for the respondents in this motion to have proceeded ex parte.**
- **The respondents have not demonstrated that they have requested either the Company or the Directors to take any of the steps which they now wish to ventilate through the derivative action and that the said requests have been denied. Further, that the application for leave to institute a derivative action was and is premature.**
- **Further, the respondents have also not demonstrated that the other over 15,000 shareholders support the institution of the derivative action, and that in the circumstances, there is a danger that if the leave is not set aside, other shareholders who may not be of like mind as the respondents may also seek leave to institute derivative actions to agitate their interests, which will open a floodgate of litigation and overwhelm not only this Honourable Court but also the Company which is at the moment defending numerous proceedings on the same issues.**
- **The company therefore stands to suffer loss in terms of the resources it will have to set aside to defend the multiple proceedings.**
- **The respondents obtained the leave granted on 10th May, 2012 without disclosing to the court that sometime in the year 2011, Andy Forwarders Services Limited (hereinafter "Andy"), a shareholder of the Company, instituted proceedings in Petition Number 216 of 2012 wherein it sought, among others, a declaration that it was entitled to hold an Extra Ordinary General Meeting (EGM) to remove Mr. Paul Ndung'u, Mr. Andrew P. Hamilton, Mr. Joel Kamau Kibe and himself (Mr. Lay), as directors of the Company.**
- **By an application dated 16th December, 2011, the respondents** sought to be joined as Interested Parties in the said Petition, which application was allowed by the Honourable Mr. Justice Lenaola on the 22nd **March, 2012.**
- **Petition Number 216 of 2011 is currently pending determination and was scheduled for ruling on an interlocutory matter on 22nd June, 2012.**
- **Failure of the respondents to disclose the aforesaid pertinent facts was aimed at misleading this Honourable Court into making *ex parte* orders in their favour.**
- **All the grounds in support of the of the application for leave are identical in almost all aspects with the issues raised in the pleadings filed in High Court Petition Number 216 of 2011, HCCC Number 503 of 2011, HCCC Number 149 of 2012 and HCCC Number 154 of 2012 as follows:-**

a) ***The allegation that the forensic investigation conducted by PricewaterhouseCoopers***

Limited was not sanctioned by the Board of Directors of the Company is the subject of proceedings in HCCC Number 503 of 2011, HCCC Number 149 of 2012 and HCCC Number 154 of 2012, which suits were instituted prior to these proceedings.

b) ***The Webber Wentzel Report is also the subject of proceedings in HCCC Number 503 of 2011 and HCCC Number 154 of 2012.***

c) ***The issue of whether a shareholder was entitled to convene an EGM on 21st October, 2011 is the subject of proceedings in High Court Petition Number 216 of 2011 and HC Misc 909 of 2011.***

d) ***The issue of the alleged contract dated 1st June, 2011 (hereinafter "the Pewin Contract") is also the subject of proceedings in HCCC Number 503 of 2011, HCCC Number 149 of 2012 and 154 of 2012.***

- **The proceedings herein were instituted for the sole purpose of providing the respondents with an avenue for forum shopping or having multiple bites at the cherry.**

- **Merely stating that they have established that Directors have diverted and misappropriated the property and assets of the Company, the respondents have not stated the particular assets or property alleged to have been misappropriated and that the Directors benefited from the same and in any event, the report did not make any finding against the Directors that would lead to an inference of fraud or misappropriation of the assets or property of the Company, which report is the subject matter of the suits outlined above and its findings and effect will be determined in those suits and cannot be the subject matter of a new suit.**

- **Contrary to the respondents' allegations, the Directors have taken all the necessary steps to protect the Company's property by:-**

a) ***Engaging the firm of PricewaterhouseCoopers Limited to conduct a forensic investigation into the dealings between the Company, its subsidiary, CMC Motors Group Limited and Andy.***

b) ***Opening up its books to M/s Webber Wentzel and cooperating with the forensic investigator engaged by the CMA.***

c) ***Instituting proceedings in HCCC Number 503 of 2011 (CMC Holdings Limited and Another v. Andy Forwarders Services Limited and others) and seeking restitution of the sums which Andy was found to have overcharged the Company and its subsidiary in respect of the supply of logistics services.***

- **In the circumstances, the allegation by the respondents that the Directors have misappropriated the Company's property is not only false and deceitful but is a deliberate suppression of the facts.**

- **The issue of the reversal of the salary increment for sixty one (61) employees is the subject matter of the above proceedings and in particular HCCC No. 503 of 2011 and HC Petition No. 216 of 2011. It cannot be the basis of a new suit or a ground for the grant of leave to commence a derivative action.**

- **The respondents have not provided any or sufficient evidence of misconduct or fraud by**

the Directors on the Company to warrant the issuance of leave to institute a derivative action. Further, that the said allegations are un unnecessary reaction and no more than a red herring meant to hoodwink this Honourable Court and conceal the true but illegitimate purpose of these proceedings.

C. THE RESPONDENTS' REPLY

5. The respondents filed a replying affidavit sworn by **Daniel Kimotho Muchiri**, duly authorized by Alois Wafula Chami, Emmanuel Fenswa Masaba and Geoffrey Bethuel Maoga, being minority shareholders, and deponed, *inter alia*, that:

- **The application before the court is fatally defective on account of fact that the applicants have not appeared nor appointed an advocate to act for them in the matter.**
- **The application dated 28/5/2012 has been brought by an advocate not dully and properly appointed.**
- **Without prejudice to the foregoing, prayer 3 of the application before the court exceeds the leave granted on 22/5/2012 which was limited to a challenge to the leave of court granted on 10/5/2012 and ought therefore to be struck off *in limine.***
- **With regard to the affidavit sworn in support of the application, he objected to the same for reasons that the deponent could not swear the supporting affidavit on behalf of the company and the 6 directors because, by its very nature, in the derivative suit, the Plaintiffs aver wrong doing by the directors against the company and its shareholders, hence, the interests of the company in this matter are very far and apart from the interests of the directors who are accused of the wrong-doing and that it is a conflict of interest for the counsel for the applicants to purport to act for both the wronged company and the directors accused of wrong-doing against the same company.**
- **That as a matter of practice all applications for leave of court are ex parte, the rationale being that a derivative suit is a suit brought against wrong doing directors for the benefit of the company. That to serve them with the application for leave is the surest way to defeat the application for leave since the delinquent directors are likely to use every means in the book to fight back to avoid their misdeeds being laid bare.**
- **That the main issue in the derivative suit herein is to uncover the wrongs perpetrated against the company by the wrong-doing directors, recover any funds wrongly paid by the said directors and compel the applicants to hold an AGM in accordance with the law.**
- **The above prayers have been made pursuant to the discovery of the various wrongs enumerated therein by the said directors including the writing by the said directors to the Registrar of Companies seeking exemption from holding an AGM as required by law and further, that given the goings on at CMC over the past one year and the admitted dysfunctional Board of Directors, it would be a contradiction in terms, if not foolhardy, to request the same wrongdoing directors seeking for an exemption from holding an AGM to accede to such a request.**
- **It would be practically impossible for a minority shareholder to marshal the resources**

necessary to contact each of the 15,000 shareholders of CMC in order to seek to know their opinion on the derivative action, which action is to save the company and its assets from further wastage, loss and damage.

- **The directors are totally afraid of the scrutiny of the shareholders at a properly constituted AGM in that:-**

a) This suit has nothing to do with High Court Petition No. 216 of 2011 which is one of the many cases pending before this Honourable Court pertaining to this company;

b) In any event, High Court Petition No. 216 of 2011 was a petition by the majority shareholders to force CMC to convene an EGM and not an AGM;

c) It is true that the applicants have been joined in the said petition but that does not affect or change the basic nature and prayers of the said petition;

d) The pending ruling in HC Petition No.216 of 2011 is an alleged contempt of court by one of the parties and has nothing to do with the prayers sought in the derivative action herein.

- **That they have fully disclosed to this court that they have been enjoined as parties in High Court Petition No. 216 of 2011 and that at the leave stage, the court was alive to the fact of the existence of other suits.**

- **That whether indeed or not the removal of Mr. Peter Muthoka as a director of CMC was proper or valid is not an issue in the derivative action.**

- **Contrary to paragraph 16 of the supporting affidavit, the fact that the grounds in support of the application for leave are similar to issues raised in other cases does not change the facts of this case, and that in any event, the prayers in the several cases are all different in that:-**

a) HCCC 503 of 2011, CMC Holdings Ltd vs. Andy Forwarders Limited and 2 others, is a suit seeking recovery of Kshs.1.5 billion from the Defendants.

b) HCCC 149 of 2012, Andy Forwarders Limited vs. PWC & others, is a suit seeking, inter alia, for declaration that the engagement of PWC to conduct a forensic audit was null and void.

c) HCCC 147 of 2012, Daniel Maina Kabuba vs. Andy Forwarders Limited & 2 others, is a petition seeking, inter alia, for a declaration that the shares held by Andy Forwarders Limited in CMC were illegally acquired.

d) High Court Petition No. 216 of 2011 Andy Forwarders vs. CMC and 2 others, is a petition seeking inter alia, for a declaration that the decision of CMC of 11/10/2011 not to hold EGM was in breach of a statutory duty contrary to Section 132 of The Companies Act.

e) HCCC No. 909 of 2011, is a Petition by a minority seeking, inter alia, to suspend the holding of the EGM.

- **None of the suits is filed by a minority shareholder of CMC alleging fraud and mismanagement of the affairs and assets of the company by a group of directors and**

seeking requisition of an AGM in accordance with the provisions of the Companies Act, and further that this is the only action that seeks to right the wrongs perpetrated against the company by its very own directors.

- **If the applicant wishes to attack the derivative action for being an abuse of court process, then such challenge can only be made within HCCC No. 307 of 2012 and not in the present application.**

- **Contrary to paragraph 19 of the supporting affidavit, Weber Wentzel Report is not the gospel truth as it epitomizes the very management problems that beleaguer CMC in that while the investigation was initiated by Capital Markets Authority (CMA), the audit fee of Kshs. 25M ended up being paid by CMC under thoroughly unclear circumstances. That the company and its shareholders should have been saddled with such a bill smacks of mismanagement of the affairs of the company.**

- **Contrary to paragraph 20 of the supporting affidavit, the steps enumerated therein were part of the maneuvers/steps taken by the directors in their internal board wrangling aimed at kicking out the majority shareholder, Andy, and its directors from the Board and nothing more and that it was this very circumstance that led to the appointment of Webber Wentzel auditors to conduct a further audit into the affairs of CMC and that the steps taken to investigate AFLS were steps to protect the company properties and assets, when at the same time, the directors have:-**

a) Irregularly awarded a Sales and Marketing contract to a company in direct competition with the CMC core business.

b) The company pays this Agent commission on business initiated prior to the effectualization of the Commission Agreement.

c) The Directors use the company money and other assets in order to settle boardroom scores.

- **The above actions demonstrate fraud on the company shareholders and that cannot be permitted to persist. That grant of leave is not tantamount to a condemnation of a party without a hearing but simply a grant of permission to institute a suit for and on behalf of the company at its own cost.**

- **There has been no contravention of the Constitution and in any event, the suit herein is brought by some minority shareholders in an effort to protect their rightful investment in CMC and the company property and should not be viewed as a breach of the directors' constitutional rights, to hold otherwise is tantamount to saying that only the directors and not the shareholders of CMC have a right to enjoy protection of the law.**

D. PRELIMINARY OBJECTIONS TO THE APPLICATION

6. Further, the Respondent has raised a preliminary objection dated 6th June 2012, on the grounds that;

"1. The application before court is fatally defective in that theapplicants have not appeared nor appointed an advocate for them in the above matter.

2. The application dated 28/5/2012 has been brought by an advocate not duly and properly appointed.

3. Without prejudice to the foregoing, prayer 3 of the application before the court exceeds the leave granted on 22/5/2012 which was limited to a challenge to the leave of court granted on 10/5/2012. It must be struck *out limine.*

4. In any event, prayer 3 cannot be brought within the present application as indeed the same pertains to HCCC No. 307 of 2012 which is the object of the challenge in the application in the first instance.

5. The Applicants herein cannot purport to have a common interest to the extent that the application for leave (12/5/2011) was made on behalf of CMC Holdings Ltd against the wrong-doing directors of the company.

6. Other grounds to be argued at the hearing hereof."

E. THE APPLICANTS' COUNSEL'S SUBMISSIONS

7. Mr. Karori for the applicants and the company and Mr. Mbobu for the respondents filed comprehensive submissions and lists of authorities and highlighted the same. Mr. Karori started with the respondents' Preliminary Objection and submitted that the purpose of appointment of advocates is to inform the court and the other side that an advocate has been appointed. That where the other side had been put on notice that an advocate has been appointed and an application will be filed, the notice of appointment is superfluous. Further, that no prejudice will be suffered by failure to file a notice of appointment. He made reference to **Article 159 (2) (d) of the Constitution, 2010.**

8. As to whether leave to institute a derivative action could be granted ex parte, Mr. Karori submitted that **Rule 3 of The Companies (High Court) Rules** imports the **Civil Procedure Rules.** He further made reference to **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** which provides that no motion should be brought without notice of the other party.

9. Further, Counsel submitted that the court was faced with a Miscellaneous Cause whose life ended upon making an order for grant of the leave. He submitted that leave stage is intended to enable the court determine whether the minority shareholders have *locus standi* to commence a derivative action on the basis of the allegations in their pleadings. That can only be established if the plaint is filed together with the application for leave, which was not done here. In addition, at the leave stage the court has to make a determination as to whether the minority shareholders have demonstrated a prima facie case against the wrong doing directors to warrant institution of a derivative action. In his view, all the parties must be heard before that determination is made.

10. Mr. Karori submitted that that where an application ought to be made *ex parte*, the law so states, for example in Judicial Review applications and contempt applications, and that there was no rule that applications to commence derivative proceedings be commenced ex parte. He cited the authorities of **DADANI vs. MANJI & 3 OTHERS [2004] KLR 94** and **AGIP (NIGERIA) LIMITED v. AGIP INTERNATIONAL & OTHERS, SC No. 351 of 2002.** I will revert to the holdings in these cases later.

11. He further submitted that the application has to be heard *inter partes* and that when the plaintiffs came to court *ex parte,* they did not make full disclosure of all material facts.

12. With regard to conflict of interest on the part of his firm, he submitted that the company and the directors are aggrieved by the *ex parte* grant of leave and that the parties he represents have consented to his acting for both the directors and the company.

F. THE RESPONDENTS' COUNSEL'S SUBMISSIONS

13. Mr. Mbobu for the respondents opposed the application and sought to argue the Preliminary Objection aforesaid. However, he chose to abandon the objection regarding failure to file a notice of appointment of Advocates.

14. He submitted that the *ex parte* applicants were saying that the named directors were conducting the affairs of the company fraudulently, to the detriment of the company and the shareholders. He posed the question: How could one advocate act for both in the circumstances" He submitted that that is grave conflict of interests. He added that there would be a risk of embarrassment on the part of Mr. Karori if he continued to act for the two and even if the directors and the company had consented to their joint representation, Mr. Karori ought to have given them proper advice and declined instructions. He cited **HALSBURY'S LAWS OF ENGLAND**, 4th Edition, Volume 3 (1) at page 369, where the learned author states:

"A barrister ought not to accept instructions or a brief to represent two clients whose interest will or may conflict. if, after a barrister has accepted a set of instructions or a brief on behalf of more than one client, there appears to be a conflict of interest between any one or more of such clients, he may not continue to act for any such client unless all such clients consent that he should so act, and he is able to do so without embarrassment. Even if there is no conflict of interest, when a barrister has accepted a set of instructions or held a brief for any party in any proceedings, he should not accept a set of instructions or a brief on an appeal or further stage in the proceedings for any other party without obtaining the prior approval and consent of the original client."

15. With regard to the question whether the proceedings could be brought ex parte, his answer was in the affirmative. He submitted that there was no prescribed procedure for bringing a derivative action and made reference to **DADANI v. MANJI & 3 OTHERS (Supra)** where Mwera, J. referred to Joffe, V. in **MINORITY SHAREHOLDERS: LAW PRACTICE AND PROCEDURE** where the learned author states:

"There is no approved pre-action protocol in relation to derivative claims."

The learned author states that only in cases of extreme urgency is a claimant advised to set out his complaint in a letter before action because of the court's wide discretions to costs.

16. He further submitted that **Rule 3** of the **Companies (High Court Rules)** does not bar the bringing of *ex parte* proceedings. That it is a definition provision, not prescribing the manner of commencing derivative actions. He stated that the **DADANI** case was distinguishable as it had been filed by a significant shareholder, not a minority shareholder and it dealt with permission to continue with a derivative action that had already been filed. He pointed out that since the suit had already been filed, it

was incumbent upon the plaintiff to serve it upon the other party. With regard to the **AGIP (NIGERIA) LTD CASE**, he submitted that the court held that the derivative proceedings ought to have been brought *inter partes* but that was a statutory requirement of the Nigerian Statute and that there was no equivalent provision in our companies Act.

17. Mr. Mbobu further submitted on the threshold set out in **FOSS v. HARBOTTLE (1843) 67 ER 189.** The exception as to when a shareholder can bring a suit on behalf of a company are:

(i) When it is complained that the company is acting or proposing to act ultra vires

(ii) When the act complained of, though not ultra vires, could be effective only if resolved upon by more than a simple majority vote

(iii) When it is alleged that the personal rights of the plaintiff shareholder have been infringed or are about to be infringed

(iv) Where those in control of the company are perpetrating a fraud on the minority

(v) Any other case where the interests of justice require that the general rule, requiring suit by the company should be disregarded.

(See L.C.B. Gower, **The Principles of Modern Company Law**, 3rd Edition).

18. As regards to whether the issues raised in this matter are *sub judice,* Mr. Mbobu submitted that the reliefs sought had not been addressed in the other suits. He stated that they were seeking calling of an AGM by the company since the said directors had refused to subject themselves to the scrutiny of the shareholders in an AGM.

19. With regard to non-disclosure of material facts, he submitted that High Court Petition No. 216 of 2011 came to their knowledge after they had obtained leave. He further stated that if he had been aware of the case he would have disclosed that but would still have proceeded with the application for leave. He reiterated that leave was properly sought and grant of the same was not a condemnation of the other parties without a hearing.

20. He concluded by submitting that the leave should not be vacated and that proceedings in the main suit should not be stayed or struck out.

21. In reply, Mr. Karori for the applicants submitted that at the time of granting leave to commence the derivative action the court was not aware that the plaintiffs were parties in Petition No. 216 of 2011.

G. FINDINGS

22. I have carefully perused the pleadings, submissions and the preliminary objections raised herein.

23. From the exhaustive affidavits and submissions on record, the major issues that I deem appropriate for determination in this application are as follows:

(a) Whether the application to set aside the leave granted ex parte was properly brought before the court.

(b) Whether an application for leave to commence a derivative action should be brought ex parte or inter partes.

(c) Whether the respondents were entitled to grant of leave to commence the derivative actions, in other words, whether the respondents met the threshold set out in FOSS vs. HARBOTTLE.

(d) Whether the issues raised by the respondents are sub judice.

24. The 1st and 2nd preliminary objections that were raised by the counsel were subsequently abandoned and therefore they do not fall for determination. As regards grounds 3 and 4 of the preliminary objection, I agree with the respondents' advocate that the third prayer in the applicants' application exceeds the leave that was granted on 22nd May, 2012 which was limited to a challenge of the leave granted to the respondents to commence this derivative action on 10th May, 2012. That being the case, the third prayer is hereby struck out *in limine*.

25. The issue of representation of the directors and the company by Mr. Karori that was raised by Mr. Mbobu is important. An advocate employed or retained by an organization represents the organization which ordinarily acts through its duly authorized officers, in this case the directors. In this instance, Mr. Karori has been instructed to represent the company by the very same directors who are alleged to have mismanaged the company. Even though it was argued that there is likelihood of a conflict of interest, at this stage that is yet to be established since no evidence has been adduced. If at the appropriate time such evidence is availed the court will make appropriate directions in the event that Mr. Karori, of his own volition, will not opt to cease representing either the company or the directors.

26. I now proceed to consider whether the application for leave to commence the derivative action ought to have been brought ex parte or inter partes. Mr. Karori for the applicants strongly argued that the application ought to have been argued inter partes. He stated that at the leave stage the court has to be satisfied that the applicants have *locus standi* to commence the action on the basis of the allegations in their pleadings. That can only be established if the plaint is filed together with the application for leave, he added. The respondents herein, having obtained leave vide Misc. Civil Cause No. 273 of 2012, filed their plaint vide HCCC No. 307 of 2012. Mr. Karori further submitted that at the leave stage the court must be satisfied that the shareholders have a prima facie case against the alleged wrong doing directors. That determination cannot be made unless all the parties are heard, he stated. He cited the case of **DADANI vs. MANJI (Supra)** where the court held, *inter alia*:

"The permission or leave to continue with an action such as this is sought after the suit has been instituted. And substantially all that has been done. Then came the question whether the proceedings in this aspect are ex parte or ought to be after serving the other side. Again we revert to Joffe who continues:

'the claim form the application notice and written evidence in support of the application must be served on the defendant within the period within which the claim form is to be served….in any event at least 14 days before the court is to deal with the application.'

In our context the claim form is the plaint and the application is the one to continue the derivative action. May it not be forgotten that Joffe writes specifically for the English courts with their law procedures and practices. All those may not be applicable here in Kenya. So the plaint plus the application for permission to continue the derivative action must be served before the application is heard. The application has to be heard inter partes because the plaintiff has to

demonstrate a prima facie case by the company against the wrong doing directors and that the plaintiff should bring the case. The service of the plaint and the application affords an opportunity to the defendants in their own pleadings to try and knock out the intended derivative action."

27. In **AGIP (NIGERIA) LIMITED vs. AGIP PETROLEUM INTERNATIONAL & OTHERS (Supra)**, the Supreme Court of Nigeria was dealing with the question whether an application for leave to institute a derivative action ought to be brought with notice to the defendants. At Page 54 of the judgment the court held as follows:

"It is consequently imperative that a minority shareholder who intends to bring a derivative action in the name of the company must first and foremost apply for leave of court by way of originating summons on notice to the company….The hearing of the shareholders' application thereafter proceed in the manner of an ordinary interim application with both sides being afforded the opportunity to submit evidence and submission. The company must be given notice of such hearing so that the company or director may be able to appear and present their view of the shareholder's case."

28. On the other hand, Mr. Mbobu submitted that there is no statutory provision or hard and fast procedure on how an application for leave to commence a derivative action should be brought, since the concept of such an action emanates from common law. The application for leave can be heard ex parte, he stated.

29. In **DADANI vs. MANJI & 3 OTHERS (Supra),** the court rightly observed that the procedure set out by Joffe in his book is in conformity with the statutory law of England, whereas in Kenya our outdated Companies Act contains no provisions as to how a derivative action ought to be instituted. That notwithstanding, Mwera, J. stated:

"But whether we have the law or procedure covering derivative actions…...we are persuaded and inclined to adopt and follow the English courts procedures when derivative actions come calling."

The learned judge came to the conclusion that:

"The proper way to lay a derivative action is to begin with filing the suit, then following it with an application to be served along with the plaint, followed by the court hearing and determining whether the plaintiff should continue with the action."

30.In the above cited case, the plaintiff had filed an ex parte application seeking leave to prosecute a derivative action and the leave had been granted. The company then filed an application to set aside the ex parte orders granting leave to institute the derivative action. It argued that leave must precede the instituting of a derivative action and that had not been the case since the plaint was filed together with the application for leave. On the other hand, the plaintiff's counsel argued that the application that had been filed was for the court to allow him to continue with the derivative suit and not to file it.

31. Although Mwera, J. was convinced that the application seeking leave (or permission to continue) ought to have been argued inter partes following the practice in England, considering all the circumstances of the case he declined to set aside the ex parte orders. The judge observed:

"The hearing base of a derivative action is cemented in equity. Much as principles, maxims

and rules of equity reign it is never in doubt that the ancient basis of discretion underlies them all."

The reference to the procedure of instituting derivative actions as quoted by Mwera, J., relying on the writing of Joffe was before the amendment to the **Companies Act 2006** of the United Kingdom which has made provisions for instituting derivative claims.

32. Currently, the **Companies Act 2006 (UK)** specifically provides for leave before commencement of derivative actions. This qualification of the proceedings for derivative actions under the **2006 Companies Act** led to a review and amendment of the **English Civil Procedure Rules** with the result that an application for leave is now to be made ex parte. The application does not involve the defendants at that stage. The defendants are only heard after the determination of application for leave and where the court finds that the evidence filed by the applicant in support of the application for leave discloses a prima facie case for giving leave, only then will the court order the company be served and give directions as to the evidence to be provided by the company.

33. In the English case of **PRUDENTIAL ASSURANCE COMPANY LIMITED vs. NEWMAN INDUSTRIES LIMITED (NO. 2) [1982] Ch.2004** at pages 221 -222, the Court of Appeal, with regard to granting of leave prior to the **2006 Companies Act** stated that:

"….the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in FOSS vs. HARBOTTLE."

34. In the English case of **ALEXANDER MARSHALL WISHART vs CASTLECROFT SECURITIES LTD and OTHERS [2009 CSIH 65]** the court set out the procedure of commencing a derivative action under the **Companies Act 2006** which is as follows:

"266 Requirement for leave and notice

(1) Derivative proceedings may be raised by a member of a company only with the leave of the court.

(2) An application for leave must-

(a) specify the cause of action, and

(b) summarise the facts on which the derivative proceedings are to be based.

(3) If it appears to the court that the application and the evidence produced by the applicant in support of it do not disclose a *prima facie* case for granting it, the court-

(a) must refuse the application, and

(b) may make any consequential order it considers appropriate.

(4) If the application is not refused under subsection (3)-

(a) the applicant must serve the application on the company,

(b) the court-

(i) may make an order requiring evidence to be produced by the company, and

(ii) may adjourn the proceedings on the application to enable the evidence to be obtained, and

(c) the company is entitled to take part in the further proceedings on the application.

(5) On hearing the application, the court may-

(a) grant the application on such terms as it thinks fit,

(b) refuse the application, or

(c) adjourn the proceedings on the application and make such order as to further procedure as it thinks fit."

35. The procedure for commencing derivative actions set out in **DADANI v. MANJI & 3 OTHERS (Supra)**, in my view, can only be insisted on in Kenya if our Companies Act had such peremptory provisions but that is not the case. In the circumstances, the long standing practice, and which I find reasonable, has always been that before a derivative action is filed, the applicant brings to court an ex parte application for leave, supported by a detailed affidavit so as to demonstrate that he has *locus standi* to institute such an action and that he has a prima facie case. In so doing, the applicant must satisfy the court that the company is entitled to the intended relief and that the action falls within the threshold of the exceptions to the rule in **FOSS vs. HARBOTTLE**.

36. If the court is so satisfied and grants leave, then the suit is filed. In my view, if one were to first file the suit and then follow with an application for permission to continue with the derivative action, if the court is not satisfied that the applicant has *locus standi* and/or *prima facie* case and therefore declines to grant the permission, the applicant will have wasted resources in filing the suit.

37. Once leave has been granted, the plaint should then be filed in the same court file and must accord with the leave granted. The plaint together with a copy of the application for leave will be served upon the company and/or the alleged wrong doing directors, who may choose either to challenge the grant of the leave by way of an application or file a statement of defence. Since the plaintiff is suing in a representative capacity on behalf of himself and all the other members of the company other than the ones who may already be involved in the suit, it is necessary that all the other shareholders are notified of the suit. An application can be made at this stage under **Order 1 rule 8** of the **Civil Procedure Rules** for the court to give appropriate directions as to the mode of service/notification of the other shareholders.

38. It should be borne in mind that in derivative suits the applicant usually alleges that some ills have been or are being committed by some directors against the company and if the application for leave were to be served and argued inter partes, the directors are likely to use every means available to frustrate, delay or defeat such an application and the company may continue to suffer loss.

39. The case of **AGIP (NIGERIA LIMTIED v. AGIP PETROLEUM INTERNATIONAL & OTHERS (Supra)** which was cited by Mr. Karori is distinguishable from the present case simply because in Nigeria the **COMPANY AND ALLIED MATTERS ACT** specifically stipulates the procedure for commencement and prosecution of derivative actions. **Section 303** of that **Act** states:

"Subject to the provisions of Section (2) of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company".

40.I think time has come to enact a new Companies Act which will, inter alia, shed light on all the grey areas of company law practice, including derivative claims. But before that is done, our courts cannot adopt wholesome the practices in other jurisdictions such as England and Nigeria which have statutory provisions laying down the procedure for instituting derivative actions.

41. In the application for leave that was made by the respondents herein, the court, being satisfied that the respondents had met the threshold set out in **FOSS v. HARBOTTLE**, granted leave to commence the derivative suit.

42. Grant of such leave cannot amount to condemnation of the directors unheard. They will bring all their defences and the court will determine the matter accordingly.

43. Billionaires and millionaires, who are usually the majority shareholders in public quoted companies as well as the middle class and people of meager income, usually the minority shareholders in such companies, are all equal in the eyes of the law and must therefore be treated alike in legal proceedings. Courts should be slow in driving out minority shareholders from the seat of justice when they are questioning the manner in which directors of a company are running its affairs.

44. The fact that the plaint herein was filed in a different court file from the one where leave was granted cannot *per se* invalidate the suit. That is a procedural issue and **Article 159 (2) (d)** of the **Constitution of Kenya, 2010** enjoins the court to dispense justice without undue regard to procedural technicalities.

45. The last issue for determination is whether the issues raised by the respondents herein are sub judice. I have looked at all the other suits filed either by the company or against the company and its directors or some of them and there is none that is specifically dealing with the law regarding holding of an Annual General Meeting (AGM) and other specified wrongs alleged to have been done by the directors. High Court Petition No. 216 of 2011 is a petition by a majority shareholders seeking to convene an Extraordinary General Meeting (EGM). The simple and straight forward answer is that the issues raised herein are not sngaib judice. There may be some similarities between this case and some of the other cases but I believe further directions can be given as to how the various matters will be handled.

46. In conclusion, I find no merit in this application and dismiss the same with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2012.

D. MUSINGA

JUDGE

In the presence of:

Muriithi – Court Clerk

Miss Ondari for Mr. Karori for the Applicant

Mr. Mbobu for the Respondent