



**Maina & another v Maina & 2 others (Environment & Land Case E462 of 2024) [2025] KEELC 4511 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 4511 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E462 OF 2024**

**JG KEMEI, J  
FEBRUARY 7, 2025**

**BETWEEN**

**GEORGE KIBUKU MAINA ..... 1<sup>ST</sup> PLAINTIFF  
AVIATOR INN (K) LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ROBERT WAHOME MAINA ..... 1<sup>ST</sup> DEFENDANT  
ELLIZABETH WAITHERA MAINA ..... 2<sup>ND</sup> DEFENDANT  
PATRICIA NYAWIRA MAINA (SUED AS ADMINISTRATORS OF THE  
ESTATE OF THE LATE JAMES MAINA MUNUHE) ..... 3<sup>RD</sup> DEFENDANT**

*(In respect of the Applicants’ Notice of Motion dated 12/11/2024  
and the Defendants’ Notice of Preliminary Objection dated 31/1/24)*

**RULING**

1. The Applicants filed this suit vide the Complaint dated 12/11/24 seeking several reliefs against the Defendants. Together with the Complaint, the Applicants filed the Notice of Motion of even date seeking a temporary injunction to restrain the Respondents by themselves, servants, agents, or assigns from selling, disposing of, or in any way alienating, transferring or dealing or in any way interfering with the Plaintiff’s interest in Nairobi/Block 1X5/6XX2; Nairobi/Block 1X5/6XX8; Nairobi/Block 1X5/6XX7; Nairobi/Block 106/6XX3; and; Title Block Number 1X5/6XX6 and Nairobi/ Block 1X5/ 6XX9 (suit lands). The Applicants also pray for costs of the application.
2. The application was supported by the affidavit of George Kibuku Maina sworn on even date. George Kibuku Maina (George) described himself in the affidavit as a Director of the 2<sup>nd</sup> Applicant (the Company) and a Cousin to the Defendants. The Applicants’ case against the Respondents as disclosed in the said affidavit is that, the Defendants’ father, the late James Maina Munuhe (James) approached



him with a business proposal to establish a hotel and restaurant. The Partnership was to be undertaken under the deceased's existing company, the 2nd Applicant herein. The project was estimated to cost Kshs, 32, 000,000/= and the deponent was to make the initial contribution of Kshs,15, 000,000/= equivalent to 40% of the shareholding in the Company as captured in a Shareholders Agreement dated 10/3/2015.

3. The Deponent avers that the deceased's share capital contribution was by way of assignment of his interest in the suit lands then represented in the share Certificates (plot numbers) held in Embakasi Ranching Company Limited namely Plot Nos. -9395, P-9403, P-9400, P-9072, V- 570 and P-V571. He further states that vide the Addendum to the Shareholders Agreement, he purchased additional 10 (ten) ordinary shares raising his shareholding to 50% in the Company.
4. In fulfillment of his obligation, the deponent avers that he made a total capital contribution of Kshs. 16, 000,000/=. He avers that, since the Share Certificates were in the name of the deceased, Embakasi Ranching Co. Ltd processed the titles of the said plots in the personal names of the deceased. He contends that pursuant to the Shareholding Agreements, a constructive trust arose in favour of the Company. That unfortunately, the deceased passed away before executing vesting instruments in favour of the Company as stipulated in the agreement.
5. The Applicant decries the action of the Respondents in petitioning for succession despite their knowledge that James held the plots in trust for the 2<sup>nd</sup> Applicant.

#### **The Respondents' Preliminary Objection and Replying Affidavit.**

6. The application was opposed by the Respondents through a Notice of Preliminary Objection dated 3/12/24 and a replying affidavit sworn by Patricia Nyawira Maina on 4/12/24. In their objection, the Respondents contend that the suit and the application be struck out on the grounds that;
  - a. The First Applicant has no locus to institute this suit as a shareholder /director of the 2nd Applicant as he can only institute a derivative suit which leave must be granted by the court under the provisions of Section 238, 239 and 240 of the [Companies Act](#), 2015.
  - b. To the extent that no leave was sought by the 1st Applicant to institute and continue this suit as a derivative suit, this Honourable Court lacks Jurisdiction to hear and determine the application and the suit;
  - c. That this suit is not authorized and is incapable of ratification noting that the only one shareholder/director remains and cannot form quorum to authorize institution of a suit and appointment of advocate and the only recourse was the provisions of Section 280 of the [Companies Act](#);
  - d. That to the extent that the 1st Applicant did not invoke the provisions of Section 280 of the [Companies Act](#), this Honourable Court has no jurisdiction to hear and determine this suit noting it is a nullity *ab-initio*.
7. The Respondents in their Replying Affidavit, contend that the suit properties were registered in the name of their father on 16/12/16 before his demise and without any trusts; the agreements were brought to their attention too late after they had obtained the letters of representation of the estate of James; the authenticity of the Agreements is in question hence the need to subject them to forensic examination at the opportune time; the listed plots in the Agreement are different from the titles hence lack of any nexus between the plot Numbers and the titles; Titles were issued in 2020 and not in 2016 as alleged; That James run and managed a hotel called Aerotropolis Hotel as can be attested by the



licenses and not the 2nd Plaintiff's name as alleged; the applicant has not demonstrated that he made any payments as alleged.

8. All in all the deponent contended that the 1st Applicant has not proved a prima facie case and secondly that the Applicant's claim has been quantified hence they can be compensated by way of damages.

### **The Applicants' Supplementary Affidavit**

9. In answer to the averments contained in the Replying Affidavit, the Applicants avowed that whereas it is true that titles were initially issued in favour of the deceased, it was a term of the Agreement that the titles would later be transferred to the Company in accordance with the Shareholders Agreement dated 10/3/2015. That the Shareholder's Agreement of 10/12/25 vested the properties to the company as part of the initial capital contribution for the hotel project. That James held them in trust for the 2<sup>nd</sup> Applicant.
10. In reference to the sum of Kshs. 12, 800,000/=, the deponent avers that the deceased expressly acknowledged in Clause 5.3 of the Shareholder's Agreement receipt of the said sum as well as a further Kshs. 2,200,000/= as the 1st Applicant's capital contribution.
11. In response to the assertion that there is no nexus between the plots listed in the Shareholders' Agreement and the title deeds, the Applicant has annexed documents showing the plot allotment certificates as well as the verification information documents linking the plot Numbers to the Land reference Numbers issued by Embakasi Ranching Company Ltd together with the Supporting survey documents used for the processing of the Certificate of Titles. It is further averred that in any event the Respondents have not presented any evidence disputing that the properties were indeed allocated by Embakasi Ranching Company Ltd.
12. With regards to the argument that the deceased operated a hotel known as Aerotropolis Lodge Limited, the deponent avers that the hotel managed by the deceased is immaterial in view of the mutual agreement stated in the Shareholders' Agreement. That at Clause 5.1, the deceased acknowledges his contribution and the fact that the properties became company assets.

### **The Written Submissions.**

13. The Preliminary objection and the application were canvassed by way of written submissions. The Plaintiff/Applicants' submissions are dated 23/11/2025 while the Defendant/ Respondents' submissions are dated 27/1/25. I have read and considered the respective written submissions of the parties.

### **Analysis and Determination.**

14. The key issues for determination are;
  - a. Whether the Preliminary Objection raises pure points of law and further whether the objection is merited
  - b. Whether the Applicants' application dated the 12/11/24 is merited.

### **A. Whether the Preliminary Objection raises pure points of law and whether the said objection is merited**

15. It is trite that for a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is



sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit in its entirety. See *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696.

16. The Respondents Preliminary Objection is based on the grounds that the Applicant did not file a board resolution authorizing him to institute this suit on behalf of the company. Further the Respondents contended that by dint of Sections 238, 239 and 240 of the *Companies Act* 2015, this court lacks jurisdiction to hear and determine the application and the suit herein. In addition, it was contended that the 1st Applicant lacks the *locus standi* to institute these proceedings for lack of leave of court to institute derivative action/suit.
17. The issues of jurisdiction and *locus standi* and derivative action are pure points of law which can determine the matter without having to consider the merits of the case. The objection is therefore properly before the Court.
18. The next issue is whether the objection has merit. Section 238 of the *Companies Act*, 2015 defines a derivative claim 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.”

19. The procedure is set out in Section 239 of the *Companies Act* which states as follows;

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.



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.
20. Following the enactment of the new *Companies Act*, courts in Kenya have had the occasion to determine disputes arising out of derivative actions. I will single out a few for reference. In the case of *Gbelani Metals Limited & 3 others v Elesb Gbelani Natwarlal & another* [2017] eKLR the court had this to say;
- “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.

37. 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.
  38. 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.”
21. Similarly, in the case of *Samson Mukeku Mutuku v David Kioko Musau* [2020] KEHC 6256(KLR) a derivative action was defined as;
- “A derivative action is essentially an action of the minority. It is a rule that gives remedies to minorities against the oppression of the majority on exceptional grounds. In a derivative action envisaged by this application, the conduct complained about must be one that arises from an act or omission involving negligence, breach of duty or breach of trust by a director of the company, and the plaintiff ordinarily would be the company save that the name of the company could not be used because the company is unwilling through its directors to enforce the action against the company..... A derivative claim should aver the steps taken to bring the action in the name of the company and which steps failed on account of majority action.”
22. In the case at hand, the 1<sup>st</sup> Applicant has averred that he entered into a shareholder’s agreement with the Respondents’ father for a joint project that was to be run under the 2<sup>nd</sup> Applicant company. A shareholders agreement dated the 11/3/2015, extract of the 2<sup>nd</sup> Applicants company minutes dated the 5/10/2015, addendum to the sale and purchase of shares agreement dated the 18/12/2014, transfer of shares and finally the CR 12 were adduced in the affidavit evidence. According to the CR 12 the 1<sup>st</sup> Applicant and James Maina are director and shareholder of the 2<sup>nd</sup> Applicant respectively.
23. The 1<sup>st</sup> Applicant has averred that the two shareholders made contributions into the company. He averred that he contributed Kshs 12.5 Million and James contributed the suit lands into the project and that the hotel business was to be set up on the suit lands. That the suit lands were to be transferred to the 2<sup>nd</sup> applicant but James passed away before this was accomplished.
24. Flowing from the statutory provisions and case law set out above, it is clear that the 1<sup>st</sup> Applicant is suing on his own account as a 50% shareholder of the 2<sup>nd</sup> Applicant for rights that accrued based on his cash contributions therein. Equally the 2<sup>nd</sup> Applicant being a company with power to sue and be sued has staked a claim in the suit arising from the shareholder’s agreement. The new *Company’s Act* allows for a single director and shareholder in making decisions for the company unlike the repealed Act and it cannot be argued that the 2<sup>nd</sup> Applicant is incapable of mounting the suit as it has on its own. Courts have relaxed the requirement of filing a resolution before commencing a suit and it has been held that a suit that is filed without a board resolution is not fatal.
25. Going by the CR 12 the parties holding in the company is 50% ; 50% and therefore the issue of oppression of a minority does not arise. In the instant case the Company is indeed a claimant and not a



defendant as would be expected in a derivative suit. There is no evidence led to show that the company was unwilling or unable to file suit to advert its rights.

26. It is to be noted that none of the Respondents are directors, shareholders and or internal management of the Company as at the time of the filing of this suit and therefore they cannot be said to have failed refused and or neglected to pursue to right wrongs committed against the Company.
27. In the end, the court is satisfied that to the extent that the court had to refer to evidence on record, the objection does not demonstrate a crisp point of law. Moreover, the Company is a co- claimant and not a defendant. The Company being a legal person with powers to sue and be sued, there was no need for leave to institute these proceedings and clearly this is not a derivative action and consequently the preliminary objection is unmerited on that account.
28. Whether the provisions of section 280 of the Companies Act ought to have been invoked? Section 280 of the Companies Act, 2015 provides: -
  - “(1) This section applies if for any reason it is impracticable-
    - a. To convene a meeting of the company in any manner in which meetings of that company may be convened; or
    - b. to conduct the meeting in the manner required by the articles of the company or this Act.
  2. The Court may, either on its own initiative or on the application-
    - a. of a director of the company; or
    - b. of a member of the company who would be entitled to vote at the meeting, make an order requiring a meeting to be convened, held and conducted in any manner the Court considers appropriate.
  3. If an order is made under subsection (2), the Court may give such ancillary or consequential directions as it considers appropriate.
  4. Directions given by the Court under subsection (3) may include a direction that  
one member of the company present at the meeting be regarded as constituting a quorum.
  2. A meeting convened, held and conducted in accordance with an order under this section is taken for all purposes to be a meeting of the company properly convened, held and conducted”.
29. In my view these provisions are intended to allow a company to run its affairs without any impediments as to the impracticability of convening, calling and/or conducting a general meeting in the manner prescribed by the Articles or the Act.
30. In the case at hand, the 1st Applicant avers that Article 15 (b) of the Articles of Association of the 2nd Applicant provides for a single director. That with the passing away of the 2<sup>nd</sup> Director, he has the mandate to authorize the filing of the suit via a resolution of the Company. Moreover, Courts have held that it is not mandatory to file a resolution of a company alongside with the Plaint. Courts have held that failure to file the resolution by the board of directors is not fatal to the suit as the same may be



filed any time before the suit is fixed for hearing. See the case of *Leo Investment Ltd vs Trident Insurance Company Limited* (2014) eKLR when the Court held that: -

“... such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is therefore not fatal to the suit”.

31. This court is in agreement with the above decisions. In addition, the Court finds that the 2<sup>nd</sup> Applicant is not bereft of the legal capacity to file suit and therefore the necessity of invoking the Provisions of Section 280 of the *Companies Act* was inapplicable.
32. The mere fact that the 1st Applicant did not file a resolution authorizing him to file the suit on behalf of the company is not a ground for invalidating the suit. The Resolution can be availed before trial of the suit.
33. I find that the preliminary objection dated 3/12/2024 is devoid of merit and the same is hereby dismissed with costs to the Applicants.

**B. Whether the Applicants’ application dated 12/11/24 is merited.**

34. The Applicants have sought a temporary injunction to restrain the Respondents by themselves, servants, agents, or assigns from selling, disposing of, or in any way alienating, transferring or dealing or in any way interfering with whatsoever with the suit properties pending the determination of the suit.
35. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. The Applicant ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) eKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

36. In support of the application, the Applicants have adduced the Agreement dated 10/3/15 as well as the Shareholder’s Agreement dated 10/12/2011 expressly vesting the properties to the company as part of the initial capital contribution for the hotel project. The Applicants have also adduced the application for registration of a title in which the plots listed in the agreement are indicated demonstrating the nexus between the plot numbers and the contested titles.

In my view, the Applicants have established a prima facie case.

37. Secondly, the Applicant has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted.
38. The Applicants have deposed that a Confirmation of Grant has been issued in respect of the deceased estate. A fact that the Respondents confirms to be true. What is pending is the distribution of the estate of the deceased Director. Once the properties are distributed, the beneficiaries shall be at liberty to deal with the assets as they wish including selling. This will convolute the matter and likely to introduce third parties.
39. I am satisfied that the balance of convenience tilts in granting the injunction sought.



## Orders for Disposal

40. From the foregoing analysis, I do proceed to grant the following orders: -
- a. The Preliminary Objection dated 3/12/2024s is devoid of merit and the same is hereby dismissed with costs to the Applicants.
  - b. An Order of temporary injunction is hereby issued restraining the Respondents by themselves, servants, agents, or assigns from selling, disposing of, or in any way alienating, transferring or dealing or in any way interfering with whatsoever with the Properties Titles Number Nairobi/Block 1X5/6XX2; Nairobi/Bock 1X5/6XX8; Nairobi/Block 1X5/6XX7; Nairobi/Block 106/6XX3; and; Title Block Number 1X5/6XX6 and Nairobi/ Block 1X5/ 6XX9 pending the hearing and determination of this suit.
  - c. Costs of the application in the cause
41. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI JUDGE**

Delivered in Open Court in the Presence of:

Ms. Muthoni for plaintiffs

No appearance for the Defendants

Court Assistant - Yvette

