



**Ojiambo & another v Embakasi Ranching Company Limited & 3 others;  
Mutuku (Intended Interested Party) (Environment and Land Case Civil  
Suit 7 of 2022) [2025] KEELC 6018 (KLR) (16 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6018 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE CIVIL SUIT 7 OF 2022  
AY KOROSS, J  
SEPTEMBER 16, 2025**

**BETWEEN**

**PETER XAVIER INDINDI OJIAMBO ..... 1<sup>ST</sup> PLAINTIFF**

**JAMES SIMPSON SAKA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EMBAKASI RANCHING COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KIPKAI ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**BEATRICE NGINA MUTUKU ..... INTENDED INTERESTED PARTY**

**RULING**

1. This ruling seeks to determine two notices of motion, one filed by the 2<sup>nd</sup> defendant, dated 10/11/2024 and the other filed by the intended interested party (IP), dated 21/11/2024.

**Motion dated 10/11/2024**

2. In this particular motion, the 2<sup>nd</sup> defendant seeks the following reliefs: -
  - a. Spent.
  - b. That the plaintiffs' plaint dated 28/01/2022, together with its accompanying documents, be struck out in their entirety.



- c. That the costs of this motion and the suit be awarded to the 2<sup>nd</sup> defendant.
3. The motion is premised on the grounds listed on the face thereof and Jane Nyaboke's supporting affidavit, sworn on 10/11/2024. A summary of the grounds in support of the motion are: a) from the year 1999, the 2<sup>nd</sup> defendant was and is the legal and/or beneficial owner of land parcel no. L.R no 12715/627 (suit property), b) the plaintiff fundamentally fails to disclose a reasonable cause of action against the 2<sup>nd</sup> defendant as it is a bona fide purchaser for value who acquired the suit property through a valid claim of ownership from Cardinal Properties Ltd, who in turn had acquired it from the 1<sup>st</sup> defendant; and
4. C) The plaintiff raises issues of internal wrangles and not one that lays a claim on the property itself, d) the plaintiff is scandalous, frivolous, and vexatious, e) the filing of this suit represents a gross abuse of the court process that cannot be countenanced, f) the respondent is attempting to bypass the protections afforded by the indoor management rule and the procedures for derivative actions by recasting what is essentially a corporate governance dispute as a land matter; and lastly, f) the plaintiff fails to plead any facts that would defeat these statutory and common law protections, making it an abuse of process.
5. The motion is opposed vide replying affidavit sworn by the 1<sup>st</sup> plaintiff on 24/01/2025. Briefly, he contended that: a) the motion is an abuse of the court process and thus frivolous and vexatious, b) the signature in the supporting affidavit is markedly different from the one in the 2<sup>nd</sup> defendant's defence, counterclaim and witness statements, c) the annexures were not properly marked and filed without leave of the court, lastly, d) the 2<sup>nd</sup> defendant filed its defence and counterclaim, thus showing that the plaintiff was valid and raised litigable issues.

#### **Motion dated 21/11/2024**

6. This is filed by the intended IP and the orders sought are: -
- a. Spent.
- b. That the honourable court does allow the intended IP to be joined as a party to this suit.
- c. That upon being joined, the intended IP be granted leave to file her defence and counterclaim.
- d. That the orders granted to the 2<sup>nd</sup> defendant by the court on 8/08/2023 be vacated together with its consequential effects.
- e. That pending the hearing and determination of the main suit, an order does issue that the defendants be barred from entering, trespassing and evicting the intended IP from the suit property.
- f. That the cost of this motion be provided for.
7. The motion is premised on the grounds recorded on the face thereof and the intended IP's supporting affidavit, sworn on 21/11/2024. Concisely, she avers that: a) she is the registered legal and absolute owner of the suit property, having been gifted the same by her late father, Reuben Mutuku Kiva (deceased), b) the parties to the suit are not known to her, and the fighting over the suit property has led to the issuance of court orders which adversely affect her; and c) since she has an interest in the suit property, it is only fair and just that she be joined in the suit as a defendant and be granted leave to file her counterclaim.
8. The 1<sup>st</sup> defendant opposed this motion by a replying affidavit deposited by Gabriel Gitonga on 29/01/2025. In short, he contended,



- a) on 3/11/1980, the 1<sup>st</sup> defendant became a member of Syokimau Farm Limited and acquired 10 shares ranging from nos. 451 to 460 under receipt no. 46, and a share certificate was issued,
  - b) subsequently, the 1<sup>st</sup> defendant was provisionally allocated plot number 343 at the farm and received a plot allotment letter dated 6/08/1981;
  - C) Following the subdivision of the farm and registration of the subdivided plots, the allocated plot was identified as the suit property, and the title deed originally issued to Syokimau Farm Limited was transferred to the 1<sup>st</sup> defendant on 23/11/1990 and since then, the plot has remained the property of the 1<sup>st</sup> defendant and has never been allocated and/or transferred to any individual or entity.
  - D) Therefore, it is the 1<sup>st</sup> defendant's position that all the parties in this suit claiming to hold any interest of whatsoever nature in the suit property are misleading the court, e) the inclusion of the intended IP into the instant suit is bound to cause a severe change in the trajectory of the suit and to change the cause of action thus altering the nature of the existing suit, lastly, f) the intended IP has not demonstrated a prima facie case with high chances of success as alleged and joining her to the suit at this stage would unnecessarily delay the proceedings as the main suit is already at an advanced stage.
9. The motion was also opposed by the 2<sup>nd</sup> defendant, who in summary asserts thus:
- a) the intended IP has failed to demonstrate any direct, substantial or legally enforceable interest over the suit property or that her presence would effectively complete adjudication of all issues pertaining to the suit property,
  - b) the inclusion of the intended IP would change the nature of the suit; and
  - C) It is the registered owner of the suit property, and the orders issued by this court on 1/02/2023 were intended to preserve it,
  - d) the intended IP has been interfering with the suit property and has even put up a perimeter wall on it,
  - e) a joinder would introduce a new cause of action and derail the proceedings and lastly,
  - f) the intended IP does not have a prima facie case with high chances of success.

### **Submissions**

10. Despite directions from the court, the parties did not file any written submissions, except the intended IP, whose written submissions dated 17/04/2025 were filed by the law firm of Ms. Musee Manyolo & Associates Advocates.

### **Issues for determination, Analysis and Determination**

11. Having carefully considered the motions, their grounds, affidavits and submissions, the following issues, which shall be handled separately, arise for determination.
- a. Whether the motion dated 10/11/2024 is merited.
  - b. Whether the motion dated 21/11/2024 is merited.



### Whether the motion dated 10/11/2024 is merited.

12. As settled in the decision of *Salomon vs. Salomon Company Limited* [1895-99] All ER 33, a company acquires its own property, rights and liabilities separate from its members upon incorporation and is principally a distinct entity from its members. Therefore, the proper plaintiff in any proceedings or action in respect of a wrong done to the company is the company itself. In this case, it arises that the proper plaintiff should be the 1<sup>st</sup> defendant.
13. However, the plaintiffs have brought a lawsuit in their own names, apparently as representatives of the 1<sup>st</sup> defendant. In essence, they have filed a derivative claim. As established in *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] KEHC 4629 (KLR), derivative actions enable shareholders, in this case the plaintiffs, to sue on behalf of the corporation, often against an insider (such as a director, majority shareholder, or other officer) or a third party whose actions have allegedly harmed the company. This is a form of accountability action to obtain redress against all wrongdoers, through a representative suit brought by a shareholder on the corporation's behalf: see *Wallersteiner v Moir (No.2)* [1975] 1 All ER 849, as cited in *Ghelani Metals Limited (Supra)*.
14. On matters of law, Sections 238, 239, 241, and 243 of the *Companies Act*, which address derivative suits, guide this court. Through these provisions, the court exercises judicial discretion in accepting such suits. Some of the factors typically considered by the court were highlighted in the decision of *Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u* [2016] KEHC 3032 (KLR), and they are as follows: -

“In making that determination, the Court is guided by the considerations stipulated in section 241(2) of the *Companies Act*. Among other things, the Court considers the following factors:

- a. Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors' challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;
- b. Whether the Plaintiff has made any efforts to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;
- c. Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of *Recchion v Kirby* 637 F. Supp. 1309 (W.D. Pa. 1986), for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;
- d. Whether the Plaintiff is acting in good faith;



- e. Whether the action taken by the Plaintiff is consistent with one a faithful director acting in adherence to the duty to promote the success of the company would take;
  - f. The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company – is likely to be authorised or ratified by the company in the future; and
  - g. Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative action.”
15. Furthermore, the decision of Ghelani Metals Limited (Supra) stated that, in addition to the principles stated in Ngumi (Supra), the following factors should also be taken into consideration: -
- “ 53. Firstly, the court should always also consider the seriousness of the alleged wrong-doing by conducting a cost-benefit analysis of the intended action. The court ought to satisfy itself that the litigation will not disrupt the company business and additionally that the cost of the intended litigation is not burdensome to the company. Likewise the court ought to reflect on the reputational damage, if any, the company is likely to suffer in the event the claim fails.
  - 54. Secondly, I would hasten to add that of critical import is also the factor that the derivative suit ought to be allowed if it is in best interest of the company. This factor should be of the highest concern especially when ss. 143 & 144 of the Act are read into context. Both sections advocate the duty of the director to act in a way as to promote the success of the company for the benefit of its members.
  - 55. Finally, the existence of alternative remedies and the view of independent members of the company where the court has invited such evidence pursuant to s.239 (4) & (5) of the Act ought to also be considered before granting or disallowing an application for permission to continue a derivative suit: see also s. 241(3) of the Act.”
16. The question that suffices is whether the plaintiffs should be allowed to continue with this suit. For starters, they never sought leave to file a derivative suit, whether before the institution of this suit or thereafter. Further, they have not presented any evidence demonstrating that they made a demand to the board of directors of the 1<sup>st</sup> defendant or that such a demand is excused, and they have also not sued any of the directors of the 1<sup>st</sup> defendant, whether present or past, for wrongs allegedly committed.
17. Moreover, though the plaintiffs appear to act in good faith, they do not adequately represent the interests of other shareholders but those of their own as occupants of the suit property. Additionally, the reliefs sought do not flow directly from the provisions of Sections 238, 239, 241 and 243 of the *Companies Act*. In the circumstances and having failed to meet the threshold, this court finds that the suit is incompetent and should not be permitted to proceed further. Consequently, the motion dated 10/11/2024 is allowed. In consequence, this outcome renders a determination of the 2<sup>nd</sup> motion unnecessary.
18. Before this court concludes, it is observed that the 1<sup>st</sup>, 2<sup>nd</sup>, and intended IP allegedly hold title documents to the suit property. In other words, the suit property ostensibly has three title documents, each separately held by three persons. At this point in time, the legitimate owner has not been



ascertained by the court. Notably, had the plaintiffs raised their concerns with the 1<sup>st</sup> defendant, it might have been unnecessary for them to file suit, as it is feasible that the 1<sup>st</sup> defendant would have appropriately brought this matter before the court. Be that as it may, liberty is granted to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the intended IP party to file suits over the suit property.

19. In the end, and in issuing the final disposal orders, the entire suit is hereby struck out with each party bearing their respective costs of the suit and motions. This file is hereby effectively marked as closed.

Orders accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**16. 09.2025**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM**

In the presence of;

Mr Isaac Aloo for plaintiffs.

M/s Munari holding brief for Mr Mabeya for 2<sup>nd</sup> defendant.

Mr Ouma holding brief for Mayoloo for Intended interested party.

M/s Jilo holding brief for Mr Kithii for 1<sup>st</sup> defendant.

Ms Kanja- Court Assistant.

