



Ilmi Investments (K) Ltd v Saini & 4 others; Greenfiled Developers Ltd (Affected Company) (Commercial Case E519 of 2024) [2025] KEHC 4716 (KLR) (Commercial and Tax) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E519 OF 2024**

**PM MULWA, J
APRIL 10, 2025**

BETWEEN

ILMI INVESTMENTS (K) LTD APPLICANT

AND

JAYESH SAINI 1ST RESPONDENT

BLISS GVS PHARMA LIMITED 2ND RESPONDENT

HASS CONSULT LIMITED 3RD RESPONDENT

SIGNATURE DEV'T COMPANY 4TH RESPONDENT

LIFECARE HOSPITALS (K) LTD 5TH RESPONDENT

AND

GREENFILED DEVELOPERS LTD AFFECTED COMPANY

RULING

1. The Plaintiff instituted the present suit against the Defendants through a plaint dated 28th August 2024, seeking various reliefs, including a refund of the money invested by the Plaintiff in the company.
2. Alongside the suit, the Plaintiff filed a Notice of Motion of even date under Sections 238 and 239 of the *Companies Act*, Order 51 Rule 1 of the Civil Procedure Rules, and Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*. In the application, the Plaintiff sought temporary injunctive orders restraining the Defendants from further charging, alienating, and/or disposing of the property known as Land Reference No. 209/8760, situated in Upper Hill, pending the hearing and determination of the suit.



The Plaintiff also sought leave to institute a derivative suit on behalf of Greenfield Developers Limited against the actions of the Defendants.

3. The application is supported by the annexed affidavit of Adan Ilmi, who avers that the majority shareholders have misappropriated funds intended for development to the detriment of the company, diverting company resources for their personal benefit. Consequently, the project was halted, and after ten years, there remains no hope of its revival. Due to the Defendants' actions, the company continues to suffer losses and incur expenses, placing the minority shareholders at risk of losing their investments. It is further contended that the 1st and 2nd Defendants' resignation as directors and the subsequent transfer of their shares to the 5th Defendant were calculated moves intended to cripple the company's operations and enable the majority shareholders to continue misusing company resources.
4. In response, the 1st Defendant, Jayesh Saini, who is also a director of the 2nd and 5th Defendants, filed a replying affidavit sworn on 13th November 2024. He contends that the Plaintiff's application is malicious, frivolous, vexatious, and an abuse of the court process, as it fails to meet the legal threshold for the grant of leave to institute a derivative action. He asserts that the orders sought exceed the jurisdiction of the court and that the Plaintiff has failed to establish a prima facie case. Furthermore, he argues that Greenfield Developers Limited has not suffered any loss warranting a derivative suit, and no complaints have been lodged with the Board of Directors by any shareholder.
5. The 3rd and 4th Defendants, through their director, Farhana Hassanali, filed a replying affidavit sworn on 21st November 2024. While they do not oppose the application, they contend that they have been wrongly sued, as they are merely minority shareholders in the affected company with minimal influence over its affairs.
6. Farhana Hassanali states that the 1st Defendant tasked the 3rd Defendant with sourcing investors for the Montave Project through a special purpose vehicle, namely the Affected Party (Company). All outsourced investors were to acquire shares in the Affected Company through the 4th Defendant. In fulfilling this role, the 3rd Defendant secured an investment of Kshs. 360 million, which was used to settle part of the loan facility from Diamond Trust Bank, whereas the Plaintiff invested Kshs. 200 million.
7. It is further asserted that the 1st Defendant has since resigned and is no longer a director of the Affected Company. Additionally, the shares held by the 1st and 2nd Defendants have been transferred to the 5th Defendant without the participation or knowledge of the 3rd and 4th Defendants. Given these circumstances, the 3rd and 4th Defendants argue that, as minority shareholders, they have also been adversely affected by the recent developments in the Affected Company and should not have been sued.
8. Subsequently, the 1st, 2nd and 5th Defendants filed a Notice of Preliminary Objection dated 27th September 2024, challenging the Plaintiff's locus standi in bringing the current application and the court's jurisdiction to grant the prayers sought. The Defendants argue that the Plaintiff lacks proper authority to represent the company, as it is neither a shareholder nor a person duly authorized by the company to initiate such proceedings. They contend that if the Plaintiff has been injured by the actions of any shareholder or director of the affected company, it should seek recourse through other legal channels, rather than resorting to a derivative suit. Furthermore, the Defendants assert that the prayer for the refund of the Plaintiff's investment would cripple the company's operations and is a clear indication that the Plaintiff's suit is driven by personal and selfish interests.
9. The application and the Notice of Preliminary Objection were heard through written submissions. The Plaintiff's submissions are dated 8th November 2024, while the 1st, 2nd and 5th Defendants'



submissions are dated 14th February 2024. The 3rd and 4th Defendants' submissions are dated 10th February 2025.

10. I have considered the grounds laid out in the application and the notice of preliminary objection, the affidavits filed for and against and the contending written submissions and authorities relied upon.

11. I will first deal with the notice of Preliminary objection, which challenges the jurisdiction of this court and the Plaintiff's locus standi to move this court. In the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 the court analyzed the definition of a preliminary objection in the following manner:

“A Preliminary Objection is in the nature of what used to be a 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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

12. The 1st, 2nd and 3rd Defendants raised arguments regarding shareholding. However, determining shareholding often involves factual disputes that require evidence, such as company records, agreements or witness testimonies. Given that an interlocutory stage primarily addresses temporary or procedural matters before a full trial, resolving a complex factual issue like shareholding at this stage would be premature. Therefore, I find that the preliminary objection fails to meet the required threshold, as it should be determined purely on a point of law. Since the issue of shareholding necessitates further scrutiny and cannot be settled as a pure point of law, the preliminary objection is dismissed.

13. I will now address whether the application is merited. The instant application seeking a derivative suit has been brought under the provisions of Section 238 of the [Companies Act](#) which provides 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.”
14. Section 238 of the *Companies Act* provides that a shareholder may institute a derivative action on behalf of the company where the directors have engaged in conduct that is prejudicial to the interests of the company. However, the right to bring such an action is not automatic. A shareholder must first establish legal standing by demonstrating that they hold shares in the company or have been duly authorized to bring the claim. This requirement serves as a safeguard against frivolous or vexatious litigation and ensures that only those with a legitimate interest in the company’s affairs may invoke the court’s jurisdiction to seek redress on its behalf.
15. It is a well-established principle that the exceptions to the rule in *Foss v Harbottle* exist primarily for the protection of minority shareholders. This is because, as a general rule, the majority shareholders exercise control over the company and direct its affairs. Without such exceptions, minority shareholders would be left without recourse where the majority acts in an oppressive, fraudulent or prejudicial manner. The Court of Appeal in *Sultan Hasham Lalji & 2 Others v Ahmed Hasham Lalji & 4 Others* [2014] eKLR reaffirmed this principle, underscoring that minority shareholders must be afforded protection where the company’s affairs are being conducted in a manner that is oppressive or unfairly prejudicial to them.
16. In the present case, the claim has been brought directly by the Plaintiff, a company incorporated under the *Companies Act*, rather than by an individual shareholder on its behalf. The Plaintiff alleges that the Defendants’ actions amount to a breach of contractual and statutory duties, which has caused loss and damage to the company. Notably, evidence has been adduced to show that the Plaintiff raised concerns with the majority shareholders regarding the impugned actions, yet no remedial action was taken. This inaction by the majority shareholders raises the question of whether a derivative action should have been pursued instead.
17. The issue of whether the 3rd and 4th Defendants have been wrongly sued as Defendants on account of their status as minority shareholders is a substantive matter that shall be determined at trial. At this interlocutory stage, making a conclusive determination on their involvement would require the court to delve into the merits of the case, which is premature and would amount to prejudging the main suit.
18. It is a well-established principle that courts should refrain from making definitive findings of fact or law at an interlocutory stage where such findings may prejudice the fair hearing of the substantive dispute. To do so would be tantamount to usurping the trial court’s mandate and undermining the right to a fair hearing.
19. Accordingly, in the interest of justice, this court deems it proper to allow the Plaintiff an opportunity to fully ventilate its case against all named Defendants. The question of whether the 3rd and 4th Defendants are properly enjoined in these proceedings shall therefore be determined upon full consideration of the evidence adduced at trial.
20. Consequently, I find that the Notice of Motion dated 28th August 2024 is merited, and proceed to issue the following orders:



- a. A temporary injunction is hereby issued restraining the Defendants from further charging, alienating, or disposing of the property known as Land Reference No. 209/8760, situated in Upper Hill, pending the hearing and determination of the suit.
- b. Leave is granted to the plaintiff to institute a derivative suit on behalf of Greenfield Developers Limited against the actions of the Defendants.
- c. Costs of the application will be in the cause

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF APRIL 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Mubea & Mr. Irungu for Plaintiff/applicant

Ms. Masara h/b for Dr. Arwa for 1st, 2nd & 5th Defendants/resps

Mr. Attika for 3rd & 4th Defendants/respondents

Court Assistant: Kadzo

