



Savannah Heights Limited & another v Seruji Limited & 8 others (Commercial Case E081 of 2023) [2025] KEHC 13149 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E081 OF 2023
MN MWANGI, J
SEPTEMBER 18, 2025**

BETWEEN

SAVANNAH HEIGHTS LIMITED APPLICANT

AND

SAVANNAH CEMENT LIMITED PLAINTIFF

AND

SERUJI LIMITED 1ST RESPONDENT

BENSON SANDE NDETA 2ND RESPONDENT

PETER MUKIZA 3RD RESPONDENT

ALLAN OFISI PAUL 4TH RESPONDENT

IGOR VISHNEVSKIY 5TH RESPONDENT

MARTIN ERIC BACHMANN 6TH RESPONDENT

YVONNE KATUSIME NDETA 7TH RESPONDENT

ABSA BANK KENYA PLC 8TH RESPONDENT

KCB BANK KENYA LIMITED 9TH RESPONDENT

RULING

1. The 1st plaintiff/applicant filed a Notice of Motion application dated 1st March 2023 pursuant to the provisions of Sections 1A, 3 & 3A of the *Civil Procedure Act*, Sections 238(1), (2)(a), (3) & (4) and 241(2) & (3) of the *Companies Act*, 2015, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and



- all other enabling provisions of the law. The 1st plaintiff prays for an order of leave to continue with this suit as a derivative claim on behalf of the 2nd plaintiff, in respect of the acts and omissions by the 1st to 7th defendants, involving fraud, negligence, breach of duty and breach of trust in their capacity as shareholders, and Directors of the 2nd plaintiff.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on 1st March 2023 by Mr. John Gachanga Kaiganaine, a Director of the 1st & 2nd plaintiffs herein. He stated that the 1st plaintiff is a minority shareholder of the 2nd plaintiff with 3,000 shares. He averred that the 1st defendant, a majority shareholder of the 2nd plaintiff with 4,500 shares dominated the 2nd plaintiff's Board by appointing 5 of 8 Directors. He claimed that the defendants obtained substantial loans from the 8th & 9th defendants without proper Board approval, endangering the company's financial position. Mr. Kaiganaine deposed that the Court appointed an interim Board including himself and Mr. Donald Kiboro Mwaura, via an order dated 22nd June 2016 in HCCC No. 170 of 2016. He confirmed that the Articles of Association remained effective for Board procedures and quorum. He asserted that this suit aims to shift repayment liability from the 2nd plaintiff, personally to the Directors in issue.
 3. Mr. Kaiganaine stated that the USD 35,000,000.00 loan was approved without notifying or involving the two interim Directors, thereby violating the 2nd plaintiff's Articles of Association on Notice and quorum, thus rendering the resolution invalid. He further stated that he and others raised concerns in letters to the 8th defendant and the Central Bank of Kenya, citing irregularities and suspected fraud. That while the 8th defendant declined to share information citing confidentiality and the complainants' lack of signatory authority, the Central Bank responded stating that the loan facility advanced to the 2nd plaintiff was based on Board resolutions dated 24th January 2018 and that due diligence had been conducted. Mr. Kaiganaine claimed that since the 2nd to 7th defendants gave a cross-undertaking in damages prepared by Oraro & Co. Advocates who also registered the charge in favour of the 8th defendant, the said defendant was aware of flaws in the 2nd plaintiff's Board resolution it relied on.
 4. He averred that between 2011 and 2014, the 2nd plaintiff obtained loans totaling approximately USD 40,500,000.00 and Kshs.549,000,000/= from the 9th defendant, all duly approved by a valid Board resolution, but in 2015 an additional USD 30,480,000.00 and Kshs.135,000,000/= loan facility was acquired without proper Board resolutions from the 2nd plaintiff, due to lack of quorum as a result of Director resignations and disputes following the 1st defendant's takeover. He noted that the 2nd plaintiff's Articles of Association required a two-thirds majority and at least five Directors for valid resolutions, but by December 2014 only three Directors remained. He asserted that this lack of quorum was admitted in HCCC No. 170 of 2016, thus the 2015 loan facility was unauthorized having been orchestrated solely by the 2nd defendant in breach of trust and fiduciary duty.
 5. In the premise, Mr. Kaiganaine claimed that the 2nd plaintiff cannot be held liable for the 2015 loan facility, and that personal liability should fall on the 2nd defendant. Mr. Kaiganaine further claimed that after the Board was reconstituted in 2016, it was dominated by wrongdoers, thus preventing any internal change. He contended that several charges and debentures were improperly created over the 2nd plaintiff's assets without valid authorization, and that documents purportedly showing Board resolutions were forged. Further, he accused the 8th & 9th defendants of negligence or complicity in issuing substantial loans without verifying the legitimacy of Board resolutions or complying with know-your-customer requirements.
 6. In opposition to the application, the 1st defendant filed Grounds of Opposition dated 26th July 2023 raising the following grounds –



- i. That the application as laid is malicious, incompetent and has not been made in good faith;
 - ii. That the application seeks that leave be granted to the applicant to file a derivative claim for and on behalf of the 2nd plaintiff of the acts and omissions by the 1st & 7th defendants which order cannot be granted noting that the Companies Act, 2015 holds the acts of Directors of a company valid notwithstanding any defects underlying the passing of their resolutions;
 - iii. That the above notwithstanding, the 1st defendant as the majority shareholder in the 2nd plaintiff confirms that there have never been any defects underlying the resolutions that are subject of this suit;
 - iv. That the grounds for the application herein clearly indicate the knowledge of the applicants of the existence of the bank facilities which is being alleged to have been negotiated without their knowledge thus have never had an issue with the same;
 - v. That flowing from the above, the filing of this application now is a clear indication of ulterior motive and lack of good faith;
 - vi. That the above application dated 1st March 2023 is an abuse of the Court process; and
 - vii. That in any case, the 2nd plaintiff is currently placed under Administration because of the non-performance of the bank facilities among others which means that this application has been overtaken by events and must fail.
7. The 2nd to 7th defendants in opposition to the application filed a Preliminary Objection dated 20th March 2023 raising the following grounds –
- i. That the suit herein is sub judice, contravening the provisions of Section 6 of the Civil Procedure Act, by raising similar issues pending before Nairobi High Court Civil Case No. E174 of 2022, Savannah Cement Limited v KCB Bank Limited & Absa Bank Limited;
 - ii. That the entire suit and issues raised therein are Res judicata, the ruling delivered in Nairobi High Court Civil Case No. E174 of 2022, Savannah Cement Limited v KCB Bank Limited & Absa Bank Limited on the 24th November 2022;
 - iii. That the High Court at Milimani/Nairobi, handling Nairobi High Court Civil Case No. E174 of 2022, Savannah Cement Limited v KCB Bank Limited & Absa Bank Limited is a Court of competent and concurrent jurisdiction capable of adjudicating all the issues as submitted before this Court by the applicant. This Court is bereft of jurisdiction to preside over and or determine a matter which is pending before another Court of such competent and concurrent jurisdiction; and
 - iv. That in the circumstances, the applicant's suit and the interlocutory orders or prayers sought thereon are sub judice, frivolous, a monumental procedural and substantive legal nullity, fatally and irredeemably incompetent, an abuse of the Court process, an afterthought, vexatious, mischievous and a proper candidate for dismissal and or striking out with costs.
8. The 2nd to 7th defendants also filed a replying affidavit sworn on 11th April 2023 by Mr. Benson Sande Ndeta, a Director and chairperson of the Board of Directors of the 2nd plaintiff. He confirmed that the 2nd plaintiff has two shareholders being the 1st defendant holding 60% of the shares and the 1st plaintiff holding 40% of the shares. He denied the 1st plaintiff's allegations and asserted that the said plaintiff was involved in prior facilities and Board resolutions, with the participation of Directors Donald Mwaura and John Kaiganaine. Mr. Ndeta averred that the 2nd plaintiff and the 8th & 9th defendants have had a



- long-standing relationship and that all facilities advanced to the 2nd plaintiff by the 8th & 9th defendants were backed by proper securities.
9. He deposed that due to financial strain, the 2nd plaintiff sought and received loan restructuring in 2021, supported by valid Board resolutions and a Court order issued in Misc. App. No. E445 of 2021 – Seruji Limited v Savannah Cement Limited & another, with the 1st plaintiff participating in those proceedings. Mr. Ndeti asserted that the *Companies Act* upholds the validity of Directors' actions despite procedural defects and that the shareholder dispute referred to by the 1st plaintiff was dismissed in 2022. He averred that in view of the HCCOMM No. E174 of 2022, this suit is sub judice.
 10. The 8th defendant in opposition to the application herein filed a replying affidavit sworn on 6th April 2023 by Ms Faith Mutuku, the 8th defendant's Head of Business Support & Recoveries. She contended that there is no basis for the 1st plaintiff to be allowed to pursue a derivative suit on behalf of the 2nd plaintiff. This is because the loan facilities advanced to the 2nd plaintiff by the 8th defendant were granted based on valid Board resolutions dated 16th October 2017 & 24th January 2018. Ms Mutuku averred that the Directors listed in the Board resolution dated 16th October 2017 were installed by a Court order based on the 2nd plaintiff's annual returns filed at the Companies' Registry. She further averred that the aforesaid loan facilities were later restructured pursuant to the 2nd plaintiff's resolutions made on 9th March 2021.
 11. She stated that the 1st plaintiff's complaints have been previously investigated by the Central Bank of Kenya and dismissed, which findings have never been legally challenged by the 1st plaintiff. Ms Mutuku contended that the 8th defendant was not legally required to investigate internal company procedures like Board notices or Director consent prior to advancing financial facilities to the 2nd plaintiff. She also contended that the indoor management rule protects third parties like the 8th defendant herein, relying on a company's apparent authority and internal resolutions. She averred that the 2nd plaintiff has already filed a suit against the 8th defendant being HCCOMM No. E174 of 2022, on the facilities advanced to it by the 8th defendant. She stated that maintaining another suit would amount to an abuse of the Court process.
 12. The 9th defendant in opposition to the instant application filed a replying affidavit sworn on 16th March 2023 by Mr. Alforanse Kisilu, the 9th defendant's Head of Special Assets. He averred that in the main suit, the plaintiffs seek to have properties known as L.R. No. 18474/227 (Original Number 18474/216/11), I.R. 130785 & Kaputiei-North/25517 partially discharged in respect of loan amounts of Kshs.30,484,333.00 and Kshs.135,371,039.00, on grounds that the 1st plaintiff was neither invited to, nor did it attend meetings at which the resolutions to borrow the said sums were passed, thus it was not involved in the borrowing of the said amounts. He contended that in as much as the 1st plaintiff admits to being only involved in all banking facilities advanced by the 9th defendant to the 2nd plaintiff between 2011 and 2014, the Board resolution dated 6th January 2015 shows that Mr. Donald Kiboro Mwaura and Mr. John Gachanga Kaiganaine were present.
 13. Mr. Kisilu asserted that in addition to a charge over the suit properties, the facilities advanced to the 2nd plaintiff were also secured by inter alia, a corporate guarantee dated 6th January 2015 for Kshs.321,618,569.00 and USD 70,979,463.00 executed by Savannah Heights Limited, a Board Resolution dated 4th June 2018 for Kshs.606,226,278.00 and USD 41,533,542.00 by Savannah Heights Limited, a supplemental letter of offer dated 4th July 2019 executed by Savannah Heights Limited, a Board Resolution of Savannah Heights Limited pursuant to the supplemental letter of offer dated 4th July 2019 and a corporate guarantee and indemnity for Kshs.3,318,925,000/= and USD 16,283,039.00 together with a supporting Board resolution pursuant to the same.



14. Mr. Kisilu stated that so as to prevent insolvency and enforcement of securities by the 9th defendant, the 2nd plaintiff requested a restructuring of the term loan, which was granted via a letter of offer dated 3rd June 2021. He further stated that a ruling by Mabeya J., delivered on 10th September 2021 in Misc. App. No. E445 of 2021 granted the 2nd plaintiff leave to conduct the meeting that led to a Board resolution approving the restructuring terms. He contended that the 1st plaintiff cannot allege the absence of a valid Board resolution to invalidate the facility. Mr. Kisilu averred that the 1st plaintiff's objection in the manner of passing Board resolutions are misplaced. Further, that under the indoor management rule, the 9th defendant was entitled to assume regularity and was not obliged to inquire into the 2nd plaintiff's internal processes.
15. The application herein was canvassed by way of written submissions. The 1st plaintiff's submissions were filed on 24th November 2024 by the law firm of Gichigo Kamangu & Associates Advocates, the 8th defendant's submissions were filed by the law firm of Walker Kontos Advocates on 17th December 2024 and the 9th defendant's submissions were filed on 16th December 2024 by the law firm of Muriu, Mungai & Co. Advocates LLP.
16. Mr. Gichigo, learned Counsel for the 1st plaintiff cited the provisions of Sections 238 & 239 of the Companies Act. He relied on the case of *Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u* [2016] eKLR and submitted that the 1st plaintiff has made out a case to warrant being granted the orders being sought. He stated that the 1st plaintiff has pleaded negligence, default, breach of duty, or breach of trust by the 2nd plaintiff's Directors, thus its case fits within the scope of Section 238(1) of the Companies Act. Counsel referred to the Court of Appeal case of *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] eKLR and stated that the 1st plaintiff has established a prima facie case to warrant being granted of the orders being sought herein. He argued that the 1st to 7th defendants caused the 2nd plaintiff to borrow substantial sums of money from the 8th & 9th defendants without valid Board resolutions.
17. It was submitted by Mr. Gichigo that Messrs John Gachanga Kaiganaine and Donald Kiboro Mwaura being Directors of the 2nd plaintiff were neither present nor notified of the meetings where the impugned Board resolutions were passed. He argued that as such, the loans advanced to the 2nd plaintiff by the 8th & 9th defendants should not be borne by the 2nd plaintiff company, but personally by the 1st to 7th defendants. Counsel asserted that the intended derivative claim serves the 2nd plaintiff's best interests and is distinct from HCCOMM No. E174 of 2024, which seeks injunctive relief against the 8th and 9th defendants, whereas this suit seeks recovery of the loans advanced to the 2nd plaintiff from the 1st to 7th defendants personally. Mr. Gichigo submitted that restructuring cannot cure the illegality of the loans in question having been obtained without valid Board resolutions. Further, that due to the 1st to 7th defendants' control over the 2nd plaintiff, a derivative claim is necessary to protect the company's interests.
18. Mr. Ogunde, learned Counsel for the 8th defendant relied on the case of *RM Patel & Partners v Rift Valley Agricultural Contractors Limited & another* [2021] eKLR and argued that the 1st plaintiff has failed to establish a prima facie case as required under Sections 238 to 241 of the Companies Act. He contended that the proposed derivative claim is flawed, as it hinges on the allegation that two Directors were not present or notified of meetings approving the loans, an argument that violates the indoor management rule, which protects third parties acting with companies in good faith. Mr. Ogunde submitted that allowing the application herein would undermine ongoing proceedings in HCCOMM No. E174 of 2022, where the 2nd plaintiff is already challenging the same loan facilities and the Court has ruled in favour of the 8th defendant's right to enforce securities.



19. Counsel contended that this issue is barred from being re-litigated under the doctrine of estoppel, since it was or it should have been raised in HCCOMM No. E174 of 2022. Mr. Ogunde asserted that there is a risk of conflicting Court decisions in the event that the instant application is allowed, leading to legal absurdity and embarrassment. He was of the view that there has been unexplained inordinate delay in filing the instant application, despite the fact that complaints have been raised since the year 2021. Counsel submitted that given the legal and procedural conflicts, the risk of contradictory rulings, the ongoing administration process and the risk of disrupting already determined proceedings, the application herein ought to be dismissed.
20. Mr. Musyoka, learned Counsel for the 9th defendant submitted that under Sections 238 to 241 of the *Companies Act*, a derivative action must be brought by a company member, involve a company's cause of action, and seek relief benefiting the company. He contended that the 1st plaintiff challenges the validity of Board resolutions authorizing loans from the 9th defendant but in Misc. App. No. E445 of 2021, the Court under Section 280 of the *Companies Act* allowed the 2nd plaintiff to hold a general meeting despite quorum issues, after which valid resolutions approving loan restructuring were submitted.
21. Counsel relied on the Court of Appeal case of *Kuwinda Rurinja Company Limited v Kuwinda Holdings & 13 others* [2024] KECA 1397 (KLR). He invoked the indoor management rule from the English case of *Royal British Bank v Turquand* [1856] 6 E & B 327 and argued that the 9th defendant as an external party, acted in good faith and was not obligated to investigate the 2nd plaintiff's internal processes. Mr. Musyoka referenced the case of *Shirawuse Limited & another v Pianesi Gino* [2012] eKLR and asserted that any procedural flaws in the loan restructuring process could be remedied through valid company resolutions. It was submitted by Counsel that the instant application has been filed inordinately late with no expectations whatsoever, despite the 1st plaintiff's awareness of the 2nd plaintiff's debts since 2015 and a Court ruling in 2021.
22. He cited the decisions made in *Nextgen Office Suites Ltd & another v Netcom investments Ltd & another*; *Shah Minakshi Navinchandra (Interested Party)* [2021] eKLR and submitted that the 1st plaintiff failed to establish a prima facie case to warrant being granted the orders sought herein. Mr. Musyoka argued that the loans in question were approved through Board resolutions where the 1st plaintiff was represented and the 2nd plaintiff benefited from them. Further, that the 1st plaintiff has not provided evidence of repayment of the said loans or wrongdoing by the 9th defendant. He contended that denying the loan's validity would amount to unjust enrichment and that the 9th defendant is entitled to enforce its securities, as the agreements were valid and made by persons with ostensible authority.

Analysis and Determination.

23. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the Notice of Preliminary Objection, Grounds of Opposition and replying affidavit by the defendants and the written submissions by Counsel for the 1st plaintiff, and the 8th & 9th defendants. The issues that arise for determination are -
 - i. Whether the instant application is sub judice and/or res judicata; and
 - ii. Whether the 1st plaintiff should be granted leave to prosecute this suit as a derivative claim.



Whether the instant application is sub judice and/or res judicata.

24. The doctrine of sub judice is provided for under the provisions of Section 6 of the [Civil Procedure Act](#) which states that –

No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

25. The rationale behind the doctrine of sub judice is to prevent having conflicting orders emanating from two or more different Courts over the same subject matter. A five-judge bench in the case of David Ndii & others v Attorney General & Others [2021] eKLR, had this to say in regard to the doctrine of sub judice –

The rationale behind this provision (Section 6 of the [Civil Procedure Act](#)) is that it is vexatious and oppressive for a claimant to sue concurrently in two Courts. Where there are two Courts faced with substantially the same question or issue, that question or issue should be determined in only one of those Courts, and the Court will....

26. For the doctrine of sub judice to be successfully invoked, the person seeking to rely on it has to demonstrate that the matter in issue in the subsequent suit is directly and substantially in issue in the previously instituted suit, proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title and such suit or proceeding must be pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

27. In this case, the defendants contend that the 2nd plaintiff has already filed a suit against the 8th & 9th defendants being Nairobi HCCOMM No. E174 of 2022 - Savannah Cement Limited v KCB Bank Limited & Absa Bank Limited. It is noteworthy that in the said suit, the 2nd plaintiff is challenging the exercise of the 8th & 9th defendants' statutory power of sale over the properties that had been offered as security for the loans advanced to the 2nd plaintiff by them. In that suit, the 2nd plaintiff herein seeks an order restraining the 8th & 9th defendants from taking steps to recover the said loans from it. Whereas in this suit, the plaintiff contends that the 1st to 7th defendants without valid Board resolutions from the 2nd plaintiff took loans from the 8th & 9th defendants in the name of the 2nd plaintiff. The 1st plaintiff being the 2nd plaintiff's minority shareholder, seeks leave of Court to institute a derivative suit against the 1st to 7th defendants being the 2nd plaintiff's Directors, in order for them to be held personally liable to repay the said loans to the 8th & 9th defendants.

28. In as much as the parties in HCCOMM No. E174 of 2022 are similar to the parties in this suit and HCCOMM No. E174 of 2022 is still pending in a Court of equal and competent jurisdiction to this Court, the matter in issue in Nairobi HCCOMM No. E174 of 2022 is not directly and substantially in issue in this suit. For that reason, it is this Court's finding that the instant application does not offend the doctrine of sub judice as provided for under Section 6 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya.



29. The doctrine of res judicata on the other hand is provided for under the provisions of Section 7 of the *Civil Procedure Act* which states as hereunder –

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

30. In the case of *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, the Court of Appeal sitting in Malindi set out the ingredients of res judicata as follows –

..... From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the Court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83.

31. The defendants herein contend that this suit is res judicata Nairobi HCCOMM No. E174 of 2022 in view of the Ruling delivered in the said suit on 24th November 2022. In the said Ruling, the Court dismissed the 2nd plaintiff's application for injunction which sought to restrain the 8th & 9th defendants from realizing the securities charged to them to secure the loans advanced to the 2nd plaintiff by the 8th & 9th defendants.
32. As stated here before, in as much as this suit and Nairobi HCCOMM No. E174 of 2022 have the same parties and subject matter, the matter in issue in the said suit is not directly and substantially in issue in this suit. In Nairobi HCCOMM No. E174 of 2022, the 2nd plaintiff seeks to stop the 8th & 9th defendants from exercising their statutory power of sale over the properties charged to them as security for the loans advanced to the 2nd plaintiff, while in this suit the 1st plaintiff seeks an order that the 1st to 7th defendants be held personally liable for the said loans, since the loans were obtained without valid Board resolutions from the 2nd plaintiff.
33. A perusal of the Ruling delivered in Nairobi HCCOMM No. E174 of 2022 on 24th November 2022, reveals that the issue of whether or not there were valid Board resolutions passed by the 2nd plaintiff for purposes of securing loans from the 8th & 9th defendants was not determined by the Court that delivered the said Ruling, either partially or with finality.
34. This Court's finding on the said issue is that this suit is not res judicata Nairobi HCCOMM No. E174 of 2022.

Whether the 1st plaintiff should be granted leave to prosecute this suit as a derivative claim.

35. Derivative suits are provided for under Sections 238 to 241 of the *Companies Act* 2015. Section 238 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.
36. The Court in *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] eKLR, addressed the issue of derivative claims as hereunder–

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.

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.

37. It is trite that pursuant to the provisions of Part XI of the *Companies Act*, this Court has the discretion to either allow or disallow an application for leave to proceed with a suit as a derivative action. In dealing with such an application, the Court must first satisfy itself that the applicant has established a prima facie case with high chances of success. In the case of *Isaiah Waweru Ngumi & 2 others v Muturi Ndungu* (supra), the Court set out some of the factors to be considered in such an application as follows -
- 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 effort 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 of 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 authorized or ratified by the company in the future; and
 - g. Whether the cause of action contemplated is one that the Plaintiff could bring directly as opposed to a derivative action.
38. It is not contested that the 1st plaintiff is the 2nd plaintiff's minority shareholder. The 1st plaintiff's case is that the loan advanced to the 2nd plaintiff in 2015 by the 9th defendant and the one advanced to the 2nd plaintiff in 2018 by the 8th defendant were advanced without valid Board resolutions from the 2nd plaintiff to borrow. The 1st plaintiff contended that the meeting where the alleged resolution to borrow from the 8th defendant was passed, was in a meeting that was conducted without notifying or involving the 2nd plaintiff's two interim Directors, thereby violating the 2nd plaintiff's Articles of Association on Notice and quorum, thus rendering the said resolution invalid.
39. It is also contended that the resolution passed by the 2nd plaintiff to borrow from the 9th defendant in 2015 was not proper due to lack of quorum as a result of Director resignations and disputes following the 1st defendant's takeover. The 1st plaintiff claimed that the 2nd plaintiff's Articles of Association required a two-thirds majority and the presence of at least five Directors in a meeting for valid resolutions to be passed, but by December 2014 only three Directors remained, and as such, the 2015 loan facility was unauthorized having been orchestrated solely by the 2nd defendant in breach of trust and fiduciary duty.
40. Upon perusal of the annexures attached to the 8th defendant's replying affidavit, I note that a resolution was passed at the 2nd plaintiff's meeting of its Board of Directors held on 24th January 2018 to borrow USD 35,000,000.00 from the 8th defendant. The 1st plaintiff by its own admission averred that the 2nd plaintiff's Articles of Association required a two-thirds majority and the presence of at least five Directors in meetings for valid resolutions to be passed. From the extracts of the said meeting, it is apparent that there were five Directors present at the said meeting who unanimously voted in favour of borrowing USD 35,000,000.00 from the 8th defendant. I am therefore not persuaded that the resolution to borrow from the 8th defendant was invalid to warrant issuance of the orders being sought herein.
41. The 9th defendant on the other hand has not only alleged but also demonstrated that the 2nd plaintiff vide a Board resolution dated 6th January 2015, resolved to borrow a further Kshs.135,371,069.00 & USD 30,484,333.00 from the 9th defendant. On perusal of a copy of the said resolution annexed to the 9th defendant's replying affidavit, it is evident that the meeting where the said resolution was passed was attended by Messrs Donald Mwaura & John Gachanga Kaiganaine both of whom the 1st plaintiff claims were neither notified nor attended the meeting where the said resolution was passed. It is noteworthy that the 1st plaintiff did not file a further and/or supplementary affidavit to rebut the allegations that Messrs Donald Mwaura & John Gachanga Kaiganaine were indeed present in the said



meeting. From the foregoing, I am not persuaded that the 2015 loan facility advanced to the 2nd plaintiff by the 9th defendant was orchestrated solely by the 2nd defendant in breach of trust and fiduciary duty.

42. In the premise, this Court finds that the resolution to borrow from the 9th defendant was valid.
43. In the oft cited case of *Altaf Abdulrasul Dadani v Amini Akberazi & 3 Others, Nairobi (Milimani) HCCC No. 913 of 2002 [2004] 1 KLR 95*, the Court held as follows-

By derivative suits, the minority shareholders(s) feeling that wrongs have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company, come to Court as agents of the 'wronged' company to seek reliefs or relief for the company itself, all the shareholders including the wrong doers, and not for the personal benefit of the suing minority shareholders (s)..... it is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights and actions vested in the company to sue for the wrongs done to it and in the absence of illegality a shareholder cannot bring these proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters.... However if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such shareholder can bring an action by way of derivative action... mere irregularity in internal running of a company cannot be a basis for one to bring a derivative suit for such can be rectified by a vote/resolution at the company's meetings and if a shareholder contemplates using a personal claim of infringement of his rights then a derivative suit will not avail as the relief must be for the benefit of the company...

44. Even if this Court had found that there were no valid Board resolutions from the 2nd plaintiff to borrow from the 8th & 9th defendants, it is not in contest that the loans advanced to the 2nd plaintiff by the 8th & 9th defendants as a result of the alleged invalid resolutions were used by the 2nd plaintiff for its benefit and that of its investors and shareholders. Further, it is noteworthy that the 1st plaintiff has neither alleged nor demonstrated embezzlement, misuse and/or conversion of the advanced loan facilities to personal use by the 2nd plaintiff's majority shareholder and/or Directors to warrant being granted the orders being sought herein.
45. Having found that the resolutions passed by the 2nd plaintiff to borrow from the 8th & 9th defendants were valid, this Court holds that the 1st plaintiff has not made out a case for being granted an order for leave to continue with this suit as a derivative claim on behalf of the 2nd plaintiff.
46. The application herein is bereft of merits. It is hereby dismissed with costs to the defendants.

It is so ordered.

**DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Gachigo for the plaintiffs/applicants

Mr. Teddy Ochieng for the 1st to 7th defendants/respondents



Mr. Ogunde for the 8th defendant/respondent

Ms Diru holding brief for Mr. Musyoka for the 9th defendant/respondent

Ms B. Wokabi - Court Assistant.

NJOKI MWANGI, J.

