



**Kabiri & 3 others v Kungu; Kuka Investments Limited & another (Interested Parties) (Petition E020 of 2023) [2024] KEHC 3701 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3701 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAKURU**  
**PETITION E020 OF 2023**  
**HM NYAGA, J**  
**APRIL 17, 2024**  
**IN THE MATTER OF: KUKA INVESTMENTS LIMITED**  
**AND**  
**IN THE MATTER OF: THE COMPANIES ACT, NO. 17**  
**OF 2015,**  
**PART XXIX-PROTECTION OF**  
**MEMBERS AGAINST OPPRESSIVE**  
**& PREJUDICIAL CONDUCT**  
**AND**  
**IN THE MATTER OF: THE COMPANIES ACT, NO. 17 OF**  
**2015, SECTIONS 101, 103, 114,**  
**128, 130, 133,**  
**134,138,142,146,238,280,323,504**  
**,662,666,727,780 & 782**  
**BETWEEN**  
  
**BETWEEN**  
**RITA MUTHONI KABIRI ..... 1<sup>ST</sup> PETITIONER**  
**STEPHEN KUNGU KAGIRI ..... 2<sup>ND</sup> PETITIONER**  
**STEPHEN KUNGU KAMAU ..... 3<sup>RD</sup> PETITIONER**  
**STEPHEN KUNGU KAMAU ..... 4<sup>TH</sup> PETITIONER**  
**AND**  
**KAGIRU KUNGU ..... RESPONDENT**



**AND**

**KUKA INVESTMENTS LIMITED ..... INTERESTED PARTY**  
**REGISTRAR OF COMPANIES ..... INTERESTED PARTY**

**RULING**

1. Before Court is the Notice of Motion dated 20<sup>th</sup> September, 2023 brought by the Petitioners/ Applicants herein.
2. The Application is brought under Articles 23,47,50 and 159(2)(b) of *the Constitution* of Kenya, Sections 101, 103, 114, 128,130,133,134,138,142,146,280,238,323,504,662,666,727,780 and 782 of the *Companies Act*,2015, Sections 1A,1B and 3 of the *Civil Procedure Act*, Order 40 Rules 1,2,4 and 10 and Order 50 of the Civil Procedure Rules,2010.
3. The Application seeks for leave to be granted to the Petitioners to continue this suit as a derivative action on behalf of the 1<sup>st</sup> Interested party and for an injunction barring the Respondent whether by himself or through his agents or servants or in any manner whatsoever from charging, transferring, disposing, alienating, destroying, dispossessing, or in any way removing the assets of the 1<sup>st</sup> interested party from the jurisdiction of the court.
4. The applicants/petitioners have filed the application together with the Petition, and the same are supported by an affidavit of the 1<sup>st</sup> Applicant Rita Muthoni Kagiri sworn on 20<sup>th</sup> September, 2023. The other co- Applicants swore their respective affidavits on 19<sup>th</sup> September, 2023 associating themselves with the averments of the 1<sup>st</sup> Petitioner.
5. The applicants' case as gleaned from the said Affidavit is that Kuka Investment Limited is a family company and its registered office is situated at the property known as L.R No. 8836/1174 in Nakuru. That the authorized share capital of the company is KES 2,500,000 divided into 2,500 ordinary shares of KES 1000 each and out of these,1114 shares were issued as follows: -



| Name                  | Shares | Status   |
|-----------------------|--------|----------|
| Stephene Kungu Kagiri | 523    | Deceased |
| Kagiri Kungu          | 55     | Alive    |
| Grace Nyambura Kungu  | 191    | Deceased |
| Martha Wanjiru Kungu  | 70     | Deceased |
| Mark Njoroge Kungu    | 55     | Deceased |
| Sera Wanjiku Kungu    | 55     | Alive    |
| Francis Ndegwa Kungu  | 55     | Alive    |
| David Nganga Kungu    | 55     | Alive    |
| Kamau Kungu           | 55     | Deceased |
| Total                 | 1114   |          |

6. The Respondent, Kagiri Kungu, is the current sole Director with 55 ordinary shares.
7. Stephen Kungu Kagiri and Grace Nyambura Kungu were Directors and Shareholders of the Company with Ordinary shares of 523 and 191 respectively and they passed away in the year 2015 and 2021 respectively.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners/Applicants are joint beneficiaries of 55 ordinary shares in the company which were owned by the Late Michael Ryan Kung'u alias Mark Njoroge Kung'u alias Michael Njoroge Kung'u at the time of death on 2<sup>nd</sup> March, 2002 while the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners are joint beneficiaries of 55 Ordinary shares in the company which were owned by the Late James Kamau Kung'u alias Kamau Kungu alias Kamau Kungu issued herein at the time of his death in 2001.
9. It is her averment that upon the demises of Grace Nyambura Kungu and Stephen Kungu Kagiri, the number of the directors fell below the minimum number as provided under Article 88 of the Company's Articles of Association and as such all actions undertaken by the Board from the date of their demise were unlawful and ultra vires as the Board was not properly constituted.
10. She further depones that pursuant to Article 110 of the Company's Articles of Association, only a quorate board is competent to exercise the powers exercisable by the Board and the only powers that the Board as presently constituted can lawfully exercise is to convene the General Meeting for purposes of nominating and appointing additional directors.
11. The applicants also aver that despite requests, they have not received any audited or unaudited financial statements from the Company or from the Respondent.
12. The petitioners believe that the company's Directors have not kept proper accounts with respect to all monies received and expended by the company as well as a schedule of the Company's assets and liabilities contrary to Article 144 of the Company's Articles of Association, Company has not been



- audited at least once a year as required under Article 150 of the said company article, and accounts have never been audited, presented and approved by the Annual General Meeting for the last 10 years.
13. The petitioners state that the listed filings have not been undertaken and that this omission amounts to a neglect of the Director's duty and exposes the company to undesirable consequences such as being indicted for being unlawfully constituted or operating outside the confines of the law.
  14. That in the intervening period, the petitioners having perused the tax returns from 2015 to 2022 believe that the sole director is stripping, wasting, alienating or otherwise unlawfully dealing with the assets of the company to its detriment and that of members. That in 2015 the taxable income filed was Ksh. 23,961,922 while in 2022 the taxable income filed was a mere Ksh. 463,112. Therefore, within 7 years only, the percentage decline is 98.07%.
  15. The petitioners firmly believe that this Honourable Court's intervention is essential to rectify the irregularities and protect the interests of the Company's shareholders and the company.
  16. They prayed that the application be allowed.
  17. The 2<sup>nd</sup> Petitioner Stephen Kungu Njoroge swore a supplementary affidavit on 20<sup>th</sup> November, 2023.
  18. He avers that the Respondent is dissipating assets across related companies under his control, enriching himself at the expense of the company's shareholders.
  19. He asserts that as a result of the other Director's wastage, their grandmother Grace Nyambura who was the majority shareholder/director before her demise, was necessitated to solely form a company as the sole director to collect proceeds which ordinarily would be due to the company herein.
  20. That their grandmother transferred the revenue collection and management of one of the properties Ambassador Court to her Company GNK Gracie Holdings Limited and her office at Kuka Investment LTD which was situated at Luthuli House office Mezzanie 2 to Ojijo Plaza office GF6 which was managed by the 2<sup>nd</sup> Petitioner.
  21. He deposes that due to wastage again, their said grandmother decided to open her own account where she was a sole signatory under GNK Gracie Holdings Limited Account No. 2043237341 to stop wastage in the Kuka Account.
  22. That upon her passing on, the respondent decided to reverse the instructions of the tenants to pay rent back to the Kuka Account No. 0751876955 as of 1<sup>st</sup> February, 2022.
  23. He avers that he transferred the files and management to the respondent through one of his workers that the respondent had sent as he had already started frustrating him by telling the guards at ambassador court not to allow him to enter the premises.
  24. It is his averment that the respondent went ahead to transfer all the money he had helped to collect from GNK Gracie Holding Account 2043237341 amounting to 20 million to FDA's and the account was closed by the bank and on finding out why the bank closed it stated that the account was closed by mistake.
  25. He avers that the respondent is now the main signatory in the account 0751876955 with no one to check on his excesses hence all the wastage.
  26. That the foregoing actions, plus many more, show that the affairs of the company are being conducted in a manner prejudicial to the interest of all shareholders.



27. He avers that the business run by the Company herein are; Nakuru LR 3/507- Rentals; Nakuru LR 3/506- Rentals; Kunste Hotel; Luthuli House (Rentals); Grace House (Rented out); Ambassador Court (Rentals); & Shalom Grace Church, Ngara (with Rentals), and that none of the petitioners know the status of the businesses as they are shrouded in secrecy.
28. He avers that the company herein is at a crossroads, its future hangs in the balance, and the fate of its shareholders and employees' rests in the hands of Mr. Kagiri who is doing everything to run it down, ending a long legacy left by his grandfather.
29. The respondent opposed the application via his replying affidavit sworn on 30<sup>th</sup> November, 2023.
30. He depones that the Petitioners have no locus to bring this application and the petition as they are not members and/or shareholders of the company either by law and fact.
31. He avers that they are neither directors of the company as a person cannot be appointed as director under the Law of Succession through an alleged transmission process, and that it cannot be said that the shares held by the deceased's shareholders were transmitted to the petitioners without a duly executed share transfer document by or on behalf of the transferor and transferee and the allegation that the shares were deemed transmitted is therefore unfounded and has no legal basis.
32. He states that he has not willfully neglected to regularize the position in the company as there have been attempts to appoint her sister Sera Kung'u as one of the directors but the process is yet to be completed.
33. He avers that the claim that all actions undertaken by the board from the date his mother died are unlawful and ultravires is outrageous as no evidence has been placed before court to show that the alleged decisions and/or actions have been detrimental to the company and would not be ratified by the company if the board was properly constituted.
34. He avers that there are up to date books of accounts and all reporting and annual returns are done every year and that petitioners having not completed the transfers of shares process have no locus to ask for such books of accounts.
35. He contends that the revenue deficit has been occasioned by the Covid- 19 pandemic which affected the overall demand of the company's products and services, and the fact that the company stopped managing some properties that were given to some of his siblings as per his mother's wishes.
36. He avers that the company herein used to initially manage more than one apartment but currently it only manages one i.e. Ambassador Court, while the others are managed by some of the petitioners.
37. He contends that there is no evidence of his negligence, breach of duty or trust as a director, embezzlement of funds or plan to alienate company assets as alleged by the petitioners.
38. He states that the petitioners have failed to bring their case within the four corners of what is recognized in law as a derivative suit to enable this court to grant leave to them to continue the derivative suit.
39. Further to the above, he posits that there is no law which operates as a stay of action to enable a party to continue a suit as a derivative suit.
40. He posits that the application is bad in law and orders sought have the effect of derailing company's operations. He thus urged this court to find the application lacks merit and to dismiss it with costs.
41. The application was canvassed through written submissions. The petitioners filed their submissions on 5<sup>th</sup> December, 2023 whereas the Respondent filed his submissions on 25<sup>th</sup> January, 2024.



## Petitioners' Submissions

42. The Petitioners framed three issues for determination, namely;
  - I. Whether Leave should be granted to the Petitioners to continue this suit as a Derivative Action on behalf of the 1<sup>st</sup> interested party.
  - II. Whether the Firm of Sheth & Wathigo Advocates can purport to represent the 1<sup>st</sup> interested party.
  - III. Whether the Petitioners have fulfilled the conditions in *Giella Vs Cassman Brown* for granting of an injunction pending the hearing of the petition.
43. In regards to the first issue, the petitioners submitted that shares of the company have been transmitted to them by operation of Law as conferred by a confirmation of grants.
44. They argued that the present suit can only continue as a derivative action under Part XI of the *Companies Act* which is a codification of the common law principles on derivative actions.
45. The petitioners posited that their claim falls within the purview of the derivative action under Section 238 of the Act.
46. Citing the provisions of Section 780(2) of the Act, it was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners are joint beneficiaries of 55 Ordinary shares in the company which were owned by the late Michael Ryan Kungu alias Mark Njoroge Kung'u at the time of death on 2<sup>nd</sup> March, 2002 while the 3<sup>rd</sup> and 4<sup>th</sup> petitioners are joint beneficiaries of 55 Ordinary Shares in the Company which were owned by the Late James Kamau Kung'u alias Kamau Kungu at the time of his death in 2001.
47. The petitioners referred this court to the case of *Jane Wambui Weru vs Overseas Private Investment Corporation & 3 others* [2012] eKLR on the procedure applicable to derivative suits.
48. They argued that the company and its member's rights have been continuously violated by inadequate number of directors, denial of information related to the company, lack of notice for Annual General Meetings, Non-presentation of financial statement, registration of shareholders and dividend distribution, and failure to comply with legal filings.
49. In further buttressing their submissions, the petitioners placed reliance on the cases of *Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwaral & Another*, [2017] eKLR where the court set out the factors to consider when determining whether or not to grant leave to continue a derivative action, *Dadani vs Manji & 3 others* [2004] KLR 95 ,for the proposition that 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, *Scottish Co-Operative Wholesale Society Ltd vs Meyer* [1959] AC 324 H.L cited in the case of *In Re Wembe Tours & Safaris Ltd.* [2008] eKLR in which Lord Simonds defined oppression in that Section to mean conduct which is "burdensome, harsh and wrongful." & *Naftali Wachira Njoroge & 7 others vs Hezy John Limited & 5 others* [2014] eKLR which cited with approval the case of *In The Matter of Tatu City Ltd & Kofinaf Company Ltd* (2013) eKLR where Musinga J as he then was held inter alia that;

“Halsbury's Laws of England, 4th Edition Volume 7 (2) at page 1095, the learned author states that the words “just and equitable” in Company Law are a recognition of the fact that a limited liability company is more than a “mere judicial entity with a personality in law of its own: behind or among it there are individuals of rights, expectations and obligations inter se which are not necessarily submerged in the company structure.” The court must therefore



subject the exercise of legal rights by various shareholders to equitable considerations of a personal culture arising between the shareholders in order to determine whether any of the actions are unjust or inequitable.”

50. The petitioners therefore posited that the respondent breached the statutory and fiduciary duty owed to shareholders by failing to promote the success of the company, failing to exercise independent judgment, reasonable care, skill and diligence, failing to avoid conflict of interest, failing to consider the interests of shareholders and long-term consequences by not including the beneficiaries of the deceased shareholders, maliciously withholding the information, acting as between directors and members of the company, creating an acrimonious and toxic environment within the shareholders and disregarding the procedural legal foundations under the *Companies Act* regarding appointment of directors and thereby portraying the company, its directors, and internal operations as chaotic, confused and mismanaged.
51. On the second issue, the petitioners submitted that there said firm cannot represent the 1<sup>st</sup> Interested party for reasons that if leave is granted to them to continue the suit as a derivative action, the respondent cannot be acting at the same time; that the respondent’s counsel cannot represent the company and its offender; and that there is no resolution on record appointing the law firm in question.
52. In Regards to the third issue, precisely on whether they have established a prima facie case, the petitioners cited the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125 on the definition of prima facie case, and submitted that they have established that the Respondent makes decisions regarding the company without taking the shareholders and the minority’s concerns into consideration, withholds information when taking such a decision, hides financial statements and any documents related to the company or alienates profits and dividends without the knowledge of minority shareholder.
53. On irreparable harm, the petitioners submitted that they stand to suffer irreparably if injunction is not granted because the company is at the risk of litigation; they have been denied any company information and does not know the company’s financial standing and this may put them at risk of being criminally culpable in case of fraud, tax evasion, or other crimes the company may commit, and that they have established that the respondent has been running the company as a one man show which has the deleterious effect of making the company suffer unilateral decisions.
54. On balance of convenience, the petitioners submitted that the balance of convenience tilts in their favour as the company will suffer no prejudice if the application is allowed but if the orders are disallowed, the petition will be rendered nugatory and that the respondent will not suffer prejudice that cannot be compensated by damages.
55. They averred that the respondent has not annexed any financial reports to controvert their claims and they remain in limbo as to what debts are owed by the company, what dividends are payable, and whether the company is a going concern.

### **Respondent’s Submissions**

56. On whether the applicants have established a case for the preliminary reliefs sought, the respondent submitted in the negative.
57. He referred this court to the case of Giella vs Casaman Brown & Co. Ltd [1973] EA on the threshold to be met before grant of interlocutory orders is issued and the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [supra] on the definition of a prima facie case.



58. The respondent submitted that the petitioners have no locus to institute this application as they are not shareholders of the company either by law of fact as provided under Section 96(3) of the [Companies Act](#), 2015.
59. The respondent argued that there is a process of transmission of shares provided by law and it cannot be said that the shares held by the deceased shareholders were transmitted to the Applicants without a duly executed share transfer documents and that the petitioners having failed to demonstrate that their names have been entered in the register of members cannot be deemed to have standing to bring a derivative action.
60. The respondent further argued that as per Article 37 and 47 of the Company's Article of Association, the right of a member to transfer and or transmit shares to family members is not absolute and the Directors may in their absolute and unconditional discretion and without any reasons, refuse to register any proposed transfer of shares. He therefore submitted that the Applicants have not established a clear and unmistakable right as per the threshold in *Mrao Limited (Supra)*.
61. The respondent invited this court to give regard to the provisions of the Articles of Association of the Company as was buttressed by Justice Majanja in the case of *Trevor Sawaya Ndwiga & 5 others vs Meridian Acceptances Limited & Another and Eduardo Hernandez Ciriza & 2 others* [2021] eKLR.
62. The Respondent argued that in the event this court finds the petitioners have locus then it should find that the allegation against him that the company has lost revenue due to his malfeasance is unproven.
63. On the question of irreparable injury, the respondent referred this court to the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR on what constitutes irreparable injury, and submitted that the alleged malfeasance has not been demonstrated. He submitted that the grant of the orders sought will limit the company's operations as a going concern.
64. On the balance of convenience, the Respondent submitted that this element is discretionary on the court's assessment and is only put to test when the court is in doubt as to the satisfaction of the rest of the elements. Reliance was placed on the case of *Micah Terer & another vs Letshego Kenya Limited* [2017] eKLR for the proposition that the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.
65. The respondent thus argued that no inconvenience will be occasioned to the applicants as their rights to the shares have not crystalized and that the petition will not be rendered nugatory if injunction is not granted as the derivative claim can continue with the company operating as a going concern.
66. On whether the applicants have met the threshold for grant of leave to file a derivative suit, the respondent submitted that the court must first satisfy itself that there is a prima facie case on any of the causes of action set out under Section 238(3) of the [Companies Act](#), 2015. The respondent urged this court to glean on the factors to be considered as enumerated in the case of *Isaiah Waweru Njumi & 2 Others vs Muturi Ndungu* [2016] eKLR and to disallow the Applicants' application.

### **Analysis and determination**

67. I have considered the Application, the responses, submissions and authorities cited. In my considered opinion the issues that arise for determination are: -
  - I. Whether the Applicants have locus standi to bring this Application.



- II. Whether the court should grant permission to the applicants to proceed with this suit as a derivative suit.
- III. Whether the injunctive order is warranted.
68. I will deal with these issues sequentially.
69. It is the Respondent's position that the petitioners have no locus standi to institute this proceeding as they are neither shareholders nor members of the company.
70. Black's Law Dictionary defines Locus Standi as "the right to bring an action or to be heard in a given forum".
71. In the case of *Njau vs Council of Nairobi*, KLR (1983) 625 the Court of Appeal defined the term locus standi in the following manner;
- "Locus Standi literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus means that he has no right to appear or be heard in such and such proceedings".
72. The petitioners have defended their Locus in filing application by arguing that they are members of the company as the shares of the company have been transmitted to them by operation of as conferred by a confirmation of grant.
73. Section 238 (6) (b) of the *Companies Act* provides that for the purposes of that Part 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.
74. Section 780 (2) of the Act provides that in this section, "member", in relation to a company, includes a person who is not a member of the company but is a person to whom shares of the company—
- a. have been transferred; or
  - b. have been transmitted by operation of law by dint of being beneficiaries of the deceased shareholders
75. Black's Law Dictionary, 2nd Ed. defines the phrase "by operation of law" as a legal outcome that automatically occurs whether or not the affected party intends it to.
76. Operation of Law is a legal doctrine that refers to the manner in which a right or interest automatically shifts from one party to another without any action by the parties involved. This transfer of rights is accomplished by operation of the law, which means that the rights in question are automatically transferred or terminated when specific circumstances occur. The process of operation of law is not based on the agreement or consent of the parties involved but rather on the application of legal principles. (see <https://legal-explanations.com/definition/operation-of-law>).
77. The certificate of grants appearing at page 38-40 of the annexure marked as RMK-1 shows that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners are joint beneficiaries of the 55 ordinary shares in the company which was owned by the late Michael Ryan Kung'u alias Mark Njoroge Kung'u alias Michael Njoroge Kung'u while the 3<sup>rd</sup> and 4<sup>th</sup> petitioners are joint beneficiaries of the ordinary shares in the company which was owned by James Kamau Kung'u alias Kamau Kung'u.



78. Section 79 of the *Law of Succession Act* states:

“Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

79. It is not in dispute that the petitioners/applicants are the beneficiaries of the shares as set out hereinabove. Ideally, after the confirmation of the grant the applicants were meant to step into the shoes of the deceased shareholders. This is by the process of transmission as envisaged by section 780 (2) of the *Companies Act*.

80. Evidently, any change of ownership is to be effected by directors of the company. In this case, there is no dispute that the respondent is the sole remaining director of the company. He is as much.

81. In the event the directors fail to implement the change of names in the register then how are the petitioners to enforce the same. I am of the view that a derivative action is available to them for that purpose.

82. In view of the foregoing, it is my considered view that the Petitioners/Applicants have requisite locus standi to pursue this Application.

83. According to the Black’s Law Dictionary, 9<sup>th</sup> Edition, derivative suit or action is:

“A suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary; especially, a suit asserted by a shareholder on the corporation’s behalf against a third party (usually a corporate officer) because of the corporation’s failure to take some action.”

84. 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.

85. The *Companies Act* No. 17 of 2015, defines “a derivative claim” at Section 238 :“

“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.”

86. In *Dadani vs Manji & 3 others* (Supra), the court said:

“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 a shareholder can bring an action by way of a derivative suit.”

87. In *Isaiah Waweru Njumi & 2 Others vs Muturi Ndungu* [2016] eKLR, the court set out the factors to be considered in an application for leave to prosecute a derivative action 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.
88. Under Section 238 of the [Companies Act](#), for a party to succeed in a derivative suit, the party must demonstrate the following:
- a. The party must be a member of the company which includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of the law;
  - b. The proceedings must be seeking relief on behalf of the company;
  - c. The proceedings must be for the protection of members against unfair prejudice brought under the [Companies Act](#);
  - d. The proceedings are 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.
89. In *Ghelani Metals Limited* (supra), the Court held that this is a two-stage enquiry process envisaged by the Act. In the first stage, the court must first satisfy itself that there is a prima facie case on any of the causes of action noted under section 238(3) of the Act. To surmount the first stage, an applicant only needs to establish through evidence, that he has a prima facie case without the need to show that it will succeed. The second stage entails a consideration of statutory provisions and factors which ordinarily guide judicial discretion albeit in the realm of derivative action.
90. The petitioners have satisfied the first point above as they have demonstrated that they are members of the company via operation of the law.
91. Regarding the second issue, I have perused the petition. The petitioners are seeking the following orders:-



- a. A declaration that the affairs of Kuka Investments Limited have been conducted in a manner that is oppressive and unfairly prejudicial to the interest of the Petitioners.
  - b. An order be issued directing the Respondents and the Company to register the Petitioners as shareholders within 30 days.
  - c. A mandamus does issue against the Respondent compelling him to within 30 days release to the petitioners all financial records, bank statements, management accounts, audited accounts, sales ledger, profit and loss account and any other relevant documents for the period between January 2015 and August 2023.
  - d. An order be issued directing the sole director of the company, Kagiri Kungu, to convene an Annual General Meeting within 45 days of the date of the court order failing which the petitioners be allowed to convene the meeting.
  - e. An order be issued directing the Company to regularize all filing requirements and compliance under the [Companies Act](#) and file returns.
  - f. An Order be issued directing the Company to appoint additional directors reflective of the shareholding structure of the Company.
  - g. An Order be issued directing the company to table and discuss the audited financial statements for the last 5 years at the Annual General Meeting and distribute all dividends, interest and other advantages from 1st January 2018 to date.
  - h. The above intended general meeting be supervised by the Registrar of companies or a duly appointed representative to ensure compliance with the [Companies Act](#) and the Regulations thereunder.
  - i. Such other orders as the court may deem fit in the interests of Justice.
  - j. The costs of the suit and interest thereon on a full indemnity basis until payment in full.
92. It is evident therefore that the majority of the reliefs sought would be beneficial to the 1<sup>st</sup> Interested party and it is not an avenue by the petitioners to pursue a personal claim.
93. With respect to the 3<sup>rd</sup> and 4<sup>th</sup> issues above, the petitioners have raised concern regarding the inadequate number of directors in the company. I have considered their submissions vis a vis the Respondent's submissions in this regard. The aforesaid Article 88 expressly provides that unless and until otherwise determined by the Company the Ordinary Resolution, the Directors shall not be less than two in number. There is no evidence on record that the respondent has regularized this position in the company. He has explained that he has been in the process of regularizing the position by seeking to add another director. However, the question of whether the actions he undertook were detrimental to the company are issues that cannot be determined at this stage. This would require evidence and scrupulous scrutiny of the relevant documents that are available.
94. The Petitioners also blamed the respondent for denying them right to information related to the company and for failing to register them as holders of their aforementioned respective shares. To bolster this position, the petitioners annexed a letter dated 14<sup>th</sup> July, 2023 addressed to the Respondent in which they requested to be registered as such pursuant to Article 46 of the Articles of Association and to be furnished with all the financial statements as well as the books accounts of the company from the date of appointment of the Respondent to date. They also annexed letters by their advocate dated 20<sup>th</sup> July, 2023, 18th August, 2023 and email extract of 22<sup>nd</sup> August, 2023 and 3<sup>rd</sup> August, 2023 all



- addressed to the Registrar of companies notifying her/him of the current status of the shareholders and particularly their unsuccessful plea to have the Respondent register them in place of the deceased shareholders. They also requested the company's registrar to amend the register of the Company's members to reflect the said respective shares which devolved to them.
95. Article 46 of the Company's Article of Association provides that "any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence as to his title being produced as may from time to time be required by the Directors, and subject as hereinafter provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof".
96. The Respondent on his part stated that the petitioners can only be rightful holders of the shares in issue upon proper execution of the transfer document which in this case has never been done. He also stated that under Articles 37 and 47 of the Company's Article of Association, transfer of shares to a family member is not absolute.
97. The said Articles provide as follows:-
- “ 37. the directors may in their absolute and unconditional discretion and without assigning any reason therefore, refuse to register any proposed transfer of shares except (a) where the proposed transferee is already a member and there has been due compliance with the provisions of Article 40 or (b) where such proposed transfer is made pursuant to article 39 hereof. If the Directors refuse to register a transfer they shall within 60 days after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.
47. If the person so becoming entitled shall elect to be registered himself he shall deliver or sent to the company a notice in writing signed by him, stating that he so elects. If he shall elect to have another person registered, he shall testify his election by executing to such person a transfer of such share. All the limitations restrictions and provisions of these presents relating to the right to transfer and the registration of transfers as aforesaid as if the death or bankruptcy of the member had not occurred and the notice or transfer were a transfer executed by such member”
98. It is clear therefore that the directors do not have powers to exercise the said discretion as the Petitioners herein are already members of the company pursuant to Article 37 (a). Further the petitioners complied with the provisions of Article 47 above by writing a letter to the respondent electing to be registered as members of the company but the Respondent failed to do so.
99. The petitioners blamed the respondent for failing to issue them with notices for annual general meeting in accordance with Article 53 of the Company's Articles of Association. This position has not been controverted by the Respondent.
100. I note, however, that the petitioners were issued with grant of letters of administration intestate on 21<sup>st</sup> August, 2023 and 28<sup>th</sup> February, 2023 respectively. From the attached financial statements for the year 2021 and 2022 it is clear the meeting was held annually as envisaged by the above article however at this time the petitioners were not members of the company as they had not been conferred with a certificate of a confirmed grant.
101. From the foregoing it is clear that the Applicants have proved that they are members of the company and that the reliefs sought are for the benefit of the company. They have also demonstrated that



the respondent is non-compliant with the provisions of Article 46 of the Company's Articles of association. At this stage the petitioners are not required to prove their case and every assertion raised by the Respondent. The rationale for the requirement of leave is to exclude frivolous or vexatious applications as held in the case of Republic vs County Council of Kwale & Another ex parte Kondo and 57 others (1998) eKLR.

102. The petitioners' claims as per the set out the rights of the company and their rights that have been violated by the Respondents disclose a plausible cause of action and if proved, could lead to findings against the Respondent.
103. The materials on record show that there is a case for further inquiry. I therefore find that this case meets the legal threshold of a derivative action and I hereby grant the Applicants permission to proceed to substantive hearing through a derivative suit.
104. Should an injunction issue as prayed? That is the next issue for determination.
105. The case of *Giella vs Cassman Brown & Company Ltd* (1973) EA 358 is the locus classicus case on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction and which conditions shall also form the issues for determination herein to wit;
  - i. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success,
  - ii. secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial,
  - iii. And thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.
106. In the instant case, the petitioners have proved that they are members of the company by operation of the law. They have also successfully demonstrated that the Respondent breached Article 46 of the Company's Articles of Association. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. A prima facie case was described in the case of *Mrao vs First American Bank of Kenya Ltd & 2 others* (supra) as follows:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
107. In the circumstances therefore, I find the Applicants/ petitioners have established a prima facie case.
108. Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages. In the case of *Pius Kipchirchir Kogo vs Frank Kemeli Tenei* [2018] eKLR. the Court held as follows;

“.....irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”



109. I have considered the submissions by both parties on this limb and I do find the petitioners have not demonstrated any irreparable injury likely to be suffered.
110. Even if the court was to determine the matter on a balance of convenience, my view is that the same tilts in favour of the company continuing its operations. As matters stand the injunction sought, if granted, will render the company handicapped and unable to operate in any way. The petitioners submitted that if the orders sought are not granted the petition will be rendered nugatory whereas the respondent submitted that the derivative claim can continue with the company operating as a going concern.
111. The court has a duty to ensure that the Company has an opportunity to remain a going concern. Any order that may bring its operations to a standstill would not be in the best interests of the company itself or any of the affected Parties.
112. In the premises I find the petitioners have not met the threshold for grant of injunctive relief and I disallow the same.
113. In conclusion, I grant the following orders;
- i. The applicants are granted leave to continue this suit as a derivative action as sought.
  - ii. Costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 17<sup>TH</sup> DAY OF APRIL, 2024.**

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

Mr. Waigwa for Applicants/Petitioner

Ms Aoko for Kisilah for Respondent

Court Assistant Philip

