



REPUBLIC OF KENYA



**KENYA LAW**  
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**Richu & 2 others (All on behalf of Royal Builders and Investments Ltd  
- The Company) v Mbau & another (Commercial Case E178 of 2025)  
[2025] KEHC 13439 (KLR) (Commercial and Tax) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13439 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E178 OF 2025  
PM MULWA, J  
SEPTEMBER 25, 2025**

**IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015  
IN THE MATTER OF ROYAL BUILDERS AND INVESTMENTS LIMITED IN THE  
MATTER OF THE RIGHT TO COMMENCE A DERIVATIVE ACTION ON BEHALF  
OF A COMPANY FOR THE RECOVERY OF LAND AND PROCEEDS THEREOF  
IN THE MATTER OF THE PROTECTION OF MEMBERS  
AGAINST OPPRESIVE AND UNFAIR PREJUDICES  
IN THE MATTER OF AN APPLICATION BY MINORITY SHAREHOLDERS**

**BETWEEN**

**PAUL GATONYE RICHU ..... 1<sup>ST</sup> APPLICANT  
PAULINO NJOKA M RUTHIRU ..... 2<sup>ND</sup> APPLICANT  
SAMUEL MWANGI WAMBU ..... 3<sup>RD</sup> APPLICANT  
ALL ON BEHALF OF ROYAL BUILDERS AND INVESTMENTS LTD - THE  
COMPANY**

**AND**

**ELIAS PETER MBAU ..... 1<sup>ST</sup> RESPONDENT  
JULIUS KAMANDE MANYEKI ..... 2<sup>ND</sup> RESPONDENT**



## RULING

1. This ruling relates to two applications dated 13<sup>th</sup> March 2025 and 2<sup>nd</sup> April 2025 filed by the Applicants. By consent of the parties, the applications were canvassed together by way of written submissions.
2. The first application dated 13<sup>th</sup> March 2025 is brought under Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, and Sections 142, 143, 145–148, 151, 158, 163–168, and 238–242 of the *Companies Act*, 2015. The Applicants, who are minority shareholders of Royal Builders and Investments Limited (“the Company”), seek principally:
  - i. Orders of injunction compelling disclosure of company records, including land titles, agreements for sale, bank accounts, and statements in respect to the property known as Nairobi/Block 74/16, and the resultant sub- divisions.
  - ii. Leave to continue these proceedings as a derivative suit on behalf of the Company.
  - iii. Interim injunctive orders restraining the Respondents from alienating or otherwise dealing with the Company’s assets pending determination of the suit.
3. The second application dated 2<sup>nd</sup> April 2025 seeks, in substance, injunctive orders restraining the Respondents from alienating or dealing with further subdivisions being LR Nos. Nairobi/Block 183/537–569 pending determination of the suit.

### The Applicants’ Case

4. The Applicants are minority shareholders of Royal Builders & Investment Limited. They contend that the company’s only asset, LR No. Nairobi/Block 74/16, measuring 23 acres, was acquired for purposes of subdivision and sale for the benefit of all shareholders.
5. They allege that the Respondents, in control of the company’s affairs, have acted in an opaque and clandestine manner, sold subdivisions of the property, received over Kshs. 291,681,703.50, and diverted the proceeds to themselves and a few others.
6. They maintain that the Respondents continue to dispose of subdivisions including LR Nos. Nairobi/Block 183/346, 353, and 354 despite concerns raised. Unless restrained, the company will be stripped of its assets and the shareholders deprived.

### The Respondents’ Case

7. The Respondents oppose the applications through affidavits sworn by Hon. Elias Peter Mbau. He contends that the Company acquired the suit property through his efforts, and the acquisition of the suit property was financed through loans and assignments. That it has over the years been subject to litigation, and that shareholders have from time to time been updated in annual meetings. He asserts that the Applicants, particularly the 3<sup>rd</sup> Applicant who resigned as treasurer in 2010, are driven by ulterior motives, seeking to reinstate themselves into management through the back door.
8. The Respondents maintain that the Applicants have already received capital refunds and profits, and that any queries regarding accounts can be addressed through the Company’s audited reports. They argue that the threshold for leave to institute a derivative suit has not been met, and that the



injunctive relief sought would paralyze the operations of the Company to the detriment of the majority shareholders and third parties.

### **Issues for determination**

9. Having considered the two applications, the supporting and replying affidavits, the rival submissions of counsel, and the authorities cited, the following issues crystallize for determination:
  - i. Whether the Applicants have established a case for leave to continue these proceedings as a derivative suit under Sections 238–242 of the *Companies Act*.
  - ii. Whether the Applicants have satisfied the requirements for the grant of injunctive relief pending trial.

### **Leave to continue as a derivative suit**

10. Section 238 of the *Companies Act*, No. 15 of 2017 defines a “derivative claim” in Part XI in the following manner-
  - “(1) In this part, “derivative claim” means proceedings by a member of the 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.”
11. As seen from the provisions of Section 238 of the *Companies Act*, for the plaintiff to succeed in an action for a derivative suit;
  - i. He must be a member of the Company and this includes a person who is not a member of the Company but to whom shares in the Company have been transferred or transmitted by operation of the law;
  - ii. The proceedings must be in respect to a cause of action vested in the Company;
  - iii. The proceedings must be seeking relief on behalf of the Company;
  - iv. The proceedings must be for protection of members against unfair prejudice brought under the *Companies Act*; and



- v. 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.
12. The rationale for permitting such claims was explained in *Ghelani Metals Limited & 3 Others v Elesh Ghelani Natwarlal & Another* [2017] KEHC 4629 (KLR) the Court held that:
- “The derivative action is an exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461, allowing a shareholder to bring proceedings on behalf of the company where those in control are perpetrating a wrong against the company.”
13. Likewise, in *Francis Mbugua v James Gichuhi & 2 Others* [2015] eKLR, the Court held that minority shareholders are entitled to invoke the derivative action procedure where majority shareholders act in a manner oppressive or prejudicial to the company.
14. Similarly, in *Sultan Hasham Lalji and 2 Others v Ahmed Hasham Lalji and 4 Others* [2014] eKLR, it was held as follows:
- “It is the minority shareholders that are availed to the protection by the exceptions since generally majority shareholders exercise powers of the Company and control its affairs.”
15. In the present matter, the Applicants have sworn that they are members and shareholders of the Company. They allege that the Respondents, who hold majority shareholding and control the board, have misappropriated assets, disposed of prime subdivisions of the Company’s land without disclosure, and diverted proceeds to themselves in disregard of the rights of the minority. They assert that their legitimate expectation to be informed of, and to participate in, the Company’s material transactions has been defeated by the Respondents’ conduct.
16. From the affidavits, depositions, and annexures, the Applicants have raised serious questions concerning alleged mismanagement, lack of disclosure, and unilateral dealings with the Company’s sole asset, LR No. Nairobi/Block 74/16 and its subdivisions. They have produced bank statements and documents evidencing transactions, which, if proved, may constitute classic breaches of directors’ fiduciary duties as codified in Sections 142–148 of the *Companies Act*, 2015. Such conduct also falls within the ambit of oppression and unfair prejudice contemplated under Sections 780–782 of the Act.
17. The Respondents deny wrongdoing and maintain that all dealings were in good faith, in the Company’s best interests, and within their mandate as directors under Section 142 of the Act. They argue that the Applicants’ claims are speculative, actuated by personal grievances, and based on selective disclosure of documents.
18. Having considered both sides, I am satisfied that the Applicants have demonstrated a prima facie case that the Company may have suffered a wrong in circumstances where the alleged wrongdoers are themselves in control of its management. That is the mischief which the law on derivative actions is designed to remedy. It is therefore just and equitable that the Applicants be granted leave to continue this suit as a derivative action pursuant to Sections 238–242 of the *Companies Act*, 2015.

### **Whether the Applicants have made out a case for injunctive relief**

19. The principles governing the grant of temporary injunctions are well settled in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. The applicant must establish a prima facie case with a probability of success; show that irreparable harm not compensable in damages may be suffered; and where in doubt, the Court should determine the matter on a balance of convenience.



20. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR reiterated that these three conditions are sequential, and the first condition of a prima facie case must be satisfied before the court can consider the others.
21. In the present case, the Applicants have exhibited documents suggesting that proceeds of sale from the Company's prime asset may have been distributed to a select few without disclosure or authority of the shareholders in general meeting. They have further shown that additional subdivisions of the land remain at risk of disposal. This, in my view, discloses a prima facie case that the substratum of the Company is under threat.
22. On the element of irreparable harm, it is trite that land has a unique value, and once alienated to third parties, recovery is often impractical if not impossible. Any further disposal of the subdivisions would, therefore, permanently alter the Company's asset base and render the derivative claim nugatory. This was emphasized in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, where the Court held that a prima facie case involves a right which has been infringed and requires protection.
23. As to the balance of convenience, I am persuaded that it tilts in favour of preserving the Company's property until the dispute is heard and resolved. The Respondents argue that injunctive relief would paralyze operations. However, I note that the Company's primary business revolves around the subdivision and disposal of the very land now in dispute. Restraining further dealings does not extinguish the Company's purpose but ensures that the asset is preserved pending resolution of contested allegations of mismanagement.
24. I am also mindful of the caution that the role of the court at the interlocutory stage is not to determine the merits finally, but to hold the ring pending trial.
25. In the circumstances, I am satisfied that the Applicants have met the threshold for the grant of interim injunctive relief under Order 40 Rule 1 of the Civil Procedure Rules.

### **Disposition**

26. In the result, I make the following orders:
  - i. The Applicants are hereby granted leave under Sections 238–242 of the *Companies Act*, 2015 to continue the suit herein as a derivative action on behalf of Royal Builders & Investment Limited.
  - ii. Pending the hearing and determination of the derivative suit, an injunction is hereby issued restraining the Respondents, their agents, and/or employees from alienating, transferring, or otherwise disposing of LR Nos. Nairobi/Block 183/334–356 and Nairobi/Block 183/537–569, being subdivisions of LR No. Nairobi/Block 74/16, without the sanction of the court or approval of the shareholders in accordance with the *Companies Act*.
  - iii. The prayer for blanket freezing of all company bank accounts is declined at this stage. The Applicants may, however, at pre-trial apply for specific disclosure of accounts and bank statements.
  - iv. The Respondents shall within 45 days produce and deliver to the Applicants certified copies of the documents enumerated in prayers (iii) (a)–(e) of the application dated 13<sup>th</sup> March 2025.
  - v. The costs of the two applications shall abide the outcome of the main suit.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI HIS 25<sup>TH</sup> DAY OF SEPTEMBER 2025.**



**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Marete & Ms. Mwendwa for Plaintiffs/Applicants

Ms. Odera & Mr. Waithaka for Defendants/Respondents

Court Assistant: Carlos

