



Nyakundi & 5 others v Kenya Commercial Bank Limited & 2 others (Civil Case E428 of 2024) [2025] KEHC 14702 (KLR) (Commercial and Tax) (16 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E428 OF 2024
PM MULWA, J
OCTOBER 16, 2025**

BETWEEN

**PATRICK MAKORI NYAKUNDI 1ST PLAINTIFF
GEORGE MORARA MOSOTI 2ND PLAINTIFF
RODAH MOKEIRA NYABOGA 3RD PLAINTIFF
ALICE BOSIBORI MOMANYI 4TH PLAINTIFF
OMWENGA RICHARD GICHANA 5TH PLAINTIFF
TINGA TRADERS LIMITED 6TH PLAINTIFF**

AND

**KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT
NELSON OGETO NYAMWENIA 2ND DEFENDANT
JOSEPH ARANGA BOGONKO 3RD DEFENDANT**

RULING

1. The matter before the Court concerns the question of representation and the propriety of the notice of withdrawal filed in respect of the suit instituted by the Plaintiffs through the firm of M/s Joseph Angwenyi & Company Advocates.
2. The Plaintiffs filed a plaint dated 31st July 2024 seeking, inter alia, orders restraining the Defendants from interfering with bank account number 1100109234 held in the name of the 6th Plaintiff (the Company) at Commercial Bank, Salama Branch; an injunction against alteration or substitution of



account signatories; and a declaration that the directors of the 6th Plaintiff were illegally changed and that the current directors should vacate office.

3. On 11th December 2024, the firm of M/s Mose Nyambega & Company Advocates entered appearance for the 6th Plaintiff and subsequently filed a notice of withdrawal dated the same day, purporting to withdraw the entire suit on behalf of the 6th Plaintiff. When the matter came up for directions, Mr. Kwamboka, counsel for Mose Nyambega & Co. Advocates, informed the Court that he had instructions from the 6th Plaintiff to withdraw the suit, contending that Mr. Angwenyi was not properly on record for the Company.
4. Mr. Angwenyi, appearing for the Plaintiffs, opposed the notice of withdrawal, asserting that the suit was a derivative action brought by the 1st to 5th Plaintiffs on behalf of and for the benefit of the 6th Plaintiff. He argued that the 2nd and 3rd Defendants, being the very persons accused of unlawfully interfering with the company's directorship and bank accounts, could not validly instruct counsel to withdraw a suit challenging their own alleged misconduct. According to him, the purported withdrawal by the 6th Plaintiff through counsel instructed by the said Defendants is an act of mischief intended to defeat justice and perpetuate control over the company's assets.
5. On the other hand, Ms. Kwamboka for the firm of Mose Nyambega & Co. Advocates submitted that a company cannot file a derivative suit in its own name, as such proceedings must be brought by a shareholder or member on behalf of the company. She argued that the 6th Plaintiff, being the company itself, cannot sue itself and therefore the suit as framed is misconceived and incompetent. Counsel further submitted that the representation of a company in legal proceedings must be authorized by a valid board or shareholder resolution, which in this case existed and empowered her firm to act for the company and to withdraw the suit.
6. Having considered the rival oral submissions and the pleadings on record, the issues that fall for determination are:
 - i. Whether the firm of M/s Joseph Angwenyi & Company Advocates or the firm of M/s Mose Nyambega & Company Advocates is properly on record for the 6th Plaintiff; and
 - ii. Whether the notice of withdrawal filed on 11th December 2024 is valid in law.

Analysis

7. The starting point is to clarify the nature of the suit. A derivative suit is one brought by a shareholder or member of a company seeking to enforce a right vested in the company where those in control of the company are alleged to have committed a wrong against it and are unlikely to sue. Section 238–242 of the *Companies Act*, 2015 codifies this principle.
8. In *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] eKLR, the Court observed that:

“A derivative claim is a mechanism through which shareholders can seek redress on behalf of the company where wrongs are alleged to have been done to the company by those who control it. The company itself cannot sue through the same directors who are the wrongdoers.”
7. Applying that principle here, the suit as described by counsel for the Plaintiffs is derivative in nature, brought by the 1st- 5th Plaintiffs ostensibly to protect the interests of the 6th Plaintiff from the alleged unlawful acts of the 2nd and 3rd Defendants. In that context, the company (6th Plaintiff) is a nominal



party and not the initiator of the action. Consequently, it could not, without leave of the Court or the consent of the derivative claimants, unilaterally withdraw the suit through its directors, especially where those directors are the very persons accused of wrongdoing.

8. The Court further notes that legal representation of a company must be supported by a valid resolution passed by its lawful board or members. However, where the directorship of a company is itself in dispute as is the case here the Court must tread cautiously before accepting any purported resolution emanating from a contested board.
9. The attempt by the 2nd and 3rd Defendants to instruct counsel to withdraw the suit, if indeed they are the ones purporting to act as the 6th Plaintiff's directors, raises a clear conflict of interest. The company cannot validly act through alleged wrongdoers to terminate proceedings intended to hold them accountable. The derivative principle exists precisely to prevent such an outcome.
10. Accordingly, the notice of withdrawal filed on 11th December 2024 is irregular and invalid, as it offends the protective purpose of derivative proceedings and undermines the authority of the plaintiffs who brought the claim. The firm of M/s Joseph Angwenyi & Company Advocates therefore remains properly on record for the Plaintiffs, including for purposes of prosecuting this derivative action.

Disposition

13. For the foregoing reasons, I find and hold that the suit dated 31st July 2024 is a derivative action brought by the 1st 5th Plaintiffs on behalf of the 6th Plaintiff company.
14. Consequently, I hold as follows:
 - i. The notice of withdrawal dated 11th December 2024 and filed by the firm of M/s Mose Nyambega & Co. Advocates is invalid and is hereby struck out.
 - ii. The firm of M/s Joseph Angwenyi & Company Advocates remains properly on record for the Plaintiffs for purposes of prosecuting this matter.
 - iii. The costs of this application shall be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF OCTOBER 2025.

P.M MULWA

JUDGE

In the presence of:

Mr. Angwenyi & Mr. Kerina for 1st – 5th Plaintiffs

Ms. Kwamboka h/b for Ms. Mose for 6th Plaintiff

Mr. Waweru h/b for Mr. Chege for 1st Defendant

Court Assistant: Carlos

