



**Kamau & another v Kimari & another (Commercial Case E470 of 2024)
[2025] KEHC 17283 (KLR) (Commercial and Tax) (14 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E470 OF 2024
MN MWANGI, J
NOVEMBER 14, 2025**

BETWEEN

VICTOR LOUIS KAMAU 1ST PLAINTIFF

KENYA FIRE APPLIANCES COMPANY LTD 2ND PLAINTIFF

AND

FRANCIS KIMARI 1ST DEFENDANT

MARK TILBURY 2ND DEFENDANT

RULING

1. This Ruling is in respect to two applications. The first application is the plaintiffs' Notice of Motion dated 12th August 2024 filed pursuant to the provisions of Sections 238 & 239 of the *akn ke act 2015 17 Companies Act*, Sections 1A, 2B, 3 & 3A of the *akn ke act 1924 3 Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, Article 159(2) of *akn ke act 2010 constitution the Constitution of Kenya* and all other enabling provisions of the law. The plaintiffs pray for an order of interlocutory injunction restraining the defendants, their agents, or servants from proceeding with the proposed Extraordinary General Meeting scheduled for 21st August 2024 at Mwanzo House, Nairobi, or any other venue and selling, transferring, charging, removing, or otherwise dealing with the 2nd plaintiff company's assets, pending the hearing and determination of this suit.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Victor Louis Kamau, the 1st plaintiff herein and a minority shareholder of the 2nd plaintiff company. Mr. Kamau averred that on 31st July 2024, he was served with a Notice of an Extraordinary General Meeting (EGM) scheduled for 21st August 2024, which proposed to pass the approval of a resolution for an unnamed third party to purchase assets and client list for Kshs.12,000,000 =, sale of shares in Safety Systems Ltd (Uganda) for Kshs.6,562,500 = to two third



- parties, and the voluntary winding up of Kenya Fire Appliances Company Ltd. He contended that he objected to the said Notice through his Advocates but received no response.
3. Mr. Kamau stated that the aforesaid proposals contradicted the defendants' earlier stance opposing a winding-up petition against the 2nd plaintiff in Insolvency Cause No. E034 of 2020, which was dismissed in June 2023, where they had claimed the 2nd plaintiff company was still viable. He asserted that the 2nd plaintiff company had assets valued at over Kshs.650,000,000 = as at 2005, including Mwanzo House, L.R. No. 209 8309 Dunga Close Nairobi, which houses a two storey building and a go down valued at over Kshs.120,000,000 =, which made the proposed Kshs.12,000,000 = valuation of the 2nd plaintiff and its assets fraudulent and grossly undervalued.
 4. Mr. Kamau averred that the defendants have been disposing of company assets without shareholder approval and excluding minority shareholders from decision-making. He asserted that the 2nd plaintiff's majority shareholders are acting oppressively and fraudulently by seeking to unjustly benefit at the expense of the minority. He indicated that he had repeatedly raised concerns since 2005, which remain unaddressed. He provided an undertaking as to damages and urged this Court to grant the injunctive orders being sought to prevent injustice.
 5. In opposition to the application, the defendants filed a Preliminary Objection dated 29th August 2024 raising the following grounds –
 - i. That the suit and application herein by the plaintiff are res-judicata and this Court is barred from trying the merits thereof under Section 7 of the *akn ke act 1924 3 Civil Procedure Act*, the same dispute and matter having been previously in issue between parties, tried and determined with finality by this Court in a Judgment delivered on 23 6 2020 in Milimani, High Court Commercial Insolvency Petition Number E034 2020; and
 - ii. That the application and suit herein are an abuse of the Court process and should be struck out with costs to the defendants.
 6. The defendants also filed a replying affidavit sworn on 29th August 2024 by Mr. Mark Tilbury, the 2nd defendant herein, a Director and member of the 2nd plaintiff company. Mr. Tilbury averred that the plaintiffs have neither disclosed a prima facie case nor met the legal threshold for being granted an order of injunction. He deposed that the issues raised by the plaintiffs date back to the years 1967, 2005 & 2006, which is over 57 years ago, and are therefore time-barred under the *akn ke act 1968 21 Limitation of Actions Act*. It was stated by Mr. Tilbury that the issues raised herein were litigated in Milimani HCCOMMIP No. E034 of 2020 where Judgment was delivered on 23rd June 2020 dismissing the said claims. He stated that the instant application and this suit are res judicata.
 7. Mr. Tilbury asserted that the impugned Notice for the EGM was issued in compliance with the 2nd plaintiff's Articles of Association and the plaintiffs acknowledged proper service, and any opposition to the agenda of the said meeting should be raised through internal company mechanisms, not by Court interference. He denied allegations of exclusion, oppression or mismanagement and stated that some of the properties listed by the plaintiffs do not even belong to the 2nd plaintiff company. He further stated that leave to continue with this suit as a derivative suit was obtained irregularly through suppression of material facts. Furthermore, the issues raised herein are already covered under Section 241 of the *akn ke act 2015 17 Companies Act* and the 2nd plaintiff's Memorandum & Articles of Association, hence no valid basis for a derivative action.
 8. In a rejoinder, the plaintiffs filed a supplementary affidavit sworn on 23rd September 2024 by Mr. Victor Louis Kamau, the 1st plaintiff herein and a minority shareholder of the 2nd plaintiff company. He denied



having made false or baseless claims and maintained that the instant application has been made in good faith to address fraud, negligence, breach of duty, and breach of trust by the defendants. He averred that the cause of action herein arose upon discovery of the EGM Notice proposing harmful resolutions. Mr. Kamau contended that the 2020 Insolvency Petition was different, as this is a derivative action on behalf of the 2nd plaintiff company, not a winding-up petition. Further, that the parties and the cause of action in this suit are different, hence *res judicata* is not applicable in this case. He asserted that in the event that the injunctive relief being sought is not granted, the plaintiffs will suffer prejudice as the 2nd plaintiff's majority shareholders will proceed with detrimental resolutions at the EGM.

9. The 2nd application is the defendants' Notice of Motion dated 29th August 2025 filed under the provisions of Sections 782(4), 1004(5) of the *akn ke act 2015 17 Companies Act*, Sections 1A, 1B, 3, 34, 5, 7 & 63(e) of the *akn ke act 1924 3 Civil Procedure Act*, Order 2 Rule 15 (1)(b) & (d) and Order 40 Rule 4(3) & 7 of the Civil Procedure (Amendment) Rules, 2020, and all other laws. The defendants pray for orders to set aside and discharge the interim ex-parte orders issued on 20th August 2024 and an order to strike out the plaint dated 12th August 2024 and all proceedings arising from it, including the plaintiff's Notice of Motion dated 14th August 2024.
10. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Mark Tilbury, the 2nd defendant herein, a Director and member of the 2nd plaintiff company. Mr. Tilbury averred that the ex parte orders issued herein were obtained through non-disclosure and misrepresentation, as the EGM Notice was lawfully issued under the 2nd plaintiff company's Articles of Association. He contended that leave to continue with this suit as a derivative action was improperly obtained.
11. In opposition to the application, the plaintiff filed a replying affidavit sworn on 26th September 2024 by Mr. Victor Louis Kamau, the 1st plaintiff herein and a minority shareholder of the 2nd plaintiff company. He averred that a derivative action is a legitimate statutory remedy recognized in law meant to hold Directors and majority shareholders of a company accountable for mismanagement, fraud, and breach of fiduciary duty. Mr. Kamau claimed that the plaintiffs' claim is well-founded, raises serious issues of corporate governance, and protects the interests of the 2nd plaintiff company and minority shareholders. He asserted that the defendant's application is a diversionary tactic to evade accountability, and in the event that it is allowed, the plaintiffs will suffer prejudice and the 2nd plaintiff's assets will be at the mercy of its majority shareholders' wrongful actions.
12. The applications herein were canvassed by way of written submissions. The plaintiffs' submissions were filed by the law firm of Kyalo & Associates Advocates on 12th November 2024, while the defendants' submissions were filed on 8th November 2024 by the law firm of Litoro & Omwebu Advocates.
13. Mr. Mbobu, learned Counsel for the plaintiffs cited Section 7 of the *akn ke act 1924 3 Civil Procedure Act* and the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, and submitted that this suit being a derivative action is distinct from Insolvency Petition No. E034 of 2020, as the issues and parties are different. He argued that in the petition, the 1st plaintiff was the petitioner and the 2nd plaintiff the respondent, while in this case, the 1st plaintiff sues derivatively on behalf of the 2nd plaintiff against the defendants. Counsel maintained that this suit and the plaintiff's application are not *res judicata*.
14. Mr. Mbobu submitted that all material facts necessary to assist this Court in rendering justice to the parties herein were fully disclosed by the plaintiffs. He contended that it is the defendants who failed to disclose key matters including holding statutory meetings without minority shareholders, selling



- company property and passing resolutions without proper approval. Counsel relied on the case of DT. Dobie Company Limited v Muchina [1282] KLR and the Court of Appeal case in Kisii Farmers' Co-operative Union Limited v Sanjay Natwarlal Chaunhan t a Oriental Motors [2006] KECA 36 (KLR), and argued that the defendant's application lacks merit, is a diversionary tactic to evade accountability, and should be dismissed.
15. Mr. Litoro, learned Counsel for the defendants relied on the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] KECA 477 (KLR), and submitted that the plaintiffs application is res judicata, as the issues raised were already heard, fully determined, and dismissed in the Judgment of 23rd June 2023 in Milimani HCCOMMIP No. E034 of 2020, which Judgment has neither been set aside nor reviewed. He cited the former East African Court of Appeal case of Gurbachan Singh Kalsi v Yowani Ekori Civil Appeal No. 62 of 1958, and argued that the plaintiff is attempting instalment litigation and a "second bite of the cherry". He contended that although the impugned company meeting Notice is new, the grounds of challenge are the same, as the matters litigated and dismissed in the earlier petition, making the plaintiffs' application an abuse of the Court process.
 16. Mr. Litoro submitted that the mere filing of an Appeal against the Insolvency Petition does not justify the reopening of the issues already determined by the Insolvency Judgment. He further submitted that since the same issues are pending before the Court of Appeal, Section 6 of the *akn ke act 1924 3 Civil Procedure Act* bars parallel proceedings. Counsel cited the case of In Re K Boat Service [1998] eKLR, and argued that Courts should not interfere with company affairs in the absence of reasonable grounds. He submitted that the 2nd plaintiff company's Memorandum and Articles of Association authorize the impugned meeting, to which the plaintiff was duly invited. He contended that the plaintiff has not shown a prima facie case or irreparable loss to warrant being granted an order for injunction. Counsel asserted that restraining the defendants from conducting the meeting would cause harm by paralyzing the 2nd plaintiff. He stated that no decision has been made yet on the contested resolutions and the plaintiff has not been denied participation in the meeting.
 17. Mr. Litoro urged this Court to set aside the interim orders of 12th August 2024 for non-disclosure of material facts, and find that the plaintiff has not established a prima facie case as the valuation was done without consent or independent valuers and the properties listed do not belong to the 2nd plaintiff, some being rentals or non-existent assets. For that reason, he asserted that the plaintiffs have not met the test of injunction set out in the case of Giella v Cassman Brown & Company Ltd [1973] EA 358. Counsel argued that the leave to continue this suit as a derivative claim granted ex parte on 20th August 2024 was obtained irregularly through suppression of material facts. He contended that the issues raised are authorized under Section 241 of the *akn ke act 2015 17 Companies Act* and the 2nd plaintiff's Memorandum and Articles of Association. He cited the case of Isaiah Waweru Ngumi & 2 others v Muturi Ndungu [2016] eKLR, and stated that the Court would have declined leave if all facts were disclosed.
 18. Mr. Litoro submitted that this suit is not in the 2nd plaintiff's best interest as required under Section 238 of the *akn ke act 2015 17 Companies Act*, 2015 as the issues raised can be resolved internally under the 2nd plaintiff's Memorandum and Articles of Association. He argued that the leave to continue with the derivative suit granted ex parte was irregular as it failed to consider their defence and does not meet the threshold under Section 241 of the *akn ke act 2015 17 Companies Act*. Counsel further submitted that the plaintiffs have not shown that the alleged actions lacked shareholder or company authority, nor that the issues raised herein cannot be pursued by the 1st plaintiff in his personal capacity. For that reason, he asserted that this suit is not in the 2nd plaintiff company's best interest. To buttress the aforesaid submissions, Mr. Litoro relied on the cases of Udali Group Limited v Umberto Rtccardo



Analysis And Determination.

19. I have considered the applications herein, the grounds on the face of each application and the affidavits filed in support thereof. I have also considered the replying affidavit by the plaintiff and the defendants, the Preliminary Objection by the defendants and the written submissions by Counsel for the parties. The issues that arise for determination are –
- i. Whether the plaintiffs’ application and this suit are res judicata;
 - ii. Whether the interim ex-parte orders issued on 20th August 2024 should be set aside and or discharged; and
 - iii. Whether an order of temporary injunction should issue against the defendants.

Whether the plaintiffs’ application and this suit are res judicata .

20. The defendants have urged this Court to find that this suit and the plaintiffs’ application are res judicata Milimani HCCOMMIP No. E034 of 2020 brought by the 1st plaintiff against the 2nd plaintiff company, wherein the same dispute and matter have been previously in issue between the parties herein, tried and determined with finality in a Judgment delivered on 23rd June 2023 which dismissed the Insolvency Petition. The plaintiffs on the other hand contended that the 2020 Insolvency Petition was different as this is a derivative action on behalf of the 2nd plaintiff company, not a winding-up petition. They further averred that the parties and the cause of action in this suit are different from those in the Insolvency Petition, hence the plea of res judicata is not applicable in this case.

21. Res Judicata is provided for under Section 7 of the *akn ke act 1924 3 Civil Procedure Act*, Cap 21 Laws of Kenya, which states that –

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.

22. The *akn ke act 1924 3 Civil Procedure Act* has also provided explanations in respect to the application of the res judicata doctrine. Explanations 1-6 are in the following terms -

Explanation (1) -The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) -For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) -The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) - Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) - Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.



Explanation (6) - Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

23. The Supreme Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) addressed itself on the doctrine of res judicata and held that –

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

24. From the foregoing authority and applicable legal provisions, it is evident that the doctrine of res judicata ousts the jurisdiction of a Court to try any suit or issue which has been determined with finality by a Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
25. A perusal of the pleadings in Milimani HCCOMMIP No. E034 of 2020 annexed to the affidavit in support of the plaintiffs' application, reveals that the petition therein was filed by the 1st plaintiff herein against the 2nd plaintiff herein. In the said petition, the 1st plaintiff, a minority shareholder and founding member of the 2nd plaintiff company, sought declarations that his removal as a Director of the 2nd plaintiff on 20th April 2005 was unlawful and sought to be reinstated, an order for audit of the 2nd plaintiff's accounts, valuation of assets, payment of company debts, and possible sale of assets under a Liquidator's supervision. Alternatively, the 1st plaintiff sought an order under Section 219 of the repealed *akn ke act 2015 17 Companies Act*, that the 2nd plaintiff company be wound up and for the Official Receiver to be appointed as the Liquidator. Mr. Kamau claimed that since 2005 under the management of Mr. Kimari, the 2nd plaintiff was being run oppressively against minority shareholders. He claimed he was excluded from meetings, barred from share purchases, profits were diluted, and company funds misused.
26. Upon perusal of the plaint in this suit, it is evident that the orders being sought herein are different from those sought in the Insolvency Petition. The plaintiffs in this suit pray for orders inter alia, that an independent valuation expert be appointed to assess and Report on the company's assets and liabilities within 60 days. The plaintiffs' case herein, is that the defendants have run the 2nd plaintiff oppressively by excluding minority shareholders from management, have mismanaged affairs of the company leading to loss of profitability. That they have diluted minority shares, misused and disposed of assets, denied the plaintiffs access to company records, and failed to account for revenues since 2005. They averred that the 2nd plaintiff has since acquired substantial assets worth hundreds of Millions of Shillings, including land, buildings, vehicles, stocks, and branch offices, some of which have allegedly been illegally sold by the 1st defendant.
27. The plaintiffs challenge the EGM scheduled for 21st August 2024 (now past) whose agenda proposed the sale of company assets and client list for Kshs.12,000,000 =, sale of the Ugandan subsidiary shares for Kshs.6,500,000 =, voluntary winding up of the 2nd plaintiff and distribution of surplus assets to the



2nd plaintiff's shareholders. The plaintiffs assert that this EGM epitomizes fraud and breach of trust as no valuation reports were issued, no prior general meetings were held, and the proposed resolutions contradict the defendants' earlier opposition to the Insolvency Petition. They argue that the EGM is a scheme by the 2nd plaintiff's majority shareholders to conceal mismanagement and defraud the minority.

28. From the I have made, it is clear that the Insolvency Petition was filed by the 1st plaintiff herein, against the 2nd plaintiff herein, whereas this suit is a derivative claim on behalf of the 2nd plaintiff against its Directors majority shareholders. As pointed out earlier, the reliefs being sought in this suit are different from those which were sought in the Insolvency Petition. In the Insolvency Petition, the core complaint included oppressive conduct, exclusion from management, misuse of funds, and dilution of shares, whereas in this suit, the core complaint includes oppressive conduct, mismanagement, exclusion, asset disposals, undervaluation, fraudulent EGM Notice for a meeting scheduled for 21st August 2024 (now past).
29. From the above, this Court finds that the parties in this suit are not litigating under the same title as in the Insolvency Petition. In the Insolvency Petition, the 1st plaintiff instituted a suit on his own behalf against the 2nd plaintiff in its personal capacity, but this suit has been initiated by the 1st plaintiff on behalf of the 2nd plaintiff against its majority shareholders. As to whether the issues being litigated on, in this suit are similar to those determined in the Insolvency Petition, it is my considered view that save for the Notice of an EGM scheduled for 21st August 2024 and the proposed resolutions, there is an overlap on core issues between the parties herein and those in the Insolvency Petition, especially in respect to allegations of oppression, mismanagement and exclusion since 2005.
30. To this end, I refer to the holding by the Court in the oft cited case of Gurbachan Singh Kalsi v Yowani Ekori (supra) where the former East African Court of Appeal in dealing with a similar issue held as follows -

The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

31. The question that now arises is whether the lack of legality of the EGM scheduled for 21st August 2024 (now past) could have been brought up and determined by the Insolvency Court in Milimani HCCOMMIP No. E034 of 2020. The Insolvency Petition was determined in a Judgment delivered on 23rd June 2023 and the EGM the plaintiffs are challenging in this suit was scheduled for 21st August 2024 (now past) and a Notice for the said meeting was also issued after delivery of the Insolvency Petition Judgment. It is therefore apparent that challenge to the 2024 EGM and proposed resolutions is indeed a fresh cause of action that could not have been litigated on, and determined in the Insolvency Petition.
32. It is therefore my finding that not all the issues raised in this suit are similar to the ones raised in Milimani HCCOMMIP No. E034 of 2020. Consequently, the issues raised in this suit have not been



heard and determined by a Court of competent jurisdiction with finality in order for the defendants to successfully raise a plea of res judicata in this case.

Whether the interim ex-parte orders issued on 20th August 2024 should be set aside and or discharged.

33. On 20th August 2024, this Court granted the 1st plaintiff leave to proceed with this suit as a derivative action on behalf of the 2nd plaintiff. The defendants on the other hand contend that the said Order was obtained through suppression of material facts and ought to be set aside.
34. Derivative claims are provided for under Sections 238-241 of the Company's 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.
35. Pursuant to the provisions of Part XI of the *Kenya Companies Act 2015*, 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* [2016] eKLR, the Court set out some of the factors to be considered in such an application as hereunder -
- 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.
36. The issue of oppressive conduct by the 2nd plaintiff's majority shareholders was addressed by the Court in Milimani HCCOMMIP No. E034 of 2020. The Insolvency Court at paragraphs 35 - 43 found that the 1st plaintiff did not establish a case for oppressive conduct by the majority shareholders of the 2nd plaintiff. It is not in contest that the decision by the Insolvency Court has not been varied, altered and or set aside, thus it remains binding on the parties herein and this Court, as the said Judgement was delivered by a Court of equal and competent jurisdiction.
37. As explained above herein, the only thing that has changed since the delivery of the Judgment by the Insolvency Court and the filing of this suit is the issuance of a Notice for an EGM scheduled for 21st August 2024. The plaintiffs' challenge to the intended meeting is that the EGM epitomizes fraud and breach of trust as no valuation reports were issued, no prior general meetings were held, and the proposed resolutions contradict the defendants' earlier opposition to the Insolvency Petition. For that reason, they asserted that the EGM is a scheme by the 2nd plaintiff's majority shareholders to conceal mismanagement and to defraud the minority.
38. Upon examining the 2nd plaintiff's Memorandum and Articles of Association, it is clear that the Directors of the 2nd plaintiff under Clause 19 of the 2nd plaintiff's Articles of Association have the power to convene an EGM when they think it fit to do so. Accordingly, by issuing the impugned Notice, the defendants acted in accordance with the provisions of the 2nd plaintiff's Articles of Association. It is not disputed that a Notice for the said meeting was issued and served upon the 1st plaintiff, who does not dispute receipt of the same. Section 285 of the *akn ke act 2015 17 Companies Act* provides for the contents of a General Meeting. It states that –
- In giving notice of a general meeting, a company shall specify -
- a. the time and date of the meeting;
 - b. the place of the meeting;
 - ba) in the case of a hybrid or virtual meeting, specify the means ofCjoining and participating in the meeting; and
 - c. the general nature of the business to be dealt with at the meeting.
39. The impugned Notice, in this matter complies with the aforesaid provisions. The 1st plaintiff's claims that no valuation reports were issued, no prior general meetings were held, and that the proposed resolutions contradict the defendants' earlier opposition to the Insolvency Petition are not enough to invalidate a meeting or warrant this Court to interfere with the conduct of the 2nd plaintiff's internal affairs.
40. All the other issues complained of in respect to oppressive conduct of the 2nd plaintiff's majority shareholders were already determined by the Insolvency Court where it was found that the 1st plaintiff did not demonstrate and or prove oppressive conduct by the 2nd plaintiff's majority shareholders.



Courts generally refrain from interfering with a company's internal affairs unless illegality or ultra vires conduct is shown. From the foregoing, I am not persuaded that there is any illegality and or that the 2nd plaintiff's majority shareholders acted ultra vires their powers as conferred to them by the *akn ke act 2015 17 Companies Act* and the 2nd plaintiff's Memorandum & Articles of Association to warrant this Court's interference.

41. As correctly submitted by the defendants, pursuant to Section 241(2)(f) of the *akn ke act 2015 17 Companies Act*, in considering whether or not to grant leave to a minority shareholder to proceed with a suit as a derivative action, Courts have to consider whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in the member's own right rather than on behalf of the company.
42. It is evident that this is a suit which could be pursued by the 1st plaintiff in his own capacity and not on behalf of the 2nd plaintiff. The above notwithstanding, the Notice for the EGM had proposed the resolutions to be passed at the said meeting. It is my considered view that this suit is premature since it challenges resolutions that have not been passed. It as such amounts to an invitation for this Court to supervise the winding up and or internal management of the 2nd plaintiff, which invitation was declined by the Court in Milimani HCCOMMIP No. E034 of 2020.
43. In the end, I am not persuaded that the plaintiffs have established a prima facie case to warrant being granted leave to proceed with this suit as a derivative claim.
44. I am therefore persuaded that I should set aside and or discharge the interim ex-parte orders issued on 20th August 2024, which I hereby discharge.
45. The upshot is that plaintiffs' application is unmeritorious, whereas the defendants' application is merited. As a result, I make the following orders.
 - i. The interim ex-parte orders granted on 20th August 2024 are hereby discharged;
 - ii. The plaintiffs' application dated 12th August 2024 and this suit are hereby struck out; and
 - iii. Costs of the two applications and this suit are hereby granted to the defendants .

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF NOVEMBER, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Chamia for the plaintiffs

Mr. Litoro for the defendants

Ms B. Wokabi - Court Assistant.

