



**Kinyanjui & 2 others v Mathu (Sued in his Personal Capacity as the Administrator of The Estate of Monica Wangui Njenga) & 4 others (Civil Suit 27 of 2020) [2025] KEHC 17587 (KLR) (25 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17587 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 27 OF 2020  
JM NANG'EA, J  
NOVEMBER 25, 2025**

**BETWEEN**

**DAVIS NJENGA KINYANJUI ..... 1<sup>ST</sup> PLAINTIFF  
NJEMONI LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
DANDORA MILLERS LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**DAVID KINYANJUI MATHU (SUED IN HIS PERSONAL CAPACITY  
AS THE ADMINISTRATOR OF THE ESTATE OF MONICA WANGUI  
NJENGA) ..... 1<sup>ST</sup> DEFENDANT  
FRECIA WANJIKU GATHOGO ..... 2<sup>ND</sup> DEFENDANT  
DAVID KINYANJUI MATHU ..... 3<sup>RD</sup> DEFENDANT  
JOYCE NYAMBURA NJENGA ..... 4<sup>TH</sup> DEFENDANT  
REGISTRAR OF COMPANIES ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This Ruling is premised upon the 1<sup>st</sup> Defendant's Notice of Motion dated 12<sup>th</sup> March, 2025 by which reliefs are sought as hereunder:
  1. Spent
  2. That this honourable court be pleased to grant leave to the 1<sup>st</sup> defendant herein (Plaintiff in the counter-claim) to amend its defence and counter-claim as per attached amended defence and counter-claim. (sic)



3. That upon amendment of the counter-claim, this honourable court be pleased to grant leave to the plaintiff in the counter-claim to prosecute the same on behalf of the affected parties as a derivative claim.
4. That cost of the instant be in the cause. ( sic )

### **The Applicant's Affidavit Evidence.**

2. The 1<sup>st</sup> Defendant (hereinafter referred to as the Applicant) swore an affidavit in support of the Application in his own personal capacity as well as in his capacity as the legal representative of the Estate of Monica Wangui Njenga (deceased) who is said to have been a Director/shareholder of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. The Applicant further deposes that he is a Director of the 3<sup>rd</sup> Plaintiff and a rightful shareholder of the 2<sup>nd</sup> Plaintiff. It is also averred that the Applicant is the Legal Administrator of the Estate of George Mathu Njenga (deceased) who was a Director of the 3<sup>rd</sup> Plaintiff too.
3. The Applicant contends that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff companies are being mismanaged by the 1<sup>st</sup> Plaintiff (hereinafter referred to as "the Respondent") who is allegedly undertaking illegal, un-procedural, fraudulent and ultra vires acts in breach of the Company's Articles of Association. Specifically, the Respondent is accused of illegally fabricating minutes of the 2<sup>nd</sup> Plaintiff's Board of Directors in an unsuccessful attempt to allocate himself 300 extra shares.
4. The Applicant continues to complain that the Respondent is unilaterally managing the affairs of the 2<sup>nd</sup> Plaintiff while denying other members access to the company's properties that include Nakuru Municipality Block 5/194 and Nakuru Municipality Block 5/56. The Respondent is said to have even gone ahead to lease out a portion of the 2<sup>nd</sup> Plaintiff's parcel of land known as L.R. No.451/2055, I.R. 33556 to third parties without the consent of other shareholders and failing to account for rent received thereon. Additionally, the same property was charged to the Consolidated Bank of Kenya without the requisite authorization by other members of the 2<sup>nd</sup> Plaintiff.
5. In furtherance of his alleged illegal and fraudulent acts, the Respondent is also said to have increased the 3<sup>rd</sup> Plaintiff's nominal share capital through fabrication of minutes of the Company's Board Meetings.
6. It is also charged that the Respondent has failed to ensure that dividends are paid to the shareholders, the Applicant pointing out that the Estate of the late George Mathu in particular has not received dividends for over 26 years.
7. Despite protests by other Directors and /or shareholders the Respondent is said to have failed to take heed and persisted in the wrongful acts. In the premises, the Applicant avers that there is need to amend his defence and counterclaim as proposed in this Application and further craves permission to prosecute the counterclaim as a derivative suit, hence this Application.

### **The Respondent's Affidavit Evidence in Reply.**

8. The Respondent opposes the Application vide an affidavit in reply purported to have been sworn on 23<sup>rd</sup> April, 2025. He contends that the Application is brought in bad faith with the sole objective of delaying hearing and determination of this suit. It is averred that similar allegations the Applicant previously made against the Respondent in his application dated 7<sup>th</sup> August, 2024 were rejected by the Court.
9. The Respondent brings to the Court's attention that the late Monica Wangui Njenga on behalf of whose Estate the Applicant also brings the Counterclaim and the Application under consideration, had previously filed Nakuru HCCC No. 25 of 2020. In that suit the deceased made the same allegation



of unilateral management of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs against the Applicant. An Application dated 24<sup>th</sup> June, 2000 was also filed in the suit seeking to have the claim proceed as a derivative suit. On Application of the Applicant, that suit is said to have been consolidated with the instant suit upon which the Applicant herein applied to withdraw Nakuru Civil Suit No.25 of 2020. According to the Applicant, the suit was marked as withdrawn by consent of the parties dated 19<sup>th</sup> June, 2023.

10. It is the Respondent's contention in the circumstances that having withdrawn Nakuru Civil Suit No.25 of 2020 and the said Application therein praying for the suit to be instituted as a derivative suit, the same Application could only be reintroduced in an application for review or setting aside of the consent order. Filing a Counterclaim and a similar Application to bring a derivative action after withdrawal of the stated suit is an abuse of the Court process, protests the Respondent.
11. It is further stated that the Applicant also instituted an Originating Summons (O.S.) No. E868 of 2020 at the Milimani Commercial & Tax Division of the High Court, Nairobi, seeking rectification of the 3<sup>rd</sup> Plaintiff's registrar to reduce the Respondent's shareholding therein. The Respondent avers that this Application was struck out and no appeal was lodged to challenge the order. Pointing out that part of the Applicant's Counterclaim herein relates to the 3<sup>rd</sup> Plaintiff's shareholding structure, the Respondent charges that this is further demonstration of the Applicant's abuse of the Court process.
12. The Respondent continues to contend that since he has already been allowed to proceed with this suit as a derivative suit, granting the Applicant similar permission would be untenable and result in absurdity as the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff's Companies would be plaintiffs and also defendants in the same suit.
13. In addition to the foregoing objections to the instant Application, the Respondent also argues that the Application lacks in merit. He contends that the Plaintiffs' case in the instant suit is that the Applicant fraudulently became a shareholder of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and, therefore, he does not have the necessary bonafides to prosecute a claim on behalf of the same entities while the suit is pending.
14. Besides, the Applicant's complaint that the Respondent has failed to involve him and other Directors/ shareholders of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the companies' meetings is dismissed as a personal grievance for which permission to mount a derivative claim may not be given. So are the Applicant's alleged claims that the late Monica Wangui Njenga was denied access to a parcel of land; and further that there is failure to pay dividends to some shareholders.
15. The Respondent therefore contends that the Applicant cannot be given leave to prosecute his Counterclaim as a derivative suit because he is championing his own and/or other shareholders' personal interests rather than the interests of 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff companies. To reinforce this contention the Respondent refers the Court to paragraph 17 of the Applicant's affidavit in support of the Application where the latter is said to concede that he is fighting for the benefit of shareholders and not the subject companies per se.
16. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants don't oppose the Application whilst the 5<sup>th</sup> defendant does not seem to have put in a defence to the suit.
17. The Applicant was allowed to put in a further affidavit in reply to the Respondent's affidavit but the record does not show that such further affidavit evidence has been filed.
18. Learned counsel for the Applicant and the Respondent filed written submissions which I have perused against the affidavit evidence and the record:



### **Applicant's Submissions.**

19. Counsel allude to the provisions of Section 238 of the *Companies Act* as well as other cases of Nextgen Office Suites Ltd & Another vs Netcom Investments Limited & Another; Shah Minakshi Navinhandra (Interested Party) [2021] eKLR and Ghelani Metals Ltd & 3 Others V. Elesh Ghelani Natwarlal & the Registrar of Companies (HCCC NO. 102 of 2017) regarding the meaning of a derivative suit. These judicial and statutory authorities explain that a derivative claim is one brought on behalf of and in the interests of a company as opposed to the interests of individual shareholders.

### **Respondent's Submissions**

20. The Respondent's Advocates cite the same authorities supra as stating the nature and operation of a derivative action. In addition, Counsel place reliance on Paolo Murri vs Gian Bahistan Murri & Another (2000) eKLR for the proposition that an Application such as before may only be granted if made in good faith and not for nuisance value. In Satya Bhama Gadhi vs DPP and Others (2018) eKLR also cited by the Respondent, it was observed that abuse of court process arises where court action is resorted to unfairly, improperly or dishonestly. By Instituting a multiplicity of actions on the same dispute in different courts constitutes abuse of the court process, according to the Respondent.
21. The Respondent further submits that issues raised in the Counterclaim were also raised in the withdrawn Civil Case No.25 of 2020 and in the struck out Nairobi Case No.E868 of 2020 as averred in his affidavit in reply to the Application.
22. To buttress the position that the Applicant does not merit to be allowed to bring a derivative claim, the Respondent's Advocates make reference to the case of Viren D.M. Joshi -vs- Bags & Balers Manufacturers (K) Ltd & Another (2021) eKLR where it was held that in a situation where a shareholder suffers a personal wrong caused by a Director, majority Directors or the company threatens an ultra vires act the lawful remedy is a personal action by the affected shareholder. The same holding was made in the case of Golden Mines Ltd vs Revill also relied upon by Counsel.

### **Analysis and Determination**

23. The gist of the Application before the Court is permission to prosecute the Applicant's Counterclaim herein on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as a derivative suit. This relief is sought upon grant of the prayer for further amendment of the Applicant's Amended Defence and Counterclaim dated 22<sup>nd</sup> November, 2023 and first amended on 27<sup>th</sup> June, 2023.
24. Beginning with the prayer for further amendment of the Applicant's Amended Defence and Counterclaim, the Respondent does not seem to oppose this aspect of the Application. What he is vehemently opposed to is grant of leave to the Applicant to bring the Counterclaim on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as a derivative claim.
25. With regard to the prayer to bring the Counterclaim as a derivative suit, the Applicant's advocates refer the Court to the provisions of Section 238 (1) of the *Companies Act* for the definition of a derivative claim. The statutory provision enacts that a derivative claim means:

“Proceedings by a member of a company:-

- a. In respect of a cause of action listed in the company; and
- b. Seeking relief on behalf of the company.



- “4. 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.
- “5. A derivative claim may be brought against the director or another person, or both. It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.”
26. According to Section 238(6) of the Act, “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.”
27. This definition of a derivative claim is underscored in many other judicial determinations including; *Ayim vs Multitrading Industrial Suppliers Ltd & 2 Others*; *African Banking Corporation (Interested Party) (2022) KEHC 16231 (KLR)*.

### **Determination**

28. From the foregoing submissions, Counsel for both parties correctly state the law as regards the meaning and import of a derivative action. The Applicant presents evidence purporting to show that he is a member of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. The Respondent, however, alleges in this suit that he fraudulently made himself a shareholder/member of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.
29. In my view, the Applicant needs to successfully defend himself to acquire the necessary locus standi before considering to bring a derivative suit on behalf of the subject companies. He is also substantially seeking personal and/or other shareholders’ remedies which is not permitted in a derivative claim under the law.
30. I further agree with the Respondent that the Applicant is guilty of abuse of the court process for filing a multiplicity of actions over the same dispute, and in some cases withdrawing and filing them again. In the circumstances, he does not come to the court of equity with clean hands.
31. Regarding his alleged locus standi as the legal representative of the Estate of the late Monica Wangui Njenga, there is no evidence that the Applicant formally obtained the deceased’s shares through transmission by operation of law as envisaged in Section 238 (6) of the *Companies Act* supra.. It is not shown that Grant of Letters of Administration in his favour has been confirmed and the deceased’s shares in the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs actually transferred to him. His shareholding in place of the deceased’s Estate therefore appears to be premature.
32. In the result, the Applicant is allowed to further amend his Defence and counterclaim as proposed. The further amended Defence shall be deemed duly filed upon payment of applicable court fees, if any, within 7 days from the date hereof. Permission to prosecute the Counterclaim as a derivative suit is, however, declined. For the reasons given. Because the parties equally succeeded and considering their relationship as family members they will bear their own costs of the Application.
35. Ruling accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**J. M. NANG’EA, JUDGE.**



In the presence of:

Plaintiffs' Advocate, Mr. Githui.

1<sup>st</sup> Defendant's Advocate, Mr. Muthui for Mr. Muriithi.

2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Advocate, absent

5<sup>th</sup> defendant - absent

Court Assistant (Jeniffer)

