

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
HCCOMPET NO. E004 OF 2025

HON. JUSTICE ALEEM VISRAM

4TH DECEMBER, 2025

BETWEEN

STEPHEN KINGOO MBUTI.....1ST PETITIONER
PETER MUSAU NZIOKA.....2ND PETITIONER
BENJAMIN KYALO MUTHOKA.....3RD PETITIONER

VERSUS

DAVID NDOLO NGILAI.....1ST RESPONDENT
LEONARD KYANIA KITUA.....2ND RESPONDENT
JULIUS MBAU NZYUKO.....3RD RESPONDENT
JULIUS KILONZO MAWEU4TH RESPONDENT

RULING

Introduction

1. The Petitioners, all shareholders of Malili Ranch Limited, approached this Court alleging serious governance failures within the company. Their complaint centers on the persistent failure to convene Annual General Meetings since 2007, exclusion of shareholders from participation, non-disclosure and

mismanagement of proceeds from compulsory land acquisition for the Konza City project, and the broader paralysis of the company's internal machinery. They seek Court intervention to protect their rights and restore corporate governance.

2. The Respondents raised a Preliminary Objection dated 26th May, 2025, challenging the competency of the Petition. The objection rests on four central grounds: that the Petition is barred by the doctrine of exhaustion; that the Petition is incompetent for want of leave as a derivative action; that the suit is fatally defective for failure to join necessary parties; and that the Petitioners did not issue statutory notice for the proposed removal of directors.
3. Parties filed written submissions, which I have carefully reviewed. The Court now turns to determine whether the objection meets the legal threshold and whether any of the grounds raised dispose of the Petition.

Whether the Preliminary objection Meets the Legal Threshold

4. The law on preliminary objections is settled. The celebrated authority of ***Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696*** states that a preliminary objection must raise a pure point of law arising from the pleadings and be capable of disposing of the suit without the Court engaging in contested facts.

5. In *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR)]. In *Mukisa*(supra)

Law J.A., and *Newbold P. respectively at 700 and 701*, held as follows: -

Law, JA.:

“So far as I am aware, a Preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued ass a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.” (Emphasis mine)

6. The Supreme Court reaffirmed this position in *Lucy Kurgat v Franline Yaola Manyonge* [2020] and the Court of Appeal restated the principle in *Kenya County Government Workers Union v County Government of Narok*. Both decisions emphasize that any issue requiring factual proof, evidentiary

interrogation, or the exercise of judicial discretion does not qualify as a preliminary objection.

7. On the material before me, several of the Respondents' grounds require the Court to examine contested factual issues, including whether AGM notices could practically issue in a non-functional company, whether internal remedies were available or effective, and whether the Petitioners' membership or standing is disputed. These are not issues that can be assumed, nor can they be resolved without evidence. They fall outside the parameters of a true preliminary objection.

8. For this reason, the objection does not satisfy the *Mukisa Biscuit* test. Nonetheless, given the importance of the issues raised, I address each limb in turn.

Whether the Petition is Barred by the Doctrine of Exhaustion

9. The Respondents contend that the Petition is premature and that the Petitioners ought to have pursued internal mechanisms under the Companies Act before invoking the Court's jurisdiction. Reliance is placed on *Speaker of the National Assembly v Karume* [1992], which requires litigants to follow prescribed statutory procedures.

10. However, the doctrine of exhaustion is not absolute. The High Court and the Court of Appeal have repeatedly recognised exceptions, particularly where internal mechanisms are unavailable, ineffective, or where the circumstances demonstrate bad faith or procedural paralysis. In *IEBC ex parte NASA (2017)*, the Court held that the High Court may intervene where the statutory forum is incapable of providing adequate relief.
11. On the facts presented, the company has not convened an AGM since 2007. There is no evidence of functioning internal structures. Directors have allegedly excluded members from participation and failed to account for proceeds from compulsory acquisition. The Petitioners' complaint is that the internal corporate machinery has collapsed entirely.
12. In such circumstances, the statutory mechanism under the Companies Act itself envisages recourse to the Court. Section 280 empowers the Court to order the convening of a meeting if **....for any reason it is impracticable—(a) to convene a meeting of a company in any manner in which meetings of that company may be convened; or (b) to conduct the meeting in the manner required by the articles of the company or this Act.** Sections 780–782 recognize judicial intervention where the conduct of directors is oppressive, unfairly prejudicial, or contrary to members' interests.

13. The Petitioners are not bypassing internal remedies; they are invoking the statutory reliefs specifically designed for situations of corporate paralysis. The exhaustion doctrine is therefore inapplicable.

Whether the Petition is Incompetent for Want of Leave (Derivative Action)

14. The Respondents argue that the Petition is, in substance, a derivative action and therefore incompetent for failure to obtain leave under Sections 238–242 of the Companies Act.

15. Whether a claim is derivative is a matter of substance, not label. The Court must examine whether the cause of action is vested in the company, whether the Petitioners seek relief on behalf of the company, and whether the dominant purpose is the enforcement of corporate rights rather than personal shareholder rights.

16. On the face of the Petition, the gravamen of the complaint is the protection of the Petitioners' individual statutory rights as members: the right to attend meetings, the right to participate in the governance of the company, and the right to information concerning company affairs. They also challenge failures by directors to convene AGMs and to account for proceeds. These concerns fall

squarely within the ambit of Sections 280 and 782, which expressly allow members to seek relief in their own capacity.

17. While the Respondents rely on *Waweru v Karoki; County Choma Grill [2024]*, that decision concerned a classical derivative claim where shareholders sought to litigate on behalf of the company for wrongs done to the company. The present Petition is materially different. The Petitioners seek personal reliefs to restore governance, not compensation or enforcement of corporate rights on behalf of the company.

18. Based on the material that is presently before me, leave for a derivative suit is therefore not required. However, if I am wrong, the appropriate remedy is to direct the Petitioner to seek leave to continue the present action as a derivative suit. The court may thereafter consider whether the appropriate threshold has been met prior to issuing any further substantive orders rather than striking out the Petition at this stage. The objection on this ground therefore fails.

Whether the Petition Is Fatally Defective for Non-Joinder

19. The Respondents argue that the Petition is defective for failure to join Malili Ranch Limited and the Registrar of Companies. Order 1, rules 9 and 10 of the Civil Procedure Rules are clear: misjoinder or non-joinder shall not defeat a suit,

and the court may add a party at any stage where necessary for the complete determination of the issues.

20. The Registrar's role in this context is administrative. No substantive relief is sought against the office. As for the company, it may ultimately be added as a nominal party should the need arise, particularly where orders may affect it.
21. Non-joinder in this case is a procedural matter that does not go to jurisdiction. The appropriate remedy is joinder, not striking out. This ground too cannot sustain the objection.

Whether the Petition Is Incompetent for Failure to Issue Statutory Notice

22. The Respondents contend that the Petition is invalid because the Petitioners did not issue the special notice contemplated under Section 139 of the Companies Act for removal of directors.
23. Section 139 presumes a functional company capable of receiving, processing, and acting upon such notice. A statutory process cannot be insisted upon where its fulfilment is impossible due to the very failures complained of. To hold otherwise would elevate form over substance and insulate directors from scrutiny despite prolonged misconduct.

24. The Companies Act provides multiple avenues for intervention, including Section 280 and the unfair prejudice provisions. Judicial relief in situations of prolonged governance paralysis does not depend on prior issuance of a Section 139 notice. On the facts, the Petitioners have demonstrated that such a process was impracticable.

25. This limb of the objection also fails.

Conclusion

26. The Respondents' Preliminary Objection raises issues intertwined with disputed facts and matters requiring judicial discretion. It does not meet the threshold of a proper preliminary objection. Moreover, none of the individual grounds has merit in law or fact.

27. I therefore find that the Preliminary Objection dated 26th May, 2025, is without merit and is hereby dismissed with costs.

Dated and delivered virtually via Microsoft Teams this 4th day of December, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant: Lispa

.....for 1st Petitioner
.....for 2nd Petitioner
.....for 3rd Petitioner
.....for 1st Respondent
.....for 2nd Respondent
.....for 3rd Respondent
.....for 4th Respondent

ORIGINAL