



REPUBLIC OF KENYA



**Amenya v Johansson & another; Asawa Enterises Limited (Interested Party) (Miscellaneous Civil Application E032 of 2025) [2025] KEHC 18565 (KLR) (16 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18565 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION E032 OF 2025**

**J NGAAH, J**

**DECEMBER 16, 2025**

**BETWEEN**

**EZEKIEL ONYANGO AMENYA ..... APPLICANT**

**AND**

**NILS ESKIL JOHNNY JOHANSSON ..... 1<sup>ST</sup> RESPONDENT**

**ALI KASSIM ABDALLA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ASAWA ENTERISES LIMITED ..... INTERESTED PARTY**

**RULING**

1. The application before court is a miscellaneous civil application dated 12 February 2025 expressed to be brought under sections 238 and 239 of the *Companies Act*, 2015 and Order 51 Rule 1 of the Civil Procedure Rules. In the main, the applicant seeks the order that:
  - “ 1. That leave be granted to the Applicant to file a derivative action on behalf of ASAWA Enterprises Limited against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.”
2. The application is supported by the affidavit of the applicant who has sworn that he is a shareholder and director of the interested party and that he holds 50% of the shares in the company. The 1<sup>st</sup> Respondent, holds the other 50% of the shares while the 2<sup>nd</sup> Respondent, is a non-shareholding director.
3. On 2 December 2024, the applicant received a notice stating that a directors' meeting was to be held on 4 February 2025. Nonetheless, the respondents, held the meeting on 9 December 2024, in the absence of the applicant, and passed a resolution to the effect that the 1<sup>st</sup> respondent would be paid Kshs. 4,200,000/= pursuant to an agreement “dated 2015 and 2016” which was entered before the company was incorporated.



4. The applicant is aggrieved by this resolution since the company was not privy to the alleged loan agreements and, therefore, not bound by them. The applicant swears that both he and the 1<sup>st</sup> respondent have contributed to the capital investment of the company and its operational expenses. These investments can only be recovered upon the company being wound up.
5. Apart from passing a resolution to pay the 1<sup>st</sup> respondent, the respondents also passed another resolution to dispose of land known as Title No. PLOT NO. 756 M V (Kwa Shee Sub-location, Mikindani) by way of auction. The property is said to be a company asset which houses the company's offices and is also the applicant's place of residence.
6. As at the time of filing the application, the respondents had convened an extraordinary meeting on 12 February 2025. The applicant was apprehensive that the Respondents would proceed with the implementation of the resolutions to the detriment of the company unless urgent interim orders are granted.
7. The respondents opposed the motion and the 1<sup>st</sup> respondent swore a replying affidavit to that effect.
8. The 1<sup>st</sup> respondent has admitted that he holds 50% of the shares of the interested party and that the company was incorporated in 2015. The 2<sup>nd</sup> respondent is a non-shareholder director of the company. Because the 1<sup>st</sup> respondent a foreign resident, it was agreed that the applicant who is a resident of Mombasa would run the company and, therefore, was "nominated" as the company's managing director. This was through a resolution of the Board made on 14 March 2016.
9. Although the 1<sup>st</sup> respondent invested a substantial amount of money in the company, the applicant could not account for it. As far as the parcel of land said to be long to the company is concerned, sometime in 2015, the Applicant presented himself as the bona fide owner of a parcel of land title Plot No. 756 M V (Kwa Shee Sub location, Mikindani) and offered to sell it to the company. The offer was accepted and in consideration for the transfer of the land to the company, the applicant withdrew some money from the company account in settlement of the purchase price.
10. The 1<sup>st</sup> respondent loaned the company the sum of Kshs. 3,000,000/= in 2016. The applicant used the money to construct the company's business premises where the applicant also resides. The company eventually closed its business but the applicant still resides in the property built for the company. The applicant, it is sworn, has failed to account for the company property including money.
11. Part XI of the *Companies Act*, cap. 486, provides for derivative actions. Section 238 (1) thereof defines a derivative action to mean proceedings by a member of a company in respect of a cause of action vested in the company; and, seeking relief on behalf of the company.
12. Section 238 (2) of the Act prescribes that derivative proceedings may be initiated either under Part XI of the Act or at the instance of a court order in any other proceedings commenced under the *Companies Act* for the protection of members of a company against what the Act describes as "unfair prejudice".
13. The applicant in this application has invoked section 238 and 239 of the Act and, therefore, on the face of it and, everything else being equal, his application would be derivative proceedings under Part XI of the Act. But proceedings do not attain a particular character merely by invoking specific provisions of the law; it is the substance of the proceedings that count and inform the legal character or the cause of action before court. Turning to the applicant's case, the pertinent question is whether a miscellaneous application, in itself, constitutes "derivative proceedings" as understood under Part XI of the Act. In my humble view this is a preliminary issue that this court has to contend with before proceeding any further.



14. To begin with, the very fact that, first, this is a miscellaneous application and, second, that the application is, in any event, seeking leave to file a derivative action point to the conclusion that the application before court does not constitute derivative proceedings.
15. None of the provisions under Part XI of the Act contemplate such an application filed independent of the derivative proceedings themselves. The reading of relevant provisions suggest that an application may be made not to commence but “to continue” with a derivative action. Section 239 under which the application for leave may be made reads as follows:
239. Application for permission to continue derivative claim
- (1) In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.
  - (2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—
    - (a) shall dismiss the application; and
    - (b) may make any consequential order it considers appropriate.
  - (3) If the application is not dismissed under subsection (2), the Court—
    - (a) may give directions as to the evidence to be provided by the company; and
    - (b) may adjourn the proceedings to enable the evidence to be obtained.
  - (4) On hearing the application, the Court may—
    - (a) give permission to continue the claim on such terms as it considers appropriate;
    - (b) refuse permission and dismiss the claim; or
    - (c) adjourn the proceedings on the application and give such directions as it considers appropriate.
16. Section 239 (1) is clear that a derivative claim must have been brought and that it is within a derivative claim that an application is made to the court seeking its permission for the claimant to continue with the claim as a derivative action. Ordinarily, the derivative claim and the application for leave to continue with the claim as a derivative claim are filed simultaneously. Such was the case in *Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another* [2015] KECA 356 (KLR). The Court of Appeal did not find anything untoward in the applicant filing the substantive derivative action together with the application for leave. It held as follows:
- “ 40. Where no application for leave is filed or where one is filed long after the suit is filed, different considerations would, of course, apply. The application for leave to continue with the suit filed in this matter was not made long after the suit was filed. Both were filed contemporaneously and were placed before a judge on the same day under a ‘certificate of urgency’. In the circumstances of this case, we find no impropriety in the procedure.”
17. In the absence of any codified law on when the application for leave may be made, the Court of Appeal in *Amin Akberali Manji* held that the practice under the common law applied and the



application could be made either before or after the substantive proceedings for the derivative action had commenced. The court held as follows:

“ 38. We have anxiously considered the first issue and in the end we have formed the following firm view on the matter. Firstly, on the procedure for granting leave to mount a derivative action, it is common ground that there are no express provisions in Kenyan company laws to govern the procedure. Musinga J. (as he then was) was right in lamenting that state of affairs in the CMC Holdings case (supra) stating:

“I think time has come to enact a new *Companies Act* which will, inter alia, shed light on the grey areas of company law practice, including derivative claims....”

The nearest we come to an express provision is in Rule 3 of the Companies (High Court) Rules which states:-

“Any proceedings brought under these Rules shall be deemed to be a suit within the meaning of the *Civil Procedure Act* and any Rules made thereunder, and the general practice of the Court, including the course of procedure and practice in chambers, shall apply in so far as the Act or these Rules otherwise provide”.

39. The procedure therefore remains the English common law, and it matters not whether it is the common law extant as at 1987, as submitted by Mr. Ochieng or before 2006, as contended by Mr. Oyatsi. Leave of court shall be obtained before filing a derivative suit, but may also be obtained to continue with the suit once filed. On this, the trial court was right in adopting the exposition of the procedure in the treatise “Minority Shareholders: Law, Practice and Procedure” by Joffe that ‘there is no approved pre-action protocol in relation to derivative action’ and that

“..after the claim form has been issued, the claimant is required to make an application - which must be supported by written evidence- for permission to continue with the claim.”

18. The judgment in this case was delivered on 25 September 2015. A week before then, that is, on 18 September 2015, the *Companies Act*, 2015 had commenced but it was not until 6 November 2015 that Part XI, amongst several other parts of the *Companies Act*, came into force.
19. While it is true, as the Court of Appeal in Amin Akberali Manji case held, that at the time of its determination of the case there was no codified law on when the application for leave could be filed and, therefore, following the common law practice, leave could be sought either before or after the substantive derivative action had commenced, this position changed with the enactment of the *Companies Act*, 2015. This Act, in particular Part XI thereof, fills the gaps identified in the Amin Akberali Manji case on when and how, among other things, the application for a derivative action may be made.
20. Even then, the quote from Joffe’s (Victor Joffe KC’s) book, “Minority Shareholders: Law, Practice and Procedure” which the learned Judges of Appeal adopted, could be understood to suggest that the application for permission could only made in the substantive action.



21. In my humble view, this is the meaning of the expression by the author that:
- “...there is no approved pre-action protocol in relation to derivative action’ and that...after the claim form has been issued, the claimant is required to make an application - which must be supported by written evidence- for permission to continue with the claim.”
22. I understand this to mean that there was neither room nor procedure for antecedent applications prior to the filing of the substantive derivative suit and that once the claim was filed, it was incumbent upon the applicant to file the application for permission “to continue with the claim.” I suppose it is for this reason that the claimant in Amin Akberali Manji case filed the application for leave “to continue” the substantive claim alongside the claim itself. This procedure is also in tandem with section 239 which, as noted, is clear that a substantive derivative claim ought to have been filed for the applicant to seek “to continue” with the claim.
23. In an isolated and independent miscellaneous application such as the one before court, it would be impossible, for the court to make orders under section 239 (3) and (4) of the Act. These provisions read as follows:
- (3) If the application is not dismissed under subsection (2), the Court—
- (a) may give directions as to the evidence to be provided by the company; and
- (b) may adjourn the proceedings to enable the evidence to be obtained.
- (4) On hearing the application, the Court may—
- (a) give permission to continue the claim on such terms as it considers appropriate;
- (b) refuse permission and dismiss the claim; or
- (c) adjourn the proceedings on the application and give such directions as it considers appropriate.
24. The Court can only give directions as to the evidence to be provided by the company and may adjourn the proceedings for the evidence to be obtained under section 239(3)(a) and (b) if there are substantive proceedings before it. The evidence to be provided and for which an adjournment of the proceedings would be warranted, is the evidence in support of the claim. In the absence of the substantive claim, there would be no basis to order for production of evidence.
25. Similarly, under section 239(4)(a) the court cannot “give permission to continue the claim” under subsection (4)(b) if there is no claim before it. It may also not “refuse permission and dismiss the claim” if “the claim” does not exist in the first place.
26. In the final analysis, I find the applicant’s application to be misconceived and incompetent. It is hereby struck out with costs to the respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED ON 16 DECEMBER 2025**

**NGAAH JAIRUS**

**JUDGE**

