



REPUBLIC OF KENYA



KENYA LAW
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**Jun v Yan & 2 others (Civil Case E019 of 2024) [2025] KEHC 18564 (KLR)
(Commercial and Tax) (4 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E019 OF 2024
F GIKONYO, J
DECEMBER 4, 2025**

BETWEEN

LI JUN APPLICANT

AND

FU YAN 1ST DEFENDANT

WANG LIPING 2ND DEFENDANT

FUXIN ENGINEERING LIMITED 3RD DEFENDANT

RULING

1. The 1st and 2nd defendants/ applicants filed the notice of motion dated 1.4.2025 seeking: -
 - (4) Discharge or variation of the orders of 30.7.2024 and 19.11.2024
 - (5) Striking out of the respondent's suit on the grounds that it is frivolous, vexatious and constitutes an abuse of the process of this court.
 - (6) In the alternative, stay all proceedings in this suit pending the hearing and determination of the criminal proceedings pending against the respondent and his agent, Qiu Jie.
 - (7) an order directing the respondent to provide security for costs in this suit, such amount and manner as the court shall deem just, to safeguard the applicants from potential financial prejudice.
2. The application is made mainly under Order 2 Rule 15 and Order 40 Rule 7 of the Civil Procedure Rules. It is supported by an affidavit sworn by the 1st defendant/ applicant, Fu Yan on 1.4.2025 and written submissions dated 29.4.2025.



3. The main grounds are that: -

1. Fuxin Engineering Limited is facing imminent financial collapse due to the orders of 30.7.2024 prohibiting the sale and/ or leasing of the apartments in Enzi Heights Apartments Development and the orders of 19.11.2024 requiring the rental income and service charge from the said apartments to be deposited into an escrow account.
 2. The company is unable to meet statutory obligations such as corporate tax, Housing Levy, and the National Industrial Training Authority (NITA) levy and other financial obligations.
 3. The suit is frivolous, vexatious and constitutes an abuse of the court process.
 4. The withdrawal of the company from the proceedings undermines the substantive and procedural legal foundation of the derivative suit.
 5. The respondent and his agent, Qiu Jie have been formally charged before the Chief Magistrate's Court at Milimani in Criminal Case No. E167 of 2025 with multiple criminal offences arising from alleged fraud against Fuxin Engineering Limited, relating to Enzi Heights Apartments Development, the subject matter of this suit.
 6. The respondent's continued absence from the jurisdiction creates a risk of non-recovery of costs and calls for posting of security.
4. The application is opposed by the plaintiff/ respondent through grounds of opposition dated 5.5.2025 and written submissions dated 26.7.2025.
 5. The salient contentions are that the application is bad in law as it seeks to appeal the ruling of 17.3.2025 or cause the court to sit on appeal of its decision. It raises the issues regarding respondent renting out certain apartment in his name and the commencement of criminal proceedings which are sub judice as they have been raised before the court before the ruling of 17.3.2025.
 6. The respondent also contended that the application is an abuse of the court process and that the criminal proceedings are frivolous and independent of these proceedings.

Analysis and Determination

7. I have considered the application, the supporting affidavit, the grounds of opposition and the respective submissions and authorities cited.
8. The issue is whether the application is merited.

Striking out

9. The applicants prayed that the suit be struck out on grounds that it is frivolous, vexatious and constitutes an abuse of the process of the court. The court may strike out pleadings at any stage of the proceedings based on the grounds under Order 2 Rule 15 of the Civil Procedure Rules
10. The court's discretion to strike out a suit is a strong and draconian power which should only be exercised in the clearest cases. *D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] KECA 3 (KLR)
11. A suit is frivolous if it lacks seriousness and vexatious if it annoys or tends to annoy. *Mpaka Road Development Co. Ltd v Abdul Gafur Kana T/A Anil Kapuri Pan Coffee House* [2001] eKLR



12. Abuse of the court process is the improper use of the judicial process in litigation. *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] KEHC 6100 (KLR)
13. The issue of whether the suit is frivolous, vexatious and an abuse of the court process depends on facts and ought to be determined in the trial.
14. Therefore, the court finds that prayer 5 is not merited.

Withdrawal of the company

15. The applicants' posited that the withdrawal of the company from the proceedings undermines the substantive and procedural legal foundation of the derivative suit.
16. On the other hand, the respondent asserted that the withdrawal of the company as the 2nd defendant was done to join the company as a nominal plaintiff. He argued that the law does not mandatorily require that the company on whose behalf derivative action is being pursued be made a nominal defendant.
17. The respondent further highlighted that the court in a previous ruling allowed him to maintain this suit in the name of the company.
18. Through the ruling dated 4.3.2025, the court found at para. 31 that: -

“

“ 31. I accept the proposition that the suit as brought is one of a derivative claim. In such a suit the same must be brought by either a member or a director of the company in his own personal name and capacity as aforesaid. This emphasizes the importance of accountability and the duty of care that a shareholder/member or director has towards the company. In such a proceeding, the Plaintiff always must be the shareholder or director of the Company and the company is always a nominal defendant.”

In my view, the court has already pronounced itself of the matter: ‘...the company is always a nominal defendant.’

There is no provision for withdrawal of the company as the nominal defendant in a derivative suit. If there was a withdrawal, then, that was an anomaly and a defect that is curable as ‘the company is always a nominal defendant’. The purported withdrawal of the company as a nominal party does not, therefore, defeat the foundation of the suit.

Stay pending criminal proceedings

19. The applicants prayed that the suit be stayed pending criminal proceedings against the respondent and his agent. They argued that the issues in the criminal case are substantially intertwined with the subject matter of this suit and have a direct bearing on its fair and just resolution. They faulted the respondent for absconding the jurisdiction and evading the criminal proceedings while pursuing this case.
20. The applicants relied on *Access Bank Kenya PLC v Mengich & another* [2024] KEHC 5682 (KLR). They acknowledged that the court's discretion to stay of proceedings must be exercised with caution. They contended that the duality of the proceedings undermines the rule of law, prejudices them and calls for the court to exercise its discretion to stay the proceedings in the interests of justice.



21. On the other hand, the respondent asserted that parallel civil and criminal proceedings can proceed concurrently unless there is a demonstrable and direct conflict between the two. He faulted the applicants for using the criminal proceedings to bully him to relinquish his shares in the company and to frustrate the suit. He relied on *Republic v Chief Magistrates' Court at Mombasa ex parte Ganijee & Another* [2002] eKLR where the court held that the purpose of criminal proceedings is not to advance a civil cause for either party in a civil dispute.
22. The respondent submitted that the reliance on the criminal proceedings to undermine the suit is contrary to the principles of presumption of innocence and distinct jurisdiction of the civil and criminal courts.
23. The court's power to stay proceedings is a matter of discretion to be exercised judicially based on principles. The principles for consideration in determining whether to stay proceedings are well established.
24. The court considers whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. The court should essentially weigh the pros and cons of granting or not granting the order. *Lucy Waithera Kimanga & 2 others v John Waiganjo Gichuri* [2015] KEHC 6120 (KLR)
25. The discretion also ought to be exercised sparingly and only in exceptional cases. *Halsbury's Law of England*, 4th Edn. Vol. 37 page 330 and 332,
26. Section 193 A of the Criminal Procedure Act provides for concurrent criminal and civil proceedings. See *Republic v Chief Magistrate Criminal Division another Exparte Mildred Mbuya Joel* 2014 KEHC 7794
27. I am not convinced that there exist exceptional circumstances to warrant a stay of this suit pending the conclusion of the criminal proceedings.
28. Accordingly, prayer 6 fails.

Security for costs

29. The applicants prayed for an order directing the respondent to pay security for costs to safeguard them from potential financial prejudice. They proposed payment of Kshs. 20,000,000/- as security for costs which they feel is proportionate and necessary to prevent injustice to them. They also urged that should the respondent fail to comply with the order to pay security, the suit be dismissed.
30. The applicants relied on *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 Others* [2023] KESC 11 (KLR) and *Ignazio Messina & C.P.S.A. v Stallion Insurance Company Ltd* [2005] eKLR to argue that the criteria for the order for security have been met. They highlighted that the respondent is nonresident Chinese national and has no known assets or enforceable presence within the jurisdiction. That he faces multiple criminal charges directly related to the subject matter of this case and extradition proceedings.
31. The applicants further highlighted that they have filed a counterclaim for Kshs. 45,200,000/- and are incurring substantial legal and statutory costs. They also added that the respondent continues to actively pursue relief despite having withdrawn the suit company on whose behalf the claim was brought.
32. The court has the discretion to call for security for costs for the defendant be given by any other party. Order 26 Rule 1 of the Civil Procedure Rules. The court's discretion ought to be exercised reasonably



and based on principles applied to the unique circumstances of the case. “The court would still refuse to order security to be lodged if circumstances do not support any lodgment of security.” See *Saudi Arabian Airlines Corporation v Sean Express Services Ltd* [2014] KEHC 8695 (KLR)

33. The principles for consideration are well established and have been numerously restated in case law.

“The test is not whether the plaintiff has established a prima facie case but whether the defendant to show that it has a bona fide defence.” *Shah v Shah* [1982] KLR 95

34. Other factors to be considered are: -

“absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff’s claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant.

.... In the latter category, conduct by the Plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations, and disposal of assets. And the conduct of the Defendant includes, filing of application for security for costs as a way of oppressing or obstructing the Plaintiff’s claim, for instance, where the defence is mere sham, or there is an admission by the Defendant of money owing except there is deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain.” *Saudi Arabian Airlines Corporation v Sean Express Services Ltd* [supra]

35. In the circumstances of this case, the respondent has instituted this derivative action as a shareholder in the subject company. The respondent has instituted the action as an agent of the company. The direct beneficiary of the action is therefore the company and not the respondent.

36. It is for this reason that Lord Denning, MR in *Wallersteiner v Moir* (No. 2) [1975] QB 371 391 observed that: -

“The minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of the agency ... Seeing that, if the action succeeds the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf.” See also *Wilton UK Ltd v Shuttleworth* [2018] EWHC 911 (Ch) 91

37. However, the question here is not about the plaintiff being indemnified by the company for the costs. It is about whether the plaintiff should give security for the costs.

38. A policy consideration is that the burden of costs of derivative claims may stifle or discourage minority shareholders from filing derivative suits on behalf of the company where the company or the controlling shareholders are not willing to seek legal redress or are complicit, thereby undermine corporate good governance.¹

39. The court has already given the plaintiff/ respondent permission to continue with the derivative action. In my view, it would be prohibitive to require the plaintiff to give a security for costs at this stage.

¹ Darren Subramanien, LLB, LLM, PHD, Nelson Mandela University, “A discussion on the issue of costs in relation to derivative proceedings in section 165 of the *companies act* 71 of 2008” *Obiter* Vol 42 Issue 2 published online on 11th November 2021, accessed on 21.11.2025 via https://journals.co.za/doi/epdf/10.10520/ejc-obiter_v42_n2_a2



40. Therefore, in the circumstances of this case, I am not persuaded that this court should call for security for costs of the defendants by the plaintiff.
41. Prayer 7 also fails.

Discharge of the orders of 30.7.2024 and 19.11.2024

42. The applicants urged the court to vary the orders of 30.7.2024 and 19.11.2024 to permit Fuxin Engineering Limited to resume the sale and leasing of apartments, and to access rental income -whether already held in escrow or received henceforth for the sole purpose of meeting essential operational and statutory obligations subject to the applicants maintaining appropriate records of disbursement for inspection if and when directed by the court.
43. The respondent argued that the applicants have failed to demonstrate any legal or factual basis for discharge of the interim orders. He contended that the discharge of the interim orders would have the effect of pre-empting the main suit and rendering it academic. He also contended that the discharge would result in the irreversible dissipation of company assets, compromise ongoing leases and deny him a fair opportunity to pursue the derivative claim on its merits.
44. The respondent challenged the applicants' claims of inability to comply with the interim orders due to financial constraints. He faulted the applicants for not raising allegations of financial distress before Hon. Mabeya J. before the issuance of the interim orders. He contended that the raising of the issue months later, is highly suspect and undermines credibility of their claim.
45. The respondent asserted that the applicants' conduct of paying its recently appointed advocates legal fees of Kshs. 9,800,000/- out of company accounts dents their professed financial hardship. He asserted that this points to the access to considerable financial resources which could have been applied towards settling the purported company's mounting liabilities, including tax liabilities dating back to 2022.
46. The respondent argued that a derivative action is initiated on behalf of the company and a company cannot be paying legal fees to defend the suit. He also argued that the claim of financial hardship is unsubstantiated and meant to evade obligations and obstruct fair administration of justice.
47. The respondent highlighted that the applicants have failed to comply with the notice to produce dated 5.5.2025, seeking production of the company's accounts which would support any claim that the company is insolvent, despite being served. He posited that the company accounts would support any claim that the company is insolvent.
48. The respondent argued that a court of law cannot make an order based on a purported insolvency of a company without analyzing the company's financial statements. He added that a party cannot be seen to be hiding evidence or information and still attempt to get positive orders from the court.
49. The interim orders of 30.7.2024 were to the effect that: -
 - “ An independent agent will be appointed to run the building pending the determination of the suit.
 - Further contracts of sale and/ or leases are suspended till 20/8/2024”
50. On 20.8.2024, the matter was mentioned before the Deputy Registrar. The parties indicated that they were unable to agree on an estate agent who could be appointed to run the building. The matter was slated for a mention before Hon. Mabeya J. on 24.9.2024.



51. On 24.9.2024, the court gave the parties an opportunity to discuss the proposal by the plaintiff. The court also extended the interim orders.
52. The applicants did not agree with the respondent's proposal and on 23.10.2024, the court directed each party to suggest names preferred estate agents for nomination of one by the DR.
53. On 19.11.2024, the court endorsed the appointment of Ayub Wothiru of Board Registration No. 1725 as the managing agent of Enzi Heights, Mombasa Road until further orders of the court.
54. The court has the discretion to review its own orders. Section 80 of the *Civil Procedure Act* and the discretion ought to be exercised judicially. The conditions to be met are given under Order 45 Rule 1 of the Civil Procedure Rules.
55. In the circumstances of this case, the issue is whether the applicants have demonstrated a sufficient reason for a review. *Shanzu Investments Ltd v Commissioner of Lands [1993] eKLR*
56. The applicants ground for a review of the orders is that the company is about to become insolvent due to the orders of 30.7.2024 which prohibited the sale of apartments in Enzi Heights Apartments and the orders of 19.11.2024 requiring the rental income and service charge from the said apartments to be deposited into an escrow account.
57. The applicants expressed that the company is unable to meet its statutory and financial obligations due to the orders. This has compelled them to deposit Kshs. 9,578,000/-. They exhibited a copy of the account statement for the company's main current account Equity Bank Account Number 1470275518548.
58. There are 11 apartments that are remaining and/ or yet to be transferred to the initial investors.
59. The applicants exhibited a copy of the escrow account statement showing that it held Kshs. 3,273,000/- as of the date of the application.
60. The court issued the orders of 30.7.2024 and 19.11.2024 in order to preserve the company's assets pending the hearing and determination of the suit.
61. From a reading of the ruling of 19.11.2024, the court directed that "b) the advocates for the parties to open an interest earning account in their joint names before 30/11/2024 into which the rent and service charge accruing from the premises would be deposited into on or before the 10th day of each subsequent month starting from 10/12/2024."

And

"e) any expenses for maintenance shall be with the concurrence and approval of the parties."

62. The court gave directions as to the utilization of the funds deposited in the escrow account for the company's operational expenses. The court therefore struck a balance between the need to preserve the company's assets and to ensure operational continuity. In my view, the funds may be accessed for any legitimate costs with the concurrence and approval of the parties.
63. The lack of concurrence and approval by the parties is not a sufficient reason for discharge of the subject orders. A prudent way would be to serve the request for payment of any legitimate costs from the account.



Multi-door approach to Access to Justice

64. I have thoughtfully pondered over the circumstances of this case which involves disagreement between directors of a company. This is one case that would immensely benefit from the multiple doors for dispute resolution under Article 159 (2) (c) of *the Constitution*. It is simple. And I mean it is simple. It only requires parties to set aside their differences and make a conscientious decision to pursue a method of dispute resolution that suits their circumstances. The doors available under *the Constitution* are many and are meant, inter alia, to resolve disputes expeditiously in a cost-effective manner, and preserve the dignity and confidentiality of the persons involved. If I may suggest, each party may select a person they respect, to engage the other on their behalf. The process will consider and resolve any deep-seated grievances standing on the way of resolution; and the parties are at liberty to fashion any redress they believe will resolve their issues without the limitation that comes with formal requirements of court pleadings and cause of action. And, such resolution may take the shortest time as the parties intend. Therefore, I will give the parties an opportunity to explore the amicable settlement through the alternative justice systems provided in article 159(2)(c) of *the Constitution* and give a report within 45 days from the date of this ruling.

Disposal

65. The application dated 1.4.2025 is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 4TH DAY OF DECEMBER, 2025**

F. GIKONYO M

JUDGE

In the presence of: -

Ometo for plaintiff

Ms. Mukala for Dr. Kimani for defendant

Edeyo for Anyichi for defendant

CA Kinyua

