



REPUBLIC OF KENYA



KENYA LAW
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**Wanjala v Kiprop & another (Civil Case E006 of 2025)
[2026] KEHC 602 (KLR) (29 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL CASE E006 OF 2025
RK LIMO, J
JANUARY 29, 2026**

BETWEEN

BRAMWEL NAMUTALE WANJALA PLAINTIFF

AND

KENNEDY KIPYEGON KIPROP 1ST DEFENDANT

STANLEY NGACHA GATERO 2ND DEFENDANT

RULING

1. Bramwel Namutale Wanjala, the plaintiff/applicant herein has filed the suit herein as a director and shareholder of The Namz Autocare Company Limited against the defendants Kennedy Kipyego Kiprop and Stanley Ngacha Gatero who also happen to be directors of the same company. The gist of the plaintiff's claim is that the defendants are in breach of fiduciary duty and working against the best interest of the company. That through a meeting held on 29/7/2025 the defendants resolved to instruct clients of the company to stop payments due to the company until further communication is made to them.
2. The plaintiff therefore seeks the following reliefs namely;
 - a. A declaration that the resolution dated on 29/7/25 is ultra vires and be set aside.
 - b. An order of permanent injunction to restrain the defendants and agents from interfering with operations of the company.
 - c. An order of removal of the defendants as Directors of NAMZ AUTOCARE LIMITED.
 - d. Costs and interests.
3. The plaintiff/applicant vide a Notice of Motion dated 29/8/25 seeks the same prayers in the interim pending the determination of the suit.



4. The defendants in response have raised a preliminary objection dated 16/9/25 where they have contended that the plaintiff's action is a suit brought by a shareholder on behalf of a company for the interest of a company which to them is a derivative action provided under section 238 of the *Companies Act*. According to them the suit is defective because under section 239 of the Act, a party intending to file a derivative action must first obtain leave of court.
5. In their written submissions dated 24/9/25 done through learned counsel F.M Ndwia & Co Advocate, the defendants rely on the decision of Ghelani Metals Ltd & 3 Others –vs- Elesh Ghelani Natwarlal & Anor (2017) KEHC 4629 (KLR) where the court defined a derivative action as follows;

“Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a 3rd party whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers in the form of a representative suit filed by a shareholder on behalf of the corporation”.
6. The defendants submit that because the plaintiff has not complied with mandatory provisions of section 239 of the Act, the application is incurably defective, procedurally incompetent and unsustainable.
7. The plaintiff in response to the preliminary objection has opposed the preliminary objection vide written submissions dated 24/10/25 done through M/S Apollo Ambutsi & Co Advocate. The plaintiff contends that the question whether the suit herein is a derivative action cannot be determined at preliminary stage. According to the plaintiff the preliminary objection raised requires this court to examine factual issues.
8. The plaintiff contends that his claim is not derivative action but personal based on his rights as the sole shareholder. He further contends that leave under section 239 is discretionary and cannot be properly determined through a preliminary objection. He prays that this court gives what he calls case management directions instead of striking out the suit. He relies on the case of D.T.Dobie & Co (K) Ltd –vs- Muchina (1982) KLR 1 where the court held that striking out a suit is a draconian measure reserved for clearest of cases where the pleadings discloses no reasonable cause of action.
9. He further seeks shelter under provisions of Article 159 (2) (d) of *the Constitution* and submits that this court is bound to administer justice without undue regard to technicalities. According to the plaintiff the preliminary objection is a procedural gamble that undermines substantive justice. He submits that his action is anchored under sections 780-782 of the *Companies Act* 2015.
10. This court has set out the plaintiff's case and the preliminary objection raised. I have also summarized the plaintiff's opposition to the preliminary objection.
11. The preliminary objection raised is based on a point of law and more specifically hinged on the provisions of section 238 and 239 of the *Companies Act* (Cap 486).
12. The main issue in the preliminary objection raised is what constitutes a derivation whether the suit or action herein is a derivative action and whether leave of court is mandatory before a derivative action is taken.
13. The provisions of section 238 defines a derivative claim as “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”.



In other words what the above means in my understanding is, a derivative action is a suit filed by a shareholder on behalf of the company to address a wrong done to the company for example breach of duty by its directors or its officer. The action taken by a shareholder is meant to protect the company and any compensation or relief sought goes to the company with a view to protecting the interests of the company.

14. As I have observed and/or summarized above, the gist of the plaintiff's claim is based on a breach of fiduciary duty by the named defendants who are shareholders. The reliefs sought clearly are aimed at protecting the interest of the company. The suit herein therefore for all practical purposes is a derivative action. The decision of Ghelani Metals Ltd (Supra) cited by the defendants gives the same interpretation. So the answer to the first issue in this matter is that the plaintiff's claim is a derivative action well stipulated under section 238 of the Act. The cause of action is clearly vested in the company itself.
15. Now let me turn to the next question which is whether one must first seek leave to file a derivative action. Section 239 of the Act states as follows;
 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. (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.

The above section presupposes that a derivative claim has been brought or initiated by the company itself and a member or shareholder is required to seek the permission of the court to proceed with the derivative claim. Subsection (2) gives this court discretion to consider the application and either allow or decline permission.
16. The discretion granted to court under section 239 (4) is intended to give the court latitude to weed out frivolous claim and only allow bona fide claims brought in the interest of the company. In that respect this court takes the position that a derivative claim is subject to leave of court. This is the position taken in the case of Mohamedin Mohamed & Anor –vs- Ibrahim Ismael Isaac & Anor (2021) eKLR.
17. My interpretation of section 239 is consistent or in tandem with the provisions of section 240, 241 and 242 of the Act. The permission or leave of court is imperative because a company is a body corporate with its own identity able to sue or be sued in its own name. It is distinct and separate from the shareholders or directors and therefore when a shareholder or a director wants to file a derivative action on behalf of the company, leave or permission of court is an imperative. In Hotstar Investment Ltd –vs- Peter Kuria (2019) KEHC 7511 (KLR) the court found that section 239 requires that leave of court must first be sought before a party can commence or proceed with a derivative suit on behalf of the company.
18. The plaintiff has sought refuge under provisions of Article 159 (2) (d) of *the Constitution* but failed to seek leave pursuant to section 239 of the Act to be allowed to proceed with the claim.
19. This court finds that the provisions of section 239 are silent on what happens if an action is initiated by a shareholder or a director without first seeking leave. I have of course found that leave is a requisite and the only remaining issue is whether a derivative claim filed without leave should be struck out. In my view I agree that striking out a claim is a drastic measure which should only be made where the defect



raised is incurable. The requirement of leave in my view is curable under the provisions of Article 159 (1) (d) of *the Constitution* so that this court can consider the substance of this matter. The applicant is granted a chance to seek for leave pursuant to the provisions of section 239 of the Act. I see no prejudice being suffered by the respondent because even if I was to strike out the suit and ask the plaintiff to seek leave first, we shall deal with the same issue of whether the plaintiff is entitled to leave to proceed with the derivative claim. He has 14 days to move this court. Costs shall be in cause.

DELIVERED, DATED AND SIGNED AT KITALE THIS 29TH DAY OF JANUARY , 2026.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Ruling delivered in open court

In the presence of

M/s Mukamo holding brief for Ambutsi for plaintiff

Ndwiga for respondent

Duke/Chemosop- Court assistants

