

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC. APP. NO. E334 OF 2025

IN THE MATTER OF SECTION 238 OF THE COMPANIES ACT, NO. 17 OF
2015, LAWS OF KENYA

-AND-

IN THE MATTER OF MUA INSURANCE (KENYA) LIMITED

-AND-

IN THE MATTER FOR LEAVE TO COMMENCE A DERIVATIVE ACTION

-BETWEEN-

MOYEZ ALIBHAI.....1ST APPLICANT

MAHEBOOB ALIBHAI.....2ND APPLICANT

-AND-

MUA LIMITED MAURITIUS.....1ST RESPONDENT

SAMSON NDEGWA.....2ND RESPONDENT

JOERG WEBER.....3RD RESPONDENT

MEHTAB ALY.....4TH RESPONDENT

RULING

1. The applicants filed an *ex-parte* Notice of Motion application dated 27th March 2025, pursuant to the provisions of Articles 50 & 159 of the Constitution of Kenya, 2010, Sections 238 & 239 of the Companies Act, the Companies (General) Regulations, 2015, Sections 1A, 2B, 3 & 3A of the Civil Procedure Act, Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law.
2. The applicants pray for an order for leave to institute a derivative suit on behalf of MUA Insurance (Kenya) Limited against the respondents for breach of

fiduciary duty and trust in their capacity as Directors of MUA Insurance (Kenya) Limited, and for the annexed plaint and pleadings to be deemed as duly filed upon the Court granting leave to commence the derivative suit. They also seek an order of temporary injunction restraining the respondents from selling, transferring, or dealing with MUA Kenya's shares in MUA Tanzania and MUA Uganda, to MUA Mauritius pending the hearing and determination of the instant application and the intended suit and an order for stay of sale of the company's assets pending an independent valuation and if necessary, a competitive rebidding process.

3. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Moyez Alibhai, the 1st applicant herein. Mr. Alibhai averred that on 18th February 2025, the Board of MUA Insurance (Kenya) Limited approved the sale of its majority ownership of MUA Tanzania and MUA Uganda, both being significant long established general insurance companies, to MUA Mauritius, an entity controlled by its majority shareholder and Board members. He further averred that the applicants believed that the proposed prices were substantially below the true value of the companies, and they offered to purchase the shares at significantly higher prices subject to due diligence, but their offer was rejected on the basis that MUA Kenya urgently required capital, and the sale to MUA Mauritius was the fastest option.
4. Mr. Alibhai stated that the aforesaid sale to MUA Mauritius was approved by interested Directors without an open, competitive, or independently reviewed process, and that it involved self-dealing and conflict of interest, in breach of the Directors' fiduciary duties. He asserted that the said transaction unjustly enriches the majority shareholders of MUA Insurance (Kenya) Limited at the expense of minority shareholders, and it will occasion substantial loss to MUA

Insurance (Kenya) Limited unless the Court intervenes by granting the orders being sought herein.

5. In opposition to the instant application, the 1st respondent filed Grounds of Opposition dated 7th April 2025, raising the following grounds –

- i) The applicants did not obtain the leave of the Court prior to suing the 1st respondent, despite the 1st respondent being a foreign company. This is contrary to Order 5 Rules 25, 27 & 29 of the Civil Procedure Rules (“the Rules”);
 - ii) The Honourable Court does not therefore have jurisdiction over the 1st respondent;
 - iii) Without prejudice to the above, the 1st respondent is neither a shareholder nor a Director in MUA Insurance (Kenya) Limited and as such, no derivative action may lie as against it by the applicants;
 - iv) There is no cause of action disclosed or established as against the 1st respondent by the applicants;
 - v) There is no legal basis upon which the application can be granted as against the 1st respondent; and
 - vi) The application is an abuse of the process of the Court.
6. The 1st respondent also filed a replying affidavit sworn on 7th April 2025 by Mr. Japhet Mucheke, a non-executive Director of MUA Insurance (Kenya) Limited. Mr. Mucheke averred that MUA Kenya has been in severe financial distress for several years, as confirmed by audited accounts and a statutory Actuarial Report by Zamara, which showed a negative capital adequacy ratio of – 44.6% as at 31st December 2024, and a solvency deficit of approximately Kshs.867.5 Million, placing the company in breach of statutory capital and solvency requirements and at risk of regulatory intervention. He stated that to address this

crisis, the Board, with the participation of the applicants, approved two recapitalization options: first, a rights issue and possible acquisition of shares by MUA Ltd, subject to regulatory approvals; and alternatively, the sale of MUA Kenya's entire shareholding in MUA Tanzania and MUA Uganda to MUA Ltd at the mid-point of independent valuations conducted by Ernst & Young and Deloitte.

7. Mr. Mucheke deposed that since the necessary regulatory exemptions and approvals were not obtained, the Board resolved on 18th February 2025 to implement the second option of selling the Tanzanian and Ugandan subsidiaries at prices reflecting the independently determined fair market values. He asserted that the process was transparent, the said subsidiaries were professionally valued and undertaken in good faith to save the company from collapse, and that the applicants were fully involved throughout, but are now acting in bad faith after voting against the majority decision. He denied all allegations of undervaluation, conflict of interest, self-dealing, or breach of fiduciary duty, noting that the applicants produced no evidence of a higher binding offer or of wrongdoing.
8. Mr. Mucheke deposed that the instant application fails the legal tests for a derivative action and for injunctive relief, as no *prima facie* case, irreparable harm, or balance of convenience in the applicants' favour has been shown. He averred that stopping the transaction would likely lead to MUA Kenya's insolvency to the detriment of shareholders and policyholders. Mr. Mucheke thus urged the Court to dismiss this application with costs, and in the event that it is inclined to grant the injunctive relief sought, the same be granted on condition that a substantial cash undertaking equivalent to the solvency deficit be deposited in Court.

9. In opposition to the instant application, the 2nd, 3rd & 4th respondents filed Grounds of Opposition dated 7th April 2025, raising the following grounds –

- i) The subject matter of the application is the proposed acquisition of the shareholding of Insurance (Kenya) Limited (the “Company”) in MUA Tanzania and MUA Uganda, by MUA Limited (the “Proposed Transaction”). The Court is precluded by Section 241(1)c of the Companies Act, No. 17 of 2015, Laws of Kenya, from granting leave in respect of the proposed derivative action in view of the fact that the proposed transaction has already been approved by the Board of Directors of the Company;
- ii) The aforementioned approval of the proposed transaction by the Board of Directors of the Company was done in line with the Company's Memorandum and Articles of Association;
- iii) The applicants have not demonstrated how the acts complained of are prejudicial or detrimental to the company, if at all, or any wrongdoing or oppressive conduct by the 2nd to 4th respondents, in respect of their rights as minority shareholders of the company;
- iv) The applicants have not satisfied the test for being granted the injunctive orders as sought in the application; and
- v) The application is otherwise an abuse of the process of the Court.

10. The application herein was canvassed by way of written submissions. The applicants’ submissions were filed by the law firm of Shapley Barret & Company Advocates on 9th July 2025, while the respondents’ submissions were filed on 17th September 2025 by the law firm of Coulson Harney LLP.

11. Ms Akello, learned Counsel for the applicants relied on the principles established in the case of **Ghelani Metals Limited & 3 others v Elesh Ghelani**

Natwarlal & another [2017] KEHC 4629 (KLR), which recognized derivative actions as mechanisms for minority shareholders to seek redress on behalf of a company, where insiders have allegedly harmed it. She also relied on the case of **Waweru v Karoki; County to County Choma Grill Limited (Interested Party)** [2024] KEHC 5358 (KLR) and submitted that a derivative action is a legal remedy that allows a shareholder or Director to sue on behalf of a company when the company itself is unable or unwilling to take action against wrongs done to it, typically due to control by majority shareholders or management.

12. Counsel cited the provisions of Sections 238 & 239 of the Companies Act, 2015, which require an applicant to show membership in the company, that the cause of action belongs to the company, and that the relief sought benefits the company, rather than personal interest. She argued that the alleged transaction constitutes a breach of fiduciary duty, negligence, self-dealing, and conflict of interest, noting that the applicants offered a superior purchase proposal that was dismissed by the Board and that no open bidding or independent valuation was conducted. Ms Akello referred to the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] KECA 175 (KLR), and stated that the applicants have established a *prima facie* case, meeting the statutory requirements for leave to commence a derivative suit and that shares in the subsidiaries are unique property interests, whose loss cannot be adequately remedied by damages, thus satisfying the test for irreparable harm. Counsel argued that the balance of convenience tilts in favour of the applicants.
13. Ms Mwangi, learned Counsel for the respondents cited the provisions of Section 238(3) of the Companies Act and submitted that the 1st respondent is not a Director of MUA Kenya, thus no cause of action lies against it in relation to a derivative action. Citing the case of **Simon Wallington Horner & another**

v Equity Bank Limited [2020] KEHC 3392 (KLR), Counsel asserted that derivative claims against non-directors of a company cannot stand and as a foreign company domiciled in Mauritius, this Court lacks jurisdiction, particularly, since the applicants failed to seek leave for foreign service, a principle affirmed by the Court of Appeal in the case of **Misnak International (UK) Limited v 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan & 3 others** [2019] KECA 471 (KLR).

14. Ms Mwangi submitted that the applicants have not satisfied the test for leave to commence a derivative suit, as outlined by the Court of Appeal in **Lalji v Trio Holdings Limited & 2 others** [2023] KECA 853 (KLR). He cited the case of **Ooko & 4 others v Muruthi & 4 others** [2024] KEHC 1588 (KLR), and argued that no *prima facie* case has been established by the applicants as MUA Kenya, the proper party, was not joined to this suit, rendering the application void *ab initio*. She further submitted that the proposed transaction was duly authorized by MUA Kenya's Board on 18th February 2025, as permitted under Section 241(1) of the Companies Act, and there is no allegation of fraud or ultra vires action as was held by the Court in **Banja & another v AP Solutions OY & another** [2021] KEHC 350 (KLR). Counsel stated that the applicants have also failed to provide evidence supporting claims of undervaluation, alternative offers, or financial capacity, making their claims speculative and insufficient to establish a genuine cause of action.
15. Ms Mwangi argued that given MUA Kenya's fragile financial position, the proposed transaction is necessary to avert statutory management by the IRA. She stated that interfering with a majority-approved Board decision would undermine shareholder confidence, foreign investor trust, and the company's ability to operate in the public interest. In regard to an order for injunction, Counsel submitted that it is procedurally premature without a main suit. She

contended that the applicants had failed to establish all the three limbs of the test for an injunction as was set out by the Court in the case of **Giella v Cassman Brown & Co Ltd** [1973] EA 358.

ANALYSIS AND DETERMINATION.

16. I have considered the instant application, the grounds on the face of it, and the affidavits filed in support thereof. I have also considered the Grounds of Opposition filed by the respondents, the 1st respondent's replying affidavit, and the written submissions by Counsel for the parties. The issues that arise for determination are –

- i) Whether the 1st respondent is a proper party to these proceedings;**
- ii) Whether the applicants have satisfied the legal threshold for being granted leave to institute a derivative suit; and**
- iii) Whether the applicants have met the legal threshold of being granted a temporary injunctive relief.**

Whether the 1st respondent is a proper party to these proceedings.

17. The applicants seek leave to institute a derivative suit pursuant to Sections 238 and 239 of the Companies Act, 2015. Section 238 of the said Act defines a derivative claim as hereunder -

- 1) In this Part, "derivative claim" means proceedings by a member of a company-**
 - a) in respect of a cause of action vested in the company; and**
 - b) seeking relief on behalf of the company.**
- 2) A derivative claim may be brought only-**
 - a) under this Part; or**

b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.

3) 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.

18. Section 238(3) of the Companies Act, 2015, is explicit that a derivative claim may only be brought 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. The 1st respondent, MUA Limited Mauritius, is admittedly neither a Director nor a shareholder of MUA Insurance (Kenya) Limited. The applicants themselves acknowledge in their prayers that the intended derivative suit is directed at the respondents in their capacity as Directors of MUA Insurance (Kenya) Limited. To this end, I agree with the Court's holding in the case of **Simon Wallington Horner & another v Equity Bank Limited** (supra), where the Court held as follows-

The Applicant however, avers that, there exists a prima facie wrong doing as against the 2nd Plaintiff, by the Respondent within the meaning of section 238(3) of the Companies Act by virtue of the Defendant freezing the 2nd Plaintiff's bank account. The provisions of that section states that: "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." In the instance case, the Plaintiffs have brought the suit against a party who is neither an officer, shareholder or even a director of the company. At most the 1st

Plaintiff should have named the co-director and/or shareholder as a defendant. On this ground alone the claim herein cannot stand.

19. In this instance, the 1st respondent herein is neither a Director nor a shareholder of MUA Insurance (Kenya) Limited. The 1st respondent does not therefore fall within the class of persons contemplated under Section 238(3) of the Companies Act, 2015. Therefore, a derivative action cannot be brought against it under the said provisions.
20. Even if a derivation action may be brought against another person, under the provisions of Section 238(4) of the Companies Act, there is no evidence to establish that the 1st respondent falls in that category of persons. In addition, the 1st respondent is a foreign company domiciled in Mauritius. It is not disputed that the applicants did not seek leave of the Court before effecting service of the instant application outside the jurisdiction of the Court as required under Order 5 Rule 22 of the Civil Procedure Rules, 2010, which provides as follows–

1) Service out of Kenya of the following process or of notice thereof may be allowed by the court by –

- a) an originating summons, originating notice of motion, petition, or other originating proceedings under any written law under which proceedings can be commenced otherwise than by plaint;***
- b) any summons, order or notice in any interpleader proceedings or for the appointment of an arbitrator or umpire, or to remit, set aside or enforce an award in an arbitration held or to be held within the jurisdiction;***

c) any summons, order or notice in any proceedings duly instituted whether by plaint or other originating process mentioned in paragraph (a); or

d) where the person on whom the originating summons, originating notice of motion, petition or other originating proceedings, or a summons, order or notice, is to be served is not resident in Kenya, a copy of the originating summons, petition, notice of motion or other originating proceedings, or summons, order or notice shall be served instead of the original together with an intimation in writing that process in the form of the copy has been issued or otherwise launched.

2) Rules 25, 26, 27, 28 and 30 shall apply mutatis mutandis to service of any process under subrule (1).

3) Nothing in this rule shall affect any practice or power of the court under which, when lands, funds, choses in action, rights or property within the jurisdiction are sought to be dealt with or affected, the court may (without affecting to exercise jurisdiction over any person out of the jurisdiction) cause such person to be informed of the nature or existence of the proceedings with a view to such person having an opportunity of claiming, opposing, or otherwise intervening.

21. The Court of Appeal in the case of **Misnak International (UK) Limited v 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan & 3 others** (supra), cited by the respondents addressed itself on this issue as hereunder-

Additionally, summons to enter appearance also plays another pivotal role when it comes to a defendant who is outside the court's jurisdiction. The supplemental but equally important role is that it empowers the court in question to assume jurisdiction over such a party. See Order 5 Rules 21 & 22 of the Civil Procedure Rules and this Court's decision in W K, M W K (Both suing as the Administrators of the Estate of Dr. W K) & another vs British Airways Travel Insurance & Another [2017] eKLR.

The manner in which such jurisdiction is assumed by the court is that firstly, the plaintiff has to seek leave of the court to serve such summons outside the court's jurisdiction. The purposes of seeking leave is to enable the court to weigh the reasons adduced by the plaintiff and determine whether a proper case has been made out for service of summons outside its jurisdiction. The principles which govern the court in determining whether or not to grant leave are set out, though not exhaustively, under Order 5 Rule 25 which reads:

“Every application for leave to serve such summons or notice on a defendant out of Kenya shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a Commonwealth citizen or a British protected person or not, and the grounds on which the application is made; and no such leave shall be granted unless it is made sufficiently to appear to the court that the case is a proper one for service out of Kenya under this Order.”

Secondly, upon such leave being granted, the summons has to be served upon such a defendant. It is only upon such service of the summons that a court assumes jurisdiction over a foreign defendant and not a moment sooner. This Court in Raytheon Aircraft Credit Corporation & Another vs Air Al-Faraj Limited (supra) appreciated as much by stating that -

“The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a plaintiff to serve summons or notice of summons, as the case may be, outside the country after such summons are served in accordance with the machinery stipulated therein.”

22. The question of jurisdiction was dealt with by the Court in the case of the **Owners of the Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited** [1989] KLR 1, as follows –

Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

23. Having applied the foregoing decisions and the applicable law to the facts herein, this Court is persuaded that the 1st respondent is neither a proper party to this suit nor does this Court have jurisdiction to hear this case against the said respondent. Accordingly, this Court finds that the instant application as against the 1st respondent is incompetent and it is hereby struck out.

Whether the applicants have satisfied the legal threshold of being granted leave to institute a derivative suit.

24. In **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another** [2017] KEHC 4629 (KLR), the Court made the following observation in regard to derivative actions-

*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 third 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: see *Wallersteiner v Moir (No.2)* [1975] 1 All ER 849. 38.*

Until 2015, in Kenya, the common law guided derivative actions in Kenya.

*With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in *Foss v Harbottle* was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance.*

25. Pursuant to the provisions of Part XI of the Companies Act, 2015, this Court has the discretion to either allow or disallow an application for leave to proceed with a suit as a derivative action. In dealing with such an application, the Court must first satisfy itself that the applicant has established a *prima facie* case with high chances of success. In the case of **Isaiah Waweru Ngumi & 2 others v**

Muturi Ndungu [2016] eKLR, the Court set out some of the factors to be considered in such an application as hereunder -

- a) *Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors' challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;*
- b) *Whether the Plaintiff has made any effort to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;*
- c) *Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of *Recchion v Kirby* 637 F. Supp. 1309 (W.D. Pa. 1986), for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;*
- d) *Whether the Plaintiff is acting in good faith;*
- e) *Whether the action taken by the Plaintiff is consistent with one of a faithful director acting in adherence to the duty to promote the success of the company would take;*

- f) The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company – is likely to be authorized or ratified by the company in the future; and*
- g) Whether the cause of action contemplated is one that the Plaintiff could bring directly as opposed to a derivative action.*

26. From the above decision, it is apparent that a party seeking leave to institute and/or continue with a suit as a derivative claim must demonstrate on a *prima facie* basis, that there exists a cause of action vested in the company arising from negligence, default, breach of duty or breach of trust by majority directors and/or shareholders, and that the relief sought is for the benefit of the company. Even though the applicants seek leave of the Court to institute a derivative suit against the respondents on behalf of MUA Insurance (Kenya) Limited, the company has not been joined as a party to these proceedings.
27. A derivative action is by its very nature a representative suit brought on behalf of the company, and the company must be a party so as to be bound by the outcome, so that it can be capable of enforcing any orders granted in its favours. However, under the provisions of Order 1 Rule 9 of the Civil Procedure Rules, 2010, no suit can be defeated by misjoinder and/or non-joinder of parties. It states that –

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

28. The Court of Appeal in the case of **William Kiprono Towett & 1597 Others v Farmland Aviation Ltd, Marco Dunn & Toby Dunn** [2016] KECA 301

(KLR), held as hereunder in regard to the provisions of Order 1 Rule 9 of the Civil Procedure Rules-

Most critically order 1 rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.

29. This Court is therefore of the considered view that non-joinder of necessary parties or misjoinder of parties in a suit is an irregularity which does not go to the root of a suit as the defect can be cured by amendment of the pleadings. In the circumstances, I am satisfied that the failure to join MUA Insurance (Kenya) Limited is not a fatal defect sufficient to render the intended derivative claim incompetent.

30. Further, Section 241(1)(c) of the Companies Act requires Courts to decline to grant leave for filing of derivative claims where the act or omission complained of has been authorized or ratified by the company. The provisions state that-

1) If a member of a company applies for permission under section 239 or 240, the Court shall refuse permission if satisfied -

a) that a person acting in accordance with section 144 would not seek to continue the claim;

b) if the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company; or

c) if the cause of action arises from an act or omission that has already occurred, that the act or omission—

i) was authorised by the company before it occurred; or

ii) has been ratified by the company since it occurred.

31. In the case of **Banja & another v AP Solutions OY & another** (supra), the Court in dismissing an application for leave to institute a derivative claim held as follows-

In sum, I fail to find any 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 AP Kenya as demanded by section 238(3) of the Companies Act. The actions taken by AP Kenya are ordinary decisions taken by a company's board of directors and it is not for this court to micromanage or second guess the company on how it is to conduct its affairs. Further, the fact that the Applicant's opinions differ from those of the other majority director/shareholder AP OY does not necessarily mean that AP OY was acting against the interests of AP Kenya. In absence of such fraud, negligence, default or breach of duty, the majority decisions of a board must be allowed to prevail.

It is for the same reasons I have set out above, that the prayer for lifting of the 'caveat' on the Sidian Bank Account cannot be granted as the court cannot issue an adverse order against such a decision made in compliance Board's request to the Bank. The court cannot also grant the prayer of allowing the Applicant to sign off as a singular director/shareholders in expending the day to day running expenses of AP Kenya as this will be akin to micromanaging the affairs of the company and would undermine the valid resolution of the company.

32. From the averments made by both the applicants and the respondents, it is evident that the Board of MUA Insurance (Kenya) Limited, which includes the applicants, considered two recapitalization options and on 18th February 2025 resolved by majority to sell the company's shareholding in MUA Tanzania and

MUA Uganda on the basis of independent valuations by Ernst & Young and Deloitte. It is clear from the applicants' averments that there is no allegation that the aforesaid resolution was ultra vires, fraudulent or unlawful. To the contrary, the applicants vide a letter dated 13th March 2025 wrote to the Board of Directors of MUA Insurance (Kenya) Limited confirming the resolution and expressing their opposition to it. In the said letter, the applicants expressed their wish to purchase the impugned shares at substantially higher prices than those offered by MUA Mauritius.

33. The Board in a letter dated 17th March 2025 responded to the applicants stating that MUA Insurance (Kenya) Limited was in urgent need of capital, and of MUA Mauritius readiness to conclude a quick deal and pay the purchase price for the shares in readily available funds without conducting any due diligence. The Board also expressed its concerns that although the applicants had indicated their willingness to acquire the impugned shares at substantially higher prices and subject to due diligence, they did not indicate the said price, the kind of due diligence that would be required, how long it would take and whether the local shareholders in MUA Tanzania & MUA Uganda would support the sale.
34. This Court notes that even from the pleadings filed by the applicants and the evidence adduced, despite having knowledge of MUA Insurance (Kenya) Limited's Board of Directors' concerns and questions as to their interest in the purchase of the impugned shares, allegations of undervaluation and self-dealing have not been substantiated. No alternative Valuation Reports were produced, no competing offer was placed before the Court, and no evidence of the applicants' financial capacity was tendered. Mere dissatisfaction with a Board decision, without cogent proof of breach of fiduciary duty or trust, does not

demonstrate a *prima facie* case for being granted leave to file a derivative claim.

35. In the circumstances, this Court is not persuaded that the applicants have met the statutory and jurisprudential threshold for the being granted leave to institute a derivative suit.
36. The above means that an order of temporary injunction cannot be granted in the absence of a properly instituted substantive suit.
37. The upshot is that the application dated 27th March 2025 is found to be defective. It is hereby struck out with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 13th day of February, 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Owino h/b for Ms Akello for the applicants

Ms Mwangi for the respondents

Mr. Kimutai – Court Assistant.