

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL CASE NO. 42 OF 2013**

**HON. JUSTICE ALEEM VISRAM**

**12<sup>TH</sup> FEBRUARY, 2026**

**ANTONIADIS EVANGELOS.....PLAINTIFF**

**AND**

**PEMA FARM FRESH LIMITED.....1<sup>ST</sup> DEFENDANT**

**CORET PETRUS WILHELMUS JOSEPHUS.....2<sup>ND</sup> DEFENDANT**

**MAUREEN WAKASA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. This dispute arises from the breakdown of a joint commercial venture between the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. At its core, the case concerns exclusion from a company, continuation of the same business through a newly incorporated entity, and competing claims of corporate regularity on one hand and oppression, breach of duty, and passing off on the other.
  
2. The Plaintiff alleges that he was unlawfully excluded from a company he co-founded, following which the Defendants incorporated a new entity and

continued the same business using the same premises, branding, concept, and assets.

3. The Defendants on the other hand contend that the suit is fatally defective for want of leave to institute a derivative claim, for failure to lift the corporate veil, and in any event that the tort of passing off has not been established.
4. The Court has considered the pleadings, oral evidence, documentary exhibits, and the detailed written submissions filed by both sides.

#### **Issues for Determination**

5. From the record, the following issues arise for determination:-

- i. Whether the suit, as framed, is incompetent for want of leave to institute a derivative action or to pierce the corporate veil.*
- ii. Whether the Plaintiff was unlawfully excluded from Pema Fresh Company Limited.*
- iii. Whether the 2nd and 3rd Defendants breached fiduciary duties owed to the Plaintiff and to the company.*
- iv. Whether the Defendants committed the tort of passing off.*
- v. What remedies, if any, are available.*

#### **Whether the suit is incompetent for want of leave**

6. The Defendants submitted that the instant suit is procedurally defective for two reasons. Namely, because the Plaintiff failed to seek leave of this Court to

institute and/or continue a derivative suit; and because the Plaintiff failed to seek leave to pierce the corporate veil before instituting suit against the Defendants in their personal capacities.

7. I will address the above issues first, noting that the submission, if affirmative will conclude the matter, rendering the remaining issues moot.

8. The Plaintiff's case is, broadly speaking, having set up a business with several partners, after the commencement of operations, his partner, without warning, left him, and set up a competing business, with an identical name and excluded him from their new venture. His complaint is that he has suffered loss and damages; his partners have oppressed him; and have breached their fiduciary duties by reason of the above action.

9. The Defendant, on the other hand pointed out that the reliefs sought by the Plaintiff in the instant suit are purported to be sought on behalf of and for the benefit of **PEMA FRESH COMPANY LIMITED ("the Company")** and not the Plaintiff in his own right.

10. A reading of the Plaint shows that the final orders sought in the Plaint are the following: a permanent injunction to restrain the Defendants from passing off, rebranding, opening, or trading in the name of Pema Farm Fresh Limited and from interfering with the assets, business, and tenancy of Pema Fresh Co. Ltd;

and finally, to release all profits derived from the period of operation to Pema Fresh Co. Ltd.

11. It is evident that the final orders relate to reliefs on behalf of the Company, and not the Plaintiff as an individual. It is also evident that the loss and harm occasioned are prima facie, in relation to the Company, and not the Plaintiff as an individual, who is one, among several shareholders of the Company.
12. It is trite that a company is an independent legal person, and therefore ought to ordinarily sue in its own name see *Salomon v Salomon & Co. Ltd [1897] AC 22* for harm or loss occasioned to it. This did not happen. In the present matter, the Plaintiff has sued in his own name for loss and harm, he has expressly pleaded was occasioned to the Company arising out of the actions of the Defendants. He goes as far as to plead that the damages be paid to the Company. It is therefore clear to me that the suit has indeed been brought on behalf of the Company.
13. The statutory framework for derivative actions is provided under the Companies Act, 2015. Under Section 238(1) of the Companies Act, 2015, a derivative action is defined as a proceeding initiated by a member of a company to enforce a cause of action vested in the company, seeking relief on its behalf.

This mechanism empowers shareholders to address wrongs committed against the company.

14. I note however, that the present suit was filed in 2013, which is prior to the enactment of the Companies Act. At that time, such suits were governed by the rule in *Foss v Harbottle [1843] 67 ER 189* which established the general principal that a wrong alleged to have been done to a company, may only be remedied by an action by the company itself. However, several exceptions to the rule developed including the derivative action which allowed a minority shareholder to bring a claim on behalf of the Company. The rule therefore permitted derivative actions, but only upon proof that the relevant exceptions had been made out, and leave granted by the court. This was not done in 2013, pursuant to the rule in *Foss v Harbottle (supra)* at the time when the suit was filed, and the Plaintiff has not sought leave under the applicable statutory regime thereafter.

15. The Companies Act, 2015 governs the statutory criteria that is relevant for grant of leave to continue or commence a derivative action. The Act outlines several considerations the court must weigh when deciding whether to allow a derivative action to proceed, including:-

- a) *Whether the shareholder is acting in good faith.*
- b) *The best interests of the company.*
- c) *Whether there are alternative remedies available.*

***d) Whether the alleged wrong could be ratified by the company.***

16. In *Kipketer v Kiptoo & 2 Others [2023] eKLR (Commercial Suit E103 of 2022)* this Court emphasized that derivative actions may not be used to advance personal agendas.

17. Pursuant to Section 239(1) of the Companies Act, 2015, a derivative action cannot be commenced or sustained in the absence of the Court's express permission. This was bolstered by the Court of Appeal in *Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another [2015] KECA 356 (KLR)* wherein the court states as follows at paragraph 19;

***“Leave of court shall be obtained before filing a derivative suit, but may also be obtained to continue with the suit once filed.”***

18. Similarly, in *Raindrops Limited & 3 others v Nzioka (Civil Appeal E054 of 2022) [2025] KECA 1570 (KLR) (3 October 2025)* the Court of Appeal held thus;

***“As stated above, it is trite that a member of the company should seek permission from the court in order to bring a derivative claim. The provision is also clear that it is an exercise of discretion by the trial judge whether or not to grant such permission, having regard to the circumstances of the case.”***

19. I reiterate that the Plaintiff has never sought seek leave of this Court to institute and/or continue the derivative claim on behalf of PEMA FRESH COMPANY LIMITED against the Defendants.
20. Based on the law as set out above, it is clear that where a claim seeks to enforce a cause of action vested in a company, the proper claimant is the company itself. Whereas, here, a shareholder purports to litigate such a claim in his personal capacity, the law requires strict compliance with the procedure governing derivative actions.
21. The requirement for leave under Section 239 of the Companies Act, 2015 is not a mere technicality. It is a substantive jurisdictional threshold intended to protect companies from unnecessary or vexatious litigation, to respect the principle of majority rule, and to ensure that the court only intervenes where it is just and equitable to do so. In the absence of such leave, the court is deprived of the jurisdiction to entertain the claim.
22. This position has been consistently affirmed by Kenyan courts. In ***Amin Akberali Manji Supra***, the Court of Appeal made it clear that leave to institute or continue a derivative suit is mandatory, and that a suit commenced without such leave is incompetent, unless and until the court grants permission.

23. Similarly, in *Ghelani Metals Limited & another v Elesh Ghelani Natwarlal & another [2017] eKLR*, the Court held that a shareholder cannot sidestep the derivative action procedure by framing the claim as a personal suit where the alleged wrong is, in substance, a wrong against the company. The Court emphasised that failure to obtain leave under the Companies Act renders the proceedings incurably defective.
24. In *Isaiah Gichu Ndirangu & another v Samuel Mungai Muchiri & 2 others [2018] eKLR*, the High Court struck out a suit brought by shareholders in their own names, holding that where the reliefs sought relate to loss allegedly suffered by the company, the action must either be brought in the name of the company or with leave as a derivative suit. Absent such leave, the court lacks jurisdiction to proceed.
25. Applying those principles to the present case, I am satisfied that the gravamen of the Plaintiff's complaint concerns alleged injury to Pema Fresh Company Limited, including the appropriation of its name, business concept, goodwill, and commercial opportunity. Those are causes of action vested in the company, not in the Plaintiff personally. This was not done and no explanation has been offered for this omission, and no application for leave was made at any stage of the proceedings.

26. In those circumstances, I find and hold that the suit, to the extent that it seeks to enforce rights vested in Pema Fresh Company Limited, is incompetent for want of leave under Section 239 of the Companies Act, 2015.

27. This finding is dispositive of the suit. Having found that the action is procedurally and jurisdictionally defective at inception, it would be inappropriate for the Court to proceed to determine the remaining substantive issues, which are accordingly rendered moot.

28. The suit is accordingly struck out with costs to the Defendants.

*Dated and delivered virtually via Microsoft Teams this 12<sup>th</sup> day of February, 2026*

**ALEEM VISRAM, FCI Arb**

**JUDGE**

**In the presence of;**

**Court Assistant: Godfrey**

.....Plaintiff  
 .....1<sup>st</sup> Defendant  
 .....2<sup>nd</sup> Defendant  
 .....3<sup>rd</sup>  
**Defendant**