



**Mwangi & another v Omondi (Commercial Case E278 of 2025)  
[2026] KEHC 1152 (KLR) (Commercial and Tax) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1152 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E278 OF 2025  
AA VISRAM, J  
FEBRUARY 5, 2026**

**BETWEEN**

**DOUGLAS KARIUKI MWANGI ..... 1<sup>ST</sup> PLAINTIFF**

**G&P TRADING COMPANY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**VICTOR RICHARD OMONDI ..... DEFENDANT**

**RULING**

**Introduction and Background**

1. The Court is being called upon to determine the 1<sup>st</sup> Plaintiff's ("the Plaintiff") application dated 15<sup>th</sup> April, 2025 ("the Application") that seeks leave to continue this suit as a derivative claim on behalf of the 2<sup>nd</sup> Plaintiff ("the Company") in respect of alleged actions and omissions by the Defendant involving negligence, breach of duty and breach of trust in his capacity as a director of the Company. The Plaintiff is also seeking an order compelling the Defendant to remove the caveat he placed on the Company's business registration, pending the full hearing and determination of the derivative claim.
2. The Application is supported by the grounds on its face and the Plaintiff's affidavit sworn on 15<sup>th</sup> April, 2025. Despite service, there has been no response from the Defendant. The Plaintiff has also supplemented his arguments by way of written submissions which together with the pleadings, I have considered, and to which I will refer, as may be necessary.

**Analysis and Determination**

3. The applicable law is found at Sections 238 and 239 of the *Companies Act* (Chapter 486 of the Laws of Kenya) which provides as follows :-



- (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.
- (4) A derivative claim may be brought against the director or another person, or both.
- (5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.
- (6) For the purposes of this Part—
  - (a) "director" includes a former director;
  - (b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

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. [Emphasis mine]



4. The aforesaid provisions provide the framework for instituting claims by members of the Company on behalf of the Company. Prior to the enactment of the Companies Act, 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, can 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.
5. In *Ghelani Metals Limited, Ghelani Enterprises Limited, Tononoka Fireworks Limited & Jayshree Suchak Sanjiv v Elesh Ghelani Natwarlal & Registrar of Companies* [2017] KEHC 4629 (KLR) the court stated that the effect of the Companies Act on the common law rule in *Foss v Harbottle* (Supra) is as follows :-
  44. Statutory procedure is now the exclusive method of pursuing derivative claims. The Act sets out what sorts of company claims may be pursued and is also explicit that derivative claims may only be pursued under the Act. The question must only be the factors the court ought to consider before approving a derivative claim.
  45. There appears, in my view, to exist a two stage process. The court must first satisfy itself that there is a prima facie case on any of the causes of action noted under s.238(3). S.239(2) of the Act provides that the application for permission will be dismissed if the evidence adduced in support “do not disclose a case” for giving of permission. The essence of judicial approval under the Act is to screen out frivolous claims. The court is only to allow meritorious claims. All that the Applicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed.
6. This was affirmed by the Court of Appeal in *Amin Akberali Manji, Hemanth Kumar & Musikland Millenium Limited v Altaf Abdulrasul Dadani & Musikland Limited (Under Receivership)* [2015] KECA 356 (KLR). When considering whether to grant permission, the court was guided by Section 241 of the Companies Act which sets out circumstances under which the court shall refuse the application, and set out the considerations that the court ought to take into account. The Section provides as follows:-

241.

  - (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 authorized by the company;
    - (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.
  - (2) In considering whether to give permission, the Court shall take into account the following considerations:
    - (a) whether the member is acting in good faith in seeking to continue the claim;



- (b) the importance that a person acting in accordance with section 143 would attach to continuing it;
  - (c) if the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—
    - (i) authorised by the company before it occurs; or
    - (ii) ratified by the company after it occurs;
  - (d) if the cause of action arises from an act or omission that has already occurred—whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company
  - (e) whether the company has decided not to pursue the claim;
  - (f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in the member's own right rather than on behalf of the company.
- (3) In deciding whether to give permission, the Court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest (direct or indirect) in the matter. [Emphasis mine]

7. The Plaintiff relied on the decision of the court in *Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u* [2016] KEHC 3032 (KLR) where Ngugi J.,(as he was then) summarised some of the factors to be considered in granting permission to commence or continue a derivative action in the following terms :

[21] ...Among other things, the Court considers the following factors:

- (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 efforts 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 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 authorised or ratified by the company in the future; and
  - (g) Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative action. (Emphasis mine)
8. The Plaintiff submitted that the Defendant has become unreachable for a prolonged period of time, and has failed to perform his statutory duties as a Director, despite requests from the Company; that he ignored multiple summons to attend meetings called to discuss his alleged negligence and gross misconduct; and that he registered a caveat on the Company's business registration services through its e-citizen account, which is severely hindering the Company's daily operations. He deposed that these actions and omissions constitute negligence, breach of duty, and breach of trust in his role as a director.
  9. No reply to the above allegations has been tendered by the Respondent despite service of the same.
  10. Guided by the law as set out above, the first part of the two -part test is to inquire whether or not, based on the evidence before me, a prima facie case on any of the causes of action noted under Section 238(3). Section 239(2) may be made out? The allegations made are serious and are grounded in the relevant statutory framework. In the absence of evidence to the contrary, and for the reasons below, I find that the same meet the threshold.
  11. The claims relate to negligence, breach of duty, and breach of trust by the Defendant. These are wrongs alleged to have been done to the Company. The harms said to be occasioned to the Company include: obstructing operations, and financial loss to the Company. The Court is being called upon to rectify these harms for the purpose of allowing the Applicant to promote the success of the Company, rather than for personal gain. I find that the same have been made out on a prima facie basis.
  12. I therefore move to the second part of the test, namely, whether or not the Applicant is acting in good faith in seeking to continue the derivative claim. The requirement is grounded in statute as stated above. In ascertaining the dominant purpose of the action, the Court must look at the evidence on the record at this stage of the proceedings. The evidence contained in the Plaintiff's affidavit, the CR19 resolution and the Defendant's comments on the Business Registration Service (BRS) portal provides a limited factual basis for these allegations.
  13. It is evident that the Respondent registered a caveat on the Company's official BRS account, an act that directly impedes the Company's operations for reasons that are alleged to be personal. The said acts by the Respondent reasonably appear to be a misuse of position.
  14. On the other hand, there is no evidence to show that the Plaintiff is acting in bad faith, for collateral motive, or for private advantage at the Company's expense. The Applicant submitted that the Company has already passed a resolution to remove the Defendant, indicating collective shareholder/ director dissatisfaction with the Defendant. The Plaintiff has submitted in relation to various efforts made to address the harms complained of internally, including several requests to the Defendant to perform his duties; and summoning him to meetings. None of which have worked. The Applicant pointed out that a special resolution was even passed to remove the Defendant but despite the same, this has not been possible.
  15. Applying the statutory criteria, it is evident that the cause of action arises from past acts on the part of the Respondent, and it appears unlikely these acts, including negligence and breach of duty may be



ratified by the Company. The actions are alleged to constitute a breach of duty to the Company, and alleged to be harming the Company. The Plaintiff pointed out fact that the Company's has passed a resolution to remove the Defendant in support of his submission that the Company would not ratify the Defendant's conduct.

16. Additionally, based on the material, it would appear that the Company, through its other directors have shown clear intent to act against the Defendant but are unable to do so based on the actions by the Defendant giving rise to the derivative action.
17. Based on the reasons above, I find and hold that the statutory threshold has been met in accordance with the criteria set out under Sections 238 and 239 of the Companies Act. I find it appropriate to grant the Plaintiff permission to commence or continue the present matter on behalf of the Company as a derivative suit.
18. Additionally, I find that the present matter presents the Court with 'exceptional circumstances' that justify the grant of a mandatory injunction at the interim stage of proceedings. Accordingly, Prayer No.2 of the Application is allowed.
19. Finally, the Court notes that despite service of the Application, no reply has been provided by the Defendant to date explain why he lodged the caveat, or to explain, how it is of benefit to the Company. To the contrary, the evidence before me shows that the same was lodged for personal leverage, vendetta, or collateral motive. The presence of the caveat appears to be hampering the Company's operations, affecting its statutory compliance, preventing it from carrying out its lawful operations. Therefore, in my view no prejudice will be occasioned to the Company by vacating the same. To the contrary, this is in the best interest of the Company and for all its shareholders.

### **Conclusion and Disposition**

20. In the upshot, I allow the Plaintiff's Application dated 15<sup>th</sup> April, 2025, as follows: -
  - a. Leave be and is hereby granted to the 1<sup>st</sup> Plaintiff to continue the derivative claim seeking relief on behalf of G & P Trading Company Limited, the 2<sup>nd</sup> Plaintiff against the Defendant in respect of acts and omissions involving negligence, breach of duty, and breach of trust in his capacity as a director.
  - b. A mandatory injunction be and is hereby issued compelling the Defendant to remove the caveat registered with the business registration services on the e-citizen account of the 2<sup>nd</sup> Plaintiff, pending the inter-parties hearing and final determination of the derivative claim.
  - c. The Applicant shall have the costs of the application.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2026**

**ALEEM VISRAM, FCI Arb**

**JUDGE**

In the presence of;

Court Assistant: Lispa

.....1<sup>st</sup> Plaintiff

.....2<sup>nd</sup> Plaintiff

.....Defendant

