

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
HCCOMMPET NO. E006 OF 2025

DR. ERICK CHOGE BARTUIYOT (Suing as a
Majority Shareholder of Greenshield Mania Limited)PETITIONER

-VERSUS-

EVERLYNE CHEBET NAIBEI.....RESPONDENT

RULING

1. This Ruling is in respect to a Notice of Preliminary Objection dated 3rd April 2025. The background giving rise to the said Preliminary Objection is that the petitioner filed a petition dated 19th March 2025, seeking orders directing the respondent to resign as a Director of Greenshield Mania Limited and relinquish her 30% shareholding, with the shares to be independently valued for a buyout. He also seeks an injunction to restrain the respondent from interfering with the company's suppliers, employees, and financial operations, from making defamatory statements about the company, and from presenting herself as its agent, Director, or representative. The petitioner also prays for an order allowing him to have exclusive authority to manage the company's finances, an order compelling the respondent to render an immediate accounting of all transactions undertaken in the company's name and compensation for personal funds allegedly expended to sustain the company, and costs of the petition.

2. The petitioner's case is that he is a majority shareholder with 70% shareholding of the shares in Greenshield Mania Limited, and that he brings this petition against the respondent, a 30% shareholder and his co-director, seeking her removal on grounds of gross misconduct and conduct detrimental to the

company's interests. The petitioner contended that the respondent engaged in actions harmful to the company, including interfering with suppliers, making defamatory and false allegations of fraud against him, misrepresenting herself as an authorized representative without Board approval, disrupting business relationships, and blocking access to company accounts.

3. The petitioner averred that as a result thereof, the company has suffered significant financial harm, including unpaid employee salaries amounting to Kshs.584,000/=, outstanding supplier payments totaling Kshs.2,404,808.00, PAYE arrears of Kshs.33,383.00, VAT arrears of Kshs.142,775.00, and rent arrears of Kshs.394,400/=. The petitioner stated that he had personally injected over Kshs.800,000/= in the past two months to sustain operations. He contended that the respondent's conduct constitutes breach of fiduciary duty, oppressive and unfairly prejudicial conduct under Section 780 of the Companies Act, defamation of the company, unlawful self-representation, and obstruction of business operations, thereby justifying her removal as a Director and shareholder.
4. In opposition to the application, the respondent filed a response to the petition and filed a cross-petition dated 31st March 2025. In her response to the petition, she denied all allegations made against her except those expressly admitted. The respondent contended that it is the petitioner, and not herself, who has engaged in conduct detrimental to the company and that she has at all times acted within the scope of her duties as a Director. She asserted that the petitioner is responsible for the company's financial distress, claiming that he mismanaged company funds and diverted a sum of Kshs.8,802,089.00 to his personal accounts and M-Pesa, for which he ought to refund the company. She disputed any claims of breach of fiduciary duty or oppressive and prejudicial

conduct, asserting that instead, it is the petitioner who has acted contrary to Section 780 of the Companies Act and endangered the company's viability.

5. In her cross-petition, the respondent averred that her petition seeks to stop a Special General Meeting scheduled for 4th April 2025, which she contended was being convened oppressively and in a manner prejudicial to her rights as protected under Section 780 of the Act. She deposed that she founded the company in 2019 after selling a similar business, and that the petitioner persistently sought to join the enterprise, promising to invest Kshs.12,000,000/= and was consequently allocated a 45% shareholding based on trust, but the petitioner only invested Kshs.3,000,000/=, which he later recouped, and thereafter begun mismanaging company affairs, particularly after she left the country in December 2022 for further studies. The respondent claimed that the petitioner diverted company funds for personal use, resulting in a loss of Kshs.8,802,089.00 between December 2022 and February 2025. In addition, that he unlawfully convened a Special General Meeting aimed at removing her as a Director, despite her role as a founder and co-director of the company.
6. The respondent averred that the petitioner has exploited his majority shareholding to frustrate corporate governance processes and prevent the company from taking any action against him. She also claimed that the petitioner has failed to pay her salary, commissions, and profit share, has participated in improper employee dismissals, forgery of the respondent's signature on share transfer forms, diversion of funds through personal bank and M-Pesa accounts, blocking the respondent's access to company accounts, emails, and data, altering signatory rights, operating shadow accounts, interfering with Auditors and opposing independent valuation of the company. She further claimed that the petitioner failed to convene Annual General

Meetings, and is in breach of various statutory duties under the Companies Act. The respondent asserted that the petitioner attempted to acquire a new company without her involvement and has taken steps, including placing the company Accountant on forced leave. That he had made attempts to remove the respondent as a Director and positioned himself as the sole controller of the company.

7. In the cross-petition, the respondent seeks orders for dismissal of the main petition with costs, an order of temporary injunction suspending the Special General Meeting scheduled for 4th April 2025, an order compelling the respondent to refund the company Kshs.8,802,089.00 allegedly misappropriated, and an order to limit the company's banking operations to specified active accounts.
8. The respondent also seeks directions requiring the petitioner to appoint an independent valuer to determine the company's value, including intellectual property and her shareholding, and for the appointment of an independent auditor to conduct a full audit of the company's accounts from 2019 to date. The respondent also seeks orders for payment of profit shares due to her for the years 2019 to 2024, salary arrears amounting to Kshs.800,000/= for the period between July 2024 and March 2025, and a 10% commission amounting to Kshs.3,600,000/= for contracts onboarded between 2019 and 2024. In addition to the foregoing, she prays for restraining orders to protect her from intimidation and restoration of her access to company accounts and systems.
9. In opposition to the cross-petition, the petitioner filed a response dated 3rd April 2025 and a Notice of Preliminary Objection dated 3rd April 2025, raising the following grounds -

- i) That the cross-petition, to the extent that it purports to assert derivative claims on behalf of Greenshield Mania Ltd, is fatally defective for failure to comply with Section 239 of the Companies Act, 2015, which requires leave of Court before filing a derivative action. No such leave was sought or granted;
 - ii) That the cross-petition constitutes an abuse of the Court process as it improperly includes extraneous allegations and criminal insinuations without basis, aimed at scandalising the petitioner and disrupting due process;
 - iii) That the cross-petition improperly seeks substantive reliefs such as injunctive orders and freezing of company assets without a formal Notice of Motion and supporting affidavit, contrary to the Civil Procedure Rules; and
 - iv) That the cross-petition offends Order 2 Rule 15 of the Civil Procedure Rules, 2010, and should be struck out in whole or in part as it is scandalous, vexatious, and otherwise an abuse of the process of the Court.
10. The Notice of Preliminary Objection was canvassed by way of written submissions. The petitioner's submissions were filed by the law firm of Wavinya Wanjala Advocates on 2nd July 2025, while the respondent's submissions were filed on 23rd July 2025 by the law firm of Ndung'u Kang'ethe & Company Advocates
11. Ms Wanjala, learned Counsel for the petitioner submitted that the respondent's cross-petition improperly advances derivative claims, such as the recovery of alleged company losses, suspension of corporate resolutions, and demands for audits, without first obtaining leave of the Court as required under Section

239(2) of the Companies Act. Counsel relied on the cases of **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another** [2017] KEHC 4629 (KLR) and **Hotstar Investments Ltd v Peter Kuria** [2019] KEHC 7511 (KLR), and further submitted that failure to seek such leave is not a mere procedural defect but renders the respondent's cross-petition fatally defective.

12. She cited the Court of Appeal case of **Kenya Commercial Bank Limited v Nicholas Ombija** [2009] KECA 228 (KLR), and contended that the injunctive reliefs sought, including the suspension of the scheduled Special General Meeting, are untenable in law, as contrary to the provisions of Order 51 Rule 1 of the Civil Procedure Rules, 2010, they were not sought through a formal Notice of Motion supported by an affidavit. Ms Wanjala referred to the Court of Appeal case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others** [2009] KECA 453 (KLR) and submitted that the respondent's cross-petition contains scandalous, abusive and irrelevant allegations intended to embarrass and prejudice the petitioner, thereby constituting an abuse of Court process under Order 2 Rule 15(1) of the Civil Procedure Rules, 2010.
13. Mr. Ndung'u, learned Counsel for the respondent submitted that the cross-petition is competent and properly before the Court, noting that leave for derivative relief was sought and granted in **HCCOMMMISC No. E317 of 2025**, which pre-dates the cross-petition. He relied on the Court of Appeal case of **Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another** [2015] KECA 356 (KLR) and the case of **Arnold Kipkirui Langat v Atticon Limited & 6 others; Linkit Limited (Affected Company)** [2021] KEHC 7197 (KLR), and further submitted that a derivative action may

proceed where leave has been sought and a *prima facie* case of harm to the company is demonstrated, as is the case herein.

14. He asserted that the cross-petition is supported by affidavit evidence and annexures, including audited financial statements showing misappropriation of Kshs.8,802,089.00, a police report concerning alleged forgery of the respondent's signature and documentation of unilateral financial transactions by the petitioner.
15. On procedural propriety, Counsel submitted that the cross-petition was duly filed with a supporting affidavit and therefore meets the requirements of Order 51 Rule 1 of the Civil Procedure Rules, 2010, thereby making the petitioner's objection baseless. Mr. Ndung'u denied that the cross-petition is scandalous or vexatious, stating that the allegations raised are relevant, truthful and substantiated, and therefore fall within permissible pleadings.
16. He stated that should the Court deem it necessary, the respondent seeks leave to continue the cross-petition as a derivative suit under Section 239(2) of the Companies Act. He argued that the respondent meets the statutory requirements for such leave. Mr. Ndung'u maintained that the respondent has acted in good faith to protect the company, by issuing letters and emails seeking audited accounts and mediation, whereas the petitioner excluded her from management of the company and violated his Director's duties under Sections 143 and 780 of the Companies Act, 2015.

ANALYSIS AND DETERMINATION.

17. I have considered the petitioner's Notice of Preliminary Objection dated 3rd April 2025 and the written submissions by Counsel for the parties, the issue that

arises for determination is whether the petitioner's Notice of Preliminary Objection should be sustained.

18. In order for a Preliminary Objection to succeed, it should raise pure points of law, it should be argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. What constitutes a valid Preliminary Objection was considered by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696 as follows—

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

In the said case, Sir Charles Newbold P., stated as follows-

... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.

19. The Court in the case of **Oraro v Mbaja** [2005] 1KLR 141, weighed in on the issue of Preliminary Objections and held that -

The principle is abundantly clear. A ‘preliminary objection’ correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.

20. The first ground of the petitioner’s Preliminary Objection is that the cross-petition is defective for asserting derivative claims without first obtaining leave of the Court as required under Section 239(2) of the Companies Act, 2015. The respondent in opposition to that ground submitted that leave to pursue a derivative claim on behalf of the company, Greenshield Mania Limited, was sought in **HCCOMMMISC No. E317 of 2025**, a matter filed prior to her cross-petition.
21. From the above assertion by the respondent, it is apparent that in order for this Court to determine the question of whether leave to institute a derivative claim was sought before the respondent filed her cross-petition or whether it suffices to regularize the derivative aspects of the cross-petition is a question that requires examination of facts, pleadings and the nature of the orders sought and

granted, if any, in the application filed in **HCCOMMMISC No. E317 of 2025**. This Court therefore holds that this is not a pure point of law that can be determined without factual inquiry. The Preliminary Objection fails on that ground.

22. The third ground of the petitioner's Preliminary Objection is that the cross-petition improperly seeks injunctive relief without a formal Notice of Motion, and that it is scandalous, vexatious, or an abuse of the Court process. In respect to the third ground, it is not in contest that the respondent's cross-petition was accompanied by a supporting affidavit sworn on 31st March 2025, by Ms Everlyne Chebet Naibei, the respondent herein. The fact that the respondent's claim has been brought by way of a cross-petition as opposed to a Notice of Motion as provided for under Order 51 Rule 1 of the Civil Procedure Rules, 2010, is a procedural technicality that affects the form of the claim rather than the substance of it, curable under Article 159(2)(d) of the Constitution. This Court is of the considered view that even if the respondent's claim was to be brought by way of a Notice of Motion, its substance would still not change. It also means that the Court would only consider the prayer for an order of injunction only after the hearing of the cross-petition and not an interlocutory stage. For this reason, this Court finds that the third ground of the Preliminary Objection also fails.
23. In regard to the petitioner's second and fourth grounds of the Preliminary Objection, I am not persuaded that the said grounds qualify as pure points of law, since in order to determine whether some averments contained in the respondent's cross-petition constitute an abuse of the Court process by including extraneous allegations and criminal insinuations aimed at scandalizing the petitioner and disrupting due process, and that the petition is

scandalous, vexatious or irrelevant; they require evaluation of content, context, and evidentiary material. These issues cannot be summarily determined without delving into the merits of the pleadings and the facts of the respondent's claim. The said grounds therefore fall outside the narrow scope of a Preliminary Objection, thus the petitioner's Preliminary Objection also fails on the said grounds.

24. Furthermore, allegations of scandalous or abusive pleadings under Order 2 Rule 15 of the Civil Procedure Rules, 2010, typically require a substantive application accompanied by a supporting affidavit upon which the person claiming that a suit is scandalous, vexatious and/or an abuse of the Court process can adduce evidence in support of such allegations. This Court therefore finds that such allegations are not capable of being disposed of, through a Preliminary Objection.
25. From the analysis I have made, it is evident that the petitioner's Notice of Preliminary Objection dated 3rd April 2025, largely invites this Court to make a determination on issues that are fact-dependent and entwined with the merits of the cross-petition, offending the test of what constitutes a valid Preliminary Objection as was stated by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** (supra).
26. I conclude by stating that the petitioner ought to have been patient enough to await the determination of these issues at the substantive hearing of the petition and cross-petition.
27. It is my finding that the petitioner's Notice of Preliminary Objection dated 3rd April 2025 is not merited. It is hereby dismissed with costs to the respondent

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 20th day of February 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Wanjala for the petitioner

Mr. Ndungu for the respondent

Ms Wokabi – Court Assistant.

ORIGINAL