



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
MISC APPLN NO. E638 OF 2025

BETWEEN

JOHN GACHAU THEURI
APPLICANT

VERSUS

TABITHA WANJIRU KIGUTA
RESPONDENT

RULING

Background and Introduction

1. For determination is the application dated 25th June 2025, in which the Applicant seeks leave to institute a derivative suit on behalf of Mobistar Communications Limited (“the Company”), which operates as a super agency for Safaricom Kenya Limited. The Company’s business involves vetting, managing, and remunerating sub-agents on Safaricom’s behalf. In addition, the Applicant seeks interim orders suspending the Respondent from

serving as Director and/or Managing Director of the Company.

- 2.** The Applicant contends that both he and the Respondent were administrators of the Safaricom portal, a platform through which all transactions relating to the super agency business are conducted. He alleges that in February 2025, the Respondent unilaterally deleted his profile from the portal, thereby assuming exclusive control over sub-agent commissions, company capital, and other financial flows. The Applicant further contends that the Respondent diverted company commissions into her personal account and failed to remit payments due to sub-agents.
- 3.** These actions, he argues, have impaired the Company's ability to service its loan facilities, as evidenced by bank statements annexed to his Supplementary Affidavit. He also maintains that the Company has defaulted on statutory obligations, including VAT payments. According to the Applicant, the Respondent's conduct is detrimental to the Company's overall operations.

4. The application is opposed through a Replying Affidavit sworn on 16th October 2025 by **Tabitha Wanjiru Kiguta**, the Managing Director of the Company and the Respondent herein. She avers that the Applicant has already acknowledged being added as the second administrator of the Safaricom platform, where his consent is mandatory for any decisions or actions executed. Accordingly, she denies the allegation that his profile was deleted, asserting that he remains an active member of the platform. She further contends that, as a mandatory administrator, the Applicant would necessarily have had to consent to any such deletion. In her view, both parties retain unfettered control over access to and use of the Company's commissions.
5. The Respondent states that all commissions are payable into the Company's account at KCB Bank. She emphasizes that the Applicant is currently the sole signatory to that account, having removed her as a signatory, thereby granting himself exclusive discretion over the use of commissions to her prejudice as a co-director. She further explains that the Applicant has previously experienced difficulties

in repaying loans he obtained and in reallocating commissions.

6. As a result, the parties resolved that commissions earned by the Company would first be applied to offset the Applicant's loans, and thereafter to pay rent for the residence occupied by the Applicant together with their children, given that they are estranged spouses and the Applicant has full physical custody of the children. The balance of commissions, if any, was to be remitted to her. Upon full repayment of the loans, the parties agreed that commissions would be shared equally between them as co-directors.
7. The Respondent also asserts that she has had to personally reassure sub-agents of the Company's commitment after the Applicant misapplied commissions intended for them. In support of this, she attaches and marks as "TK 1" a copy of a letter she wrote to the sub-agents communicating the same.

Analysis and Determination

8. I have carefully considered the written submissions filed by both parties. The central question for

determination is whether the Applicant has demonstrated a sufficient basis for the grant of leave to institute a derivative claim. The governing framework is set out under **Sections 238 and 239 of the Companies Act, 2015**, which outline the nature of derivative proceedings and the requirement for court permission before such claims may proceed. The applicable threshold is further articulated in **Section 241(2) of the Act**, which provides that:

“(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."

9. These statutory provisions have been interpreted and applied in various judicial pronouncements, including ***Ghelani Metals Limited & 3 Others V Elesh Ghelani Natwarlal & Another, [2017] eKLR***. Against the backdrop of such authorities, the burden rests upon the Applicant to place before the Court credible evidence that satisfies the threshold outlined above. To begin with, the Certificate of Incorporation produced confirms, without dispute, that the Applicant is a member of the Company.
10. In ***Abdulkarim Saleh Muhsin V Nedim Mohamed Ibrahim & 3 Others, [2019] KEHC 2328 (KLR)***, just like in ***Ghelani Metals Limited & 3 Others (supra)***, the Court underscored that an application under ***Section 238*** must be anchored in an actual or proposed act involving negligence, default,

breach of duty, or breach of trust by a director of the company.

- 11.** I have carefully examined the evidence presented by both parties. The Applicant alleges that the Respondent excluded him from the Company's core digital platforms and email system, diverted commissions into her personal accounts, suspended sub-agent accounts, and engaged in mismanagement that resulted in loan defaults, adverse credit references, and the suspension of the Company's KRA PIN.
- 12.** However, no evidence has been placed before me to support these assertions. Even if, for argument's sake, the allegations were assumed to be true, the Applicant has not demonstrated that he raised these concerns formally for the benefit of the Company, whether through board resolutions or other form of shareholder communication. In any case, the Applicant's own evidence undermines his assertions. He has produced a statement of account from the Company's KCB Bank account. This raises a critical inconsistency that if indeed he was locked out of the Company's financial systems and denied signatory

rights, how then was he able to access and produce such statements?

13. In addition to the insufficiency of evidence, this Court must also consider whether the application has been brought in good faith and whether the claim genuinely advances the interests of the Company, rather than serving as a vehicle for personal disputes or vendettas. Good faith is a critical requirement in derivative proceedings. In the persuasive decision of the Court of Appeal Singapore in **Ang Thiam v Low Hian Chor, [2013] SGCA 11**, as quoted in **Wan Laisu & Another V Oversea Boat and Fishing Supplier & 2 Others, [2020] KEHC 5691 (KLR)** the court stated that:

“The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all. Naturally, the parties opposing Section 216A (with similar provisions with our Part XI of the Companies Act 2015 application will seek to show that the

application is motivated by an ulterior purpose; such as dislike, ill feeling or other personal reasons, rather than by the applicants concern for the company. Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his judgement will be clouded by purely personal considerations, that may be sufficient for the court to find a lack of good faith on his part: An applicant's good faith would also be in doubt if he appears set in damaging or destroying the company out of sheer spite or worse, for the benefit of the competitor. It will also raise the question whether

the intended action is going to be in the interests, of the company at all.”

14. In the present case, the Applicant has not shown that the grievances raised were ever pursued through proper corporate channels for the benefit of the Company. Instead, the circumstances suggest that the application is intertwined with personal disputes between the Applicant and the Respondent, who are not only co-directors but also estranged spouses. This context raises legitimate concerns as to whether the application is motivated by personal animosity rather than a bona fide desire to safeguard the Company's interests. That is not the purpose of proceedings under **sections 238 and 239.**

Disposition

15. Accordingly, I come to the conclusion that the application for leave to continue derivative suit is not merited. The application dated 25th June 2025 is therefore dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 20TH DAY OF FEBRUARY 2026.**

F. MUGAMBI
JUDGE

Delivered in presence of:

Mr Gichuki for the applicant

NA/ for the respondent

Court Assistant: Lillian

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