



Gitau (Suing as the Administrator of the Estate of John Gitau Kamau) v Manyara & 2 others; Muringa Company Limited (Interested Party) (Commercial Case E176 of 2025) [2026] KEHC 3957 (KLR) (Commercial and Tax) (19 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E176 OF 2025
JWW MONG'ARE, J
MARCH 19, 2026**

BETWEEN

PETER KIMANI GITAU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHN GITAU KAMAU) PLAINTIFF

AND

DAVID GITHIOMI MANYARA 1ST DEFENDANT

JOSEPH KINUTHIA NGURURU 2ND DEFENDANT

FRANCIS NDUNGU MBUA 3RD DEFENDANT

AND

MURINGA COMPANY LIMITED INTERESTED PARTY

RULING

Introduction and Background

1. The Plaintiff has filed the Notice of Motion dated 21st February 2025 under sections 238(3),239(2) and 280 of the Companies Act(Chapter 486 of the Laws of Kenya), sections 1A,1B, 3A and 63 of the Civil Procedure Act(Chapter 21 of the Laws of Kenya), and Order 40 Rule 1 and Order 51 Rule 1-3 of the Civil Procedure Rules seeking the following orders:

1. Spent
2. Court grants leave for the Applicant to institute and continue a derivative action on behalf of the Interested Party against the Respondent.



3. Pending hearing of the this application and suit inter partes, this Honourable court be pleased to issue an order restraining the Respondents either by themselves or through their authorized agents, servants, workers, employees and/or any person acting on their behalf from selling by private treaty, transferring, alienating, disposing of and/or altering the land records and/or changing ownership of that property known Land Title No. L.R. 7785/1443 and/or 1 interfering with the Interested Party's possession thereof.
 4. Upon hearing of this Application inter partes, this Honourable court be pleased to issue an order restraining the Respondents either by themselves or through their authorized agents, servants, workers, employees and/or any person acting on their behalf from selling by private treaty, transferring, alienating, disposing of and/or altering the land records and/or changing ownership of that property known Land Title No. L.R. 7785/1443 and/or interfering with the Interested Party's possession thereof until the same is approved by members of the Interested Party.
 5. Pending hearing of this application and suit inter partes, this Honourable court be pleased to issue an order restraining the Developer either by themselves or through their authorized agents, servants, workers, employees and/or any person acting on their behalf from continuing with developments on property known Land Title No. L.R. 7785/1443.
 6. Upon hearing of this Application, this Honourable court be pleased to issue an order restraining the Developer either by themselves or through their authorized agents, servants, workers, employees and/or any person acting on their behalf from continuing with developments on property known Land Title No. L.R. 7785/1443 until the same is approved by members of the Interested Party
 7. Members of the company be furnished with a copy of the sale agreement of the property known Land Title No. L.R. 7785/1443 and be allowed to consider and approve the said sale in a special meeting.
 8. The costs of this application be provided for.
 9. Any other orders that this Honourable Court may deem just and fit.
2. The application is supported by grounds on its face and the supporting affidavit of the Plaintiff sworn on 19th February 2025 and it is opposed by the Defendants through the replying affidavit of the 2nd Defendant sworn on 26th March 2025. The application has been canvassed by way of written submissions which together with the pleadings I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. From the parties' submissions, the court is being called to determine whether the Plaintiff should be granted leave to file a derivative action on behalf of the Interested Party ("the Company") and whether he is entitled to the injunctive reliefs sought. It is not in dispute that whether the court should grant him permission to proceed with this suit as a derivative suit is governed by sections 238 and 239 of the [Companies Act](#) which provide as follows:

238

- (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. The late Onguto J., in *Ghelani Metals Limited, Ghelani Enterprises Limited, Tononoka Fireworks Limited & Jayshree Suchak Sanjiv v Elesh Ghelani Natwarlal & Registrar of Companies* [2017] KEHC 4629 (KLR) explained the effect of the *Companies Act* on the common law rule in *Foss v Harbottle* (Supra) 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. The position that an applicant ought to establish a prima facie case 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 (). In considering whether to grant permission, the court is also guided by section 241 of the *Companies Act* which sets out circumstances under which the court shall refuse the application and the considerations the court shall take into account when granting permission to the applicant to continue the suit as a derivative suit. 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. In *Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u* [2016] KEHC 3032 (KLR) Ngugi J.,(as he was then) summarized some of the factors to be considered in granting permission to commence or continue a derivative action as follows:
- (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.
8. The Plaintiff alleges that the Defendants, as directors of the Company, are mismanaging its assets and acting without the approval of the shareholders. That on 14th January 2025, the directors held a meeting informing members that they had received a deposit for the sale of the Company’s property known as TITLE NO. L.R. 7785/1443 (“the suit property”). The Plaintiff claims the sale was conducted without a shareholder resolution, without scrutiny of the sale agreement, and without approval of the sale price and that the directors have refused to share a copy of the sale agreement with the shareholders and have excluded them from the negotiation process. He further claims that a Developer has already commenced developments on the suit property following the receipt of the deposit and that he and other members feel oppressed by the directors’ rush to sell the suit property without accountability.
 9. In response, the Defendants depone that the Plaintiff has no locus standi to bring this suit because he has not formally transferred the shares from his late father's name into his own name as per the Company's Articles of Association. That without this, he is not recognized as a formal shareholder with the right to vote or challenge Company decisions. The Defendants deny that the sale was secretive or unauthorized and they claim the shareholders were fully involved. They state that during an Extraordinary General Meeting on 11th September 2021, the shareholders including the Plaintiff’s representatives were briefed on the Company’s assets and the members present unanimously agreed that the directors should urgently sell the suit property at a price they deemed necessary. That during the meeting on 14th January 2025, the sale agreement was tabled and read aloud and the members were informed that a buyer had offered Kshs. 120 million and a 10% deposit had been received.
 10. The Defendants assert that the members present unanimously accepted the price and urged the directors to move with speed to finalize the deal and that nobody objected. The Defendants note that while the Plaintiff chose not to attend the January 2025 meeting, his brother and sister were present and participated and they argue that the estate of the deceased was therefore properly represented when the sale was adopted. The Defendants state that receiving a deposit is a normal part of a sale agreement and is done according to the terms and conditions of the contract and they deny any wrongdoing in accepting the payment.
 11. The Defendants claim the Plaintiff has not come to court with clean hands because he did not seek the consent of the other members before filing the case, and he is not a formally registered shareholder. For these reasons, the Defendants urge the court to dismiss the application with costs.
 12. Having gone through the parties’ arguments above and juxtaposed the same with the principles of the *Companies Act* and authorities on granting leave to institute and continue a derivative claim, I am not persuaded that the Plaintiff has set out a prima facie case and find that he has not satisfied the threshold for being granted leave to continue a derivative suit. First, whereas the Plaintiff argued that the directors breached their duty by selling the suit property without member approval and refusing to share the sale agreement, the Respondents have annexed minutes from the 14th January 2025 meeting which show the sale agreement was read to the members, the price of Kshs. 120 million was disclosed, the members present including the Plaintiff’s siblings, representing the estate, agreed unanimously and accepted the offer and the members urged the directors to move with speed. At this point, the court



can only assume that these minutes are authentic and thus destroys the Applicant's allegation. As the members approved the sale and the price, there is no prima facie breach of duty and the directors were simply executing the will of the majority.

13. Second, the Defendants have raised an argument that that has not been rebutted by the Plaintiff that he lacks locus standi to file the application as he is not yet a member of the Company. They annexed the Articles of Association where Article 14 deals with the transmission of shares and that the said shares have not been transferred from the estate of the deceased to himself. Even though section 238(6)(b) of the *Companies Act* states that members of a company include persons to whom shares have been transmitted by operation of law, I am of the view that unless the grant of letters of administration has been confirmed, then it cannot be deemed that the shares have been transferred or transmitted by law. I am therefore inclined to agree with the Respondents that the Plaintiff is not a member and therefore lacks the requisite locus standi to institute and continue a claim on behalf of the Company.
14. Third, the Defendants pointed out and it was not rebutted that the Plaintiff chose not to attend the crucial meeting, but his siblings did. By filing this suit after choosing not to attend that meeting, the court can only presume this is an attempt by the Plaintiff to litigate a decision he personally dislikes, rather than one the Company, through its members, actually opposed. This imputes bad faith on the part of the Plaintiff rather than a desire to remedy a wrong to the Company.
15. Fourth, section 241(1)(c) and (2)(d) of the *Companies Act* provide that the court shall refuse permission if the act or omission has been ratified by the company since it occurred. The minutes of the 14th January 2025 meeting and the 11th September 2021 meeting indicate that the shareholders and the Company in a general meeting ratified the decision to sell the suit property and approved the specific price. Fifth, under section 241(3) of the *Companies Act*, the court must have particular regard to the views of members who have no personal interest. The Plaintiff claims to speak for other members but the Defendants have provided attendance lists suggesting that dozens of members attended and approved the sale. Unless the Plaintiff can show that these members were coerced or misled, which he has not, the view of the majority appears to support the Defendants, not the Plaintiff.
16. Lastly, a plaintiff must show they made a demand on the board or that such a demand would be futile. Whereas the Plaintiff wrote demand letters, which shows he tried, he is essentially asking the court to sue the directors for doing something the members asked them to do. It is not futile to ask the directors to stop the sale but rather, it would be contrary to the shareholders' resolution.
17. In summary, to grant leave for a derivative action, the court must believe the company has a valid claim. Here, the Company, through its members, appears to support the directors. Granting leave would allow one dissatisfied family representative to overturn the will of the majority shareholders, which is exactly what the rule in *Foss v Harbottle*(supra) seeks to prevent, unless there is fraud or illegality which has not been demonstrated here.

Conclusion and Disposition

18. In the upshot, the Plaintiff's application dated 21st February 2025 is dismissed with costs. The interim orders in place are hereby discharged forthwith.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MARCH 2026

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J.W.W. MONGARE



JUDGE

IN THE PRESENCE OF

1. N/A for the Plaintiff.
2. N/A for the Defendants.
3. N/A for the Interested Party.
4. Amos - Court Assistant

