

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**COMMERCIAL SUIT NO. E006 OF 2025**

**AGNES NYAWIRA MATHENGE alias**

**AGNES**  
**GATURA.....PLA**  
**INTIFF**

**VERSUS**

**STEPHEN WANYOIKE GATHU..... 1<sup>ST</sup>**  
**DEFENDANT**

**PETER GATHERU GATHU.....2<sup>ND</sup>**  
**DEFENDANT**

**NYERI GOOD SHEPHERD ACADEMY LTD.....3<sup>RD</sup>**  
**DEFENDANT**

**RULING**

1. By the notice of motion dated 1.10.2025, the Plaintiff sought the following reliefs:

- (a) Spent
- (b) Spent
- (c) Spent
- (d) Pending the hearing and determination of the main suit, an injunction do issue restraining the Defendants, their agents and or servants from:

- (i) Conducting or convening board meetings and passing resolutions in respect of the 3<sup>rd</sup> Defendant excluding the Plaintiff or her duly appointed attorney.
  - (ii) Operating or transacting on the 3<sup>rd</sup> Defendant's bank accounts to the exclusion of the Plaintiff.
  - (iii) Blocking the Plaintiff or her duly appointed attorney from accessing the 3<sup>rd</sup> Defendant's offices, records or participating in shareholder/director related matters.
  - (iv) Undertaking any restructuring, share transfer, change in signatories or financial commitments in respect of the 3<sup>rd</sup> Defendant prejudicial to the Plaintiff's interest.
- (e) The Defendants do forthwith provide the Plaintiff or her duly appointed attorney with access to the 3<sup>rd</sup> Defendant's financial records including bank statements from January 2024 to date.
- (f) Leave be granted to the Plaintiff to continue and prosecute the derivative suit on behalf of the 3<sup>rd</sup> Defendant against certain Directors for acts of oppression, exclusion, mismanagement, breach of fiduciary duty and unlawful exclusion.
- (g) Costs of this application be provided for.

2. The application is based on the grounds stated in the application as well as the Supporting Affidavit of Susan

Valentine Wanja Gatura, power of attorney and daughter of the Plaintiff sworn on 1.10.2025 materially stating *inter alia* as follows:

- i) The Plaintiff is a shareholder and director of the 3<sup>rd</sup> Defendant.
- ii) Beginning April 2004, the Plaintiff was excluded from cheque signing and corporate financial decisions with cheques signed by other directors in her absence and with unauthorized withdrawals without transparency.
- iii) Plaintiff and her authorized power of attorney have been denied access to the company WhatsApp group, and the Plaintiff's use of the company motor vehicles has been restricted.
- iv) The Plaintiff's officer was locked due to the directors' instructions.
- v) The Plaintiff's deceased husband, who was a director, remains listed as a signatory, exposing the 3<sup>rd</sup> Defendant to fraud and contravention of the Banking and Companies Acts.
- vi) The acts of the directors are oppressive, breaching fiduciary duty, and breach the Companies Act.

3. The Respondent filed a Replying Affidavit sworn by Peter Gatheru Gathu, substantially contending *inter alia* that:

- i) He was the director of the 3<sup>rd</sup> Defendant.

- ii) The application does not meet the legal test for commencing a derivative action under sections 239 and 242 of the Companies Act, and there is thus no prima facie case.
- iii) The Plaintiff is pursuing her own self-interest on demanding Ksh. 20,000,000/=, knowing the company does not have it.
- iv) The company answered the Plaintiff's concerns, but she did not respond or avail herself for addition as a signatory to the alleged account.
- v) The Plaintiff, as secretary in the meetings, always attended and presented her views, and was not locked out of any meeting, and participated in the management of the company.
- vi) The 3rd Respondent, being both a business and a duly registered and operational school, provides educational services to numerous pupils whose parents and guardians have already paid school fees, which are currently held in the school's accounts.
- vii) Any disruption of the school's management and operations would expose the 3rd Respondent to multiple potential suits from parents and guardians seeking, among others, a refund of school fees.

#### The Plaintiff's Written Submissions

4. The Plaintiff filed submissions dated 6.2.2026 in support of the application. They submitted that they had established a case

for leave to commence a derivative suit. They relied on Section 238 of the Companies Act, 2015.

5. To further canvass the submission in support of a derivative action, the Applicants relied inter alia on the case of **Isaiah Waweru Njumi & 2 Others vrs Muturi Ndug'u (2016) eKLR** to submit that the application pleaded facts that established a cause of action against the Defendants.
6. On the injunction reliefs, it was also submitted that the Plaintiff had established a case for the reliefs sought. They cited **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** as follows:

*“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

*(a) establish his case only at a prima facie level,*

*(b) demonstrate irreparable injury if a temporary injunction is not granted, and*

*(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.*

### The Defendant's Submissions

7. The Defendants filed submissions dated 9.9.2024. It was submitted that the Plaintiff had not met the legal parameters for a derivative suit. Reliance was placed on Section 242 of the Companies Act, on the basis of which it was submitted that, when considering whether to grant permission to continue such a claim, the Court must take into account, inter alia:

- a. Whether the applicant is acting in good faith;
  - b. Whether the continuation of the claim is in the best interests of the company;
  - c. Whether the act or omission complained of has been authorized or ratified by the company; and
  - d. Whether a person acting in accordance with the duty to promote the success of the company would pursue the claim.
8. The Defendant submitted that the Plaintiff was furthering her own personal interest and acting in bad faith, and her actions were not in the best interest of the 3rd Respondent. Reliance was also placed on **Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another [2015] KECA 356 (KLR)**.
9. It was submitted that the applicant must establish a prima facie case, demonstrate locus standi, show that the company is entitled to the relief sought, and that the action falls within the exceptions to the rule in *Foss v Harbottle*, as follows:
39. The procedure therefore remains the English common law, and it matters not whether it is the common law extant as at 1987, as submitted by Mr. Ochieng or before 2006, as contended by Mr. Oyatsi. Leave of court shall be obtained before filing a derivative suit, but may also be obtained to continue with the suit once filed. On this, the trial court was right in adopting the exposition of the procedure in the treatise "Minority Shareholders: Law, Practice and Procedure" by Joffe that 'there is no approved pre-action protocol in relation to derivative action' and that

“..after the claim form has been issued, the claimant is required to make an application - which must be supported by written evidence- for permission to continue with the claim.” It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such action, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in *Foss vs. Harbottle*.

10. They also relied on the case of **Foss vs. Harbottle (1843)** **67 ER 189 (the Foss case)**, popularly referred to in company law as “the rule in *Foss v. Harbottle*”(the rule), where the rule was restated by Jenkins L. J. in the case of *Edwards vs. Halliwell (1950) All ER 1064* as follows:

The rule in *Foss-v-Harbottle*, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

11. Further reliance was placed on the case of **Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u [2016] KEHC 3032 (KLR)**, where the High Court, Joel Ngugi, as he then was stated as follows:

21. Counsel for the Respondent and Interested Parties suggested that the test is the substantive one whether the Applicants have made out a prima facie case. That test intuitively makes sense given the policy objectives of the requirement for leave I posited above. In making that determination, the Court is guided by the considerations stipulated in section 241(2) of the Companies Act. 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.

12. The court continued as follows:

The purpose of the leave requirement is so that the Court can, prima facie, balance between invading the discretionary field of the management of a corporation and the need to hold faithless directors accountable for actions or omissions which fall outside the ambit of the

protection of the business judgment rule. While derivative actions can provide effective remedies against faithless officers and directors as well as third parties who may have injured the corporation and whom the corporate managers have refused to pursue, they also run the risk of needlessly diverting the attention and energies of corporate officers and directors from their primary role of managing the business to deal with litigation. The requirement for leave strikes the balance between the two. If this is the policy objective of the rule, there is no reason to dogmatically require that the leave must be obtained at the point of commencement rather than at any point before the suit goes for hearing on its merits.

13. They submitted that a prima facie case was not shown. Reliance was placed on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)**, where the Court of Appeal [RO Kwach, SEO Bosire & EO O'Kubasu, JJA] held as follows:

**4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.**

14. It was submitted that good faith is a mandatory consideration under Section 242, and the Plaintiff's conduct falls far short of this requirement. This was shown from the fact that despite receiving a comprehensive response dated 23rd May 2025 addressing all her allegations, the Plaintiff chose not to respond or engage further. It was submitted that the plaintiff is a signatory to six out of seven company bank accounts. Further, the remaining account could not be regularized due to an outstanding bank facility. However, the Defendants expressly offered to facilitate her inclusion as a signatory.
15. Consequently, they submitted that in the case of **Ghelani Metals Limited v Elesh Ghelani Natwarlal** (supra), the Court held that lack of good faith, including this material nondisclosure, is fatal to an application for leave to continue a derivative claim, such as this. It was submitted that the orders sought would paralyze the company's operations, interfere with lawful management, and expose the company to operational and reputational harm.
16. It was submitted that the Plaintiff actively participates in board meetings and that she serves as the Secretary, with custody of records and minutes, and that no meeting is conducted in her absence.
17. It was concluded that it is apparent that the Plaintiff has failed to satisfy the threshold for leave under Sections 239 and 242 of the Companies Act, 2015, the good faith and best-

interests tests, and the need to be granted any injunctive relief. The application was said to be founded on personal grievance and material nondisclosure, and should be dismissed.

### Analysis

18. The issues that present for this Court's determination are as follows:

- a. Whether the applicant has met the threshold for the grant of leave to file a derivative suit.
- b. Whether the applicant has established a case for the interlocutory reliefs sought

19. On the place and rationale of derivative suits, Section 238 of the Companies Act, No 17 of 2015 states as thus:

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.

20. The court amplified the above provisions in **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwaria & another** [2017] eKLR as follows:

*“That statutory procedure is now the exclusive method of pursuing derivative claims”.*

21. It is not uncommon for the minority shareholders to seek to enforce their rights in a company through a derivative suit. The minority shareholders often have peripheral rights that can be suppressed by the majority shareholders, and when a dispute arises that leads to an irretrievable breakdown of the working relationship between the majority and minority shareholders, the latter have to apply for leave to enforce their rights.

22. The position of the law is that the claim must relate to a cause of action vested in the company and seeking relief on behalf of the company. So what relief is being sought on behalf of the company? To address the question, we must reverse it: if the board were unanimous in support of the plaintiff's proposal, could it file the proposed case? It must first be noted that the alleged misbehavior started in 2004. Her claim is that the Plaintiff was excluded from cheque signing and corporate financial decisions, with cheques signed by other directors in her absence and with unauthorized withdrawals without transparency.

23. There was no scintilla of evidence placed on the record of any oppression by the majority. Signing a cheque is personal to the director and not to the company. It is not a claim that vests in the company. The company is entitled to make a decision and even exclude certain persons. If such persons are excluded, that is not a claim vested in the company. It is not a claim seeking relief on behalf of the company. There is no claim disclosed that is vested in the company. The claim is thus personal to the applicant and not vested in the company.

24. The Applicant needs to establish the existence of a cause of action arising out of the Plaintiff; thus, the Applicant ought to establish a prima facie case for the derivative action. In **Joachim Mwangi Githinji & 7 others v Peter Gicheru Mbuthia & 8 others & Ol Kalou Diaries Ltd** [2019] eKLR, the court stated as follows:

“I have considered several authorities and it seems that the courts have been quite flexible on the procedure of instituting a derivative suit. Whether one files an application for leave first, the court will consider the said application and if it discloses a prima facie case, then the suit will subsequently be filed. On the other hand, the application for leave may be filed contemporaneously with the plaint. In the persuasive decision by J. Musinga as he then was, in Misc Appl 273/2012 *in the matter of CMC Holdings* the court held that the fact that the plaint was filed in a different court file from the one where leave was granted could not invalidate the derivative suit because that was a procedural issue and article 159(2) (d) of the Constitution empowers the court to dispense justice without undue regard to procedural technicalities. I find that the fact of filing a miscellaneous application seeking leave to file a derivative suit cannot deny the applicants the right to leave. All they have to do is establish that they have a prima facie case sufficient for the court to grant them leave.”

25. The court has to be clear about the interest of the Plaintiff in this company as a director. The Plaintiff did not describe her stake in this company and the court is only called upon to infer that the Plaintiff is the minority shareholder seeking to oust perceived oppressive acts of the majority shareholders. Such inference should, however, be premised on cogent evidence with a demonstration of what the Plaintiff has done towards remedying the affairs she asserts against the

Defendants. There is no such evidence tendered. In fact, the plaint betrays the applicant, where the applicant stated as follows:

*(7) Due to personal and health reasons, on 4<sup>th</sup> July 2025, the plaintiff executed a General Power of Attorney in favour of her daughter, Susan Valentine Wanja Gatura, authorizing her to represent the plaintiff in shareholder and related matters.*

*(8) On 28<sup>th</sup> July 2025, when the Power of Attorney was presented to the 1<sup>st</sup> and 2<sup>nd</sup> defendants, it was unlawfully dismissed, and the plaintiff's rights were ridiculed. ...*

*(11) As a result, the plaintiff the plaintiff has suffered prejudice in her capacity as both a shareholder and director, while the 3<sup>rd</sup> defendant has been exposed to financial risk, governance instability, and non-compliance with the law.*

26. The plaintiff must demonstrate illegality on the part of the company that needs remedying. This was not done. In **Dadani v Manji & 3 others HCC 913/2002 (2004) I KLR**, the court said:

**“If due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit.**

27. Section 239 of the Companies Act provides as follows:

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
  - 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.

28. The court is satisfied that the applicant is a member entitled to continue with a derivative claim. However, the court is not satisfied that the application and the evidence adduced by the applicant in support thereof disclose a case for the grant of permission. Consequently, the permission to continue is declined.

29. The second issue is the question of the grant of the injunction. Though permissions are declined, this is not the

last court in the land. The court must therefore address the injunction and find whether it could have granted the same if the applicant had been granted permission to start a derivative suit. The law that governs applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules which provides as follows:-

1. Where in any suit it is proved by affidavit or otherwise-

a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

30. The principles were laid down in the celebrated case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358** where the court held that in order to qualify for an injunction;

(i) *First the applicant must show a prima facie case with a probability of success.*

*(ii) Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.*

*(iii) Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.*

31. There was no evidence that the respondents in any way breached the statutory duty or in any way oppressed the applicant or caused illegalities. It was demonstrated that the applicant attended all meetings and was a signatory to 6 out of 7 accounts. The explanation given in respect of the 7<sup>th</sup> account is plausible. The applicant, therefore, did not demonstrate a prima facie case capable of succeeding. The tests are sequential if there is no prima facie case, the court need not move further.

32. In any case, there is no irreparable harm if the order is not issued. The parties agree that the company is a going concern. The court cannot stop a going concern from meeting. It will be contra more bonos to stop a school or a company that is a going concern from operating based on conjecture, surmise, and subterfuge.

33. The last aspect is that there was no explanation why the applicant had to delegate the filing of a matter to the holder of a power of attorney. Being a director is personal to the holder. Being a private company, the applicant should have regard to the role of a director. In a matter as personal as a director,

regard should be had to the decision of **Simeon Nyachae V Lazarus Ratemo Musa & Another [2007] KEHC 885 (KLR)**, where M. Warsame, J, as he then was held as follows:

*The dent or stigma was on the character of the plaintiff and he filed the present suit to be vindicated by an award of damages. He also wants the court to exonerate him against the allegation by entering judgment in his favour. As stated I have no evidence to show that the plaintiff had been shunned or that he had suffered any stigma.*

34. The applicant cannot proceed as a proxy on matters of directorships. She must face fellow directors and depone to matters of the directorship. All factors considered, the balance of convenience tilts in favor of the respondents.
35. In view of my above analysis and findings, the application lacks merit and is dismissed in *limine*. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

**(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give**

**all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**

**(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

36. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** **[2018] KECA 158 (KLR)** had this to say:

**It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

37. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** **[2014] KESC 31 (KLR)**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

38. The Defendant is entitled to costs. The matter has terminated at a very preliminary stage. The costs of Ksh. 65,000/= will suffice.

### Determination

39. In the upshot, I make the following orders:

- a) The Notice of Motion dated 1.10.2025 is dismissed.
- b) The Respondent shall have costs of Ksh. 65,000/=.
- c) Having declined to grant permission to file a derivative suit, the entire suit stands dismissed.
- d) The file is closed.

**DELIVERED, DATED and SIGNED** at **NYERI** on this **15<sup>th</sup>** day of **April, 2026**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of:-**

Mr. Omagwa for the Plaintiff/Applicant

Mr. Wambora for the Defendants/Respondents

Court Assistant – Martin/Michael