

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC. APP. NO. E247 OF 2024

JOHN MUNGAI MUTHEMBA.....1ST

PLAINTIFF/APPLICANT

AMM HOLDINGS LTD.....2ND PLAINTIFF/APPLICANT

-VERSUS-

JANE NJERI MUNGAI.....1ST

DEFENDANT/RESPONDENT

DAVID MUTHEMBA MUNGAI.....2ND DEFENDANT/RESPONDENT

RAYMOND KIHU MUNGAI.....3RD

DEFENDANT/RESPONDENT

-AND-

KENTAZUGA HARDWARE LIMITED.....INTERESTED PARTY

RULING

1. The plaintiffs/applicants filed a Notice of Motion application erroneously dated 20th October 2024 instead of 20th March 2024 pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 142, 143, 145, 238, 239, 780 & 782 of the Companies Act, No. 17 of 2015 and all enabling provisions of the law. The applicants seek orders for leave for the 1st applicant to continue this suit derivatively on behalf of the 2nd applicant, AMM Holdings Limited, that the Dispute Settlement Agreement to be set aside and declared invalid on the

basis that it was entered into, in violation of the Companies Act, No. 17 of 2015 and the Memorandum and Articles of Association of the 2nd applicant, and that the respondents be restrained from conducting any transactions or entering into contracts on behalf of the 2nd applicant or its Shareholders.

2. The applicants also seek orders for the 1st & 2nd respondents to be compelled to provide full disclosure to the 1st applicant of all financial transactions and any liabilities incurred by the 2nd applicant that may affect the applicant in his capacity as Director and Shareholder, and that the respondents be ordered to pay damages for the unauthorized actions and unjust interference in the management and operations of the 2nd applicant.
3. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on 20th March 2024 by Mr. John Mungai Muthemba, the 1st applicant herein. Mr. Muthemba averred that he, the 2nd respondent and the 3rd respondent are siblings and step-siblings, as well descendants of the late Andrew Mungai Muthemba, who was one of the initial Shareholders and Directors of the interested party, when it was incorporated in 1968. Mr. John Mungai stated that following the death of their father in 2003, administration of the Estate initially involved the 1st & 2nd respondents, but a 2021 Court Ruling revoked their appointment and appointed him, the 2nd respondent and the 3rd respondent to manage the said Estate. He deposed that the 2nd applicant was incorporated in 2004 to manage the Estate property, Beaver House, with him, the 1st & 2nd respondents as Shareholders and Directors.
4. Mr. John Mungai outlined various business dealings, including the leasing of part of the property to Troy Medicare Pharmacy Limited, which defaulted on rent payments, leading to multiple legal Disputes. He asserted that the

respondents, without proper authority or Board approval, entered into a Settlement Agreement with the tenant on 8th March 2024, resulting in unauthorized payments totaling Kshs.15,000,000/= thereby exposing the 2nd applicant to additional liabilities. He further stated that the respondents also entered into new lease agreements without his knowledge or consent and/or that of the other Shareholders, conducted the company's affairs secretly and unfairly, thereby prejudicing him and other beneficiaries of the Estate of the late Andrew Mungai Muthemba. He deposed that he seeks to continue with this suit derivatively on behalf of the company against the respondents for breaches of the Companies Act, so as to protect the interests of the company and the Estate beneficiaries, and to prevent the adoption of the impugned Settlement Agreement.

5. In opposition to the application herein, the 1st respondent, Ms Jane Mungai, filed a replying affidavit sworn on 17th April 2024. Ms Mungai averred that the 1st applicant has persistently engaged the respondents in multiple litigation concerning the Estate of the deceased, thereby hindering its effective administration, and that the intended derivative suit is driven by personal interests rather than the interests of the company. She attributed various proceedings before the Business Premises Rent Tribunal to the 1st applicant's actions, which she characterized as disruptive and prejudicial to the Estate and its tenants. She asserted that the 2nd applicant's objectives are not limited to Estate management and that the revocation of the respondents' roles as Administrators of the Estate did not affect their positions as Directors of the company.
6. Ms Mungai deposed that the Directors of the 2nd applicant company have acted in good faith and in the best interests of the company, and that it is the

1st applicant's conduct that led to litigation against the company, including proceedings in **Milimani MCOMM No. E146 of 2024**. She argued that the application seeks to undermine ongoing efforts to amicably resolve that Dispute through a Settlement Agreement beneficial to the company. She claimed that the orders being sought in the instant application including stay of proceedings, are drastic and unwarranted, as no irreparable harm has been demonstrated and any alleged loss can be compensated by damages, or addressed through appeal or review.

7. The 2nd respondent in opposition to the applicants' application filed a replying affidavit sworn on 19th April 2024 by Mr. David Mungai, the 2nd respondent herein, and a Director of the 2nd applicant company and the interested party company. Mr. David Mungai averred that the application herein has been overtaken by events, as the impugned Agreement became effective upon execution, leading to the tenant vacating the premises, settlement of the agreed sums, and closure of all related cases, leaving only formal Court acknowledgment. He maintained that the actions undertaken were duly approved by the 2nd applicant, with the participation of majority of the Directors, and that the applicant properly assumed control of the Dispute after the 1st applicant's individual efforts failed to meet legal requirements.
8. He deposed that the 1st applicant has acknowledged the collective actions of the Directors, and that being a Director of Kentazuga Hardware Limited, he was aware of, and was represented during the settlement process, thus cannot claim exclusion. He emphasized that company decisions are governed by majority rule, with due consideration to minority views. He asserted that the application herein is incompetent, due to procedural defects in the affidavit.

9. In a rejoinder, the 1st applicant filed a supplementary affidavit and further affidavit sworn on 26th April 2024 and 1st May 2024, respectively, by Mr. John Mungai, the 1st applicant herein. He Disputed the existence of the minutes relied on by the 2nd respondent allegedly evidencing a resolution by the 2nd applicant to settle the Dispute by paying the tenant Kshs.30,000,000/=. He asserted that if any meetings were held, they were convened by family members in their capacity as beneficiaries of the Estate and not as Directors of the 2nd applicant company. He further stated that he neither attended nor was he aware of the said meetings, as evidenced by his absence of signature on the minutes, and questioned the authenticity of the 2nd respondent's participation, noting discrepancies in the signatures.
10. Mr. John Mungai stated that in any event, the minutes relied upon do not support the allegation that the 2nd applicant company resolved to compromise the case or pay the tenant, as the minutes confirm that the tenant, Troy Medicare Pharmacy Limited, was in persistent rent arrears, a fact acknowledged by the 2nd respondent during the meetings. He asserted that it is therefore illogical and unjustifiable for the company to have paid Kshs.30,000,000/= to a tenant who was indebted to it.
11. In addition, he challenged the validity of the Settlement Agreement, claiming that it was not properly executed on behalf of the company, as the signatures do not correspond to those of the alleged signatories, and that they were affixed by unauthorized persons, rendering the Agreement incapable of binding the 2nd applicant company. Mr. John Mungai clarified that any discussions regarding the withdrawal of cases in the referenced meetings related only to Disputes among family members over rent collection, and not

to cases involving tenants and the 2nd applicant company, concerning rent arrears.

12. The 2nd respondent, Mr. David Muthemba, a Director of the 2nd applicant company and the interested party company, filed a supplementary affidavit sworn on 7th June 2024. Mr. Muthemba deposed that the consent referred to by the applicants was duly adopted in open Court on 29th May 2024 in **ELC Misc. Application No. E046 of 2024**, before Justice J.A. Mogeni. He contended that the relief being sought by the applicants herein, is no longer available before the Commercial Division of the High Court. He asserted that the signatures appearing on the impugned documents are indeed his, and explained that he uses multiple signatures for various reasons, including concerns over fraud.
13. The 1st applicant, Mr. John Mungai, filed a supplementary and a further affidavit sworn on 10th June 2024 & 22nd July 2024, respectively, by Mr. John Mungai, the 1st applicant herein. He averred that even if the Dispute Settlement Agreement had already been adopted as a Court decree, such adoption does not resolve or negate the substantive issues raised in his application, which concern alleged breaches of duty by the respondents in entering into an unjustified settlement.
14. He maintained that the respondents have failed to explain why the company paid substantial sums, ranging between Kshs.22,000,000/= and Kshs.30,000,000/=, to a tenant who was admittedly in significant rent arrears, a position previously acknowledged by the respondents and in family meetings. He reiterated that the instant application seeks leave to institute a derivative suit to address these alleged breaches and to recover losses occasioned to the 2nd applicant company. He stated that the Court retains

jurisdiction to entertain such claims despite the adoption of the Settlement Agreement.

15. Mr. John Mungai further averred that he was unaware of the proceedings in which the Settlement Agreement was adopted and believes that any such suit by the 2nd applicant company would have been for recovery of rent arrears, which had accrued to over Kshs.24,000,000/= as at February 2024. He outlined the sequence of events leading to the Dispute herein, including the tenant's persistent default in rent payment, the company's decision to terminate the tenancy, subsequent legal proceedings initiated by the tenant, and the tabulation of arrears owed. He deposed that in light of these facts, the respondents had no lawful or rational basis to enter into a settlement involving payment to the tenant, thereby acting in abuse of their powers and in breach of their fiduciary duties to act in the best interests of the company. He emphasized that the said company was established to manage the Estate of the deceased and that following the revocation of the respondents' roles as Administrators, they lacked the legal capacity to deal with the Estate property or enter into binding transactions concerning it, notwithstanding their positions as Directors.
16. The application herein was canvassed by way of written submissions. The applicants' submissions were filed on 2nd July 2025 & 19th December 2025 by the law firm of M. A. Ngesa & Company Advocates. The 1st respondent's submissions were filed by the law firm of Simba & Simba Advocates on 21st November 2025, and the 2nd respondent's submissions were filed on 13th December 2025 by the law firm of Muhatia Pala & Associates Advocates.
17. Ms Ngesa, learned Counsel for the applicants submitted that the Dispute herein is governed by the well established rule in **Foss v Harbottle** [1843] 2

Hare 461, which embodies the proper plaintiff and majority principles, namely, that a wrong done to a company must be remedied by the company itself and that the will of the majority prevails. She however argued that this rule admits exceptions, as recognized by the Court in the case of **Grace Wanjiru Munyinyi & another v Gedion Waweru Githunguri & 5 others** [2011] KECA 42 (KLR), which was reaffirmed in **Prudential Assurance Co Ltd v Newman Industries Ltd** [1982] 1 All ER 364, including instances of illegality, ultra vires acts, breach of special procedures, infringement of personal rights, and fraud on the minority. Counsel further relied on scholarly authority such as **Gower's Principles of Modern Company Law**, to emphasize that derivative actions serve as an exception where justice demands intervention.

18. Ms Ngesa defined a derivative action, with reference to **Black's Law Dictionary 10th Edition** and the case of **Kebenei v African Grain Care Equipment Limited & 2 others** [2024] KEHC 6193 (KLR), as a mechanism allowing Shareholders to litigate on behalf of a company, where Directors have breached duties. She highlighted the purpose of a derivative action as a tool of accountability as discussed in the case of **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another** [2017] KEHC 4629 (KLR). Counsel cited the case of **Joseph Munyoki Nzioka v Raindrops Limited & 3 others** [2019] KEHC 9387 (KLR), and contended that under Sections 238, 239 & 241 of the Companies Act, 2015, derivative actions are now governed by statutory principles requiring leave of the Court. She submitted that an applicant must demonstrate membership in the company, a cause of action vested in the company, and that the claim seeks relief on behalf of the

company arising from Directors' negligence, breach of duty, or breach of trust.

19. Ms Ngesa argued that the Court must also consider factors such as good faith, likelihood of ratification, and the best interests of the company. She relied on the case of **Arnold Kipkirui Langat v Atticon Limited & 6 others; Linkit Limited (Affected Company)** [2021] KEHC 7197 (KLR), to outline the two-stage test for granting leave and the discretionary factors guiding the Court. Applying these principles, Counsel argued that the 1st applicant has satisfied the statutory threshold as he is a Shareholder and Director of the 2nd applicant company, that the cause of action relates to breaches of fiduciary duty by the respondents, and the relief sought is for the benefit of the 2nd applicant company.
20. She submitted that a *prima facie* case has been established, as it is undisputed that the tenant owed substantial rent arrears, yet the respondents entered into an unsanctioned Settlement Agreement and paid the tenant Kshs.22,000,000/= without any Board resolution or proper authorization, including execution by a non-officer. She maintained that such conduct is irrational, prejudicial, and amounts to breach of duty, which cannot be ratified by majority rule.
21. Ms Ngesa relied on the cases of **Paa Brothers Company Limited v Cheruiyot & another** [2023] KEHC 25441 (KLR), **Awale & another v Awale** [2024] KEHC 1114 (KLR), and **Patel v Patel & another; Kenya Flexogravure Limited** [2022] KEHC 15080 (KLR), to demonstrate that Courts grant leave where there is evidence of mismanagement, fraud, or breach of duty affecting the company.

22. She asserted that the 1st applicant is acting in good faith and in the best interests of the 2nd applicant company, having taken steps to recover rent arrears and safeguard company assets amidst resistance from the respondents, whose prior removal as Administrators and failure to account for funds underscores their lack of accountability. She argued that the derivative suit is necessary because the majority Directors cannot reasonably be expected to authorize proceedings against themselves.
23. Ms Ngesa relied on the case of **Giella v Cassman Brown & Co. Ltd** [1973] EA 358, and asserted that the 1st applicant has established a *prima facie* case, that the 2nd applicant company faces irreparable harm through continued mismanagement and misappropriation of funds, and that the balance of convenience tilts in favour of protecting the 2nd applicant company and its Shareholders. In the end, she submitted that the impugned Settlement Agreement was entered into without authority, in breach of fiduciary duties, and to the detriment of the 2nd applicant company, which was instead entitled to recover substantial rent arrears. She asserted that the claim herein falls squarely within the framework of derivative actions under the Companies Act, 2015.
24. Mr. Munywoki, learned Counsel for the 1st respondent relied on the cases of **Lalji v Trio Holdings Limited & 2 others** [2023] KECA 853 (KLR) and **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another** (supra), and submitted that the respondents' case is anchored on the statutory framework governing derivative claims under Sections 238, 239 & 241 of the Companies Act, which establish that such claims are not automatic and can only be sustained with the Court's leave upon demonstration of a *prima facie* cause of action arising from negligence, default, breach of duty, or breach of

trust by Directors. Counsel further relied on the cases of **Nextgen Office Suites Ltd & another v Netcom Investments Ltd & another; Shah Minakshi Navinchandra (Interested Party)** [2021] KEHC 13357 (KLR), which underscores the necessity of good faith and acting in the best interests of the company, and **Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u** [2016] KEHC 3032 (KLR), which highlights additional considerations such as prior demand on Directors, and avoidance of personal vendetta.

25. Mr. Munywoki contended that the 1st applicant has failed to meet these thresholds, as the impugned actions relate to tenancy Disputes involving Troy Medicare Pharmacy Limited, which arose after the 1st applicant's unilateral and unauthorized actions, including issuing termination notices and attempting distress for rent without authority. Counsel argued that the subsequent settlement through a consent agreement in **MCCOMM Suit No. E146 of 2024** was undertaken in good faith and in the best interests of the company, considering the tenant's substantial financial investment in the premises. Counsel denied any breach of duty by the respondents and asserted that the respondents' actions were aimed at preserving business continuity and minimizing losses. He accused the 1st applicant of acting in bad faith, pursuing personal interests, and failing to utilize internal Dispute resolution mechanisms or issue prior notice to the Directors.
26. Counsel referred to the Court of Appeal case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] KECA 606 (KLR), and argued that the 1st applicant has not established a *prima facie* case, irreparable harm, or that the balance of convenience tilts in his favour, more so as any alleged loss is quantifiable and compensable by damages. He further submitted that the prayers for disclosure and damages are final in nature and premature at the

interlocutory stage, as affirmed by the Court of Appeal in the case of **Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others** [2016] KECA 663 (KLR).

27. Mr. Muhatia, learned Counsel for the 2nd respondent submitted that the 1st applicant failed to establish the requisite threshold for grant of leave to continue with a derivative suit on behalf of AMM Holdings Limited under Part XI of the Companies Act, 2015. He relied on the case of **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another** (supra), and further submitted that Section 238(3) of the Companies Act, limits such claims to causes of action arising from negligence, default, breach of duty, or breach of trust by a Director, while Section 241(2) of the Companies Act sets out guiding factors including good faith, the company's best interests, and whether the acts complained of are capable of ratification.
28. Counsel argued that the 1st applicant has failed to demonstrate any actionable misconduct by the respondents, as instead, the evidence shows that the 1st applicant's own unilateral actions have exposed the company to multiple legal disputes, thereby forcing the Directors to focus on litigation rather than advancing the company's interests. Mr. Muhatia contended that the Directors of the 2nd applicant company acted lawfully and in good faith, in amicably settling **MCCOMM Suit No. E146 of 2024** through a Dispute Settlement Agreement aimed at safeguarding the 2nd applicant company's reputation and operations, and that such actions cannot be construed as breach of duty. He maintained that the 1st applicant's derivative action is driven by this personal interests and misuse of his position as a Shareholder.
29. In a rejoinder, Ms Ngesa submitted that the respondents have unjustifiably portrayed the 1st applicant as acting in bad faith and pursuing a personal

vendetta, whereas the contemplated derivative suit is grounded in law and aimed at protecting the interests of the 2nd applicant company. She maintained that the 1st applicant has consistently acted in good faith, particularly, following the revocation of the respondents' appointment as Administrators of the Estate of the deceased, Andrew Mungai Muthemba, due to their failure to account for Estate income, and for mismanagement contrary to the Law of Succession Act. She asserted that the 1st applicant's efforts to enforce rent collection and safeguard company assets demonstrate a genuine intention to protect the company, and that the respondents' attempts to attribute the tenant Disputes to him are unfounded, as the termination of the tenancy was a corporate decision implemented by the respondents themselves, pursuant to family resolutions.

30. Ms Ngesa argued that a *prima facie* case of breach of fiduciary duty has been established, as the respondents authorized payment of Kshs.22,000,000/= to a tenant who owed the company over Kshs.24,000,000/= in rent arrears, without Board approval, and in a clandestine manner. This, she submitted constituted a clear breach of duty under Section 143 of the Companies Act and amounts to corporate waste and breach of trust. She further contended that the respondents' justification of the payment as a settlement is untenable, given the absence of proof of the alleged Kshs.60,000,000/= investment by the tenant and the fact that prior legal advice had supported recovery of rent arrears. She maintained that the cause of action is vested in the 2nd applicant company, the loss is quantifiable, and the derivative suit is the only viable mechanism for recovery, as the 1st applicant cannot appeal the consent adopted in separate proceedings to which he was not a party.

31. On the issue of procedural objection, Counsel relied on the case of **Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u** (supra), and submitted that failure to issue a demand notice or invoke internal Dispute resolution mechanisms is not fatal, as the circumstances fall within the recognized exception of futility. She argued that the respondents, being the alleged wrongdoers, could not reasonably be expected to authorize proceedings against themselves, and that urgent action was necessary to prevent further dissipation of company assets. She distinguished the case of **Nextgen Office Suites Ltd & another v Netcom Investments Ltd & another; Shah Minakshi Navinchandra (Interested Party)** (supra), cited by the 1st respondent on the basis that no imminent loss existed in that case.
32. In regard to the injunctive reliefs being sought herein, Counsel contended that a strong *prima facie* case has been established through evidence of mismanagement and financial loss, that the 2nd applicant company faces irreparable harm through continued depletion of its assets, and that the balance of convenience favours preservation of the 2nd applicant company's assets. She emphasized that without an injunction, the respondents may continue unauthorized transactions, rendering the derivative suit nugatory.

ANALYSIS AND DETERMINATION.

33. I have considered the application filed herein, the grounds on the face of it, and the affidavits filed in support thereof. I have also considered the replying, further and supplementary affidavits filed by the 1st & 2nd respondents and the written submissions by Counsel for the parties. The issues that arise for determination are -

- i) Whether the 1st applicant should be granted leave to continue with this suit as a derivative claim on behalf of the 2nd applicant company;
- ii) Whether the Dispute Settlement Agreement should be set aside and invalidated;
- iii) Whether the respondents should be barred from carrying out any transactions or entering into any contract on behalf of the 2nd applicant and/or its Shareholders;
- iv) Whether the 1st & 2nd respondents should be compelled to make full disclosure of the financial transactions carried out in the name of the 2nd applicant and the extent of any liabilities incurred that may affect the 1st applicant as a Director/Shareholder of the 2nd applicant company; and
- v) Whether the respondents should be compelled to pay for damages caused as a result of their unauthorized actions and unjust interference in the running of the 2nd applicant company.

Whether the 1st applicant should be granted leave to continue with this suit as a derivative claim on behalf of the 2nd applicant company.

34. Derivative claims are provided for under Sections 238-241 of the Company's Act, 2015. Section 238 defines a derivative claim as hereunder -

- 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.*
35. Pursuant to the provisions of Part XI of the Companies Act, this Court has the discretion to either allow or disallow an application for leave to proceed with a suit as a derivative action. In considering such an application, the Court must first satisfy itself that the applicant has established a *prima facie* case with a high likelihood of success. In the case of **Isaiah Waweru Ngumi & 2 others v Muturi Ndungu** (supra), the Court set out some of the factors to be considered in such an application as hereunder: –
- 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 effort 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 of 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 authorized or ratified by the company in the future; and*
- g) Whether the cause of action contemplated is one that the Plaintiff could bring directly as opposed to a derivative action.”*

36. In this case, it is not in contest that the 1st applicant is a Director and a minority Shareholder of the 2nd applicant company. As such, he is entitled to institute a derivative suit on behalf of the said company. In the case of **Sultan Hashab Lalji & 2 others v Ahmed Hasham Lalji & 4 others** [2014] KECA 440 (KLR), the Court of Appeal held as hereunder in regard to derivative suits –

It is the minority shareholders that are availed to the protection by the exceptions since generally majority shareholders exercise powers of the Company and control its affairs.

37. The 1st applicant's case is that the respondents entered into a Dispute Settlement Agreement with Troy Medicare Pharmacy Limited without Board

approval or authority, resulting in a payment of Kshs.22,000,000/= to a tenant who owed the company Kshs.24,000,000/= in rent arrears.

38. Upon perusal of the replying, supplementary and further affidavits filed by the respondents, it is evident that they do not Dispute their participation in the said actions, but contend that they acted in good faith to protect the 2nd applicant company's interests. They further claim that the settlement was ratified by the company. However, the only minutes annexed to their affidavits relate to the beneficiaries of the late Andrew Mungai Muthemba's Estate for a meeting held on 2nd September 2022, and minutes of Kentanzuga Hardware Limited for a meeting held on 6th July 2022. No Board resolutions of the 2nd applicant company authorizing the settlement with Troy Medicare Pharmacy Limited was produced by the respondents.
39. Leave to institute a derivative action is a discretionary relief and requires the applicant to demonstrate on a *prima facie* basis that he is a member of the company, the cause of action is vested in the company, the relief sought is for the benefit of the company, and that the majority Directors of the company have committed a breach of duty, mismanagement, or an act that cannot be ratified.
40. In the premise, this Court is persuaded that the evidence adduced by the parties herein demonstrates that the 1st applicant is a Shareholder and Director of the 2nd applicant company, that the cause of action concerns alleged breaches of fiduciary duty and mismanagement, and that the reliefs sought are intended for the benefit of the 2nd applicant company and its Shareholders, including the beneficiaries of the Estate of the late Andrew Mungai Muthemba.

41. While the respondents argue that the settlement was necessary and that the 1st applicant acted in bad faith, this Court finds that the said applicant has presented a *prima facie* case, particularly, in light of the absence of Board resolutions authorizing the impugned settlement and the fact that the said settlement resulted in a payment of Kshs.22,000,000/= to a tenant who owed the 2nd applicant company Kshs.24,000,000/= in rent arrears.
42. Accordingly, this Court is satisfied that the 1st applicant should be granted leave to continue with this suit as a derivative claim on behalf of the 2nd applicant company.

Whether the Dispute Settlement Agreement should be set aside and invalidated.

43. The 1st applicant averred that the subject Settlement Agreement was entered into without authority, in breach of Section 143 of the Companies Act, which imposes a duty on Directors to act in good faith and in the best interests of the company, and that the respondents acted in breach of the 2nd applicant company's Memorandum & Articles of Association. The respondents on the other hand claim that this application has been overtaken by events as the said Settlement Agreement was adopted by the Court and was intended to preserve the 2nd applicant company's operations and reputation.
44. This Court notes that the impugned Settlement Agreement has since been adopted in open Court in **ELC Misc. Application No. E046 of 2024**. However, such adoption neither cures procedural irregularities nor does it validate acts that were unauthorized at the company level. At this juncture, this Court is of the considered view that the key issue is whether the Directors of the 2nd applicant company had the requisite authority, and whether the

settlement was executed in compliance with the company's internal governance procedures.

45. The record shows that the 1st applicant Disputed the authenticity of the minutes relied upon by the respondents and asserted that the respondents have not adduced any evidence demonstrating that Board resolution was passed to authorize the settlement. This Court finds that the respondents' reliance on majority rule and the notion that the settlement was necessary to preserve the company's operations and reputation, does not negate the *prima facie* irregularity of paying a tenant who was in arrears, without Board approval.
46. This Court however notes that the prayer to set aside and invalidate the Dispute Settlement Agreement seeks a final remedy as opposed to an interim relief. The Court is of the considered view that before granting such relief, the Court ought to afford the parties an opportunity to present evidence under oath and for such evidence to be subjected to cross-examination.
47. In the circumstances, I hold this issue in abeyance for determination after the hearing of the derivative suit, for the Court to determining its merits.

Whether the respondents should be barred from carrying out any transactions or entering into any contract on behalf of the 2nd applicant and/or its Shareholders.

48. The relief being sought in the above issue takes the form of an interlocutory injunction. Interlocutory injunctions are provided for under Order 40 Rules (1), (a) and (b) of the Civil Procedure Rules, 2010, which states as hereunder-

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.*

49. The conditions to be considered when dealing with an application for a temporary injunction were laid down in the case of **Giella v Cassman Brown & Company Limited** (supra), where the Court held that -

Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.

50. Earlier on in this Ruling, this Court found that the 1st applicant has demonstrated a *prima facie* case with high chances of success against the respondents in light of the absence of Board resolutions authorizing the Settlement Agreement and the fact that the settlement resulted in a payment of Kshs.22,000,000/= to a tenant who owed the 2nd applicant company Kshs.24,000,000/= in rent arrears. This Court must now consider whether an

interim restraint is necessary to prevent further mismanagement of the 2nd applicant company and to protect the interests of the said company. This Court is satisfied that the 1st applicant has demonstrated that unauthorized transactions have already occurred, including payments to a tenant who owed the company rent arrears, without the knowledge and/or consent of all the Directors of the 2nd applicant company.

51. The respondents on the other hand contended that they have acted in good faith and in the best interest of the 2nd applicant company, and that any interference would disrupt the company's operations. While this Court acknowledges that Directors are generally entitled to manage the company's affairs, this right must be exercised within the confines of statutory duties and the company's Articles of Association. Accordingly, given the *prima facie* evidence of mismanagement and unauthorized actions, this Court finds that it is necessary to grant an interim order restraining further unauthorized acts until the derivative suit is heard and determined.
52. This Court therefore holds that the 1st applicant has made out a case warranting the exercise of this Court's discretion in his favour and for issuance of an order barring the respondents from carrying out any transactions or entering into any contracts on behalf of the 2nd applicant company and/or its Shareholders.

Whether the 1st & 2nd respondents should be compelled to make full disclosure of the financial transactions carried out in the name of the 2nd applicant and the extent of any liabilities incurred that may affect the 1st applicant as a Director/Shareholder of the 2nd applicant company.

53. Disclosure is a critical aspect of derivative actions, as it allows an applicant to ascertain the extent of any mismanagement or losses. The 1st applicant has sought full disclosure of financial transactions and liabilities incurred by the 2nd applicant company that may affect him as a Director and Shareholder of the said company.
54. It is evident from the record that the respondents do not Dispute that transactions occurred, but argue that the disclosure sought is premature. This Court however finds that in order to properly adjudicate the derivative action and assess the validity of the Settlement Agreement and other corporate decisions made, disclosure of relevant financial records and liabilities is necessary.
55. In the premise, this Court finds that an order compelling the 1st & 2nd respondents to provide full disclosure of all financial transactions and liabilities incurred by the 2nd applicant company is warranted in the interests of justice and for the proper determination of the derivative suit.

Whether the respondents should be compelled to pay for damages caused as a result of their unauthorized actions and unjust interference in the running of the 2nd applicant company.

56. The 1st applicant contended that unauthorized payments to the tenant and other actions by the respondents caused the 2nd applicant company to suffer quantifiable losses. The respondents on the other hand asserted that any losses suffered by the applicants are compensable through the company and that damages are premature at this interlocutory stage.
57. This Court notes that while a full assessment of damages is generally conducted at trial, the establishment of a *prima facie* case of breach of

fiduciary duty and mismanagement provides sufficient grounds to preserve the company's assets and maintain the *status quo* pending the hearing and determination of the derivative suit. I therefore find that the issue of payment of damages is an issue that should be held in abeyance and be left for determination at the substantive hearing of the derivative action.

58. This Court therefore holds that the issue of damages is not ripe for immediate determination but will be determined in the substantive derivative suit.

59. In the end, this Court finds that the application herein is partly merited, thus it is hereby allowed in the following terms -

- i) The 1st applicant is granted leave to continue with this suit as a derivative claim on behalf of the 2nd applicant company;**
- ii) The respondents are hereby restrained from conducting any transactions or entering into contracts on behalf of the 2nd applicant company or its Shareholders pending the hearing and determination of the derivative suit;**
- iii) The respondents are hereby directed to provide full disclosure within 21 days of this Ruling, of all financial transactions and liabilities incurred by the 2nd applicant company;**
- iv) The issues of setting aside of the Dispute Settlement Agreement and quantification of damages are hereby reserved for the substantive hearing of the derivative suit; and**
- v) Costs of this application shall be in the cause.**

It is so ordered.

DATED, SIGNED and DELIVERED at KIAMBU on this 10th day of April 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI
JUDGE

In the presence of:-

Ms Ngesa for the 1st & 2nd applicants

Mr. Chebukosi h/b for Mr. Maruti for the 1st respondent

Mr. Muhatia for the 2nd respondent

No appearance for the 3rd respondent

No appearance for the interested party

Ms Julia – Court Assistant.

COPY