



REPUBLIC OF KENYA



**Machuki v Gikundi (Commercial Miscellaneous Application E324 of 2025)
[2026] KEHC 4836 (KLR) (Commercial and Tax) (9 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 4836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E324 OF 2025**

MA OTIENO, J

APRIL 9, 2026

BETWEEN

ROY MONYANCHA MACHUKI APPLICANT

AND

KUBAI JOSHUA GIKUNDI RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 20th March 2025 brought under Sections 238 and 239 of the *Companies Act*, 2015. The Applicant, Roy Monyancha Machuki, seeks, in the main, leave to institute a derivative claim on behalf of Jambostar Ventures Limited, against the Respondent, Kubai Joshua Gikundi.
2. The application is supported by the affidavit of the Applicant, sworn on even date. Specifically, the Applicant seeks orders:
 - i. Granting leave to institute a derivative claim for alleged breaches of fiduciary duty, misappropriation of company funds, and fraudulent conduct;
 - ii. Holding the Respondent personally liable for the company's financial losses and indebtedness;
 - iii. Lifting the corporate veil to attribute company liability to the Respondent personally; and
 - iv. Facilitating recovery of company assets, specifically a fleet of motor vehicles.
3. The Applicant's case is that together with the Respondent, they incorporated Jambostar Ventures Limited in July 2018 as equal shareholders and directors to provide logistics and transport services, primarily to Del Monte Kenya Limited.



4. He contends that while he was away handling urgent family matters in early 2024, the Respondent engaged in a series of fraudulent acts, including incorporating a parallel entity, Jambostar Ventures Group Limited, to divert company contracts; redirecting payments from Del Monte to his personal accounts or to the new entity; unlawfully transferring or disposing of company motor vehicles; locking the Applicant out of the company's email systems; and attempting to remove him as a bank signatory.
5. It was further the Applicant's case that these actions have resulted in substantial debts owed to suppliers such as Mercury Autospares and Centenary General Suppliers.
6. The Respondent, on his part, opposed the application vide a replying affidavit sworn on 25 April 2025. He asserts that he was the sole director at the incorporation of the company in 2018, and only added the Applicant as a director in 2022.
7. He further contends that the application is fatally defective for failing to enjoin the company as a party and for want of a draft Plaint. He maintains that he acted in good faith to sustain the business during the Applicant's prolonged absence and that the allegations levelled against him are speculative.
8. The Application was canvassed through written submissions. The Applicant's submissions are dated 12 June 2025, whilst those of the Respondent are dated 16 August 2025.

Analysis and Determination

9. The Court has carefully considered the pleadings, annexures, and the respective submissions. The central issue for determination is whether the Applicant has established a prima facie case for the grant of leave to institute a derivative claim under Section 239 of the *Companies Act*.
10. The Application before Court is anchored in Sections 238 and 239 of the *Companies Act*, 2015, which codify the law on derivative claims in Kenya.
11. Section 238(1) defines a derivative claim as proceedings brought by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company. Subsection (3) thereof provides that such a claim may concern negligence, default, breach of duty, or breach of trust by a director.
12. Section 239 of the Act, which is the main provision, sets out a two-stage process for granting leave to proceed with a derivative claim. The provision states 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
 - 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.”
13. From the above provision of the law, it is evident that under Section 239, the Court must first determine whether the application discloses a prima facie case. If not, the application must be dismissed. If it does, the Court proceeds to evaluate the claim, guided by the discretionary factors set out under Section 241 of the Act.
14. This statutory scheme constitutes an exception to the “proper plaintiff rule” set in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 that only the company itself can sue if it incurs losses due to fraudulent or negligent acts by directors or outsiders. The exception enables a shareholder to bring proceedings on behalf of the company where wrongs are committed against the company, and those in control of the company are unwilling to act.
15. In *Isaiah Waweru Ngumi & 2 others v Muturi Ndung’u* [2016] KEHC 3032 (KLR), the Court emphasized that leave shall only be granted where an Applicant demonstrates a plausible cause of action and that the claim is brought in good faith. The learned judge (EM Ngugi – as he then was), stated as follows:
- “These are well particularized claims and if proved, could lead to findings against the Defendant and Interested Parties and benefit the corporation. That is a different way of stating that the claims could plausibly succeed if not rebutted or demonstrated to be false. In other words, they raise a prima facie case at least warranting for the case to proceed to trial. They disclose a plausible cause of action.”
16. Similarly, in *Kebenei v African Grain Care Equipment Limited & 2 others* [2024] KEHC 6193 (KLR), the Court clarified that the leave stage is intended to filter out speculative or unmeritorious claims and ensure that only deserving cases proceed. The Court was clear that an application for leave to institute a derivative claim may be instituted by way of a miscellaneous application. The Court (JRA Wananda J) stated as follows: -
- “My understanding of the process of applying for leave to institute a derivative action is simply to satisfy the Court that there is a merited suit to be prosecuted. One may at that stage bring the Application for leave in terms of a Miscellaneous Application. Once the Application is allowed, the Applicant then proceeds to file the substantive suit in the ordinary manner by way of Plaintiff. This is the correct and widely accepted procedure. The alternative procedure, whose acceptance is however still debated and therefore unsafe, an Applicant right away files the suit by way of a Plaintiff but together with the Plaintiff also files an Application seeking leave that the Court ratifies it or allows the Applicant to proceed with the already filed suit as a derivative action.”
17. I respectfully concur with the reasoning in *Kebenei* (supra). Consequently, I find no merit in the Respondent’s submission that the present application is incompetent for having been commenced as a miscellaneous application without an accompanying Plaintiff

Whether the Applicant has met the statutory threshold for leave

18. The next inquiry is whether the Applicant has demonstrated a prima facie basis warranting permission to pursue the claim and whether the application is brought in good faith.



19. The Applicant alleges diversion of company revenue; incorporation of a parallel competing entity; transfer or disposal of company assets; exclusion from management; and exposure of the company to significant debt.
20. He has annexed NTSA searches showing transfers and encumbrances over vehicles previously registered under the Company, now under Jambostar Ventures Group Ltd or in favour of third-party financiers; emails and correspondence assigning payments to personal or alternative accounts; supplier demands indicating outstanding debts during the Respondent's period of sole control; evidence of attempts to remove the Applicant from key email and banking access.
21. The Respondent denies wrongdoing but has not provided primary documentation supporting the lawfulness of the transfers, any authorizing board resolutions, or evidence of personal financial injections into the business.
22. At this stage, the Court is not required to make definitive findings. The test is whether a prima facie case is established. The material before the Court raises genuine and substantial questions regarding the Respondent's conduct, which includes the alleged transfer or encumbrance of company assets; alleged redirection of company revenues; alleged exclusion of a co-director from management; and the alleged creation of a parallel entity conducting similar business.
23. In the absence of any documentary rebuttal, the Applicant has satisfied the threshold under Section 239(2).
24. Regarding good faith, the Respondent alleges abandonment by the Applicant, yet provides no documentation to support this claim. His assertion that his actions were necessary to preserve the company is similarly unsupported.
25. In the circumstances, only a full hearing can resolve the factual disputes.
26. For clarity, this ruling does not adjudicate the substantive issues between the parties. It merely grants leave for the derivative action to proceed.

Disposition

27. In light of the foregoing, the Court makes the following orders:
 - i. Leave is hereby granted to the Applicant to institute a derivative claim action on behalf of Jambostar Ventures Limited against the Respondent.
 - ii. The derivative suit shall be filed within twenty-one (21) days from the date of this ruling.
 - iii. Pending the hearing and determination of the derivative suit, a temporary injunction is hereby issued restraining the Respondent, whether by himself, his agents, servants, or proxies, from:
 - a. Transferring, selling, charging, disposing of, or otherwise dealing with any movable or immovable assets registered in the name of Jambostar Ventures Limited;
 - b. Receiving, diverting, or redirecting payments from clients of the Company;
 - c. Altering bank mandates or interfering with access to company email accounts;
 - d. Presenting or holding out Jambostar Ventures Group Ltd as a continuation of, substitute, or replacement of Jambostar Ventures Limited in respect of existing contracts or assets.



28. Costs of the application shall abide the outcome of the derivative suit.

29. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 9TH DAY OF APRIL 2026

HON. MR. JUSTICE MOSES ADO

JUDGE OF THE HIGH COURT

In the presence of: -

C/A – Moses

N/A.....for the Applicant

Ms. Kinuthia.....for the Respondents

Njuguna.....for the Interested Party

