



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELCLMISC NO. E029 OF 2025

**IN THE MATTER OF ARTICLES 2 (1), 2(2), 3(1), 20(4), 22(1),
22(2), 40 AND 60 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES
40, 60 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF RULES 3, 23 AND 24 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS**

PRACTICE AND PROCEDURE RULES, 2013

AND

**IN THE MATTER OF SECTION 238 AND SECTION 239 OF
THE COMPANIES ACT, 2015**

BETWEEN

JAMES MACHARIA CHEGE

PAUL MAINA NGUATA

BERNARD NJUGUNA GAKUMO

**JOHN NDURU MUHIA (Suing on behalf of the shareholders
of**

GITAMAIYU TRADING CO. LTD.....

APPLICANTS

VERSUS

**GITAMAIYU TRADING CO. LTD.....1ST
RESPONDENT**

**JOHN NJOROGE MUGANA.....2ND
RESPONDENT**

**NYAKINYUA MUGUMO KIAMBAA CO. LTD.....3RD
RESPONDENT**

**J.R NJENGA.....4TH
RESPONDENT**

**ESTATE OF JAMES NJENGA KARUME.....5TH
RESPONDENT**

**FANROS CO. LTD.....6TH
RESPONDENT**

**LAND REGISTRAR KIAMBU.....7TH
RESPONDENT**

**THE ATTORNEY GENERAL.....8TH
RESPONDENT**

RULING

1. The Applicants in this case filed a Notice of Motion Application dated 11/04/2025. The said Application is brought under Articles 22 and 40 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act; Sections 238, 239 and 240 of the Companies Act, 2015; Order 51 of the Civil Procedure (Amendment) Rules 2020 and all other enabling laws. When the parties appeared in Court on 01/07/2025, the Applicants notified the Court that they had been served with a Preliminary Objection filed by the 7th and 8th Respondents. The parties sought time to file a response

to the Preliminary Objection. The Court granted leave of 14 days to all Respondents to file their responses to the Notice of Motion and to Preliminary Objection.

2. On 01/10/2025 when the parties appeared in Court for a mention the Applicants' Counsel moved the Court to dismiss the Preliminary Objection since the 7th and 8th Respondents were not present in Court to canvass it. The Court struck out the Preliminary Objection for want of prosecution on 01/10/2025 and granted the Applicants and the Respondents 14 days each to field their written submissions to the Notice of Motion Application.
3. This Ruling is in respect of the Chamber Summons Application dated 11/04/2025 seeking the following:
 - 1) Spent.**
 - 2) THAT the Honorable Court be pleased to grant the Applicants leave to file a derivative suit in the form of a Constitutional Petition on behalf of the 1st Respondent.**
 - 3) THAT the cost of this application be provided for.**
4. The grounds upon which the application is based are on the face of the Application and is supported by the Affidavit of James Macharia Chege sworn on even date.
5. The Applicant deposes and affirms his status as a shareholder of the 1st Respondent, as evidenced by the CR12 and list of shareholders which is Annexures as **"JMC 1a & 1b"**. He asserts that the 1st Respondent, Gitamaiyu Trading

Company Ltd (herein after “**Company**”) is the lawful owner of **L.R. Nos. 89/4 through 89/20** (approx. 512 acres in Kiambu), having purchased the same via a Sale Agreement dated 18/02/1977 as per Annexure “**JMC 3**” for KES 4,200,000/=.

6. The Applicant deposes that the 3rd to 7th Respondents, including the Estate of the late Hon. Njenga Karume conspired to fraudulently transfer the suit properties to the 3rd Respondent.
7. That the said transfer is challenged because there is no proof of payment by the 3rd Respondent. Further that the Indenture dated 07/02/1979 as per Annexure **JMC 6** lacks the signature of the 6th Respondent, the Vendor.
8. At the same time there was no Land Control Board Consent obtained yet this is agricultural land, contrary to the Land Control Act (Cap 302), and also there was non-payment of stamp duty.
9. The Applicant further deposes that the 4th Respondent (former Commissioner of Lands) allegedly used his office to facilitate the fraud and illegally removed cautions by intentionally using a wrong postal address to bypass the 1st Respondent’s notice.
10. Further, the Applicant states that for decades, the 5th Respondent used political influence and promises of amicable settlement to stall legal action. And that despite the filing of **Nairobi HCC No. 4496 of 1994**, current

Directors have remained adamant or have actively colluded with the Respondents to withdraw the suit as per Annexure **JMC 8a**.

11. Consequently, the shareholders invoke the principle in **Foss v. Harbottle (1843)** as codified in the **Companies Act, 2015**, arguing that the Company is under wrongdoer control and the Directors have failed to protect the corporate interest.
12. The Applicant contends that the Respondents' actions violate the right to property under Article 40 of the Constitution of Kenya, 2010. He prays that the Court grants him leave to file a Constitutional Petition as a derivative suit. That the petition will protect him from irreparable loss and economic prejudice. He contends that he has established a *prima facie* case with high probability of success as per the standards in **Giella v. Cassman Brown & Co. Ltd (1973) EA 358**.
13. The Application is opposed vide three replying affidavits filed by the two Directors, one sworn on 29/09/2025 by Director Stephen Njoroge and the other sworn on 01/12/2025 by Director John Njoroge Mugana and grounds of opposition filed by the 4th Respondent and another Replying Affidavit filed the 5th Respondent and sworn on 14/10/2025.
14. The deponent of the 1st Replying Affidavit, Stephen Njoroge, stated that as a Director and Shareholder of **Gitamaiyu Trading Company Limited**, he expressly

admits and corroborates the Applicants' averments regarding the fraudulent acquisition of the suit properties, specifically **L.R. Nos. 89/4 through 89/20**, by the 4th and 5th Respondents. He confirms that the 1st Respondent was deprived of its land through a manifest abuse of power and illegal transfer mechanisms. However, while concurring that the Company's proprietary rights were violated, the Deponent vehemently contests the Applicants' *locus standi* to institute a derivative action under Section 238 of the Companies Act, 2015. He asserts that as a Director, he and his co-Directors hold a higher priority and the proper legal mandate to conduct proceedings on behalf of the Company, pursuant to the long-standing rule in **Foss v. Harbottle (1843) 2 Hare 461**.

15. The Deponent further deposes that the Applicants failed to exhaust internal corporate dispute resolution mechanisms by neglecting to involve the Board of Directors before moving the Court. He clarifies that any delay in seeking legal redress was not occasioned by Director negligence or wrongdoer control, but was instead a direct result of the non-cooperation and thwarting efforts of the Applicants themselves, who allegedly frustrated all attempts at amicable settlement. Consequently, the Deponent argues that the Applicants have failed to meet the stringent legal threshold for leave to file a derivative suit as established in **Wallersteiner v. Moir (No. 2) [1975] QB 373**, rendering

the present application incompetent and lacking in merit since the Directors remain willing to act if not bypassed.

16. In light of the foregoing, the Deponent maintains that any *prima facie* case belongs strictly to the 1st Respondent acting through its lawful agents and not the shareholders in their personal capacities. He therefore prays that the Chamber Summons dated **11/04/2025** be dismissed with costs. In the alternative, should the Honourable Court find the suit viable, the Deponent requests to be joined as a Plaintiff alongside other Directors to properly represent the 1st Respondent's interests, further urging the Court to hear the matter on a priority basis due to the gravity of the fraud alleged.

17. Strangely, the same Stephen Njoroge swore an Affidavit on 8/10/2025, and denied having sworn any replying Affidavit. In the said affidavit he raises a grave challenge to the integrity of the judicial records in **ELC Misc. Application No. E029 of 2025 (Thika)**. The crux of his testimony is a categorical and unequivocal denial of the authenticity of a Replying Affidavit purportedly sworn by him on 29/09/2025. He depones that upon being served with or shown the said pleadings, he discovered a document that falsely bears his name and a signature that is not his known or official mark.

18. Mr. Njoroge further testifies that he never appeared before the Commissioner for Oaths indicated in the

impugned document on the stated date, or at all, for the purpose of executing the same. Consequently, he characterizes the purported Replying Affidavit as a forgery and a fabrication, disclaiming any involvement in its creation or the averments contained therein. By doing so, the Deponent effectively moves the Court to find that the document is a nullity and an attempt to mislead the Honourable Court through the filing of fraudulent pleadings.

19. The 2nd deponent John Njoroge Mugana, a Director and Shareholder of Gitamaiyu Trading Company Limited, deposes in his Replying Affidavit expressly admitting and confirming the Applicants' averments regarding the proprietary interest of the 1st Respondent in **L.R. Nos. 89/4 through 89/20**. By validating the contents of paragraphs 4 through 12, 15, and 16 of the Supporting Affidavit, the Deponent corroborates the claims of illegal acquisition, manifest abuse of power, and the fraudulent transfer of the suit properties by the 4th and 5th Respondents.

20. However, while supporting the substantive merits of the claim against the other Respondents, the Deponent challenges the procedural propriety of the Applicants' unilateral institution of a derivative suit under Section 238 of the Companies Act, 2015. He invokes the foundational principle in **Foss v. Harbottle (supra)** to assert that the Board of Directors holds higher priority and the primary mandate to litigate on the Company's behalf, arguing that

the Applicants ought to have consulted or joined the Directors rather than acting independently.

21. Furthermore, the Deponent denies that the Board is responsible for the prolonged delay in seeking legal redress, deponing instead that the stalemate was occasioned by a lack of cooperation and misunderstandings specifically triggered by the Applicants. He maintains that the Applicants do not qualify to file a derivative suit in their personal capacity to the exclusion of the Board, as the right to sue for a corporate wrong resides primarily with the Company's lawful officers. Notwithstanding these procedural objections, the Deponent concedes that a *prima facie* case exists against the 3rd to 8th Respondents for the recovery of the suit land, meeting the evidentiary threshold established in **Giella v. Cassman Brown & Co. Ltd (supra)**.

22. In conclusion, the Deponent prays to be formally joined as a Plaintiff in the proposed Constitutional Petition to ensure the 1st Respondent is properly represented by its Directors. He expresses no objection to the matter being heard on a priority basis given the sensitivity of the fraud alleged, provided the current procedural imbalance regarding the Company's representation is cured by his joinder.

23. On their part, the 4th Respondent filed Grounds of Opposition. They contend that Respondent's opposition to the Application dated 11/04/2025 is anchored on the fundamental premise that the entire Motion is fatally

defective, devoid of merit, and constitutes an abuse of the Court process. Central to this opposition is the contention that the Applicant has improperly conflated distinct legal regimes by seeking leave to institute a derivative suit which is strictly a commercial cause of action through the vehicle of a Constitutional Petition. The 4th Respondent maintains that there is no provision in law that permits the pursuit of commercial claims under the guise of enforcing fundamental rights and freedoms, thereby rendering the Application a procedural nullity.

24. Furthermore, the 4th Respondent challenges the jurisdiction of the Honourable Court, asserting that the Court lacks the requisite mandate to grant leave for a derivative suit within the framework of constitutional litigation. This jurisdictional challenge is compounded by the plea of *res judicata*, as the 4th Respondent points out that the subject matter of this dispute has already been conclusively determined by the Supreme Court of Kenya in **Gitamaiyu Trading Co. Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 10 Others (Motion 17 (E025) of 2021)**. Given that the apex Court has delivered a final and binding Ruling on the issues herein, the 4th Respondent argues that this Court is barred from re-litigating the same.

25. Finally, the 4th Respondent moves the Court to find the Application incompetent on the ground that the Applicants lack the necessary *locus standi* to bring a derivative action.

On the strength of these combined legal infirmities ranging from the lack of standing and jurisdiction to the clear violation of the doctrine of *res judicata* the 4th Respondent asserts that the Application is incurably defective and prays for it to be struck out or dismissed with costs to the 4th Respondent.

26. On their part, the 5th Respondent Replying Affidavit, deponed by **Dr. Stephen Ngung'u Karau** in his capacity as a co-executor of the Estate of the late James Njenga Karume (herein "**JNK**"), and with authority of his co-executors of the 5th Defendant's will, James Raymond Njenga and Dr Francisca Wanjiku Kahui serves as a comprehensive rebuttal to the Application dated **11/04/2025**. He raises a challenge to the *locus standi* of the Applicants, asserting that they have failed to demonstrate their status as bona fide shareholders of the 1st Respondent.

27. The 5th Respondent and his co-executors have deponed that the purported list of shareholders annexed by the Applicants exhibit "**JMC-1b**" is a legal nullity, as it does not constitute a Register of Members within the mandatory requirements of Section 93(2) of the Companies Act, 2015. The affidavit points out that the list is deficient in form and substance, lacking postal addresses and dates of entry, and is further marred by grave inconsistencies, including duplicated membership numbers and the absence of National ID numbers for key deponents like James Macharia Chege.

28. Beyond this issue, the 5th Respondent contends that the Application is an incompetent abuse of the Court process that flagrantly violates Section 238(3) of the Companies Act, 2015. This statutory provision restricts derivative claims to specific causes of action involving negligence, default, or breach of duty by Directors. The 5th Respondent depones that the Applicants' claims are bereft of particularity and founded on nothing more than conjecture and speculation. Specifically, the allegations that the late JNK compromised Directors to withdraw appeals in **High Court Civil Suit No. 4496 of 1994** are dismissed as casual, opaque, and unsupported by a single shred of admissible evidence.

29. The affidavit further seeks to vindicate the reputation of the late JNK against what is described as a transparent and ill-motivated smear campaign. Dr. Karau categorically denies that the late JNK had any proprietary, legal, or beneficial interest in the subject parcels known as **L.R. Nos. 89/4-20** in Kiambu County. He further rebuts the scandalous insinuation that the late JNK exploited his relationship with the late President Daniel Toroitich Arap Moi to **circumvent Land Control Board consents or evade Stamp Duty**. The 5th Respondent emphasizes that throughout his distinguished public career, the late JNK was never the subject of any inquiry or sanction regarding these properties. Consequently, the 5th Respondent maintains that the estate of the late JNK has no interest in the suit properties and

prays that the frivolous and vexatious Application be dismissed with costs for failing to meet the evidentiary threshold required to sustain a claim of fraud or breach of duty.

30. The application was canvassed by way of written submissions the Applicants filed their written submissions dated 14/10/2025, the 3rd Respondents filed theirs dated 13/10/2025, the 4th Respondents filed theirs dated 28/10/2025 and the 5th Respondent filed their written submissions dated 28/11/2025. I will summarize all the submissions in a brief treatise herebelow.

31. The Applicants in their submissions contend that the 3rd to 7th Respondents fraudulently and illegally alienated Company land through a forged indenture that lacked the signature of the original owner. Despite the Applicants' persistent pleas, the Company's Directors acted unreasonably late, filing a previous suit only after vital evidence and witnesses had vanished. Citing Section 238 of the Companies Act, 2015 and the landmark holding in **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another [2017] eKLR**, the Applicants argue they have met the statutory threshold for a derivative action. They assert a *prima facie* case exists defined in **Mrao Ltd v First American Bank of Kenya Ltd (2003) KLR 125** as a genuine and arguable claim and pray that the

Court permits them to protect the Company's interests from the adamant refusal of its own Directors to seek justice.

32. The 3rd Respondent vehemently submits and opposes the application, characterizing it as a fatally defective afterthought and a blatant abuse of the Court process. They submit that the dispute is *res judicata*, as the legality of the land transfers has already been litigated and finalized through the hierarchy of the Kenyan legal system, including **Nairobi HCC No. 4496 of 1994**, **Nairobi Court of Appeal No. 84 of 2013**, and **Supreme Court No. 57 of 2019**. Furthermore, they argue the Applicants are guilty of concealing material facts regarding these prior determinations. The 3rd Respondent notes that the land has since been subdivided, developed with permanent structures like bungalows and flats, and transferred to innocent third parties who are not even before the Court. They maintain that the Applicants never possessed the land and are merely seeking sympathy by invoking the name of the late President to reopen a closed chapter.

33. The 4th Respondent challenges the Court's jurisdiction, arguing that as an Environment and Land Court (ELC) established under Article 162(2)(b) of the Constitution, it lacks the mandate to hear convoluted commercial derivative claims, which are the exclusive preserve of the High Court under Article 165. Relying on the principle in **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989]**

KLR, they assert that since jurisdiction is everything, the Court must down its tools immediately. Substantively, they argue the claim is statute-barred under Section 7 of the Limitation of Actions Act, as the Applicants are challenging a 1979 transaction 46 years later. They further invoke the doctrine of laches, citing **Daniel Kibet Mutai & 9 Others v Attorney General [2019] KECA 125**, contending that the Applicants have slept on their rights to the extreme prejudice of the 4th Respondent, who is now elderly and sickly.

34. The 5th Respondent adopts a similar defensive stance, focusing on the procedural inadmissibility of the application. They contend that the attempt to frame a Company dispute as a Constitutional Petition is a jumbled legal strategy that misapplies the bill of rights to avoid the strictures of Company law. Like their co-Respondents, the 5th Respondent argues that the Applicants have failed to establish a *prima facie* case to warrant the Court's discretion.

35. They emphasize that the litigation has reached its finality in previous forums and that allowing this suit would amount to endless litigation that undermines the stability of land titles and the principle of finality in the Kenyan justice system. The 5th Respondent's position aligns with the collective defense of *res judicata* and lack of standing.

Analysis and Determination

36. The Application before this Court, dated 11/04/2025, presents a singular procedural question which is whether a shareholder can be granted leave to institute a derivative suit under the Companies Act in the specialized form of a Constitutional Petition. To resolve this, the Court must first address the jurisdictional and substantive boundaries that separate corporate law from constitutional litigation.
37. The Applicants anchor their prayer on the contention that the fraudulent alienation of L.R. Nos. 89/4 through 89/20 constitutes a violation of the right to property under Article 40 of the Constitution. However, the law maintains a clear distinction between the enforcement of private corporate rights and the protection of fundamental freedoms. As established by the Supreme Court of Kenya in **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR**, a Constitutional Petition is not a substitute for ordinary civil or commercial litigation; it is a specialized vehicle for redressing public law wrongs where the Bill of Rights is the primary focus, not a secondary or auxiliary claim to a land or shareholding dispute.
38. The focus of the key issue for determination therefore is whether the derivative nature of a claim is compatible with the constitutional nature of a Petition. Under Section 238 of the Companies Act, 2015, a derivative claim is an action

brought by a member in respect of a cause of action vested in the Company seeking relief on behalf of that Company.

39. In contrast, Article 22 of the Constitution provides for the enforcement of the Bill of Rights by any person acting in their own interest or on behalf of others. The fundamental tension arises because a derivative suit is a statutory exception to the rule in **Foss v Harbottle (1843) 2 Hare 461**, designed to remedy fraud on the minority or wrongdoer control within a corporate entity. Which is the focus of the instant Application. When such a claim is dressed as a Constitutional Petition, it risks bypassing the rigorous statutory safeguards and judicial leave mandated by Sections 239 and 241 of the Companies Act, which require the Court to assess the good faith of the member and whether the Company itself has decided not to pursue the claim.

40. The Court of Appeal in **Bashir v Commissioner of Lands & others [1960] EA 818** and more recently the High Court in **Stephen Mwangi & 2 others v Tusker Mattresses Limited (Suit No. 19 of 2017) [2021] eKLR** have consistently held that where a specific statutory remedy exists such as the derivative claim procedure under the Companies Act a party should not circumvent that regime by invoking the general constitutional jurisdiction of the Court. To allow a derivative suit to proceed as a Constitutional

Petition would be to permit forum shopping under the guise of constitutionalism.

41. Furthermore, as the 4th Respondent correctly argues citing **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR**, jurisdiction is everything. This Court, sitting as an Environment and Land Court (ELC) under Article 162(2)(b), has a specialized mandate over land disputes. While land is the subject matter here, the procedural vehicle of a derivative suit is governed by the Companies Act, which predominantly falls under the commercial jurisdiction of the High Court. Combining these regimes constitutes a procedurally flawed approach, lacking clear enabling legislation.

42. Moreover, the Applicants face the insurmountable hurdle of *res judicata*. The 4th Respondent has pointed to the Supreme Court's finality in **Gitamaiyu Trading Co. Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 10 others [2021]**, which dealt with the same subject matter. As held in **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**, the doctrine of *res judicata* is a rule of substantive law that prevents the reopening of settled disputes to ensure the finality of litigation. If the Apex Court has already pronounced itself on the ownership of these 512 acres, this Court cannot use the derivative suit or constitutional petition labels to bypass the hierarchy of the Courts. The claim is also hampered by the

Statute of Limitations under Section 7 of the Limitation of Actions Act, as the transaction occurred in 1979. While constitutional rights are often described as timeless, the Court in **Alice Chemutai Too v Nicholas Kipkoech Kimosop & 2 Others [2021] eKLR** affirmed that even in claims involving property rights, the doctrine of laches and statutory timelines apply to prevent the ambushing of Respondents decades after the fact.

43. Ultimately, a derivative case cannot be a Constitutional Petition because their purposes and procedural requirements are mutually exclusive. A derivative suit seeks to vindicate a private corporate interest (the Company's assets), whereas a Constitutional Petition seeks to vindicate public law standards (the Bill of Rights). To allow a shareholder to bring a derivative suit as a petition would effectively grant them a constitutional shortcut to avoid proving the specific requirements of negligence, default, or breach of duty by Directors required under Section 238(3) of the Companies Act.

44. The Applicants' attempt to humanize a commercial dispute by framing it as an Article 40 violation does not change the fact that the underlying grievance is a corporate one, which has already been exhausted in the halls of the High Court, Court of Appeal, and Supreme Court.

Final Orders

- i) The application dated 11/04/2025 is hereby struck out for being a procedural nullity, as the law does not permit the institution of a derivative suit in the form of a Constitutional Petition.***
- ii) The Court finds that the matter is Res Judicata, having been conclusively determined by the Supreme Court of Kenya, and this Court lacks the jurisdiction to re-litigate the same under any procedural guise.***
- iii) Costs of this Application are awarded to the 3rd, 4th and 5th Respondents, to be borne by the Applicants.***

Orders Accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA VIDEOLINK THIS 28TH DAY OF APRIL, 2026.

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**MOGENI J
JUDGE**

In the presence of:

Mr. Kaloki Mumo holding brief for Mr. Maina Ngaruiya for the 1st, 2nd and 3rd Applicants

Mr. S. N. Nganga for the 1st Respondent

Miss Nganga for the 2nd Respondent

3rd Respondent – Absent

Miss Colleen holding brief or P. M. Kamara for the 4th Respondent

Mr. Karuti for the 5th Respondent

6th Respondent - Absent

Miss Mwangi holding brief for Mr. Motari for the 7th and 8th
Respondents

Mr. Melita - Court Assistant

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MOGENI J
JUDGE

ORIGINAL