

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. COMM. APPLICATION NO. E755 OF 2025
IN THE MATTER OF SECTIONS 238 AND 239 OF THE
COMPANIES ACT, 2015
AND
IN THE MATTER OF THE COMPANIES (GENERAL)
REGULATIONS, 2015
AND
IN THE MATTER OF AN APPLICATION FOR LEAVE TO
INSTITUTE A DERIVATIVE ACTION ON BEHALF OF COPPER
PLUS LIMITED

ASHOK KUMAR
DUGAR.....APPLICANT

VERSUS
VIVEK UNNIKRISHNAN
NAIR.....RESPONDENT

AND
COPPER PLUS LIMITED.....NOMINAL
RESPONDENT
RULING

1. This ruling concerns the Applicant’s Notice of Motion dated 23rd July 2025 brought under Sections 238 and 239 of the Companies Act, 2015. The Applicant seeks, inter alia:

- i. The applicant be granted leave to institute a derivative claim on behalf of the Company, Copper Plus Limited.*
 - ii. A temporary injunction restraining the Respondent from selling, alienating, transferring, charging, disposing, removing or in any manner dealing with the company.*
 - iii. The Respondent be compelled to produce Audited financial statements and books of the company, annual returns from 2021 - 2024, current bank account statements the current inventory from 2019-2024, Aged creditor and Debtors list as at 31st May 2025, contracts entered into by the company from 2019 to date management accounts report by the auditors for the year 2020- 2024, confirmation of any outstanding financial liabilities with any financial institution and or individual shareholders loans as at 31st May 2025 and any agenda notes and minutes of the Board for the years 2019 - 2024.*
 - iv. The Costs of the application*
2. The application is grounded on the assertion that the Applicant, a minority shareholder holding approximately 24% of the shares, has been excluded from the management of the Company and that the Respondent has refused to implement resolutions passed by the majority shareholders.

3. The application is supported by the affidavit of Ashok Kumar Dugar who depones that he is a minority shareholder unlawfully excluded from the affairs of the Company.
4. He avers that an Extraordinary General Meeting held on 19th May 2023 resolved, inter alia, to appoint him as a director and restructure the shareholding, but the Respondent has declined to implement those resolutions.
5. He further desposed that the Respondent has mismanaged the Company, resulting in financial distress, including tax liabilities exceeding Kshs. 131 million and demands from Kenya Power and landlords.
6. The Company has failed to prepare audited accounts for several years, and shareholders have been denied access to the books of accounts. There are allegations of diversion of company affairs, siphoning of funds, and oppressive conduct against the Applicant and other shareholders. The Applicant contends that unless leave is granted, the Company will continue to suffer irreparable harm due to ongoing mismanagement.
7. In its supplementary affidavit, the Applicant asserts that the Respondent's Replying Affidavit is defective for non-compliance with the Oaths and Statutory Declarations Act. The Respondent has failed to account for substantial tax liabilities, including a KRA demand exceeding Kshs. 136 million. The alleged availability of records is illusory, and access has been systematically denied. The Respondent

continues to act oppressively and in breach of fiduciary duties.

8. The Respondent opposes the application through a Replying Affidavit sworn by Vivek Unnikrishnan Nair on 1st September 2025. The Respondent's case is that, the application is misconceived and amounts to interference with internal company management. The disputes raised are subject to other pending proceedings, including Nairobi Commercial Case No. E382 of 2023, and thus are sub judice.
9. The Applicant himself contributed to the alleged governance issues and cannot rely on them to seek relief. Financial difficulties, including KRA issues, were caused by shareholder disputes and lack of cooperation. The Company's records exist and have been available for inspection, and allegations of concealment are unfounded. The Applicant has not demonstrated any actionable wrongdoing warranting a derivative action.
10. The application was heard by way of written submissions, which I have considered.

Analysis and Determination

11. Having considered the application, affidavits, and submissions, the issues for determination are:
 - i. Whether the Applicant has satisfied the threshold for the grant of leave to institute a derivative action*
 - ii. Whether the injunctive sought is merited;*
 - iii. Who should bear the costs of the application?*

12. **Section 238** of the **Companies Act, No. 15 of 2017** defines a “derivative claim” in Part XI in the following manner:
- “(1) In this part, “derivative claim” means proceedings by a member of the 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.”**
13. From the provisions of Section 238 of the Companies Act, for the plaintiff to succeed in an action for a derivative suit-
- i. He must be a member of the Company and this includes a person who is not a member of the Company but to whom shares in the Company have been transferred or transmitted by operation of the law;*

- ii. The proceedings must be in respect to a cause of action vested in the Company;*
 - iii. The proceedings must be seeking relief on behalf of the Company;*
 - iv. The proceedings must be for protection of members against unfair prejudice brought under the Companies Act; and*
 - v. The proceedings are 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.*
14. To determine whether leave to file a derivative suit ought to be granted, the court will be guided by two considerations:
 - a) Whether the Applicant has established a prima facie case to warrant grant of such leave.*
 - b) Whether the application for leave has been brought in good faith.*
15. In the present case, it is not in dispute that the Applicant is a shareholder. The complaint revolves around exclusion from management, failure to implement shareholder resolutions, lack of audited accounts, and alleged mismanagement.
16. The material placed before the Court discloses allegations of governance failures, financial opacity, and possible breach of fiduciary duties. At this interlocutory stage, the Court is not called upon to make definitive findings.

17. In the case of **Sultan Hasham Lalji and 2 Others v Ahmed Hasham Lalji and 4 Others [2014] eKLR**, it was held as follows:

“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.”

18. In my view, the cumulative effect of the allegations raises serious triable issues concerning the management and financial integrity of the Company.

19. I am therefore satisfied that the Applicant has established a prima facie case and that the application has been brought in good faith.

20. Accordingly, leave to institute a derivative action is merited.

Injunctive order

21. The Applicant also seeks injunctive orders restraining the Respondent from dealing with the affairs and assets of the Company.

22. **Order 40 Rule 1** of the **Civil Procedure Rules 2010** 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.

23. The principles for grant of interlocutory injunctive orders were laid down in the celebrated case of **Giella v Cassman Brown & Co Ltd [1973] EA 358** where the court held that in order to qualify for an injunction, First the 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 harm which would not be adequately compensated by an award of damages, and Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
24. Having already found that a prima facie case has been established, the next consideration is whether the Applicant stands to suffer irreparable harm.

25. The allegations relate to potential dissipation of company assets, continued financial mismanagement, and lack of transparency. Such harm, if established, would affect the Company as a going concern and may not be adequately compensable in damages.
26. On the balance of convenience, it tilts in favour of preserving the status quo pending the hearing of the derivative claim.
27. In the circumstances, I am satisfied that the threshold for grant of injunctive relief has been met.

Disclosure orders

28. The Applicant seeks production of financial statements, bank records, and other statutory documents.
29. Access to company records is a fundamental right of shareholders and is central to corporate accountability.
30. Given the allegations of financial opacity and denial of access, I find that limited disclosure is necessary to safeguard the interests of the Company and facilitate the just determination of the dispute.
31. In the result, the application dated 23rd July 2025 is merited and is hereby allowed on the following terms:

- i. Leave is hereby granted to the Applicant to institute a derivative action on behalf of Copper Plus Limited;***
- ii. A temporary injunction is hereby issued restraining the Respondent from selling, transferring, alienating, charging or otherwise***

dealing with the assets and operations of the Company pending the hearing and determination of the suit;

iii. The Respondent shall, within 60 days, produce the Company's audited accounts, bank statements, and statutory records as sought in the application;

iv. Costs of the application shall be in the cause.

Orders Accordingly.

RULING delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **April** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Otieno h/b for Mr. Kigata Applicant

Ms. Ngina h/b for Ms. Ms. Katasi Respondent

Court Assistant: Lispa