



**Kigo & another v Weru & another; Finezza Capital Holdings Limited
(Interested Party) (Miscellaneous Commercial Application E931 of 2025)
[2026] KEHC 5566 (KLR) (Commercial and Tax) (16 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS COMMERCIAL APPLICATION E931 OF 2025**

MA OTIENO, J

APRIL 16, 2026

BETWEEN

FRANCIS MATHENGE KIGO 1ST APPLICANT

ANWAR MAHENDRA PANDYA 2ND APPLICANT

AND

ZEPHANIAH GETHI WERU 1ST RESPONDENT

PETER NJERU KARUANA 2ND RESPONDENT

AND

FINEZZA CAPITAL HOLDINGS LIMITED INTERESTED PARTY

RULING

1. By Notice of Motion dated 10th September 2025 brought under Sections 238, 239, 240, 241, and 242 of the *Companies Act*, 2015, the Applicants seek leave to institute and continue a derivative suit on behalf of the 1st Interested Party company.
2. The Applicants further seek orders compelling the Respondents to produce the company's financial and accounting records and for such further orders as the Court may deem fit.
3. The application is supported by the affidavit of Francis Mathenge Kigo, sworn on 10 September 2025, and the grounds set out therein, together with the Applicants' submissions dated 19 November 2025.
4. It is deponed that the Applicants were originally creditors of the company, having extended loans of Kshs 9,160,339 and Kshs 5,000,000 respectively. Due to the company's inability to repay these debts—



allegedly caused by the Respondents' mismanagement—the Respondents proposed a debt-to-equity conversion, through which the Applicants became shareholders and directors.

5. Applicants' case is that the Respondents, in their capacity as directors, engaged in acts of mismanagement, breach of fiduciary duty, negligence, and diversion of company resources. It is alleged that such conduct resulted in the company being rendered financially distressed and unable to meet its obligations, including repayment of loans advanced by the Applicants.
6. According to the Applicants, an audit by Hudson & Associates subsequently revealed major financial discrepancies in the company's books, which remained under the substantive control of the Respondents.
7. The Applicants further state that the company has been subject to multiple suits by creditors, including *Ruth Niva Ongachi Solomon v Finezza Capital Holdings Limited* (CM COMM NO. E723 OF 2020), where a decree for over Kshs 10 million was entered against the company.
8. The Applicants express apprehension as proceedings have been instituted to lift the corporate veil in the aforementioned case, which would jeopardize the personal properties of the "innocent" directors due to the Respondents' actions.
9. It is on that basis that the Applicants contend that there is an urgent need to institute a derivative action to protect the company's interests and hold the Respondents accountable.
10. Despite service, the Respondents did not file any response to the application, nor did they file any submissions.

Analysis and Determination

11. From the pleadings and submissions, the single issue for determination is whether the Applicants have met the legal threshold for the grant of leave to institute a derivative suit under the *Companies Act, 2015*.
12. Derivative actions in Kenya are governed by Part XI of the *Companies Act, 2015*, specifically Sections 238–242. Section 238 defines a derivative claim as proceedings brought by a member of a company in respect of a cause of action vested in the company, seeking relief on behalf of the company.
13. 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.
14. 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.”
15. 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.
16. 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.
17. 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.”
18. 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 Plaint. 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 Plaint but together with the Plaint 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.”
19. In the present case, the Applicants allege serious acts of mismanagement, including diversion and misapplication of company funds, failure to properly account for financial transactions, and rendering



- the company insolvent or asset-deficient. They further rely on audit discrepancies and inconsistencies between financial records and audited accounts, suggesting possible financial impropriety.
20. At this interlocutory stage, the Court is indeed not required to make definitive findings of fact, but only to determine whether there is a plausible cause of action. The Court must also be satisfied that the application has been made in good faith.
 21. On the “good faith” requirement, evidence on record reveals that the Applicants were originally creditors who converted their debt of over Kshs 14 million into equity to save the company. Their interest is therefore aligned with the company’s recovery and protection from further liability. Consequently, the Court finds that the requirement has been established.
 22. As to whether the Applicants have established a prima facie case to warrant the grant of the orders sought, the Court notes from the evidence on record that the company is exposed to multiple creditor claims and has limited or no tangible assets. It is also available on record that there are pending proceedings seeking to lift the corporate veil, which may expose directors to personal liability, as well as claims of audit reports identifying discrepancies.
 23. Given that the company is currently unable to satisfy its debts due to the alleged mismanagement of the Respondents, and the Applicants face personal liability through the lifting of the corporate veil for those same acts, there is a compelling and urgent need to allow the derivative suit to proceed.
 24. Granting leave will enable the company to potentially recover misdirected funds or hold the Respondents liable for the financial ruin of the 1st Interested Party.
 25. In such circumstances, and in the absence of any documentary rebuttal from the Respondents, the Court is satisfied that the Applicant has met the threshold under Section 239(2).
 26. Consequently, the Court concurs with the Applicant that it is in the company’s best interest that any alleged wrongdoing by its directors be investigated and, if established, remedied.
 27. The upshot of the foregoing is that the Notice of Motion dated 10th September 2025 is allowed as follows:
 - i. Leave is hereby granted to the 1st and 2nd Applicants to institute and continue a derivative suit on behalf of the 1st Interested Party against the Respondents.
 - ii. The Applicants shall file and serve the derivative suit within 21 days from the date hereof.
 - iii. The prayer for production of documents shall be addressed within the derivative suit through appropriate discovery procedures.
 - iv. Costs of the application shall be in the cause.
 28. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL 2026

HON. MR. JUSTICE MOSES ADO

Judge of the High Court

In the presence of: -

C/A – Moses

Ms. Kagendo h/b for Gitonga.....for the 1st & 2nd Applicants



N/A.....for the Respondent

