

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT THIKA  
CIVIL SUIT NO. E007 OF 2025

PETER MWANIKI MAINA.....PLAINTIFF

VERSUS

JULIET WANJIRU MAINA.....1<sup>ST</sup> DEFENDANT  
REGISTRAR OF COMPANIES.....2<sup>ND</sup> DEFENDANT  
MWAIVE LIMITED.....3<sup>RD</sup> DEFENDANT

**RULING**

The plaintiff's notice of motion dated 9<sup>th</sup> of May 2025 to which this application relates has the following prayers;

- a. Spent.
- b. Spent.
- c. Spent.
- d. **THAT** leave be and do hereby issue for the applicant to institute a derivative suit as against the 3<sup>rd</sup> respondent.
- e. **THAT** this Honourable Court do issue orders compelling the 1<sup>st</sup> respondent, to render a full account of all transactions, dealings, liabilities and benefits obtained by or through the 3<sup>rd</sup> respondent through the applicant's credentials including bank statements, loan applications, disbursements and usage.
- f. **THAT** this Honourable Court be pleased to issue orders restraining the 1<sup>st</sup> respondent from acting as an agent of the 3<sup>rd</sup> respondent and incurring

and/or undertaking any liabilities on behalf of the 3<sup>rd</sup> respondent pending the hearing and determination of the suit filed herewith.

- g. **THAT** this Honourable Court be pleased to issue orders restraining the 2<sup>nd</sup> respondent from registering any debentures over the 3<sup>rd</sup> respondent's assets pending hearing and determination of the suit filed herewith.
- h. **THAT** the Honourable Court be pleased to issue such further orders as it may deem just and expedient in the circumstances of this case.
- i. **THAT** costs of this application be in the cause.

The application contains eight grounds which are basically to the effect that; the 1<sup>st</sup> defendant fraudulently incorporated the 3<sup>rd</sup> defendant and included the plaintiff as a director without his consent using forged documents and the plaintiff fears that the 1<sup>st</sup> defendant is likely to use his properties to secure loans from banks through the 3<sup>rd</sup> defendant.

The application is supported by affidavit sworn by the plaintiff on 9<sup>th</sup> May 2025 in which he depones that sometime in 2015 being desirous of investing in both movable and immovable property within Kenya, he executed a power of attorney in favour of the 1<sup>st</sup> defendant authorizing her to act on his behalf in identifying, negotiating and purchasing real property in Kenya using his personal funds. He adds that based on trust and familial confidences, he gave the plaintiff his Kenyan national identity card, KRA PIN and eCitizen platform log-in credentials in order to facilitate the intend transactions.

The plaintiff has added that the 1<sup>st</sup> defendant breached the trust by using the documents and information entrusted to her to incorporate the 3<sup>rd</sup> defendant

where she included him as a director. He avers that he never signed the documents used in incorporating the 3<sup>rd</sup> defendant because at the time of their execution, he was in the United States of America where he lives.

The plaintiff has stated further that he has fears that 1<sup>st</sup> defendant went ahead on to use the the 3<sup>rd</sup> defendant as a vehicle to secure multiple financial facilities and credit instruments from various banks and financial institutions using his personal properties as collateral. The plaintiff avers that he discovered in April 2024 that the 1<sup>st</sup> respondent had charged several of his properties and those of his siblings to secure some facilities with Rafiki Microfinance without their knowledge. He adds that the 1<sup>st</sup> defendant failed to pay the said loans which almost caused auction of the proprieties following which he instituted this court's civil suit numbers E007 of 2024 and E006 of 2024 which have been closed after the 1<sup>st</sup> defendant settled the loans. He has also learned that the 1<sup>st</sup> defendant used his two vehicles as securities for two other loans with microfinance institutions which made him file Thika Chief Magistrate's Court civil suits numbers E721 of 2024 and E723 of 2024.

The plaintiff has further averred that he got information that the 1<sup>st</sup> defendant is holding herself out as an agent of the 3<sup>rd</sup> defendant including operating several bank accounts in the name of the 3<sup>rd</sup> defendant in the guise of his authority. He concludes by averring that his attempts to resolve the issues amicably by way of resignation from the 3<sup>rd</sup> defendant and transferring his shares to the 1<sup>st</sup> defendant or her nominee have been in vain due to frustration of the process by the 1<sup>st</sup> defendant.

In opposition to the application, the 1<sup>st</sup> defendant has sworn affidavit dated 30<sup>th</sup> May 2025. The 1<sup>st</sup> defendant avers that the application is misconceived, based on falsehoods and is an abuse of the court process. She adds that there was a

conversation between the plaintiff and her after the incorporation of the 3<sup>rd</sup> respondent where the plaintiff proposed that she could use the company for her business and that he could hold shares in it as her proxy, which proposal never materialized.

The 1<sup>st</sup> defendant avers further that the 3<sup>rd</sup> defendant was incorporated by the plaintiff and one Brian Mwenda Eliud and only the two can explain its state of affairs. She denies being in possession of any of the 3<sup>rd</sup> defendant's documents and states that she has never operated any bank account or held any financial documents or acted as an agent of the 3<sup>rd</sup> defendant. She however admits existence of the power of attorney which she avers she used as per the plaintiff's directions but she cannot remember using it in respect of the affairs of the 3<sup>rd</sup> defendant and if she did so, it must have been on clear understanding and approval by the plaintiff and proper arrangements with Brian Mwenda Eliud.

She confirmed that from her experience and interactions with the plaintiff, she is aware that he uses different signature impressions on different occasions and only him and Brian Mwenda Eliud could explain the apparent difference in the signatures on documents for the 3<sup>rd</sup> defendant. She adds that if the 3<sup>rd</sup> defendant has obtained any loan facilities, she was not aware or party to the process and the plaintiff's fears on that aspect are unfounded and speculative.

On the eCitizen credentials, the 1<sup>st</sup> defendant avers that the plaintiff is telling lies. She claims to be aware that some other people she names as Hajila Kimeria and Michael Kimeria had access to the plaintiff's account which position is evident in email correspondences between him and the two which she has exhibited as annexure 'JWM-M2'.

The plaintiff has also denied that she has frustrated the plaintiff's efforts to resign from the 3<sup>rd</sup> defendant as she is neither a director nor a shareholder and the resignation does not require her involvement. It is a matter which is within the control of the plaintiff and his co-director and shareholder which they can do through the procedures provided for in the Companies Act.

The 1<sup>st</sup> defendant states that this suit is the latest chapter in a prolonged and distressing campaign of vexatious and multifarious litigation launched by the plaintiff seemingly aimed at causing her maximum legal and financial strain and to embroil other family members. She has listed other suits which have been commenced by the plaintiff against her and others as; this court's civil suits numbers E006 of 2024, E007 of 2024, E008 of 2025 and E009 of 2025 and Thika Chief Magistrate's civil suits numbers E723 of 2024 and E721 of 2024. She adds that she has made all efforts to reconcile and solve her differences with the plaintiff who is her brother but her offers have been countered by filing of suits in court.

Brian Mwenda Eliud a director and shareholder of the 3<sup>rd</sup> defendant averred in a replying affidavit sworn on 19<sup>th</sup> June 2025 that, his association with the plaintiff and the 1<sup>st</sup> defendant dates back to 2010 during which he has engaged in numerous ventures with them. He adds that in 2020, the plaintiff approached him with an idea of a comprehensive shipping application which he eventually progressed but has not been paid for the intellectual energy he used in bringing the idea to life.

As a follow up, the plaintiff in 2021 came up with an idea of a new company and its structure from which they eventually incorporated the 3<sup>rd</sup> defendant. The proposal was for Brian to get 10 per cent stake which he would hold in trust for

the plaintiff and the remaining 80 per cent to be reserved for the plaintiff's family.

He adds that the 1<sup>st</sup> defendant never approached him with a request for incorporation of the 3<sup>rd</sup> defendant or to use the 3<sup>rd</sup> defendant for any tender or business whatsoever. He says that he is surprised that the plaintiff is now turning around to term the incorporation of the 3<sup>rd</sup> defendant as a fraudulent or clandestine act. He swears that the plaintiff was the architect, the prime mover and the financier of the entire process and that the plaintiff was an active, informed and willing participant from inception to completion. Brian has exhibited a funds transfer confirmation statement for Kshs 19,000.00 sent to him by the plaintiff on 14-06-202 for payment of statutory fees required to incorporate the 3<sup>rd</sup> defendant.

He avers further that the plaintiff had been accessing his eCitizen portal since the incorporation of the 3<sup>rd</sup> defendant and was fully informed of the status of the 3<sup>rd</sup> defendant all through. He adds that the plaintiff's use of proxies has been his pattern and adds that he has also held 10 per cent stake in another company he calls Bripek Builders Limited in trust for the plaintiff. He states further that the plaintiff has engaged him in other undertakings including construction. He adds that they never formalized the 3<sup>rd</sup> defendant's set up and they have never even proceeded to open a bank account for the company.

The said deponent avers that contrary to the picture the plaintiff has painted, it is him who has exploited him by using his (Brian's) personal identification documents and information to ship containers from the USA without paying him a fact the plaintiff at some point admitted.

He has denied that the plaintiff has ever attempted to resign from the 3<sup>rd</sup> defendant because if the plaintiff was to resign, he (Brian) would have to be invited as a director which has not been done. He goes on to confirm that the contents of the 1<sup>st</sup> defendant's replying affidavit are correct and concludes by stating that the 3<sup>rd</sup> defendant is a dormant, non-trading paper company that possesses no bank account or assets and carries no liabilities and therefore the foundation of a derivative action is nonexistent. He pleads that he wished the plaintiff and the 1<sup>st</sup> defendant could find a path to reconcile their differences outside this court.

I have carefully read and considered the application and the parties' affidavits. I have also read and considered the plaintiff's submissions dated 1<sup>st</sup> September 2025, the 1<sup>st</sup> defendant's submissions dated 11<sup>th</sup> September 2025 and the 3<sup>rd</sup> defendant's submissions dated 11<sup>th</sup> September 2025. For an application for interlocutory injunction as the one before me to succeed, the applicant must establish two main things. He must demonstrate that he has a *prima facie* case with a probability of success and that an award of damages will not be adequate to compensate him for the loss he is likely to suffer if the application is not allowed. If the court is in doubt as to the first two principles, it will decide the application on a balance of convenience.

The substratum of the plaintiff's suit is that the 3<sup>rd</sup> defendant was incorporated fraudulently by the 1<sup>st</sup> defendant using forged documents. He claims that the 3<sup>rd</sup> defendant included him as a director in the 3<sup>rd</sup> defendant without his consent or knowledge. He denies that the signatures on the documents used to incorporate the 3<sup>rd</sup> defendant were his.

The position in law is that fraud being a serious allegation must be specifically pleaded and proved. Mere allegations and generalised statement that fraud was

committed will not stand no matter how sensationalized the same may be. In ***Re Estate of Harjit Singh Brah alias Harjit Singh Nihal (Deceased) [2023] KEHC 25531 (KLR)***, Honourable Justice R.E. Aburili held that;

*‘From the forgoing precedents, it is settled law that the allegation of fraud is a serious allegation that must be strictly pleaded and proved. The burden of proof is on the person alleging and the standard of proof is higher than that which is required in civil cases, which is on a balance of probability, and lower than the one in criminal cases, which is beyond reasonable doubt.’*

The burden of proving the allegations and the truth of the facts he has pleaded was on the plaintiff. Going through the documents filed by the plaintiff, all that I can see are general and sensational statements that the documents were forged and that the plaintiff was not aware and did not give consent for his name to be included as a director of the 3<sup>rd</sup> defendant. There is no evidence to that effect has been placed before me. I am not an expert in examination of documents neither do I have capacity or tool to establish whether or not the documents were forged or who presented them to the 2<sup>nd</sup> defendant for registration.

The plaintiff’s pleadings and affidavits do not mention Brian Mwenda Eliud who is the plaintiff’s co-director and shareholder in the 3<sup>rd</sup> defendant. Brian’s sworn affidavit clearly shows that he is the one who facilitated incorporation of the 3<sup>rd</sup> defendant on instructions and directions of the plaintiff. He states that it is the plaintiff who actually gave money for the registration. These statements have not been controverted and going by the narrations in the said affidavit, I see consistency and indicators of a sincere person who is out to say nothing but the truth. The plaintiff has approached this court for equitable relief and was as such expected to disclose all material facts and evidence.

He who comes to equity must come with clean hands if they expect the court to give favourable orders. It was held in ***St Elizabeth Academy-Karen Limited v Housing Finance Co. of Kenya Limited [2013] KEHC 4447 (KLR)*** that;

*‘The issue of non-disclosure of material facts goes into the very root of court’s discretionary powers to grant injunctive orders as this is an equitable relief. I accept the Defendant’s submissions that the Plaintiff came to court with unclean hands and he cannot therefore enjoy the relief sought.’*

As I have stated in a related case between the plaintiff and the 1<sup>st</sup> defendant and others (this court’s civil case number E008 of 2025), making false documents and registering a company using such documents is a serious criminal offence which no reasonable victim would let go unreported. The plaintiff, should not expect this court to believe that he can sit pretty and instead of reporting the offence to competent law enforcement agencies engage in litigation of this nature when the 1<sup>st</sup> defendant is out there holding forged documents without authority and with a possibility of using the said documents to get financial facilities. This court is not so naive to believe such a weird story especially when Brian, one of the directors of the 3<sup>rd</sup> defendant and whose narrative is so consistent that it cannot be nothing else but truth, has told the court that the company is dormant and holds no assets or bank accounts.

The plaintiff’s claim that he has tried to resign but has been frustrated by the 1<sup>st</sup> defendant is another general allegation which has no basis or evidence. There is no clarity of how the alleged efforts were made and frustrated. The procedure for one to withdraw or resign is provided for in the Companies Act. The same cannot be done without involving the other shareholders or directors yet the evidence produced in court does not show that the plaintiff approached his co-

director who has said as much. If indeed there have been any frustrations, the same should have come from Brian.

The plaintiff has alleged that the 1<sup>st</sup> defendant has been holding herself out as an agent of the 3<sup>rd</sup> defendant yet his co-director has unequivocally told the court that the 1<sup>st</sup> defendant has never been an agent of the 3<sup>rd</sup> defendant in any capacity. The plaintiff has once again thrown words and statements which have no substance of evidence. The plaintiff has not identified to the court the accounts he claims to have been opened. The plaintiff's fellow director has stated that the 3<sup>rd</sup> defendant has never held a bank account.

Having said the above, I hold that the plaintiff has failed to prove the allegations he has made against the defendants and in my opinion this suit was not filed with a purpose of pursuing an identifiable genuine cause of action but for other ulterior motives. I agree with the 1<sup>st</sup> defendant that this matter and others are a culmination of strained relationship between the plaintiff and the 1<sup>st</sup> defendant which seems to stem from some family disputes. How I join Brian Mwenda Eliud in praying and hoping for the plaintiff, the 1<sup>st</sup> defendant and their family to see the light and seek reconciliation for whatever disputes they may have. Nothing in this world is incapable of being resolved amicably especially where family members are involved.

Having said the above, I hold that the plaintiff has failed to establish a *prima facie* case with probability of success against the defendants. It is not necessary for me to go into considering whether the plaintiff has established that he stands to suffer loss which is incapable of being remedied by an award of damages and balance of convenience because they will serve no meaningful purpose.

I now turn to the prayer for leave to file a derivative suit against the 3<sup>rd</sup> defendant. A cause of action for a derivative suit is available to a member who demonstrates that the company in question has suffered loss or injury and those in control of the company are not willing to take action to remedy the loss. According to the CR12 exhibited as annexure ‘PMM2’ of the plaintiff’s supporting affidavit, the plaintiff holds 100 shares while Brian holds 100 shares. The remainder of 9,800 shares seem not to have been allocated. It can safely be said that the plaintiff is in control of the company in equality with Brian. He has not demonstrated the injury caused to the 3<sup>rd</sup> defendant or acts of the other co-director that has injured the 3<sup>rd</sup> defendant not to mention that there is no evidence of any activity of the 3<sup>rd</sup> defendant since its incorporation.

Part XI of the Companies Act provides for basis for a derivative suit. Upon analysis of what has been placed before me, there is nothing in this matter that places it under any of scenario contemplated in the Act for a derivative suit. There are no specific allegations against the plaintiff’s co-director or any loss attributable to actions of the co-director or any other person. The plaintiff’s gun is turned and directed at the 1<sup>st</sup> defendant who has no role to play in the 3<sup>rd</sup> defendant. I find that the plaintiff has failed to fit the case within the required threshold as set in ***Isaiah Waweru Ngumi & 2 others v Muturi Ndung’u [2016] KEHC 3032 (KLR)*** In the circumstances, I must decline that prayer. In the cited case, it was held that;

*‘In making that determination, the Court is guided by the considerations stipulated in section 241(2) of the Companies Act. Among other things, the Court considers the following factors:*

- 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 efforts 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 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 authorised or ratified by the company in the future; and*
- g. Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative action.’*

Just as I have done in this court’s civil suit number E008 of 2025 which I have mentioned hereinabove, I conclude this ruling by imploring the plaintiff and the 1<sup>st</sup> defendant to consider coming down from the tree, sit down under a wide beautiful shade, take tea, breath in and out ten times and reflect, perhaps with their eyes closed, of the old times before ego, hardline stands and emotions took toll on their relationship. The advocates for the parties will do justice to their clients if they engaged them in an honest and truthful conversation. No one wins but all are likely to lose when siblings or close family members duel in courts. Resources will be wasted, relationships strained, ties broken, allies parted for good and permanent painful wounds inflicted. May reason prevail and mediation take the center stage.

In the meantime, the application dated 9<sup>th</sup> May 2025 is dismissed with costs to the defendants.

Dated signed and delivered at Nairobi this **30<sup>th</sup>** day of **April** 2026.

**B.M. MUSYOKI**  
**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Mr. Omondi holding brief for Miss Ikua for the plaintiff, Mr. Kairu Kihunyo for the 1<sup>st</sup> defendant, Miss Kirera for the 3<sup>rd</sup> defendant and in absence of the 2<sup>nd</sup> defendant.

COPY