REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL SUIT NO. **E008** OF 2025

PETER MWANIKI MAINA……...……PLAINTIFF

VERSUS

JULIET WANJIRU MAINA……...…….……1ST DEFENDANT
REGISTRAR OF COMPANIES...……..2ND DEFENDANT
TACGEAR INTERNATIONAL LIMITED……....3RD DEFENDANT

RULING

By a notice of motion dated9th of May 2025 which was filed simultaneous with the plaint in this mater, the plaintiff prays for the following;

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 3rd respondent.

e. **THAT** this Honourable Court do issue orders compelling the 1st respondent, to render a full account of all transactions, dealings, liabilities and benefits obtained by or through the 3rd 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 1st respondent from acting as an agent of the 3rd respondent and incurring

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

g. **THAT** this Honourable Court be pleased to issue orders restraining the 2nd respondent from registering any debentures over the 3rd 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 eight grounds upon which the application is brought are on the face of it. They are basically that; the plaintiff was included and registered as a director of the 3rd defendant at the time of registration without his consent, the signatures appearing in the documents filed with the 2nd defendant during incorporation of the 3rd defendant were not plaintiff's and were forgeries and the plaintiff fears that the 1st defendant may use his properties to secure loans from banks and other financial institution using the 3rd defendant without his knowledge or consent.

In addition to the aforesaid grounds, the plaintiff has sworn affidavit dated 9th May 2025 in which he depones that sometime in 2015, he executed a power of attorney in favour of the 1st defendant who happens to be his sister with a purpose of her identifying, negotiating and purchasing real property in Kenya on his behalf. The 1st defendant abused this relationship by registering the 3rd defendant and allocating him shares using his national identity card, KRA PIN and eCitizen log-in credentials without his knowledge or consent. The plaintiff has added that he never signed the documents used in incorporating the 3rd

defendant because at the time of their execution, he was in the United States of America where he lives.

The plaintiff has expressed fears that 1st defendant may use the 3rd defendant as a vehicle for securing multiple financial facilities and credit instruments from various banks and financial institutions using his properties which were acquired through the power of attorney as collateral although he has already revoked the said power of attorney. This fear is borne out of discovery that the 1st respondent had charged several of his properties and those of his sibling's to secure some facilities with Rafiki Microfinance Bank without his knowledge. He claims that the 1st defendant defaulted in payment of the secured loans to a point of the proprieties almost being auctioned following which he instituted this court's civil suit numbers E007 of 2024 and E006 of 2024 which have been closed after the 1st defendant paid the loans. He has also filed Thika Chief Magistrate's Court civil suits numbers E721 of 2024 and E723 of 2024 against the 1st respondent following some other fraudulent loans.

The plaintiff has further averred that he has information that the 1st defendant is holding herself out as an agent of the 3rd defendant including operating several bank accounts in the name of the 3rd defendant under the guise of the plaintiff's authority. His attempts to resolve the issues by way of resignation from the 3rd defendant and transferring his shares to the 1st defendant have been in vain as she has frustrated the process.

The 1st defendant has sworn affidavit dated 30th May 2025 in response to the application while the 2nd and 3rd defendants did not participate in the application. The 1st defendant avers that she is not a director or shareholder of the 3rd defendant and adds that the defendant is a director while their mother who is not a party to this suit is the sole shareholder. She adds that in May to June 2017, the plaintiff was physically present in Kenya and it was during this period that

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he informed her that their mother was in the process of setting up the 3rd defendant in which he would be a director. She adds that the plaintiff voluntarily appointed her as an agent of the 3rd defendant and allowed her to use the company to do her business. She states further that the plaintiff sent to her email documents used to incorporate the company which appeared to bear his signature. She denies forging the plaintiff's signature and avers that it is only him who can explain any differences in signatures on the documents.

On the eCitizen credentials, the 1st defendant avers that she was not the only one who accessed the portal and names other users as one Hajila Kimeria and Michael Kimeria which position is evident in email correspondences between him and the two dating back to 2017. Her appointment as the 3rd defendant's bank account agent was to enable the plaintiff show up the account and make it appear active for future use by the plaintiff to apply for tenders from the government.

The plaintiff has denied ever having intention of encumbering the 3rd defendant or obtaining loans and terms the allegation to that effect as baseless, speculative and fishing expedition. She also denied that she has frustrated the plaintiff's attempts to reigns from the 3rd defendant as she is neither a director nor a shareholder and the resignation does not require her involvement. She avers that contrary to the plaintiff's alleged fear, she has previously allowed and enabled the plaintiff to get loans from Rafiki Microfinance Bank through her other companies and she has even given her personal guarantee for loans in favour of the plaintiff which he used to secure his personal properties.

The 1st defendant has termed the plaintiff as vexatious litigant who has instituted several suits against her in order to inflict on her maximum legal and financial strain and to embroil other family members. She cites this court's civil suit

numbers E006 of 2024, E007 of 2024 and E009 of 2025 and Chief Magistrate's civil suits numbers E723 of 2024 and E721 of 2024. She claims that the plaintiff is being used by third parties to destroy their family relationship. She goes on to give a detailed history of the beginning and progression of their bad blood which I don't wish to reproduce in this ruling and adds that her offer of an olive branch has been met with more litigations.

I have considered the application and the parties' affidavits. I have also read and considered submissions dated 1st September 2025 and 11th September 2025 filed by the plaintiff and the 1st defendant respectively. Both parties are agreeable on the established principles governing consideration of an application of this nature. The plaintiff is duty bound to demonstrate that he has a *prima fascie* 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, it will decide the application on a balance of convenience. It was held in ***Njimu v Jaswant Singh & Brothers Ltd & 2 others [2023] KEHC 21578 (KLR)*** that;

> *'The principles for grant of temporary injunction are well settled. These were set out in the case of Giella v Cassman Brown (1973) EA 358 as follows:*
>
> *a) The Applicant must establish a prima facie case with a probability of success.*
> *b) If the injunction is not granted, the Applicant will suffer irreparable injury that may not be compensated by an award of damages.*
> *c) Where a court is in doubt, it should decide the application on a balance of convenience.'*

The onus of proving existence of this state of affairs is always on the applicant. In ***Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] KEHC 7263 (KLR),*** the court held that;

> *'In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles.'*

The plaintiff's suit is based on allegations of fraud allegedly committed by the 1st defendant. He claims that the respondent registered the 3rd defendant and included him as a director without his consent or knowledge. He also alleges that the signatures on the documents used to incorporate the 3rd defendant were forged. If indeed it is proved that those documents were forged, the element of fraud would have been established. The position in law is that fraud is a serious allegation and must be specifically pleaded and proved. The Court of Appeal held in ***Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] KECA 232 (KLR)*** that;

> *'Given the seriousness of the allegations, the onus was on the appellants to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof as was underscored by this Court in* ***Central Bank of Kenya Limited v Trust Bank Limited & 4 Others*** *[1996] **eKLR** as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:*
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> > ***"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."***

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Other than giving a general statement that the documents were forged, the plaintiff has not placed before me any iota of evidence in proof of the alleged fraud. This court is not in a position to know whether or not the documents were forged or who presented them to the 2nd defendant for registration. I do not know the plaintiff's ordinary signature neither do I have capacity to establish the authenticity of the documents or the person who signed them.

I have looked at the signature in the supporting affidavit and those in forms CR7 (memorandum of association), CR8 (notice of residential address and statement of nominal capital of the 3rd defendant) and they look different to the ordinary eyes. However, there is always a possibility that a party can have more than one signature. Only a documents examiner would be in a position to tell whether the two sets of signatures were made by the same author. The plaintiff did to see it fit to produce evidence from such an expert to enable the court make an informed decision on that issue.

Making false documents and registering a company using them is a serious criminal offence which no reasonable victim would let go unreported. According to the plaintiff, he suspects that the company may be used to access credit from institutions yet he has sat back without reporting the alleged fraud to law enforcement agencies. Rushing to this court which has no capacity to investigate such technical issues does not depict the plaintiff as a man of truth.

The plaintiff has claimed that the 3rd defendant was registered while he was in the United States of America but he has not provided proof to that effect while the 1st respondent claims that on 1-07-2017 which was the date of incorporation, the plaintiff was in the country. This again is a general statement which has not been substantiated with tangible evidence.

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It is also claimed by the plaintiff that he has tried to resign but the 1st defendant has frustrated his efforts to do so. The plaintiff has again made a general allegation without giving facts or details. He has not told the court how such efforts have been frustrated. Resignation from a company is done in conjunction with the other directors or shareholders. It cannot be done by exchange of correspondence as the plaintiff wants the court to believe.

I have noted form the CR12 exhibited by the plaintiff that the 1st defendant is neither a shareholder or a director of the 3rd defendant and obviously has no role to play and cannot actively participate in the process of removing the plaintiff from the directorship. If indeed there have been any frustrations, the same should have come from the sole shareholder of the 3rd defendant but I have seen none. It is also strange that the plaintiff claims that he has tried to transfer his shares in the 3rd defendant to the plaintiff when he owns no single share. With respect, this is a manifestation of a party who is propagating false narratives and as such he does not, in my view, deserve equitable relief from this court.

On the issue of the 1st defendant holding herself out as an agent of the 3rd defendant, I again find that the plaintiff has just thrown words and unsubstantiated statements. A bank account agent is ordinarily introduced by the owner of the account. There is no evidence or claim that the 1st defendant is a signatory to or has control over the bank accounts if they exist at all. The plaintiff has not identified to the court the accounts he claims to have been opened. He alleges to have revoked the power of attorney which gave the 1st defendant authority to represent or act for him and the 1st defendant has not shown intentions of flouting the revocation or continuing to use the power of attorney. Him being the director of the 3rd defendant, he needs nothing more than a letter to the bank removing the 1st defendant as an agent. I find it ironical

for the plaintiff to claim that the company was incorporated without his consent and authority and still wants to have control of the same instead of resigning from it.

On the basis of what I have stated above, I find that the plaintiff has not proved the allegations he has loaded on the 1st defendant and in my opinion this suit is most likely meant to vex the 1st defendant for reasons best known to the plaintiff and probably the 1st and the 3rd defendants. If not so, how would one explain the justification for leaving out of these proceedings, Joyce Wanja Maina the sole owner of the company who in law has the sole mandate to appoint directors of the 3rd defendant. I am tempted to believe that the suit is a culmination of a strained relationship between the plaintiff and the 1st defendant which seems to stem from some family disputes.

Having said the above, I hold that the plaintiff has failed to establish a *prima fascie* case with probability of success against the defendants. The suit is nothing but a red herring that must have been actuated by malice and ego calling out for massaging.

I do not think that I need to go into the limbs of irreparable damages and balance of convenience because they will serve no meaningful purpose. Where an applicant fails to establish a *prima fascie* case with a probability of success, the inevitable outcome is dismissal of the application. The first two conditions must go hand in hand and absence of one makes the application unmerited. In ***Nguruman Limited v Nielsen & others (2014) KECA 606 (KLR),*** the Court of Appeal held as follows;

> *'If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the*

injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.'

Similarly, the prayer for leave to file derivative suit is unmerited. Such leave is granted to a member of the company to bring suit on behalf of the company where it is demonstrated that some remedy accrues to the company but those in control of the company are not willing to pursue it. That is the purport of Sections 238 of the Companies Act which provides that;

1. *In this Part, "derivative claim" means proceedings by a member of a 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.*

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5. *It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.*
6. *For the purposes of this Part—*
    a. *"**director**" includes a former director;*
    b. *a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.*

In making a finding on what derivative action means, the Court of Appeal held in ***Juletabi Africa Adventure Limited & another v Christopher Michael Lockley [2017] KECA 118 (KLR),*** that;

> *'We think we have said enough, on the basis of those decisions to demonstrate that a derivative suit is basically brought on behalf of a company for wrongs committed against it or in other words for the benefit of the company.'*

The plaintiff has not demonstrated the acts of the shareholder of the company which have worked against the interests of the 3rd defendant. The only shareholder of the 3rd defendant has not been accused of a single act. She has not participated in these proceedings and I see no basis for granting the leave. There are other available ways for the plaintiff to get himself out of the company than a derivative suit. The prayer is dismissed.

Before I conclude this ruling, I must put some words for the plaintiff and the 1st defendant to ponder on as far as their obvious strained relationship is concerned. I had the opportunity to write a ruling on two applications in this court's civil case number E006 of 2024 where the plaintiff herein sought to commit the 1st defendant to civil jail and in response, the 1st defendant also filed a similar

application against the plaintiff. In short, each wanted to see the other serve a jail term. In my said ruling, I stated in that the two applications manifested bad blood between the two siblings which I recommended should be settled through reconciliation and mediation. Filing cases after cases against a sibling will never solve whatever differences the parties have especially where their old mother is watching silently from the stage. I note that the shareholder of the 3rd defendant is the mother to the two protagonist and at her advanced age, she does not deserve to see this kind of rivalry unless she is part of the fuel. I decline to be used to settle personal scores or to aggravate personal differences and emotions where no reasonable cause of action is disclosed.

The upshot of the above is that the application dated 9th May 2025 lacks merits and the same is dismissed with costs to the defendants.

Dated signed and delivered at Nairobi this **30th** 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 and Mr. Kairu Kihunyo for the 1st defendant and in absence of the 2nd and 3rd defendants.

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