

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
MISC. APPLICATION NO. E867 OF 2025

BETWEEN

SOPHIA WAWIRA MBOGO.....

PLAINTIFF

AND

MICHAEL MUASYA MUTUA.....

.....DEFENDANT

RULING

Introduction and Background

1. The court is being called upon to determine the Plaintiff's application dated 27th August 2025 that seeks leave to commence and prosecute a derivative claim on behalf of *Riverview Premier Academy Limited's* ("the Company") name against the Defendant and that liberty be granted to her to continue the suit as a derivative action for the Company's benefit regarding the Defendant's alleged wrongful acts. The application is supported by the grounds on its face and the Plaintiff's supporting affidavit sworn on 27th August 2025. It is opposed by the Defendant through his replying affidavit sworn on 29th September 2025 and the Notice of

Preliminary Objection dated 1st October 2025. The Plaintiff has also supplemented her arguments by way of written submissions.

2. The Plaintiff's case is that the parties are equal shareholders and co-directors of

the Company, which runs a private school in Utawala, Nairobi. The Plaintiff alleges the Defendant has committed serious breaches including diverting school fees from the Company's official *M-PESA* Paybill to a personal Paybill account, forging a board resolution for a Kshs. 1,000,000.00 corporate guarantee without approval, coercing her to sign documents for a Kshs. 5,000,000.00 *HFC Bank* loan, which she had rejected, defaulting on that loan and exposing the Company to legal and credit risk. Further, that the Defendant has excluded her from Company communications and operations and she claims that she tried to resolve matters internally but failed because the Defendant controls the Company and blocks any action against himself.

3. The Plaintiff states that under the ***Companies Act(Chapter 486 of the Laws of Kenya)***, a shareholder may seek leave to bring a derivative claim when the company is unable or unwilling to act

due to the wrongdoer's control. She adds that she is acting in good faith and in the best interests of the Company.

4. In response, the Defendant states that the application should be struck out on technical grounds that the Plaintiff is not the Company and that she has no standing to bring a derivative suit because a derivative claim must be brought by the company, not an individual director and that the Company has not authorized this action because the Plaintiff claims to act on behalf of the Company, but the Company itself has passed no resolution authorizing the suit. Substantively, the Defendant depones that the Plaintiff filed this derivative claim only after he filed a divorce petition against her at Mavoko Law Courts and he claims the Plaintiff has filed three separate cases against him in retaliation. He alleges the Plaintiff once came to the school premises wielding an axe, smashed a door, and destroyed food and that she allegedly lied to police that he was assaulting their children but the police found him peacefully asleep.
5. The Defendant contends that the coercion claim is unbelievable as he fails to understand how an adult of sound mind can be coerced to apply for a loan and challenges the Plaintiff to prove duress. On

the Paybill dispute, he states that the Paybill number she claims he changed has been on the school's official fee structure since the school opened. The Defendant maintains that the Plaintiff abandoned the matrimonial home in February 2023, leaving him with their three young children for over two years and he claims he has been solely working to support the children and the school during her absence. In summary, the Defendant avers that this application was precipitated by the divorce case and is not any genuine company emergency.

Analysis and Determination

6. From the pleadings, the Objection and the Plaintiff's submissions, the issues for the court's determination are whether the Objection raises proper points of law and whether the Plaintiff has satisfied the statutory requirements for leave to continue with this suit as a derivative claim on behalf of the Company. In respect of the Objection, I am inclined to agree with the Plaintiff's submission that Company authorization is not required, nor would it be logical to require it, in derivative actions. This court (the late Majanja J.,) in **Brickman Homes Limited & another v Mberia & 2 others (Civil Case E430 of 2022) [2023] KEHC 24703 (KLR)** held that *"...a member and director of the Company, is entitled apply for*

relief from this court to commence and continue this suit as a derivative suit and she does not require approval or ratification by the Company to do so..... Such a requirement would negate the very purpose of a derivative suit which is designed to protect minority shareholders.” It has not been contested that the Plaintiff is a member and director of the Company and as such, she is entitled to apply for relief from the court to commence and continue this suit as a derivative suit. I therefore find that the present suit is properly before the court as it is filed by the correct party with statutory standing and that no company board resolution was required before the suit could be filed. The Defendant’s Preliminary Objection is therefore dismissed in its entirety at this point.

7. Turning to the merits of the application, the Plaintiff rightly submits that whether the court should grant him permission to proceed with this suit as a derivative suit is governed by inter alia **sections 238** and **239** of the **Companies Act** which provides as follows:

238 (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.

(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.

239. Application for permission to continue derivative claim

(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.

[Emphasis mine]

8. The aforesaid provisions provide the framework for instituting claims by members of the Company on behalf of the Company. As the Plaintiff further submits, prior to the enactment of the **Companies Act**, such suits were governed by the rule in **Foss v Harbottle [1843] 67 ER 189** which established the general principal that a wrong alleged to have been done to a company, can only be remedied by an action by the company itself. However, several exceptions to the rule developed including the derivative action which allowed a minority shareholder to bring a claim on behalf of the Company.

9. I am in further agreement with her submissions that the late Onguto J., in **Ghelani Metals Limited, Ghelani Enterprises Limited, Tononoka Fireworks Limited & Jayshree Suchak Sanjiv v Elesh Ghelani Natwarlal & Registrar of Companies [2017] KEHC 4629 (KLR)** explained the effect of the **Companies Act** on the common law rule in **Foss v Harbottle (Supra)** as follows:

44. *Statutory procedure is now the exclusive method of pursuing derivative claims. The Act sets out what sorts of company claims may be pursued and is also explicit that derivative claims may only be pursued under the Act. The question must only be the factors the court ought to consider before approving a derivative claim.*

45. *There appears, in my view, to exist a two stage process. The court must first satisfy itself that there is a prima facie case on any of the causes of action noted under s.238(3). S.239(2) of the Act provides that the application for permission will be dismissed if the evidence adduced in support “do not disclose a case” for giving of permission. The essence of judicial approval under the Act is to screen out frivolous claims. The court is only to allow meritorious claims. All that the applicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed.*

10. The position that an applicant ought to establish a prima facie case was affirmed by the Court of Appeal in **Amin Akberali Manji, Hemanth Kumar & Musikland Millenium Limited v Altaf Abdulrasul Dadani & Musikland Limited (Under**

Receivership) [2015] KECA 356 (KLR). In considering whether to grant permission, the court is also guided by **section 241** of the **Companies Act** which sets out circumstances under which the court shall refuse the application and the considerations the court shall take into account when granting permission to the applicant to continue the suit as a derivative suit. The section provides as follows:

241. (1) *If a member of a company applies for permission under section 239 or 240, the Court shall refuse permission if satisfied—*

(a) that a person acting in accordance with section 144 would not seek to continue the claim;

(b) if the cause of action arises from an act or omission that is yet to occur—that the act or omission has been authorized by the company;

(c) if the cause of action arises from an act or omission that has already occurred — that the act or omission

—

(i) was authorised by the company before it occurred; or

(ii) has been ratified by the company since it occurred.

(2) *In considering whether to give permission, the Court shall take into account the following considerations:*

(a) *whether the member is acting in good faith in seeking to continue the claim;*

(b) *the importance that a person acting in accordance with section 143 would attach to continuing it;*

(c) *if the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—*

(i) authorised by the company before it occurs; or

(ii) ratified by the company after it occurs;

(d) *if the cause of action arises from an act or omission that has already occurred-whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company*

(e) *whether the company has decided not to pursue the claim;*

(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in the member's own right rather than on behalf of the company.

(3) In deciding whether to give permission, the Court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest (direct or indirect) in the matter.

[Emphasis mine]

11. In **Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u [2016] KEHC 3032 (KLR)**, Ngugi J.,(as he was then) summarised some of the factors to be considered in granting permission to commence or continue a derivative action as follows:

[21]...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.*

12. Going through the pleadings, I note that the Plaintiff has provided screenshots showing fees being paid into a personal account under account number 074****610 in the Defendant's name. The Defendant himself attached a fee structure that has listed a different Paybill account LPB 24***7 a/c 1****4. The Plaintiff has stated that the Defendant fraudulently altered the fee structure to include the personal account later. Whereas this is a factual dispute for trial, I find that the Plaintiff's evidence is specific and creates a credible prima facie case of diversion which demonstrates a possible breach of fiduciary duty on the part of the Defendant. The court cannot resolve this factual dispute at this leave stage, but the

Plaintiff has provided enough evidence to allow the claim to proceed.

13. The Plaintiff also claimed that the Defendant forged a board resolution for a

corporate guarantee, that she was coerced into signing for a Kshs. 5,000,000 *HFC bank* loan under duress, then defaulted, exposing the Company to legal action and credit risk. Further, that she was excluded from Company communications and management which presents a prima facie case of oppression. These are not frivolous claims as they are specific, serious, and if proven, would constitute actionable wrongs against the Company. It is therefore my finding that the Plaintiff indeed has a prima facie case.

14. It is also my finding that the Plaintiff has demonstrated good faith as she financed the Company's land and construction from personal loans she continues to service and she is seeking to recover alleged misappropriated funds and protect the Company from further liability. In my view, this is not a personal vendetta, but an attempt to salvage a jointly owned asset. The Plaintiff also states she made repeated internal efforts to resolve the issues, which the Defendant ignored or blocked. Because the Defendant is an equal 50%

shareholder and co-director who controls half the Company and is the alleged wrongdoer, any demand on the Company to sue him would be futile. The alleged wrongdoer is in control, which is a reasonable justification for a derivative action.

15. In sum, I find that the Plaintiff has alleged serious wrongs such as fraud, breach of duty and misappropriation that satisfy **section 238(3)** of the **Companies Act** above and she has shown good faith and the futility of seeking action from the alleged wrongdoer-controlled company. The factual disputes raised by the Defendant on whether the Paybill was properly changed and whether coercion occurred are precisely the issues to be determined at the full trial of the derivative claim, not grounds to deny permission at this preliminary stage.

Conclusion and Disposition

16. In the upshot, I allow the Plaintiff's application dated 27th August 2025 as follows:

1) The Defendant's Notice of Preliminary Objection dated 1st October 2025 is hereby dismissed

2) The Plaintiff is hereby granted leave and permission to continue prosecuting this suit as a derivative claim on behalf of the Company, Riverview Premier Academy Limited against the Defendant

3) Due to the relationship of the parties and to avert further hostilities, there is no order as to costs

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
8th DAY of MAY 2026**

.....
**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF

1. N/A for the Plaintiff
2. N/A for the Defendant
3. Amos- Court Assistant

ORIGINAL