

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION NO. E185 OF 2025**

**JONATHAN OKOTH**  
**OPANDE.....APPLICANT**

**VERSUS**

**GILBERT**  
**ORWE.....RESPONDENT**

**AND**

**DRICH SECURITY LIMITED.....AFFECTED**  
**COMPANY**

**RULING**

1. This is a Ruling arising out of an Application by the Applicant seeking to continue a derivative action against the Respondent on behalf of a Company.

**Background Facts**

2. The Applicant filed the Motion dated 19<sup>th</sup> February 2025 seeking the following orders;
  - a) *Spent.*
  - b) *THAT this Honorable (sic) Court be pleased to grant permission to the Applicant continue a*

*derivative claim against the Respondent seeking relief on behalf of the company.*

*c) THAT pending the hearing and determination of this Application this Honorable (sic) Court be pleased to issue an order of Mandamus compelling the Respondent to deliver an account of all the transactions he conducted with the affected company.*

*d) THAT pending the hearing and determination of this Application, the Honorable (sic) Court be pleased to issue an order of Prohibition restraining the Respondent or their agents or employees from holding himself out as the director of the affected company.*

*e) Costs of this Application be provided for.*

*f) Any other order deemed fit by the court.*

3. The Application was supported by the Affidavit of **Jonathan Okoth Opande**. He deponed that the Respondent has falsely and fraudulently represented himself as a director of the affected company. That between 2023 and 2025, the

Respondent unlawfully conducted transactions with third parties under that guise despite knowing the representation was false. Some of these dealings are said to have been fraudulent. These prompted complaints being made to the **Directorate of Criminal Investigations (DCI)** and exposing the Respondent to possible prosecution.

4. The Respondent has also failed to account for the transactions undertaken in the company's name. That his actions have allegedly caused reputational harm and financial loss to the company. The Applicant has been receiving inquiries from the **DCI** and business partners regarding suspected criminal activities. Despite demands to rectify the situation, the Respondent has refused or neglected to do so, necessitating the present application in the interest of justice.
5. Despite service as shown in the Affidavit sworn on 21<sup>st</sup> February 2025, the Respondent did not respond to the Application.

### **Issues for determination**

6. Having considered the Application, the Applicant's submission and the oral highlights; there is only one issue for determination;

*a) Whether the court should grant permission to the applicants to proceed with this suit as a derivative suit.*

*b) Whether an order of mandamus should issue as sought.*

*c) Whether an order of prohibition should issue as sought.*

### **Analysis**

7. It was the Applicant's case and the substance of the Application is that the Respondent acted unlawfully to the detriment of the affected company. The Applicant therefore urged the Court to grant him leave to continue a derivative suit.

**a) Whether the court should grant permission to the applicants to proceed with this suit as a derivative suit.**

8. **Section 238(1) of the Companies Act** provides as follows;

- 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.**

9. The objective of derivative claims was well explained in **Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwaral & Another, [2017] eKLR** where the Court held as follows:

*“Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of a corporation”.*

10. Further, **Section 239(1) of the Companies Act** allows a party to apply for permission to proceed with the

suit as a derivative suit in the course of proceedings. It states:

***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.***

11. In addition to the above, the Court of Appeal held in the case of **Amin Akberali Manji & 2 Others versus Altaf Abdulrasul Dadani, [2015] eKLR** that:

*“Leave of court shall be obtained before filing a derivative suit, but may be obtained to continue with the suit once filed.... It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such action falls within any of the exceptions to the rule of Foss vs Harbottle.”*

12. The Court in **Isaiah Waweru Ngumi & 2 others v Muturi Ndung’u [2016] KEHC 3032 (KLR)** summarized some of the factors to be considered in granting permission to commence or continue a derivative action in the following terms: -

*[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."*

13. In light of the above, it is clear that the Court in deciding whether or not to grant permission exercises discretion based on the facts supported by evidence. It is notable that the Applicant stated that some third parties who transacted with the Respondent reported the matter to the **Directorate of Criminal Investigations (DCI)** on account of the alleged unlawful conduct, thereby exposing the Respondent to possible prosecution.

14. The Applicant added that he received communications and calls from the **DCI**, as well as from business associates and partners, indicating that the company of which he is a director is implicated in criminal and fraudulent activities.

15. The Court has to be satisfied of the Application and the evidence in support of it before granting the leave to continue with a derivative suit. If the Court is not satisfied that a prima facie case has been established to warrant the orders sought, the Court may dismiss the Application. The Court may also exercise its discretion to call for more evidence to support the application or fill in any missing gaps.
16. This Court notes that the Applicant states that he is a Director of the Company. No CR-12 has been furnished to the Court to establish this crucial piece of evidence. If the Respondent is passing himself off as a director, then at least a recent search at the Companies Registry should reveal that piece of evidence.
17. The structure of the Company, the number of Directors (if others exist), their current whereabouts and inability to act for the Company have not been disclosed.
18. The Court is also concerned that these alleged fraudulent actions being undertaken by the Respondent are rather vague. It is not clear which type of fraud is being

perpetrated, when and where as well as the how. The structure of the Company, the number of Directors (if others exist), their current whereabouts and inability to act for the Company have not been disclosed.

19. It also concerns the Court why the Company itself is not standing up for its rights. Why isn't the Company which is capable of suing and being sued, taking legal action.

20. It is not clear to this Court why the Affected Party **Drich Security Limited** cannot file the intended suit or action or continue with any existing action. The Company is a separate and corporate entity capable of suing in its own name. No reasons have been adduced why the Applicant who is said to be a Director of the Company cannot move a resolution to act and represent the other Directors (if any) of **Drich Security Limited**. It is also not clear whether leave is sought to continue with an already commenced suit or whether it is fresh leave to commence a derivative suit?

**b) Whether an order of mandamus should issue as sought.**

21. Lastly it would appear the Applicant is using the Application to carry out discovery of facts and evidence. No sufficient basis has been laid out why that information sought is not available and what action has been taken to obtain it, independent of this application.

**c) Whether an order of prohibition should issue as sought.**

22. The Court is persuaded to await the filing of a Supplementary Affidavit prior to consideration of this issue.

23. In the circumstances, the Court is unable to grant the orders sought at this time. The Applicant is granted Fourteen (14) days to file a Supplementary Affidavit attaching further evidence and particulars in support of his case. Thereafter, the Application will be relisted before the Court for consideration. In the meantime, the Application is adjourned.

**Determination**

24. The Court finds that the evidence tendered by the Applicant in support of the Application for leave to continue a derivative suit is insufficient.
25. Pursuant **to Section 239(3) of the Companies Act**, the Application is HEREBY adjourned. Leave is HEREBY granted to the Applicant to file a Supplementary Affidavit within the next Fourteen (14) days to attach further evidence and particulars in support of his case Thereafter, the Application will be relisted before the Court for consideration.
26. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI  
THIS 05TH DAY OF MAY, 2026.**

**NJOROGE BENJAMIN K.**

**JUDGE**

In the presence of;

Mr. Salim Odeny for the Applicant.

N/A for the Respondent.

Mr. John Paul - Court Assistant.