



**Chagadwa v Witteveen & another; Medlink Africa Limited &
7 others (Interested Parties) (Commercial Case E138 of 2021)
[2025] KEHC 368 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E138 OF 2021
A MABEYA & F GIKONYO, JJ
JANUARY 27, 2025**

BETWEEN

WILKINS LOVEGA CHAGADWA PLAINTIFF

AND

JOLANDA ALEXANDRA WITTEVEEN 1ST DEFENDANT

GERDA MARGO SYBELLA HEIJTING KLEPEL 2ND DEFENDANT

AND

MEDLINK AFRICA LIMITED INTERESTED PARTY

ELLY OGOLLA INTERESTED PARTY

COLLINS LANOGA INTERESTED PARTY

DONALD KUSIMBA INTERESTED PARTY

DEBORAH WANGARI INTERESTED PARTY

ISHMATH BASHIR INTERESTED PARTY

ELIZABETH WANJIRU INTERESTED PARTY

ZACHARIA ARINGO INTERESTED PARTY

RULING

1. By the Notice of Motion dated 6/9/2023 and made under sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) and sections 238 (3), (4), 239(1), (3), (4), 780(1), (2), 782, 140, 143, 145, 146, 148, 150(6) of the [Companies Act](#), the Plaintiff seeks leave to amend his



Plaint so that he can continue this suit as a derivative action on behalf of the 1st Interested Party (“the Company”) and against the Defendants.

2. The application is supported by the grounds set out on its face and the supporting affidavit of the Plaintiff sworn on 6/9/2023. It is opposed by the Defendants through the cross-application dated 4/10/2023 wherein they seek to strike out the suit and further responded to by an affidavit sworn by the 2nd Defendant. This application is in turn opposed by the Plaintiff through his replying affidavit sworn on 5/2/2024. The Court directed that the two applications be disposed by way of written submissions which are on record.
3. The Plaintiff contends that he and the Defendants are directors and shareholders of the Company which has registered offices in Nairobi and Mombasa. It was mainly incorporated as a vehicle to help Mission Hospitals to put up equipment for labs and diagnostics services.
4. That the Plaintiff, 1st and 2nd Defendants’ shareholding in the Company is 250, 375 and 375 of the 1,000 shares of the Company respectively. That in the course of its operations, the Company had purchased assets worth approximately KShs. 5,000,000/-. He claims that despite the provisions of the Company’s Memorandum and Articles and the *Companies Act*, the Defendants have repeatedly acted in breach of the said provisions, their fiduciary duty and with malicious intent to defraud the Plaintiff.
5. He them of excluding him from the management of affairs of the Company including access to the Company accounts at the Banks and that they have engaged in oppressive, unfair conduct in conflict of interest in that, they failed to regularly account or seek requisite approvals prior to withdrawals from the Company accounts. That they are guilty of conspiring and voting to have him suspended and removed as a director of the Company without any justification and in utter disregard of the Plaintiff’s effort and capital in the Company.
6. The Defendants have advanced colossal sums of moneys to themselves without any justification and/or his approval massive losses to the company. They deliberately frustrated efforts to carry out a proper forensic audit to understand the Company’s financial standing and gaps in its operations. They also failed and/or refused to send him financial reports of the Company’s projects on its properties or account for the affairs of the Company.
7. That they have unfairly and without due regard to the relevant laws made a resolution to terminate all pending contracts with customers, employees and service providers and thereafter purported to ‘wind up’ the Company. That these actions were prejudicial to the Company as the Company also dealt with chronic and difficult wounds as well as amputation prevention and comprehensive burn care, whose services are not easily replaceable and/or attainable from anywhere else.
8. That despite notice to the Defendants and efforts to resolve the dispute, the Defendants have continued with their aforesaid conduct which is oppressive and unfair conduct prejudicial to the welfare of the Company and the Plaintiff as a member and director of the Company. That the suit is bona fide and brought for the welfare and best interests of the Company against oppressive and unfair conduct of the Defendants.
9. In response, the Defendants state that the Plaintiff is a former director of the Company removed by a special meeting resolution of the board of directors/shareholders that was held on the 6/3/2021 via Skype. That the grounds for removal of the Plaintiff as a director in the Company are the same grounds that he cites before this Court to be allowed to file a derivative suit for and on behalf of the Company, whereas the company has instituted a suit against him; HCCOMM E680 of 2021, in a bid to recover funds misappropriated by him.



10. The Defendants aver that the Plaintiff's application is enough proof that this suit is redundant because it does not raise any unique issues for determination while there is another suit with similar parties before a competent Court that is able to determine the same issues that the Plaintiff has identified to be the issues for determination necessitating an application for derivative action.
11. That the Plaintiff, as a party in the other suit can respond accordingly to the suit in his defense, with an option of filing a counterclaim or a third-party notice and that while some of the facts listed in the grounds for application to continue the suit as a derivative action do not warrant the application, other grounds have been both pleaded and proven by way of evidence in the suit against the Plaintiff to be both a reason for his removal from his directorship and the claim against him.
12. The Defendants claim that the Plaintiff advanced himself over Kshs. 7,000,000/- while the Company was falling into debt and facing numerous demands for payment for rent, to suppliers, to employees and other service providers. That this was due to the fact that the Company's bank account required only one director's signature to effect a withdrawal and the Plaintiff frustrated any effort to make any change to this provision evidence to which is sufficiently adduced.
13. The Defendants state that the pleadings and evidence in the suit against the Plaintiff demonstrate that himself, in a bid to defraud his fellow directors, maliciously instructed an uncertified person by the name Elizabeth Wanjiku Mathenge, the 7th interested party herein, who not only lacked papers to show qualification but also after confirmation by the Institute of Certified Public Accountants, pronounced unauthorized to offer audit and/or assurance services. That the Plaintiff has conveniently failed to inform the court that at the point of terminating employment contracts of employees of the Company, the world had been hit by COVID and unfortunately, the 1st Defendant who was also the managing partner was locked out of the country in Uganda and the 2nd Defendant was in Netherlands at the time and travelling restrictions could not allow them back in the country and as such they could only act on the information presented to them by the Plaintiff who was the only director who was on the ground.
14. Further, that the Plaintiff alleging oppressive, unfair and prejudicial conduct against himself was the cornerstone of the suit, this Court had already ruled on 19/8/2021 subject to the Defendants' preliminary objection dated the 23/3/2021 rendering the need for the derivative action application nugatory. That a quick look at the evidence against the Plaintiff in HCCOMM E680 of 2021, it becomes apparent that the Plaintiff is not at all acting in good faith or even have the Company's best interest as alleged as it is clear the Plaintiff's goal is revenge and getting back on the other directors through the back door.
15. As such, the Defendants contend that it is in the interest of justice that the Plaintiff's application be dismissed and the suit struck out to avoid multiplicity of issues for determination that are already sub-judice in HCCOM E680 of 2021 pending before a competent sister Court with similar jurisdiction.
16. In reply, the Plaintiff depones that to the best of his knowledge, he is still a director of the Company and that the Defendants have not attached the minutes of the meeting allegedly held on the 6/3/2021 wherein he was removed as a Director. That the Defendants did not pioneer wounds and burn care and treatment as alleged. That there were other players in the market in 2010 when the Company was registered. That it was him who was training the wound care specialists.
17. That when this suit was filed, he wanted the Court to intervene as the Defendants were disrupting the day to day operations of the Company under the guise of 'Winding up' yet there were patients to attend to, existing contracts with hospitals, staff e.t.c and the route taken by them was not proper and or the legal way of 'Winding up'. He denies that the Company operations were adversely affected by



COVID as the Company is an essential service health provider and asserts that the operations of the Company were only disrupted when the Defendants closed the office in March 2021.

18. The Plaintiff avers that the present suit was filed before HCCOMM E680 of 2021, so this suit was first in time. That in the latter suit, the Defendants allege that the Plaintiff stole Company funds together with Ms. Elizabeth Wanjiru and Mr. Collins Lanogwa and they have filed Defence thereto. That the Defendants could have filed a counterclaim in this Suit if they felt that the Plaintiff was liable in any way.
19. The Plaintiff denies that he caused wrangles and chaos in the Company and it was the Defendants that imposed a resolution on him to the effect that the Company be wound up despite the fact that the Company was doing well. That they had won tenders and signed up contracts to a tune of over Kshs. 80,000,000/- and they had an existing clinic named Woundscape Limited which was newly established and was offering exemplary services in chronic difficult wounds treatment. He prayed for his application to be allowed while that of the defendants be dismissed.
20. The rival contestations and submissions have been considered. The main issues for determination are whether the Plaintiff should be allowed to amend his plaint to proceed with this suit as a derivative action on behalf of the Company or whether the suit should be struck out.
21. The jurisdiction to grant permission to the Plaintiff to proceed with this suit as a derivative suit is governed by sections 238 and 239 of the *Companies Act* (Chapter 486 of the Laws of Kenya) which provides: -

“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.”

22. The aforesaid provisions provide the framework for instituting claims by members of the Company on behalf of the Company. 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.

23. I agree with the parties’ 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:

“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.

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.”

24. 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).
25. 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: -

- “241. If a member of a company applies for permission under section 239 or 240,
- (1) 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) authorized 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.”

26. In *Isaiah Waweru Njumi & 2 Others v Muturi Ndungu KBU HCCC No. 6 of 2016 [2016] eKLR*, the court held: -

“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 authorized 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.”

26. I have gone through the grounds presented by the Plaintiff in his application and the amended Plaintiff. He claims they were a result of the Defendants’ breach of their fiduciary duties and negligence. However, the Court finds that the same are not substantiated and do not present a demonstrable prima facie case against the Defendants. The fact that the Defendants resolved to wind up the Company



and terminate the employment contracts of some employees, cannot also be termed as unfair and oppressive conduct against the Company as the directors are at liberty in their ordinary course of duty and management of the Company and the law, to come up with such resolutions to enter into voluntary liquidation and dismiss employees.

27. The Plaintiff has also not demonstrated that he had made effort to bring these alleged breaches to the attention of the Defendants or that he made a demand to them on the same. For example, on his allegation that the Defendants failed to call for a meeting of the Company's Annual General Meeting and Special General Meetings, the Plaintiff did not demonstrate that he attempted to requisition a meeting to resolve their grievances or invoke section 280 of the *Companies Act* to seek appropriate relief (See and *Waweru v Karoki; County to County Choma Grill Limited (Interested Party)* [2024] KEHC 5358 (KLR)).

Samuel Mburu Gitere & Anne Wanjiru Gitere (Both Suing on behalf of Gitere Kahura Investments Limited) v Kenneth Kimari Gitere, David Wakangu Gitere, National Bank of Kenya, Chabrin Agencies Limited, Co-operative Bank of Kenya Limited & Lucas Waithaka Gitere [2021] KEHC 12594 (KLR)

28. It is for the above reasons that I find that no case has been made out by the Plaintiff for the grant of permission to proceed with this suit as a derivative action on behalf of the Company.
29. As to whether this suit ought to be struck out as urged by the Defendants based on the fact that this suit deals with the same issues in controversy as HCCOMM E680 of 2021, I am inclined to agree that a determination in the latter suit would definitely have a bearing on this matter as the allegations made by the parties against each other are present in both suits.
30. In the ruling of 19/8/2021, the Court held as follows: -

...The Company should have been made a party not just an interested party. It is the Company to be affected by the prayers in the plaint. It will be the Company to comply with the orders to be made therewith. With the foregoing flows, it cannot be said that the plaintiff has disclosed any prima facie case with any probability of success.

20. As regards damages, the plaintiff has a remedy in the proposed insolvency proceedings. He may join the same and raise questions as to the way the Company arrived where it is. He may make a claim against his Co-directors/ shareholders if found culpable.

31. As the court refused to restrain the Defendants from carrying out the day-to-day affairs of the Company and has now declined to grant leave to the Plaintiff to continue with this suit as a derivative claim, the plaintiff should seek how best to pursue his claim. Further, to have waited for more than 3 years since the advice given in the ruling of 19/8/2021 to make the present application, the bona fides of the plaintiff is brought into question.
32. As to the striking of this suit because of the existence of HCCOMM E680 of 2021, I do not think that there exists jurisdiction to do so. The existence of a latter suit that mirrors a previous suit cannot call for the striking out of the former suit. I decline to heed to the defendants' call to strike out this suit.
33. Accordingly, I find that both applications are without merit and hereby dismiss them with costs.

It is so ordered.

SIGNED AT NAIROBI THIS 14TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb



JUDGE

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2025.

***F. GIKONYO**

JUDGE

