



**Kibue & another v Kibue & 3 others (Commercial Petition E014 of 2022)  
[2025] KEHC 12414 (KLR) (Commercial and Tax) (4 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12414 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**COMMERCIAL PETITION E014 OF 2022**

**PM MULWA, J**

**SEPTEMBER 4, 2025**

**IN THE MATTER OF ARTICLES 22 AND 23 OF THE  
CONSTITUTION OF KENYA**

**IN THE MATTER OF ALLEGED INFRINGEMENT AND/OR  
ONGOING INFRINGEMENT OF ARTICLES 35 AND 48 OF THE  
CONSTITUTION OF KENYA**

**IN THE MATTER OF THE COMPANIES ACT, NO. 17 OF 2015  
IN THE MATTER OF MURUGA INVESTMENT LIMITED**

**BETWEEN**

**ANNUNCIATA WAITHERA KIBUE ..... 1<sup>ST</sup> PETITIONER  
PAUL KIMARI NJAO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**SUSAN NJERI KIBUE ..... 1<sup>ST</sup> RESPONDENT  
NICHOLAS KIBUE NJAO ..... 2<sup>ND</sup> RESPONDENT  
ELIZABETH NJERI KIBUE ..... 3<sup>RD</sup> RESPONDENT  
MARY CHRISTINE WANJA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioners herein filed the petition dated 30<sup>th</sup> November 2022 in their capacity as directors of the 7<sup>th</sup> Respondent and as persons acting to safeguard their rights under Articles 35 and 48 of the



Constitution. The Petitioners contend that the 1<sup>st</sup> to 6<sup>th</sup> Respondents have been conducting the affairs of the 7<sup>th</sup> Respondent in a manner that is oppressive and prejudicial to them. The Petitioners sought various declaratory and mandatory reliefs as well as costs of the petition.

2. It is that petition that prompted the filing by the Respondents of the Notice of Motion application dated 1<sup>st</sup> March 2023 which is the subject of this ruling. The said application is brought under the provisions of Sections 238 and 239 of the Companies Act 2015, Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Respondents/Applicants seek the following orders:
  - i. Spent
  - ii. That the supporting affidavit purportedly filed by the 1<sup>st</sup> Petitioner Annunciata Waithera Kibue be struck out.
  - iii. That the Court be pleased to strike out the 1<sup>st</sup> Petitioner Annunciata Waithera Kibue from this petition.
  - iv. That the petition herein be struck out for lack of jurisdiction.
  - v. That the Court be pleased to grant any other orders it may deem fit and just.
  - vi. That costs of this application be to the Respondents/Applicants.
3. The application is based on the grounds set out in the body thereof, as well as the affidavit sworn by Dr. Susan Njeri Kibue, the 1<sup>st</sup> Respondent. It is opposed by a replying affidavit sworn on 27<sup>th</sup> March 2023 by the 1<sup>st</sup> Petitioner, Annunciata Waithera Kibue.
4. When the matter came up for directions on 26<sup>th</sup> June 2024 prayer nos. 2 and 3 of the motion were allowed by consent of the parties in view of a decision made by the Family Court in a matter where the same parties were involved. What then remained for determination by this Court was the issue of jurisdiction as per prayer no. 4. To that extent, the application was canvassed by way of written submissions. The Respondents/Applicants filed the submissions dated 24<sup>th</sup> April 2024 while the 2<sup>nd</sup> Petitioner/Respondent's submissions are dated 24<sup>th</sup> July 2024. I have considered all the material placed before the court.
5. The Respondents/Applicants submit that by dint of Sections 238 and 239 of the Companies Act 2015 this Court lacks jurisdiction to hear and determine the petition herein as the 2<sup>nd</sup> Petitioner did not seek leave to lodge a derivative suit as required. The Respondents/Applicants urges the court to dismiss the petition. They rely on the case of Sam Kinyua v Yusuf Mbuno and 4 others; Tolbert Manyonge (Interested Party) (2022) eKLR.
6. On his part the 2<sup>nd</sup> Petitioner/Respondent acknowledged that the petition herein would ordinarily constitute a derivative action and conceded that he never sought for leave to institute the same as such. The 2<sup>nd</sup> Petitioner contend that the omission should, however not render the entire suit null and void. That Section 239 of the Companies Act imply that where a derivative claim has already been instituted, the same may be allowed to proceed with the permission of the Court subject to the party making the relevant application for leave. Reliance was also placed on Sections 240 and 241 of the Act.
7. It is now settled that jurisdiction is everything. Without jurisdiction, a court must down its tools. This principle was famously enunciated in the landmark decision of the Court of Appeal in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.



8. The Supreme Court in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR reaffirmed this position, stating that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law.”

9. The Applicant argues that this Court is clothed with jurisdiction pursuant to Sections 240 and 241 of the Companies Act, No. 17 of 2015. These provisions grant the High Court jurisdiction to grant leave to a party to continue with a derivative action.
10. In the petition the 2<sup>nd</sup> Petitioner stated that he was bringing the suit in his capacity as the director of the 7<sup>th</sup> Respondent. A derivative action is a legal action brought by a shareholder (or a member) of a company on behalf of the company itself, against the company’s directors, officers, or third parties. The action is brought when the company has been wronged but has failed or refused to take legal action to remedy the wrong. The purpose of a derivative suit is to protect the company’s legal interest.
11. A derivative action is often seen as a way to enforce corporate governance, ensure accountability among directors, and safeguard shareholders’ investments when those in charge of the company are not acting in its best interest.
12. In Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another [2017] eKLR, the court explained:

“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 the corporation: see *Wallersteiner v Moir* (No.2) [1975] 1 All ER 849. 38.

Until 2015, the common law guided derivative actions in Kenya.

With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in *Foss v Harbottle* was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance”.

13. Section 238(1) of the Companies Act provides that a derivative suit is a proceeding initiated by a member of a company in respect of a cause of action vested in the company, with the objective of seeking relief on behalf of the company.
14. The 2<sup>nd</sup> Petitioner has impliedly filed the petition herein to protect the 7<sup>th</sup> Respondent. This means that the instant petition is a derivative suit in disguise and as such, I am in agreement with the Applicants that the 2<sup>nd</sup> Petitioner ought to have sought leave as provided for by section 239 of the Companies Act.
15. A party must seek leave and permission of the court to commence or continue with such a suit. This position was reiterated by the Court of Appeal in *Amin Akberali Manji, Hemanth Kumar & another*



v Altaf Abdulrasul Dadani & Musikland Limited (Under Receivership) [2015] KECA 356 (KLR) as follows:

“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.”

16. Before allowing an application for leave to continue with a derivative suit, the Court must first establish that a prima facie case exists regarding the cause of action, as outlined under Section 238(1) of the Companies Act. This means that the shareholder must present a clear, credible claim that the company has been harmed due to the wrongful conduct of directors, officers, or third parties, and that the company's interests are at stake.
17. The 2<sup>nd</sup> Petitioner/Respondent has not controverted or denied that he did not seek leave to commence, and indeed has not sought leave to continue with the petition herein. This leads to a finding against him that there are no prima facie issues worth further court consideration.
18. Consequently, I find the application dated 1<sup>st</sup> March 2023 has merit and is allowed to the extent that the petition dated 30<sup>th</sup> November 2022 is struck out for want of leave to commence and/or continue the same as a derivative action. The Respondents/Applicants are awarded costs of the application.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Rukwaro h/b for Mr. Kimani for Petitioner

Mr. Njoroge & Ms. Nzilani for Respondents

Court Assistant: Carlos

