

COURT AFFIRMS REQUIREMENT FOR LEAVE IN DERIVATIVE CLAIMS

Are you aware that as a shareholder, you cannot bring a claim on behalf of a company without first obtaining the court's permission? This crucial principle was reaffirmed in the recent High Court decision in *Simon Njoroge Ndungu vs. Stanley Livondo & David Kiguongo Kanja & 2 Others*, where the court struck out an application improperly filed without leave as required for a derivative claim.

We are pleased to have represented the company that filed the application through the firm of G.K. Muturi, with counsels **Gideon K. Muturi** assisted by **Anita Nyaga**.

BACKGROUND

The Applicant sought to be reinstated as a director and shareholder of the company, alleging that his removal was part of a scheme to defraud the company's suppliers, consultants, and workers. The Respondents argued that the Applicant had not sought leave to continue the suit as a derivative claim despite the fact that the grievances raised concerned wrongs to the company rather than personal claims. The court agreed, finding that the claim was effectively a derivative suit and could not proceed without prior leave.

KEY LEGAL TAKEAWAYS

1. Derivative Claims Require Leave - The Companies Act, 2015, under Sections 238 and 239, mandates that a shareholder must obtain court approval before pursuing a derivative claim on behalf of a company.
2. Foss v. Harbottle Principle - A company is the proper plaintiff in an action concerning its losses, and shareholders cannot bypass this rule unless they meet the statutory requirements for derivative actions.
3. Case Precedents - The Court of Appeal in *Amin Akberali Manji & Another v. Altaf Abdulrasul Dadani & Musikland Limited (Under Receivership)* emphasized that leave must be sought at any stage before proceeding with a derivative suit.



4. Striking Out for Want of Leave- Failure to obtain leave renders the suit defective, and courts will not hesitate to strike out such applications, as seen in *Ghelani Metals Limited & Others v. Elesh Ghelani Natwarlal & Registrar of Companies*.

CONCLUSION

The ruling in *Simon Njoroge Ndungu's* case underscores the importance of adhering to procedural requirements when bringing derivative claims. Shareholders seeking to protect the interests of a company must first establish a prima facie case and obtain the court's permission. Failure to do so will lead to dismissal, as procedural compliance is a fundamental requirement under corporate litigation principles. For further inquiries or assistance in structuring corporate claims, reach out to our team of experts for guidance on compliance with the Companies Act and best practices in shareholder / director's litigation.

NOTICE: *The content of this alert is intended to be of general use only and should not be relied upon without seeking specific legal advice on any matter.*