



**Maalim & 2 others v Business Registration Services; Ragus & 3 others
(Interested Parties) (Miscellaneous Civil Application E011 of 2024)
[2024] KEHC 9532 (KLR) (Judicial Review) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS CIVIL APPLICATION E011 OF 2024**

JM CHIGITI, J

JULY 30, 2024

BETWEEN

MOHAMED DAHIR MAALIM 1ST APPLICANT

MARIAM ALI SAMATAR 2ND APPLICANT

AFPEIC LIMITED 3RD APPLICANT

AND

BUSINESS REGISTRATION SERVICES RESPONDENT

AND

ANTE RAGUS INTERESTED PARTY

MOHAMED ELTAF INTERESTED PARTY

ANTHONY KEGODE INTERESTED PARTY

JONCO COMPANY LIMITED INTERESTED PARTY

RULING

Brief Background

1. The 1st, 2nd and 3rd Applicants have instituted the present suit through Chamber Summons dated 7th February 2024 accompanied by a statutory statement and a verifying affidavit by Mohamed Dahir Maalim on the same date in which they are praying for:
 - i. “spent”



- ii. An order that the honourable court be pleased to grant leave to the *Ex-parte* application to apply for an order of *certiorari* to bring the Court and quash the decision by the Respondent rectifying the entries made to the register by virtue of filing dated 15th August, 2017 consequently reverting to the position as at incorporation as follows:
 - a. Ante Raguz-Director Shareholder with 49 shares
 - b. Mohamed Eltaf-Director/Shareholder with 18 shares
 - c. Anthony Kagode with 33 shares
 - iii. An order that this honourable court be pleased to grant leave to the *Ex-parte* Applicant to apply for an order of *Mandamus* compelling the Respondent to reinstate the 1st, 2nd and 3rd *Ex-parte* Applicants as the Directors of the 4th Interested Party (company)
 - iv. An order for the Honourable Court to grant leave to the *Ex-parte* Applicant to apply for an order of *Mandamus* compelling the Respondent to substantively hear the *ex-parte* applicants on their claim of directorship over the 4th Interested Party formerly known as Avia Company Limited.
 - v. An order for the Honourable Court to grant leave to the *Ex-parte* Applicant to apply for an order of prohibition to the Respondent from proceeding with and/or implementing a change of name.
 - vi. An order for that the leave sought does operate as a stay against the Respondent from effecting from effecting and/or implementing any changes to the 4th Interested Party pending the hearing and determination of the substantive application for Judicial Review.
 - vii. Costs of the suit and Interests.
2. The application is vehemently opposed by the respondents through a notice of preliminary objection dated 3rd March 2024.
 3. This ruling is in relation to the said objection challenging the application dated 14th February 2024 on the following grounds;
 - i. That this Honourable Court does not have the jurisdiction to hear and determine this Application.
 - ii. That Section 3 of the *Companies Act* contemplates that it is only The High Court that has jurisdiction to preside over matters relating to company law as is the case herein
 - iii. That this application does meet the threshold required to grant sought orders.
 - iv. That this application is frivolous, lacks merit and an abuse of court process.
 4. Reliance is placed in the case of *Mukisa Biscuit Manufacturing Co. Limited v. West End Distributors Limited* [1969] EA 696, Newbold, V.P, observed as follows;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does



nothing but unnecessarily increase cost and, on occasion, confuse issues. This improper practice should stop."

5. Reliance is placed in the case of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR1 in the first advisory opinion rendered by the Court in in the Matter of the Interim Independent Electoral Commission where the Court stated:

"Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S'v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

The *Lillian 'S'* case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."

6. The High Court sitting in Kiambu had an opportunity to render a decision in *Republic v Resident* held as follows....

"

"27. It is common among all the parties that only the High Court has jurisdiction to hear and determine any disputes touching on company law matters by virtue of section 3 of the *Companies Act*, 2015. That position is so self-evident that no further analysis and comment is required."

"Section 3 of the *Companies Act*,2015 read together with practice directions issued by the Chief Justice on the 18th November 1997 vests all company matters be heard by the Commercial Division of the High Court.

7. From the facts of the case and the provisions of section 3 of The *Act*, it is our take that in the present circumstances as far as the dispute is concerned the only court contemplated under the *Companies Act* is the Commercial Division of High the Court. It is their case therefore, that this honourable court has no jurisdiction to preside over such matters.
8. To grant leave would cause the Judicial Review court to embark upon an examination and appraisal of the evidence on the regime of registration of companies which is not the function of the judicial review court.
9. The registrar as the custodian and regulator of companies registered under the *Companies Act* has already entertained doubts owing to the membership and shareholding of the interested party as presented.
10. In those circumstances, the best course would be to file a suit at the commercial & admiralty division of the high court where parties would have an opportunity to present their contested facts to the court.



11. The court would then authoritatively pronounce itself on the merits of the membership and shareholding of the company.

Replying Affidavit To The Preliminary Objection Dated 3Rd March, 2024

12. Lilly Umazi an advocate of the High Court of Kenya, swore an affidavit wherein she responded to the Notice of Preliminary objection.
13. It is her case that contrary to the assertions by the Respondent and as can be deduced from the Exparte Applicant's Chamber Summons Application dated 7th February, 2024, the grounds therein speak to the principle of procedural fairness among other considerations under Article 47 and not the decision in itself, of the Registrar of Companies.
14. She further argues that the ex-parte Applicants maintain that they were not afforded an opportunity to present their explanation or rebuttal to the complaint lodged.
15. It is the applicant's case that Article 47 and the *Fair Administrative Actions Act* establish standards of review such as proportionality, efficiency, procedural fairness, and the duty to give reasons.
16. Counsel in drawing a distinction between the suit herein and that adjudicated upon in *Republic v Registrar of Companies & 2 others Exparte waterfronts outlets limited 2023 KLR JR E059 of 2022*; the 5th case quoted by the Respondent in its submissions dated 3rd March, 2024, the court in the said case, highlighted the grounds upon which the prerogative orders were sought, noting that the said grounds warrant a merit review. The court in its Ruling noted the following: -

“In summary, the applicants case was that a cursory look at the copies of registration documents with the registrar of companies uncovered the revelation that a great fraud had been perpetrated against the applicant wherein the memorandum and articles of association held by the registry's file had been fraudulently substituted. That the effect of the fraudulent substitution introduced and added one Christopher Onuonga Oanda to the company as a shareholder holding 10 shares. Further, that the applicant came to learn of another company appearing on the e-citizen portal under the same name, Waterfront Outlets Limited, associated with Christopher Onuonga Oanda.

That on April 7, 2022, the applicant wrote to the registrar of companies detailing the disclosed fraud and seeking the assistance of the registrar to ensure the rectification of the record and that on May 6, 2022, the registrar of companies replied to the applicant wherein the impugned decision calling for the ex parte applicant to change its name was communicated to them [applicant]. It is urged that the Registrar of Companies letter dated May 6, 2022 is correspondence in furtherance of the averred fraud and a covert attempt to throw the applicant off the trail of the evident collusion between the 1st respondent and the interested party” (Emphasis mine)

Further, it flows from the facts of the case that the application naturally invites the court to venture into a merit review of the decision of the registrar of companies. The exercise would of necessity involve an analysis of whether the registrar complied with the provisions of the *Companies Act*. (Emphasis mine)

17. According to the applicants through counsel, the Preliminary Objection therefore is ripe for dismissal with costs since as rightly conceded by counsel for the Respondent, the Judicial Review Division is a court with the status of the High Court.



Analysis And Determination;

18. Flowing from the notice of preliminary objection, and the rival Submissions by counsel, the issue that presents and crystallizes for determination is whether this court has jurisdiction or not.
19. In *Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others*, Application No. 2 of 2011 [2012] eKLR, the Supreme Court pronounced itself on jurisdiction thus [paragraph 68]:

“

“(68) 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. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondent's in his submission that the issue as to whether a Court of law has jurisdiction to entertain a Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.” (Emphasis provided).

20. This court has from a cursory look at the reliefs sought identified that the Applicants are asking this court into a merit analysis and determination of *inter alia*;

The rectification the entries made to the register by virtue of filing dated 15th August,2017 consequently reverting to the position as at incorporation as follows:

- a. Ante Raguz-Director Shareholder with 49 shares
- b. Mohamed Eltaf-Director/Shareholder with 18 shares
- c. Anthony Kagode with 33 shares, an order compelling the Respondent to reinstate the 1st, 2nd and 3d Exparte Applicants as the Directors of the 4th Interested Party(company), a claim of directorship over the 4th Interested Party formerly known as Avia Company Limited, The implementation of a change of name.

Section 3 of the *Companies Act*,2015 read together with practice directions issued by the Chief Justice on the 18th November 1997 vests all company matters be heard by the Commercial Division of the High Court.

21. Any matter dispute touching on a company incorporated under the *Companies Act* can only be filed at the High Court with exceptions as enumerated in sections 215(2)(a), (3),815(1), (2), (4) & 1001(1)(2)(4) of The *Companies Act*.



22. From the facts and the nature of the redress the applicants are pursuing it is clear that The Commercial Division of High the Court and not this division of the High Court has the jurisdiction to hear and determine this suit.

Disposition;

23. This matter is at a very nascent stage and it would be not proper for this court to delve into the hearing and determination of whether or not the applicant is entitled to the orders sought.

24. To do so will amount to contradicting this court's finding that it lacks jurisdiction and I so hold.

Order:

1. The notice of preliminary objection dated 3rd March 2024 upheld.
2. This file shall be transferred to the commercial division of the high court for hearing and determination.
3. Costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY, 2024.

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J. CHIGITI (SC)

JUDGE

