



**Tinga Traders Limited & 2 others v Business Registration Services &
2 others (Judicial Review Miscellaneous Application E107 of 2023)
[2024] KEHC 15065 (KLR) (Judicial Review) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E107 OF 2023
JM CHIGITI, J
NOVEMBER 29, 2024**

BETWEEN

**TINGA TRADERS LIMITED 1ST APPLICANT
RICHARD OMWENGA GICHANA 2ND APPLICANT
BENSON OMWENGA MOSOTI 3RD APPLICANT**

AND

**THE BUSINESS REGISTRATION SERVICES 1ST RESPONDENT
THE REGISTRAR COMPANIES 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. This is a ruling to the Respondents' Notice of Preliminary Objection dated 27th November, 2023.

Background;

2. The Applicants herein commenced these proceedings by way of Chamber Summons Application dated 6th October, 2023 seeking, inter alia, leave to institute Judicial Review proceedings. Leave having been granted, the Applicants filed the substantive Judicial Review application vide the Notice of Motion Application dated 18th October, 2023.
3. In their motion, the Applicants seek, inter alia: -
 - a. An order of certiorari removing from the High Court for purposes of being quashed and/or quashing the 1st and/or 2nd Respondents' decision dated 19th April, 2023 purporting to link,



update and/or change the beneficial ownership of the 1st Applicant Company Registration No. C.9578 (“the impugned decision”)

- b. An order of prohibition precluding and/or preventing the Respondents and/or any of their respective officers, servants, agents, and/or employees from making available the company on e-citizen and/or any other platform including physical access of records to the public, making any recommendations and/or taking any steps, actions, alterations and/or changes to the 1st Applicant company’s records prior to the said impugned decision dated 19th April, 2023 pending the 1st Applicant putting its affairs in order.
 - c. An order of Mandamus compelling and/or directing the 1st Respondent to archive and/or make unavailable to the public the records of the 1st Applicant pending the said 1st Applicant putting its affairs in order.
4. The Respondents have jointly filed a Notice of Preliminary Objection dated 27th November, 2023 wherein they contend that this court lacks the jurisdiction to preside over this matter. They state that Section 3 of the Companies Act as read together with the practice notes issued on 18th November, 1997 by the Chief Justice vests the Commercial and Tax Division of the High Court with such jurisdiction.

The Respondents’ case;

5. It is the Respondent’s case that this Honorable Court has no jurisdiction to handle this suit.
6. Towards propelling this argument, the Respondents took out a Notice of Preliminary Objection dated 27th November 2023 predicated on One (1) ground for determination in limine as to why this Honorable Court does not have jurisdiction to entertain the application.
7. The Respondents posit that what is before this court is a matter revolving around the Companies Act No 17 of 2015 (herein after referred to as the act) as read together with practice directions issued by the Chief Justice on the 18th November, 1997 (herein after referred to as the directions).
8. It is the Respondents’ case that the applicants are seeking orders to quash the decision of the Registrar to link the company and update the beneficial ownership information.
9. It is its case that the Applicant is seeking to challenge the directive of the Registrar which was done in accordance with the provisions of The Act.
10. Reliance is placed in the case of *Mukisa Biscuit Manufacturing Co. Limited vs. 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.”
11. The Respondent invokes Section 3 of the “Act” which states;

“ the Court” means (unless some other court is specified) the High Court”



12. The practice directions dated 18th November, 1997 and which are reproduced hereunder provide as follows;

“The following matters shall be deemed to be Commercial matters, suitable for trial by the Commercial Division of the High Court situated in New Milimani Commercial Courts, Upper Hill Nairobi.

- i. All proceedings in which an injunction is sought to restrain the realization of securities whether debentures or charges.
- ii. All company matters and applications including winding-up, excluding cases in which a Company is suing or being sued as an entity.

13. The Respondents also rely in the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others, Application No.2 of 2011[2012] eKLR, wherein the Supreme Court pronounced itself on jurisdiction thus:

“(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 respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission(Applicant), Constitutional Application Number 2of 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).

14. The Respondent submits that this court's jurisdiction is limited by statute and therefore it has no jurisdiction whatsoever to proceed with the matter.

15. The supreme Court in an extensive analysis of the issue of its own jurisdiction quoted with approval the of the cited case of Owners of Motor Vessel "Lillian S' v Caltex Oil (Kenya)Limited [1989] KLR in the first advisory opinion rendered by the Court in in Re the Matter of the Interim Independent Electoral Commission where the Court stated: -

“(29) 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." (underlining supplied)

[30] 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 endeavours 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*."

16. The Jurisdiction of the court is set out in the *companies Act* and further clarified by the practice directions of 1997 which emphasizes that the Commercial division should be the best forum in the first instance to preside over the complaints against the Registrar of Companies arising from the duties performed in exercise of his duties.

17. In Republic v Attorney General & 2 others *Ex-parte Xplico Insurance Company Limited [2014] eKLR JR Case 261 of 2014* (Ruling No 2 delivered on 4th day of September, 2014 while dismissing a similar matter made a finding;

"It is apparent that the core issue herein is a vicious fight for the heart and soul of Xplico Insurance Company Limited. I do not know what the company will look like at the end of the looming battle but I think that judicial review being limited in its reach may not be the appropriate tool for resolving such a dispute. However, it is upon the parties to decide on the most appropriate course of action."

18. The Respondents acknowledge that the judicial review division is a court with the status of the High Court. However, from the facts of the case and the provisions of section 3 of the Act as read together with the practice directions, the respondents considered view that the complaints raised by the applicants herein would be best solved at the Commercial Division of the High Court.

19. The Respondents submit that the matters raised in the application are matters that substantively require a merit review a function which the judicial review court cannot embark on as judicial review largely concerns itself with the decision making process.

20. In Republic v Registrar of Companies & 2 others *Ex-parte Waterfront Outlets Limited 2023 KLR JR E059 of 2022* the Learned Judge A.K Ndung'u stated;

"(19) Suffice to note that even with the expanded scope of judicial review under the new constitutional dispensation, judicial review still remains a special jurisdiction that is majorly restricted to examination of whether an administrative decision conforms to the requirements of legality, rationality and procedural propriety. It is opportune to add that the judicial review process cannot be a substitute to statutorily provided for jurisdiction of other courts or bodies and the judicial review court cannot and should not assume jurisdiction where statute clearly places jurisdiction at the door of another court or body



(22) 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*. The judicial review court, as earlier noted, is restricted in so far as merit review is concerned and the court with the necessary wherewithal under the Act and the Hon Chief Justice's practice directions is the commercial division of the High Court."

21. The Respondents submit that the High Court Commercial Division is the right forum to hear matters relating to companies.

The Exparte Applicants case;

22. According to the Applicants, a perusal of the *Companies Act*, 2015, and specifically Section 3 therein, does not state the Commercial Division but the High Court.

23. They argue that This Honourable Court ranks as a division of the High Court duly recognized as such by the Practice directions of 8th December, 2015 by the Chief Justice.

24. It is their application that contrary to the Respondents' belief, that practice directions have no statutory authority. They do not form part of statute but are made to introduce important procedural innovations for the dispensation of justice. For this reason, the said Preliminary Objection should automatically fail.

25. The Applicants are of the strong persuasion that this Honourable Court has the requisite jurisdiction to hear and determine this matter.

26. The substantive judicial review motion invites the Honourable Court to query the procedure followed in arriving at the impugned decision of 19th April, 2023. Vide the letter dated 29th May, 2023, the 1st Respondent rightfully pointed out the inconsistencies and even proposed a way forward.

27. The process leading to the impugned decision of 19th April, 2023 can only be interrogated vide Judicial Review proceedings wherein the Applicants can assert their right to fair administrative action.

28. The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected both in civil or criminal proceedings and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question.

29. Reliance is placed in the case of Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made but the decision making process itself.

30. They also rely on the findings by the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while Article 47 of *the Constitution* of Kenya as read together with the grounds for review provided by Section 7 of the *Fair Administrative Action Act* reveal an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator. The Court can only remit the matter to the administrator and/or make orders as stipulated in Section 11 of the Act.

31. In this instance, the process leading to the decision is the bone of contention.



32. They believe that the Preliminary Objection is an effort by the Respondents to condemn the Applicants unheard and invite the court to heed the warning issued as long ago as 1969 when Sir John Newbold, the then President of the Court of Appeal of East Africa stated at page 701 in the case of Mukisa Biscuit Manufacturing Co. Ltd Dvs- West End Distributors Ltd [1969] E. A. 696, that;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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 costs and, on occasion, confuse the issues. This improper practice should stop”.

Analysis and determination;

33. Upon perusing the pleadings and the rival submissions of parties alongside the authorities cited, this court finds the following to be the issues for determination:

1. Whether or not this court has Jurisdiction to hear and determine this suit.
2. Whether or not the interest party/Applicant is entitled to the orders sought.
3. Who should be the costs.

The 1st issue: Whether or not this court has Jurisdiction to hear and determine this suit.

34. The Law on preliminary objection is well settled in the case of Mukisa Biscuit Manufacturing Co. Limited vs. 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.”

35. The Respondents’ Preliminary Objection goes to the jurisdiction of this court.

36. In the case of 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:

“(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 Jurisdiction to entertain a matter before it, is not one of mere procedural Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, Commission (Applicant), Constitutional Application Number 2 of 2011. Where they cannot expand its jurisdiction must operate within the constitutional limits. It confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, court or



tribunal by statute law." (Emphasis provided) where it quoted with approval the oft cited case of Owners of Motor Vessel 'Lillian S' v Caltex In Re The Matter of the Interim Independent Electoral Commission where the Court stated:-

"[29] 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."(underlining supplied)

[30] 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 endeavours 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*."

37. In the instant suit The Applicants herein have filed this application principally seeking orders against the office of The Registrar of Companies.
38. Section 11(1) of the *High Court (Organization and Administration) Act* provides that for purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions—
 - a) the Family and Children Division;
 - b) the Commercial Division;
 - c) the Admiralty Division;
 - d) the Civil Division;
 - e) the Criminal Division;
 - f) the Constitutional and Human Rights Division;
 - g) the Judicial Review Division; and
 - h) any other division as the Chief Justice may, on the advice of the Principal Judge determine.
39. This court lacks jurisdiction to preside over the matter since the matter revolves around the provisions of The *Companies Act* No 17 of 2015 (herein after referred to as the act) and the practice directions issued by the Chief Justice on the 18th November, 1997 (herein after referred to as the directions).



40. Section 3 of the act defines court as "the Court" means (unless some other court is reproduced hereunder provide as follows;

“The following matters shall be deemed to be Commercial matters, suitable for trial Courts, Upper Hill Nairobi.

1

2. All company matters and applications including winding-up, excluding cases in which a Company is suing or being sued as an entity.

41. The Exparte Applicants argument that the objection by the Respondents is basically premised on practice notes that were published in the year 1997 as an administrative action which cannot supersede the provision of article 165 of *the constitution* which bequeaths this Honourable Court with the jurisdiction to hear such matters as is before this court is misplaced.

42. Given that The *Companies Act* came force in 2015 gave the High Court the jurisdiction to deal with Companies disputes under Section 3 of the Act. Section 11(1) of the *High Court (Organization and Administration) Act* set up the various Divisions of the High Court.

43. These pieces of legislation which came into force Post the 2010 Constitution did not do away with the practice directions.

44. In so finding, I am further guided by the finding in Republic v Registrar of Companies & 5 others Ex-Parte Midlands Company Limited [2019] eKLR the court while faced with a similar matter and in dismissing the application held that;

“38. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review.”

Disposition;

45. This court lacks jurisdiction to hear this suit

Order:

1. The Notice of Preliminary objection dated 20th August 2024 is upheld.

2. This suit is hereby transferred to the High Court Commercial and Tax Division.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2024.

J. M. CHIGITI (SC)

JUDGE

