



REPUBLIC OF KENYA



KENYA LAW
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**Ouma v Speed Capital Ltd & 7 others; Registrar Of Companies
(Interested Party) (Miscellaneous Civil Application E701 of 2022)
[2023] KEHC 24579 (KLR) (Commercial and Tax) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 24579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E701 OF 2022
MN MWANGI, J
APRIL 25, 2023
IN THE MATTER OF: COMPANIES ACT, CAP 486 LAWS OF KENYA,
-AND-
IN THE MATTER OF: RECTIFICATION OF THE COMPANY
REGISTER (SPEED CAPITAL
LTD-CPR/20009/11168)**

BETWEEN

JAMES OWINO OUMA APPLICANT

AND

SPEED CAPITAL LTD 1ST RESPONDENT

DANIEL GITHUA MWANGI 2ND RESPONDENT

SOLOMON MUHUTHU WAITHAKA 3RD RESPONDENT

DAVID WAKABA WAWERU 4TH RESPONDENT

JESSE KAMAU MWANGI 5TH RESPONDENT

GILBERT KIBICHO 6TH RESPONDENT

PETER MUCHINA GICHUHI 7TH RESPONDENT

BENSON KARIUKI IRETI 8TH RESPONDENT

AND

REGISTRAR OF COMPANIES INTERESTED PARTY



RULING

1. This ruling relates to a Notice of Preliminary Objection filed pursuant to an Originating Notice of Motion (sic) dated 28th September, 2022 by the applicant herein. The said application is premised on the provisions of Sections 118, 138 and 185 of the Companies Act, Cap 486 (repealed) Laws of Kenya and Companies General Regulations, 2015. The applicant seeks the following orders –
 - i. Spent;
 - ii. That the respondents be hereby ordered to file the necessary company resolutions and returns removing the name of the applicant as a shareholder/member and director of the 1st respondent company effective 23/12/17 within fourteen days of such order;
 - iii. That an order and declaration be hereby made that the applicant ceased to be a shareholder/member and director of the 1st respondent company from 23/12/7 and is not liable for any acts of the company and its directors from the above date;
 - iv. That in default of compliance with order 2 above, this Honourable Court do and hereby issue an order for the Company Register of Speed Capital Ltd (No. CRP/2009/98) to be rectified and the name of the applicant James Owino Ouma be hereby removed from the company register as a shareholder and director of the company with effect from 23/12/17 and such order be effected by the interested party (Registrar of Companies) forthwith;
 - v. That the applicant be and is hereby declared not liable and/or responsible for any acts of the respondents or liabilities of the company from the date he ceased being a director and shareholder of the 1st respondent company on 23/12/17;
 - vi. That the respondents to pay the costs of this suit and any fines, penalties or liabilities which have be imposed by the Court and the Registrar of Companies for failure to comply with the provisions of Section 138 of the Companies Act or any other provisions of the law; and
 - vii. That the Court do hereby grant such further or other orders that it deems just and expedient in the unique circumstances of this case.
2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on 28th September, 2022 by James Owino Ouma, the applicant herein.
3. In opposition thereto, on 17th October, 2022, the respondents filed a Notice of Preliminary Objection of the same date raising the following grounds -
 - i. That the entire suit offends the provisions of the Companies Act, 2015;
 - ii. That the suit grossly offends the provisions of Cap 23 Laws of Kenya and is a non-starter;
 - iii. That the suit is fundamentally and incurably defective; and
 - iv. The applicant has no locus standi.
4. On 18th October, 2022, this Court gave directions for the Preliminary Objection to be heard first and for written submissions to be filed. The respondents' submissions were filed on 8th March, 2023 by the law firm of Kinyanjui, Kirimi & Company Advocates, whereas the applicant's submissions were filed by the law firm of T.O K'opere & Company Advocates on 20th March, 2023.



5. Mr. Kirimi, learned Counsel for the respondents relied on the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 and submitted that the instant Preliminary Objection is solely founded on clear points of law and that there is no factual evidence needs to be adduced or inferred from.
6. On whether the applicant has locus standi to bring the suit herein, Mr. Kirimi referred to Section 238 of the *Companies Act*, No. 15 of 2015 which defines a derivative claim and stated that the applicant is a shareholder and director of the 1st respondent where he holds 200 shares as can be seen from the company's CR12, but he has filed the instant application without first seeking leave of the Court to file a derivative suit.
7. He further stated that a perusal of the said CR12 reveals that the applicant is the majority shareholder in the 1st respondent whereas all the other directors/shareholders have equal or less shares in the company. He cited the case of Sultan Hasham Lalji and 2 others v Ahmed Hasham Lalji and 4 others [2014] eKLR, and asserted that the law under the *Companies Act* prohibits shareholders/directors from bringing derivative actions in situations where they are the majority shareholders, since they are mandated with the power to effect changes for the company. Mr. Kirimi relied on the case of Altaf Abdulrasul Dadani v Amini Akberazi & 3 others, [2004] 1 KLR 95 and submitted that the suit herein cannot stand for reasons that it has been filed by a majority shareholder and director of the 1st respondent company, claiming personal reliefs against it and the other members, directors and shareholders,
8. Counsel for the respondents submitted that companies transact business through resolutions passed either at the meetings of the board of directors, or of shareholders at annual or special general meetings as was laid down by the Court in the case of Salomon v Salomon Co. Ltd [1895-99] All ER 33 and Foss v Harbottle (1843) 2 Hare 461. He further relied on the case of Mahesh Meghji Shah v Jewel Holdings Limited & 2 others [2017] eKLR and contended that the proper plaintiff in a case of this nature, where a wrong is alleged against the directors of the 1st respondent, ought to have been by the company.
9. Mr. Kirimi relied on the provisions of Order 37 Rule 1 of the Civil Procedure Rules, 2010, and the case of Davis Gatobu M'Ndegwa v Divisional Criminal Investigations Officer (DCIO) Kiambu & 2 others [2022] eKLR and stated that in the application dated 28th September, 2022, the applicant is seeking declaratory and final orders in an interlocutory application, since there are no substantive pleadings that lay a foundation to the said application. He further stated that the said application is fatally unacceptable.
10. On whether there is evidence of any executed contract, Counsel relied on the provisions of Section 107 of the *Evidence Act* and stated that in as much as the applicant's case is that he ceased being a director and shareholder of the 1st respondent on 23rd December, 2017 by selling his shares through a resolution, he has failed to give evidence of a meeting and such a transaction by way of an executed sale agreement or signed resolution showing he sold his shares. He cited Section 3(2) of the *Law of Contract Act* and submitted that since the applicant's claim is purely based on a contract of sale of shares, such a contract cannot be oral.
11. He also submitted that the application herein has been brought under various sections of the *Companies Act* which are not applicable to the circumstances of this case, such as Section 118 which deals with rights of nominated members of a company but the applicant is not a nominated member. He stated that other provisions are Section 138 which provides for the duty of a company to notify the Registrar of changes of directors and directors' addresses but in this case, there is no resolution to change directors or sell any shares to the applicant. Mr. Kirimi pointed out that Section 139 on the



- other hand provides for resolutions to remove directors from office but there was no such resolution. He stated that Section 185 of the *Companies Act* provides for exceptions for payments in discharge of legal obligations and that the applicant has cited the said Section to try and deceive this Court that he should be exempted from the liabilities of the company which he oversaw.
12. It was submitted Mr. Kirimi that the applicant has cited the Registrar of Companies as an interested party herein since he wants this Court to compel him to perform specific tasks that he has neglected/ refused to perform. He contended that in order for the applicant to succeed in such an application, he ought to have instituted Judicial Review proceedings against the Registrar for an order of mandamus as provided for under Article 159 of *the Constitution* of Kenya, 2010 and under the *Law Reform Act*. He relied on the case of Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 others Civil Appeal No 234 of 1996, where the Court of Appeal cited Halsbury's Law of England, 4th Edition. Vol. 7 at p. 111 para 89 with approval, as quoted in Republic v County Secretary, Narok County Government & another Ex parte SEC & M Company Limited [2022] eKLR. The respondents' Counsel asserted that in view of the foregoing, the instant application is not only defective but also a nonstarter.
 13. Mr. K'opere, learned Counsel for the applicant cited the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (supra) and the case of Oraro v Mbaja [2005] 1KLR 141 in opposition to the Notice of Preliminary Objection. He submitted that the suit herein is not a derivative suit as provided for under Section 238 of the *Companies Act* but is an application for rectification of the Company Register to remove the applicant as a member of the 1st respondent, since he left the company through a sale of shares to the 2nd respondent pursuant to a resolution made by the company, and a share purchase and transfer agreement prepared by the company's Advocates which they failed to register.
 14. The applicant's Counsel contended that Section 118 of the *Companies Act*, Cap 486 (repealed) Laws of Kenya cloths this Court with the requisite jurisdiction, to rectify the register of a company in regard to its members once an application is made by a party. He stated that a member of a company limited by shares is a shareholder and that the applicant herein was both a director and a shareholder of the 1st respondent company. He further stated that through a resolution by the company made on 10th November, 2017 and sale of his shares to the 2nd respondent on 23rd December, 2017, he ceased to be a shareholder and director of the 1st respondent company.
 15. In making reference to the case of Oraro v Mbaja (supra), where the Court held that rectification is a remedy whereby a Court orders a change in a written document, to reflect what it ought to have said in the first place and as such, when the Court entertains such an application, it is bound to go into all the circumstances of the case and to consider what equity the applicant has to call for its interposition and the purpose for which the relief is sought.
 16. On the issue of locus standi, Mr. K'opere referred to the case of Obsidition Investments Limited v Attorney General & another [2015] eKLR and stated that the applicant has the requisite locus standi to bring the instant application as a person aggrieved under Section 118 of the *Companies Act*, for he has exhibited the extract of the company resolution dated 10th November, 2017 and the share purchase agreement dated 23rd December, 2017. Counsel asserted that all the documents relating to the said company resolutions, transfer of shares and agreements are in the custody of the 1st and 2nd respondents and the company's Advocates M/s Kinyanjui, Kirimi & Company Advocates.
 17. Mr. K'opere submitted that the Registrar of Companies was merely joined to these proceedings for purposes of effecting the Court orders and not as a substantive party. In addition, he stated that this is a proper case in which the Court has power to grant the remedies sought and to safeguard the rights and interests of the applicant. It was his submission that the Preliminary Objection herein does not meet the



threshold of a Preliminary Objection as was laid down by the Court in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (supra).

Analysis And Determination.

18. I have considered the application herein, the grounds raised in the Preliminary Objection by the respondents and the written submissions by Counsel for the parties. I am of the considered view that the issue that arises for determination is if the Preliminary Objection herein should be sustained.
19. The Court in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (supra) considered what constitutes a Preliminary Objection and held that –

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the said case, Sir Charles Newbold P., stated as follows-

“..... the first matter related 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 issues. This improper practice should stop.” (emphasis added).

20. In order for a Preliminary Objection to succeed the following tests have to be satisfied; it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
21. On perusal of the Preliminary Objection, it is evident that the respondents are challenging the application dated 28th September, 2022 on grounds that the applicant has no locus standi to institute the suit and/or application herein. That he is seeking final orders in an interlocutory application and that he is seeking judicial review orders. The respondents also contended that the suit as filed offends the provisions of the *Companies Act*, 2015 and the *Law of Contract Act*, Cap 23 Laws of Kenya. To this end, I agree with Counsel for the applicant that the Preliminary Objection is vague to some extent since it does not specify which sections of the *Companies Act*, 2015 and the *Law of Contract Act* the application herein offends. As such, in order for this Court to determine whether or not the said contention has any basis, it will have to determine the application dated 28th September, 2022 on its merits. The Preliminary Objection fails on that ground.
22. On the issue of locus standi, the respondents submitted that the applicant did not seek leave of the Court as provided for under Section 238 of the *Companies Act* before he filed the instant application since this is a derivative suit. The applicant on the other hand submitted that the suit herein is not a derivative suit, as it is an application for rectification of the Company Register to remove him as a member of the 1st respondent, since he left the company through a sale of shares to the 2nd respondent, pursuant to a resolution made by the company. He further stated that a share purchase



and transfer agreement was prepared by the company's Advocates but they failed to register the same. The respondents are however disputing the fact that the applicant left the 1st respondent company and that he is no longer a shareholder/director in the said company and that in order for the applicant to sustain a suit of this nature, he ought to have first sought leave of the Court.

23. In view of the foregoing, I am of the considered view that the issue of whether or not the applicant is still a director and shareholder of the 1st respondent company and/or is a person aggrieved under Section 118 of the Companies Act is a matter that calls for rebuttal by factual evidence, through the alleged company resolution(s), share purchase and transfer agreement. Additionally, such facts that call for verification do not constitute grounds of Preliminary Objection and can only be addressed by way of a replying affidavit. It is therefore this Court's finding that these issues call for the hearing and determination of the application dated 28th September, 2022 on merit, mainly because the instant application is premised on the contention that the applicant ceased to be a director and shareholder of the 1st respondent company as at 23rd December, 2017. The Preliminary Objection fails on the said ground.
24. The respondents in their submissions stated that the application herein is not founded on a substantive pleading and the applicant is seeking declaratory and final orders in an interlocutory application, which is unacceptable. It is not disputed that there are no substantive pleadings on record. The matter herein has been instituted as a Miscellaneous Application and by way of an Originating Notice of Motion. Upon perusal of the applicant's submissions, I find that he has not addressed this issue. This Court therefore concludes that the applicant does not dispute the fact that he is seeking final and declaratory orders in the application dated 28th September, 2022.
25. In the application herein, the applicant is not only seeking declaratory and final orders, but he is also seeking an order directing the Registrar of Companies to rectify the Company Register of Speed Capital Ltd (No. CRP/2009/98) by removing his name therefrom as a shareholder and director of the company with effect from 23rd December, 2017. He seems to be seeking an order of mandamus which is ordinarily granted in judicial review proceedings. However, these are not judicial review proceedings.
26. In view of the foregoing, this Court finds that the orders sought herein are substantive in nature which for all intents and purposes cannot be issued through a Miscellaneous Application. Section 19 of the Civil Procedure Act Cap 21 provides as follows-

“Every suit shall be instituted in such manner as may be prescribed by Rules.”
27. Similarly, Order 3 Rule 1 of the Civil Procedure Rules 2010 provides that-

“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”
28. From the above, it is evident that both Section 19 of the Civil Procedure Act and Order 3 of the Civil Procedure Rules use the word “shall”, which makes the filing of a plaint or any other pleadings prescribed a mandatory requirement except otherwise as provided for by the law.
29. In *Proto Energy Limited v Hashi Energy Limited* [2019] eKLR, the Court in upholding a Preliminary Objection in the manner in which proceedings had been instituted held that –

“Order 3 Rule (i) (ii) of the Civil Procedure Rules provides that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an



originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.”

30. The suit herein was instituted by way of a Miscellaneous Application, there is no Complaint, Petition or Originating Summons that has been filed. It is this Court’s finding that the application dated 28th September, 2022 is fatally defective for failure by the applicant to file a substantive suit on which to anchor his application. Ultimately, it is my finding that the Preliminary Objection herein is merited.
31. The upshot is that I uphold the Preliminary Objection dated 17th October, 2022 raised by the respondents. As a result thereof, the application dated 28th September, 2022 is hereby struck out with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF APRIL, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ligala holding brief for Mr. K’opere for the applicant

No appearance for the respondents

Ms. B. Wokabi – Court Assistant.

