



**Directline Assurance Company Limited v AKM Investments Limited & 3 others;  
Insurance Regulatory Authority (Interested Party) (Commercial Case E247 of 2022)  
[2023] KEHC 18659 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18659 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E247 OF 2022**

**DAS MAJANJA, J**

**MAY 26, 2023**

**BETWEEN**

**DIRECTLINE ASSURANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**AKM INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TRIAD NETWORKS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**STENNEY INVESTMENTS PTY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**SUREINVEST COMPANY LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**INSURANCE REGULATORY AUTHORITY ..... INTERESTED PARTY**

**RULING**

1. On September 28, 2022, the court delivered a ruling allowing the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants' applications striking out the suit on the ground that it was an abuse of the court process. The court also directed that Evans Nyagah, the Chief Executive Officer ("the CEO") of the plaintiff to show cause why he should not be ordered to pay costs of the suit personally and on an indemnity basis.
2. Evans Nyagah has sworn an affidavit on February 22, 2023, pursuant to the court's order of September 28, 2022 showing cause. The 1<sup>st</sup> Defendant has responded to Evans Nyagah's affidavit through the replying affidavit of its director, Lisa Anyango Amenity sworn on February 27, 2023. The 2<sup>nd</sup> and 4<sup>th</sup> defendants have also replied to through the affidavit of the 4<sup>th</sup> Defendant's director, Kevin Dermont



- McCourt, sworn on February 23, 2022. The parties have also supplemented their arguments by filing written submissions.
3. Mr Nyagah depones that the filing of this suit was not unilateral or on his accord as Principal Officer and that the same was sanctioned by the plaintiff through its Board of Directors in discharging their statutory obligation for the plaintiff to comply with section 23A of the *Insurance Act*. He adds that pursuant to section 68 of the *Insurance Act*, he was appointed as the agent of the Interested Party and he was obliged to file this suit in exercise of those powers and pursuant to the aforesaid resolution.
  4. Mr Nyagah does not deny that he is conversant with contents of the Complaint and in particular the reliefs sought therein but then contends that the said reliefs have never been sought in any proceedings before this Court or the Arbitration. That the plaintiff is aggrieved by the ruling delivered by this court on September 28, 2022 in its entirety and has sought to prefer an appeal to the Court of Appeal. He reiterates that he did not authorize filing of the suit in his personal capacity but as the CEO of the plaintiff acting on instructions of the Board of Directors and in his capacity as the Principle Officer discharging duties under section 68 of the *Insurance Act* and that amongst his duties, is a requirement for him to ensure that the plaintiff being a regulated entity complies with the provisions of the *Insurance Act*.
  5. Mr. Nyagah states that he is not a party in this proceedings and none of the defendants moved court by way of application or otherwise seeking orders for him to bear costs or show cause as to why he should bear costs. He thus restates that the suit was filed on instructions of the Board of Directors and his role was to depone the verifying affidavit and other affidavits/witness statement having been authorized to do so and that it will thus be an absurdity for his role to be interpreted as one in which he acted outside the law and without sanction of the Board of Directors. In the circumstances, he states that he ought not be condemned/sanctioned to bear costs of the suit in his personal capacity/ or as Principal Officer.
  6. The defendants state that the majority shareholders did not authorize Mr. Nyagah to institute this suit on behalf of the plaintiff or sign any affidavits on behalf of the plaintiff and that Mr. Nyagah has admitted as much in his deposition. They further state that the minority shareholders were always aware of the arbitral award where it was declared by the arbitral tribunal that their denying the defendants access to the plaintiff's premises was unlawful and a trespass and that their exclusion violated the defendants' rights. That as the 3 minority directors were appointed without the involvement of the majority shareholders, the defendants herein, it would have been clear to them they were not lawfully in office and they had no authority to authorize the filing of a suit against the majority shareholders in the circumstances.
  7. The defendants contend that Mr. Nyagah was aware of the arbitral proceedings and the minority shareholders indicated he would be called as a witness even though he never testified. He was going to testify on the basis of a statement he had prepared in Milimani Chief Magistrates' Court Criminal Miscellaneous Application No. E2754 of 2021; Directline Assurance Company Limited and 3 Others v Hillary Mutyambai & 3 Others where the minority shareholders were trying to institute a private prosecution. That Mr. Nyagah also swore an affidavit in High Court Commercial and Tax Constitutional Petition E003 of 2022; Directline Assurance Company Limited vs Philip Aliker and 6 others where in that petition, the plaintiff, controlled by the minority shareholders, sought to stay the arbitral proceedings and Chepkwony J., struck out the petition for being an abuse of the court process.
  8. The defendants thus state that this suit was an improper attempt to relitigate the issue of shareholding and they aver that the court has the discretion to determine who or what party will bear the costs of a suit and issue any other order it may deem fit or necessary in the interest of justice. They assert that Mr. Nyagah has not shown cause why he should not personally bear the costs of this suit that was filed



without the requisite authority and that he should thus bear the costs of the suit having instituted the suit without the authority of the majority shareholders.

9. I do not think it is in dispute that the court has discretion as to how costs can be awarded. This position was fortified by the Supreme Court of Kenya in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SCK Petition No. 4 of 2012 [2014] eKLR where it was stated as follows:

(11) It emerges clearly that, whether in this Court or any other superior Court, costs are awarded at the discretion of the Court or Judge.....

.....

(12) Such a principle applies in other countries as well, as we learn from the comparative lesson. We draw, in this respect, from Halsbury's Laws of England, 4<sup>th</sup> ed Re-Issue [2010], Vol. 10, para. 16:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” [emphasis supplied].

10. In the court's ruling of September 28, 2022, the court found that the majority shareholders did not authorize the filing of the suit. The issue of costs was partly determined when the court stated that the same could not be borne by the plaintiff but by the person who authorized the suit. The court was inclined to order Mr. Nyagah to bear the costs personally but this determination was reserved and he was given a chance to be heard before the court made the final order.

11. Mr. Nyagah, in his deposition, does not dispute that he authorized the filing of the suit but that he did so in his capacity as the plaintiff's CEO and on instructions of the Board of Directors. He still insists that he did not act outside of the law and that his actions were with the sanction of the Board of Directors in as much as there is an arbitral award and the court's ruling that has found otherwise. I can only impute and presume that Mr. Nyagah deliberately filed the suit even with the knowledge that there was an arbitral award and that he knew that the plaintiff's Board of Directors was constituted of minority shareholders who had no authority to authorize the filing of this suit. I find such actions to be impetuous and without regard to the arbitral award and orders of the court and the same must be sanctioned by costs.

12. Mr. Nyagah has not shown cause why he should not personally bear the costs of this suit that was filed without requisite authority of the majority shareholders and that he should thus bear the costs of the suit personally having sworn the verifying affidavit in support of the Plaintiff.

13. The costs shall be on party to party basis as taxed and certified by the Deputy Registrar of this court.

**DATED and DELIVERED at NAIROBI this 26th day of MAY 2023.**

**D. S. MAJANJA**

**JUDGE**



**Court of Assistant: Mr M. Onyango**

**Ms Achieng instructed by Orege J and Associates Advocates for the plaintiff.**

**Ms Wambugu instructed by W. G. Wambugu and Company for the 1<sup>st</sup> Defendant.**

**Ms Ndumia instructed by Kairu and McCourt Advocates for the 3<sup>rd</sup> Defendant.**

**Mr Kimani, SC with Ms Sirawa instructed by Hamilton Harrison and Mathews Advocates for the 2<sup>nd</sup> and 4<sup>th</sup> defendants.**

