



**Directline Assurance Company Limited v AKM Investments Limited & 3 others;
Insurance Regulatory Authority (Interested Party) (Commercial Case E247 of 2022)
[2022] KEHC 13148 (KLR) (Commercial and Tax) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E247 OF 2022
DAS MAJANJA, J
SEPTEMBER 28, 2022**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED PLAINTIFF

AND

AKM INVESTMENTS LIMITED 1ST DEFENDANT

TRIAD NETWORKS LIMITED 2ND DEFENDANT

STENNEY INVESTMENTS PTY LIMITED 3RD DEFENDANT

SUREINVEST COMPANY LIMITED 4TH DEFENDANT

AND

INSURANCE REGULATORY AUTHORITY INTERESTED PARTY

RULING

1. The Plaintiff is a limited liability company carrying on the business of insurance in accordance with the [Insurance Act](#) (Chapter 487 of the Laws of Kenya) and is regulated by the interested party, the Insurance Regulatory Authority (“the IRA”). The Defendants, among others, are its shareholders.
2. The Plaintiff commenced this suit by the Plaint dated July 4, 2022 stating that in the year 2011, the [Insurance Act](#) was amended by virtue of enacting section 23(4A), which restricts and/or prohibits direct or indirect ownership and management of an insurer to either 25% of the paid up share capital or the control by an individual in management of more than 20 % shares. The Plaintiff claims, inter alia, that the 1st Defendant, in an endeavor to circumvent the provisions of section 23(4A) of the [Insurance Act](#) executed unlawful contracts disguised as trust deeds in favor of the 2nd, 3rd and 4th Defendants



- appointing them as its nominees under its direct control resulting in the 1st Defendant having direct control of 10,550,407 out of the 15,000,000 shares issued by the Plaintiff which translates to 70% holding in the Plaintiff contrary to the provisions of the [Insurance Act](#).
3. The Plaintiff alleges that the increase of its share capital by the Defendants was done in secrecy and the issued shares were never paid for by the Defendants neither were the other lawful shareholders called up to exercise their pre-emptive rights as provided for under the Memorandum and Articles of Association. Further, that the shares were issued to the Defendants without the knowledge and participation of other lawful shareholders contrary to Article 14 of the Memorandum and Articles of Association.
 4. As a result of the allegations set out in the Plaintiff, the Plaintiff seeks the following reliefs against the Defendants:
 - A. An Order of permanent injunction directed to the 2nd, 3rd and 4th Defendants herein, restraining them, their servants, employees, assigns, proxies, agents or anyone acting on their behalf from disposing off, and/or dealing with the shares held in the plaintiff company in contravention of Section 23(4A) of the [Insurance Act](#).
 - B. An order be issued by this honourable court revoking the undated unlawful and void contract disguised as a trust deed executed by the 1st Defendant in favour of the 2nd Defendant appointing it as its nominee in contravention of Section 23(4A) of the [Insurance Act](#).
 - C. An order be issued by this honourable court revoking the unlawful and void contract disguised as a trust deed dated November 18, 2013 executed by the 1st Defendant in favour of the 3rd Defendant appointing it as its nominee in contravention of Section 23(4A) of the [Insurance Act](#).
 - D. An order be issued by this honourable court revoking the undated unlawful and void contract disguised as a trust deed executed by the 1st Defendant in favour of the 4th Defendant appointing it as its nominee in contravention of Section 23(4A) of the [Insurance Act](#).
 - E. That this honourable court annuls the share transfer executed on December 28, 2011, December 7, 2012, and December 18, 2012 by the 1st Defendant in favour of the 2nd, 3rd and 4th Defendants resulting into the 2nd Defendant holding 2,999,407 shares and the 2nd and 3rd Defendants each holding 3,000,000 shares in the plaintiff Company as they are in contravention of Section 23(4A) of the [Insurance Act](#).
 - F. That the shares held by the 2nd, 3rd and 4th Plaintiff be returned to the Plaintiff for allotment in line with the Memorandum and Articles of Association and the [Insurance Act](#). Costs and other reliefs this Honourable court deems just and fit to grant.
 5. Together with the Plaintiff, the Plaintiff filed the Notice of Motion dated July 4, 2022 made, *inter alia*, under Order 40 Rule 1 of the [Civil Procedure Rules](#) (“the Rules”) primarily seeking to restrain the 2nd, 3rd and 4th Defendants, their servants, employees, assigns, proxies, agents or anyone acting on their behalf from disposing off, and/or dealing with the shares held in the Plaintiff in contravention of section 23 (4A) of the [Insurance Act](#). The application is supported by the affidavits of Evans Nyaga, the representative/CEO/Principal Officer of the Plaintiff sworn on July 4, 2022 and July 21, 2022 respectively. It is opposed by the 1st Defendant through its Notice of Preliminary Objection dated July 7, 2022 and the replying affidavit of its director, Lisa Anyango Amenywa sworn on July 14, 2022. The 3rd Defendant also opposes the application through its Grounds of Opposition dated July 7, 2022 whereas



the 4th Defendant opposes the same through the Grounds of Opposition dated July 7, 2022 and the affidavit of its director, Kevin McCourt sworn on July 13, 2022.

6. In reaction and response to the Plaintiff's application, the 1st, 2nd and 4th Defendants have filed applications to strike out the Plaintiff's suit. The 1st Defendant's Notice of Motion is dated July 14, 2022 and made, *inter alia*, under Order 2 Rule 15 of the Rules. It is supported by the affidavit of Lisa Anyango Ameyna sworn on July 14, 2022. The 2nd and 4th Defendants' Notice of Motion dated July 12, 2022 is also made under Order 2 Rule 15 of the Rules and is supported by the affidavit of Kevin McCourt sworn on July 13, 2022. The Plaintiff has responded to these applications through the further affidavit of Evans Nyaga sworn on July 21, 2022.
7. In addition to their pleadings, the parties have also filed written submissions in support of their respective positions. Since the Defendants objections seek to impugn the competence of the Plaintiff's suit and application, I will address them first.

Defendants' Case

8. The thrust of the Defendants' objection is that the Plaintiff's claims have already been determined by a competent Arbitrator in The Matter of an *Ad Hoc* Arbitration Between Sureinvest Company Limited, Stenny Investment Pty Limited, Triad Networks Limited, AKM Investments Limited and Janus Limited and Royal Media Services, Royal Credit Limited, Samuel Kamau Macharia and Purity Gathoni Macharia through a First Partial Arbitral Award dated May 11, 2022("the Award") issued by Phillip Bliss Alier ('the Arbitrator). They also contend that the application and the suit are an abuse of the court process and ought to be struck out.
9. The Defendants urge that the Award is pending enforcement before the Court in HC COMM Misc Civil Application E509 of 2022; *Sureinvest Company Limited and 4 Others v Royal Media Services Limited and 3 others*. That the Plaintiff raised similar issues as the ones raised herein in HCCC No E278 of 2019; *Directline Assurance Company Limited And 4 Others Versus Suninvest And 15 Others* where the Plaintiff withdrew the suit when it was referred to arbitration by Kasango J., on October 15, 2019 pursuant to section 82 of the Plaintiff's Memorandum and Articles of Association of the company, with the sole aim of defeating and/or frustrating the arbitral proceedings before the Arbitrator.
10. The Defendants argue that the Plaintiff's conduct as demonstrated does not merit the grant of the orders sought as their conduct is an abuse of process, vexatious and aimed at defeating the cause of justice and that the Plaintiff is guilty of misrepresentation of material facts by failing to disclose that it had raised the issues raised in the above-mentioned suits being HCCC No E278 of 2019; *Directline Assurance Company Limited And 4 Others v Suninvest And 15 Others* and CMCC Misc Application No E2754 of 2021 *Directline Assurance and Others v Hilary Mutyambai, Inspector General of Police and Others*.
11. The Defendants further impugn the locus standi of the Plaintiff's deponent to bring this suit and state that the purpose of this suit is to frustrate the Defendants' effort to enforce the Award. They further aver there is no evidence that Mr Nyaga is authorized by the Interested Party pursuant to section 68 of the *Insurance Act* to serve as the Principal Officer and that he has in previous proceedings including HC Petition E003 of 2022; *Directline Assurance Company Limited v Philip Alier and others* and HC Misc No E250 of 2021; *Directline Assurance Company Limited and others v Philip Alier and others* represented that he is the Chief Executive Officer/Principal Officer of the Plaintiff. Further that there is no evidence that Mr Nyaga has met the qualifications set out in section 31(h) of the *Insurance Act*.
12. The Defendants state that the minority shareholders in the Plaintiff; Royal Media Services Limited, Royal Credit Limited, Samuel Kamau Macharia and Purity Gathoni Macharia were ordered by the



Arbitrator to hand over possession of the Plaintiff and that they have no mandate to instruct Mr Nyaga to institute the suit. Further, that there is no evidence that any of the persons who claim to be directors have been approved by the Interested Party under section 68 of the Insurance Act.

13. It is the Defendants' position that an award once published is binding under section 36 of the Arbitration Act and has to be acted upon and that a suit brought in disregard of an award or to defeat it is an abuse of the process of the court. It is their further position that a company has no legal basis to initiate or maintain an action in respect of its shares and that only shareholders can litigate over the shares and that this suit is a collateral attack on the award published by the Arbitrator and that section 10 of the Arbitration Act bars any intervention in arbitration.

The Plaintiff's Response

14. In response to the Defendants' applications and averments, the Plaintiff deposes that the Mr. Nyaga is the CEO as well as the Principal Officer of the Plaintiff having been appointed on July 20, 2021. The Plaintiff contends it seeks to enforce the Constitution and the Insurance Act and that the Interested Party is a state organ within the meanings of Articles 10 and 232(2) of the Constitution and is bound by among others, the national values of adhering to the rule of law, respect for human rights, impartiality and prompt provision of services to the Plaintiff.
15. The Plaintiff states that it relies on the pleadings in HC Misc No E250 of 2021; Directline Assurance Company Limited and others v Philip Alier and others and HC Petition E003 of 2022; Directline Assurance Company Limited v Philip Alier and others and urges the court to call for these files as they are related matters to those which it is inquiring into.
16. The Plaintiff reiterates that there has been concern about compliance with section 23(4) of the Insurance Act since 2009 and that 13 years later, its efforts to comply have been obstructed by the Defendants. The Plaintiff claims that it has since 2019 been endeavoring to obtain from the court redresses connected with enforcement of section 23(4) of the Insurance Act and that the question of compliance with the said section and Articles 10, 27, 40 and 232 of the Constitution have not been the subject of litigation before any court in any of the suits concerning the parties.
17. The Plaintiff avers that it has been seeking legal redress against the Defendants since 2019 when it discovered that in 2011 they engaged in gigantic frauds and contraventions of the Insurance Act as pleaded in the Plaintiff. That the persons who have wronged the Plaintiff are many and different suits have had to be filed and that the Defendants sought to use arbitration and exclude the Plaintiff from it and are now trying to keep the Plaintiff out of the court, which arbitration was conceived by the Defendants to be a 'no-go area where the rule of law is excluded'. The Plaintiff impugns the arbitration process by stating that no reliance can be made on the Award as the issue of jurisdiction is pending before the court and that there was no dispute capable of being referred to arbitration.

Analysis and Determination

18. Although the Defendants have raised several issues, I intend to focus on the issue whether the Plaintiff's suit is an abuse of the court process in view of the undisputed fact that the Plaintiff's shareholders engaged in a dispute resolution process that resulted in the Award.
19. In the arbitration, Defendants were the Claimants together with Janus Limited while the Respondents were Royal Media Services Limited, Royal Credit Limited, Samuel Kamau Macharia and Purity Gathoni Macharia. In the Award, the Arbitrator summed up the dispute as follows, "In this dispute, the shareholders of Directline Assurance Company Limited ("the Company") contest relevant shareholdings and the right to control the Company..."



20. The Defendants, as Claimants before the Arbitrator, contended that they held 13,550,450 shares of the 15,000,000.00 allotted ordinary shares in the Plaintiff. The substance of their case against the Respondents was that Samuel Macharia and Purity Macharia had interfered with the Plaintiff, its operations and business, and had stopped them, as majority of the shareholders, from running the Plaintiff. They therefore sought declarations in relation to the Plaintiff's shareholding and related reliefs.
21. In response to the claim, the Respondents alleged that the Claimants were seeking to enforce a fraudulent, illegal and unenforceable contract to transfer shares to Sureinvest, Stenny and Triad contrary to section 23(4D) of the *Insurance Act* and the Plaintiff's Memorandum and Articles of Association through the instrumentality of shares held upon trust for Janus and AKM by Sureinvest, Stenny and Triad. In essence, the Respondents claimed that they constitute a majority of the Plaintiff's shareholders and as a result sought declarations that the amendment of the Articles and subsequent admission of Sureinvest, Stenny and Triad as members of the Plaintiff was null and void.
22. After hearing the matter, the Arbitrator issued the Award and granted, inter alia, the following reliefs:
 1. A declaration that the Claimants hold 90.336% ordinary shares in Directline Assurance Company Limited equivalent to 13,550,407 ordinary shares in Directline Company Limited
 2. A declaration that the Respondents hold 9.66 ordinary shares in Directline Assurance Company Limited equivalent to 1,499,592 ordinary shares in Directline Assurance Company Limited
 3. A declaration that Dr Macharia, his servants and agents unlawfully entered the business premises of Directline Assurance Company Limited
 4. A declaration that the Respondents' exclusion of the Claimants, their servants and agents from the business premises of Directline Company Limited is unlawful and a trespass. The exclusion violated the rights of the Claimants as shareholders in majority
23. The substance of the Award and the resulting relief concerns the shareholding in the Plaintiff. The issues being raised in this suit by the Plaintiff including the issues surrounding the transfer of shares and compliance with the *Insurance Act* were directly and substantially in issue before the Arbitrator. It is also clear that the Arbitrator addressed the evidence and made conclusive findings concerning the Plaintiff's shareholding.
24. The Plaintiff has not disputed the existence of the arbitration proceedings and the resultant Award although it did not disclose the same in its Plaint or application. The Award dealt with the issue of shares now raised by the Plaintiff in this suit. The only gloss on this case is that the Plaintiff now prosecutes the suit purporting to enforce the provisions of the *Insurance Act*. In arriving at the conclusion whether the shareholders' arrangements in the Plaintiff violate the *Insurance Act*, this court would have to rehear the shareholders' suit which has already been determined by the Award. This suit therefore amounts to a collateral challenge on the Award and is an abuse of the court process.
25. The Plaintiff seeks to re-litigate the issue of shareholding under the guise of enforcing the provisions of the *Insurance Act*. Obviously it would not be proper for this court to embark on unravelling a lawful arbitral award and proceed to determine the same issues that have already been resolved by award. To do so would contravene section 10 of the *Arbitration Act* which delimits the court's jurisdiction on terms that, "Except as provided in this Act, no court shall intervene in matters governed by this Act." An



arbitral award can only set aside or interfered with in the manner contemplated under the Arbitration Act.

26. The Defendants are correct to point out that once the Award was published, it became binding on the parties under section 36(1) of the Arbitration Act which provides that, "A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to his section and section 37." Permitting this suit to proceed any further would amount to an abuse of the court process in view of the statutory incidents accruing as a result of the Award.
27. The other effect of the Award, which has been alluded to by the Defendants, is that it conclusively determined the shareholding of the Plaintiff. The Arbitrator declared that the Defendants were the majority shareholders and until the Award is set aside in accordance with the Arbitration Act, it remains binding on all the shareholders who were in any case party to those proceedings. This calls into question whether minority shareholders can pursue litigation regarding shares of a company in the Company's name. The general principle is that the court will not permit a suit instituted in the name of the company to proceed unless it is supported by the majority shareholders (see East Africa Safari Air Limited v Kegode and Another NRB CA Civil Appeal No 42 of 2007 [2011] eKLR). In this case, the Defendants, who are the majority shareholders, oppose the suit hence the suit cannot proceed any further and must meet the inevitable fate of being struck out.
28. Having concluded that the suit is an abuse of the court process and must be struck out, who shall bear the costs of the suit? Since the majority shareholders did not authorize the suit, their costs cannot be borne by the Plaintiff. The person who authorized the suit must bear the costs. In this case, Evans Nyaga, the Chief Executive Officer, who swore the verifying affidavit in support of the Plaintiff, must be called upon to show cause why he should not bear the costs of the suit personally and on an indemnity basis.

Disposition

29. For the reasons I have set out above, I allow the Defendants' applications dated July 12, 2022 and July 14, 2022 and order as follows:
 - a. This suit be and is hereby struck out on the ground that it is an abuse of the court process.
 - b. Evans Nyaga, the Chief Executive Officer of the Plaintiff, shall show cause why he should not be ordered to pay costs of the suit personally.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Ndegwa instructed by Ndegwa and Ndegwa Advocates for the Plaintiff.

Ms Wambugu instructed by W. G. Wambugu and Company for the 1st Defendant.

Ms Ndumia instructed by Kairu and McCourt Advocates for the 3rd Defendant.

Mr Kimani, SC with Ms Sirawa instructed by Hamilton Harrison and Mathews Advocates for the 2nd and 4th Defendants.

