



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 17 OF 2019 (O.S)**

**IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015**

**IN THE MATTER OF RECTIFICATION OF THE COMPANY REGISTER OF NASSAU LIMITED**

**BETWEEN**

**TASMAC LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**NASSAU LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LYDIA MORAA ONDIEKI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RUGGERO SCIOMMERI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**CALEDONIA LIMITED.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**REGISTRAR OF COMPANIES.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Mogaka Bwongaki Advocates for the Plaintiff/Applicant**

**Kilonzo & Aziz Advocates for the Defendant/Respondents**

**RULING**

On 5.11.2019, the appellant filed an Originating Summons under Section 37 Rule 1, 2 and 4 of the Civil Procedure Rules; and Section 1, 1A, 3 and 3A of the Civil Procedure Act, and Section 103 of the Companies Act seeking the following reliefs:

- 1. That the Honourable Court be pleased to certify this application as utmost urgent due to its nature and circumstances and direct the same to be heard ex parte at first instance.***
- 2. That pending inter parties hearing of this application the Honourable Court be pleased to temporary issue injunctive orders against the respondents, their agents, servants, employees and/or any other person acting on behalf from transferring, disposing of and/or dealing in any manner with shares held by the 4<sup>th</sup> respondent.***
- 3. That pending hearing and determination of the main suit the respondents, their agents, servants, employees and/or any other person be restrained from transferring, disposing of and/or interfering in any manner with shares held by the 4<sup>th</sup> respondent.***
- 4. That a declaration that the applicant has never transferred to anyone or shade its 480 shares held in Nassau Limited, the 1<sup>st</sup> respondent and any purported transfer of the aforesaid shares of the 2<sup>nd</sup> respondent to the 3<sup>rd</sup> respondent was void, illegal and unenforceable, ultra vires of the applicant and the same was carried out to defraud Tasmac Limited the applicant herein by the parties who were knowingly carrying out business in a manner aforesaid.***

5. That a declaration that sale of 480 shares belonging to the applicant by the 2<sup>nd</sup> respondent to the 3<sup>rd</sup> respondent was ultra vires the applicant and the said 2<sup>nd</sup> and 3<sup>rd</sup> respondents are liable for conversion and the act of transfer by the aforesaid 2<sup>nd</sup> and 3<sup>rd</sup> respondents cannot vest ownership pursuant to sale of Goods Act Section 3 and the applicant be indemnified by the aforesaid 2<sup>nd</sup> and 3<sup>rd</sup> respondents individually and or severally.

6. That a declaration that continued retainer of the applicant's properties/shares constitutes a tort of detinue as there was no contract of sale between the applicant and the 3<sup>rd</sup> respondent hence the applicant is entitled to damages and dividends which have been declared during the time the applicant's name did not appear in the register.

7. That an order against the 5<sup>th</sup> respondent to immediately rectify the register of companies and reinstate the applicant's 480 shares in Nassau Limited and payment by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents' damages sustained.

In support of the Originating Summons is also an affidavit of **Giancarlo Bottini** filed in Court on 5.11.2019 in response to the Originating Summons, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed a preliminary objection premised on the following objections:

(1). That the originating summons is *res judicata* in view of the Ruling of the Court of Appeal No. 6 of 2017 where same reliefs are being sought by the applicant/plaintiff.

(2). The Originating Summons is an abuse of the Court process and the Court has no jurisdiction to grant any of the reliefs, on view of the fact that the applicant has not paid the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents costs of Kshs.2,082,715 ordered in Misc. No. 5 of 2013.

(3). That the applicant being an off shore company has not complied with the provisions of Section 975 to 985 of the Companies Act 2015 and hence lacks the capacity and locus standi to bring the acting.

(4). That the applicant has not obtained the leave of the Court to bring the derivative action against the respondents as required under the Companies Act.

(5). That the Originating Summons and the notice of motion dated 5.11.2019 by a party without locus standi in the matter of Nassau Limited.

(6). That the Originating Summons and the notice of motion dated 5.11.2019 were filed by an unauthorized and unrecognized agent and therefore the corresponding affidavit is fatally defective with us locus standi and it remains to be a nullity.

Submissions in support of the preliminary objection, it was submitted by the respondents Learned Counsel, **Mr. Kilonzo** that the instant suit is *res judicata* in view of the decisions made by **Angote J.** in **Misc. Case No. 5 of 2013** and the Court of Appeal Ruling in **Court of Appeal No. 6 of 2017** where the same material facts in the Originating Summons was reliably rejected by the Court.

The appellant counsel submitted that a combined reading of Section 7 of the Civil Procedure Act and the principles in the cases of **POP – IN (Kenya) Ltd & others v Habib Bank A G Zurich {1990} KLR 609, Yat Tang Investment Co. Ltd v Dao Heng Bank Ltd & another {1975} AC 581**, represents the applicable principles in support of the application.

On the other hand, Learned counsel submitted that the Originating Summons besides being *res judicata* under Section 7 of the Civil Procedure Act, it is also *sub judice* by virtue of existence of **Malindi HCC No. 65 of 2017**.

Further, Learned Counsel argued and submitted that there is a misnomer which occurred by the applicant approaching the Court through an Originating Summons which is mainly a process used in simple and straight forward claims. On this Learned Counsel cited the case of **Wakf Commissioners v Mohamed Bin Umeya Bin Mwijabu {1984} KLR and in Muskerteers Ltd v A. G. & 2 others MLD ELC No. 182 of 2011**.

Further, Learned Counsel submitted that no leave for derivative action has been applied or given by the Court to the applicant. That the case in point involves a foreign company that has no registered office in Kenya or in anyway incorporated as such under the provisions of Section 973 to 985 of the Companies Act. Also submitted by Learned Counsel at this preliminary stage are issues on the effect of failure by the applicant to pay costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondents of Kshs.2,082,715 as provided under Order 25 Rule 4 of the Civil Procedure Rules.

Finally, Learned Counsel submitted that the applicant is neither a director or shareholder in the 1<sup>st</sup> respondent company with respect to the alleged transfer of shares already sold. As regards the preliminary objection the applicant reiterated most of the facts made in Originating Summons. The appellant emphasized that in the case at bar the 2<sup>nd</sup> respondent had been issued with the power of Attorney by the applicant to participate in condominium meetings and general management of the properties where the applicant had beneficial and legal interest. That the questioned sale of shares of the applicant in Nassau Ltd (the 1<sup>st</sup> respondent) was done fraudulently.

Regarding, the consent Judgment, Learned Counsel submitted that the same was not set aside for the simple reason that the firm of **Anjarwalla & Khanna Advocates** flopped due to the fact that the aforesaid advocates and not obtain leave of the Court to represent the applicant. Learned counsel further submitted that the donation of the power of the Power of Attorney to the said **Lydia Moraa Ondieki** from **Giancarlo Bottini** was later revoked by the same done after the effected registration of the transfer of shares or stock of shares in Nassau Limited.

Therefore, Learned Counsel contended that the respondents have not met threshold of a preliminary objection as known in Law. (See **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd {1969} EA 696**). Further, the contention by the applicant counsel is to the effect that contrary to the respondents' assertion, the suit in question is neither *subjudice* or *res judicata*. It was also the arguments by the applicant counsel that the Court has jurisdiction to adjudicate over the claim. In respect of the shares of the company or issues with regard to membership.

Further, Learned Counsel submitted that the suit is not incompetent because the applicant is yet to settle the certificate of taxed costs as alleged by the respondents. In this preliminary objection too, the applicant counsel submitted that the alleged supporting affidavit is not defective as the deponent herein is the sole proprietor of Talmac Ltd and a resolution was passed on 10.8.2019 at Milano Italy to prosecute the claim in Kenya. In a nutshell, Learned Counsel urged the Court to dismiss the preliminary objection.

### **Determination**

The applications before Court which receives priority attention is the one which deal with preliminary objection by the respondent. The Courts have indicated on several occasions in the cases of **Nitin Properties Ltd v Jagji Singh Kalsi & Another C. A No. 132 of 1989 {1995 – 1998} 2 EA 257** that:

***“A preliminary objection 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 aim of preliminary objection is to save time of the Court and the parties by not giving into the merits of an application because there is a point of Law that will dispose of the matter summarily.”(See also Mukisa Biscuit manufacturing Co. Ltd v West End Distributors Ltd {1969} EA).***

I am also guided with the decision in the case of **United Insurance Co. Ltd v Scholastica A. Odera C. A No. 6 of 2005** in which the Court held:

***“A preliminary objection must be based on a point of Law which is clear and beyond doubt and preliminary objections which is premised on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are not contested or disputed.” (See also Artar Singh Rhamra & Anotehr v Oriental Commercial Bank HCCC No. 53 of 2004).***

In the instant objection, by the respondent it seems first from the incompetence of the suit initiated by the applicant by way of an originating summons under Order 37 of the Civil Procedure Rules. In determining both the grounds pleaded in the originating summons are the reply in answer to the application, it's the respondent contentions that the litigation raises serious complex issues not capable of being resolved competently in the forum of procedure. On perusal of originating summons facially and the affidavit in support of it as deposed by the applicant, there are substantial issues in dispute adopted by the applicant on the facts of this case disclosed by the parties in support of their claims. The facts as averred in the affidavit are supported by some prima facie evidence which at all would be best contested and irreconcilably in conflict such that it requires to be tested by way of *viva voce* evidence. I do not agree with Learned Counsel for the applicant that the claim is a straight forward dispute based on transfer of shares from one director to another in the shareholding and stock value of the first respondent. It is clear that the alleged documentary exhibits attached no doubt calls for the Court to call for evidence to prove the allegations of fraud contained therein.

Thus in **Nigerian Reinsurance Corp v Cudjoe {2008} ALL FWLR P+ 414 1455 The Court of Appeal** stated as follows on the inapplicability of the originating summons to contentious issues thus:

***“When it is obvious or evident from the state of the affidavit evidence that there would be an air of friction in the proceedings, then an originating summons is no longer appropriate. An originating summons is only applicable in that circumstances as where there is no dispute. In the instant case, the issue of validity of lease agreement was contentious between the parties, therefore the originating summons used by the plaintiffs in instituting the proceedings was inapplicable.”***

There is apparently a common thread in our jurisprudence on this issue. In the case of **Wakf Commissioners v Mohammed Bin Umeya Bin Abdulmanj, Bin Mwijabu {1984} KLR**, the Court of Appeal held as follows:

***“Originating procedure is intended for settling simple matters without the expense of a full trial and not for serious complex issues where complex issues are raised and disquieted in an application made by way of originating summons, the Court should dismiss the submissions and leave the parties to pursue their claims in an ordinary suit.”***

In another case **Muskerteers Ltd v The Attorney General & 2 others MLD ELC No. 182 of 2011** that:

***“position on originating summons intended to settle simple matters as a question which goes to the extent of the Court's jurisdiction to determine the validity of the suit dependent on the allegations pleaded is of vital important to be considered by the Court at the preliminary interlocutory stage.”***

From the material before me, I find merit in such a judicial approach as is well exemplified in the cited authorities, that the declarations sought by the applicant in respect to the shares sold and transferred are not maintainable in an originating summons procedure. Taking into account that position the originating summons is for striking out as out rightly prayed for by the respondent.

The respondents impugned the legal entity of Tasmac Limited, the plaintiff/applicant to the claim against the respondents. From the facts deponed by the applicant, Tasmac Ltd suffice to day is a limited liability company incorporated in the year 2006 under Section 24 of the Companies Act 2001, in the Republic of Mauritius.

Learned Counsel has drawn the attention of the Court to some statutory provisions under Section 973 to 985 of the Companies Act 2015 on foreign companies and the requirements of being registered in Kenya with the Registrar of Companies for purposes of recognition and attain a legal personality status in Kenya.

He identified some salient features of the supporting affidavit which confirms that the applicant/plaintiff company has not complied with the provisions of Section 974 and 975 which obligates it to apply to be so registered to carry on business in Kenya. Under Section 975 (2) of the Act:

***“The Registrar shall approve the application for registration of a foreign company by entering its name and other particulars in the foreign companies register to ensure that the application contains the information prescribed by the regulations that demonstrates that at least thirty percent of the company – shareholding is held by Kenyan citizens by birth is accompanied by the prescribed fee, if any and the required documents.”***

Going through the affidavit, I actually observed that the list containing the names of its directors and shareholders are all foreign citizens, the company has its place of origin and registered office in Mauritius, its principal place of business in Kenya is unknown and the state of its registered office under Section 983 has not been availed in the annexed documents. That the deponent’s affidavit in respect of a certificate of registration issued by the Registrar of Companies that companies with subsection (5) is not attached, instead there is a certificate of incorporation in Mauritius.

It appears Sections 974 – 983 and of the Act do not assist the applicant for granting any rights for doing any business or Act prescribed or allowed by that Act. It is evident that the application lacks *locus standi* to institute proceedings of a nature contemplated in the originating summons.

Furthermore, Learned Counsel pointed out that the applicant on 16.9.2014 recorded a consent in Malindi ELC Misc. Application No. 5 of 2013 in the following terms:

***(1). That Tasmac Limited acknowledges and agrees that Caledonia Limited holds 52% of the shares of Nassau Limited whereas Tasmac Limited holds 48% shares of Nassau Limited.***

***(2). That Tasmac Limited acknowledges and agrees that the Directors of Nassau Limited are Robert Maori and Ruggero Sciommeri.***

***(3). That this Court be and is hereby marked as settled with no orders as to costs.***

Moreover, the applicants counsel contends and acknowledges that the Court would not entertain an action for a declaration of shares, where its clear that the consent Judgment is binding to the parties unless a relief is sought to set it aside.

It is settled Law that proceedings which have culminated into a consent order or Judgment can only be varied or set aside on grounds of mistake, misrepresentation, duress, or if it infringes public policy etc. **(See the principles in Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd {1982} KLR 485).** It is patently the case as stated in the said case that:

***“An advocate has general authority to compromise on behalf of his client as long as he is acting bonafide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”***

Whether or not all of these issues on sale and transfer by Caledonia Ltd was manipulated to reduce the shareholding held by the applicant in Nassau Ltd is a moot. By virtue of the consent order any director or entity who claims to have suffered injustice in consequence of the Company or director maladministration must do so first by seeking leave of the Court to set aside the consent order of 16.09.2014.

The autonomy of the parties to a litigation is so wide, that they have even a freedom by express agreement to choose to compromise the suit by way of a withdrawal or entering into a consent. A Court will not interfere with the consent order entered into by the parties within their power and free will.

In the case of **Republic v District Land Registrar Nandi & another ex-parte Kiprono Tegere & another {2005} eklr and Kasimir Wesonga Ongoma v Ismael Etoicho Wanga Civil Appeal No. 25 of 1986** the Courts adopted a passage in Seton on Judgments and Orders 7<sup>th</sup> Edition Vol. 1 and held:

***“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an arrangement contrary to the policy of the Court . or if consent was given without sufficient material facts or in misapprehension or ignorance of such material facts, or in a general for a reason which would enable the Court to set aside an agreement.”***

In my view, it is within the province of the Court when dealing with an application of this nature by the respondent to undertake an evaluation the circumstances upon which the counsel order was recorded and adopted as a Court order.

A Court before which such proceedings are brought in a matter of existence of a valid consent, has not jurisdiction to set it aside unless it meets the criterion in **Lenina Kemigisha Mbabazi Star Fish Ltd v Jing Jeng International Trading Ltd (HCT OO – MA – 344 – 2012)** which held as follows:

**“That a consent may be varied or set aside where, the consent was obtained fraudulently, collusion between the affected parties, where the consent is based on insufficient material facts and where the consent is based on misapprehension or ignorance of material facts or for any sufficient reason.”**

A similar position is also as in the case of **Flora W. Wasike v Destino Wamboko {1988} eKLR** the Court stated:

**“It is now settled Law that a consent Judgment or order has contractual effect and can only be set aside on grounds which would justify a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”**

Nevertheless, it should be noted that the applicant does not have the power to question the consent order or in anyway through an originating summons. By reasons of the parties consent in terms of appropriation of shares and directorship in that impugned consent the nature and the scope of the measures necessary to avert any misgivings would never be in the procedural forum of an Originating Summons.

Clearly, there is inherent danger if a contracting party to a consent is allowed too much latitude to look for possibilities to vary or set aside the consent in terms of the shares captured in the consent order. Evidently the doctrine of *res judicata* under Section 7 of the Civil Procedure Act which has evolved in the jurisprudence of Kenya cannot be derogated from by the parties in this suit. There are various reasons that the doctrine be a subject of operation in view of the earlier suit Misc. 5 of 2015. The consent was between **Tasmac Ltd, Caledonia Limited, Nassau Limited Robert Maori and Ruggero Sciommeri**. Likewise, in **HCC No. 17 of 2019** the key actors central to the consent remain as captured above save for **Lydia Moraa Ondieki**, the 2<sup>nd</sup> respondent allegedly brought into the proceedings by virtue of a Power of Attorney and the Registrar of Companies in his official capacity as custodian of the instruments at the registry.

The question that arise in this case, may classified as one with a valid consent Judgment on the facts of the case and the obligations of the parties toward each other that result from the facts. What was involved and determined in the further suit has been tested by an examination of the record and proceedings therein, including the evidence submitted, the respective contentions of the parties and the consent order of the Court. As this is true from the record, then the applicant should not be allowed to relitigate on the same issue of fact regarding the transfer unless and until a fresh suit to vary or set aside the consent order has been instituted and determined by the Court.

It is therefore sufficient for the applicability of this doctrine on *res judicata* under Section 7 of the Act to apply directly to the issues framed in the originating summons. In **Pop-In Kenya Ltd & Others v Habib Bank AG Zurich {1990} KLR 609** to rely on the defence of *resjudicata* as a requisite for justice. The litigant must satisfy the following criteria:

- (a). Existence of a previous suit in which the matter was in issue.**
- (b). The parties were the same or litigating under the same Ltd.**
- (c). A competent Court heard the matter in issue.**
- (d). The issue had been raised once again in a fresh suit.**

It is apparent that some of the applications filed, the parties in essence settled the disputes amicably accompanied with finality orders. What is significant would be the context where there is no case to answer on account of the same facts as the ones earlier pleaded, adjudicated and settled. Put in another way *res judicata* applies to applications just as it applies to suits.

Whereas in the present, there is a consent and can be no suggestion to set it aside. I see no reason why Section 7 of the Civil Procedure Act on *res judicata* should not apply to deprive the applicant a second bite at the cherry.

In the instant case, the applicant is estopped in pursuing a claim on shares allocated to as determined in the consent order adopted as a consent Judgment in the previous litigation between the same parties to the consent.

There is not the slightest doubt to the extent and context of the consent order before **Angote J**, the described terms and judicial decision pronounced over the cause or matter in litigation and over the parties thereto the doctrine of *res judicata* is applicable. The desire to relitigate matters which are in the scope of that judicial decision between same parties in respect of the same subject matter is frowned at by the provisions of Section 7 of the Civil Procedure Act.

For all those reasons, I would uphold the preliminary objection to strike out the Originating Summons and in view of the fact that the original claim is dead, I make no orders for costs in the motion as well.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 26<sup>TH</sup> DAY OF FEBRUARY 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Michira holding brief for Mogaka Bwongaki advocates for the applicant
2. Ms. Mulwa holding brief for Kilonzo advocate for the respondent