



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 9 OF 2019 (OS)**

**MICHELINA FORINO..... 1<sup>ST</sup> APPLICANT**

**SALVATORE FORINO (Suing as Administrators of the Estate of**

**GIOVANNI FORINO (Deceased ) .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ALFONSO FORINO..... 1<sup>ST</sup> RESPONDENT**

**PARKER RANDALL – EAST AFRICA LIMITED.....2<sup>ND</sup> RESPONDENT**

**LAZARUS KIMANGA..... 3<sup>RD</sup> RESPONDENT**

**REGISTRAR OF COMPANIES.....4<sup>TH</sup> RESPONDENT**

**GIO-FO LIMITED.....5<sup>TH</sup> RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Kimeto Advocate for the Applicants**

**Ms. Ruttoh Erica Advocate for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent**

**Ms. Lutta for the 4<sup>th</sup> Respondent**

**Ms. Binyenya Thurania Advocate for the 1<sup>st</sup> and 5<sup>th</sup> Respondent**

**JUDGMENT**

**Giovanni Forino**, herein after referred to as the deceased, died intestate domiciled in Italy on the 22<sup>nd</sup> of January 2019. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants as well as the 1<sup>st</sup> Respondent are children of the deceased while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the Company Secretary and the Company Auditors, whereas the 5<sup>th</sup> Respondent is the Company known as **GIO-FO Limited** incorporated as a private limited company on the 19<sup>th</sup> of May 2006 pursuant to the provisions of the Companies Act, Cap 486 of the Laws of Kenya (now repealed). The 4<sup>th</sup> respondent is the Registrar of Companies.

Vide Summons dated 21<sup>st</sup> June 2019, the Applicants vide **Malindi Succession Cause No. 3 of 2019** sought orders from the Honorable Court:

- (i) *That the Summons and Petition filed herewith be certified urgent and admitted for hearing ex parte.*
- (ii) *That letters of administration ad colligenda bona defuncti for the administration of the Estate of Giovanni Forino (Deceased) do hereby issue to the Applicants/Petitioners Michelina Forino and Salvatore Ferino.*
- (iii) *That the grant of letters of administration ad colligenda bona defuncti do permit the Applicants/Petitioners to take over all litigation and legal processes initiated by the Deceased Giovanni Forino for the benefit of the deceased's Estate.*
- (iv) *That the grant of letters of administration ad colligenda bona defuncti do permit the Applicants/Petitioners to engage the Registrar of Companies to enquire into the irregular share transfers in the company known as GIO-FO LIMITED for the benefit of the Deceased's estate and where found necessary to cause the rectification of the register of the company at the Companies Registry.*
- (v) *That costs be provided for out of the Estate of the Deceased.*

The same was granted on the 26<sup>th</sup> of June 2019.

In furtherance of their duties conferred by the grant of the letters of administration *ad colligenda bona defuncti* the Applicants by way of Originating Summons dated 17<sup>th</sup> September 2019 and filed in Court on the 18<sup>th</sup> of September 2019 by the Firm of **Kimeto & Associates Advocates, Michellina Forino** and **Salvatore Forino**, sought the following reliefs from this Honorable Court:

1. *That for reasons to be recorded this application be certified urgent and be heard ex parte, in the first instance in respect of prayers 2,3,4,5,6 & 7 hereof;*
2. *That an injunction be and is hereby granted restraining the respondents herein whether by themselves or their Servants or Agents, proxies, or Advocates or any of them or otherwise howsoever from presenting or transmitting to the Registrar of Companies names or particulars of persons or any of them as shareholders, directors and company secretaries of the 5<sup>th</sup> Respondent pending the inter partes hearing of this application or until further orders of this court;*
3. *That an injunction be and is hereby given granted restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein whether by themselves or their Servants or Agents, proxies or Advocates or any of them or otherwise howsoever from presenting, holding out or otherwise asserting to any person respectively as being the Board of Directors, the Company Secretary and Auditors of the 5<sup>th</sup> Respondent pending inter partes hearing of this application or until further orders of this court;*
4. *That an injunction be and is hereby given granted restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein whether by themselves or their Servants or Agents, proxies or Advocates or any of them or otherwise howsoever from transacting any business of the Board of Directors of the 5<sup>th</sup> Respondent pending inter partes hearing of this application or until further orders of this court;*
5. *That an injunction be and is hereby given granted restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein whether by themselves or their Servants or Agents, proxies or Advocates or any of them or otherwise howsoever from receiving,*

*and/or implementing any resolutions or any of the resolutions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from changing the shareholding of the 5<sup>th</sup> Respondent, reconstituting the Board of Directors of the 5<sup>th</sup> Respondent and ensuring the status quo of the 5<sup>th</sup> Respondent as it existed before the death of the Deceased in September 2018 pending inter partes hearing of this application or until further orders of this court;*

- 6. That an injunction be and is hereby given granted staying implementation of the alleged resolutions of the 1<sup>st</sup> Respondent and the Deceased of the 8<sup>th</sup> of November 2012 purporting to transfer the deceased's shares to the 1<sup>st</sup> Respondent and thereby divesting controlling ownership of the 5<sup>th</sup> Respondent company from the estate of the deceased pending inter partes hearing of this application or until further orders of this court;*
- 7. That an injunction be and is hereby given granted restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein whether by themselves or their Servants or Agents, proxies or Advocates or any of them or otherwise howsoever from presenting, holding out or otherwise asserting to any person that they are sole shareholders, auditors and company secretaries of the 5<sup>th</sup> Respondent or passing off any of the said person as such, pending inter partes hearing of this application or until further orders of this court;*
- 8. That an injunction be and is hereby given granted restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein whether by themselves or their Servants or Agents, proxies or Advocates or any of them or otherwise howsoever from presenting or transmitting to the Registrar of Companies names or particulars of persons or any one of them as majority shareholders of the 5<sup>th</sup> Respondent, pursuant to the transfer of 999 shares of belonging to the estate of the deceased pending inter partes hearing of this application or until further orders of this court;*
- 9. That a declaration that 999 shares belonging to the late Giovanni Forino were fraudulently, illegally and irregularly transferred to the 1<sup>st</sup> Respondent contrary to the wishes of the Deceased and the provisions of the Law of Succession Act Cap 160, Laws of Kenya, The Companies Act No.17 of 2015 and the Articles of Association of the 5<sup>th</sup> Respondent;*
- 10. That an order against the 4<sup>th</sup> Respondent to immediately rectify the register of Companies with respect to the 5<sup>th</sup> Respondents and restraining all the 999 shares illegally transferred back to the Estate of the late Giovanni Forino;*
- 11. That the Honorable Court be pleased to issue any further Orders, Directions and writs as may be necessary to safeguard the Estate of the Late Giovanni Forino and prevent any/or further transactions by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents of the provisions of the Law of Succession Act Cap 160, Laws of Kenya, The Companies Act No.17 of 2015 and the Articles of Association of the 5<sup>th</sup> Respondent;*

Before the said application could be heard and determined the 1<sup>st</sup> and 5<sup>th</sup> Respondents filed a Notice of Preliminary Objection dated 23<sup>rd</sup> September 2019. The grounds of the 1<sup>st</sup> and 5<sup>th</sup> Respondents Preliminary Objection were as follows:-

- a) The deceased was at the time of his demise not a shareholder in GIO-FO Limited, the 5<sup>th</sup> respondent herein;*
- b) The Applicants have no locus standi to bring the originating Summons;*
- c) The Originating Summons has been brought in contravention of Section 103 (1) of the Companies Act, 2015.*

The Applicants in turn on the 14<sup>th</sup> of February 2020 through their advocate on record filed a Statement of Grounds of Opposition dated 13<sup>th</sup> February 2020 in opposition to the Preliminary Objection.

The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned Originating Summons.

### **The 1<sup>st</sup> and 5<sup>th</sup> Respondents' written submissions**

The 1<sup>st</sup> and 5<sup>th</sup> Respondent through their Advocate on record, **Mr. Binyenya**, submitted that the 1<sup>st</sup> Respondent was appointed as a Director of the 5<sup>th</sup> Respondent on 13<sup>th</sup> February 2007 and that the registration of the transfer of shares from the deceased to the 1<sup>st</sup> Respondent was done on the 24<sup>th</sup> of October 2018 and as such the deceased was not a member of the 5<sup>th</sup> Respondent at the time of his death. Counsel also submitted that the Applicants are not members of the 5<sup>th</sup> Respondent as defined in of Section 3 of the Companies Act 2015.

Further Counsel contends that rectification of a Company's Register as provided for under Section 103 of the Companies Act 2015, is a remedy limited to the membership and shareholding of a company and does not extend to directors, advocates and company secretaries who by every definition are not members of a company but are merely a company's agent. For this the 1<sup>st</sup> and 5<sup>th</sup> Respondents submissions relied on the case of **Guo Dong v Muli Win Trading (E.A) Company Ltd & 6 others [2015] eKLR**. Counsel submitted that proceedings for rectification of a register of companies can only be brought where the applicant has a right to registration as member or shareholder of the company and relied on the decision in **Clement Muturi Kigano v Kibera Development Company Limited [2019] eKLR**.

It is Counsel's submission that the *Estate* of a deceased, as defined in section 3 of the Law of Succession Act, Cap 160 of the Laws of Kenya, means free property of a deceased person, property that the deceased was legally competent to freely dispose during his lifetime and in respect of which interest has not been terminated by his death. It is his contention that at the time of death the deceased had already transferred all his shares to the 1<sup>st</sup> Respondent in respect of the 5<sup>th</sup> Respondent and was not a shareholder of the 5<sup>th</sup> respondent as per the agreement dated 8<sup>th</sup> November 2012 and stamped on the 12<sup>th</sup> of October 2018.

Further it was Counsel's submission that a grant of letters of administration intestate is not sufficient to constitute the Applicants as members of the 5<sup>th</sup> Respondent under Section 103 (1) of the Companies Act 2015 and that a person who obtains a grant *ad colligenda bona* is not a representative of the deceased until they obtain a full grant and even so that person cannot be treated as a member of the company until he/she has been entered into the register of members. For the issue on *locus standi* counsel relied on the cases of **Re Kahawa Sukari Ltd [2004] 2 EA (CCK)**, **Francis Gitau Parsimei & 2 Others v National Alliance Party & 4 Others [2012] eKLR**, **Sondhu v Noble Builders (U) Ltd and Another [2005] 2 EA**.

It was Counsel's submission that Originating Summons can only be used where the Civil Procedure Rules provide for it or where some statute especially provides for that method. He submitted that an application for rectification of the register of members of a company is a summary process which is only invoked in the clearest of cases and that the form of procedure adopted by the Applicants and the suit as framed is incompetent for the reason that issues and allegations raised therein are complex and contested issues that ordinarily cannot be resolved in a suit commenced by Originating Summons.

On the issue of whether the Originating Summons were competent, **Mr. Binyenya**, Learned Counsel for the 1<sup>st</sup> and 5<sup>th</sup> Respondents relied on the cases of; **John W Wepukhulu v Secretary, Board of Governors, Buru Buru Secondary School [2005] eKLR**, **Clement Muturi Kigano v Kibera Development Company Limited [2019] eKLR**, **Geoffrey Ndung'u Theuri v Law Society of Kenya [1988] eKLR** and **Christopher Kanyi Nderitu & Another v Mwerua Farmers Cooperative Society [2017] eKLR**.

Counsel concluded his submissions by asking the court to dismiss Originating Summons for being incurably defective with costs to the 1<sup>st</sup> and 5<sup>th</sup> Respondent.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' written submissions**

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents through their Advocate on record, **Ms. Ruttoh**, submitted that it was their concurrent and considered view that the notice of preliminary objection is well taken and that the application is defective and therefore make their submissions in support of the 1<sup>st</sup> and 5<sup>th</sup> Respondents.

Learned Counsel submitted that the form and procedure adopted by the applicants and the suit as framed was incompetent for the reason that the issues and allegations raised in the originating summons are complex issues that ordinarily cannot be resolved in a suit commenced by

originating summons. She further submitted that an originating summons is used where there are no complex and contested issues of law and fact whereas in this case the applicants raise complex and contested issues.

For her submissions, Learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent relied on the cases of; **Wakf Commissioners v Mohamed Bin Umeya Bin Abdulmanji Bin Mwijabu & Another Civil Appeal No. 83 of 1983**, **James Njoro Kibutiri v Eliud Njau Kibutiri (Law & Potter JJA & Hancox AG. J.A) Civil Appeal 30 of 1982** and **Mnazi Moja Estates Ltd v Mistry & 5 Others Civil Appeal No. 310 of 2002**

### **The 1<sup>st</sup> and 2<sup>nd</sup> Applicants' written submissions**

The Applicants through their advocate on record **Mr. Kimeto for Kimeto & Associates Advocates** submitted that the Preliminary Objection was premised on broad factual grounds of ownership of shares in the 5<sup>th</sup> Respondent as well as *locus standi*, erroneously considering them to be points of law. Learned Counsel submitted that the Preliminary Objection had failed the first and only technical test of a Preliminary Objection as no points of law had been raised but rather matters of fact which need to be proven in evidence. In addition, Learned Counsel submitted that the prayers and grounds submitted in the Preliminary Objection are purely issues of fact that need to be investigated by this Honorable Court and therefore have no business featuring in a preliminary objection.

On the issue of whether his clients had *locus standi*, Learned Counsel for the Applicants, **Mr. Kimeto** stated that the suit had been brought by the widow and the two children of the deceased who have been disinherited by the alleged act of forgery occasioned by the 1<sup>st</sup> Respondent. It was his submission that the issue of joinder of parties which is a curable issue of fact and not law does not have the capacity to dismiss a suit summarily. He relied on Order 1 Rule 9 of the Civil Procedure Rules.

He further stated that the Applicants are the biological children of the deceased whose shares have been illegally transferred to the 1<sup>st</sup> Respondent at a time when he was seriously ill with stage 4 Cancer and as such due to the peculiar circumstances of the illegal transactions in question which are the subject matter of the suit it is not yet clear whether the transfer of shares took place when the deceased was on his death bed or after he was already dead. He stated that this was a matter that must be ascertained in a full trial especially since the original documents evidencing the transaction have suddenly disappeared making the highly contested transaction more suspicious.

He submitted that the Applicants had obtained a special grant on behalf of their mother in Succession Cause No. 3 of 2019 so as to allow them pursue the shares that belonged to their deceased father. As such it was her submission that they had a right to move the court. As such it was Learned Counsel's contention that the Preliminary Objection as raised is defective and an abuse of the Court process aimed at buying time and diverting the Court's attention from the crime and injury that the Respondents have occasioned upon the estate, the widow and the children of the late **Giovanni Forino**. With regard to his submissions, Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants relied on the cases of; **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1969] EA 696**, **George Oraro v Barak Eston Mbaja [2005] 1 KLR 141; eKLR**, **William KipronoTowett & 1597 Others v Farmland Aviation Limited & 2 Others [2016] eKLR** and **African Inland Church Mwingi District Church Council v Geoffrey Musava Matiti & 5 others [2016] eKLR**.

Counsel concluded his submissions by urging the Court to hasten and stop the plundering of the Estate of the Deceased because soon there shall be nothing left to salvage. As such he urged the Court to dismiss the 1<sup>st</sup> and 5<sup>th</sup> respondent's Preliminary Objection with costs and allow the Applicants' matter to be heard on its merit and grant the interim orders sought in the Originating Summons as a protection measure to protect the 5<sup>th</sup> Respondent Company from plunder.

### **Issues for Determination**

- a) **Whether the Preliminary Objection is competent.**
- b) **Whether the Applicants have *locus standi* to move the court**
- c) **Whether the letters of administration *ad colligenda bona defuncti* are sufficient to allow the Applicant institute the current proceedings.**

- d) Whether the advocate on record for the 1<sup>st</sup> and 5<sup>th</sup> Respondent should be barred from representing the 1<sup>st</sup> and 5<sup>th</sup> Respondent.
- e) Whether the Originating Summons itself is competent.

#### Legal Analysis

- a) Whether the Preliminary Objection is competent.

In the case of **Mukisa Biscuits Manufacturing company Limited v West End Distributors Limited [1969] EA 696**, the Court of Appeal defined a Preliminary Objection as follows and I quote:

*“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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”*

In the most recent case of **Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga v Eliud Timothy Mwamunga & Sagalla Ranchers Limited {2017} eklr para 44-47** court stated that;

*“The multiple filing of suits and seeking to strike out matters on technicalities ought to stop forthwith so as to get to the root of the dispute between the parties herein. In the same breathe, dismissing the action herein in limine suit herein will have denied this court the opportunity of hearing and determining the real issues that are in dispute or in controversy over the parties....Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application....Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”*

In view of the foregoing it is my humble opinion that there are weighty matters that need to be addressed in this suit and as such the grounds adduced by the 1<sup>st</sup> and 5<sup>th</sup> Respondents' Preliminary Objection cannot stand.

- b) Whether the Applicants have *locus standi* to move the court.

Section 103 (1) of the Companies Act 2015 provides:

*“If-*

*(a) The name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or*

*(b) The cessation of membership of a person who has ceased to be a member of the company has not been entered, the person affected, or the company or any member of the company may apply to the Court rectification of the register.*

**(2) On hearing an application made under subsection (1), the Court shall either refuse the application or order rectification of the register and payment by the company of any damages sustained by any party affected by the error or is failure.**

**(3) On hearing such an application, the Court may-**

**(a) decide any question relating to the title of a person who is a party to the application to have the person's name entered in**

or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and

(b) Generally decide any question that it considers should be decided in order to rectify the register.

(4) In the case of a company required by this Act to lodge a list of its members with the Registrar, the Court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the Registrar, who shall on receipt of the notice make such adjustments to the Register as the Registrar considers appropriate.”

It is not in dispute that the late **Giovanni Forino** was at one time a director and shareholder of the 5<sup>th</sup> Respondent and that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants are children of the deceased.

A derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation **Wallersteiner V Moir (No. 2) {1975} 1 ALL ER 849**. Up until 2015, common law guided derivative actions in Kenya. Ordinarily under common law, one had to fall under the exceptions to the rule in **Foss –v- Harbottle {1843} 2 Hare 461** that

*“a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it” (See also Hawes v Oakland 104 U.S. 450 {1881}. The exceptions to the rule in Foss v Harbottle were mainly where there was fraud on a minority caused by majority shareholder(s). The action to be commenced had also to be in the best interest of the company and without any ulterior motive (See Nurcombe v Nurcombe {1985} 1 ALL ER 65).*

However, with the Companies Act 2015, the law fundamentally changed. The requirement to fall under the exceptions to the rule in **Foss v Harbottle** was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance.

Further in **Part XI of the Act (ss. 238-241)** deserves close reading. The Act stipulates as follows:

#### **238. Interpretation: Part XI**

(1) In this Part, "derivative claim" means proceedings by a member of a company—

(a) in respect of a cause of action vested in the company; and

(b) seeking relief on behalf of the company.

(2) A derivative claim may be brought only—

(a) under this Part; or

(b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.

(3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

(4) A derivative claim may be brought against the director or another person, or both.

(5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

*(6) For the purposes of this Part—*

*(a) "director" includes a former director;*

*(b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.*

**239. Application for permission to continue derivative claim**

*(1) in order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.*

*(2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—*

*(a) shall dismiss the application; and*

*(b) may make any consequential order it considers appropriate,*

*(3) If the application is not dismissed under subsection (2), the Court—*

*(a) may give directions as to the evidence to be provided by the company; and*

*(b) may adjourn the proceedings to enable the evidence to be obtained.*

*(4) On hearing the application, the Court may—*

*(a) give permission to continue the claim on such terms as it considers appropriate;*

*(b) refuse permission and dismiss the claim; or*

*(c) adjourn the proceedings on the application and give such directions as it considers appropriate.*

**240. Application to Court for permission to continue claim as a derivative claim: how disposed of**

*(1) If—*

*(a) a company has brought a claim; and*

*(b) the cause of action on which the claim is based could be pursued as a derivative claim under this Part, a member of the company may apply to the Court for permission to continue the claim as a derivative claim on the ground specified in subsection (2).*

*(2) The ground is that—*

*(a) the manner in which the company commenced or continued the claim amounts to an abuse of the process of the Court;*

*(b) the company has failed to prosecute the claim diligently; and*

*(c) it is appropriate for the member to continue the claim as a derivative claim.*

*(3) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—*

*(a) shall dismiss the application; and*

*(b) may make any consequential order that it considers appropriate.*

*(4) If the application is not dismissed under subsection (3), the Court—*

*(a) may give directions as to the evidence to be provided by the company; and*

*(b) may adjourn the proceedings to enable the evidence to be obtained.*

*(5) On hearing the application, the Court may—*

*(a) give permission to continue the claim as a derivative claim on such terms as it considers appropriate;*

*(b) refuse permission and dismiss the application; or*

*(c) adjourn the proceedings on the application and give such directions as it considers appropriate.*

**241. Application for permission to continue claim as a derivative action**

*(1) If a member of a company applies for permission under section 239 or 240, the Court shall refuse permission if satisfied—*

*(a) that a person acting in accordance with section 144 would not seek to continue the claim;*

*(b) if the cause of action arises from an act or omission that is yet to occur—that the act or omission has been authorized by the company;*

*(c) if the cause of action arises from an act or omission that has already occurred — that the act or omission—*

*(i) was authorised by the company before it occurred; or*

*(ii) has been ratified by the company since it occurred.*

*(2) In considering whether to give permission, the Court shall take into account the following considerations:*

*(a) whether the member is acting in good faith in seeking to continue the claim;*

*(b) the importance that a person acting in accordance with section 143 would attach to continuing it;*

*(c) if the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—*

*(i) authorised by the company before it occurs; or*

*(ii) ratified by the company after it occurs;*

*(d) if the cause of action arises from an act or omission that has already occurred—whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company*

*(e) whether the company has decided not to pursue the claim;*

*(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in the member's own right rather than on behalf of the company.*

*(3) In deciding whether to give permission, the Court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest (direct or indirect) in the matter.*

**242. Application for permission to continue derivative claim brought by another member**

*(1) If a derivative claim—*

*(a) has been brought by a member of a company;*

*(a) Was brought by a company and is continued by a member of the company as a derivative claim; or*

*(c) has been continued by a member of the company as a derivative claim, another member of the company may apply to the Court for permission to continue a derivative claim to which this section applies on the ground specified in subsection (2).*

*(2), The ground is that—*

*(a) the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of the Court;*

*(b) the claimant has failed to prosecute the claim diligently; and*

*(c) it is appropriate for the applicant to continue the claim as a derivative claim.*

*(3) If it appears to the Court that the application and the evidence provided by the applicant in support of it does not disclose a case for giving permission or leave, the Court—*

*(a) shall dismiss the application; and*

*(b) may make any consequential order that it considers appropriate*

*(4) If the application is not dismissed under subsection (3), the Court—*

*(a) may give directions as to the evidence to be provided by the company; and*

*(b) may adjourn the proceedings to enable the evidence to be obtained.*

*(5) On hearing the application, the Court may—*

*(a) give permission to continue the claim on such terms as it considers appropriate;*

*(b) refuse permission and dismiss the application; and*

*(c) adjourn the proceedings on the application and give such directions as it considers appropriate.*

Further in the case of *African Inland Church Mwingi District Church Council v Geoffrey Musava Matiti & 5 others* {2016} EKLRL para45 *the court stated that;*

*“There appears, in my view, to exist a two stage process. The court must first satisfy itself that there is a prima facie case on any*

*of the causes of action noted under s.238(3). S.239(2) of the Act provides that the application for permission will be dismissed if the evidence adduced in support “do not disclose a case” for giving of permission. The essence of judicial approval under the Act is to screen out frivolous claims. The court is only to allow meritorious claims. All that the applicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed. The second stage entails a consideration of statutory provisions and factors which ordinarily guide judicial discretion albeit in the realm of derivative action.”*

In view of the foregoing it is evident that statutory provisions to be met include the requirement under s. 238(3) of the Companies Act that the derivative action be commenced only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty, breach of trust by a director of the company after which the Court then needs to determine whether the permission ought to be granted and on what terms **Ghelani Metal Limited & 3 others v Elesh Ghelani Natwarlal & Another {2017} eKLR.**

What has all these to do with the applicants’ claim? To me it is just about everything. That this concept of free property of intestate estate and ownership plays an important role in establishing its existence and its form on or before the demise of the deceased. The expectations that ordinarily go with the estate property of the deceased is to establish the hierarchical scheme of beneficiaries as defined under Section 29 of the Law of Succession Act.

In accordance with this provision, once a court is satisfied that the requirements of Section 3 of the Act have been complied with, he must then determine a just and equitable distribution of the estate to the dependants. Indeed, this court is at pains to point out that the beneficiaries have not taken reasonable steps and other measures to ensure the formalities of the making of the Grant to have the administrator of the estate appointed by the court as stipulated in the Act.

The respondents argue that the Companies Act does not afford the applicants the rights to the extent that they can file a claim challenging the terms and purported transfer of shares in a company which in their believe should fall within the ambit of free property of the deceased as defined in Section 3 of the Law of Succession Act. The respondents’ argument places focus only on the rights of the shareholders, directors or members to specifically itemize their grievances to bring a suit against the company. A denial of the existence of the rights asserted by Section 29 of the Act might inadvertently result in what would be in effect an injustice and an immediate infringement of the applicants’ rights to inheritance. At the heart of this underlying context is the interpretation of Section 238(6)(b) of the Companies Act. In the words of **Onguto J in Ghelani Metal Limited & 3 others (supra):**

*“The defendant appears in my view to impose an unnecessarily strict interpretation to the requirement that the claimant in a derivative claim must be a member. My view is that a person effectively need not be a registered member of the company to bring a derivative action. His name need not be reflected in the register. He need not be holding a share certificate for that matter. It is sufficient if it is shown that he is beneficially entitled to any shares. This view comports well with Section 286(6)(b) of the Act which is relatively clear that for purposes of derivative claims, a ‘member’ includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of the law.”*

First, this conception rests on the content given to the nature of the derivative action in particular, the initial enquiry into the valuation of the validity of any right that the deceased may have had, in the ownership of the disputed company subject matter of this proceedings.

Why all this? To make an obvious point, some of the very issues both counsels have written about are set to be determined before this court. The court is not called upon at this stage to determine questions of credibility or resolve the issues in dispute, but in the language of the respondents, I ought not to try this suit for reason that the applicants are not directors, shareholders or members of the 5<sup>th</sup> respondent. In my Judgment, there is a reasonable basis for the complaint and the actions sought to be litigated is a legitimate and arguable one under the Law of Succession on intestate free property of the deceased.

The applicants cannot be described as mere busybodies motivated with ulterior or collateral purpose in instituting the claim against the respondent. I echo the passages in **Gabriel Peters & Partners (suing as a firm) v Wee Chong Jin & Others {1997} 3 SLR (R) 649 at [22], citing Lonrho plc v Fayed (No. 5) {1993} 1 WLR 1489):**

*“In this content, it is settled Law that an action brought for an ulterior or collateral purpose may be struck out as an abuse of the*

*process of the court. Given that the statutory derivative action under s 216A of the Companies Act similar to our part IX of the Companies Act 2015 also relates to a similar exercise wherein the court has to evaluate the bona fides of the applicant based on affidavit evidence, the “abuse of process” test provides a useful standard by which to decide whether the applicant’s collateral purpose amounts to bad faith. In this regard, it should be borne in mind that the purpose of the statutory derivative action is to provide (see Pang Yong Hock at [19]): “ ..... a procedure for the protection of genuinely aggrieved minority interests and for doing justice to a company while ensuring that the company’s directors are not unduly hampered in their management decisions by loud but unreasonable dissidents attempting to drive the corporate vehicle from the back seat. 31 The onus is upon the applicant to demonstrate that he is or may be “genuinely aggrieved” (See Pang Yong Hock at [19]), and that his collateral purpose is sufficiently consistent with the purpose of “doing justice to a company” (see likewise Pang Yong Hock at [19] so that he is not abusing the statute, and, by extension, also the company, as a vehicle for his own aims and interests.”*

In my view, nobody is disputing that the applicants are not dependants of the deceased. In regard to situations of wrong doer to the company a derivative action may be brought for them to pursue the rise against the company and third parties acting in good faith and in the best interest of the company.

Furthermore, on this issue of the *locus standi* of the Applicants, Order 1 Rule 9 of the Civil Procedure Rules (2010) provides that;

*“No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it”*

**c) Whether The letters of administration *ad colligenda bona defuncti* are sufficient to allow the Applicant institute the current proceedings**

Section 2 of the Law of Succession Act a personal representative is defined as “the executor or administrator of a deceased person” and an administrator is defined as a person to whom a grant of letters of administration has been made under the Act.

The letters of administration *ad colligenda bona defuncti* (Latin for ‘collecting the goods of the deceased’ are necessary **to secure the estate assets that may at risk pending administration.** Section 67 of Law of Succession Act (Cap 60) The provisions of rule 36 under the Probate and Administration Rules which reads as follows:

*“36(1) where owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant Ad Colligenda Bona defuncti of the estate of the deceased.”*

The Applicants petition for Letters of Grant Colligenda Bona was within the provisions of section 67(1) of the Law of Succession but for purposes described under rule 36(1). Under the Law of Succession, a limited grant of letters of administration *Ad Litem* enables the representative of an estate to sue on behalf of the estate or defend a suit where the estate has been sued.

I can very well understand the anxiety and fears expressed by the applicants on the basis that the 1<sup>st</sup> respondent is intermeddling with the estate and may be wasted if not preserved. It follows therefore that this court has to invoke the inherent jurisdiction under rule 73 of the Probate and Administration Rules which states as follows:

*“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

Further, the primary purpose of a court system is to ensure that a right being infringed is not without a legal recourse. Under the Kenyan Constitution the court is mandated to administer justice in a manner that promotes and protects the principles of the constitution one of which is safeguarding of the bill of rights which include the right to property.

**d) Whether the advocate on record for the 1<sup>st</sup> and 5<sup>th</sup> Respondent should be barred from representing the 1<sup>st</sup> and 5<sup>th</sup> Respondent.**

In their Notice of Motion and Supporting Affidavit dated 27<sup>th</sup> of January 2020 and filed on the 28<sup>th</sup> of January 2020, the Applicants

questioned the capacity of the 1<sup>st</sup> and 5<sup>th</sup> Respondent's Advocate to act in this matter based on the fact that they (the Advocates for the 1<sup>st</sup> and 5<sup>th</sup> Respondents) were involved in the drawing of the alleged transfer of shares instruments pertaining to the 5<sup>th</sup> Respondent dated 8<sup>th</sup> November 2012 and the subsequent transfer thereof on behalf of the 1<sup>st</sup> Respondent. Consequently, according to the Applicants, the Firm of **Binyenya Thuranira & Company Advocates** will be persons of interest in the instant proceedings and will have to be called upon as witnesses to shed light on the alleged fraudulent share transfer instruments. It is the Applicants contention that should the said Advocate and Law Firm be allowed to proceed to act in this matter the applicants and the Estate of the Late **Giovanni Forino** will be severely prejudiced and thereby occasioning a great injustice upon the applicants.

Since the share transfer instruments are an important subject matter raised in this Application I am of the opinion that the capacity of **Mr. Binyenye**, Learned Counsel for the 1<sup>st</sup> and 5<sup>th</sup> respondents, is a preliminary issue which ought to be determined whether his continued representation would be prejudicial to the trial.

**e) Whether the Originating Summons itself is competent.**

While I am persuaded that the issues and allegations raised in this matter are complex and contested issues that ordinarily cannot be resolved in a suit commenced by Originating Summons, I am also of the opinion that dismissing this suit will be an injustice to the family of the deceased. The circumstances of this case are of such a nature as to warrant this court to invoke the overriding objective of the Civil Procedure Act [4] (Sections 1A & 1B) and article 159 (2) (d) of the Constitution of Kenya 2010.

I find it fitting to consider the words of **Justice Hancox** in **Githere vs Kimungu {1975-1985} E.A. 101** where he stated that

*“the relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress and that the Court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case.”*

Procedural laws refer to rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties. It was this strictness of having due regard to the rules of Civil Procedure that occasioned the loss of many legitimate claims by plaintiffs thus denying them access to justice. (See **Adrian Kamotho Njenga v Cabinet Secretary, Ministry of Information, Communication and Technology & 8 others {2017} eKLR para 29**)

The Overriding objective also known as the Oxygen Principle (the double O's in the phrase Overriding Objectives are what coins the term Oxygen Principle) as defined by **Michael Howard (Civil Litigation and Dispute resolution: Vocabulary series, Legal English Books. Publishers, 2013)** is a principle from the civil procedure rules whose purpose is to ensure that the civil litigation and dispute resolution process is fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. It therefore transcends that Courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules. The principle as captured in Section 1A of the Civil Procedure Act is that:-

*“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*

*(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

*(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”*

Section 1B of the Civil Procedure Act imposes a duty on the court to further the overriding objective in its handling of disputes.

Section 1A of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. Under the Civil Procedure Rules rule 1.1 makes clear a new procedural code with the overriding objective of enabling the court to deal with cases justly as such the court no longer has need to take draconian steps such as striking out proceedings or pleadings.

Furthermore, Article 159 (2) (d) of the constitution of Kenya 2010 enjoins courts to determine cases without undue regard to technicalities. Equally the 1<sup>st</sup> and 5<sup>th</sup> Respondents seem to pay scant attention to the court's inherent jurisdiction under Section 3A of the Civil Procedure Act which provides that:-

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

The circumstances in this case so demand this Court to invoke its jurisdiction under Section 3A of the Civil Procedure Act and as such in view of the peculiar facts before this Court, in my humble opinion, I shall hesitate to dismiss the originating summons as unprocedural or improper.

### **Disposition**

This Court cannot grant such orders as requested by the 1<sup>st</sup> and 5<sup>th</sup> Respondents Preliminary Objection at this stage based on affidavit evidence only. In light of the accusations and counter accusations swinging from the Applicants to the Respondents and vice versa on the conduct of management and operations of the Company, such crucial issues can only be determined on the basis of direct evidence, its veracity tested through cross examination and credibility of authors of documents and witnesses so as to enable the Court grant an informed final decision.

On this issue there is an error on the face of the record when the Court unmistakably admitted the O.S pursuant to a special Grant of Letters of Administration *Ad Colligenda bona* under Section 67 of the Act which does not allow the holder to easily cross the threshold of prosecuting or defending any suit touching on the estate of the deceased.

That the applicants leave to continue a derivative action against the respondents' flows from the purported transferred shares by the deceased during his lifetime. Indeed, that claim is to be empowered under Section 54 of the Act, notably, a separate Grant of Letters of Administration *Ad litem* for purposes of filing suit.

In the instant case, it seems plain it affects the capacity to litigate or bring an action on behalf of the estate of the deceased. In the best interest of the estate of the deceased, the claim intended to challenge the transfer of shares incorporating the 5<sup>th</sup> respondent can be filed as a derivative action by the legally appointed administrator to the estate of the deceased under Section 51 of the Law of Succession as read in conjunction with Section 66 of the Act.

The effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party his or her day in court. Such summary dismissal or striking out of a case is a draconian issue that must be exercised with caution and as a last resort.

Accordingly, the 1<sup>st</sup> and 5<sup>th</sup> Respondents Notice of Preliminary Objection dated 23<sup>rd</sup> September 2019 is not merited and the same is hereby dismissed. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 27<sup>TH</sup> DAY OF MAY 2020**

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**R. NYAKUNDI**

**JUDGE**