

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC.CIVIL APPLICATION NO. 490 OF 2014

IN THE MATTER OF XPLICO INSURANCE COMPANY LIMITED

AND

IN THE MATTER OF AN APPLICATION FOR THE RECTIFICATION OF THE REGISTER

UNDER SECTION 118 OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA

BETWEEN

OBSDITION INVESTMENTS LIMITED.....APPLICANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE REGISTRAR GENERAL OF COMPANIES.....2ND RESPONDENT

AND

XPLICO INSURANCE COMPANY LIMITED.....1ST INTERESTED PARTY

ALTAF HUSEN BHURAWALA.....PROPOSED 2ND INTERESTED PARTY

PATRICK NDIRANGU.....PROPOSED 3RD INTERESTED PARTY

RULING

1. Obsdiation Investments Limited (the Applicant or Obsdiation) moves the Court by way of an Originating Notice of Motion for rectification of the register in respect to Xplico Insurance Company Limited (**Xplico or the Company**).

2. In that Motion of 13th October 2014, Obsdiation seeks the following order:-

1. The Registrar General of Companies rectifies the register and reverts back to the status ante the details of XPLICO INSURANCE COMPANY LIMITED (“the Company”) to show that the Company’s shareholding and directorship as at 30th June, 2014 does not differ in any way from the following:-

LIST OF COMPANY’S SHAREHOLDERS

NO	NAME OF SHAREHOLDER	NO. OF SHARES HELD AS AT 30TH JUNE 2003
1	Redstone Properties Limited	8,000
2	Green Properties Limited	8,000
3	Obsdiation Investments Limited	11,100
4	Open Scope Ventures Limited	15,900

5	HPH Limited C/O Fiduciary Management Limited	30,000
6	Vispa Properties Limited	14,900
7	NSNI Investment Limited	15,100
8	Keith David Beekmeyer	300
9	Jayhan Limited	29,700
10	Altaf Hussein Bhurawala	30,000
	TOTAL	163,000

LIST OF COMPANY'S DIRECTORS AS AT 30TH JUNE 2014

(i) Keith David Beekmeyer

(ii) Lee Wariungi

(iii) Jitin Mediratta

(iv) Anil Mahan

(v) Isaac Ng'ang'a; and

(vi) Raj Sahi

3. The Motion is against the Honorable Attorney General (AG or 1st Respondent) and the Registrar General of Companies (**the Registrar or 2nd Respondent**). Other parties joined in as interested parties. They are Xplico, Altaf Husein Bhurawala (Altaf) and Patrick Ndirangu.

4. Although the main dispute, which revolves around the shareholding of Xplico, is intense, the events leading to these proceedings are more straightforward.

5. It is common cause that Xplico was incorporated as a private limited liability company on 23rd October 2009 under the provisions of the repealed Companies Act (Chapter 486 Laws of Kenya)(hereinafter the **Repealed Act**). Thereafter the Company commenced business as an insurance underwriter and provider. Obsidition avers that by way of various share allotments, transfers and transmissions, the Company's issued and paid up share capital, as at 30th June 2014, stood at Khs.600,000,000.00 divided into 240,000 shares of Ksh.2,500 each. It contends that the shareholding as at 30th June 2014 is as set out in paragraph 2 of this decision.

6. The grievance by Obsidition is the decision by the AG and Registrar contained in the letters of 6th February 2014 and 19th March 2014, and form CR 12 referenced CPR/2009/12818 of 26th June 2014. Obsidition assails the action of the two as a unilateral and unlawful decision to alter the shareholding and directorship of the Company. It avers that the decision is neither supported or recommended by a resolution of the board or directors of the Company nor is it necessitated by a Court decree or legal intervention.

7. Obsidition's case is that the AG and the Registrar have acted unlawfully and in excess of their powers, mandate and jurisdiction and have interfered with the internal management, operations and shareholding of the Company.

8. In response, Margaret Wangu, an Assistant Registrar of Companies, explains the decision of the Registrar through a replying affidavit of 17th November 2014. That at incorporation the nominal share capital of the Company was Khs.3,000,000,000.00 divided into 1200 shares of Khs.2,500.00 each. The initial directors and shareholders being Xplico Investment Group Limited (Xplico Investment) with 1100 shares and Salim Husein Durgarwalla (Salim) with 100 shares.

9. That on 5th February 2014, Xplico Investment transferred 300 shares each to Keith David Beekmeyer (Keith) Altaf, Shiraz Husein Durgarwalla (Shiraz) and 200 shares to Salim. By a Special Resolution dated 11th February 2010, the nominal capital of the Company was increased from 3,000,000.00 to 300,000,000.00 by creation of 118,800 ordinary shares of Kshs.2,500 each. Salim, Altaf, Keith and Shiraz were each allotted 29,700 shares.

10. Subsequently, Keith transferred 29,700 shares to Jayhen Limited, Salim transferred 15,100 shares to NSNI Investment Limited and 14,900 shares to Vispa Properties Limited. On his part Shiraz transferred 30,000 shares to HPH Limited. In addition, Ordinary Resolutions and Statements of Increase of Nominal capital were filed increasing the nominal capital of the Company from Kshs. 300,000,000.00 to

Kshs.500,000,000.00 and then to Ksh.600,000,000.00.

11. Following the changes, the office of the Registrar received several complaints alleging illegal and unprocedural alteration of directorship and shareholding of the Company. So, on 6th February 2014, the Senior Deputy Registrar General Jane Joram wrote a letter quashing the decision to allot 29,700 shares each to Salim, Altaf, Keith and Shiraz as the return of allotment form dated 11th February 2010 and filed on 24th July 2012 was not supported by a board resolution approving the same. With that decision all subsequent changes in directorship, shareholding and company secretarial were similarly quashed.

12. The Registrar asserts that according to the records they hold, the directors of the Company as at 17th October 2014 are Paul Mucai Gitau, Ferhat R. E Shekelly, Naima Sheikh Ahmed, Keith, Anil Kumar Mahan and Altaf. As to shareholders they are the Estate of Salim, Altaf, Keith and Shiraz with 300 shares each.

13. Altaf supports the position of the Registrar (and without going into details) he depones that the illegal changes to the directorship and shareholding of the Company were perpetrated by Keith. That on his complaint, Keith was charged in **Nrb. Criminal Case No. 1160/2014-REPUBLIC VS. KEITH DAVID BEEKMEYER** where he faces several counts of forgery, fraud, conspiracy to defraud and obtaining money by false pretenses.

14. The Company, as well, opposes the Motion.

15. By agreement of the parties and concurrence of the Court, the Originating Motion was argued by way of written submissions which were augmented by oral highlights. This Court has considered the issues raised in the Motion, Responses, the submissions and has come to the firm view that the Motion turns upon one substantial issue. That is, whether the Registrar upon receiving the complaints on alteration of the directorship and shareholding, could make a decision whose effect was to make changes to the Register of directors and shareholders.

16. The decision of the Registrar which is the subject of challenge was made in the era of the now repealed Companies Act (chapter 486 Laws of Kenya). For that reason this matter is determined in the context of the law as then existing. This Court is moved to rectify the Register of members of the Company back to status as at 30th June 2014. The power of a Court to rectify the register of members was provided for in Section 118 of the Repealed Act as follows:

“118. (1) 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) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the court for the rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his 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 generally may decide any question necessary or expedient to be decided for rectification of the register.

(4) In the case of a company required by this Act to send a list of its members to 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”.

17. In terms of procedure to be adopted, Rule 7 of the then existing Companies (High Court) Rules, 1964 provided;

“Applications to rectify the Register of members of a company under Section 118 of the Act shall be by Originating Motion or when the Company is in voluntary liquidation by Summons”.

As the Company herein is not in liquidation, the procedure used by the Applicant is the correct one.

18. In a nutshell, the core argument by the Applicant is that the Registrar acted outside and beyond the powers donated to that office by the provisions of Section 164 and 166 of the Repealed Act.

19. The Respondents and the Interested Parties on the other hand argue that the Registrar acted within powers available to that office both under the Constitution and the repealed Act. They take similar views of the matter. These can be rehashed in summary.

20. It is argued for the Registrar that, falling under the office of the Attorney General, its mandate under Article 156(6) of The Constitution is to promote, protect and uphold the rule of law and defend public interest. It is contended that matters of company registration have great ramifications on members of the public who interact with a company since they are not privy to the internal procedures of a company. That there was therefore a public interest element in defending innocent members of the public from fraud perpetrated by members of a company.

21. It was contended that where, therefore, the Registrar, on prima facie basis, notes a clear cause of fraud either on his own motion or through notification by a member of public then the Registrar shall call upon the affected person to respond. In the event that no response is forthcoming then the Registrar has a duty to correct details of the fraud at the earliest opportunity.

22. Citing the decision in **Guo Dong vs. Multi Win Trading (E.A) Company Ltd and 6 others [2015] eKRL**, the Registrar makes two propositions. One, that issues of shareholding and directorship of a company are to be dealt with by the company and it is the prerogative of the Registrar to give effect to the registration so long as it is devoid of fraud or concealment. The argument being that to the extent that the Applicant seeks rectification of the Company register with an impact on shareholding and directorship, such an application should fail.

23. Second, the Court was urged to look into the circumstances of fraud that was perpetrated by the Applicant and refuse to sanction an illegality.

24. On another front, Mr. Cohen for the Company submitted that it would have been an abdication of the duty of the Registrar if he/she were to turn a blind eye to illegalities that were brought to her/his attention. In this regard, Counsel called into aid the Court of Appeal decision in **Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others [2015] eKRL**, in which the Court rendered itself thus:-

“50. And so it is in the matter before us. The documents which perpetrated the fraud of share transfer were not even presented to the Company Registry by the real company secretary of West End.

They were all forgeries. They never bound West End in any way. The Registrar of Companies failed in his statutory duty to West End and members of the public who rely on the authenticity of documents entrusted to that office. The Registrar easily allowed the perpetration of the fraud and was complicit in it as he allowed the disappearance of annual returns filed by West End and copies of official receipts issued to it. To cap it all, the entire file was still missing when West End applied to peruse it, and appears to have been reluctantly produced in court, according to the observation of the trial court on the conduct of Johnson Otieno Odera (DW1), a former Senior Assistant Registrar General. The case is a clear exception to the Rule in Turquand’s case, derived from the case of Royal British Bank v Turquand (1856) 6 E & B 327 which prevents outsiders from being affected by internal irregularities of which they have no means of discovering. But the Rule does not apply, amongst other exceptions, where the corporate signature is forged or if the outsider knew of the internal non-compliance, or knew facts that would lead a reasonable person to inquire further”.

25. Even before I consider the merits or otherwise of the application, this Court must reflect on the scope of its power to order rectification of a company’s register under Section 118 of the Repealed Act and generally. In this regard the Court turns to **Halsbury’s laws of England 5th Edition vol.14** where the authors made observations about that power in relation to Section 125 of the UK Companies Act, 2006 which is *para materia* Section 118 of the repealed Act. The authors in regard to the general jurisdiction to rectify company’s register of members write:-

“General jurisdiction to rectify a company’s register of members is discretionary; and it is not limited by the provisions of the Companies Act 2006. Thus the court will rectify the register, apart from the Act, to enable the members of a company to have a fair and reasonable exercise of their rights.

When the Court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought.

The power to rectify has been exercised where there has been misrepresentation in the prospectus, where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of the name struck out by the directors; where shares have been illegally allotted at a discount; where the application for shares has been made in the name of a person, as, for example, an underwriter, without his authority; where there is no valid allotment of shares; or the allotment is not made within a reasonable time, or is irregular; where a transfer of shares has been improperly registered or registration has been refused; where there are joint holders of shares who wish to divide the shares so held into two parts with their names entered in the register of each part in a different order; where the company puts on its register matters which are not required by the statute; in order to set right allotments of shares which have been issued as fully paid without a proper contract being filed, and where an overseas company was entered in the register without the permission of the Treasury, which was at the time required”.

26. Also to be observed is that since the procedure adopted is summary in nature, it should not be invoked where there is a substantial dispute as to fact (*para 353 Halsbury’s (supra)*). In that instance, the Authors advice that the Court will look to actively manage the dispute by making appropriate directions rather than simply striking out the application for rectification.

27. The effect of the action of Registrar of 6th February 2014 in which it quashed the decision to allot certain shares was to alter the register in respect to shareholding of the Company so as to “revert back” to the position when the nominal share capital was Kshs.300 million divided into 120,000 shares of Kshs.2,500 each with only 1,200 shares allotted to:-

- Estate of Salim Dungarwalla (300 shares)
- Keith D. Beekmeyer (300 shares)
- Altaf H. Bhurawal (300 shares)

- Shraz H. Dungarwalla (300 shares)

28. In so far as the Motion asks this Court to annul the decision of the Registrar with the effect it will rectify the register and revert it to shareholding as at 30th June, 2014, then the application is brought within the rectification jurisdiction of this Court.

29. This Court agrees with the view taken by the Registrar in her letter of 19th March 2014, in which she noted that the role of the Registrar of Companies is not a 'classical officious by-stander'. Indeed, the High Court, in **West End Butchery Limited vs. Arthi Highway Developers Limited & others** [2012] eKLR frowned upon a Registrar who sees no evil and hears no evil. That said, it behooves on the Registrar in being a vigilant defender of public good to himself or herself act within the confines of the law.

30. It is not in dispute that the Registrar received various complaints about certain changes that had been made to the directorship and shareholding of the Company. Some examples include the letter of 30th July, 2010 by Morgan Hall Solicitors acting for Altaf and the letter of 6th July, 2017 by Paul Ndungu. It would seem that as at 30th July 2012, some of the changes complained of had been effected in the Register of members of the Company (see the CR 12 form of the Company of 30th July 2012 and CR 12 of 14th December 2012).

31. How was the Registrar to deal with the complaints? A critical consideration, in my view, was for the Registrar to first consider whether or not changes had been effected in the register on the basis of the matters complained of. If there is just an attempt to have changes made, then the Registrar can halt the process and carryout investigations. Where, however, the disputed documents have been used to effect changes in the registry, the Registrar, ought to have followed the procedure available under section 164 of the Repealed Act. The provision gave the Registrar latitude in correcting the wrongs and fraud brought to her attention in the following manner :-

“164. (1) (a) Where the registrar has reasonable cause to believe that the provisions of this Act are not being complied with, or where, on perusal of any document which a company is required to submit to him under the provisions of this Act, he is of opinion that the document does not disclose a full and fair statement of the matters to which it purports to relate, he may, by a written order, call on the company concerned to produce all or any of the books of the company or to furnish in writing such information or explanation as he may specify in his order.

(b) Such books shall be produced and such information or explanation shall be furnished within such time as may be specified in the order.

(2) On receipt of an order under subsection (1) it shall be the duty of all persons who are or have been officers of the company to produce such books or to furnish such information or explanation so far as lies within their power.

(3) If any such person refuses or neglects to produce such books or to furnish any such information or explanation he shall be liable to a fine not exceeding two hundred shillings in respect of each offence.

(4) If after examination of such books or consideration of such information or explanation the registrar is of the opinion that an unsatisfactory state of affairs is disclosed or that a full and fair statement has not been disclosed the registrar shall report the circumstances of the case in writing to the court”.

32. That in my view is what the Registrar ought to have done in the matter before this Court. It may well be that the Registrar had come to the opinion that the Applicant was guilty of wrong doing but each side was making competing assertions. Since a resolution of the matter was likely to lead to a rectification of the register, then the Registrar needed to report the matter to the Court for its decision in that respect. To follow that path would not be to make the Registrar an inactive bystander. The Registrar would be triggering a process that would lead to the matter being resolved substantively.

33. An alternative would be for the Company or aggrieved members to move Court to rectify the register. That would give parties an opportunity to ventilate their respective positions and allow the Court to make a decision.

34. This Court takes the view that in so far as the Registrar lacked the power to rectify the register, and because her actions led to the rectification of the register, the Registrar overstepped her powers. What then is the Court to do in the circumstances?

35. This Court is urged by the Respondents to decline the application and to allow the position subsisting after the intervention of the Registrar to continue. The Respondents argue that the evidence overwhelming reveals a fraudulent scheme on the part of the Applicant and to allow the application would be to allow the Applicant to escape with fraud by hiding behind Section 164.

36. I observe that the question as to whether or not the Registrar overstepped her powers is one that can be made quickly on the basis of the matter that she was asked to resolve vis-à-vis the action she took. The events that led to the Registrar's action may not be controversy. They may in fact be common cause. On the other hand, circumstances that led to the changes complained of by the interested parties are contested and involve allegations of fraud. For that reason, while the application before this Court can be determined on affidavit evidence, the primary controversy about who are the true shareholders may be more complex. For this latter question, which may include interrogation as to whether fraud was committed, a summary procedure such as an application under section 118 of the Act may not be an efficacious procedure.

37. What commends itself to this Court is to allow the application because of the breach of the Registrar and then leave parties herein to move the Court in more substantive proceedings to litigate about the shareholding. In doing so I do not in any way ordain the correctness of the Applicant's position in respect to shareholding. That is a call that belongs elsewhere. All the Court seeks to do is to put the matter back onto the right path and allow a resolution of the dispute within the confines of the law.

38. Lastly, even as I allow the application, I must limit myself to rectification of the register on membership. The Applicant choose to invoke Section 118 of the repealed Act, I cannot also effect rectification of directorship.

39. I allow the Motion of 13th October 2014 but only in regard to shareholding. I make no order to costs.

Dated, Signed and Delivered in Court at Nairobi this 26th Day of July, 2019.

F. TUIYOTT

JUDGE

PRESENT:

Cohen for 1st Interested party

Eboso for 2nd and 3rd Interested Party

Njoki for Applicant

No appearance for Attorney General

Nixon – Court Assistant