



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL APPEAL NO. 158 OF 2008**

**AIMI MA KILUNGU LTD.....APPELLANT**

**-AND-**

**CHARLOTTE JOYCE NZOKA** (Suing as legal Representative of the  
estate of the late **CHARLES AMBROSE NZOKA.....RESPONDENT**

*(An appeal for the whole ruling of Senior Resident Magistrate's Magistrate*

*E. Nderitu dated 25.8.2008 in Machakos Civil Case No. 422 of 2008)*

**-BETWEEN-**

**CHARLOTTE JOYCE NZOKA** (Suing as legal  
Representative of the estate of the late  
**CHARLES AMBROSE NZOKA).....PLAINTIFF**

**-BETWEEN-**

**AIMI MA KILUNGU LTD.....DEFENDANT**

**JUDGMENT**

1. The decision of the trial court the subject of the appeal is a ruling on a Preliminary Objection as to jurisdiction as follows:

***REPUBLIC OF KENYA***

***IN THE CHIEF MAGISTRATE'S COURT AT MACHAKOS***

***CIVIL CASE NO. 422 OF 2008***

***AIMI MA KILUNGU LTD..... APPELLANT***

***VERSUS***

**RULING**

*The ruling relates to a preliminary objection raised by the defendant on two grounds first that the plaintiff's suit is time barred and secondly that this court has no jurisdiction to grant the order sought by virtue of the same being bestowed on the High Court by the Company's Act.*

*That a look at the plaint herein shows the cause of action arose in 1977. That plaintiff sat on her rights for 31 years and this court's jurisdiction is therefore ousted.*

*On the second limb he argues that the companies Act particularly the preamble vests jurisdiction of all matters relating to incorporation, operation and winding up on the High Court and this court therefore has no jurisdiction. He argues that the right forum is the High Court and hence the plaint and the application which seeks to restrict a winding up should be dismissed.*

*In response, the plaintiff deny that the cause of action arose in 1977. She indicated that though the shares in the company were purchased in 1977, the cause of action did not arise until the year 2008 when the company allocated dividends leaving out the plaintiff and thereafter expressing intention of wind-up. She too submitted that this being a claim for a declaration that the plaintiff is a bonafide member of the company and for an injunction, the court has jurisdiction.*

*I have duly considered the respective submission. I agree that the cause of action in this matter arose when the plaintiff was omitted from the list of shareholders and denied dividends and not when the shares were purchased. The same is not time barred.*

***Similarly a look at the prayers in the application as well as the suit clearly shows that the plaintiff seeks the equitable remedy of injunction. She has indeed invoked the provisions of Order XXXIX. This court has jurisdiction to grant the equitable remedy being a court of equity.***

***The company's Act grant jurisdiction to the High Court to deal with the dissolution process itself, incorporation etc. the plaintiff is not invoking the dissolution process.***

*All in all I find the preliminary objection unmerited and overrule the same.*

*Dated, Signed and Delivered in open court on this 25<sup>th</sup> day of August 2008 in presence of Wambua Kilonzo for O.N. Makau for defendant.*

**E. NDERITU**

**S.R.M.**

**25/8/08**

2. The Plaint in the civil suit before the trial court is as follows:

**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT MACHAKOS**

**CIVIL SUIT NO. 422 OF 2008**

**CHARLOTTE JOYCE NZOKA (Suing as the legal Representative of the Estate of**

**CHARLES  
(Deceased.....)AMBROSE NZOKA  
PLAINTIFF/APPLICANT**

## **VERSUS**

**AIMI MA KILUNGU LTD.....DEFENDANT/RESPONDENT**

### **PLAINT**

1. The plaintiff is a female adult of sound mind residing and working for gain within the Republic of Kenya and brings this suit as the legal representative of the Estate of **CHARLES AMBROSE NZOKA-DECEASED**. Her address of service for purposes of this suit is care of **ANNE M. KIUSYA & COMPANY ADVOCATES, KITANGA HOUSE, 2<sup>ND</sup> FLOOR, P.O. BOX 614, MACHAKOS**.

2. The Defendant is Limited Liability Company duly incorporated and registered under the Company Act Cap 486, Laws of Kenya and its address of service for the purpose of this suit is care of **P.O. BOX 88, YOANI SALAMA**. (Service of Summons to Enter Appearance shall be effected through the Plaintiff's Advocates Office).

3. At all material times to this suit, the Plaintiff was a Shareholder of the Defendant Company holding **3 shares** having duly paid the requisite registration fee.

4. On or about 19.4.1977 and 7.11.1997 respectively, the Deceased bought three shares from the Defendant Company at a cost of Kshs. 3,000/= which money the Defendant acknowledged receipt and issued receipts and this was in compliance with the Defendant's terms and conditions.

5. As a result of the paragraph 4 above the Deceased at all material times was bona fide shareholder/member of the Defendant Company therefore the Plaintiff as the legal representative of the Deceased is entitled to any benefits and or dividends that have accrued or may accrue as a result thereof.

6. The Plaintiff has in the recent past learned that the Defendant Company through its directors, agents and or servants has allocated land parcels to the other members through balloting exercises and it has come to her knowledge that her names are not among the registered balloters and also that the Defendant company is in the process of winding up. As a result the Plaintiff stands to suffer damage, loss and expense due to the Defendant's company fraudulent activities thus:-

### **PARTICULARS OF FRAUD**

i. The Defendant has failed to show the Plaintiff her land and or give her notice to that as per terms and condition of the Defendant Company.

ii. The Defendant Company through its agents and or servants have fraudulently and without reasons failed to include the Plaintiff as beneficiary of the Defendant Company.

iii. The Defendant Company has fraudulently denied the Plaintiff participation in balloting exercise and the subsequent allotment of land.

7. As a consequence of the illegal unlawful and fraudulent action of the Defendant Company the Plaintiff stands to suffer damage, financial loss and expense.

8. Despite demand and notice of intention to sue having been duly given, the defendant has reused, neglected, ignored and/or failed to make good the plaintiff's claim.

9. The plaintiff aver that there is no other suit pending and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter.

10. The cause of action arose within the jurisdiction of this Honourable court.

**REASONS WHEREFORE:** - *The Plaintiff prays for judgment against the Defendant for:-*

**a. A declaration that the Plaintiff is a bona fide shareholder and member of the Defendant Company.**

***b. The Defendant Company, its' Directors, agents and/or employees be restrained by an Order of this Court from proceeding to wind up the company before giving to the plaintiff dividends in form of land and all the dividends that have previously accrued and those that may accrue.***

***c. That the Defendant Company be compelled by an Order of this Court to allocate land to the Plaintiff just like the other shareholders of the Defendant Company.***

*d. Costs of the suit.*

*e. Interest in (d) above at court rates.*

*f. Any may deem fit and proper to grant.*

**DATED at MACHAKOS this 23<sup>rd</sup> day of April 2008.**

(Underlining mine)

### **Determination**

3. The court has considered the appeal and the written submissions filed thereon by the counsel for the parties. For the reasons given below the court finds merit in the appeal.

4. The Respondent's cause of action for declaration as "a bona fide shareholder and member of the defendant Company" is based on a dispute as regards her status as a member of the company, pleaded at paragraph 6 of the Plaint as follows:

*"The Plaintiff has in the recent past learned that **the Defendant Company through its directors, agents and or servants has allocated land parcels to the other members through balloting exercises and it has come to her knowledge that her names are not among the registered balloters and also that the Defendant company is in the process of winding up.** As a result the Plaintiff stands to suffer damage, loss and expense due to the Defendants' company fraudulent activities..."*

5. Section 2 of the Companies Act provides that the court for purposes of the Act is the High Court. It is true as held by the learned magistrate that the plaintiff in this case is not invoking the dissolution process of a company under the Act. However, the remedies of injunction sought in the Plaint are dependent and consequential upon a determination, which may competently only be made by the High Court as the companies' court. The central dispute between the parties is whether or not the plaintiff is a member of the defendant company.

6. With respect, the respondent's plaint does seek orders the jurisdiction over which lies with the High Court. The Magistrate Court has no jurisdiction to determine a question of the membership of a Company, and it therefore cannot grant or deny an application for injunction based on a disputed membership to a company. Although the prayers of injunction sought in the Plaint are equitable remedies which under the Civil Procedure Rules the magistrate's court is competent to grant, the remedy of injunction may only be granted in proceedings in which the court is competent to entertain. Not being empowered to deal with company law matters of membership of a company the court cannot in a suit before it grant an injunction to restrain lawful operations of a company or to compel the recognition of a party as a member of the Company. Determination of membership to a company is the province of the High Court and therefore it is the High Court which may order the company to halt winding up proceedings and to recognize and treat a party as a member of the company following its determination of

the question of membership. It is that plain.

7. To be sure Section 28 of the Companies Act cap. 486 provided for membership of company as follows:

***“28.(1) The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, on its registration shall be entered as members in its register of members.***

***(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members shall be a member of the company.”***

8. It cannot be assumed that the plaintiff/respondent herein is a member of the defendant company. The Plaintiff must prove it before a competent court, which may then make consequential orders as appropriate. The determination of a question as to whether the plaintiff is or has become a member of the company is clearly the function of the court under the Companies Act: the High Court.

### **Orders**

9. Accordingly, for the reasons set out above, I find merit in the appeal which is, therefore, allowed as prayed with costs to the appellant.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF OCTOBER 2018.**

**G.V. ODUNGA**

**JUDGE**

**Appearances: -**

M/S O.N. Makau & Mulei for the Appellant.

M/S Anne M. Kiusya & Company Advocates for the Respondent.