



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

OBSIDITION 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. The application before the court is a Notice of Motion dated 1st September, 2015 whereby the 2nd and 3rd proposed interested parties seek to be enjoined in this suit. The same was supported by the grounds contained in the application and the affidavit of AlfatHusenBhurawa sworn on 1st September 2015.
2. It was pleaded that the suit herein seeks rectification of the register of members of the 1st interested party, Xplico Insurance Company Limited. That as of the time the said company was incorporated on 23rd October, 2009, it had four promoters including the 2nd proposed interested party.
3. The applicants contended that the nature of the orders sought, if granted, will alter the shareholding of the company and may dilute the 2nd Interested Party's shareholding. It was also deponed that pursuant to

the Memorandum and Articles of Association of the company, every shareholder has a right to approve or reject an incoming or new member of the company. In this regard, it was deponed that the proposed 2nd interested party is not privy to the Applicant's claims as a shareholder of the company and indeed has never approved the alleged membership.

4. That accordingly, the applicants are the only bona fide and present directors of the company as is evident in the CR12 forms attached to the application. Consequently, it was the applicants' argument that they are the only individuals authorized to carry out the duties and functions of the company as provided for in the Memorandum and the Articles of Association.

5. In sum, the Applicants urged the court to allow the application as it was in the interest of justice for them to be enjoined in the suit as the dispute revolves around the issue of directorship and shareholding of the company. Obsiditon Investments Limited did not oppose the subject application.

6. However, in reply to the application, the 1st interested party filed the Replying Affidavit of Farhat Rashid K. Shirely sworn on 9th December, 2015. It was contended that the proposed 3rd interested party is neither a shareholder nor a director of the 1st interested party.

7. Further to this, the deponent contended that the said proposed 3rd interested party was a former principal officer of the Xplico Insurance company limited, but had been subsequently dismissed for fraudulently acquiring monies from the said company.

8. That the applicants have not presented any documents to show that Patrick Ndirangu was a shareholder or director to the company. it was further contended that the CR12 documents presented by the Applicants were not genuine. That in short, the 3rd proposed interested party had not demonstrated that he was entitled to be enjoined in the suit as a necessary party as he had no interest or stake in the matter.

9. With regard to the proposed 2nd interested party, the 1st interested party was not opposed to his joinder in the suit. The court directed that the application should be dispensed by way of written submissions on 3rd November, 2015. However, parties came to court on 17th February, 2016 and orally submitted on the application. In their oral address, the advocates more or less repeated what was contained in the affidavits of their respective clients.

10. I have considered the application, affidavits, and submissions of the learned counsel to the respective parties including the various cases cited in support of their arguments. The following is my view on the matter.

11. The two applicants herein claim to be the bona fide directors of the 1st interested party. They state that, since the nature of the orders sought in this suit seek to alter the shareholding and directorship of the 1st interested party company, it is clear that they have an interest in the outcome of this suit. In other words, they want to be heard and have their day in court.

12. No party was opposed to the joinder of the proposed 2nd interest party, the contention was with regard to the joinder of the 3rd proposed interested party, Mr. Patrick Ndirangu. I shall thus focus on the reasons raised by the 1st interested party on why the said person cannot be enjoined as an interested party.

13. I must state that the Civil Procedure Rules do not contain any express provision with regard to applications by interested parties to be enjoined to suits. This is often left to the discretion of the court. However, in exercising this discretion, the courts must assess whether a party has sufficient interest in the subject matter in order to be enjoined in a suit.

14. According to Order 1 rule 10(2) of the Civil Procedure Rules:-

“(2). The court may at any stage of the proceedings, either upon or without the application of

either party and on such terms as may appear to the court to be just, order that the name of any party.....whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”(emphasis mine)

15. I therefore agree with the holding of Sila J in the case of **Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2015] eKLR** when he stated thus;

“18. In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.” (emphasis added)

16. Further to the above case, The Supreme Court has had occasion to pronounce itself on who an interested party is. In **COMMUNICATIONS COMMISSION OF KENYA AND 4 OTHERS V ROYAL MEDIA SERVICES LIMITED & 7 OTHERS, PETITION NO. 14 OF 2014 [2014] eKLR** where it was held that:

“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court’s decision in the MumoMatemo case where the Court (at paragraphs 14 and 18) held:

“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

Similarly in the case of **Meme v Republic, [2004] 1 EA 124**, the High Court observed that a party could be enjoined in a matter for the reasons that:

(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions: a) what is the intended party's stake and relevance in the proceedings? And b) will the intended interested party suffer any prejudice if denied joinder?"

17. From the foregoing, has the 3rd proposed interested party met the required threshold in order to be enjoined as an interested party? It has clearly been demonstrated by the pleadings filed in court with regard to this matter that there is a dispute as to the directorship and shareholding of the 1st interested party company. I have seen the various documents presented to the court with regard to the composition of the company.

18. More so, I note the as per the CR12 from issued by the Assistant Registrar of companies on April 30th, 2012 and April 8th, 2015, the 3rd proposed interested party is listed as one of the directors of the 1st interested company, with zero shares allotted to him.

19. Of course the 1st interested party through its learned counsel Mr. Cohen, disputes these documents and stated that the Insurance Regulatory Authority has the power to approve or disapprove the directorship of an insurance company.

20. That vide their letter to the Principal Officer of the 1st interested party only recognized three directors to serve alongside other approved directors. That by dint of this letter, there was no approval for the proposed 3rd interested party as a director. The 1st interested party further submitted to the court that the CR12 presented to the courts with the inclusion of the 3rd proposed interested party as a director were not genuine.

21. I have considered the above rival arguments. However, I must state that the court at this stage is not able to determine the directors and shareholders of the 1st interested party. The determination of the proper directors and shareholders of the Applicant can only be done after the full hearing of the matter.

22. However, based on the evidence before me, there is a probability that the 3rd proposed interested party could have been a director to the 1st interested party. This is clearly shown in the CR12 dated April 30th, 2012 and April 8th, 2015, the veracity of which shall be proved after full trial and cross examination of the witnesses.

23. To go into the rigors of trying to determine whether the same are accurate in nature would be venturing into the trial courts mandate. To this end, I would have to agree with the Applicants' submission that since the nature of the orders sought in this suit are in regard to the directorship and shareholding of the 1st interested party, it would only be in the interest of justice for a party alleging to be a director of the said company, to be enjoined.

24. The order issued after the adjudication of the instant matter can indeed curtail the rights of the proposed 3rd interested party.

25. For those reasons, I find that the applicants have persuaded this court to exercise its discretion under the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules and add them to these proceedings as necessary parties.

26. The court orders that **ALTAF HUSEN BHURAWALA** and **PATRICK NDIRANGU** be and are hereby added as interested parties to this suit. I shall make no orders as to costs.

27. It is hereby ordered.

Dated, signed and delivered in court at Nairobi this 23rd day of March, 2016.

.....

C. KARIUKI

JUDGE