



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 14 OF 2012

IN THE MATTER OF: KILIMANI JUNIOR ACADEMY LIMITED

IN THE MATTER OF: THE COMPANIES ACT

IN THE MATTER OF: APPLICATION FOR RECTIFICATION OF REGISTER

DAVID JOSEF MOTION

(AS ADMINISTRATOR OF THE

ESTATE OF JOSEPHINE MAGADALENA MOTION APPLICANT

VERSUS

KILIMANI JUNIOR ACADEMY LIMITED 1ST RESPONDENT

HEIDI JANE BIRD JUDY 2ND RESPONDENT

CHRISTOPHER BIRD 3RD RESPONDENT

RULING

1. The Applicant, **David Josef Motion** filed a Notice of Motion dated 5th February 2014 under the provisions of **rule 5 (1) (d)** of the *Companies (Winding up) Rules*. The Application sought Orders as regards the rectification of the shareholders' register of the first Respondent herein – **Kilimani Junior Academy Ltd** by the removal of the third Respondent **Christopher Charles Bird** as a shareholder and director and that the Applicant's name be included as a member and director of the first Respondent in his capacity as the Administrator of the Estate of the late **Josephine Motion** deceased. The Applicant swore an Affidavit in support of his Application dated 5th February 2014. That Affidavit basically underlined the Grounds in support of the Application which were as follows:

“a. The circumstances under which the 3rd Respondent became a member and director of the 1st Respondent Company are mired in fraud, illegality and borderline theft.

b. The effect of the foregoing has had an extremely harmful and prejudicial impact upon the Petitioner/ Applicant and the 1st Respondent/Company in that:-

- i. **The allotment of a share to the 3rd Respondent immediately eroded the interest of the Estate of the late Josephine Motion in the 1st Respondent from 33.33% to 25%. In terms of value of the Company, this translates to sum of Kshs. 23,893,686.49 as per a recent valuation.**
- ii. **Further by way of the allotment of a share to him, the 3rd Respondent illegally acquired 25% of the 1st Respondent which he was not entitled to and he thus alienated 25% of the company to himself, without sufficient cause. By value of the Company this translates to a sum of Kshs.71,709,743.38.**
- iii. **The appointment of the 3rd Respondent as a director of the 1st Respondent is null and void *ab initio* and has imposed a complete stranger and *persona non grata* upon the company's affairs.**
- iv. **The 3rd Respondent has in any event violated his fiduciary duty owed to the Company and its shareholders and has failed to conduct himself in a manner consistent with the company's best interests, his tenure as a director having been plagued by serious mismanagement of the company, including a complete failure to render true and just accounts.**

c. **The Petitioner, on the other hand, is legally entitled to assume the role and function performed by the late Josephine Motion as a member and director of the 1st Respondent pursuant to his appointment as Administrator of the Estate of the late Josephine Motion.**

d. **Further, the Petitioner is entitled to be included in the 1st Respondent's register of members in his own capacity as a beneficiary in equal share with the 2nd Respondent of the late Josephine Motion's share in the company.**

e. **However, rather than according him his legal right and entitlement to become a member and director of the 1st Respondent and to be involved in the Company's affairs, the 2nd and 3rd Respondents have instead worked in concert to completely shut out the Petitioner from the affairs of the 1st Respondent and to deny him his aforesaid legal right and entitlement.**

f) **It is fair, just, equitable and in the interest of justice that the Application be allowed as prayed".**

2. **The first Respondent filed Grounds of Opposition dated 24th February 2014 opposing the said Application before Court. Those Grounds detailed as follows:**

"1. THAT the Application does not disclose any grounds that merit the grant of the orders being sought by the Applicant.

2. THAT the application is legally untenable and is grounded on simple misunderstanding of the basic principles of company law and is a complete abuse of process.

3. THAT the Applicant, not being a member or director of the 1st Respondent is a stranger in the management and control of the 1st Respondent.

4. THAT the Articles of Association of the 1st Respondent provide an elaborate procedure for the process of the transmission of a deceased member's share and the appointment of a new director.

5. THAT the Applicant has failed the elaborate procedure in the Articles of

Association. The Applicant seeks to circumvent the procedure provided in the Articles of Association by the present application. The Applicant is the author of his own misfortune.

6. THAT the board of Directors of the 1st Respondent has unfettered discretion in admitting a new member to the company, including a personal representative of a deceased member such as the Applicant.

7. THAT the Respondent do not intend to admit the Applicant as a member of the 1st Respondent or appoint him as a director.

8. THAT the Articles of Association of the 1st Respondent and the law provides the remedies available to a personal representative of the estate of a deceased member or director.

9. THAT the value of the 1st Respondent remains unknown.

10. THAT there is no evidence or factual proof of the 3rd Respondent's breach of fiduciary duty or failure to conduct himself legally.

11. THAT the present application and the entire petition are an extension of the succession dispute between the Applicant and the 2nd Respondent and are made in bad faith. It is trite law that a winding up court does not exist for improper purposes.

12. THAT the Application confirms the legal position that a non member cannot file a winding up petition under Section 211 of the Companies Act”.

3. On 27th March 2014 the Respondents raised a Preliminary Objection on a point of law in 2 paragraphs namely:

“(1) A preliminary objection on a point of law that the suit herein being a winding up grounded on the Petition dated 15th June 2012, does not provide the legal basis to support the Notice of Motion dated 5th February 2014.

(2) The application before the court is one to allot shares to a stranger who is not a member of the company. Such an exercise is not pleaded in the Petition and is unsupported by the pleadings before the court.”

Before Court on 2nd April 2014, it was determined that the Preliminary Objection of the Respondents would be heard first and determined prior to proceeding with the hearing and determination of the said Notice of Motion dated 5th February 2014.

4. On 28th April 2014, Mr. Ahmednasir for the Respondents detailed before Court that they were raising a simple issue namely that the Applicant could not bring the said Notice of Motion dated 5th February 2014 as the issues that it sought to ventilate were not pleaded in the Petition filed herein on 15th June 2012. In counsel's view, in the absence of such substratum, there was no basis in law for the said Application to be brought. The prayers in the Petition spoke for themselves and in essence the Petitioner sought to wind up the first Respondent Company. Since the filing of the Petition there were now new parties enjoined thereto being the second and third Respondents. However, counsel submitted that a winding-up cause can only relate to one matter and that was the winding up of the Respondent Company. By his said Notice of Motion, the Applicant wanted one person to be removed as a shareholder and director and another party to be added in those capacities. This would imply that the Applicant had completely abandoned his Petition. The Orders sought in the Application could not be dealt with under a Winding-up Petition. Such would

- require a separate suit to be filed. As regards the Petition, counsel maintained that there was no grievance pleaded as against the second and third Respondents. He maintained that it was trite law that a party cannot seek Orders when such could not be obtained/sustained at the final determination of the Petition. To support his submissions, learned counsel for the Respondents put before Court the following authorities namely **Nairobi City Counsel v Thabiti Enterprises Ltd (1995) 2EA 231 (CAK)**, **Sande v Kenya Cooperative Creameries Ltd (1992) LLR 314 (CAK)** (in which the Court approved the decision in **Gandy v Caspair Air Charters Ltd (1956) 23 EACA 139** as well as the quotation from **Bhag Bhari v Medhir Khan (1965) 2 EA 94**).
5. In his turn, Mr. Odera learned counsel for the Applicant, took the Court through the history of the pleadings admitting that the Petition filed on 18th June 2012 sought a prayer that the company be wound up. However there was an alternate prayer that the Court should order for the purchase of the Applicant's shares for value and a third prayer for the Court to make such orders as it deemed fit. Counsel noted that in response to the Petition an Affidavit had been sworn by the second Respondent dated 26th June 2012 which, at paragraph 7, detailed that the deponent believed that they were only two shareholders of the first Respondent Company being her mother and herself. Further, by a Supplementary Affidavit sworn on 28th August 2012, the second Respondent had maintained that the Return of Allotments filed at the Companies Registry, recording the third Respondent as having become a shareholder and director of the first Respondent Company, was a forgery. These matters were before the Court for determination as well as the issue of the buyout of the Applicant's shares being 50% of the share in the first Respondent Company held by his deceased mother. Counsel submitted that the Applicant had come before Court as the Administrator of his mother's Estate. Counsel insisted that by the introduction of the third Respondent as a shareholder through a forgery, it was necessary for the Court to make a determination as to whether he should remain as a member of the Company as per **section 120** of the *Companies Act*. Counsel went on to note that **section 118** of the *Companies Act* gave this Court power to rectify the register of members.
 6. Thereafter, Mr. Odera turn his attention to the Applicant's List of Authorities dated 1st April 2014. He drew the attention of the Court to **paragraphs 370-372 Halsbury's Laws of England Volume 7 (1) Companies** as regards rectification of shareholders' registers by the Court and **Volume 16** as regards jurisdiction in equity in respect of fraud. Thereafter the Court was referred to **paragraph 957** of **Halsbury's Laws of England Volume 16** as regards approbation and reprobation. Counsel then referred to the case of **Lazarus Estates Ltd v Beasley (1956) 1 All ER 341** in relation to fraud as well as the local case of **Mistry Singh v Kulubya (1963) EA 408**. In Mr. Odera's view, the facts that Mr. Bird had come onto the Register of Members of the first Respondent Company was an irregularity. The Court should consider whether such inclusion on the Register of Members being brought about by a forgery, would amount to an illegality. Finally, counsel referred the Court to 2 further cases being **Mapis Investment (K) Ltd v Kenya Railways Corporation (2006) eKLR** and **National Bank Kenya Ltd v Wilson Ndolo Ayah Civil Appeal No. 119 of 2002**. He requested that this Court should allow the Application to be heard on its merits.
 7. Mr. Ahmednasir for the Respondents in a brief reply commented that Mr. Odera had put forward submissions on the part of the Petitioner regarding a different case from the one that he had prosecuted. He emphasised that the Petition was for the winding up of the first Respondent Company. Mr. Odera had failed to answer the question that the remedy he was seeking on the part of his client was not contained within the pleadings. He had not explained how the second and third Respondents had been brought into the Petition proceedings. The single party was the first Respondent company and whether it should be wound up. The authorities that Mr. Odera had quoted were good authorities but had no relevance to the Preliminary Objection before this Court. The pleadings comprised of (*inter alia*), were the Petition and there was no pleading in relation to fraud. This was the basis of the Preliminary Objection. As there were no pleadings therein relating to fraud, the same could not be aired at the trial. With reference to **Bullen & Leake & Jacobs, Precedents of Pleadings, 16th Edition**, counsel submitted that a party can't raise anything in its Affidavit which has not been pleaded. The Applicant could not bring any other application under the Petition, which could not be amended in any event. The Applicant would have to file a separate suit. Mr. Ahmednasir submitted that the Preliminary Objection had not been answered but instead, counsel for the Applicant had raised matters which were irrelevant thereto.

8. A Preliminary Objection is raised purely on a point of law or procedure. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696** Law, J.A (as he then was) held at page 700 *inter alia*;

“...so far as I am aware, 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...”. (Emphasis mine).

As Mr. Ahmednasir has pointed out, the Respondents’ Preliminary Objection as regards the Application before this Court arises from the pleadings contained in the Petition herein. The prayers of the Petition read as follows:

“a) THAT KILIMANI JUNIOR ACADEMY LIMITED be wound up by the Court under the provision of the Companies Act (Cap. 486) Laws of Kenya.

b) THAT as an alternative to winding-up the Company, the Court order that the Company purchase the Petitioner’s interest in the Company at an open market value, or as the Court may deem fit.

c) THAT such further or alternative orders be made in the circumstances as the Court shall deem fair and just.

d) THAT costs of the Petition be provided for out of the assets of the Company”.

9. The Respondents’ point is that the Application before Court seeks remedies outside what has been pleaded and indeed, prayed for in the Petition. Mr. Odera, in what the Court considers to be a somewhat last ditch submission, attempted to persuade this Court that the prayers sought in the Application could be brought under prayer c) of the Petition. Unfortunately for the Applicant, I do not share that viewpoint. The Orders sought in prayer No. 2 of the Application dated 5th February 2014 are, to my mind, very specific in requesting that the name of the third Respondent should be struck out as a member and director of the first Respondent and that the Applicant’s name should be included, basically, in its place. I cannot agree with Mr. Odera that prayers as specific as those can be brought under a general prayer as to what the Court should deem “fair and just”. In this view, I am supported by the authority put before Court by the advocates for the Respondents being the **Bullen & Leake & Jacobs** volume relating to **Precedents of Pleadings** (supra). I consider that the position was admirably put in the Australian case of **Dare v Pulham (1982) 148 CLR 658 at 664**:

“Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it; they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial; and they give a defendant an understanding of a plaintiff’s claim in aid of the defendant’s right to make a payment into court. Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings. But where there is no departure during the trial from the pleaded cause of action, a disconformity between the evidence and particulars earlier furnished will not disentitle a party to a verdict based upon the evidence. Particulars may be amended after the evidence in a trial has closed”.

This viewpoint is supported in the local case of **Galaxy Paints Co. v Falcon Guards Ltd C.A 219 of 1998**, in which it was held *inter alia*:

“i. it is trite law as confirmed by the provisions of Order XIV of the Civil

Procedure Rules that issues for determination in a suit generally flow from the pleadings.

ii. unless the pleadings are amended, the trial court as per requirement of order XX Rule 4 Civil Procedure Rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination."

Of course **Order XX rule 4** has now been replaced by **Order 21 rule 4** of the *Civil Procedure Rules, 2010* which reads:

"Judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

10. In this regard, I do not consider that any of the authorities as referred to by Mr. Odera dwell upon the point that his client, the Applicant, is bound by his pleadings as per the Petition herein. They may be pertinent to the Application before Court but not to the Preliminary Objection. However, the authorities supplied by Mr. Ahmednasir are relevant as per **Akiwumi JA** in the **Nairobi City Council** case (supra):

"It is now settled law that the only way to raise issues for determination by the Court is through pleadings and it is only then that a claimant would be allowed to proceed to prove them. See the case of *Sande v Kenya Co-operative Creameries Ltd [1992] LLR 314 (CAK)*".

In the **Sande** case by which I am bound, the Court of Appeal observed:

"We do not know that these cases are really of any assistance to the Appellant in this matter. As was said in the case of *Bhag Bhari v. Medhi Khan (1965) 2 EA 94 at 104 Letters H to I:*

"The rules of procedure are designed to formulate the issues which the court has to determine and to give fair notice thereof to the parties. Were it not that the Judge had seen fit to determine a number of issues which were never raised in the originating summons, I should not have thought it necessary to state that a Judge has no power to determine an issue which was not before him. If authority were needed for that proposition, I would refer to *Gandy v (as pair Charters Ltd, supra*. It is for this reason that the court will freely grant applications for amendment if they are made at the proper time, do not create injustice and do not change the suit into one of a substantially different character'

We would endorse the well established view that a Judge has no power to decide an issue not raised before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge. In our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleading and procedure are designed to crystallize the issue which a Judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are".

11. As a result of the foregoing, I uphold the Preliminary Objection of the Respondents herein dated 26th March 2014 and strike out the Applicant's Notice of Motion Application dated 5th of February 2014 with costs to the Respondents.

DATED and delivered at Nairobi this 30th day of June, 2014.

J. B. HAVELOCK

JUDGE