



**Ndungu v Livondo & 3 others (Miscellaneous Application E302 of 2024)
[2025] KEHC 3318 (KLR) (Commercial and Tax) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E302 OF 2024
JWW MONG'ARE, J
MARCH 17, 2025**

BETWEEN

SIMON NJOROGE NDUNGU APPLICANT

AND

STANELY LIVONDO 1ST RESPONDENT

DAVID KIGUONGO KANJA 2ND RESPONDENT

AGNES NAINI WALYAULA 3RD RESPONDENT

DLS INTERNATIONAL GROUP LIMITED 4TH RESPONDENT

RULING

1. It is common ground that sometime in February 2023, the Applicant entered into a contractual arrangement with the 1st to 3rd Respondents to jointly incorporate the 4th Respondent (“the Company”) as a Special Purpose Vehicle to perform and execute a contract with the Government of Zambia. The contract was for the supply, installation, equipping and training of two United Nations Level (II) Mobile Field Hospitals and Upgrading of Maina Soko Medical Center to a United National Level (IV) Referral Hospitals and for a contractual sum of USD21,200,000.00. The firm of Messrs. Omuyama & Co. Advocates (“the Advocates”) were involved in the Company’s incorporation process which at inception had the Applicant and the 1st - 3rd Respondents as directors and shareholders and additionally, the Applicant was appointed as the Managing Director.
2. The Applicant has now instituted the present suit by way of a Miscellaneous Application dated 11th April 2024 made under sections 1, 1A, 3, 3A, of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), sections 30, 34, 35, 139,141,143, 146, 151,152, 243, 287, 317, 780, 782 of the *Companies*



Act(Chapter 486 of the Laws of Kenya), Order 40 Rules 1, 2, 4, 8, 10, and Order 51 Rule 1 of the Civil Procedure Rules, seeking the following orders:-

1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. Spent
 6. Spent
 7. That this Honourable Court be pleased to reinstate the Applicant as director of the 4th Respondent and a joint signatory of the 4th Respondent's bank accounts No's: 666035, 666036 and 666194 maintained by Eco Bank Limited, Valley Arcade Branch for the purpose of disbursing funds to consultants, contractors, suppliers and workers of the 4th Respondent.
 8. That this Honourable Court be pleased to revoke the appointment of Mr. Simon White as the acting Chief Executive Officer of the 4th Respondent.
 9. That this Honourable court be pleased to make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.
 10. That the costs of this Application be provided for.
3. This application is grounded on the facts set out on its face and the supporting affidavit of the Applicant sworn on 11th April 2024. It is opposed by the Respondents through the replying affidavit of the 2nd Respondent sworn on 9th May 2024, the undated replying affidavit of the 3rd Respondent and the 2nd Respondent's Grounds of Opposition dated 13th June 2024. The Company has also filed the Notice of Motion dated 12th May 2024 made under sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 2, Rule 15 (c) and (d) of the Civil Procedure Rules, sections 55 and 56 of the Advocates Act(Chapter 16 of the Laws of Kenya) and Rule 6,7 and 8 of the Law Society of Kenya Code of Ethics and Conduct of Advocates, 2016 and sections 238, 239 and 240 of the Companies Act where the Company seeks the following orders:-
1. Spent
 2. The firm of Omuyama & Co. Advocates be and is hereby barred from acting for the Applicant in this matter.
 3. The Honourable Court be pleased to strike out and expunge the Notice of Motion dated 11th April 2024 and all documents filed by the Applicant.
 4. The costs of this application be awarded to the 4th Respondent.
4. The application is grounded on the facts set out on its face and the supporting affidavit of the 1st Respondent sworn on 12th May 2024. It is opposed by the Applicant, Simon Njoroge Ndungu, through his replying affidavit sworn on 25th June 2024. The court directed that the two applications be canvassed by way of written submissions which are on record and which together with the pleadings, I will make relevant references to in my analysis and determination below.



Analysis and Determination:

5. Going through the applications, rival depositions and submissions of the parties, it is clear that there are technical and preliminary issues that have been raised and therefore, I propose to first deal with same before dealing with the merits of Applicant's application, if at all.
6. First, is the issue of the Advocates' representation of the Applicant in this matter. The Company avers that since the Advocates were involved in its incorporation, and that there is a palpable conflict of interest that may arise since the Advocates accessed the Company's confidential information and they might exploit the said information which will prejudice the Company. In response, the Applicant states that other than the incorporation of the Company, the Advocates are not involved in its intricate businesses and that the Advocates have never met the Respondents as it was the Applicant who personally reached out to the Advocates on the incorporation process. He states that the Company is not a client of the Advocates and that it will not be prejudiced since it has never engaged the services of the Advocates.
7. Whereas I agree with the Company's submission that section 134(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) explicitly prohibits an advocate from disclosing any communication made to them in the course of their professional engagement without the express consent of the client, it has not been demonstrated what privileged information is in the possession of the Advocates that has since been disclosed by them.
8. That the incorporation documents prepared and lodged by the Advocates cannot be termed as privileged or confidential documents as the same are common to all the parties and they became documents that can now be accessed by the Advocates and third parties on application to the Registrar of Companies. In any event, it should not be lost that the fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest. An applicant is required to establish, and present to the court evidence that would persuade the court to reach a conclusion that indeed there is a possibility that a conflict of interest would arise where the advocate is allowed to act for the opposing party against such a litigant (see Kimaru J., as he was then, in *Charles Gitonga Kariuki v Akuisi Farmers Co. Ltd* [2007] KEHC 1059 (KLR)).
9. Other than stating that the Advocates incorporated the Company, no evidence has been presented to demonstrate the conflict of interest and prejudice that will be occasioned if the Advocates continue to represent the Applicant in this matter. No evidence of confidential or privileged information has also been presented to demonstrate that the same has since been shared with the Applicant to detriment and prejudice of the Company. I therefore dismiss this objection by the Company and find that the firm has every right to represent either party in the proceedings before this court.
10. Second, is the Company's contention that the Applicant has not sought leave to continue with this suit as a derivative claim, being that the Applicant grievances revolve around alleged wrongs to the Company rather than to the Applicant personally. That by failing to first obtain this permission, the Applicant has improperly filed this suit, attempting to bring a claim against the other directors and shareholders of the Company purportedly on behalf of the Company and a cause of action vested in the Company without seeking leave of the court as required before filing a derivative claim.
11. In his reply, the Applicant states that his cause of action is not vested in the Company and that he is not seeking relief on behalf of the Company and therefore, the issue of a derivative claim does not arise. However, I have gone through his application and the grounds set out therein and I beg to differ. The Applicant seeks to be reinstated as a director and shareholder of the Company and claims that



his dismissal is part of a scheme by the Respondents to defraud the Company's suppliers, consultants, and workers.

12. That the Respondents are unconcerned with the Company's long-term viability and are actively working to damage its relationships with these stakeholders. He estimates that the suppliers, contractors, and workers of the Company stand to lose USD4,641,750, while consultants face losses of USD 2,437,000 in professional fees and directors' remuneration and an additional loss of USD2,240,000, representing his share capital, equity, and stake in the Company. These, in my view, are clearly actions that are vested in the Company as the said wrongs, if proved, are against the Company and by approaching the court, instead of a Company, the Applicant is impliedly filing this suit on its behalf. This means that the present suit is a derivative suit in disguise and as such, I am in agreement with the Company's submission that the Applicant ought to have sought leave to continue with this claim as provided for by section 239 of the Companies Act.
13. Section 238 thereof interprets a "derivative claim" as '...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 and that '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.' It is trite that the law does not allow the shareholder of a company to bring an action for losses and damages suffered or to be suffered by the Company and that the proper plaintiff in an action arising out of losses and damages suffered by the company is the company itself (See *Foss V Harbottle* (1843) 2 Hare 462 and *Gitobu Imanyara, Njehu Gatabaki & Bedan Mbugua v Attorney General* [2016] KECA 557 (KLR). This can only be done through a derivative action which as I have stated above, a party must seek leave and permission of the court to continue with such a suit. This position was reiterated by the Court of Appeal in *Amin Akberali Manji, Hemanth Kumar & Musikland Millenium Limited v Altaf Abdulrasul Dadani & Musikland Limited (Under Receivership)* [2015] KECA 356 (KLR) as follows:-

'Leave of court shall be obtained before filing a derivative suit, but may be obtained to continue with the suit once filed.... It is our view that at whatever stage leave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has locus standi to institute such action falls within any of the exceptions to the rule of *Foss vs Harbottle*.'

14. I also note that the Applicant has presented this application under sections 780 and 782 of the Companies Act which provide as follows:-

780 (1) A member of a company may apply to the Court by application for an order under section 782 on the ground—

- a. that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or
 - b. that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.
15. The above provision is clear that such an application is made on behalf of the Company and wrongs against it and reading the said provision together with section 239, leave ought to be first sought and obtained for the applicant to continue with such a suit. The purpose for leave is to enable the court sieve through such applications to establish that the same is not frivolous and further satisfy itself that there is a prima facie case on any of the causes of action noted under the Act and that an application for



permission will be dismissed if the evidence adduced in support “do not disclose a case” for giving of permission (see *Ghelani Metals Limited, Ghelani Enterprises Limited, Tononoka Fireworks Limited & Jayshree Suchak Sanjiv v Elesh Ghelani Natwarlal & Registrar of Companies* [2017] KEHC 4629 (KLR)). It is only after leave has been granted that the court may then grant the reliefs set out in section 782 of the *Companies Act* as follows:-

782(1) If, on the hearing of an application made in relation to a company under section 780 or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of -

2. In making such an order, the Court may do all or any of the following:
 - a. regulate the conduct of the affairs of the company in the future;
 - b. require the company—
 - i. to refrain from doing or continuing an act complained of; or
 - ii. to do an act that the applicant has complained it has omitted to do;
 - c. authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court directs;
 - d. require the company not to make any, or any specified, alterations in its articles without the leave of the Court;
 - e. provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s capital accordingly.
 3. Subsection (2) does not limit the general effect of subsection (1).
 4. The company is entitled to be served with a copy of the application and to appear and be heard as respondent at the hearing of the application.
16. Since the Applicant is seeking reliefs and claims which ideally ought to be sought by the Company, he ought to have applied for leave and demonstrated a prima facie case as to why he sought to institute and continue with the present suit as a derivative claim. As he has not sought leave, the present suit has no legs on which it can stand on and the only option available to this court I to strikeout the suit in its entirety.
17. On whether the present suit ought to have been commenced by way of a petition rather than a Miscellaneous application, I note that under section 780 above, there is no express requirement that an application under section 780 must be by way of a commercial petition in as much, the same would have been ideal. As Tuiyott J., (as he was then) stated in *John Muturi Nyaga v Graham Alexander Walsh, Mark Rene Mesdag, Eric Scott Edgar & Avro Leasing Limited* [2017] KEHC 4617 (KLR), what is important here is that the procedure provides an opportunity for specifying the grounds of the oppressive conduct and/or unfair prejudice and of proving them through oral or affidavit evidence. I would therefore have been reluctant to strike out this suit primarily because it was instituted by way of a miscellaneous application rather than a petition.

Conclusion and Disposition:-

18. In the foregoing, I make the following dispositive orders:-



1. That the 4th Respondent's application dated May 12, 2024 is allowed to the extent that the Applicant's application dated April 11, 2024 is struck out for want of leave to commence and continue with this suit as a derivative action.
2. The Respondents are awarded costs of both applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF MARCH 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Omuyoma for the Applicant.

Mr. Muriuki for the 1st and 3rd Respondents.

Mr. Chege holding brief for Mr. Issa for the 2nd Respondent.

Ms. Mugi holding brief for Mr. Muturi for the 4th Respondent.

Amos - Court Assistant

