



**Simiyu & 2 others v Kourtis & 2 others; Maniatta Limited
(Nominal Respondent) (Commercial Petition E014 of 2023)
[2025] KEHC 3635 (KLR) (Commercial and Tax) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL PETITION E014 OF 2023**

AA VISRAM, J

MARCH 24, 2025

BETWEEN

**MERCY NELIMA SIMIYU 1ST APPLICANT
MICHALIS GEORGIUS 2ND APPLICANT
CHRISTAKIS EROTOKRITOU 3RD APPLICANT**

AND

**NIKOLAOS KOURIS 1ST RESPONDENT
TAMARA JOVANOVIC SGOUROPOULOU 2ND RESPONDENT
MANOJ BAKSHI 3RD RESPONDENT**

AND

MANIATTA LIMITED NOMINAL RESPONDENT

RULING

Introduction and Background

1. The Applicants' filed the Notice of Motion dated 18th September, 2023, seeking the following orders:-
 - i. That this application be certified as extremely urgent and be heard ex-parte in the first instance and on priority basis. (spent)
 - ii. That pending the hearing and determination of this Application, a temporary injunction be issued against the 1st, 2nd and 3rd Respondent and the Nominal Respondent from in



any way dealing, alienating, transferring, allotting, registering or in any other way whatsoever determining the 5095 and 3025 shares of the 1st and 2nd Respondent respectively.

- iii. That pending the hearing and determination of this Application, an order be issued directing the stay of the implementation of the increment of the share capital and allotment of the shares and That the affairs and status of the Nominal Respondent be run and managed as it were before the alteration of the share capital, increase of the shares, allotment of the shares to the 1st, 2nd and/or 3rd Respondent.
 - iv. That pending the hearing and determination of this Application, a mandatory injunction be issued against the 1st, 2nd and 3rd Respondent and the Nominal Respondent to revert the Nominal Respondents share capital from Kes. 9, 100, 000/- to Kes. 100, 000/- and the shares from 9, 100 to 100.
 - v. That pending the hearing and determination of the Petition, a temporary injunction be issued against the 1st, 2nd and 3rd Respondent and the Nominal Respondent from in any way dealing, alienating, transferring, allotting, registering or in any other way whatsoever determining the 5095 and 3025 shares of the 1st and 2nd Respondent respectively.
 - vi. That pending the hearing and determination of the Petition, an order be issued directing the stay of the implementation of the increment of the share capital and allotment of the shares and That the affairs and status of the Nominal Respondent be run and managed as it were before the alteration of the share capital, increase of the shares and allotment of the shares to the 1st, 2nd and/or 3rd Respondent.
 - vii. That pending the hearing and determination of the Petition, a mandatory injunction be issued against the 1st, 2nd and 3rd Respondent and the Nominal Respondent to revert the Nominal Respondents share capital from Kes. 9, 100, 000/- to Kes. 100, 000/- and the shares from 9, 100 to 100.
 - viii. That an order be issued directing the registrar of companies to revert the share capital of the Nominal Respondent to Kes. 100, 000 and 100 shares each valued at Kes. 1, 000. 9.
 - ix. That the Honorable Court do grant any order it deems just and fit.
 - x. That the costs of this application be provided for.
2. The Application is brought under inter alia Section 780 and 782 of the Companies Act, 2015, Order 40 rule 1, 2, 4 and 8 of the Civil Procedure Rules, 2010.
 3. From the outset, and before delving into the facts of the matter, it is evident to me That the nature of the dispute between the parties is in the nature of a derivative action, and therefore, subject to the provisions of Section 239 and 240 of the Companies Act.
 4. The said sections cited above provide expressly That leave, or permission, is required from the court to either commence, or continue an action as a derivative claim.
 5. Based on the record before me, no such permission or such leave has been granted to the Applicant. As such, the starting point is That there is no competent suit present before this Court, at this stage.
 6. As a matter of law therefore, the various prayers seeking injunctive orders are premature, and may not issue at this stage. Order 40 rules (1) (2) of the Civil Procedure Rules are express and peradventure. The said Order and rules require the existence of a valid suit as precursor for the grant of injunctive relief.



7. In the present matter, until leave or permission has been granted, no such suit validly exists before the court. As such, the jurisdiction of the Court has not yet been triggered for the grant of such relief, and in the absence of the same, no such orders may issue.
8. Similarly, the various reliefs seeking to rectify the register, and further, seeking to revert the share capital of the company to previous shareholdings, held by various shareholders, are to my mind, prayers seeking final orders at an interlocutory stage. The said prayers are sought in the main Petition verbatim. I do not think That this court may make such orders based on affidavit evidence at an interlocutory stage.
9. Having stated the above, I find That the Applicant is premature. The Applicant ought to have first applied for leave to commence the action as a derivative suit, and thereafter, if granted leave, approached the Court for the various reliefs sought in the present application.
10. The reason why leave is required, is based on the principle That a company is a separate legal entity, and therefore has its own legal personality, distinct from its shareholders. Therefore, a company ought to commence legal action in its own name for any wrongs done to it. The company is the proper Plaintiff to bring legal action, and not its individual shareholders, unless shown otherwise. An application for leave is therefore necessary to show why the court ought to depart from the above principle. This has not been done.
11. A proper basis for intervention by this Court has not been laid out at the present stage and this Court is not inclined to interfere with matters That are internal and for which adequate governance mechanisms exist, until the said presumption has been rebutted.
12. I therefore find That the Application dated 18th September, 2023, is premature and incompetently before the Court. The same is struck out with costs.
13. I now turn to the Preliminary Objection dated 29th December, 2023. The 2nd Respondent has claimed diplomatic immunity from civil action and seeks to be struck out as a party to the suit.
14. The Objection is based on the 2nd Respondent's claim That she is the wife to the Greece Ambassador. She claimed to enjoy diplomatic immunity from civil and administrative action under Articles 29 to 37 of the Vienna Convention on Diplomatic Relations of 1961.
15. The Applicant pointed out That there was no evidence before the Court That the 2nd Respondent is in fact, the wife of the Ambassador. No marriage certificate had been furnished as proof of her claim. Moreover, if the same were to be produced, this would entail a review of evidence and therefore, fail to muster the test applicable for a Preliminary Objection.
16. Having considered the above, I do however note That the Applicant has not denied That the 2nd Respondent is the wife of the Ambassador, rather, the Applicant pointed out That there was no evidence of the same. My decision therefore does not turn on this point alone.
17. Rather, I note That both parties made submissions in relation to the applicability of the said Vienna Convention citing various Articles in relation to diplomatic immunity. I take note in particular of Articles 37 (1) and 31 (1) and (c) which states as follows:-
 - 37 (1). The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36.



- 31 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
- (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions (Emphasis mine)
18. Based on my reading of the above Articles, I find That it is not immediately clear whether or not diplomatic immunity would attach to the dispute in question. I say so because, various facts would need to be ascertained to determine if the commercial activity carried out by the 2nd Respondent, was part of her official functions and therefore, protected under Article 37. This would require a further inquiry and a review of the facts and evidence.
19. In *Mukisa Biscuit Limited Vs West End Distributors Limited* (1969) EA 596 Law J.A., and *Newbold P.* held as follows:
- Law, J.A.:
- “So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”
- Newbold, P.:
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption That all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”(Emphasis mine)
20. Guided by the above, and based on the reasons set out above, I find That the Objection does not meet the threshold set out above. Accordingly, the Preliminary Objection is dismissed with costs.

Conclusion and Disposition

21. The upshot is That the Application dated 18th September, 2023, is struck out with costs and the Preliminary Objection dated 29th September, 2023, is dismissed with costs to the Petitioners.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF MARCH, 2025

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

.....Court Assistant
for 1st Applicant
for 2nd Applicant
for 3rd Applicant
for 1st Respondent



.....for 2nd Respondent

.....for 3rd Respondent

.....for Nominal Respondent

