



REPUBLIC OF KENYA



Alambo v Nakamoto & 3 others; Carii Motor Limited & another (Interested Parties) (Civil Case E369 of 2025) [2025] KEHC 6716 (KLR) (Commercial and Tax) (26 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6716 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E369 OF 2025
JWW MONG'ARE, J
MAY 26, 2025

BETWEEN

FELIX OORO ALAMBO PLAINTIFF

AND

TOKIO NAKAMOTO DEFENDANT

AND

KOJI TOKIDA 1ST RESPONDENT

HENRY KEVIN MBUGUA WAMBUI 2ND RESPONDENT

ESTHER NDEGI NJIRU 3RD RESPONDENT

AND

CARII MOTOR LIMITED INTERESTED PARTY

REGISTRAR OF COMPANIES INTERESTED PARTY

RULING

1. Before this Honourable Court is the Plaintiff's Notice of Motion application filed on 8th April 2025 under a Certificate of Urgency and is brought under Section 1A, 1B, 3A of the *Civil Procedure Act* and Order 40 Rules 1, 2, and Order 51 of the Civil Procedure Rules, sections 238, 709, 782, 1004 of the *Companies Act* and it seeks the following reliefs: -

1. Spent

2. Spent



3. Spent
 4. Spent
 5. Spent
 6. spent
 7. That this Honourable Court be pleased to issue an order for reversal of the resolutions unlawfully passed and executed by the 1st, 2nd, 3rd and 4th Respondents, concerning the structure of the 1st Interested Party pending the hearing and determination of this application
 8. Spent
 9. That this Honourable Court be pleased to issue an order requiring the 2nd interested party to reverse any amendments or modifications made by themselves and return the status of the company as it was at the date of incorporation.
 10. That costs of this application be provided for.
2. The application is supported by the grounds set out on its face and the supporting affidavit of Felix Alambo sworn on 8th April 2025. It is opposed and the Respondents have filed a Preliminary Objection dated 6th May 2025 in addition to a Notice of Motion application filed on 6th May 2025 seeking to set aside the interim ex parte orders of the court issued on 11th April 2025. The said application was supported by the grounds set out on its face and the supporting affidavit of Koji Tokida sworn on 6th May 2025. Both parties filed written submissions which I have carefully considered.
 3. In its Preliminary Objection, the Respondents argue that the instant proceedings offend Order 3 rule 1 of the Civil Procedure Rules which stipulate that a suit may be commenced by way of Plaint, A Petition/or Originating Summons while the instant proceedings were instituted by way of Miscellaneous Application.
 4. Where a party has raised a Preliminary Objection a suit, courts are called upon to determine the same at the earliest opportunity. In the instance application, the court notes that the Respondents raise objection to the suit as filed having been initiated a Miscellaneous Application. A Preliminary Objection as defined by the courts in the locus Classica case of Mukisa Biscuit manufacturing Co. Ltd vs. West End Distributors (1969) EA 696 is described as “... 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.....”
 5. The Plaintiff in opposing the Preliminary Objection has urged the court to find that the suit before it is proper and does not offend Order 3 of the Civil Procedure. The Plaintiff has argued further that this court should be guided by the doctrine of substantive justice and fair hearing and not to deny parties access to justice on mere technicalities in line with Article 159 of the Constitution.
 6. The question then this court seeks to answer is whether the instant suit is properly before it and whether order 3 rule 1 of the Civil Procedure Rules is a mere technicality that courts can cure through directions for amendments. It is trite that as provided under Order 3 Rule 1 of the Civil Procedure Rules suits seeking substantive reliefs before a court are to be commenced by Plaint, Petition or Originating summons. Miscellaneous Applications are motions that primarily require courts to provide interim reliefs pending the hearing and determination of a main suit. In arguing the Preliminary Objection, the Respondents have urged the court to be guided by the Court of Appeal decision in the case of



Scope Telematics International Sales Ltd -vs- Stoic Company Ltd & Another(2017)eKLR where the Court of Appeal held as follows: -

“the manner of initiating a suit cannot be termed as a mere technicality. It is a basis of jurisdiction...the application should have been anchored as a suit. It was not about what prejudice the Appellant or the 2nd Respondent would suffer or what purpose the suit would have served. The discretion cannot be used to override a mandatory statutory provision. For these reasons we are in agreement with the submissions of the Appellant that the application was totally incurably defective.”

7. The above holding was similarly reiterated in the Nairobi West Limited - vs- Joseph Kariha & Another (218) eKLR where the court stated as follows:-

“.....in my view this substantive order which for all intents and purposes cannot be issued in a miscellaneous application. A perusal of order 3 Rule 1 of the Civil procedure Rules reveal that suit may be commenced by way of a plaint, petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard... consequently, the preliminary objection is upheld and the suit is ordered struck out.”

8. The above authorities from the Court of Appeal bind me. I have examined the present suit before this court and note that what is presented before the court is a Miscellaneous Application that has set out a total of 10 prayers. The court notes that indeed and as argued by the Respondents the said application is not anchored on a primary suit either brought by way of a plaint, petition and or originating summons. It is clear therefore that the orders sought therein are in a vacuum and that the failure by the Applicant to abide by the dictates of Order 3 Rule 1 of the Civil Procedure Rules cannot be termed as mere technicality. It is also true that the said omissions are not those that the law envisions as being curable through amendments of pleadings as pleadings can only be amended if and only when they have already been filed. It is not possible where a plaint or a petition has not been filed in the first instance for the court to order that one be filed as an amended pleading as what can be amended is what is present before the court and in the instant suit, it would be an amendment of the Miscellaneous Application.

9. I find therefore that the preliminary objection is merited and I uphold the same. The consequences of my findings are that the instant application is struck off in its entirety. The interim ex parte orders issued by this court are vacated forthwith and the costs of this application awarded to the Respondents.

10. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Nguono for the Applicant.
2. Mr. Kenneth Wilson for the 1st, 2nd, 3rd and 4th Respondents and 1st Interested Parties.
3. Amos - Court Assistant

