



**Profundo Technologies Limited & another v East Global Logistics
Kenya Limited (Miscellaneous Application E121 of 2024)
[2025] KEHC 10039 (KLR) (Commercial and Tax) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10039 (KLR)

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

MISCELLANEOUS APPLICATION E121 OF 2024

PM MULWA, J

JULY 10, 2025

IN THE MATTER OF THE COMPANIES ACT 2015

AND

**IN THE MATTER OF RECTIFICATION OF THE COMPANY
REGISTER OF EAST GLOBAL LOGISTICS KENYA LIMITED**

BETWEEN

PROFUNDO TECHNOLOGIES LIMITED 1ST APPLICANT

MAZARIN CAPITAL LIMITED 2ND APPLICANT

AND

EAST GLOBAL LOGISTICS KENYA LIMITED RESPONDENT

RULING

1. Before this Court for determination are two applications. The first is the Notice of Motion dated 14th February 2024 filed by the Applicants. The second is the Respondent's application dated 21st May 2024.

The first application dated 14th February 2024

2. The application dated 14th February 2024 is brought under Sections 863 and 864 of the *Companies Act*, 2015, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, and Order 51 of the Civil Procedure Rules. The Applicants seek rectification of the register of members of East Global Logistics Kenya Limited



(the Respondent), pursuant to a Share Allotment Agreement dated 8th June 2022, and costs of the application.

3. The application is based on the grounds set out on the face of the record and is supported by affidavits sworn by Christopher Bailey and Michel Labrousse, directors of the 1st and 2nd Applicants, respectively. It is their case that the parties executed a Share Allotment and Shareholders Agreement on 8th June 2022, which provided for an increase in the Respondent's nominal share capital to Kshs. 23,076,900.00. In exchange for facilitating a USD 18 million investment by KAN Consulting LLC, the Applicants were to receive a 5% stake each, having contributed USD 11,539.
4. The Applicants contend that the Respondent has refused and/or failed to update its register of members with the Registrar of Companies in line with the said agreements, despite several requests. They allege the Companies have suffered financial and reputational loss, exclusion from corporate decision-making, and denial of dividend entitlements as a result of the non-compliance. The Applicants urge the Court to exercise its jurisdiction under Section 863 of the Companies Act and order rectification of the register.
5. The Respondent opposes the application through an affidavit sworn by Mehboob Abdulkarim Chatur on 20th May 2024. It is the Respondent's position that the Share Allotment Agreement was expressly conditional on the actual injection of financing by KAN Consulting LLC, which never materialized despite multiple attempts and revised agreements. The Respondent further contends that there was no increase in share capital, no payment made for shares, and no shareholder resolution passed or merger clearance obtained from the Competition Authority of Kenya, rendering the transaction statutorily void.
6. It is further argued that granting the orders would contravene Sections 327 and 329 of the Companies Act, and Articles 40, 47 and 50 of the Constitution. The Respondent accuses the Applicants of acting in bad faith by disrupting business relationships and initiating, then withdrawing, ICC arbitral proceedings on the same dispute.

The Respondent's Application dated 21st May 2024

7. The second application is brought under Order 26 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, and Sections 1A, 1B, 3A, 22(b), and 63(e) of the Civil Procedure Act. The Respondent seeks intervention of this Court through the following substantive orders:
 - i. Spent
 - ii. That there be a stay of proceedings in respect of the Notice of Motion dated 14th February 2024 filed by the Plaintiff/Respondent pending the hearing and determination of the present application.
 - iii. That the Plaintiff/Respondent be ordered to furnish security for costs of the Defendant/Applicant in the sum of Kenya Shillings Two Million (KShs. 2,000,000/-), or such other sum as this Honourable Court shall deem fit, to be deposited in Court or secured in such manner as the Court may direct.
 - iv. That a witness summons do issue to one Daniel Ouma Okoth, Commissioner for Oaths, of KOD Advocates LLP, to attend court on a date to be fixed for purposes of cross-examination on whether the directors of the Plaintiff/Respondent personally appeared before him on 14th February 2024 in Nairobi for the purposes of commissioning the affidavits filed in support of the pending application dated evenly.



- v. That the Court do make such other or further orders and/or give such directions as it may deem just and expedient in the circumstances.
 - vi. That the costs of this application be provided for.
8. The application is premised on the grounds of the face of it and supported by the affidavit of Mehboob Abdulkarim, the director of the Respondent, sworn on 21st May 2024, who asserts that the Applicants are foreign entities with no known assets in Kenya. He states that the Applicants had filed and withdrawn arbitral proceedings before the ICC, incurring substantial legal costs, and have not demonstrated the capacity to satisfy any cost orders. The Respondent thus seeks protective measures from this Court.
 9. The application is opposed by the 1st Applicant's director, Christopher Bailey, through an affidavit sworn on 11th June 2024. He contends that the application is made in bad faith, introduces new causes of action, and seeks to impede access to justice through an unreasonable security demand. He asserts that the Applicants are reputable global businesses and that the ICC proceedings were abandoned in favour of the current suit. It is deponed that he and Mr. Labrousse appeared virtually before their Advocate, who commissioned their affidavits using electronic signatures. He disputes that the allotment was conditional on the financing arrangement.
 10. Both applications were canvassed through written submissions. The Applicants' submissions are dated 4th March 2025, and the Respondent's submissions are dated 12th February 2025.

Analysis and determination

11. I shall first consider the application dated 14th February 2024, as its determination may render the second application moot.
12. In considering the arguments presented by both parties, the primary issue for determination is whether the Share Allotment Agreement dated 8th June 2022 is enforceable in light of the alleged failure of the financing condition precedent.
13. The Applicants seek rectification of the company register under Section 118 of the (repealed) *Companies Act*, which remains instructive on rectification of company registers. That section provides that:

“ 118

- (1) If:
 - a. the name of any person is without sufficient cause entered in or omitted from the register of members of a company or
 - b. default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved or any member of the company or the company, may apply to the court for rectification of the register.
- (2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved



- (3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.
- (4) In the case of a company required by this Act to send a list of its members to the registrar, the court, when making an order for rectification of the register shall by its order direct notice of the rectification to be given to the registrar.”

14. Section 118(3) expressly empowers the court to determine any question relating to the title of any person to be entered into or removed from the register, and to make such orders as may be necessary or expedient for the rectification of the register.

15. The Respondent contends that the Applicants lack locus standi, as their names do not appear in the register of members. Indeed, under company law, a shareholder is recognized as a member only upon registration. However, Section 118 grants standing to an “aggrieved person” even if not formally registered, to seek relief where omission from the register is alleged.

16. In *Suryakant Bhailabahi Patel and 2 others v Moses Sekenya Kulundu and 4 others* Ml HC Misc. Appl. No. 467 Of 2014 [2014] eKLR, the court summarized the position as follows;

“Therefore, the first consideration in the exercise of discretion under section 118 of the *Companies Act* is; the procedure is a summary process and should be invoked only in clearest of cases.”

17. Similarly, in *Prab Hualal Tejpa Haria & Another -vs- Pravin Chandra Meghji Dodhia & 2 others* [2007] eKLR, where Warsame J (as he then was) expressed himself that:

“In my view the summary powers of the court can be invoked in plain and clear cases where there is no need for a trial...The powers under section 118 of the Company’s Act cannot be invoked when there is a real and complicated dispute as to the real interests of the parties.”

18. I am satisfied that the Applicants have the requisite standing to bring this application as “aggrieved persons.” However, the critical question is whether they are entitled to rectification on the merits.

19. Clause 3 of the Share Allotment Agreement makes clear that the allotment of shares was conditional upon successful injection of financing: KAN Consulting LLC was to inject USD 57,691, and the Applicants USD 11,539 each.

20. The law is clear that where a contract is made subject to a condition precedent, no binding obligation arises unless and until that condition is fulfilled. As was stated by the Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”



8. This principle was reaffirmed in *Total Kenya Limited v Kenya Revenue Authority* [2019] eKLR, where the court held that:

“Where parties have expressly agreed that a contract shall come into force only upon the happening of a certain event, the agreement does not become effective until the event occurs.”

21. In the present case, there is no credible evidence that the financing condition was ever fulfilled. The Respondent has produced correspondence showing repeated unsuccessful efforts to secure the funding, re-executions of agreements, and a lack of payment or regulatory approvals.

22. It follows, therefore, that no binding obligation to allot shares ever arose. Consequently, I find that the Applicants did not acquire an enforceable right to be registered as shareholders.

23. Additionally, Rule 7 of the Companies (High Court) Rules, 1964 requires that:

Applications to rectify the Register of members of a company under Section 118 of the Act shall be by Originating Motion or when the Company is in voluntary liquidation by Summons.

24. The orders sought herein are substantive in nature which for all intents and purposes cannot be issued through a Miscellaneous Application. As held in *In the Matter of Gideon Ndambuki & Another* [2018] eKLR, the Court cannot grant substantive reliefs in a vacuum. The instant application is fatally defective and incompetent for want of a proper originating process.

25. In light of the foregoing, the Notice of Motion dated 14th February 2024 is devoid of merit and is hereby dismissed.

26. Turning to the second application dated 21st May 2024, which seeks orders for security for costs, the same is rendered moot by the dismissal of the main application.

27. Nonetheless, I note that under Order 26 Rule 1 of the Civil Procedure Rules, the court has discretion to order security for costs where the plaintiff is resident outside the jurisdiction. In the case of *Shah v Shah* [1982] KLR 95, the court stated thus:

“The principle general rule is that security is normally required from plaintiffs resident outside the jurisdiction, however, a court has a discretion to be exercised reasonably and judicially, to refuse to order the security be given. The test on an application for security of costs is not whether the plaintiff has established a prima facie case but whether the defendant has shown a bona fide defence.”

28. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, the Court of Appeal emphasized that the applicant bears the burden of proving that the respondent would be unable to pay costs if unsuccessful. Mere assertions of impecuniosity are insufficient. The Applicants have placed much emphasis on violation of their right to a fair hearing and access to justice protected under Articles 48 and 50 of *the Constitution*. The Respondent/Applicant’s case is founded on the fact that the applicant is a foreign company with no known assets within the country. Those facts are not in dispute. An order for security of costs is a discretionary remedy where the court must balance the rights of both parties.



29. In the instant case, although the Applicants are foreign entities with no known assets in Kenya, the Court is satisfied that no useful purpose would be served in determining the application for security for costs, given the dismissal of applicants' application dated 14th February 2024.
30. Accordingly, the application dated 21st May 2024 is marked as spent, and no orders are issued thereon.
31. Consequently, I issue the following final orders:
- i. Application dated 14th February 2024 is dismissed.
 - ii. Application date 21st May 2024 marked as spent.
 - iii. Each party to bear their own costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Dachi for Applicants

Mr. Hamisi for Respondent

Court Assistant: Carlos

