



**Directline Assurance Company Limited v Business Registrar Service & 4 others (Petition E006 of 2023) [2024] KEHC 2537 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2537 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
PETITION E006 OF 2023  
MN MWANGI, J  
MARCH 1, 2024**

**BETWEEN**

**DIRECTLINE ASSURANCE COMPANY LIMITED ..... PETITIONER**

**AND**

**BUSINESS REGISTRAR SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF COMPANIES ..... 2<sup>ND</sup> RESPONDENT**

**SIDIAN BANK LTD ..... 3<sup>RD</sup> RESPONDENT**

**CO-OPERATIVE BANK LTD ..... 4<sup>TH</sup> RESPONDENT**

**NCBA BANK LTD ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**Background**

1. The genesis of the dispute between the parties emanates from the petitioner’s directorship and representation between the company’s minority and majority shareholders. A dispute arose as to the management of the petitioner after the demise of the Founder of the petitioner Mr. John Gichia, where one of the minority shareholders, Dr. S.K. Macharia, took over the management of the petitioner and appointed his set of directors, including Julius Orenge, Kelvin Mogeni, Salome Wanjiru Gito, David Mwaniki Ngugi, Bashir Ahmad Mburu, Francis Njakwe Githari, Hezekiah Wang’ombe and himself, a move that culminated in the majority shareholders filing a complaint with the Registrar of Companies on 14<sup>th</sup> April, 2021 seeking rectification and striking out of the illegally appointed directors, and consequently filing HCCC No. 277 and 278 of 2009, which were referred to arbitration. That the Arbitrator found in favour of the majority shareholders. Thereafter the present petition dated 20<sup>th</sup> June, 2023 and a Notion of Motion of even date were filed by the law firm of Mogeni &



Company Advocates purportedly on the instructions of the petitioner. The Notice of Motion dated 26<sup>th</sup> July, 2023, was filed by Andrew Mmbogori Advocate also purporting to act on instructions of the petitioner. This ruling will determine the two applications.

### **Application dated 20<sup>th</sup> June, 2023.**

2. The deponent in the application dated 20<sup>th</sup> June, 2023 filed by the firm of Mogeni & Company Advocates contends that the actions of the respondent led to the closure of petitioner's accounts held with the 3<sup>rd</sup> to 5<sup>th</sup> respondents. In a nutshell, the application seeks orders to suspend or stay the CR-12s issued by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 21<sup>st</sup> October, 2022, 10<sup>th</sup> November, 2022, 21<sup>st</sup> November, 2022 and 22<sup>nd</sup> May, 2023. It also seeks an order to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents from issuing a CR-12 showing different directors of the petitioner other than the directors approved by the Insurance Regulatory Authority, and a mandatory order requiring the 1<sup>st</sup> and 2<sup>nd</sup> respondents to issue a CR-12 showing the directors of the petitioner as Julius Orenge, Salome Gitohe and Kelvin Mogeni.
3. The grounds of the application are that the Court is vested with the inherent discretion to protect the subject matter of the suit and grant conservatory orders to enable it to discharge its constitutional mandate, and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have severally changed the directors of the petitioner and issued conflicting CR-12s contrary to the express directions of the Commissioner of Insurance.
4. The application is supported by the affidavit of Julius Orenge sworn on 20<sup>th</sup> June, 2023. He averred that he is an approved director of the petitioner, and has the authority to swear the affidavit on behalf of other directors.
5. The 4<sup>th</sup> respondent filed a replying affidavit sworn by the Service Manager, Daniel Gaiko in response to both the petition and the application in which he averred that the application is frivolous and vexatious and the same should be dismissed as it discloses no cause of action against the 4<sup>th</sup> respondent. He maintained that the dispute is a rivalry between the directors and shareholders of the petitioner/applicant, and it noted that various concerns had been raised by various stakeholders over the petitioner's directorship and account signatory mandates.
6. He averred that the 4<sup>th</sup> respondent acted as per its work policy and froze the petitioner's accounts due to the internal wrangles regarding the directorship and shareholding of the petitioner so as to protect and preserve the deposits of the petitioner from wastage. That it acted in the best interests of its customer (petitioner) by freezing the bank account.
7. In opposing the application, Andrew Mmbogori Advocate filed grounds of opposition dated 18<sup>th</sup> September, 2023, alleging that no resolution had been adduced to demonstrate that the firm of Mogeni and Company Advocates is properly on record for the petitioner. It was averred that Julius Orenge was irregularly appointed as a director of the petitioner and was struck out as such, by the Registrar of Companies.
8. It was stated by Andrew Mmbogori Advocate that Kelvin Mogeni and Julius Orenge lack the locus standi to prosecute the suit as filed. That by a meeting held on 1<sup>st</sup> September, 2023, there was a resolution passed by the petitioner to strike out all suits and affidavits filed by Julius Orenge on behalf of the petitioner. Mr. Mmbogori stated that the Board of directors of the company, namely, Lisa Anyango Ameyia, Janice Theresa Wanjiku Kiarie, Jackson Kionga Kamau, Tom Otieno Odongo and Kimamo Kuria, as the majority shareholders of the petitioner resolved to have the firm of Andrew Mmbogori represent the petitioner in the suit.
9. The second application dated 26<sup>th</sup> July, 2023, drawn by the firm of Andrew Mmbogori Advocate. The applicant seeks the following orders:



- i. Spent;
  - ii. Spent;
  - iii. A declaration be issued that Julius Orege has no authority to purport to plead on behalf of Directline Assurance Company Limited as the petitioner;
  - iv. A declaration be issued that the firm of Mogeni & Company Advocates has no authority to purport to act on behalf of the petitioner in the present petition;
  - v. The name of Directline Assurance Company Limited as the petitioner, be struck out as the Petitioner in these proceedings;
  - vi. In the event that prayer 5 is granted, a declaration be issued that any costs payable to the respondents be borne jointly and severally by the firm of Mogeni & Company Advocates and Julius Orege; and
  - vii. Such other orders that the Court may deem fit.
10. The application is supported by the affidavit of Lisa Anyango Amenya and the supplementary affidavit of Terry Wanjiku Kiarie sworn on 7<sup>th</sup> September, 2023. The grounds of the application are that the petition as filed is incompetent and fatally defective as neither the petitioner's Board of Directors nor its shareholders authorized the institution of the proceedings herein. That Julius Orege who purports to swear the affidavits and the firm of Mogeni & Company Advocates acting for the petitioner have not been sanctioned by the petitioner's Board of directors or its shareholders to institute the proceedings. It was contended that the firm of Mogeni & Company Advocates is irregularly on record and acting without instructions. That Julius Orege had already been struck out of the Register of directors by the Registrar of Companies at the time of the filing of the instant suit. It was stated that the orders seeking to suspend the operation of the CR-12 in respect of the 1<sup>st</sup> respondent dated 21<sup>st</sup> November, 2022, are an abuse of the Court process.
  11. In the supplementary affidavit sworn by Terry Wanjiku Kiarie, she stated that the firm of Mmbogori Advocate has been appointed by the majority shareholders of the petitioner. She attached an authority to act dated 26<sup>th</sup> July, 2023 executed by the directors of the petitioner, by the names Tom Otieno and Jackson Kionga Kamau. She stated that she is a director of the petitioner having been approved by the Insurance Regulatory Authority, and that her illegal removal of her acting in the capacity of a director of the petitioner was overturned by the judgment of the Insurance Appeals Tribunal in Appeal No. 3 of 2019. She contended that the minority shareholders have committed illegalities in the company including the appointing of new CEOs and the Principal Officer's termination of other directors
  12. Opposing the application, Kelvin Mogeni filed a replying affidavit sworn on 15<sup>th</sup> September, 2023 in which he averred that he is an Advocate of the High Court of Kenya practising in the firm of Mogeni & Company Advocates. He stated that the matter before this Court concerns the registration of persons as directors of the applicant without the prior approval of the insurance Regulatory Authority. He stated that the Registrar of Companies lacks the mandate to register any person as a director of the regulated company or the transfer of shares without the approval of the Insurance Regulatory Authority. That the CR-12s issued on 21<sup>st</sup> October, 2022, 10<sup>th</sup> November 2022, 21<sup>st</sup> November 2022, and 22<sup>nd</sup> May 2023 purport to have strangers as directors and shareholders of the petitioner. He further stated that Mr. Mmbogori Advocate's clients cannot purport to act as directors and shareholders as the Arbitral award did not confer their appointment. It was contended that Mmbogori Advocate is wrongly on record.



13. It was deposed that the Registrar of Companies ought to restrain any purported share transfers and/or purchases concerning the petitioner, and that the Motion as filed is without merit and ought to be dismissed.
14. In his supplementary affidavit sworn on 19<sup>th</sup> September, 2023, he averred that the approved Board of Directors of the petitioner vide a meeting held on 18<sup>th</sup> June, 2023 appointed his firm to commence the proceedings herein.
15. The application was canvassed by way of written submissions. The 3<sup>rd</sup> to 5<sup>th</sup> respondents were excluded from participating in the interlocutory applications as the applications had no bearing on them. The petitioner's submissions dated 12<sup>th</sup> September, 2023, were filed by Andrew Mmbogori Advocate, whereas Mogeni & Company Advocates filed written submissions on 8<sup>th</sup> August, 2023.

**Petitioner's submissions as filed by Mogeni & Company Advocates.**

16. The firm of Mogeni & Company Advocates framed 4 issues for determination, the first issue is on the authority to approve directors of an insurance company. Counsel submitted that Section 27A of the *Insurance Act* bestows on the Insurance Regulatory Authority (IRA) the responsibility to oversee the operations of the petitioner. He contended that the purported directors of the petitioner, namely, Jackson Kionga, Kimamo Kuria, Tom Otieno Odongo, Lisa Anyango Ameyna and Janice Teresa Wanjiku Kiarie, had not been approved by the IRA, whereas Julius Orege, Kelvin Mogeni and Salome Gitoho had been approved by the IRA. He relied on Regulation 6 of the *Insurance Act*, Legal Notice No. 47 of 2022 which provides that:
  - “(1) A regulated entity shall not appoint any key person without prior written approval of the authority.
  - (2) A regulated entity shall duly fill and submit the fit and proper form as specified in the schedule to these Regulations when seeking approval for the appointment of a key person.
  - (3) a regulated entity shall at the point of seeking approval of the appointment of key persons, submit a formal statement that each of the tests provided for under regulations 4 on competence, financial soundness and integrity has been performed and, where necessary, further investigations have been conducted.”
17. Counsel averred that the appointment of Advocates to represent the petitioner is done by the Principal Officer, Evans Nyagah, whereas decisions of the company are made by the Board of Directors who have to be approved by the IRA.
18. On the issue of the fraudulent CR-12, Counsel submitted that as per Sections 14(8) and 17(8) of the *Arbitration Act*, the suit herein renders the arbitral award ineffective. That the issuance of the fraudulent CR-12 has misled the public and is likely to occasion confusion amongst the members of the public.
19. On the third issue, Mr. Mogeni submitted that the suit herein is not subjudice as there are no other suits filed between the petitioner and the respondents touching on the CR-12. He agreed that there are two suits being ELRC Cause No. 165 of 2020 Terry vs Directline Assurance Company Limited & 7 others and ELRC Cause No. E004 of 2023 Evans Nyagah vs Directline Assurance Company Limited & 7 others, which touch on the CR-12 dated 21<sup>st</sup> November, 2022. He stated that none of the respondents herein are parties in the other cases, and as such, this suit cannot be subjudice.



20. This Court was urged to find that the provisions of Part XI of the *Companies Act* does not apply to the instant suit and they are not relevant. Counsel pleaded with this Court to find that the purported directors, namely, Jackson Kionga Kamau, Kimamo Kuria, Tom Otieno Odongo, Lisa Anyango Amenyua and Janice Teresa Wanjiru Kiarie have not been approved by the IRA as directors of the petitioner and have no authority to act for the petitioner. He urged this Court to find that CR-12s they are relying on were fraudulently acquired and they are illegal. He prayed for the Notice of Motion application dated 20<sup>th</sup> June, 2023 to be allowed.

**Petitioner's submissions filed by the firm of Andrew Mmbogori Advocate.**

21. Mr. Mmbogori Advocate submitted that the firm of Mogeni & Company Advocates acted without any authority from the petitioner's shareholders and or its Board of Directors as no resolution has been attached in support of their appointment. Counsel submitted that majority shareholders are entitled to decide even to the extent of overruling the directors, on whether an action in the name of the company should be commenced or allowed to proceed. He cited the case of *George Pariken Ole Narok & another vs Cabinet Secretary, Ministry of Industry, Trade & Co-operative & another: Kenya Farmers Association Ltd (Interested Party)* [2021] eKLR, where the Court held that an Advocate is an agent of the client they represent and can therefore only represent a party with the correct authority, and that the donor of such authority to act must first have the authority to properly donate the same to their agent.
22. Counsel submitted that minority shareholders have no power to institute a suit against a company. He relied on the case of *Nairobi HCCC No. 247 of 2022 Directline Assurance Company Limited vs AKAM Investments Limited & 3 others*, Insurance Regulatory Authority to support his submissions.
23. Mr. Mmbogori submitted that the contention by the firm of Mogeni & Company Advocates that the Insurance Regulatory Authority approves directors is unreasonable and wrong as it means a director of an insurance company will remain as a director unless removed by the IRA. He stated that directors of the petitioner have a right to vote in and out their directors at will, and their right cannot be restricted by the IRA, whose only role is to approve or decline such appointments. He cited the provisions of Section 27A of the *Insurance Act*.
24. Counsel submitted that former directors cannot institute suits in the name of the company to reinstate themselves through the back door, and that under Section 832 of the *Companies Act*, the Registrar of Companies is to maintain a Register of companies. He contended that there is nothing in the *Insurance Act* or Regulations of the said Act that empower the IRA to preclude the Registrar of Companies from striking out irregularly appointed directors.
25. It was also submitted that the narrative that the petitioner's current Board of Directors derives its status from the arbitral award of 11<sup>th</sup> May, 2022 is false, as the company's current CR-12 corresponds to the Arbitrator's finding on the issue of the petitioner's shareholding. Counsel submitted that this Court by the provisions of Section 105 of the *Companies Act* is bound by the position of the Companies' Registry in respect to the issue of shareholding.
26. In conclusion, he submitted that this suit is an abuse of the Court process, is subjudice and the same should not be allowed to proceed as Julius Orange is using the petitioner as a vehicle to pursue his own interests because similar orders have been sought in ELRC Cause No. E004 of 2023. This Court was urged to find that the petition as filed is incompetent and irregular for having not been sanctioned by the majority shareholders.



## Analysis And Determination.

27. I have considered the applications filed, the affidavits in support of and against the said applications. I have also considered the submissions filed by Counsel. The following issues arise for determination:
- i. Whether the Notice of Motion dated 20<sup>th</sup> June, 2023 seeking to suspend or stay the CR-12s issued by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 21<sup>st</sup> October, 2022, 10<sup>th</sup> November, 2022, 21<sup>st</sup> November, 2022 and 22<sup>nd</sup> May, 2023, should be allowed;
  - ii. Whether the application dated 26<sup>th</sup> July, 2023 ought to be allowed as prayed; and
  - iii. Who meets the costs of the applications?
28. Before I discuss the main issues, I will first address the issue of whether the application dated 20<sup>th</sup> June, 2023 is subjudice. It is trite law that the doctrine of subjudice is a matter of law that can primarily determine the issues raised and may dispose of a case at any stage.
29. In the instant application, the majority shareholders represented by the firm of Mmbogori Advocate averred that this suit is subjudice. That it is similar to ELRC Cause No. E004 of 2023, wherein similar orders are being sought and that what is different is the parties. On the other hand, the firm of Mogeni & Company Advocates averred that the suit is not subjudice as the prayers being sought in this suit are not similar to the other suit, and that the parties in the three suits are not similar, though it was agreed that the only issue similar is the CR-12 issued on 21<sup>st</sup> November, 2022.
30. Section 6 of the [Civil Procedure Act](#) provides as follows on the issue of subjudice:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
31. The above Section denotes that where a matter in issue is pending before a Court of law between the same parties, any other Court is barred from entertaining a similar suit, and the Court may stay the suit filed later to await the outcome of the suit already filed.
32. I have considered the prayers sought in the applications dated 20<sup>th</sup> June, 2023 and the suit filed in ELRC Cause No. E004 of 2023. Although the parties are different, this suit and ELRC Cause No. E004 of 2023 raise similar issues on the legality of the CR-12 issued by the Registrar of Companies in respect to the petitioner herein. Shareholding of the petitioner is an issue in both suits. In ELRC Cause No. E004 of 2023, the prayer sought is for suspension of the operation of the CR-12 issued on 21<sup>st</sup> November, 2022. The same prayer has been sought in the application dated 20<sup>th</sup> June, 2023.
33. The doctrine of subjudice prevents conflicting decisions emanating from two or more different courts. It is therefore in the interest of justice for this Court to be mindful of making a decision on the issue of the petitioner’s shareholding and the issue of the CR-12s. It would be proper to either consolidate the suits and have the same heard by one Judge or stay the instant suit pending the determination of the suit filed earlier.
34. It is my finding that the provisions of Sections 6 of the [Civil Procedure Act](#) apply to the Notice of Motion dated 20<sup>th</sup> June, 2023.



35. A perusal of the petition reveals that some of the prayers sought in ELRC Cause No. E004 of 2023 are similar to those of the instant application. It is thus prudent to stay further proceedings of the petitioner pending the hearing and determination of the other suit.
36. This Court finds that the Notice of Motion dated 20<sup>th</sup> June, 2023 is bereft of merits. The same is dismissed with costs as prayed for in the said application.

**Application dated 26<sup>th</sup> July, 2023.**

37. The second application is the Notice of Motion dated 26<sup>th</sup> July, 2023 urging this Court to find that Julius Orenge and the firm of Mogeni and Company Advocates are illegally on record, and are acting without authority from the petitioner.

38. Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 provides as follows:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

39. In the case of *Spire Bank Limited v Land Registrar & 2 others* [2019] eKLR, the Court of Appeal stated as follows:

“...It is essential to appreciate that the intention behind Order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

40. The above authority demonstrates that a resolution appointing an Advocate to represent a company as well as the authority allowing a party to swear an affidavit on behalf of such a company ought to be attached in evidence. Kelvin Mogeni Advocate submitted that the authority to act is derived from the petitioner’s Principal Officer, Evans Nyagah, who is responsible for the general control, direction and supervision of the company, while decisions of the company are made by the Board of Directors who ought to be approved by the IRA.

41. I associate myself with the authority cited by Mmbogori Advocate in *Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000* which states thus-

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute



proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

42. A perusal of the record reveals that the firm of Mogeni & Company Advocates has not attached such authority. The Board resolutions on record show that Andrew Mmbogori Advocate was appointed to act for the petitioner. Authority has also been given to Lisa Anyango Amenya and Terry Wanjiku Kiarie to swear affidavits on behalf of the company. A resolution to that effect was sanctioned by the majority shareholders of the petitioner. In the absence of authority to act for the petitioner being presented by the firm of Mogeni & Company Advocates by majority shareholders, I find that the said firm is improperly on record. It is thus apparent that Julius Orenge did not have the authority to swear affidavits on behalf of the petitioner.
43. In the circumstances this Court finds the Notice of Motion dated 26<sup>th</sup> July, 2023 merited and the same is granted as prayed.
44. As to the issue of who should bear the costs of the two applications, in the case of Nairobi HCCC No. 247 of 2022 Directline Assurance Company Limited vs AKAM Investments Limited & 3 others, Insurance Regulatory Authority, Majanja J., held as follows-

“ this calls into question whether Minority shareholders can pursue litigation regarding shares of the company in the Company’s name. the General principle is that the court will not permit a case instituted in the name of the Company to proceed unless it is supported by the Majority shareholders (see East Africa Safari Air Limited vs Kegode and Anor NRB CA Civil Appeal no 42 of 2007 (2011) eKLR)

Having concluded that the suit is an abuse of the court process and must be struck out, who will bear the costs of the suit? Since the majority shareholders did not authorize the suit, their costs cannot be borne by the plaintiff. The Person who authorized the suit must bear the costs. In this case, Evans Nyagah, the Chief Executive Officer, who swore the Verifying Affidavit in support of the plaint, must be called upon to show cause why he should not bear the costs of the suit personally on an indemnity basis.”

45. The final orders are that-
- i. The Notice of Motion dated 20<sup>th</sup> June, 2023 is subjudice and without merits and the same is dismissed with costs;
  - ii. There shall be a stay of further proceedings in the petition dated 20<sup>th</sup> June, 2023 until the determination of ELRC Cause No. E004 of 2023;
  - iii. A declaration is hereby issued that Julius Orenge has no authority to plead on behalf of Directline Assurance Company Limited on behalf of the petitioner;
  - iv. A declaration is hereby issued that the firm of Mogeni & Company Advocates has no authority to act on behalf of the petitioner in the present petition; and
  - v. The application dated 26<sup>th</sup> July, 2023 is allowed with costs.
46. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**



**JUDGE**

In the presence of:

Ms Shannon Mogeni h/b for Mr. Kelvin Mogeni (not properly on record for the Petitioner)

Mr. Mmbogori for the Petitioner/applicant

Ms Akoth h/b Mr. Odhiambo for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Ms Gitari for the 3<sup>rd</sup> Respondent

Ms B. Wokabi – Court Assistant.

**NJOKI MWANGI**

**JUDGE**

