



**Ngambi (Suing as the Administrator of the Estate of Irene Chiru Kiguta - Deceased) v Al-Riaz International Limited (Miscellaneous Civil Application E121 of 2024) [2024] KEHC 10726 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10726 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CIVIL APPLICATION E121 OF 2024  
FR OLEL, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**JAMES KIGUTA NGAMBI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF IRENE CHIRU KIGUTA - DECEASED) ..... APPLICANT**

**AND**

**AL-RIAZ INTERNATIONAL LIMITED ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The application before this court is the Notice of Motion application dated 3<sup>rd</sup> May 2024 brought pursuant to provisions of Section 1A, 1B, 3, and 3A, of the Civil Procedure Act, Order 22 Rule 35, Order 51 rules 1 and 3 of the [Civil Procedure Rules](#) and all other enabling provision of law. The applicant seeks for orders that;
  - a. The Honourable court be pleased to issue an order compelling the Directors of the respondent, namely Araslan Malik, Rehan Riaz Malik and Usman Riaz Malik to attend court on a date to be fixed by court, for examination under oath as to whether any, or what debts are owing to the respondent and whether the respondent has any, and what property or means of satisfying the decree which the chief magistrate court at Machakos issued on 11<sup>th</sup> May, 2022 in Machakos *CMCC No 250 of 2018; James Kiguta Ngambi (suing as the administrator of the estate of Irene chiru Kigutu (Decesed) v Aldonai Enterprises Limited & Another.*)
  - b. That this Honourable court be pleased to issue an order compelling the directors of the respondent, namely Arslan Riaz Malik, Rehan Riaz Malik and Usman Riaz Malik to produce the respondent's books of account, documentary evidence and inventories of the respondent's assets.



- c. That in default of compliance by the said Araslan Riaz Malik, Rehan Riaz Malik and Usman Riaz Malik with the orders of the court as set out in prayers 2 and 3 herein the court do issue warrants of Arrest against them.
  - d. That this Honourable court be pleased to allow the applicant to execute the decree which the chief Magistrate court at Machakos issued on 11<sup>th</sup> May, 2022 in Machakos CMCC No 250 of 2018 *James Kiguta Ngambi ( suing as the administrator of the estate of Irene chiru Kigutu (Deceased) v Aldonai Enterprises Limited & Another)*, which currently stands at Kshs 2,129,092.00/= against Araslan Riaz Malik, Rehan Riaz Malik and Usman Riaz Malik personally in default of full satisfaction of that decree by the respondent.
  - e. That the Costs of this Application be borne by the Respondent.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of applicant, and the same is opposed by the respondent, who filed their preliminary objection dated 19<sup>th</sup> June 2024, raising the following grounds;
    - a. That there is no suit properly filed before this Honorable court.
    - b. That the present Miscellaneous Application has been commenced through un-procedural means and thus it is fatally defective and is incapable of obtaining the orders sought.
    - c. That the application filed herein is fatally defective, incompetent, bad in law and should be stuck out.
    - d. That the application is fatally defective and/or bad in law as the orders sought by the applicants are sought as against parties that are not parties to the herein suit.
    - e. That the court does not have jurisdiction to hear and determine this application on account of the above grounds.
  3. The court directed that the preliminary objection be heard and determined in priority and the parties did file their submissions in support and opposition to the same.

## **B. The party's submissions.**

### **(i) Respondents submissions in support of the Preliminary objection**

4. The respondent submitted that the only issues that fell for determination is whether the application as filed was properly filed before this court. Section 19 of the *Civil Procedure Act*, Cap 21, stated that, "every suit be instituted in such a manner as be prescribed by the rules". Further Order 3 Rule 1 of the *Civil Procedure Rules*, 2010 states that, "every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed."
5. In *Geoffrey Ndungu Theuri v Law Society of Kenya* [1988] eKLR, the court held "..... the order specifically refers to a suit which is defined under section 2 of the *Civil Procedure Act* in these terms; 'suit' means all civil proceedings commenced in any manner prescribed under the *civil procedure rules*."
6. The Applicant herein had approached this court through the wrong procedure by filing this miscellaneous Application seeking orders inter alia of lifting the corporate veil. It was trite law that a suit can only be instituted by way of Plaint, Petition or an Originating Summons. The respondent submit that the Applicant's application was therefore defective for having not been properly instituted and thus the court did not have a competent suit before it. The respondent further relied on the decision



of Justice Maureen Odero's in [Proto Energy Limited v Hashi Energy Limited](#) [2019] eKLR where the learned Judge held that;

“Order 3 Rule (i) (ii) of the *Civil Procedure Rules* provides that every suit shall be instituted by way of a *Plaint*. As a general rule a suit can only be instituted by way of a *Plaint*, *Petition* or an *Originating summons*. A *Notice of Motion* is not legally recognized as an originating process. A *Notice of Motion* can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.” (own emphasis).”

7. The respondent further submitted that the applicant could also not seek refuge in the provisions of Article 159 of the [Constitution](#), 2010, since the filing of a suit was based on a mandatory statutory provision of law and failure of the applicant to file a substantive suit could not be overlooked as a “mere technicality” and as such, it rendered the said application to be fatally defective. Further, the persons sought to be enjoined/summoned too were not parties in the primary suit and/or in the said application filed, and it was trite that no orders could be issued as against parties we were not parties to the suit. Such orders if issued would go against the provisions of Order 1 Rule 3 of the [Civil Procedure Rules, 2010](#). Reliance was placed on Justice Mativo's decision in [Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others](#) [2017] eKLR to support this proposition.
8. The final issue raised by the respondent was that the Applicant had not sought for an order lifting the corporate veil of the respondent company and that derivatively swept off the Court jurisdiction to grant any of the prayers sought as that was the prerequisite order they need to have been sought before seeking to cross examine the respondent's directors herein. It was also to be noted that the company was a distinct and separate legal entity from its directors as established under the jurisprudence case of *Salmon and Salmon and Co. Ltd* (1897) A.C. 22HL.
9. The respondent therefore urged the court to find that, they had demonstrated that their preliminary objection had merit and urged the court to uphold the same

**(ii) The Applicants submissions in response to the said Preliminary objection.**

10. The applicant averred that he had a valid decree issued by Machakos CMCC No 250 of 2018, which remains unsettled and had made this application to summon the respondent's director's under oath to inquire as to whether they had assets or means of satisfying the primary decree. They had lodged a similar Application before the trial court but the same had been dismissed on the basis that the court did not have jurisdiction to issue the orders sought by dint of the provisions of the [Companies Act, 2015](#), which at Section 3 codified the court to mean “High court”. They were thus properly before the court having jurisdiction to determine the issues raised.
11. The applicant also relied on the provisions of Order 22, rule 35 of the [Civil procedure rules](#), which expressly allowed a holder of a money decree to apply for oral examination of any officer of a corporation regarding any assets or debts owing to the judgment debtor, or other means of satisfying the court decree and for production of books or documents. Reliance was placed in the case of Nairobi Misc Application [No E202 OF 2019](#); Jayden limited v Bradley Limited, where such an application was allowed.
12. The applicant therefore urged the court to find that their application had merit and proceed to dismiss the preliminary objection filed.



### C. Analysis & Determination

13. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same were set out in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, Where at page 700 Law JA stated that:

“A preliminary objection consists of 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, at page 701, Sir Charles Newbold, P. stated:

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

14. I have carefully considered the preliminary objection and do find that indeed it does raise a pure point of law as regards the issue of whether the suit as filed is properly before this court when considered in line with provisions of Section 19 of the civil procedure Act as read with provisions of Order 3 rule I of the civil procedure rules which provide a clear path as to how a suit can be instituted. No doubt a substantive suit has not been filed, and therefore this court lacks jurisdiction to entertain this matter. This has been held as good law, that a suit cannot be initiated by way of Miscellaneous Application. See *Rajab Kosgei Magut v Nuru Jepleting Choge* [2020] eKLR, *JP Machira T/a Machira & Co. Advocates v Wachira Waruru & Another* [2007] eKLR, *County Government of Machakos v Export Processing Authority* [2015] eKLR and *Benson Makori Mwakworo v Nairobi Metropolitan Services & 2 Others* [2022] eKLR.
15. The applicants no doubt are put in a precarious position, but the only option available for them is to consider filing a declaratory suit to enforce the decree obtained as against the directors of the respondent company and make relevant applications therein.

### Disposition

16. The upshot is that, the preliminary objection is upheld and this application is dismissed.
17. Each party to bear its own costs.
18. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**In the presence of: -**



Mr. Maina for Applicant  
Ms Gatimu for Respondent  
Susan/Sam Court Assistant

