



**Insurance Regulatory Authority v Directline Assurance Company Limited & 4 others;
Equity Bank Kenya Limited & another (Interested Parties) (Miscellaneous Application
E470 of 2024) [2024] KEHC 11891 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E470 OF 2024**

**A MABEYA, J
OCTOBER 4, 2024**

BETWEEN

INSURANCE REGULATORY AUTHORITY APPLICANT

AND

DIRECTLINE ASSURANCE COMPANY LIMITED 1ST RESPONDENT

DR SAMUEL KAMAU MACHARIA 2ND RESPONDENT

BASHIR MBURU 3RD RESPONDENT

TOY SUNA HOLDINGS LIMITED 4TH RESPONDENT

DIAMOND TRUST BANK LIMITED 5TH RESPONDENT

AND

EQUITY BANK KENYA LIMITED INTERESTED PARTY

FAMILY BANK LIMITED INTERESTED PARTY

RULING

1. This ruling is with respect to two applications. The application dated 4/6/2024 by the applicant and the application dated 10/7/2024 by the 2nd respondent.

Application dated 10/7/2024

2. The application was brought under sections 1A, 1B, 3A and section 19 of the *Civil Procedure Act*, Order 3 rule 1, Order 40 rules 1 of the *Civil Procedure Rules*. It sought a declaration that the firm of Andrew Mmbogori & co advocates was not appointed by the 1st respondent; that the Notice of Change



- of Advocates dated 6/6/2024, Grounds of Opposition dated 15/6/2024 and Notice of Motion dated 20/6/2024 filed by the said law firm on behalf of the 1st respondent was in contravention of the law and therefore null and void. That the said proceedings be struck out and the interim orders granted on 4/7/2024 be set aside.
3. The application was supported by the grounds on the face of the Motion and the affidavit of Samuel Kamau Macharia sworn on 10/7/2024. The 2nd respondent deponed that the application dated 20/6/2024 was fraudulent because it was filed by advocates who were aware that the Insurance Regulatory Authority (IRA), through a letter dated 5/3/2024, had confirmed that the 2nd respondent and his wife were the legitimate shareholders of the 1st respondent.
 4. That the said firm was improperly appointed by the 1st respondent as constituted by the shareholders of AKM Investment Limited. That the IRA letter also indicated that AKM Limited and Janus Limited were not shareholders in the 1st respondent and therefore, had no control over the company's operations.
 5. He further contended that, two applications relating to shareholding were still pending in the Employment and Labour Relations Court (ELRC) under case number 165 of 2020. That on 28/3/2023, Mbaru J had ruled that the non-shareholders were the majority shareholders, but the judge did not have the 5/3/2024 letter at the time. The 2nd respondent has since sought to have this ruling reviewed and set aside.
 6. The 2nd respondent further contended that the issue of shareholding was central to two other pending applications, Misc Appln No. E250 of 2021 and Misc Appln No. E509 of 2022, with rulings still pending notice. The 2nd respondent also contended that the affidavit sworn by Terry Wijenje Kiarie in support of the 20/6/2024 application was false and that the CR12 document annexed to it did not accurately reflect the true shareholding position.
 7. That the majority shareholders held the authority to initiate and defend suits in the name of the 1st respondent and that the shareholders had not authorized the said firm to represent the company in this case. Consequently, the firm had no authority to file pleadings in court.
 8. The application was opposed by Terry Wanjiku Kiarie, a director of the 1st respondent vide a replying affidavit sworn on 16/7/2024. She stated that she had been a director of the company since 10/11/2012, as evidenced by the company's CR12 and her approval by the IRA to act in that capacity. That the 2nd to 4th respondents were involved in the embezzlement of Kshs 400,000,000/- belonging to the 1st respondent and were responsible for the irregular encumbrance on an additional Kshs 300,000,000/-.
 9. She deposed that the application dated 10/7/2024 was defective as it was filed in contempt of the court orders issued on 18/6/2024, regarding the swearing of a supporting affidavit and the filing of unauthorized applications. She also contended that the 1st respondent's board and majority shareholders, holding 90.22% of the shares, did not authorize the filing of the application.
 10. According to her, resolutions passed on 1/9/2023, allowed the company's shareholders to reserve the right to appoint advocates, which was assigned to AKM Investment Ltd and Janus Limited. The company also resolved to ratify the actions of the directors in relation to the instruction of Messrs. Gakoi Maina & Company Advocates and Andrew Mbogori Advocate. That a resolution was passed on 6/6/2024 appointing Andrew Mbogori Advocate, who subsequently filed a notice of appointment.
 11. She further noted that the issue of legal representation had been litigated and determined multiple times by different courts. In ELC E004 of 2023, the court directed the law firm of Andrew Mbogori



- & Co. Advocates to proceed and defend the company and two subsequent applications to stay this decision were dismissed. In HCCC 247 of 2022, Majanja J struck off the entire suit deeming it an abuse of the court process. That the law firm of Kamau Kuria & Co. Advocates should be estopped from re litigating this issue.
12. She contended that the present application was an indirect attempt to restructure the shareholding of the company, a recurring subject of dispute that had been referred to arbitration. The arbitrator ruled that the minority shareholders, led by the 2nd respondent, had illegally and forcibly taken over the company's physical and practical management. The majority shareholders, comprising AKM Investment Ltd and Triad Networks Limited, held a 90.336% shareholding. However, the arbitration award was currently before the court, with the majority shareholders seeking enforcement and the minority shareholders seeking to set aside the award. That the 2nd respondent had not disclosed that the Commissioner's decision dated 5/3/2024 had been stayed and was therefore of no legal effect.
 13. In a rejoinder the applicant filed a further affidavit sworn by Samuel Kamau Macharia on 23/7/2024. He produced a bundle of resolutions passed by the directors showing that he had the authority to appoint advocates. He reiterated that both himself and his wife Purity Gathoni Macharia were the sole shareholders and directors of the company. That he had not transacted the business of the company after the court issued orders restraining him on 6/6/2024.

Application dated 4/6/2024

14. The application was brought pursuant to sections 1A, 1B, 3,3A of the *Civil Procedure Act*, Order 51 rule 1 of the *Civil Procedure Rules* 2010. It sought orders to compel the 4th respondent to refund the principal and interest, if any of Kshs 400,000,000/- transferred to account number 003049002 at Diamond trust bank limited. That the IRA do suspend the operation of the 4th respondent's power of attorney dated 8/3/2021 and assume control of the various accounts of the 1st respondent for the purpose of protecting the interest of the policy holders any other remedy necessary under section 67G of the *Insurance Act* ("the Act").
15. In support of the application, the applicant relied on the grounds on the face of the Motion and the supporting affidavit of Geoffrey Kiptum, the Commissioner for Insurance sworn on even date.
16. It was contended that while fulfilling its supervisory duties, IRA received a letter dated 16/5/2024, in which the 2nd and 3rd respondent instructed the 5th respondent to conduct transactions on behalf of the 1st respondent. The instructions directed the liquidation of a fixed deposit account totaling Kshs 350 million and the transfer of Kshs 400 million to Diamond Trust Bank Capital Center in the name of Toy and Suna Holdings. The letter stated that these funds were intended for the development of stalls and low-cost housing at Toy Market, following an international tender won by Direct Line and executed on its behalf under a power of attorney.
17. The applicant contended that these instructions were carried out by the 5th respondent. Moreover, the 1st respondent had other bank accounts with the 1st to 3rd respondent, raising concerns about potential irregular transactions affecting these accounts.
18. IRA claimed that, according to section 191(2) of the *Act*, a licensed insurer is restricted to engaging solely in insurance business. The transaction in question allegedly violated this provision and represented a conversion of policyholders' property to individual custody, contrary to sections 269(1) and 269(2)(a) of the *Penal Code*.
19. On the power of attorney, it was contended that it was improperly granted by the 2nd respondent to the 4th respondent, a company where the 2nd respondent is the sole director and shareholder. The



- applicant suspected that the transfers were intended to permanently deprive the 1st respondent of the Kshs 400 million.
20. Given these illegalities, the applicant was concerned that the insurer's actions were detrimental to the interests of the insurer, its shareholders, policyholders, and beneficiaries. This concern was based on the fact that the 1st respondent's capital adequacy as of 31/12/2023 showed a capital deficit, contrary to section 41 of the Act. Additionally, the 1st respondent's monthly claims summary as of 30/4/2024 indicated outstanding unpaid claims of Kshs 2.08 billion, reflecting a significant liability to policyholders.
 21. That in view of the foregoing, IRA determined that it was in the best interest of policyholders to use its powers under section 67G of the Act to take possession and control of the 1st respondent's assets.
 22. Terry Wanjiku Kiarie Wijenje filed a response to the application in a replying affidavit dated 15/6/2024. She claimed that the IRA had authorized her to serve as a director of the 1st respondent. That the Kshs 400 million transfer was fraudulent, illegal and irregular, and that the board of directors and the company shareholders had not approved it.
 23. That that at the time the instructions of 16/5/2024 were given, the 2nd and 3rd respondent were not listed on the 1st respondent's CR-12 and they had not been authorized by the IRA to conduct any transactions on behalf of the 1st respondent. Verification with the 1st respondent revealed that the 2nd and 3rd respondents had been removed from the board and lacked the authorization from the majority shareholders to execute the transfer.
 24. Simultaneous with the replying affidavit, the 1st respondent filed grounds of opposition dated 15/6/2024. It was stated that the application dated 4/6/2024 was defective. That the 1st respondent did not oppose the prayers for the refund of Kshs 400 million, suspension of the power of attorney as well as the order for mandatory injunction. The 1st respondent was however opposed to the prayer for the 1st respondent assuming control of the 1st respondent's accounts.
 25. The 5th respondent filed a replying affidavit dated 3/7/2024 sworn by Francis Kariuki. He stated that on 16/5/2024, the 1st respondent instructed the 5th respondent to liquidate Kshs. 350,000,000/- on fixed deposit and Kshs 50million on call deposit and transfer the total of Kshs 400 million to Toy and Suna Holdings. That the said amounts were liquidated as per the 1st respondent's account mandate and the instruction letter.
 26. That the 5th respondent was served with a court order dated 6/6/2024. That it has no claim or an interest in the sums held in the 1st and 4th respondent accounts and was willing to transfer the same as ordered by the court.
 27. The 2nd and 3rd respondents filed a replying affidavit dated 13/6/2024 sworn by Dr. Samuel Kamau Macharia. He stated that he was a founder and shareholder of the 1st respondent which was formed in 1998. That it had emerged that the shareholding of the company had been fraudulently and illegally challenged and as a consequence the various legal disputes before the courts.
 28. That sometime in 2015 the Nairobi City County Government expressed its interest from various stakeholders for development of old housing estates. That the 1st respondent held a director's meeting and it was resolved that the company purchases serviced apartments and participate in a private partnership with Nairobi City County Government.
 29. The 2nd, 3rd and 4th respondent raised a preliminary objection dated 13/6/2024. The objection was on the grounds that the application offended the mandatory provisions of section 19 of the Civil Procedure



Act and order 3 rule 2 of the Civil Procedure Rules as well as order 40 rule 1 and 2 that requires that a suit to be commenced by way of a plaint, petition or originating summons.

30. The 1st respondent in opposition to the application raised a preliminary objection dated 1/7/2024. It was founded on the grounds that the application was not valid and was fatally defective for it was commenced by way of a miscellaneous application in contravention of section 19 of the Civil Procedure Act and order 3 rule 1 of the Civil Procedure Rules.

Submissions

31. Parties canvassed the applications by way of written submissions which I have considered. Counsel the IRA submitted that the ultimate relief in the application dated 4/6/2024 was the return of Kshs 400,000,000/= to the account of the company. That the same had been transferred for the purpose of undertaking prohibited business.
32. Further, that the outcome of the meeting held on 3/7/2024, was that the sum of Kshs 400,000,000/- was to be transferred back to direct line to ensure the company continues operating and meeting its day to day costs. The said agreement was adopted by the court on 4/7/2024. It was contended that the issues of representation and shareholding of direct line could only be conclusively determined in HC Miscellaneous no E 509 OF 2022 and HC Miscellaneous NO E250 OF 2021.
33. For the 1st to 4th respondent, it was submitted that in determining the Motion dated 4/6/2024 by the IRA, there was a question as to whether the said reliefs can be granted at an interlocutory stage without a trial. That the court could not determine issues to do with shareholding since they were pending before another court. That the Motion was not a suit. That AKM Investments and Janus Limited were not shareholders and the registrar of companies had made a mistake by issuing the CR-12.
34. With respect to the application dated 10/7/2024, counsel submitted that the 2nd, 3rd and 4th respondent continued to be in contempt of the court orders. That the court gave orders that the 2nd respondent was prohibited to act for the 1st respondent.
35. It was submitted that the application was defective as it was filed by individuals who were barred by the court from acting on behalf of the 1st respondent. That the application was *res-judicata* since the parties were re-litigating the same thing. Further, that the 2nd respondent being a minority shareholder did not have locus or right to purport and appoint counsel.
36. I have considered the pleadings on record, the submissions by counsel and the authorities cited. There are three issues for determination namely;
- a. whether the preliminary objections dated 13/6/2024 and 1/7/2024 are merited;
 - b. whether the firm of Andrew Mmbogori & co advocates was properly appointed by the 1st respondent, and
 - c. whether the IRA has made out a case for grant of the orders sought.
37. On the objections, the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 settled the same as being points of law raised that can determine a matter. They are to raised only when the facts pleaded by the other party are not disputed.
38. In the present case, the objections were raised on the grounds that the application dated 4/6/2024 was incompetent for it was filed against the provisions of section 19 of the Civil Procedure Act and it offended Order 3 rule 2.



39. Section 19 of the *Civil Procedure Act* provides: -

“Every suit shall be instituted in such manner as may be prescribed by rules.

a. Order 3 of the *Civil Procedure Rules* states: -

1. Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed,

40. In *Joseph Kibowen Chemior v William C Kiseru* [2013] eKLR, the court stated: -

“The word “suit” has several meanings. Black’s Law Dictionary defines “suit” as any proceedings by a party or parties against another in a court of law, “suit of a civil nature” is defined to be a civil action.

“A civil action” is an action brought to enforce, redress, or protect a private or civil right.

Section 2 of the *Civil Procedure Act*, defines “suit” as all civil proceedings commenced in any manner “prescribed” under section 2 means prescribed by rules.

“Rules” means rules and forms made by the Rules Committee to regulate the procedure of courts.

“Pleadings” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.

Under Section 19 of the *Civil Procedure Act*, every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how Proceedings may be commenced. For example, the *Probate & Administration Rules under the Succession Act*, (14) prescribe how matters touching on succession of estates of deceased persons need to be instituted”.

41. From the foregoing, it is clear that the wording of section 19 of the *Civil Procedure rules* is mandatory in nature. It obliges the parties approaching the court to comply with the procedures set out in the rules. The rules in this case with respect to commencement of a suit are clear that one can only institute a suit through a plaint, petition or originating summons.

42. In *Proto Energy Limited v Hasbi Energy Limited* (2019) eKLR, the court held: -

“Order 3 Rule (i), (ii) 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 property 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”



43. Further, in *Samuel Chege Thiari & another v Eddah Wanjiru Wangari & 3 others* [2018] eKLR, the Court held: -
- “In the end, I find that the applicant is not properly before this court as there is no suit upon which the Notice of Motion can stand. The court cannot invoke its inherent jurisdiction to cure that defect.”
44. In view of the foregoing, I hold and find that failing to institute a suit according to the prescribed procedures is a fatal error that cannot be remedied. In this case, the IRA, initiated these proceedings by filing a miscellaneous suit by way of notice of motion.
45. In *Riro v Kabonge & 3 others* (Environment and Land Miscellaneous Application E077 of 2022) [2023] KEELC 16433 (KLR) (16 March 2023) (Ruling) the court observed that: -
- “A suit can only be commenced by way of a miscellaneous when all that a person wants is an order of court where the rights of the parties are not in contention, and where the discretion of the court is being sought or a procedural issue is sought to be endorsed. This is permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. Where there is a call to adjudicate on rights of parties, then it must be said that there is a “civil action” which must be commenced in the manner prescribed by the Rules, and not a miscellaneous application.”
46. Miscellaneous applications are used for incidental or procedural matters, not for substantive claims or enforcement of rights. The present application was filed to first obtain injunctive orders and thereafter seeking mandatory injunction requiring the refund of Kshs 400million. The suit is not addressing any procedural issues but seeks to enforce substantive rights. In this regard, a notice of motion is not an acceptable form of originating process and can only be submitted within the context of a properly instituted suit. In *Raila Odinga & Others v IEBC* (2013), the Supreme Court held that Article 159(2) (d) of the *Constitution* should not serve as a remedy for incompetent pleadings.
47. Accordingly, I hold and find that applicant’s failure to anchor the application within a suit was a fatal oversight. As a result, I uphold the preliminary objections dated 13/6/2024 and 1/7/2024 and find the Notice of Motion dated 16/6/2024 to be incompetent and is hereby strike it out with costs.
48. The second issue is whether a declaration should be made that the firm of Messrs. Andrew Mmbogori & Co advocates was not appointed by the 1st respondent to act for it in the suit. That upon making that declaration, the documents filed by the said law firm be struck out.
49. The 1st to 4th respondent argued that the majority shareholders, being Royal Credit Limited, Dr. S.K.Macharia and Mrs. P G Macharia had not instructed the said law firm to act for it. They contended that on 28/3/2023, Mbaru J held that the non-shareholders were the majority shareholders of the 1st respondent. That that was based on a wrong assumption that AKM Investment Limited and Janus Limited were shareholders. That the said ruling was up for review.
50. In *Uburu Highway Development Ltd & Others v Central Bank of Kenya Ltd & Others* (2) [2002] 2 EA 654, the court was of the view that it is not the business of the courts to tell litigants which advocate should or should not act in a particular matter. This is so because each party to a litigation has the right to choose his or her own advocate, unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter.



51. In *George Pariken Ole Narok & another v Cabinet Secretary, Ministry of Industry, Trade & Cooperatives & another; Kenya Farmers Association Ltd* (Interested Party) [2021] eKLR, the court observed thus: -

“An advocate is an agent of the client they represent and can therefore only represent a party with the correct authority. It is trite that the donor of such authority to act must first have the authority, to properly donate the same to their agent”

52. In addition, in *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd* HCCC No. 391 of 2000, Hewett J held: -

“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.”

53. Where a party is a company, an advocate is to be appointed by the directors or the majority shareholders of the company. In the present case, there is an ongoing dispute regarding the management of the company. The issue of directorship and shareholding is strenuously being fought in some pending proceedings. Given the existing dispute, it would be inappropriate for this court to intervene in matters of management or representation at this time. The ongoing proceedings are before a competent court. The proceedings must be allowed to take their course so that parties' rights and interests are duly considered and protected.

54. Furthermore, the court finds that there is already a ruling by Mbaru J allowing the firm of Andrew Mmbogori & Co Advocates to continue acting for the 1st respondent. In light thereof, the court finds that until the issue of directorship and shareholding is determined in the pending proceedings, the legality or otherwise of the appointment of Andrew Mmbogori & Co Advocates cannot be gone to. The company must continue to be represented in these and other proceedings.

55. In view of the foregoing, I find the application to be without merit and dismissed the same with costs.

56. Accordingly, I make the following orders: -

- a. The application dated 10/7/2024 is without merit and it is hereby dismissed with costs.
- b. The preliminary objections dated 13/6/2024 and 1/7/2024 are merited. They are hereby upheld. Consequently, the application dated 4/6/2024 and suit are struck out with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE

