



**Forino & another (Suing as Administrators of the Estate of Giovanni Forino - Now Deceased) v Forino & 4 others (Civil Case 9 of 2019) [2023] KEHC 1689 (KLR) (8 March 2023) (Directions)**

Neutral citation: [2023] KEHC 1689 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL CASE 9 OF 2019  
SM GITHINJI, J  
MARCH 8, 2023**

**IN THE MATTER OF COMPANIES ACT NO. 17 OF 2015  
IN THE MATTER OF RECTIFICATION OF THE  
COMPANY REGISTER OF GIO- FO LIMITED**

**BETWEEN**

**MICHELLINA FORINO ..... 1<sup>ST</sup> APPLICANT  
SALVATORE FORINO ..... 2<sup>ND</sup> APPLICANT  
SUING AS ADMINISTRATORS OF THE ESTATE OF GIOVANNI FORINO -  
NOW DECEASED**

**AND**

**ALFONSO FORINO ..... 1<sup>ST</sup> RESPONDENT  
LAZARUS KIMANGA ..... 2<sup>ND</sup> RESPONDENT  
PARKER RANDAL-EAST AFRICA LIMITED ..... 3<sup>RD</sup> RESPONDENT  
REGISTRAR OF COMPANIES ..... 4<sup>TH</sup> RESPONDENT  
GIO-FO LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**DIRECTIONS**

1. This matter came up for mention on December 8, 2022. Mr Bwire was present for the applicants, Mr Binyenya for the 1<sup>st</sup> and 5<sup>th</sup> Respondent while there was no representation for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.
2. Mr Bwire told the court that he took over the matter from the firm of Kimetto & Associates and that there were some directions given in regard to the OS dated September 17, 2019. He sought the courts directions in having the matter decided as a plaint and evidence be taken by way of viva voce evidence as



there is a lot of contested issues especially the nature in which Mr Binyenya effected transfers of shares of the 5<sup>th</sup> Respondent and thus he needs to cross examine Mr Binyenya on the said transfer.

3. Mr Binyenya on his part argued that they had appeared on March 7, 2022 with Mr Bwire and directions were issued. Further, on April 26, 2022 he appeared in court alone and sought directions which were given and they were to file submissions, thus that day's mention was to confirm filing of submissions. He told the court that he informed parties of the directions and had also filed his submissions on behalf of the 1<sup>st</sup> and 5<sup>th</sup> respondents. He added that the issue of joinder of himself and the rest was dealt with by Justice Nyakundi and dismissed thus it is late in the day to convert the OS into a plaint.
4. In response to Mr Binyenya, Mr Bwire asserted that the directions of April 26, 2022 were taken *ex parte*. In addition, he did not seek to enjoin Mr Binyenya but seeks to be allowed to cross examine him and the Registrar of companies also needs to be cross examined as there are issues of fraud alleged.
5. I have weighed the arguments advanced by both counsels. The issue for determination herein is whether the OS should be converted into a plaint. In dealing with this issue I have to go to the rationale behind claims being brought by way of originating summons. Originating summons were meant to deal with simple matters which the court can settle through the process. In other words, originating summons are appropriate where the issues sought to be determined are simple. In the case of [\*Kibutiri v Kibutiri \(1982-1988\) 1 KAR 60\*](#), Law J had this to say regarding originating summons:-

“The procedure by way of originating summons is intended;

“to enable simple matters to be settled by the court without the expense of bringing an action in the usual way not to enable the court to determine matters which involve a serious question”.

See also the case of [\*Mnazi Moja Estates Limited v Mistry and 5 others \(1987\) KLR 269\*](#) where the court of Appeal held that the procedure of originating summons is not an appropriate way to commence an action where issues raise complex and contentious question of fact.

6. I have looked at the grounds on the face of the OS dated September 17, 2019. Among others, there is the allegation of fraud. The law is clear that allegations of fraud need not only be particularized but also proved. This cannot be done in an originating summons. Mr Bwire wishes to cross examine both Mr Binyenya and the Registrar of Companies.
7. Order 37 Rule 19 of the [\*Civil Procedure Rules\*](#) gives the Court power to convert an originating summons into a plaint. Where that is done, the parties have to comply with Order 11 of the [\*Civil Procedure Rules\*](#) which require filing of documents and witness statements.
8. In the present case, Mr Binyenya is not a party to the suit. The issue of his joinder was conclusively dealt with by my brother, Justice Nyakundi. In my view, Mr Binyenya is not a party to this suit and cannot be cross examined as he has not sworn any affidavit or filed a witness statement, the basis upon which he can be cross examined.
9. However, be it as may, the Registrar of Companies is a party to this suit and would be the proper person to shed light on the issue of transfer of the 999 shares which is contested. In the interest of justice, all these issues need be addressed and this can be done when evidence is adduced *viva voce*.
10. With the above analysis, I find that this is a proper case where the originating summons should be converted to a plaint. That said, I make the following directions;
  1. That the OS be and is hereby converted to a plaint.



2. Parties to file witness statements, lists and bundles of documents and statement of issues within 21 days.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8<sup>TH</sup> DAY OF MARCH, 2023.**

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**S M GITHINJI**

**JUDGE**

**In the Presence of:**

1. Mr Muliro holding brief for Mr Bwire for the Petitioner.

2. Mr Binyenya for 1<sup>st</sup> and 5<sup>th</sup> Respondents.

3. Ms Ruttoh is for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (absent)

4. Kelvin Odhiambo is for 4<sup>th</sup> Respondent (absent)

Mention on June 13, 2023.

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**S M GITHINJI**

**JUDGE**

**March 8, 2023**

