



**Abdulkarim v Mulla & 3 others (Miscellaneous Application
E31 of 2024) [2024] KEHC 13987 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E31 OF 2024**

JK NG'ARNG'AR, J

NOVEMBER 12, 2024

**IN THE MATTER OF: ACCESS TO COMPANY INFORMATION UNDER SECTIONS 630,
662, 663, 666 AND 667 OF THE COMPANIES ACT NO. 17 OF 2015 LAWS OF KENYA**

AND

**IN THE MATTER OF: AN APPLICATION FOR PROTECTION OF
MEMBERS AGAINST OPPRESSIVE CONDUCT AND APPOINTMENT OF
INSPECTORS AND AN INVESTIGATION UNDER SECTIONS 780, 786
AND 787 OF THE COMPANIES ACT NO. 17 OF 2015 LAWS OF KENYA**

BETWEEN

NOMAN ABDULKARIM APPLICANT

AND

MUNAVARALI ABDULKARIM EBRAHIMJI MULLA 1ST RESPONDENT

NAJMUDDIN ABDULKARIM 2ND RESPONDENT

NAJMUDDIN HASSANALI NORBHAJI 3RD RESPONDENT

KENYA ADHESIVE PRODUCTS LIMITED 4TH RESPONDENT

RULING

1. The Applicant filed a Notice of Motion application dated 10th July 2024 pursuant to Sections 1A, 1B, 3, 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*, Sections 630, 662, 663, 666, 667, 780, 786, and 787 of the *Companies Act*, 2015 and all enabling provisions of law.
2. The Applicant seeks for an order of access to financial and other records of the Kenya Adhesive Products and be provided with copies of any and all documents in regard thereto, for an order of investigation into the affairs of Kenya Adhesive Products Limited and to appoint two (2) competent inspectors to do the investigations and report to court within a period to be specified, and that the 4th



- Respondent do hold a general meeting to discuss company affairs and pass any requisite and necessary resolutions upon submission of the inspection report.
3. The Application was premised on grounds on its face and the Supporting Affidavit of the Applicant sworn on 10th July 2024 that the Applicant is a member and director of the 4th Respondent company having shareholding of 25%. That the 1st, 2nd and 3rd Respondents have been running the affairs of the 4th Respondent to the exclusion of the Applicant. That despite numerous requests and demands, the 1st, 2nd and 3rd Respondents have failed and/or refused to provide the Applicant with financial and other records of the 4th Respondent. That the Respondents are conducting the company's affairs in a manner that is oppressive to the Applicant and unfairly prejudicial to the interests of members of the 4th Respondent Company. That the Applicant is apprehensive that there are legal and financial ramifications that may be adverse to his interests in relation to the affairs of the 4th Respondent that he may not be aware of.
 4. In response to the Applicant's Notice of Motion application, the Respondents filed a Notice of Preliminary Objection dated 25th July 2024 on grounds that the suit is incompetent, incurably defective and bad in law. That the Notice of Motion application dated 10th July 2024 is not anchored on any plaint and has no legs to stand on. That the Applicant did not obtain leave of this court prior to filing this suit. They therefore prayed that the application be dismissed and/or struck out with costs.
 5. The 3rd Respondent filed a Chamber Summons application dated 13th September 2024 under Sections 1A, 1B and 19 of the [Civil Procedure Act](#) and Order 1 Rule 14 and Order 3 Rule 1 (1) of the [Civil Procedure Rules](#) 2010 seeking for orders that the application be heard on a priority basis over any other proceedings in this suit, that the court be pleased to strike out the name of the 3rd Respondent Najmuddin Hassanali Noorbhai from the suit, and that costs of the application be provided for.
 6. The 3rd Respondent's application is based on grounds on its face and the Supporting Affidavit of Najmuddin Hassanali Mohamedali sworn on 13th September 2024 that the Applicant might have erroneously captured the name of Najmuddin Hassanali Mohamedali as Najmuddin Hassanali Noorbhai with the intention of suing him as the 3rd Respondent herein. That the latter is neither an employee nor officer of the 4th Respondent, is not involved in any way in the running of the affairs of the 4th Respondent, and he does not have in his custody the financial or any other records of the company. That the 3rd Respondent used to be a company secretary of the 4th Respondent and was only responsible for making statutory company returns but retired in 2017 and handed over the company records in his possession to the 4th Respondent's auditors who had instructed him on behalf of the 4th Respondent. That it is therefore in the interest of justice that the 3rd Respondent's name be struck out.
 7. The court gave parties directions for the applications to be canvassed by way of written submissions. The Applicants in their submissions dated 24th September 2024 argued that contrary to the Respondents' Notice of Preliminary Objection, the suit herein was initiated by way of an originating notice of motion which is a legally recognized means of instituting proceedings. That the courts have on several occasions held that where no specific procedure has been set for an application to be made to court by a statute, the same can be made by way of motion as was held in [Y. A. Shretta v Leisure Lodges Ltd](#) (2015) eKLR and [Ezekiel Muriithi Nephath v Kenya Bus Services Ltd & Another](#) (2002) eKLR. The Applicant further stated that the application dated 10th July 2024 was by way of originating notice of motion grounded on the provisions of Section 780 of the [Companies Act](#), 2015. That there is no specific procedure set out by the statute on the manner in which an aggrieved member of the company can approach court and that in such a case, court may be approached by way of an originating motion. That the Preliminary Objection therefore lacks merit and ought to be dismissed with costs.



8. On the Notice of Motion application dated 10th July 2024, the Applicant contended that Section 630 of the *Companies Act* requires a company to maintain accounting records and preserve the same for a period of 7 years. That the records ought to be availed to any officer of the company to inspect, and an officer is defined as either the director, manager or the secretary of the company. That under the *Companies Act*, failure to prepare accounting records or stop a company from preparing the same is an offence pursuant to Sections 666, 780, 782, and 786 of the Act. The Applicant cited the case of *Velani & 6 Others v Naran & 2 Others* (Petition E002 of 2020) (2021) KEHC 75 (KLR) (Commercial and Tax) (21 September 2021) (Judgment). That this court therefore allows the Notice of Motion dated 10th July 2024 as prayed.
9. The Respondents filed submissions dated 25th July 2024 and argued that the law on preliminary objection is set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. That in the case of *Proto Energy Limited v Hashi Energy Limited* (2019) eKLR the court held “Order 3 Rule (i) (ii) provide 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 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.”
10. The Respondents further relied on the holding in *Samuel Chege Thiari & Another v Eddah Wanjiru Wangari & 3 Others* (2018) eKLR, *Wanja & Another v Roothaert* (Miscellaneous Application E193 of 2021) (2022) KEHC 10255 (KLR) (3 June 2022) and *Gitonga Muriuki & Co. Advocates v Mbasibu Sacco Society Limited* (Miscellaneous Civil Application E731 of 2022) (2023) KEHC 23318 (KLR) (Civ). The Respondents prayed that this court allows the Notice of Preliminary Objection dated 25th July 2024 and that the Notice of Motion application dated 10th July 2024 be struck out with costs.
11. I have considered the Notice of Motion Application dated 10th July 2024, the Notice of Preliminary Objection dated 25th July 2024, Chamber Summons application dated 13th September 2024 and submissions by the parties. The issues for determination are whether the Applicant’s Notice of Motion application dated 10th July 2024 is incompetent, incurably defective and bad in law for the reason that it is not anchored on any plaint, and who should bear costs.
12. Pursuant to the holding in *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, the test to be satisfied for a preliminary objection to succeed is that it ought to raise a pure point of law, it should be based on the assumption that the facts pleaded by the opposing side are correct, and the same cannot be raised if there is need to ascertain a fact or what is sought is in the exercise of judicial discretion. If a preliminary objection is successful, it ought to dispose of the suit.
13. The Respondents in their Preliminary Objection argued that the Applicant’s Notice of Motion is not anchored on a plaint contrary to the general rule of how a suit should be instituted, and that a notice of motion application can only be filed within a properly instituted suit. According to this court, this is a pure point of law. This court is further satisfied that the Applicant’s Notice of Motion ought to have been anchored to a suit and the application is therefore not properly before this court.
14. This court relies on the holding in *Proto Energy Limited v Hashi Energy Limited* (2019) eKLR where it was held as follows: -

“Order 3 Rule (i) (ii) provides that every suit shall be instituted by way of a Plaintiff. 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.”

15. On the Chamber Summons application dated 13th September 2024 seeking to strike out the name of the 3rd Respondent, this court cannot belabor itself on the analysis considering the Notice of Motion application is improperly before this court.
16. In the upshot, I find that the Respondent’s Preliminary Objection dated 25th July 2024 has merit and is upheld, and the Applicant’s Notice of Motion application dated 10th July 2024 is struck out with costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF NOVEMBER, 2024.

J.K. NG’ARNG’AR, HSC

JUDGE

In the presence of: -

Ahmed Advocate for the Applicant

No appearance Advocate for the 1st, 2nd and 4th Respondents

Sebayiga Advocate for the 3rd Respondent

Court Assistant – Mr. Samuel Shitemi

