



IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CAUSE NO. 490 OF 2014

IN THE MATTER OF XPLICO INSURANCE COMPANY LIMITED

AND

IN THE MATTER OF AN THE COMPANIES ACT CAP 486 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR THE RECTIFICATION OF THE REGISTER UNDER SECTION 118 OF THE COMPANIES ACT CAP 486 LAWS OF KENYA

BETWEEN

OBSIDITION INVESTMENTS LIMITED.....APPLICANT

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE REGISTRAR GENERAL OF COMPANIES.....2ND RESPONDENT

RULING

Temporary injunction

[1] Apart from costs, the significant orders being sought in the chamber summons application dated 13th October, 2014 are:-

1) A stay of the following matters:-

(a) Any and all proceedings to enforce execute implement or put into effect in any manner whatsoever the said decision of the Attorney General and the Registrar of Companies purporting to determine the lawful shareholders and directors of the Applicant contained in their letters dated 6th February 2014 and 19th March 2014 and in the CR12 Form referenced CPR/2009/12818 dated 26th June 2014; and

(b) Any and all proceedings steps or actions by the Attorney General and/or the Registrar of Companies and their respective agents or servants to alter or interfere in any manner whatsoever with the shareholding and directorship of the Applicant; and

(c)The issuance by the Attorney General and/or the Registrar of Companies of any further letters, official searches, CR12 Forms or other documents or directives whatsoever purporting to show that the Applicant’s shareholding and directorship is in any way different from that set out in prayer 3 hereinabove.

2) **And order setting aside the decision of the Attorney General and the Registrar of Companies purporting to determine the lawful shareholders and directors of the Applicant contained in their letters dated 6th February 2014 and 19th March 2014 and in their CR12 Form referenced CPR/2009/12818 dated 26th June 2014.**

[2] The application is expressed to be brought under section 1A, 1B and 3A of the Civil Procedure Rules and all enabling provisions of the law. It is also supported by two affidavits by RAJ SAHI sworn on 13th October 2014 (Supporting Affidavit)and the 2nd day of December 2014 (“the further affidavit”).

Submissions by the Applicant

[3] The Applicant formulated the following issues for determination:

1. Whether the Registrar has the Authority to alter the Company’s shareholding and directorship without recourse to the provisions of the Companies’ Act Cap 486 Laws of Kenya;

2. If 1 aforesaid is in the negative, whether the decision of the Registrar general as contained in the letters dated 6th February 2014 and 19th March 2014 and in the CR12 Form referenced CPR/2009/12818 dated 26th June 2014 can be challenged by way of the present Application and “in extensio” by the manner sought herein;

3. Whether the said decision of the Registrar general of Companies as contained in the letters dated 6th February 2014 and 19th March 2014 and in the CR12 Form referenced CPR/2009/12818 dated 26th June 2014 is as a result of 1 and 2 aforesaid lawful;

4. Whether the Applicant has satisfied the principles of setting aside the said decision and whether a prima facie case been made out by the Applicant sufficient enough to warrant the issuance of the orders as sought?

[4] The Applicant argued that this Application arose from a decision by the Registrar General of Companies wherein they unilaterally altered the shareholding and directorship of Xplico Insurance Company Limited (“the Company”) which was aimed at denying the Applicant its rightful say in the affairs thereof and also placed the Applicant under direct threat of losing its shares despite having heavily invested therein. The Applicant cited Section 164 of the Companies Act Cap 486 on investigations of affairs of a company by the Registrar. The section provides;

“164. (1) (a) Where the registrar has reasonable cause to believe that the provisions of this Act are not being complied with, or where, on perusal of any document which a Company is required to submit to him under the provisions of this Act, he is of opinion that the document does not disclose a full and fair statement of the matters to which it purports to relate, he may, by a written order, call on the company concerned to produce all or any of the books of the Company or to furnish in writing such information or explanation as he may specify in his Order.

(b).....

(2).....

(3).....

(4) If after examination of such books or consideration of such

information or explanation the Registrar is of the opinion that an unsatisfactory state of affairs is disclosed or that a full and fair statement has not been disclosed the registrar shall report the circumstances of the case in writing to the Court.

Issue 1: Registrar's Authority to alter the Company's shareholding and directorship

[5] The Applicant relied on section 164 of the Companies Act; that in the event that the Registrar suspects that the Company is being mishandled, he can sanction investigations and thereafter proceed to make a report to the Court of his findings. In the present case, no such report was ever sanctioned by the registrar despite her deposing in paragraphs 11 and 12 of the Respondent replying Affidavit that she received several complaints on alleged illegal and un-procedural alteration of directorship and shareholding of Xplico Insurance Company Limited. She simply averred that on receipt of the complaints, the Registrar quashed the decision to allot 29,700 shares each to Salim Hussein Dungarwalla, Altaf H. Bhurawala, Keith D Beekmeyer and Shiraz H. Dungarwalla as the return of allotment for 213 dated 11.02.2010 filed on 24.07.2012 was not supported by a board resolution supporting the same. There is no evidence of the Registrar ever requesting and asking whether such a board resolution exists or not on the record and indeed she does not even mention whether the same was ever requested for. The Applicant, therefore, considered the averments in paragraph 12 as an afterthought since the Registrar vide her letter of 6th February 2014 was quite unequivocal when she stated that the main reason for her quashing and altering the Company's shareholding is to be contained in paragraph 3 and not as alleged in the replying affidavit. Furthermore, they submitted that the Registrar lacked the power to so quash in light of section 164 of the Companies' Act cap 486 and Section 166 thereof which provides "*inter alia*":

166. Without Prejudice to its powers under Section 165 the Court-

(a) Shall appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court directs, if the Company by special resolution declares that its affairs ought to be investigated by an inspector appointed by the Court; and

(b) May do so, if it appears to the Court upon a report from the Registrar that there are circumstances suggesting –

(i) that the Company's business is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or

(ii) that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or

(iii) That its members have not been given all the information with respect to its affairs which they might reasonably expect; or

(iv) That it is desirable so to do.

[6] They stated that the record herein reflects that at no time whatsoever did the Registrar General prior to her decision as contained in the letters dated 6th February 2014 and 19th March 2014 and in the CR12 Form referenced CPR/2009/12818 dated 26th June 2014 comply with both sections 164 and 166 of the Companies Act Cap 486 Laws of Kenya. This by its very nature shows that Registrar general of Companies acted in bad faith as against the Applicant's interests held with the Company. It therefore follows that "*prima facie*" the present Application is proper before the Honourable Court. Further, in the absence of an illegality in the affairs of a company, the same cannot be interfered with on account of mere irregularities. See **Dadani VS Manji & 3 Others: Civil Case Number 913 of 2002**; Mwera J (as he then

was) that:

“These broad issues to determine here are not exhaustive and/or exclusive of any relevant aspects touched on during the arguments or other, and it may as well be that all aspects canvassed do not find a place in this determination. Such shall not be as a result of discourtesy to counsel or disregard for the authorities put forth.

1. Jurisdiction:

After carefully this point as usually the first in all justiciable matters, the Court did not find how its original and unlimited jurisdiction as set out under s 60 of the Constitution of Kenya was lacking.

2. A Derivative Claim:

*It is a cardinal principle in company law that it is for the company and not an individual shareholder to enforce rights of action vested in the company and to sue for wrongs done to it. It is also cardinal that in absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters (see *Foss vs Harbottle (1843) 2 Hare 461*).*

All this is in deference to the self-regulation the law allows corporations and thus limits the interference by courts in the running of such bodies on their own.”

[7] According to the Applicant, the absence of the said resolutions is an irregularity and not an illegality that can be cured by a simple request by the Registrar to the Applicant and other aggrieved members or at the very most after her compliance with Section 164 and 166 of the Companies’ Act which was never complied with. Again, a Company’s destiny is determined by the members and NOT by Registrar General or any other entity. The action of the Registrar general of Companies was done without any legal basis and outright illegal which ought not to be allowed to stand.

Potency of challenging the decision of the Registrar general herein

[8] The Applicant stated that section 118 of the Companies Act in Section 118, vests the power to rectify the Register in the High Court. Thus, the correct provision that the Registrar ought to have followed is in Sections 164, 166 and 118 of the Companies’ Act Cap 486 laws of Kenya. Therefore, this Application as presented before the Honourable Court is proper and ought to be allowed as prayed.

Lawfulness of the decision by the Registrar general of Companies

[9] The Applicant argued that the decision of the Registrar general of Companies is unlawful. The Registrar of Companies possessed no such power that would have entitled her to alter and amend the register without an Order of the Honourable Court or even at the very least without calling the members to present their proof of capital prior to the quashing of the Applicant’s shareholding in the Company. The decision of the Registrar general of Companies therefore lacked procedural fairness and was completely devoid of any legal merit and “*ultra vires*” the Companies Act Cap 486 laws of Kenya. The Shareholding of Company as at 30th June 2014 remained so for a period of almost two (2) years and not a single member of the Company complained. Indeed, it is the Applicant’s contention that the Registrar general was herself part and parcel of the confusion at the registry with numerous CR 12 forms being issued that bore neither the correct shareholding nor directorship. She cannot now purport to be the sole custodian of rectifying the registrar in the absence of the intervention of the Honourable Court. See the supplementary Affidavit in paragraphs 10 to 13 thereof and Annexure “RS2”. There is indeed the real danger and likelihood that her decision could be based on conflicting documents that neither the Applicant nor other members have been called upon to confirm the authenticity thereof.

Legal threshold to set aside decision of the Registrar general of Companies

[10] The Respondent has not, through the replying affidavit, shown the provision in law which entitled her to make the said changes that disentitle the Applicant of its shares in the Company. There was no illegality established to warrant any action to be taken by the Registrar. The decision should be set aside on that basis. This Application ought to be allowed with costs to the Applicant

The Respondents opposed the application

[11] They filed a Replying Affidavit dated 17th November, 2014 and submissions. According to the Respondent, the single most important issue is to ask; who is the applicant? The chamber summons application dated 13th October, 2014 shows on its face that **OBSIDITION INVESTMENTS LIMITED** as the applicant but in the application itself another entity by the name **REDSTONE PROPERTIES LIMITED** seeks the orders of injunction and stay of proceedings. These are two different entities who are shareholders in **XPLICO INSURANCE COMPANY LIMITED** and it is not clear as to who is the applicant in the present proceedings. Therefore, this application is an abuse of the Court process as the proper Plaintiff/Applicant should have been Xplico Insurance Company Limited as it is the company whose directorship was allegedly interfered with by the 2nd Respondent.

[12] The Applicants have rightly cited the principle of derivative claim in Company law to the effect that it is for the company and not an individual shareholder to enforce rights of action vested in the company and to sue for wrongs done to it. It is also cardinal that in the absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the Company Internal affairs in circumstances where the majority is entitled to prevent the bringing of an action in relation to such matters. As a body corporate separate and distinct from its members, if an issue of interference with shareholding or directorship or management was to occur as alleged in the present application, then the proper party to make the application would have been the company, in this case Xplico Insurance Company Limited and not individual shareholders suing on behalf of Xplico Insurance Company Limited.

[13] Another point of contention by the Respondent was the manner of drafting of the application. They said it was irregular for two reasons. One, it is not seeking for judicial review of the action of the registrar; and the other, it is filed by the wrong Plaintiff/Applicant. It should be dismissed with costs to the Respondents.

[14] The Respondent argued that the replying affidavit sworn by Margaret Wangu, an assistant registrar of companies shows in clear details, the present position of Xplico Insurance Company Limited and the reasons that informed the decision of the Senior Deputy Registrar General that was communicated vide a letter dated 6th February 2014. The reasons and the decision were within the law and the registrar general exercised her powers lawfully; it was judicial exercise of discretion conferred under the law. No order should issue on the shareholding and directorship of Xplico Insurance Company whereas the said company is not the applicant. The conditions necessary for the grant of interlocutory injunction in **Giella vs Cassman Brown and Co. Ltd (1973) EA 358 have not been satisfied**. Also, at an interlocutory stage the Court is forbidden to decide with finality the various relevant "facts" urged by the parties. The applicant is only one of the shareholders in Xplico Insurance Company Limited and he has no Locus to complain on behalf of Xplico Insurance Company Limited. The applicant has not stated the true position of affairs in the supporting Affidavit and so it is not entitled to equitable relief of injunction. Therefore, no prima facie case which has been established in the sense of the case of **Mrao Ltd vs First American Bank of Kenya Ltd and 2 others (2003) KLR 125**: there is no infringement of right. The application should be dismissed with costs to the respondents.

DETERMINATION

Issues

[15] The ultimate question is; whether I should grant the orders sought. Here, I will determine

whether the legal threshold for granting a temporary injunction against the Respondents from interfering with the shareholding and directorship of XPLICICO INSURANCE COMPANY LIMITED has been met. Similarly, I will determine whether the threshold for ordering stay of the decision by the Respondents as contained in the letters dated 6th February 2014 and 19th March 2014 and the CR12 reference CPR/2009/12818 dated 26th June 2014 has been satisfied. But, the Respondents have raised an issue of preliminary importance, i.e. the competence of the application. I will settle this issue first.

COMPETENCE OF APPLICATION

Three arguments

[16] The Respondents have raised an objection as to the competence of the application before court. The objection carries three strands. The first one, that the applicant has no *locus standi* to file these proceedings on behalf of Xplicico Insurance Company Limited. They say the right applicant should have been Xplicico Insurance Company Limited which is a body corporate. The second argument is that, there is doubt as to who is the applicant is in the application. They urged that, on the face of the application, OBSIDITION INVESTMENT LIMITED is shown as the Applicant while in the body of the application orders are sought on behalf of REDSTONE PROPERTIES LIMITED. The third argument is that, the application herein is challenging a decision by the Registrar General of Companies which is a judicial exercise of discretion and ought to be challenged through an application for judicial review. I will begin with the last argument.

Judicial review

[17] Broadly stated, judicial review is a constitutional remedy available where public organs have exercised judicial or quasi-judicial authority or have taken administrative action in violation of the law. This is a reality within the constitutional structure of this nation. A decision by the Registrar General of Companies is also amenable to judicial review. However, the question before me is whether the appropriate remedy in the circumstances of this case should be judicial review? Of legal importance, the substantive suit on which the current application saddle is for rectification of company's register under section 118 of the Companies Act. Also, from the arguments presented before court as well the averments in the affidavits filed; sections 164, 165 and 166 of the Companies Act have also been called in play in this matter. The Companies Act has provided for specific remedies under section 118, 164, 165 and 166 which is quite apart from judicial review the way we know it under the Constitution, the Judicature Act and the Civil Procedure Rules. Therefore, it will be legally fallacious to ignore these remedies which have been specifically provided for in the special legislation governing companies. Although an order of mandamus is available under Judicial Review, in the circumstances of this case, it will not override the remedy of rectification of register provided in the Companies Act. Also, given the nature of this case, a court exercising judicial review jurisdiction cannot supplant its decision for that of the Registrar General. Needless to state that, Judicial Review will not provide remedies of investigation and inspection of company affairs under sections 164, 165 and 166 of the Companies Act. These remedies are provided for in the Companies Act and are most aptly applied for under the jurisdiction of the court as conferred by those provisions of law. In my own view, it would be inappropriate to invoke the jurisdiction of judicial review where there are special and specific procedures which are specially tailored in law for a particular purpose. I also do not agree with the Respondents that judicial review is the one and only remedy the applicant herein ought to have taken. The application is permitted in law.

Proper Applicant

[18] I will deal with the other two strands together. I have perused the application and it has been made by OBSIDITION INVESTMENT LIMITED and not REDSTONE PROPERTIES LIMITED as alleged by the Respondent. However, even if the rectification of the register or inspection and investigations of the company affairs will affect or benefit other shareholders, that is not a matter which will affect the competence of the application, as that will be the result off the decision of the court. I, therefore, reject the argument by the Respondent on that front. I move on to the other argument that the right applicant should have been Xplicico Insurance Company Limited.

[19] Under section 118 of the Companies Act, it is the aggrieved party or any member of the company or the company which may apply for redress of rectification of company register. It is not correct to assume that only the company can file for rectification of members register. The grounds set out in the application and the Originating Motion herein, are not extraneous in such applications. Perhaps, and without determining the main cause, one need only look at section 118 and other laws which guide exercise of discretion under section 118 of the Companies Act to appreciate this fact. One of the grounds for applying for this remedy is:-

if the name of any person is without sufficient cause entered in or omitted from the register of members of a company.

There are many other grounds or equivalent thereto as set out in the following excerpt from ***Halsbury's Laws of England, (4th Edn.), Vol. 7(1) para 372*** on which the court may rectify the company register, thus:

“372. General jurisdiction to rectify company's register of members

The jurisdiction to rectify a company's register of members is discretionary; and it is not limited by the provisions of the Companies Act 2006. Thus the court will rectify the register, apart from that Act, to enable the members of a company to have a fair and reasonable exercise of their rights.

When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought.

The power to rectify has been exercised where there has been misrepresentation in the prospectus; where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of a name struck out by the directors; where shares have been illegally allotted at a discount; where the application for shares has been made in the name of a person, as, for example, an underwriter, without his authority; where there is no valid allotment of shares; or the allotment is not made within a reasonable time, or is irregular; where a transfer of shares has been improperly registered or registration has been refused; where there are joint holders of shares who wish to divide the shares so held into two parts with their names entered in the register in respect of each part in a different order; where the company puts on its register matters which are not required by the statute; in order to set right allotments of shares which have been issued as fully paid without a proper contract being filed; and where an overseas company was entered in the register without the permission of the Treasury, which was at the time required.”

[20] Also under sections 164, 165 and 166 of the Companies Act, the person who may apply or requisition an investigation or investigation of the company affairs is any member of the company, aggrieved creditor, the company itself or the Registrar. Therefore, it is wrong for the Respondents to argue that a member or shareholder of a company cannot file suit for purposes of investigation, inspection of the affairs of the company or rectification of members register. The Applicant is a shareholder of the company and has locus standi to file this application. Matters which fall under section 118, 164, 165 and 166 do not require a party to commence derivative suit on behalf of the company in order for relief to be granted by court. In light thereof, I do not hesitate to doubt the seriousness of these objections by the Attorney General and the Registrar of Companies. In sum, the application is proper and competent. I will now proceed to determine it on merit.

Merit of application

[21] I have considered all the averments in the affidavits as well as the submissions of the parties on the substantive issues herein. I take the following view of the matter. Very serious allegations have been

levelled against the Respondents and some of the members of the company. Some of the allegations border collusion between some members of the company with the Registrar of Companies to defraud the Applicant as well as the general insuring public of Xplicco Insurance Company Limited. Xplicco is an insurer under the Insurance Act and insures the general public. Therefore, I think that the allegation that the action by the Respondents is to reduce the share capital of the company below the statutory requirement under the Insurance Act is of a grave and fundamental nature within the insurance industry and would require intense investigation by the court as well as the regulator. Similarly, matters of alleged alteration of register to defraud the Applicant of his shareholding in the company are also grave. I am aware that, at this stage, I should not express any opinions or make any finding of fact which may prejudice the hearing of the main cause. To guard against that possibility, I have carefully used the words "allegations" or "alleged". But, I should be able as a court of law, to make a decision on *prima facie* basis, and looking at the entire circumstances of the case, the Applicant has established a *prima facie* case that; a) a right has been infringed especially given the manner the register of members was altered; and b) that a law has been contravened in the manner the affairs of the company have been or is being run and the exercise of public power by the Registrar General of Companies. See the case of **Mrao Ltd vs First American Bank of Kenya Ltd and 2 Others (2003) KLR 125** that:-

In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

[22] The matters complained of warrant relief and calling upon the other parties especially the Registrar General of Companies and the regulator to provide explanations to the law on matters of Xplicco Insurance Company Limited. Although the regulator is not a party in these proceedings, matters which have been raised herein touch on his realm and the court may seek information from the office. As a statutory office charged with supervision and regulation of insurers, it must surely raise its antenna to any red flag of possible violation of the law by an insurance company. The foregoing are serious legal issues which would impel a court of law to issue relief. Accordingly, intermediate relief is deserved in this case. I will not, however, set aside the decisions by the Respondents before a proper inquiry on the affairs of Xplicco Insurance Company Limited is carried out, but I will stay enforcement or implementation or execution or putting into effect of those decisions especially the decisions by the Respondents contained in the letters dated 6th February 2014 and 19th March 2014 as well as Form CR12 referenced CPR/2009/12818 dated 26th June 2014 until further orders of this court. I also hereby estop the Respondents from taking any action or step in the matter of Xplicco Insurance Company Limited which would prejudice the specific orders I will issue here below until further orders of this court. I note that on 30th November, 2014 parties recorded a consent order to the effect that status quo to be maintained in respect of the register of members held in the companies Registry. As such, I issue the following specific orders:

(a) I hereby stay enforcement or execution or implementation or putting into effect in any manner whatsoever the decision of the Attorney General and the Registrar of Companies on the shareholding and directorship of Xplicco Insurance Company Limited contained in their letters dated 6th February 2014 and 19th March 2014 and in the CR12 Form referenced CPR/2009/12818 dated 26th June 2014; and

(b) I hereby issue a temporary injunction restraining the taking of any steps or actions by the Attorney General and/or the Registrar of Companies and their respective agents or servants to alter or interfere in any manner whatsoever with the shareholding and directorship of Xplicco Insurance Company Limited; and

(c) I hereby issue a temporary injunction restraining the issuance by the Attorney General and/or the Registrar of Companies of any further letters, official searches, CR12 Forms or other documents or directives whatsoever on the shareholding and directorship of Xplicco Insurance

Company Limited until further orders of this court.

(d) Costs shall be in the cause.

[23] The main cause should be heard expeditiously to unravel the issues in controversy herein. I will therefore issue directions on the way forward immediately upon delivery of this ruling. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 7th day of May 2015.

F. GIKONYO

JUDGE