



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS SUIT NO. 241 OF 2015

PHILIP KIBET KISABIT.....APPLICANT

- VERSUS -

REGISTRAR OF COMPANIES.....1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

FADHILI MICRO ENTERPRISE LIMITED..... 3RD RESPONDENT

RULING

1. The Applicant, **PHILIP KIBET KISABIT**, was one the Founding directors of **FADHILI MICRO ENTERPRISE LIMITED**.
2. He told the court that his two co-directors were **FREDRICK TSOFA MWENI** and **OSCAR CHARO NGOTO**.
3. However, in the year 2014, the Applicant sold his 300 shares to **LEAH WAMBUI MAINA**. After being paid for the shares, the Applicant had the change in the list of directors, registered by the Registrar of Companies.
4. However, the other 2 founding directors were unhappy about the decision of the Applicant to alter the list of directors without obtaining their concurrence. The 2 founding directors complained to the police about the actions of the Applicant.
5. As a consequence of the complaint to the police, the Applicant was charged with 2 the criminal offences of;

“False statement by a Director of a Company contrary to Section 329 (a) of the Penal Code”.

6. When he was charged with those 2 offences, the Applicant pleaded guilty, and he was consequently convicted.
7. According to the Applicant, he was fined the sum of Kshs. 60,000/-.
8. After the Applicant had been convicted, the learned trial magistrate ordered that the changes which had been effected on the strength of the false statements which the Applicant had made, be reversed.

9. The Applicant provided the Registrar of Companies with the order issued by the learned trial magistrate. However, the Registrar of Companies informed the Applicant that it would not be possible to give effect to the order issued by the magistrate. The reason given by the Registrar, for his inability to give effect to the magistrate's order was that the Chief Magistrate's Court lacked the requisite jurisdiction to entertain matters appertaining to Company Law.
10. Secondly, the Registrar expressed the opinion that a court which was exercising criminal jurisdiction could not give orders for the rectification of the Register.
11. In the circumstances, the Registrar of Companies suggested to the Applicant and the Company, that they should consider invoking the provisions of Section 118 of the Companies Act, and thus move the High Court for orders for the rectification of the register.
12. The Applicant filed a Chamber Summons dated 4th June 2015, seeking orders for the rectification of the register.
13. In the face of the said application, the Company has raised a Preliminary Objection, contending that the application was fatally and incurably defective.
14. As far as the Company was concerned, the application had contravened the mandatory provisions of **Rule 7 of the Companies (High Court) Rules, 1964**. The said Rule stipulates as follows;

“Applications to rectify the register of members of a company under section 118 of the Act shall be by originating motion or when a company is in voluntary liquidation by summons”.

15. The company submitted that when the law specified a procedure for approaching the court, then the party approaching the court was obliged to follow the said law.
16. The Company cited two authorities to back its position. In the case of **NGETHE Vs GITAU & ANOTHER, [1999] 1 E.A. 225**, the Company relied on the following holding;

“It was a mandatory requirement of Order xxxvi, rule 3D of the Civil Procedure Rules that a claim based on adverse possession under the Limitations Act be commenced by way of an originating summons”.

17. The Court of Appeal made it clear that because the claim for adverse possession had not been brought by way of an originating summons, as is mandatorily required by Order xxxvi, rule 3D of the Civil Procedure Rules, it could not succeed.
18. In the case of **KENYENGA Vs OMBWORI [2001] KLR 103**, the Court of Appeal said the following, at page 108;

“Order 36 rule 3D of the Civil Procedure Rules specifically stipulates as to the manner such claims are brought to court. Such claims for adverse possession are brought by way of originating summons. This is a mandatory provision and it has been repeatedly held by this Court that failure to comply with this mandatory provision makes a suit incontestably bad in law”.

On his part, the Applicant perceives the requirement for compliance with rules as being technicalities.

19. He made reference to the Supreme Court's decision in **ZACHARIA OKOTH OBADO Vs EDWARD AKONG'O OYUGI, CIVIL APPLICATION No. 7 of 2014** which held that the right to come to court when seeking a constitutional interpretation and/or application;

“...should not be abruptly excluded blatantly for non-compliance with a procedural rule, especially where no apparent prejudice to the other party can be deduced”.

20. In that case the Supreme Court held that the lack of the address for service does not warrant the striking out of an appeal.
21. The Applicant submitted that the application he filed cannot, in the same vein, be fatally defective simply because of the way it was brought to court.

22. To my mind, the two cases cannot be compared upon the same wavelength. In the case of **ZACHARIA OKOTH OBADO**, there was a Notice of Appeal, but it was deemed to be wanting because of the lack of an address for service.
23. In contrast, the applicant before me is said to have failed to use the proper procedure to move the court. In effect, the applicant's position could be likened to a situation where a person wishing to lodge an appeal, does so through a procedure other than that of filing a Notice of Appeal.
24. By filing a Notice of Appeal, **ZACHARIA OKOTH OBADO** used the proper procedure. The only challenge that was mounted against the Notice of Appeal was that it lacked an address for service. Therefore, the appeal process was commenced using the correct procedure, albeit with a shortcoming.
25. But the applicant did not use an originating motion, which would have been the right procedure.
26. The applicant's position could only have been comparable to that of **ZACHARIA OKOTH OBADO** if the applicant had filed an originating motion, which had some deficiency.
27. The Applicant then cited the case of **MICHAEL RICHARDSON Vs RAND BLAIR T/A MOMENTUM FEEDS & ANOTHER MISC. APPLICATION No. 51 of 2012 [At the Commercial Division of the High Court of Uganda, Kampala]**, for the proposition that the courts should freely allow amendments to pleadings, unless such amendments prejudice the other party.
28. In this instance, I understand the Applicant to have been saying that any defect in his pleadings could be cured through an amendment. In other words, instead of striking out the application, the court was being told to retain the same, subject only to appropriate amendments.
29. If the applicant was given an opportunity to amend the application, he believes that the Respondent would not be prejudiced at all. His belief is based upon the fact that his only interest is to get out from the Company.
30. The simplicity or the complexity of the issues in a case is not the basis upon which the court determines whether or not the applicant had moved the court appropriately. In most instances, the statute or the relevant rules or regulations would specify the procedure to be used when an application was being made before a court.
31. In **KARIUKI Vs COUNTY COUNCIL of KIAMBU & ANOTHER, HCC No. 1446 OF 1994** Ole Keiwua J. (*as he then was*), expressed himself thus;

***“Order L Rule 12, above, to my mind deals with omissions to state the statutory provision under which or by virtue of which an application is brought. However, to my mind it does not cover situations where a wrong or incorrect provision of the law is stated. When such is the case a party has the liberty to seek leave of the court to amend the application in that regard.*”**

A statutory provision cited invokes the jurisdiction of the court. If the jurisdiction of the court is not properly invoked, an application becomes incompetent. This is not the sort of matter in which the inherent power of the court can be invoked”.

32. In this instance, the Applicant did not cite any specific statutory provisions. He simply filed an “*Ex-parte Chamber Summons*”, without indicating the statutory provisions pursuant to which he sought to move the court.
33. His action may have been prompted by the letter from the Registrar of Companies, who had suggested to the Applicant that the orders for the rectification of the register could be sought from the High Court, pursuant to Section 118 of the Companies Act.
34. If this case was a matter brought under the Civil Procedure Rules, then Order 50 Rule 12 (*as cited by Ole Keiwua J. in the case of KARIUKI Vs COUNTY COUNCIL of KIAMBU & ANOTHER Hccc No. 1446 of 1994*), could have earned the Applicant leave to amend the application.
35. But by the same token, the failure to cite the statutory provision which would invoke the jurisdiction of the court would render the application incompetent.
36. However, it is important to bear in mind the distinction between an application which was incompetent and the court's lack of jurisdiction.
37. Pursuant to Section 2 of the Companies Act;

“the court means the High Court”.

38. Therefore, this court has the requisite jurisdiction to hear and determine, *inter alia* claims for the rectification of the Register of the members of a company. That power is expressly provided for by Section 118 of the Companies Act.
39. The procedures for moving the court in respect to different claims are set out in The Companies (*High Court*) Rules. For example, applications for the cancellation or alteration of objects of the company, shall be brought under Section 8 of the Companies Act; and shall be brought by way of a petition. That is provided for, by Rule 5.
40. Meanwhile, Rule 7 stipulates that applications to rectify the register of members of a company, under Section 118, shall be by originating motion or when the company is in voluntary liquidation, by summons.
41. The applicant did not comply with Rule 7. Should I therefore dismiss or strike out the application, as suggested by the Respondent?
42. I am aware that in the case of **HUNKER TRADING COMPANY LIMITED Vs ELF OIL KENYA LIMITED CIVIL APPEAL No. 6 of 2010**, the Court of Appeal said;

“The advent of the ‘O₂ principle’, in our opinion ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings, ensures the efficient use of the available judicial and administrative resources of the court; and results in the timely disposal of the proceedings at a cost affordable by the respective parties”.

43. Whilst acknowledging that the important factor in the exercise of the court’s powers under the ‘O₂ principle’, was the need to guard against any arbitrariness and uncertainties, the Court of Appeal emphasized thus;

“For that reason we must insist on full compliance with past rules and precedents which were O₂ compliant, so as to maintain consistency and certainty”.

44. Why did the Court of Appeal make that position so clearly and forcefully?

45. The court itself gave the following as the reason for so concluding;

“We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked the ‘O₂ principle’ could easily become an unruly horse”.

46. Meanwhile, in **DEEPAK CHAMANLAL KAMAMI & ANOTHER Vs KENYA ANTI-CORRUPTION COMMISSION & 3 OTHERS, CIVIL APPEAL No. 152 of 2009**, the Court of Appeal held that;

“If a way or ways alternative to a striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out”.

47. In that case, the Court of Appeal rejected the plea to strike out the appeal. Instead, the Court ordered the appellants to file and serve a supplementary record of appeal.

48. Obviously, when the supplementary record was filed, it would then be possible to proceed to the hearing of the appeal in a manner that was more expeditious, proportionate and affordable than would have been the case if the appellant had to commence the entire process of appeal again.

49. In the case before me, I find that the High Court has the requisite jurisdiction. The problem is that the applicant has filed a Chamber Summons, whereas he ought to have filed an originating motion. The applicant’s said error, does not take away the court’s jurisdiction to hear and determine the question regarding whether or not the register of the members of the Company ought to be rectified.

50. I also find that the error did not prejudice the Company or any of the other Respondents at all.

51. To my mind, there would be no advantage to any of the parties or to the court, if the application was struck out. If anything, the applicant would be expected to simply re-name his application as

- an originating motion, instead of a Chamber Summons.
52. In the final result, I overrule the Preliminary Objection, and reject the request that the substantive application be struck out.
53. The company will pay to the plaintiff, the costs of the Preliminary Objection.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of October 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kanyone for the Applicant.

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

Miss Muthoka for Kithi for the 3rd Respondent

Collins Odhiambo – Court clerk