



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC.CIVIL APPLICATION NO. 264 OF 2015

IN THE MATTER OF THE COMPANIES ACT (CAP. 486) LAWS OF KENYA

AND

IN THE MATTER OF RECTIFICATION OF THE COMPANY REGISTER OF CATHAM PROPERTIES LIMITED

BETWEEN

GUO DONG.....APPLICANT

VERSUS

MULTI WIN TRADING (E.A) COMPANY LTD1ST RESPONDENT

HAI CHEN.....2ND RESPONDENT

CHENG-DU UNITRUST WITH MUTLIWIN

INVESTMENT & MANAGEMENT CO. LIMITED.....3RD RESPONDENT

PENG ZANG.....4TH RESPONDENT

ONGALO TOBIAS MUGA

T/A ONGALO & COMPANU ADVOCATES.....5TH RESPONDENT

CHRISTINE ANYANGO MUGA.....6TH RESPONDENT

CATHAM PROPERTIES LIMITED.....7TH RESPONDENT

RULING

1. Before the court are two applications for determination. The first is an Originating Notice of Motion dated 11th June, 2015 in this file seeking for the rectification of the company’s register of CATHAM PROPERTIES LIMITED and another dated 12th June 2015 in HC. Misc. 268 of 2015 seeking for the rectification of the of register of **Mult-win Trading E. A Co ltd** . Both

applications are brought under section 118 of the companies Act. Both attracted a preliminary point of law raised by the respondents. The parties advocate agreed the P.O herein be argued and the ruling to apply in both applications. The P.O was predicated on the following grounds;

- **The suit is for purported rectification of the documents held by the registrar of companies.**
 - **The court lacks jurisdiction under section 118 of the companies Act read together with s 112 of the companies Act , to order a rectification of the documents held by the registrars of companies.**
 - **The applicant has not invoked the procedure for rectifying /correcting documents held by the registrar of companies.**
2. The first application in this file Originating Notice of Motion dated 11th June, 2015 was brought under **Section 118** of the Companies Act. The prayers sought in the application are as follows:

1. *Spent*
2. *Spent*
3. ***That this Honorable Court be pleased to direct the Registrar of companies to rectify the Company Register of Catham Properties Limited by deleting the names of Catham Properties Ltd by deleting the names of the 1st to 4th Respondents as directors of the company and that the register do reflect the following as the shareholding and directorship of company:***

Shareholding

- a. *Guo Dong 850 shares*
- b. *Li Wenjie 150 shares*

Total.....1000 shares

Directorship

- a. *Guo Dongdirector*
- b. *Li Wenjie..... director*

4. ***THAT the Honourable court be pleased to direct the registrar ti delete the names of the 5th and 6th respondents as Advocates and Secretary of the company respectively.***
5. ***THAT any acts, conducts and/or activities so far executed and/or performed by the 1st to 4th respondents on behalf of Catham Properties Ltd as directors and/or shareholders be declared null and void.***
6. ***THAT the costs of this application be provided for.***

The second application dated 12th June 2015 sought the following orders;

1...

2...

3.the court to direct the Registrar of companies to rectify the company register of Multi-Win Trading EA LTD by deleting the names of first and second respondents as alternate directors of the company.

4.the acts, conducts and or activities so far executed and or performed by the respondents on behalf of the multi-win EA ltd as directors, advocates and secretaries to be declared null and void.

3. The Applicant relied on the grounds on the body of the originating motion as well as his

supporting affidavit sworn on 11 June, 2015. It was the deponent's contention that on or about January, 2014, he and Mr. Li Wenjie incorporated the 7th Respondent of which they were listed as both the directors and shareholders. That Mr. Li Wenjie held 150 shares and the applicant 850 shares. The company continued trading as incorporated until 25th May, 2015 when the Applicant learnt of a notice to members of the public to the extent that he was not authorized to undertake any transaction or business on behalf of the company. It is this state of affairs that led the Applicant to instruct his advocates to undertake a physical search of the 7th Respondent's file at the Company's Registry, whereby he was informed that there were changes of both the directorship and shareholding of the company. The Applicant alleged that these changes were to the effect that he resigned as a director on 17th September, 2014 vide a letter of the same date. That further, he swore an affidavit with regard to the resignation before a Miss Christine Anyango Muga and executed a share transfer deed on the same date. The Applicant stated that the said documents were prepared by the 5th Respondent law firm and lodged with the registrar without his knowledge. He further alleged that the appended signatures on the aforementioned documents were not his and were therefore forgeries as at the time of the purported date when they were signed he was not in Kenya. In a nutshell, the Applicant contended that the purported transfer of shares and witnessed by an advocate known as Christine Anyango Muga was fake and a sham. He was of the opinion that the said purported transfer of shares was contrived to oust him from being a director of the 7th Respondent. That forgery is the crux of these proceedings, and all acts and/or omissions done pursuant to the forgery are ultra virus the objects of the 7th Respondent. That the directors appointed pursuant to the said irregularities have continued to deplete and or/siphon the resources of the 7th Respondent company.

4. The application was opposed by the Respondents' through the Notice of Preliminary objection dated 29th June, 2015.
5. The principle issues urged in the said objection were focused on the grounds that the court did not have jurisdiction to grant the reliefs sought; that in company law, it is only the company itself which can complain about any injury done to it and not a stranger or a shareholder; that the Registrar of companies has no power or role in the maintenance of the register of companies herein and that the applications were incompetent or incurably so.
6. When the matter came up for hearing it was directed that the Notice of Preliminary Objection be heard first. The Preliminary Objection was argued by way of written submissions which were highlighted in court on 22nd October, 2015. The Applicant filed his submissions on 29/07/15 while the respondents filed theirs on 20/07/15.
7. In support of its preliminary objection, the Respondents contended that they had raised pure points of law with regard to the locus standi of the Applicant and the jurisdiction of the court. The cited the cases of **Mukhisa Biscuit –v- West End (1969) E.A 696** and **Omondi –v- National bank of Kenya (2001) E.A** in support of this position. With regard to the first point, the Respondents argued that the applicant lacked the locus standi to bring the suits against them. That within the meaning of section 118 of the Companies Act, the Applicant is not an aggrieved person.
8. The Respondents also questioned the Court's jurisdiction to hear the instant applications. According to the arguments of Dr. Kamau Kuria (SC), learned counsel for the Respondents, the instant applications were based upon section 118, which gives the court a limited scope to rectify the register of members. That a close examination of the prayers sought would reveal that the Applicant seeks to rectify the company register of Catham Properties by deleting the names of the 2nd, 4th, 5th and 6th Respondent as the Company Secretary, Advocates of the Company and as the alternate Directors of the Company respectively in this instant file. According to Dr. Kuria, the register of members does not contain the names of the Directors, Secretary and Advocates. As such, the Respondents submitted that this court cannot issue orders for the rectification of entries which do not appear in the register. Further, it was argued that the removal of Directors of a company was done by way of an ordinary resolution under Section 185 of the companies Act. That given the provisions of the Act, the prayers sought were ultra virus the powers of the court. Mr. Kuria also sought to convince the court that the utility of Section 118 is limited to the Change of the members' details in two circumstances. That is, where the name is erroneously entered or omitted on the register and where there is delay in updating the membership status when one ceases to be a member.

9. In conclusion, Dr. Kuria argued that the orders sought through the instant application were untenable. It was also submitted that the application before the court should have been argued through a Complaint and not through an Originating notice of Motion. He thus urged the court to dismiss the applications with costs.
10. In response to these submissions, the Applicant, through his learned Counsel Mr. Ochieng Oduol argued that the Preliminary objection had no merit. According to him, the Respondents seek to dispose of a dispute premised on facts by way of a preliminary objection. That the argument that the Applicant has attacked a wrong register and the said register is in the possession of the Company is a factual issue that does not meet the threshold of a preliminary objection.
11. Further on the issue of locus standi, it was the submission of the Applicant that the definition of who an aggrieved person was, and whether the Applicant could be referred to as such, was based on facts. In the foregoing it was Mr. Ochieng's argument that the question of locus standi as framed by the Respondents cannot be disposed of by way of a preliminary objection. However, he pointed out that just in case this position was wrong, the Applicant herein had the locus standi to prosecute the application before the court as he fits the description of an aggrieved person as defined in section 118 of the Companies Act.
12. With regard to the question of jurisdiction, the Applicant maintained that this court has the jurisdiction to hear the application before it. That under section 118, the Court has the jurisdiction to rectify a register where names were illegally and irregularly inserted therein as held in the Case of **Obsidion Investments Limited v Attorney General & another [2015] eKLR** and **Surco Limited v Prabha Mahesh Gudka [2006] eKLR**. The Applicant also went ahead to submit on the merit of his application. He reiterated that the 5th and 6th Respondents installed themselves as Advocates and Secretary of the company without the lawful authority of Catham properties company. Mr. Ochieng further submitted that the resignation of the Applicant as director was also done illegally and the subsequent entry of the 2nd, 3rd and 4th Respondent in the register of the company was and is still unlawful and must therefore be rectified. That therefore the transfer of the Applicants 850 shares was likewise irregular. In closing, Mr. Ochieng urged the court to allow the Notice of Motion dated 11th June, 2015 and dismiss the Respondents' Notice of Preliminary Objection dated 29th June, 2015.
13. Having considered the submissions of counsel and authorities presented this is the court's view. It is trite law that a preliminary objection should be based on pure points of law. **Law JA** in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** rendered himself thus:

“So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

14. Similarly Sir Charles Newbold in the same case stated that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

15. In **Oraro vs. Mbaja [2005] 1 KLR 141** Ojwang, J (as he then was) expressed himself as follows on preliminary objections:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point

may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....."

16. The associates itself fully with the above cases as regards the nature of a Preliminary Objection. That being the case, does the Respondents' preliminary objection satisfy the requirements set out there in? I have looked at the points raised. There are two primary points, that is whether the court has jurisdiction with regard to the orders sought and whether the Applicant herein has the locus standi to bring an application under section 118 of the Companies Act.
17. The court shall first deal with the issue touching on jurisdiction since jurisdiction is everything and without it, a court has no power to make one more step. The impugned section with regard to rectification of register by the court as contained in section 118 of the Companies Act Cap 486 Laws of Kenya states that:-

"118 (1) If:-

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

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved or any member of the company or the company, may apply to the court for rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved

(3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

(4) In the case of a company required by this Act to send a list of its members to the registrar, the court, when making an order for rectification of the register shall by its order direct notice of the rectification to be given to the registrar."

18. The court notes that via their submissions, the Respondents vigorously argued that this court has no jurisdiction to rectify the register under the circumstances that the Applicant has sought. One of the facets of this argument is that the court does not have the jurisdiction to rectify the company register with regard to directors, secretary and advocates and that section 118 is limited to rectification of the register of members. A literal reading into that section reveals that the court only has the jurisdiction to rectify the register of a company with regard to its members once an application is made by a party. A member of a company limited by shares in court's view is a shareholder. A shareholder is a person who buys and holds shares in a company having a share capital. They become a member once their name is entered on the register of members. However, it is of note that a directors and/or secretary can hold shares in the company, but the court is yet to be convinced that it can order rectification as to the said members as directors and/or secretaries, for reasons expounded below.
19. The court's finding is that, rectification is a remedy whereby a court orders a change in a written document to reflect what it ought to have said in the first place. However, this is limited to the membership of the company and it would appear not to extend to directors, advocates and company secretary who by every definition are not the members of the company, but are merely its agents. The court's view is that, such changes are the sole preserve of the company according to its Articles and Memorandum of Association. The said view is fortified by Halsbury's Laws of England, (4th Edn.), Vol. 7(1) paragraph 372 where the learned authors were quite categorical concerning the court's jurisdiction in rectification. The same can only apply to a company's share register. The learned authors note as follows;

“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.” (emphasis added)

20. From the above, it is this court finding that the court has the power to rectify under section 118 of the companies act but can only do so with respect to the shares of the company or issues with regard to membership. The court can therefore not order any rectification with respect to directors, advocates and company secretary of the company as called to do in prayer 3 and 4 of the application dated 11.6.2015 in Misc 264 of 2015. On the same breath, the court has no jurisdiction to order rectification with regard to directors or Advocates and Company Secretary under prayer 3 of application dated 12.6.2015 in Misc 268 of 2015. As such, the Preliminary objection partially succeeds.
21. The court now turns to the issue of locus standi. 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, in court's view, to assume that only the company can file for rectification of members register as the Respondents has submitted. One needs to only look at section 118 and other laws which guide exercise of discretion under section 118 of the Companies Act to appreciate this fact. See Gikonyo J. holding in the case of **Obsidition Investments Limited v Attorney General & another [2015] eKLR** when he held as such. He further added that;

“[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 165 do not require a party to commence derivative suit on behalf of the company in order for relief to be granted by court.”

22. The court therefore finds that the applicant has the locus standi to bring the current application as a person aggrieved under section 118 of the Companies Act. He makes several allegations including the fact that he was once a shareholder and his shares were sold in a fraudulent manner. He is by all means an aggrieved person. The preliminary objection therefore fails on that front.
23. Costs in the main cause.
24. Parties to take directions for hearing of the matters on merit.

Dated, signed and delivered in court at Nairobi this 2nd day of December, 2015.

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C. KARIUKI

JUDGE