



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 261 OF 2014

REPUBLICAPPLICANT

VERSUS

ATTORNEY GENERAL1ST RESPONDENT

REGISTRAR GENERAL OF COMPANIES2ND RESPONDENT

AND

REDSTONE HOLDINGS LIMITED.....INTERESTED PARTY

EX-PARTE

XPLICCO INSURANCE COMPANY LIMITED

RULING NO. 2

On 3rd July, 2014 Xplicco Insurance Company Limited filed a chamber summons application seeking leave to apply for orders of certiorari, prohibition and mandamus. The application was supported by a statutory statement and a verifying affidavit sworn by Lee Waigwa Waruingi who introduced himself as a director of the Applicant. I directed that the application, which was filed by the firm of Harith Sheth Advocates, be served on the respondents and any other person who was likely to be affected by the outcome of the proceedings. I listed the matter for *inter partes* hearing on 14th July, 2014.

On 8th July, 2014 the firm of Ahmednasir, Abdikadir & Company Advocates filed a Notice of Change of Advocates and a Notice to Discontinue Suit dated the same date. Due to these developments, when the application for leave came up for hearing on 14th July, 2014 it was agreed that the Court had to determine the proper advocates for the Applicant before making any other decision.

The advocates filed affidavits in order to assist the Court in unravelling this issue. The firm of Harith Sheth filed an affidavit sworn by Raj Sahi on 16th July, 2014 and a further affidavit sworn by the same deponent on 22nd July, 2014. The firm of Ahmednasir, Abdikadir & Co. Advocates filed an affidavit sworn by Keith David Beekmeyer on 18th July, 2014. The firm also filed Grounds of Objection dated 4th August, 2014.

The most appropriate point to start this matter is to address the Grounds of Opposition filed by the firm of

Ahmednasir, Abdikadir & Company Advocates. I can only do justice to the parties by reproducing the said grounds verbatim as hereunder:

- “1. The Court has no Jurisdiction on its own motion to reopen the case that was lawfully terminated/discontinued. There are no pleadings, no applications and no suit that can cloth the Court to hear the issues as framed. Xplico Insurance Company Limited GIVES NOTICE that it will raise this as a preliminary objection on a point of law.**
- 2. The Court by purporting to hear a case lawfully closed by a party before it and purporting to determine issues that are not lawfully before it is acting in excess of its powers. It is throwing to the four winds the cornerstone of our justice system, which is adversarial. The Court is undertaking an “inquisitorial” process in exercise. Xplico Insurance Company Limited GIVES NOTICE that it will raise a preliminary objection on a point of law, with a view to close the matter herein, yet again.**
- 3. There are no “justiciable issues” between the parties that clothes the Court with jurisdiction to hear and entertain the matter. There are no legal disputes that are before the court.**
- 4. The Court has no power to determine who is the proper advocate to a party. That power and right is for the litigants to do. Xplico Insurance Company Limited has appointed its advocates.**
- 5. The underlying dispute between the parties is one relating to shareholding and directorship. This court has no power to shuffle the ownership and directorship of Xplico Insurance Company Limited.**
- 6. The offices of the Attorney General and Registrar of Companies are the lawful custodians of all records relating to Companies. The records from these offices speak loud and clear. This Court has no power to transfer shares or impose directors on companies. It has no power to determine advocates for parties.**
- 7. The issues herein can only be addressed and determined in a suit or in a new cause of action.**
- 8. The matter is a waste of the Court’s time and an abuse of the Court process.”**

A close look at the said grounds clearly shows that the firm of Ahmednasir, Abdikadir & Co. Advocates hold the view that this Court has no jurisdiction to handle this matter.

The law on jurisdiction is now well settled. When a party alleges that a court lacks jurisdiction to hear a matter, the court should first address the issue. If the court finds that it has no jurisdiction, it should down its tools and take no further step in the matter - see **SAMWEL KAMAU MACHARIA & ANOTHER v KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2014] eKLR** and **OWNERS OF THE MOTOR VESSEL “LILLIAN S” v CALTEX OIL (KENYA) LTD [1989] KLR 1**.

Mr. Ahmednasir contended that this Court has no jurisdiction to determine the issue of representation of Xplico Insurance Company Ltd.

Mr. Servia on his part argued that the question as to who is the proper advocate on record for the Applicant ought to be determined by the Court and that this Court has jurisdiction to make such a determination. He cited the cases of **LAWRENCE NDUTU & 6000 OTHERS v KENYA BREWERIES LIMITED & ANOTHER [2012] eKLR**; **BELGO HOLDINGS LIMITED v WILSON BIRIR [2010] eKLR** and **GEORGE GIKUBU MBUTHIA v PETER NJERU MUGO & 3 OTHERS [2006] eKLR** to demonstrate that the courts have in the past determined the issue of representation of parties where such an issue arose in the proceedings.

I have read the authorities cited by Servia. The case of **LAWRENCE NDUTU & 6000 OTHERS** supra is not relevant to the issue before me since in that case the question was whether plaintiffs in a representative suit could instruct different advocates. In the case before me, there is a single applicant and not several applicants.

Again the decision of this Court (L. Njagi, J) in **BELGO HOLDINGS LIMITED** is not of much assistance in the circumstances of this case. In that case the advocate for the plaintiff had sought the

striking out of notices of appointments filed by two firms of advocates on behalf of the same defendant. The learned Judge agreed with the plaintiff that indeed only one advocate can be appointed by a party but the party is at liberty to instruct other advocates who would join the proceedings with the consent of the lead counsel. In that case the advocates had been given the same instructions. However, in the case before me the Applicant has purportedly appointed two law firms and given them contradictory briefs.

The third authority of **GEORGE GIKUBU MBUTHIA** is also of no assistance to this Court. In that case the dispute was about a notice of change of advocates.

There is however a clear message in all the cases cited by Mr. Servia. The message is that a court can determine the issue of representation of a party where such an issue arises in the proceedings.

Mr. Ahmednasir, in my view, correctly submitted that this Court cannot appoint an advocate for a party. The basis of that submission is that a party is entitled to be represented by an advocate of his choice. This Court cannot therefore order the Applicant to be represented by either the firm of Harith Sheth Advocates or Ahmednasir, Abdikadir & Company Advocates. If the Applicant were a living person with the capacity to appoint an advocate then the Court would have directed that the Applicant picks an advocate of its choice.

The Applicant is however an inanimate person. It has no capacity to act or think for itself. It acts through human beings who are identified and recognised in accordance with the laws governing the operations of companies in this country.

Justice G. K. Kimondo clearly captured this point in a ruling delivered on 10th of November, 2011 in **WILLIAMS & KENNEDY LIMITED v POST BANK CREDIT LIMITED (IN-LIQUIDATION) THROUGH DEPOSIT PROTECTION FUND BOARD-LIQUIDATOR & 2 OTHERS, NAIROBI HIGH COURT CIVIL SUIT NO. 710 OF 2009** when he stated that:

“In all this, the court is alive to the fact that the 2nd defendant is a limited liability company, an inanimate legal persona that can only act through the mind and will of its directors. It is the rights of that company that are now at play.”

The only challenge that this Court faces is that it will have to make a determination as to who the proper representative of the Applicant is, without deciding on the substantive issues in this matter. I therefore hold the view that this Court has jurisdiction to decide who the proper advocate for the Applicant is.

Mr. Ahmednasir submitted that an attempt by this Court to make a determination on the issue of representation would amount to undertaking an “inquisitorial” process. He submitted that the Applicant has already terminated these proceedings and there is no foundation upon which the Court can make a determination. He also argued that there are no pleadings, no applications and no suit that can cloth the Court with the jurisdiction to determine the issue. He further submitted that there are no “justiciable issues” between the parties which the Court can determine.

On another facet, Mr. Ahmednasir submitted that the underlying dispute between the parties is one relating to shareholding and directorship of the Applicant and this Court has no power to transfer shares or impose directors on companies. He contended that the offices of the Attorney General and Registrar of Companies are the lawful custodians of all records relating to companies.

In support of his position Mr. Ahmednasir cited among other decisions, the following cases:

1. **HOUSING FINANCE COMPANY OF KENYA LTD v PALM HOMES LIMITED & 2 OTHERS, NAIROBI HIGH COURT CIVIL CASE NO. 918 OF 1999.**
2. **MYERS v ELMAN [1940] AC 282, [1939] 4 ALL ER 484;** and
3. **JOHN SHAW & SONS (SALFORD)LTD v SHAW [1935] ALL ER 456.**

For purposes of record, I will state at this point that I have considered all the cited authorities and I will

take them into account in arriving at my decision.

Mr. Servia's response to the issues raised by Mr. Ahmednasir is as follows. He agreed that the Court cannot determine an issue that has not been raised by the parties. He, however, asserted that the issue before this Court arose after the firm of Ahmednasir, Abdikadir & Company Advocates filed the notice of change of advocates and the notice to discontinue the suit. He argued that the pleadings in respect of the issue before this Court are those documents and the Court has to make a determination as to the validity of those documents. He contended that the Court cannot just say it has no jurisdiction as the notice of change of advocates is in itself not conclusive evidence of the appointment of the firm of Ahmednasir, Abdikadir & Company Advocates by the Applicant. He told the Court that the issue at hand does not involve the determination of the proper directors and shareholders of the Applicant. He submitted that it is the directors and not the shareholders who are allowed to appoint advocates for a company.

Mr. Singh for Redstone Properties Limited an interested party argued that this Court has jurisdiction to hear this matter. He pointed out the various anomalies in the decision of the Registrar of Companies which the Applicant seeks to challenge through these proceedings.

I have considered the rival submissions on the issues raised. It has clearly emerged from the papers filed in Court that there is a dispute about the directorship and shareholding of the Applicant. That is why this cause was filed in the first place. In my view the Court is entitled to make a finding as to who can appoint advocates for the Applicant at this particular point in time. It is only upon doing this that the Court can decide on the next course of action. The notice of change of advocates filed herein is not conclusive evidence of the appointment of the firm of Ahmednasir, Abdikadir & Company Advocates. It is important to note that there is no agreement as to the legitimate directors and shareholders of the Applicant.

Ideally, Harith Sheth Advocates ought to have filed an application seeking to strike out the documents filed by Ahmednasir, Abdikadir & Company Advocates. However, the route taken does not prejudice anybody. These are judicial review proceedings and the Court acting on its inherent jurisdiction can determine any matter not provided for by **Order 53 of Civil Procedure Rules, 2010**. Justice should be dispensed without undue regard to procedural technicalities-**Article 159(2)(d) of the Constitution**.

This Court at this stage is not in a position to determine the directors and shareholders of the Applicant. The determination of the proper directors and shareholders of the Applicant can only be done after a full hearing of the matter. I will only consider the evidence placed before me and decide whether or not the persons recognised by the law are the ones who have given instructions to any of the advocates. In fact the Court may reach the conclusion that none of the two firms has been properly instructed. As agreed by all the advocates the directorship and shareholding of the Applicant cannot be decided at this stage.

I now move to consider the core issue in this matter. The basic principle is that a company acts through directors & managers. A company makes returns to the Registrar of Companies giving, among other information, the names of its directors. The Registrar of Companies is the custodian of such information.

From the application for leave filed by Harith Sheth Advocates it is clear that the orders the Applicant seek are targeted at the decisions of the respondents contained in the letters dated 6th February, 2014 and 19th March, 2014 and a CR 12 Form referenced CPR/2009/12818 dated 26th June, 2014.

The letter dated 6th February, 2014 is addressed to Harith Sheth Advocates, Morgan Hall Solicitors and Langat & Company Advocates. In that letter Jane Joram a Senior Deputy Registrar General states:

“REF: XPLICO INSURANCE COMPANY LIMITED (CPR/2009/12818)”

We refer to above matter.

As you are aware the Office of the Attorney General as well as the Registrar of Companies have received several complaints involving alleged illegal and unprocedural

alteration of directorship and shareholding of the company.

After perusing all the relevant documents in our possession and those supplied as requested for, we have arrived at the following findings;

- 1. The transfer of 1100 shares of Xplico Investment Limited made on 5th February 2010 to Salim H. Dungarwalla (200 shares); Keith D. Beekmeyer (300 shares); Altaf H. Bhurawala (300 shares) and Shiraz H. Dungarwalla is valid and supported by relevant documents.”**

She then proceeds to enumerate four other findings and concludes that:

“The shareholding of the company shall revert back to the position when the nominal share capital was kshs 300 Million divided into 120,000 shares of Kshs 2,500 each with only 1,200 shares allotted to;

- Estate of Salim H. Dungarwalla (300 shares);**
- Keith D. Beekmeyer (300 shares);**
- Altaf H. Bhurawala (300 shares) and**
- Shiraz H. Dungarwalla (300 shares).**

The remaining 118,800 shares in the company remain unallotted.

We wish to advise the company and its legal advisors to ensure that due process is followed in effecting changes in the structure of the company and only then should documents be filed with Registrar.”

When challenged by the firm of Ahmednasir, Abdikadir & Company Advocates about her decision Jane Joram replied through the letter dated 19th March, 2014 that:-

“Whereas the Registrar of Companies does not involve herself in the running of companies and the decisions made therein, there are some basic facts about the Registrar’s role as a custodian of documents which role cannot be that of a “classical officious by-stander.”

The Registrar has a role to ensure that the acts of a company are within the purview of the law (the Companies Act Cap 486 of the Laws of Kenya). It is the Registrar’s duty to ensure that documents filed meet the requirements of the Act.....

Our letter dated 6th February 2014, whose contents still stand has explained the legal basis for our decision and the deficiencies that were found in the documents in question

The CR12 Form dated 26th June, 2014 addressed to the directors of Xplico Insurance Company Limited states that as at 23rd June, 2014 Alraf Husein Bhurawala was a director and held 300 shares. Keith David Beekmeyer was also a director and held 300 shares. The other director was Patrick Ndirangu who did not hold any shares. The remaining shareholders were the estate of Salim Husein Dungarwalla and Shiraz Husein Dungarwalla each holding 300 shares.

From the records held by the Registrar of Companies Raj Sahi and Lee Wariungi are neither directors nor shareholders of the company. This is a fact they vehemently dispute and they are entitled to do so. However, they are not allowed at this stage to act for a company called Xplico Insurance Company Limited. Having reached this conclusion, I need not make a finding as to whether Ahmednasir, Abdikadir & Company Advocates have proper instructions from the company.

I only wonder whether the firm of Ahmednasir, Abdikadir & Company Advocates can properly take over

proceedings that have been commenced without the instructions of the Applicant. I think the correct course of action is to strike out the chamber summons application for leave for having been commenced without any instructions.

It is apparent that the core issue herein is a vicious fight for the heart and soul of Xplico Insurance Company Limited. I do not know what the company will look like at the end of the looming battle but I think that judicial review being limited in its reach may not be the appropriate tool for resolving such a dispute. However, it is upon the parties to decide on the most appropriate course of action.

As for now, the proceedings before this Court are struck out. Considering the issues in dispute, I will direct each party to meet own costs.

Dated, signed and delivered at Nairobi this 4th day of September, 2014

W. KORIR,

JUDGE OF THE HIGH COURT.