



GC Residential Limited v Directline Assurance Company Limited & another; Kenya Revenue Authority (Interested Party) (Environment & Land Case E134 of 2022) [2024] KEELC 4380 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4380 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E134 OF 2022**

**MD MWANGI, J
MAY 14, 2024**

BETWEEN

GC RESIDENTIAL LIMITED PLAINTIFF

AND

DIRECTLINE ASSURANCE COMPANY LIMITED 1ST DEFENDANT

DIRECTLINE INVESTMENTS LIMITED 2ND DEFENDANT

AND

KENYA REVENUE AUTHORITY INTERESTED PARTY

(In respect of the application dated 26th January, 2024 seeking the striking out and expunging of pleadings filed on behalf of the 1st and 2nd Defendants without authority)

RULING

Background

1. Before me is the Notice of Motion dated 26th January, 2024 filed by Andrew Mmbogori Advocates for the 1st and 2nd Defendants. It prays that the Defence and Counter-Claim filed on behalf of the 1st Defendant by the firm of Orange J & Associates be expunged and struck off the record for having been filed without the authority of the 1st Defendant/Applicant’s Board of Directors or its Shareholders. Similarly, the Defence filed on behalf of the 2nd Defendant by the firm of Orange J & Associates be expunged and struck off the record for having been filed without the authority of the 1st Defendant.
2. Upon grant of the prayers, the Applicants pray that they be granted a period of 30 days to file fresh statements of Defence.
3. It is also prayed that any costs arising be borne by the firm of Orange J & Associates.



4. The Application is premised on the grounds on the face of it and supported by the affidavit of Terry Wanjiku Kiarie Wijenje deposed on 26th January 2024 explaining the basis of the application.
5. The Deponent explains that Dr Samuel Kamau Macharia irregularly took over the operations and management of the 1st Defendant Company and proceeded to irregularly appoint various Directors to the Board of Directors of the Company including himself as Director and chairman of the Board. The majority Shareholders who were aggrieved by the irregular appointment of Directors filed a complaint with the Registrar of Companies on 14th April 2021, under Section 862 of the [Companies Act](#). They sought rectification of the Company's register and the striking out of Dr Samuel Macharia's irregularly appointed Directors. The substantive dispute on ownership was referred to arbitration.
6. The Deponent asserts that the Registrar of Companies delivered a ruling 21st October 2022 determining in favour of the majority Shareholders and struck off Dr Macharia and all his irregularly appointed Directors from the Company's register of Directors.
7. The Deponent avers that it is unclear who had instructed the law firm of Oreng J & Associates to file the Defence and Counterclaim on behalf of the 1st Defendant. The appointment was not supported by the majority Shareholders who had already filed the complaint with the Registrar of Companies by the time Oreng J & Associates were filing the Defence and Counterclaim.
8. It was the Deponent's position that the 2nd Defendant's Board of Directors too had not authorized the firm of Oreng J & Associates to enter appearance on its behalf and file the present Defence.
9. The Deponent further deposed that the 1st Defendant's Shareholders held a general meeting on 1st September 2023 whereby resolutions were passed regarding change of Advocates resulting in Andrew Mmbogori Advocate being instructed to take over the matter. The 1st Defendant's Board held a meeting on 19th January 2024 resolving to appoint Andrew Mmbogori Advocate to file the current application to strike out the irregularly filed Defences and Counterclaim and pray for leave to file fresh Defences.
10. The 2nd Defendant's Board of Directors too passed similar resolutions in a meeting held on 5th January 2024.

Response by Julius Oreng

11. Julius Oreng Advocate, responded to the application dated 26th January 2024 vide his own affidavit sworn on 20th March 2024. He asserted that the Defendants instructed him to act and file Defences on their behalf which he duly filed on 14th June 2022.
12. The Deponent stated that he was a Director of the 1st Defendant duly approved by the Insurance Regulatory Authority (IRA). At the time of service of the pleadings by the Plaintiff and receipt of instructions to enter appearance and file Defences, he was, together with Kelvin Mogeni & Salome Githoho, a Director in the Companies' register duly appointed by the Regulator, IRA. The 1st Defendant, according to the Deponent is an insurance Company regulated under the [Insurance Act](#). According to section 27 of the [Insurance Act](#), it is the Commissioner of Insurance who approves Directors under Section 27 of the [Insurance Act](#).
13. The Deponent asserted that the instructions to the law firm of Andrew Mmbogori emanated from Terry Kiarie and Lisa Ameyna Onyango who are not approved Directors. The application for approval by Lisa Ameyna Onyango to be approved as a Director was rejected by IRA.



14. The Deponent asserted that form CR 12 does not confer or cloth persons appearing therein with authority/mandate to run the affairs of the insurance Company without approval of the regulator, IRA. Terry Wijenje and Lisa Amanya are not approved by IRA under section 27 of the [Insurance Act](#). According to the Defendant, they have no authority to rule/manage the affairs of the insurance Company, notwithstanding their names being on CR12. Their resolution removing the Deponent's law firm and appointing the firm of Andrew Mmbogori is a fraud and a breach of section 27 of the [Insurance Act](#).
15. It was further stated in the replying affidavit that the Defences on record (for the 1st and 2nd Defendants) were filed way back on 14th June 2022 and no issue had been raised since then. The application herein is but an afterthought and a vendetta.
16. The Deponent further states that at the time he filed the said Defences, Lisa Amanya & Kimamo Kuria were not Directors of the Companies. They appointed themselves and purported to remove the Deponent and other Directors much later after he had been instructed to enter appearance and file the Defence.
17. The Deponent asserted that the purported and unapproved Directors masquerading as the Board of Directors of Directline Assurance Company Ltd have no locus standi to terminate/revoke approval of Directors. It is the sole mandate and preserve of IRA. He further added that Shareholders have no locus in matters relating to the day to day operations and management of an insurance Company. The [Insurance Act](#) takes precedence over the [Companies Act](#) and the Articles and Memorandum of Association of the Company.
18. Julius Orege finally deposed that the matters relating to the arbitral award on shareholding disputes are pending determination in the commercial Division (of the High Court) being cases number E250 of 2022 and E509 of 2022. In the circumstances, this Court has no jurisdiction over the Shareholders' dispute and should not be dragged into deciding on issues/matters it is not seized of.

Supplementary Affidavit by The Applicant

19. On 20th April 2024, Mr. Mmbogori Advocate sought leave of the Court to file a supplementary affidavit. Leave was granted. The supplementary affidavit is sworn by the Advocate himself on 30th April 2024.
20. The Deponent averred that he had represented the 1st Defendant in this matter in two other matters being petition E006/2023 (Directline –vs- The Business Registration Service and Others) and in ELRC E004 of 2023 (Francis Nyagau –vs- Directline & Others).
21. The Deponent further averred that amongst the issues in the other two cases was the irregular appointment of counsel on behalf of the 1st Defendant herein. He asserted that the issue was conclusively dealt with by lady Justice Njoki Mwangi in a ruling delivered on 1st March 2024 in petition No. E006 of 2023. The Deponent attached a copy of the ruling as an annexure to the supplementary affidavit.

Court's Directions

22. This matter was previously handled by my brother Judge Wabwoto J who was since been transferred from the station. It first appeared before me on 12th March 2024 when the parties present informed the Court about the previous directions by my predecessor. Mr. Mmbogori Advocate sought a ruling date to the application under consideration since he had already filed his submissions. The Advocates for the Plaintiff and the Interested party informed Court that they were not taking a position in the



application which was essentially between the Advocates for the 1st & 2nd Defendants. I note that both sides filed submissions which I have had occasion to carefully read and consider.

Issues for determination.

23. Having considered the application before me and the supporting affidavits, the response by Oreng Advocate as well as the submissions filed, the issue that this Court is called upon to decide is, unfortunately, on the representation of the 1st and 2nd Defendants.

Analysis and Determination

24. I said that it is unfortunate that the Court is being called upon to decide on representation of the 1st and 2nd Defendants because ordinarily a party in a suit should be the one to be choose and determine the Advocate to represent him/her in the suit. It is not the business of the Court to determine that for any party.
25. In this matter however, there is a dispute as to which law firm represents the 1st and 2nd Defendants. This is but a projection of the bigger dispute between two sets of Shareholders/Directors all claiming to be the legitimate managers of the 1st and 2nd Defendant Companies. The dispute on Shareholding/ Directorship is definitely not what is before this Court. I therefore take heed of the warning by Advocate Oreng who in his Replying affidavit implored the Court not to allow itself to be dragged into determining issues not before it.
26. The attention of this Court has been drawn to a ruling delivered by Lady Justice Njoki Mwangi in petition E026/2023. In the said ruling of 12th March 2024, the Learned Judge decided, amongst others, the Notice of Motion application dated 20th July 2023 urging the Court to find that Julius Oreng and the firm of Mogeni & Company Advocates are illegally on record, and are acting without the authority of the petitioner (Directline Assurance Company Ltd).
27. The finding of the Court in petition E026/2023 culminated in the issuance of the declaration that, “..... Julius Oreng has no authority to plead on behalf of Direct line Assurance Company Ltd and on behalf of the Petitioner.”
28. The grounds leading to the issuance of the declaration are essentially the same grounds in support of the application before me. Though the decision of the Court in Pet E006/2024 is not binding on this Court, I agree with the reasoning of my sister Judge.
29. It was not disputed that Julius Oreng and the other Directors appointed alongside him were struck off from the Companies’ register of Directors through the ruling of the Registrar of Companies delivered on 21st October 2022. The appointment of Julius Oreng to act on behalf of the 1st Defendant including filing a Counterclaim on behalf of the Company was not by the Board of Directors appointed by the majority Shareholders. I agree with the Applicants in this application that Julius Oreng had no authority to act and plead on their behalf.
30. I will leave it at that considering that litigation is still going on in this and other matters in order not to prejudice or embarrass the trials.
31. I need to comment on an interesting development in this matter. While this matter was pending ruling, the firm of Oreng J and Associates purportedly filed a notice of withdrawal of the application filed by Mmbogori Advocates alongside a notice of change of Advocates. That to say the least was a vain attempt to steal a march. This Court’s finding as explained above is that Oreng J and Associates did not



have valid authority to plead on behalf of the 1st and 2nd Defendants herein. Their notice of withdrawal of the application and change of Advocates is therefore of no consequence.

32. The conclusion is that the application dated 26th January 2024 has merits and is hereby allowed as prayed in all aspects. The costs consequential to this ruling shall be borne by the firm of Orengé J & Associates on behalf of the 1st and 2nd Defendants.
33. Consequently, the Defences filed on behalf of the 1st and 2nd Defendants and the Counterclaim filed on behalf of the 1st Defendant by Orengé J & Associates are hereby expunged from the record and struck out with costs.
34. The 1st and 2nd Defendants shall have 30 days from the date of this ruling to file their pleadings afresh.
It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MAY, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Ms. Mukui holding brief for Mmbogori for the 1st and 2nd Defendants/Applicants.

Mr. Nkonge for the Plaintiff

Ms. Sheila holding brief for Orengé - the Respondent

Yvette: Court Assistant.

M.D. MWANGI

JUDGE.

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