



Nyagah v Directline Assurance Company Limited & 5 others (Cause E004 of 2023) [2023] KEELRC 795 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 795 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E004 OF 2023
M MBARŪ, J
MARCH 28, 2023**

BETWEEN

EVANS NYAGAH CLAIMANT

AND

DIRECTLINE ASSURANCE COMPANY LIMITED 1ST RESPONDENT

LISA ANYANGO AMENYA 2ND RESPONDENT

KIMAMO KURIA 3RD RESPONDENT

TOM OTIENO ODONGO 4TH RESPONDENT

KEN MARTIN MWENDA 5TH RESPONDENT

JACKSON KIONGA KAMAU 6TH RESPONDENT

RULING

1. The applicant, Directline Assurance Company Limited through the firm of Kamau Kuria & Company Advocates filed application dated February 6, 2023 seeking for orders that;
 1. This court be pleased to order that the purported notice of appointment of advocates dated January 18, 2023 and the undated notice of motion filed by the firm of Messrs Andrew Mmbogori Advocate purportedly on behalf of the 1st respondent be struck out and expunged from the record.
 2. This court do declare
 3. that the firm of Messrs Andrew Mmbogori Advocate has not been appointed by the 1st respondent to act for it in this suit.



4. This court do hold and declare that the purported notice of appointment of advocates dated January 18, 2023 and the undated notice of motion filed by the firm of Messrs Andrew Mmbogori Advocate purportedly b behalf of the 1st respondent I in contravention of the law and therefore, null and void.
 5. The costs be paid by Messrs Andrew Mmbogori Advocate personally.
2. The application is supported by the supporting affidavit of Julius Orenge a member of the Board of Directors of the 1st respondent and on the grounds that under the law an advocate who has no authority from the client cannot file a notice of appointment of advocate and if he does so, the same should be struck out with costs as held in High Court Nairobi civil case No 3791 of 1993 – *I.Z Engineering Construction Ltd v Trade Bank Ltd & 2 others*. Having not been appointed or authorised by the directors to act on behalf of the company, the memorandum of appearance filed by the advocate should be struck out with costs.
 3. In this case, Messrs Andrew Mmbogori Advocate has purportedly been appointed to act for the 1st respondent in this matter on the basis of an illegal award made by Philip Alier whose appointment as such has been challenged and nullification of the same sought by the 1st respondent in Nairobi High Court Misc Appl No E250 of 2021 – *Directline Assurance Ltd v Philip Alier & others* and which suit is pending hearing. The purported award is sought to be enforced in High Court Misc civil Appl No E509 of 2022 – *Sureinvest Company Limited & 4 others v Royal Media Services Ltd & others* and which is pending hearing. The suit has been filed by shareholders and directors who derive their purported authority for the said illegal award. By virtue of the rule in *Asia Pharmaceutical v Nairobi Veterinary Center Limited* HCC 291 of 2000 it is only the majority shareholders or directors of a company who can sue in the name of the company like the 1st respondent and under the 2009 amendment to the *Insurance Act*, the holders of 60% of the allocated shares are Royal Media Services Ltd, Royal Credit Ltd, Dr S. K Macharia and Mrs G Macharia and they have not appointed the said firm of Messrs Andrew Mmbogori Advocate to represent the 1st respondent in these proceedings.
 4. Mr Orenge avers that the directors of the 1st respondent are in two categories, the first being directors given authority to serve as such by the Insurance Regulatory Authority (IRA) and includes;
 - a) Ms Kitoho;
 - b) Kelvin Mogeni; and
 - c) Julius Orenge the deponent herein.
 5. The second category of directors is those whose approval has been sought from IRA but pending and includes;
 - a) S. K. Macharia;
 - b) Bashir Mburu
 - c) Priscilla Muthoni Kiarie;
 - d) Peter Kamau Ng'ang'a
 6. All directors of the 1st respondent are elected and appointed and placed to IRA for approval.
 7. The 2nd respondent herein together with the claimant in ELRC Cause No 165 of 2020



8. Terry Winjenje v Directline Assurance Company Limited & 6 others and in Nairobi High Court Misc Appl E509 of 2022 – Sureinvest Company Limited & 4 others v Royal Media Services Limited & 3 others in an attempt to enforce a purported arbitral award which has been challenged, have continued to act outside of lawful authority of the 1st respondent herein. The use of company seal is a counterfeit since the genuine one is held by the board of directors of the 1st respondent.
9. The 2nd to 6th respondents lack authority to appoint advocates to transact business for the 1st respondent including appointing advocates as done herein.
10. Lisa Anyango is a director of AKM Investment Ltd which holds 20% of the allotted shares in the company that is falsely described in the award of Philip Alier as holding 70.336% of the allotted shares in the 1st respondent. The said shareholding is based on false returns prepared by it and Janus Limited in 2011 fraudulent declarations of trust designated to enable them to avoid the provisions of section 23(4) of the *Insurance Act*.
11. The arbitral award is hence challenged and pending before the High Court. Courts do not enforce illegal contracts as held in *Mapis Investment (K) Ltd v Kenya Railways Corporation*, Court of Appeal at Nairobi, civil appeal No 14 of 2005 and with the 2nd and 6th respondents having been appointed as directors of the 1st respondent contrary to the law they hold false status with the 1st respondent. The 2nd respondent, Terry Winjenje of Janus Limited appointed the 2nd to 6th respondents as directors of the 1st respondent through a purported enforcement of an illegal contract taking the form of a memorandum and articles which contravene section 23(4) of the *Insurance Act*.
12. Before the High Court are 3 suits in which the lawful shareholding and directors of the 1st respondent is in issue and which are pending determination.
13. The 2nd to 6th respondents herein appointed Andrew Mmbogori Advocates to act for the 1st respondent to circumvent a similar application filed by the 1st respondent in ELRC Cause No 165 of 2020 where the purported appointment to Gakoi Maina & Co Advocates has been challenged. The 2nd to 6th respondent failed to disclose of such pending matter and are guilty of failure of material non-disclosure and for these reasons the orders sought should issue.
14. In reply, the respondents filed the replying affidavit of the 2nd respondent, Lisa Anyango Ameyia who avers that she is a director of the 1st respondent and also a director of AKM Investment Limited holding 10.34% shares of the 1st respondent.
15. The application by the applicant through the firm of Kamau Kuria & Company Advocates is defective as the same is filed without the authority of the 1st respondent or the board of directors who represent majority shareholders with 90.336% shareholding of the 1st respondent and who have not authorised Mr Orange who purports to be a member of the board of directors of the 1st respondent to support the instant application for the 1st respondent.
16. The board of directors who represent majority shareholders with 90.336% did on January 18, 2023 pass a resolution to appoint the firm of Andrew Mmbogori advocate to act for the 1st respondent in this matter and hence the firm of Kamau Kuria & Company Advocates do not have any authority to attend or act for the 1st respondent herein.
17. Ms Ameyia also avers that the parties herein have several lawsuits pending in court over the shareholding in the 1st respondent and which shareholding dispute had led to the majority shareholders on the one hand and minority shareholders on the one hand. The majority shareholders being;



- a. AKM Investments Limited;
 - b. Janus Limited;
 - c. Sureinvest Company Limited;
 - d. Stenny Investment Pty Limited; and
 - e. Triad Networks Limited.
- minority shareholders being;
- a) Dr Macharia;
 - b) Mrs Purity Macharia;
 - c) Royall Media Limited; and
 - d) Royal Credit Limited.
- b) Of these shareholders in the 1st respondent, they are as follows;
- a) AKM holds 10.36%;
 - b) Stenny Investments Pty holds 20%;
 - c) Triad Networks holds 19.99%;
 - d) Sureinvest Company Limited holds 20%;
 - e) Janus Limited holds 20%;
 - f) Dr S. K Macharia holds 0.00000067%;
 - g) Mrs Purity Macharia holds 0.000000067%;
 - h) Royal Media Limited holds 9.7%;
 - i) Royal Credit Limited holds 0.0066%;
 - j) Dan Karobia (deceased) holds 0.0000000067%

18. Ms Amenity avers that the shareholding of the 1st respondent is per the CR 12 which demonstrate the majority shareholders are as set out above. The minority shareholders have perpetuated illegalities within the 1st respondent company including the purported appointment of advocates without authority, they terminated the employment of the CEO who filed ELRC Cause No 165 of 2020 – Terry Winjenje v Directline Assurance Company Limited & others which is pending in court, they purported to appoint new officers and illegally appointed Julius Orenge and others as directors. The majority shareholders filed High Court No 277 of 2019 which was referred to arbitration and a complaint lodged with the registrar of companies on April 14, 2021 following inferences with the running of the 1st respondent company.
19. The registrar of companies delivered a ruling on October 21, 2022 and declared the resolution by minority shareholders to appoint directors was illegal.
20. The firm of Kamau Kuria & Company Advocates has not been appointed properly to act for the 1st respondent herein and is without authority to attend and represent the company and the application dated February 6, 2023 should be dismissed with costs.



21. Parties filed written submissions and also attended court and made oral highlights.
22. The applicant submitted and gave emphasis that where there is a conflict between the [Insurance Act](#) and the [Companies Act](#), the Insurance gives the procedures upon which parties can follow as required by the regulator, the Insurance Regulatory Authority (IRA). There are several pending matters before the High court addressing a challenge to the appointment of the arbitrator Philip Alier, the arbitral award he made and the same should be allowed to conclude as they relate to the shareholding dispute in the 1st respondent who has appointed the firm of Kamau Kuria & Company Advocates to represent them in these proceedings and the 2nd to 6th respondents have irregularly purported to appoint the firm of Andrew Mmbogori Advocates to act for the 1st respondent. the directorship of Lisa Anyango Ameyia, Kimamo Kuria and Mburu in 1st respondent was vacated by the registrar of companies and their purported appointment of an advocate to act for the 1st respondent is hence irregular. The right directors and shareholder have through application dated February 6, 2022 applied to have these persons committed for contempt of court because the court has power to review the registrar of companies decision where need arises.
23. The applicant submitted that the resolution by the purported directors made on February 8, 2023 purporting to appoint advocates is since suspended because it has not been approved by the IRA. There is no letter of authority filed from IRA for an insurance company and the CR-12 filed is not sufficient. The 2nd to 6th respondents have ignored the role of IRA to mislead the court. section 105 of the [Companies Act](#), one must have a *prima facie* case for the court to find in their favour. In this case, the 2nd to 6th respondents have acted fraudulently by refusing to accept the suspension of their directorship in the 1st respondent and the application dated November 23, 2022 and February 6, 2023 should be allowed with regard to a finding that the firm of Kamau Kuria & Company Advocates is properly on record for the 1st respondent and the firm of Andrew Mmbogori & Company Advocates to bear costs herein.
24. For the firm of Andrew Mmbogori & Company Advocates appearing for the respondents and including the 1st respondent, counsel submitted that upon being granted authority by majority shareholders in the 1st respondent who were served by the claimant with summons herein, they entered appearance. Indeed, there is a shareholding dispute between the 1st respondent directors/shareholders which is subject of various suits in the High Court but for the claim herein filed by the claimant, the 1st respondent has given authority to the firm of Andrew Mmbogori & Company Advocates to attend and defend the claim. There is authority drawn from majority shareholders as per the CR-12 record from the registrar of companies and the directors approved by the IRA have since been struck out by the registrar of companies and which matters the applicant's counsel is well aware of because arising from such matters has filed High Court Misc Appl No E509 of 2022 seeking for orders of certiorari to quash the determination of the registrar dated October 21, 2022. There is no order in force staying such determination by the registrar of companies.
25. The directors of the 1st respondent have applied under the [Advocates Act](#) and appointed the firm of Andrew Mmbogori & Company Advocate to act for them in these proceedings. This was followed by a resolution of the company as required under the [Companies Act](#). there is no order seeking to vary or stay such resolution or stay of the arbitral award by Philip Alier.
26. There are no provisions by the IRA stopping an insurance company to undertake its duties pending the IRA as the regulatory approvals especially where a director is not prohibited to act pending such approval. The CR-12 remains the primary record of who the directors of the 1st respondent are and their decision and authority to appoint advocates cannot be faulted.



27. The claimant did not file any affidavit with regard to application dated February 6, 2023. He however submitted through his counsel in the case of *in re Xplico Insurance Company Limited* [2020] eKLR that an insurance company carrying out business, the question of which law firm to be appointed to act for such company is not according to the CR-12 with majority shareholding but in accordance with the provisions of the *Insurance Act* and in this case, the court struck off the law firm that had been appointed by majority shareholders and further held that when dealing with an insurance company the IRA must give authority and where none is obtained, the court went ahead and struck off such appointment.
28. The IRA regulates the insurance sector to prevent a shareholder from appointing director of a limited company which carry regulated business and the law so regulating must be followed.
29. In legal notice No 47 of March 18, 2022 on the *Insurance (Suitability of Key Persons) Regulations, 2021* a regulated entity such as the 1st respondent insurance company cannot appoint any person without the regulatory approval and even a shareholder must get approval to act for the business. The 1st respondent is therefore highly regulated in law through the IRA including the regulation of its shareholders. Even where one buys an insurance company, it cannot be operated unless the IRA has given approval and in this case, the respondents have failed to address the IRA regulations and the implications on the directors is that despite being appointed they have not moved the IRA for the required approval.
30. The claimant provided a letter dated January 20, 2023 from IRA approving him as the director of the 1st respondent and as the regulator of the 1st respondent, and through letter dated January 11, 2023 the IRA declined the request for approval as director and principal officer of the 2nd to 6th respondents and the reasons were given for such refusal. Until the arbitral award as resolved, the IRA will only then reconsider the matter of the 2nd to 6th respondents and this determination has not been challenged through the allowed mechanisms.
31. The claimant also submitted that the only person who can appoint the 1st respondent advocate within the meaning of the IRA letter to the 1st respondent is to await until the question of the arbitral award before the High Court is determined because CR- 12 is not sufficient to an insurance company within the framework of the IRA regulation and pending determination by the High court, parties can maintain the status quo.

Determination

32. The claimant filed suit on January 10, 2023 and the foundation of his claim is that he is the chief executive officer (CEO) and principal officer of the 1st respondent upon appointment on January 28, 2021 and which appointment received written approval from the IRA on January 20, 2021.
33. The letter of appointment of the claimant is issued under the hand of Dr S. K Macharia, chairman of the board of the 1st respondent. The IRA letter is to the effect that the claimant's appointment as the acting principal officer for Directline Assurance Company Limited is in line with section 68 of the *Insurance Act*.
34. It is not contested that the 1st respondent's is a limited liability company under the provisions of the *Companies Act* and licenced by the IRA to run insurance business in Kenya.
35. The claimant was therefore appointed chief executive officer and principal officer/of the 1st respondent.
36. In employment and labour relations and for purposes of the matter at hand as to who the 1st respondent can appoint as its advocates to file responses in these proceedings, whereas under the *Insurance Act* a principal officer is defined and regulated, a chief executive officer is not regulated under the same law.



Though the appointing authority for the position of CEO of an insurance company may be the same for the purpose of making a request to the IRA for approval as its principal officer, the court reading of section 68 of the *Insurance Act* is that such principal officer can and may be different from a CEO for the company under the *Companies Act* regulated under a different legal regime.

37. Under section 68 of the *Insurance Act*, the role of the principal officer for an insurance company is regulated as well addressed in the case of in *re Xplico Insurance Company Limited* [2020] eKLR that an insurance company has a principal officer who should be responsible for the general control, direction and supervision of the Kenya Insurance of the registered person and should represent the registered person for the purpose of the Act. That separation is clear to the extent of the claimant and principal officer of the 1st respondent insurance business, the claimant as the initiator of these proceedings cannot then turn and be found to state that he is the same person to decide who is to attend and defend the 1st respondent company, which has its directors and shareholders and the majority of whom has taken that duty and appointed advocate of choice to attend. The CR-12 in this regard cannot be ignored.
38. The court appreciates the obvious shareholders dispute now addressed in Nairobi High Court Misc Appl No E250 of 2021 – Directline Assurance Company Limited v Philip Alier & others following his appointment as the arbitral and the award thereof and there is also Nairobi High Court civil Appl No E509 of 2022 – Sureinvest Company Limited & 4 others v Royal Media Services Ltd & others challenging the enforcement of the award of Philip Alier but such proceedings though ongoing have no orders of stay of the award.
39. These being matters relating to shareholding of the 1st respondent which are pending resolution before another court, for the purposes of the claim herein, the majority shareholders of the 1st respondent company based on the current CR-12 returns from the registrar of companies have appointed the firm of Andrew Mmbogori & Company Advocates to attend and defend the company interests as required of proceedings before this court pursuant to section 22 of the *Employment and Labour Relations Court Act*, 2011. Pending resolution of the ongoing matters on shareholding disputes, the claim before court shall proceed with the 1st respondent represented by such firm of advocates.
40. Accordingly, application dated February 6, 2023 seeking for a declaration that the firm of Messrs Andrew Mmbogori Advocates has no authority to act for the 1st respondent is without and is hereby dismissed. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF MARCH, 2023.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... **and**

