



Directline Assurance Company Limited v Macharia & 11 others (Commercial Case E328 of 2024) [2025] KEHC 559 (KLR) (Commercial and Tax) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E328 OF 2024**

F GIKONYO, J

JANUARY 30, 2025

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED PLAINTIFF

AND

**DR SAMUEL KAMAU MACHARIA 1ST DEFENDANT
BASHIR MBURU 2ND DEFENDANT
JULIUS ORENGE 3RD DEFENDANT
KELVIN MOGENI 4TH DEFENDANT
SALOME GITOHO 5TH DEFENDANT
TOY AND SUNA HOLDINGS LIMITED 6TH DEFENDANT
DIAMOND TRUST BANK LIMITED 7TH DEFENDANT
EQUITY BANK KENYA LIMITED 8TH DEFENDANT
FAMILY BANK LIMITED 9TH DEFENDANT
I & M BANK LIMITED 10TH DEFENDANT
INSURANCE REGULATORY AUTHORITY 11TH DEFENDANT
ATANAS MAINA 12TH DEFENDANT**

RULING

1. In the application dated 9th December 2024, the 1st to 6th & 12th Defendants/ Applicants are seeking orders to suspend appointment and remove Mr. Kenneth Ndura, Mr. Maina Mwangi, Mr. Tom



- Odongo and Titus Karanja from the office of temporary directors of the Plaintiff Company and to order AKM Investment Ltd and Janus Ltd to nominate members to the temporary joint board to replace them. They also seek orders to stop the Company from paying; directors' fees and allowances to Janice Theresa Wanjiku Kiarie, Lisa Anyango Ameyna, Kenneth Martin Mwenda, Tom Otieno Odongo, Kimamo Kuria and Jackson Kionga Kamau; fees for purported company secretarial services rendered to Secplus Consulting Certified Public Secretaries (Kenya) for the period July 2022 and 31st October 2024; legal fees to Andrew Mmbogori & Company Advocates, W. G. Wambugu & Company Advocates, Gakoi Maina Advocates, Dentons HHM and Kairu & McCourt Advocates for purported legal services rendered between 2019 and 31st October 2024.
2. The application is expressed to be brought under sections 1(a), 1(b) and 3 of the *Civil Procedure Act*, Order 51 rules 1 to 3 of the Civil Procedure Rules, Section 3 of the *Judicature Act* and Article 159(2) of *the Constitution*.
 3. The grounds for the application are set out in the application and the annexed supporting, supplementary and further affidavits sworn by the 1st Defendant, Samuel Kamau Macharia on 9th, 10th and 31st December 2024 respectively. These grounds are amplified in the written submissions dated 28th December 2024.
 4. The gravamen is that the temporary directors have breached their fiduciary and statutory duties to the Company by passing resolutions for the payment of the subject fees which are fraudulent and illegal because the temporary directors were not in office as IRA approved directors were running the Company and the law firms and the company secretary also did not render their services during the periods in question.
 5. The Applicants submitted that the appointment of the temporary directors can be terminated as they were appointed as "receivers" by the Court; that under section 216 of the *Companies Act*, 2015, this Honourable Court has power to make a disqualification order; that under Order 40 rule 10 of the Civil Procedure Rules, this Honourable Court has jurisdiction to preserve the assets which are the subject matter of a suit; that under section 17(8) of the *Arbitration Act*, where there are pending arbitration supervisory proceedings under that act, the management of a company in office continues to run the business until the supervision is concluded; this fact was overlooked by Hon Mabeya J.
 6. The Applicants relied on Board of Governors, Moi High School, Kabarak & another v Malcolm Bell [2013] eKLR on the inherent jurisdiction of the Court; on Nasir Ibrahim Ali & Others -v- Kamlesh Mansukhlal Danji pattni & Michael Scanlon, C.A No. 71 of 1998 to the effect that a receiver had to act in the benefit of all concerned; Kiriri Cotton Co. v. R. K. Dewani on per incurium.

Response

7. The Plaintiff opposed the application through a replying affidavit sworn by Ms. Terry Wanjiku Kiarie Wijenje on 13th December 2024 and espoused their reasons in the written submissions dated 14th January 2025. She deposed that the prayer for the removal of the temporary directors was brought in bad faith and intended to prevent the present board from exercising its mandate. The allegation that the present board have set out to make illegal and fraudulent payments is false. No fees have been paid to Andrew Mmbogori Advocate, W. G Wambugu & Company Advocates, Gakoi Maina Advocates, Dentons HHM and Kairu & McCourt Advocates for legal services rendered to the Plaintiff between 2019 and 31st October 2024.
8. The Respondent submitted that given that the present Application does not seek to stay, set aside or discharge the said Order, the application is fatally defective as the Orders of 20th November 2024 remain



fully binding on all parties. It relied on *Paolo Murri v Gian Battista Murri & "K" Boat Services Limited* (59 Of 1999) [2000] KECA 56 (KLR) (2 June 2000) to argue that Courts are normally apprehensive to interfere with the internal management of a Company. It thus urged the Court to resist the Applicants' invitation to interfere with the discharge of mandate by the Plaintiff's Directors.

Analysis and Determination

Issues

9. Borne out of the application, the replies, and the parties' respective written submissions filed and authorities cited, the court is invited to determine: -
 - a. Whether there are grounds to suspend and remove the temporary directors appointed pursuant to the orders of the court made on 4th October 2024; and 20.11.2024.
 - b. Whether there are grounds to interfere with the decisions by the temporary board of directors to pay emoluments to directors named in the application, legal fees to advocates named herein and the company secretary for the periods specified in the application.

Nature of application

10. Although it is not expressed, but, under the proper lens, the prayer for suspension and removal of the temporary directors, and appointment of others as proposed by the applicant, is equivalent to seeking review or setting aside of the previous orders of this Court.
11. Be that as it may, whereas, the Court may review its own orders, but, given the nature of orders made herein and the circumstances of the case, a sufficient cause is one evaluated within the companies' laws and the circumstances of the case. Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules.
12. Are the prayers sought merited?
Removal of Interim Directors
 - a) Disqualification under s. 216 of the [Companies Act](#)
13. One of the arguments by the applicants in support of the request for termination of appointment of the interim directors was that; the court has power under section 216 of the [Companies Act](#) to make a disqualification order of the interim members of the board. Not much detail was provided in support of this submission except that the temporary directors are engaged in making illegal payments out of the assets of the company.
14. Disqualification of a director is a grave relief. But, section 216 was specifically cited. Under section 216(2) of the [Companies Act](#): -

A court may make a disqualification order against a person who holds or formerly held an office to which this section applies if, while the company was under administration or in liquidation, it is satisfied that the person has, been found guilty of—

 - (a) fraud in relation to the company; or
 - (b) any breach of duty as the holder of such an office.
15. The section is specific that the court must be satisfied that the person has been found guilty of fraud in relation to the company or any breach of duty as the holder of such office. It is not the case here.



16. Having said that, under PART X of the [Companies Act](#) the court may make a disqualification order against a director or an officer of the company: -
- ‘...on grounds that are or include matters other than criminal convictions, whether or not the person in respect of whom it is to be made may be criminally liable in respect of those matters.’
17. Whatever section relied upon, the effect of disqualification order is dire as the person-unless the court gives leave to the contrary- is disqualified from: -
- a. being or acting as a director or secretary of a company;
 - b. being or acting as a liquidator, provisional liquidator or administrator of a company;
 - c. being or acting as a supervisor of a voluntary arrangement approved by a company; or
 - d. in any way, whether directly or indirectly, being concerned in the promotion, formation or management of a company, for such period as may be specified in the order. S.214(2) of the [Companies Act](#).
18. The requirements for the application for and threshold of disqualification order is not, therefore, casual; but stringent requiring: -
- a. A proper application being brought to court pursuant to and compliant with PART X of the [Companies Act](#).
 - b. Notice of intention to apply being given to the person against whom the order is sought;
 - c. At the hearing of the application, the person against whom a disqualification order is sought is entitled to appear as respondent to the application
 - d. On the hearing of an application, the applicant shall appear and draw the attention of the Court to any matters that appear to be relevant, and may give evidence or call witnesses.
19. The application before the court is not brought under and is not the application envisioned in PART X of the [Companies Act](#).
20. In any case, there is nothing on which a disqualification order may be issued in this case.

b) Claim temporary directors are ‘receivers’

21. The other argument by the Applicants was that the appointment of the temporary directors can be terminated as they were appointed as “receivers” by the Court. This argument was made before Mabeya J.
22. Examination of the Ruling dated 4th October 2024, and Ruling dated 20th November 2024 by Mabeya J. will confirm or deny the submission by the applicants that the temporary directors were appointed by the court as ‘receivers.’
23. Of the argument on receivership, Mabeya J stated: -
- ‘Nothing could be further from the truth. The measures undertaken vide the said orders were of an interim nature. The company was not put under receivership. The measures were geared towards enabling the plaintiff run pending the feuding parties in the arbitral proceedings expediting the process. Once the feuding parties conclude their dispute there, they will be welcome back to take over from where they left. In the meantime, the plaintiff



will be run by the interim board under the governance principles of company law the Regulator of insurance business in this country.’ Ruling dated 20.11.24.

24. Accordingly, the orders were not a receivership the way we know it in law.
25. In the ruling of 4.10.2024, the court (Mabeya J.) gave an order directing *the constitution* of a temporary board consisting of 2 nominees each of AKM Investments Ltd, Janus Ltd and Royal Credit Ltd.
26. The Court made the drastic orders upon finding that there was prima facie near fraud by the Plaintiff’s former board of directors, when, contrary to the *Insurance Act*, Kshs. 300M was committed to secure facilities to a third entity and Kshs. 400M was transferred to another entity exposing the Plaintiff Company’s policyholders and beneficiaries to untold suffering in the event the risks attached.
27. Through a Ruling dated 20th November 2024, Hon. Mabeya J. provided certain clarifications and orders, thus: -

“19. ...The orders of 4/10/2024 and 22/10/2024 meant that:-

- a. there should have been 6 nominated directors to the interim board;
- b. the said board was to be constituted under the direction, supervision and regulation of the 11th defendant (see para 4 of the ruling of 22/10/2024);
- c. after 31/10/2024, the interim board was to conduct its business in accordance with the law, that is, the meetings are to be regulated by law;
- d. the quorum therefor would be 3 and its decisions will be by majority of those attending the meeting;
- e. any decision made by the majority of those attending would be binding and enforceable as such.”

28. Mabeya J. also found that “by purporting to appoint the same individuals restrained by the Court to the interim board, Royal Credit Ltd was but attempting to circumvent the said orders of 4/10/2024”. He granted orders that the interim board of directors consisting of 4 nominees approved by the 11th Defendant be deemed to be fully constituted and that the Plaintiff’s bankers do comply with the resolution of the said board.
29. Therefore, the 4 were the interim board of directors which was deemed to be fully constituted for purposes of running the company as was ordered by the court.

c) Interference with decisions of the board

30. The present application seeks for orders which are akin to asking the Court to interference with the decisions of the interim board. The claims in issue are of illegal and fraudulent payments; which will be evaluated fully under a separate cover.
31. For purposes of this section, ordinarily, Courts do not interfere with the internal affairs of companies except in limited circumstances. *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment)



32. As was submitted by the Plaintiff, the law is that, the Company is the proper entity to sue for a wrong committed against it. *Foss v Harbottle* [1843] 2 Hare 461 and *David Langat v St. Lukes Orthopaedic & Trauma Hospital Ltd & 2 Othes* (Environment & Land Case 56 of 2013) [2013] KEELC 95 (KLR).
33. However, exceptions to the rule in *Foss v Harbottle* include: a) a derivative claim by a member of a company brought; (i) in respect of a cause of action vested in the company; and (ii) seeking relief on behalf of the company. But, which must be commenced or continued with leave by the court. S.238 and 239 of the *Companies Act*.
34. Or b) a proceeding for protection of members against oppressive conduct or unfair prejudice brought under the *Companies Act* or Part XXIX thereof.
35. The application before the court is not such proceeding of a derivative suit, or for protection against oppressive conduct and unfair prejudice; and does not meet the threshold for such proceeding.

Claims of Illegal and Fraudulent Payments

36. The claim here is that, the interim board of directors made fraudulent and illegal payments which are also a kind of asset stripping. Proof is required of these alleged fraudulent and illegal payments.
37. In its affidavits, the Applicants exhibited the temporary board's minutes of 29th October 2024 ratifying the appointment of Secplus Consulting Company Secretaries Kenya Ltd as the Plaintiff's company secretary as per the engagement letter of 25th July 2022. The Applicants also exhibited a schedule of liabilities incurred between 2019 and 2024 signed by Terry. It was indicated that the board needed to take inclusive of the director's fees, legal and company secretary's fees into account and plan on payment.
38. The Respondent produced evidence in form of Rulings and Court Orders confirming to show that Andrew Mbogori Advocate, Gakoi Maina Advocates and Kairu & McCourt Advocates acted for the Plaintiff Company during the periods in question. As such, the court is not persuaded that the Applicants have established fraud on the advocates' fees. The Respondent conceded that there were no other instructions to either Dentons HHM or W. G Wambugu & Company Advocates for the specified periods save for a single taxation matter. This explains why the two law firms were appearing in the schedule exhibited by the Applicants. The applicant did not show proof that these were illegal and fraudulent payments. Therefore, the Applicants have failed to meet the threshold for the Court to interfere with the payment of the legal fees.
39. Of payment of the Company Secretary Secplus Consulting Certified Public Secretaries (Kenya) fees for the period July 2022 and 31st October 2024?
40. The Applicants exhibited the Letter of Engagement issued to the Company Secretary 25th July 2022. It was not, however, established by the Applicants that Secplus Consulting Certified Public Secretaries (Kenya) was not duly appointed and did not provide services to the Respondent during the period in question. Thus, the prayer fails.
41. Nevertheless, the court notes that a forensic audit had been ordered which should evaluate, amongst other things, the matters complained of herein, and also act as scrutiny of the running of the company's affairs by the interim board.
42. Of Payments to the directors for the period July 2022 and 31st October 2024?
43. This issue is seen within the wider scope of directorship and shareholding of the plaintiff company.



44. The Court notes that the dispute on the Plaintiff's shareholding is yet to be resolved.
45. There are two pending Applications filed in HC MSC E509 of 2022 and HC MSC E250 of 2021 respectively seeking recognition and setting aside of the award dated 22nd June 2022 made by Phillip Bliss Alliker. According to the applicant, under section 17(8) of the Arbitration Act, where there are pending arbitration supervisory proceedings under that act, the management of a company in office continues to run the business until the supervision is concluded; a fact they claim was overlooked by Hon Mabeya J.
46. The interpretation assigned to section 17(8) of the Arbitration Act by the applicant, is not appropriately situated within the facts and peculiar circumstances of this case.
47. Important also; the Plaintiff has filed this suit in respect of its directorship. The suit is yet to be determined.
48. Projected from these empirical realities, the Court cannot make any determinations with regard to the shareholding or directorship of the Plaintiff through this interlocutory application.
49. Be that as it may, the applicants have asked the court to stop payment of directors' fees and allowances to Janice Theresa Wanjiku Kiarie, Lisa Anyango Amenya, Kenneth Martin Mwenda, Tom Otieno Odongo, Kimamo Kuria and Jackson Kionga Kamau for the period between July, 2022 and 31st October, 2024.
50. The Respondent through the affidavit by Terry Wanjiku Kiarie averred that there are legitimate questions on remuneration of the directors in question. However, it still took the position that the said directors were at liberty to approach the Plaintiff to come to terms on their exit and their replacement by the temporary board appointed through this Court's orders.
51. There is sense and prudence in stopping the payment to directors in question for the period stated in the application.

Conclusion and Orders

52. The dispute on shareholding and directorship of the plaintiff company has not been determined by the court. The interim board of directors is barely 4 months old. The plaintiff is an insurance company engaged in insuring the general public. Thus, the public interest in ensuring the company runs well for the benefit of the policyholders as well as third parties' liability covered under the insurance policies issued by the plaintiff, remains paramount.
53. In these circumstances, it is too soon to review the court orders herein on interim board; which may invite the unhealthy back and forth scenario witnessed in these proceedings.
54. The applicants have not also established any sufficient cause to deserve the orders sought except the one on directors' emoluments.
55. As directorship of the plaintiff is the major issue in controversy in these proceedings, it is not appropriate to interfere with the interim board.
56. Accordingly, the prayers seeking the suspension, revocation of appointment and removal the interim directors fail.
57. However, as a champion of AJS, parties are encouraged to and may unlock the impasse through deliberately genuine and spirited effort towards strengthening the company rather than tearing it down into pieces. Meanwhile, in the spirit of the overriding objective of the law, the court shall give directions



aimed at expeditious disposal of this case. The parties to comply with pre-trial conditions which the court and the parties will set.

58. The 11th defendant who is the regulator should also ensure regulatory, statutory compliance and accountability by the interim board of directors.
59. In the upshot, the Application dated 9th December 2024 partially succeeds to the extent only of the specific orders below: -
 1. The payment of directors' fees and allowances to Janice Theresa Wanjiku Kiarie, Lisa Anyango Ameyia, Kenneth Martin Mwenda, Tom Otieno Odongo, Kimamo Kuria and Jackson Kionga Kamau for the period between July, 2022 and 31st October, 2024 by the Plaintiff is suspended pending the resolution of this suit. But, this order does not affect any emoluments payable to the interim directors from the time they were installed pursuant to the orders of this court.
 2. Any other prayer in the application which is not specifically granted is deemed to have been denied.
 3. Costs in the cause.

DATED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF JANUARY, 2025

.....

F. GIKONYO M

JUDGE

In the presence of: -

1. Dr. Kamau Kuria for the 1st, 2nd and 6th defendants
2. Mr. Kibaara for the 12th defendant
3. Mr. Mbogori for the plaintiff
4. Ms. Arora for the 7th defendant
5. Mr. Mwangi h/b for Rimui for the 8th defendant
6. Ms. Morara for the 5th defendant
7. Ms. Yala h/b for Nyaosi for the 9th defendant
8. Ms. Wambugu for the Interested Party
9. Ms. Jan for the 10th defendant
10. Mr. Havi for the 11th defendant

