



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

PETITION NO. E002 OF 2021

IN THE MATTER OF: ARTICLE 22, 23, 31, 40, 50 OF THE CONSTITUTION OF KENYA AND SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (HIGH COURT PRACTICE AND PROCEDURE RULES 2006)

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNER ARTICLES 10, 31, 40, 47 AND 50 OF THE CONSTITUTIN REGARDING PROTECTION OF THE RIGHT TO PROPERTY

AND

IN THE MATTER OF: ABUSE OF LEGAL POWER BY THE COUNTY GOVERNMENT OF BOMET IN CAPRICIOUS MANNER IN WHICH THEY HAVE DETAINED MOTOR VEHICLE REGISTRATION NUMBER KCR 111U

AND

THE MATTER OF FAIR ADMINISTRATIVE ACT

BETWEEN

BROWNSTONE AGENCIES LTD1ST PETITIONER

EDWIN MUNENE MUREITHI2ND PETITIONER

VERSUS

COUNTY GOVERNMENT OF BOMET.....1ST RESPONDENT

COUNTY SECRETARY, BOMET COUNTY 2ND RESPONDENT

RULING

1. This ruling is in respect of the Preliminary Objection (P.O) filed by the Respondents dated 19th November 2021. The preliminary objection (PO) raised on the following grounds:

- i. **THAT** the suit herein is fatally defective as it offends Order 4 Rule 1, 4 and 6, Orders 2 Rule 15 (1) (a) and (d) of the Civil procedure Rules as the Petitioner’s director swore an affidavit without an authority/resolution of the Petitioner’s company.
- ii. **THAT** the suit herein is fatally defective as at the time of filing the suit, no authority to institute the suit from the Petitioner and/or resolution of the Board for the Petitioner’s advocates to represent it in the suit was filed.

2. The Respondents relied on the case of DIRECTLINE ASSURANCE COMPANY LIMITED VS TOMSON ONDIMU (2019) eKLR to support their Preliminary Objection.

Respondents/Applicants Submissions

3. The Respondents submitted that the Petitioners did not adduce any evidence of Resolution by the Board to institute the Petition as required by law. It was their further submission that in their response to the Preliminary Objection, the Petitioners dealt majorly on the authority of the

2nd Respondent to swear an affidavit and did not address the pertinent issue of the absence of authority from the 1st Petitioner as required. It was their further submission that in the absence of the Resolution to institute the suit, the suit was rendered fatally defective.

4. It was the Respondents' submission that their second ground in the Preliminary Objection was not addressed i.e. the fatal defect of the Petition for the absence of authority from the 1st Petitioner. That the Petitioners' submissions and authorities dealt with the issue of the authority to swear a Verifying Affidavit. The Applicants submitted that as a result, their second ground remained uncontroverted.

5. The Respondents' submitted that the case relied on by the Petitioners, LEO INVESTMENTS LIMITED VS TRIDENT COMPANY LIMITED (2014) eKLR addressed the issue of defectiveness of a Verifying Affidavit for lack of authority and not for the institution of a suit.

6. It was the Respondents' submission that the case of SPIRE BANK LIMITED VS LAND REGISTRAR & 2 OTHERS (2019) eKLR did not address their second ground in the Preliminary Objection. That it only addressed the issue of the authority to swear an affidavit on behalf of Spire Bank. It was the Applicants further submission that the aforementioned case was of no relevance.

7. The Respondents submitted that the need to have an authority to institute a suit was not a technical requirement but rather a substantive one that went deep into the jurisdiction of the court. That the need to have the said authority has been consistently decided by the courts and it was now a well settled principle that failure to have the authority to institute a suit invalidated it. They relied on the case of KENYA COMMERCIALBANK LIMITED VS STAGE COACH MANAGEMENT LIMITED (2014) eKLR and TRUST BANK LTD VS AMALO CO. LTD to support their submission.

8. It was the Respondents submission that the Supreme Court case of RAILA ODINGA VS IEBC & OTHERS (2013) eKLR was never meant to oust the obligation of the litigants to comply with procedural imperatives as they sought justice from the courts.

RESPONSE

9. The Petitioners response to the Preliminary Objection was dated 23rd November 2021 where they opposed the Preliminary Objection.

10. The Petitioners stated that Section 128 of the Companies Act provided that a private company was required to have at least one director and the deponent being the sole director of the 1st Petitioner had the capacity to institute proceedings in the company's name and that failure to file a Resolution did not wish away the substance of the case.

11. It was the Petitioners' case that the mere failure to file the Resolution of the Corporation together with the Plaint did not invalidate the suit. They relied on the case of LEO INVESTMENTS LTD VS TRIDENT INSURANCE COMPANY LTD (2014) eKLR to support this submission. They additionally relied on the cases of EYE COMPANY (K) LIMITED VS ERASTUS ROTICH T/A VISION EXPRESS (2021) eKLR and SPIRE BANK LIMITED VS LAND REGISTRAR & 2 OTHERS (2019) eKLR to advance their submissions.

12. The Petitioners averred that it was now settled that whether or not an officer is authorized to institute proceedings was a matter of evidence which required canvassing before court.

13. I have considered the Notice of Preliminary Objection dated 19th November 2021, the Response dated 23rd November 2021, the Respondents Written Submissions dated 10th January 2022 and their accompanying authorities, and; the Respondents/Petitioners Written Submissions dated 1st December 2021 and their accompanying authorities. The only issue for my determination is:

i. *Whether the failure to file a Resolution to institute suit and the Authority to swear an affidavit is fatal to the existence of the suit*

14. What constitutes a Preliminary Objection is set out in the case of MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) EA 696, where it was held that:

“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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

15. In the case of ORARO VS MBAJA (2005) eKLR,

Ojwang J (as he was then) held:

“A “preliminary objection”, correctly understood, is now well identified 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, and 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”.

16. The Respondents contend that the suit herein has offended Order 4 Rule 1 (4) and (6) and Order 2 Rule 15 (1) (a) and (d). Order 4 Rule 1 (4) provides:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so”.

Order 4 Rule 1 (6) provides:

“The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule”.

Order 2 Rule 15 provides:

“(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.

17. It is not in dispute that the 1st Petitioner, Brownstone Agencies Limited was a private company. A Certificate of Incorporation marked “MRG-1 was attached in the Supporting Affidavit and it indicated that the 1st Petitioner was a private company.

18. It is salient to note that Michael Ronald Githinji indicated that he was a sole director of the 1st Petitioner and the same was not disputed.

19. Having established that the deponent was the sole director in the company, it was evident that he controlled the affairs of the company. He deponed that he was duly conversant with the matters contained in the Petition and was competent and duly authorized by the company to swear the affidavit. In my view, the sole director did not need a resolution from the company to authorize filing of a suit. I draw guidance from MAKUPA TRANSIT SHADE LIMITED & ANOTHER V KENYA PORTS AUTHORITY & ANOTHER [2015] eKLR, where the Court of Appeal held that:-

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized”.

20. The same position was echoed in the persuasive authority in the case of EYE COMPANY (K) LIMITED VS ERASTUS ROTICH T/A VISION EXPRESS (2021) eKLR, where Ngetich J held that:-

“In view of the above, it is clear that it was sufficient for the authorized person to depose that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority”.

21. I have perused the authorities attached by both parties some of which I wish to highlight the ones that have persuaded me. In the case of LEO INVESTMENTS LTD VS TRIDENT INSURANCE COMPANY LIMITED (2014) eKLR, Odunga J held that:

“The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as he suit. Its absence, is therefore, not fatal to the suit”.

22. I am further guided by the binding authority in the case of SPIRE BANK LIMITED VS LAND REGISTRAR & 2 OTHERS (Supra), where the Court of Appeal interpreted the law thus: -

“It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized”.

23. It is clear from the above that courts have held that the absence of a Resolution to institute a suit or authority to swear an affidavit was not fatal to a suit. The Respondents' contention that the Petitioners failed to attach a Resolution or authority to swear an affidavit is true. However, such omission was not fatal to the suit. Mr. Michael Ronald Githinji indicated that he was the sole director of the 1st Petitioner. It follows then that, he is duly authorized to conduct the affairs of the 1st Petitioner. The Respondents further states that the Petitioners failed to attach the Resolution and authority to swear an affidavit. However, they did not produce evidence to prove that Mr. Michael Ronald Githinji was unauthorized to commence a suit or sign an affidavit on behalf of the 1st Petitioner. Having so alleged, it was incumbent upon them to prove.

24. In any event, even if the 1st Petitioner had more than one director, the failure to attach the said resolution and authority to swear an affidavit would not be fatal to the case. He would still have an opportunity to call the law to his aid in seeking to amend his pleadings.

UPSHOT

25. In the end, it is my finding that the Preliminary Objection dated 19th November 2021 is without merit. It is dismissed with costs to the petitioner.

26. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF FEBRUARY 2022.

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R. LAGAT-KORIR

JUDGE

IN THE PRESENCE OF MR. LETEIPA FOR THE 1ST AND 2ND PETITIONERS, MS CHEPKEMOI HOLDING BRIEF FOR KOECH COSMAS FOR THE RESPONDENT, KIPROTICH (COURT ASSISTANT)