Washtech Kenya Limited & another v Vivo Energy Kenya Limited (Civil Case 252 of 2018) [2022] KEHC 292 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 292 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 252 OF 2018

WA OKWANY, J

APRIL 28, 2022

BETWEEN

WASHTECH KENYA LIMITED ..... 1ST PLAINTIFF

JURGEN FUKS ..... 2ND PLAINTIFF

AND

VIVO ENERGY KENYA LIMITED ..... DEFENDANT

RULING

1. The plaintiffs filed this case against the defendants seeking the following orders: -

    a. Payment to the 1st plaintiff the replacement value of the car washing machine of EUR 251,247.00

    b. Payment to the 2nd plaintiff of the Silent Perkins Generator of Kshs 1,300,000.00refund of the transport costs and consultation fees of the plaintiffs expert Craig Campbell at USD 3,000.00

2. Before the suit could be listed for hearing, the defendant filed the application dated 21st July 2021 seeking the following orders: -

    1) THAT the plaint be struck out for being non compliant with the mandatory provisions of Order 4 rule (1) as read with Section 281 of the *Companies Act 2015*

    2) That the costs of this application be provided for.

3. The application is brought under Order 4 rule 1(6) of the *Civil Procedure Rules*, is supported by the affidavit sworn by the defendants Company Secretary Ms. Naomi Assumani and is premised on the following grounds; -

1) The plaintiff herein instituted the suit against the defendant on 25th June 2018

2) The plaintiff annexed a resolution as well as minutes preceding the institution of the suit which indicates that the notice calling for the meeting at which the resolution to institute these proceedings were undertaken in blatant disregard of the mandatory provisions of section 281 of the Companies Act in particular;

   a. Mr. Jurgen Fuks sent a notice to the other directors of the plaintiff Company in a manner that flouted the express provision of Section 282 of the Companies Act such as:

      i. As opposed to a 21-day Notice required under section 281 of the Companies act Mr. Jeremiah Matagaro was given 9 days' notice (Although the letter sent was dated 5th March 2018, it was posted on 19th March 2018

      ii. No proper notice was given to the other director Mr. Thornsten kruger who is resident in Augsburg in Bavaria Germany

   b. The plaintiff Company purportedly held a special General Meeting on 26th March 2018 when it passed the authorization to institute this suit.

   c. Failure to give proper notice calling for the special general meeting that served as the basis for the passing of the resolution authorizing the institution of this suit renders the proceedings of 26th March 2018 void by dint of section 281(8) of the Companies Act

3) The suit is therefore incompetent before this court and ought to be struck out for non-compliance with the provisions of law applicable to companies and their offices.

4) Such other and further grounds to be adduced at the hearing hereof.

4. The respondents opposed the application through the replying affidavit dated 27th October 2021 wherein it states that the defendant had previously unsuccessfully applied to strike out the plaintiff's suit through an application dated 6th March 2019. He contends that he has also filed this suit in his individual capacity and that any issue regarding board resolutions does not affect his case.

5. I have considered the pleadings filed herein and the parties' respective submissions. I find that the main issue for determination is whether the applicant has made out a case for striking out the plaintiffs' suit. The defendant faults the plaintiff for failing to comply with the provisions of Order 4 rule (1) of the Civil Procedure Rules as read with Section 281 of the Companies Act 2015

6. Order 4 rule 1(4) states that: -

> 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.

7. Section 281 of the Companies Act 2015 provides that: -

281. Amount of notice to be given for general meetings

(1) In convening a general meeting (other than an adjourned meeting), a private company shall give a least twenty-one days' notice.

(2) In convening a general meeting, a public company, shall give—

(a) in the case of its annual general meeting—at least twenty-one days' notice to members; or

(b) in the case of any other general meeting—at least fourteen days notice to members.

(3) The company's articles may require a longer period, of notice than that specified in subsection (1) or (2).

(4) A general meeting may be convened by shorter notice than that otherwise required if it is agreed by the members.

(5) The shorter notice referred to in subsection (4) is valid only if it is agreed to by the required majority of members.

(6) For the purpose of subsection (5), the required majority of members is a majority of members who, having a right to attend and vote at a general meeting—

(a) together hold not less than the requisite percentage in nominal value of the shares giving a right to attend and vote at the meeting; or (b) in the case of a company that does not have a share capital—together represent not less than the requisite percentage of the total voting rights at that meeting of all the members.

(7) The requisite percentage for the purpose of subsection (6) is—

(a) in the case of a private company—ninety per cent or such higher percentage, not exceeding ninety-five per cent, as may be specified in the company's articles; or

(b) in the case of a public company—ninety-five percent.

(8) The proceedings of a meeting that do not comply with the requirements of this section are void.

8. The defendant contended that the second plaintiff was not authorized, under the seal of the Company; to swear the verifying affidavit and that there was therefore non-compliance with the above provision. The defendant also faulted the plaintiffs for failing to issue notice 21 days before the Special General meeting.

9. In a rejoinder, the plaintiff argued that the case raises serious issues of law and fact that should not be considered on merit. The plaintiffs noted that the 2nd plaintiff instituted the suit in his personal capacity and the other directors of the company had not raised any issue with regard to the filing of the suit.

10. In *Spire Bank Limited vs Land Registrar & 2 others [2019] eKLR* the Court of Appeal held as follows: -

> " ...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."

11. Similarly, in *Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR* the Court of Appeal restated their position thus: -

> " The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd vs Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-
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> "The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."
>
> We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of C*ail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others* (No.3) (1970) ChpD 506, where the Lord Justice said:-
>
> "The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."
>
> We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

12. I have perused the plaint and the verifying affidavit. I note that the plaintiff attached the board resolution authorizing the 2nd plaintiff to swear the affidavit on behalf of the company. The plaintiff also produced Minutes of the 1st plaintiff's General meeting to demonstrate that the board agreed to pursue legal action against the defendant. I however note that the 2nd plaintiff was the other director present at the meeting. In the premises, I have no doubt that the 2nd plaintiff was authorized to plead on behalf of the Company as no evidence was adduced to the contrary.

13. Regarding the provisions of Section 281 of the Companies Act on notice for the Special General Meeting, I find that the right parties to raise the concern should be the other three directors of the Plaintiff Company who have elected to remain quiet on the issue. I do not consider the said technicality to be grave enough to warrant striking out of the plaintiffs' suit. The notice is dated 5th March 2018 and the meeting was held on 26th March 2018. There is no evidence to show that the directors were unaware of the meeting or were dissatisfied with the same.

14. Courts have taken the position that the power to strike out suits is a drastic step that should be used sparingly and in the clearest of cases. (See *Kenya Commercial Bank vs Suntra Investment Bank Ltd [2015] eKLR*).

15. In the premises, I find that the plaintiffs deserve to be heard on the merits of their case. I therefore dismiss the application dated 21st July 2021 with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Muchiri for Defendant.

Ms Kiptum for Gikandi for Plaintiffs

Court Assistant- sylvia