



**Gihomes Management Limited v Rebello & 5 others (Civil Case E980 of 2021)
[2022] KEHC 16126 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E980 OF 2021
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

GIHOMES MANAGEMENT LIMITED PLAINTIFF

AND

**IAN REBELLO 1ST DEFENDANT
BOSCO DOURADO 2ND DEFENDANT
PETER BRAGANZA 3RD DEFENDANT
CHERYL DE SOUZA 4TH DEFENDANT
MOLLY WAMBUI 5TH DEFENDANT
TONY GOMES 6TH DEFENDANT**

RULING

1. The plaintiff commenced this suit through the plaint dated December 22, 2021 seeking, inter alia, orders of injunction to restrain the defendants from dealing or transacting on behalf of the plaintiff and a declaration that all the documents issued to the Registrar of Companies physically or electronically are null and void.
2. Concurrently with the plaint, the plaintiff filed an application seeking interim orders of injunction pending the hearing and determination of the suit.
3. The defendants opposed the application through the preliminary objection wherein they set out the following grounds:-
 1. No resolution was passed to institute the current suit against the defendants herein.



2. The dispute between warring factions in a company can only be resolved by way of institution of a Petition and not a plaint; hence the suit is fatally defective.
3. The matters in dispute are between the plaintiff and the defendants who are members, shareholders and directors of the plaintiff herein and the provisions of part XXIX of the *companies Act*, 2015 are applicable.
4. The plaintiff responded to the preliminary objection through the replying affidavit of its Director Mr. Rolan Marcus Braganza who states that the plaintiff's Board resolved to instruct the law firm of Messrs. Chimei and Company Advocates to institute the case against the defendants. He further states that the preliminary objection does not raise pure points of law as it was blurred with factual allegations and assertions.
5. The preliminary objection was canvassed by way of written submissions which I have considered. The main issue for determination is whether the preliminary objection is merited.
6. In the case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 the court described what constitutes a preliminary objection as follows:-

“---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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

7. In the present case, the preliminary objection is based on the allegation that the plaintiff did not pass a resolution to institute the current suit against the defendants. The plaintiff, on the other hand maintained that a resolution to instruct its advocates was passed in a Board meeting held on October 3, 2021.
8. A perusal of the record reveals that plaintiff attached the minutes showing that the board made a resolution to instruct the plaintiff's advocates. The existence of the said minutes notwithstanding, I find that issue of Board's resolution is not a pure point of law but is a factual matter that the court may have to ascertain through evidence.
9. The defendants also challenged the suit on the basis that it should have been instituted by way of a petition and not a plaint. It was the defendants' assertion that the dispute between the parties is anchored on Part XXIX of the *Companies Act* 2015 which covers disputes between members of a Company.
10. Part XXIX of the *Companies Act* provides for the protection of members of a company against oppressive conduct and unfair prejudice. Once satisfied that the grounds of an oppressive conduct



and/or unfair prejudice are substantiated, the court may make such orders in respect of the Company as it considers appropriate.

11. Section 780 of the *Companies Act* provides that:-

780. Application to Court by company member for order under section 796

- (1) A member of a company may apply to the Court by application for an order under section 782 on the ground—
 - (a) that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or
 - (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.
- (2) In this section, "member", in relation to a company, includes a person who is not a member of the company but is a person to whom shares of the company—
 - (a) have been transferred; or
 - (b) have been transmitted by operation of law

Section 782(2) then provides:-

"In making such an order, the court may do all or any of the following:

- (a) regulate the conduct of the affairs of the company in the future;
- (b) require the company—
 - (i) to refrain from doing or continuing an act complained of; or
 - (ii) to do an act that the applicant has complained it has omitted to do;
- (c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court directs;
- (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;
- (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

12. My understanding of the above section is that it provides for applications made by members of a Company. The instant case has however been filed by the Company itself as against its directors. It is my view that the company has the right to pursue its claim as can be seen from its Board's resolution.



I therefore find that the provisions of part XXIX of the Companies Act 2015 are not applicable in this case.

13. Accordingly, I find no merit in the preliminary objection which I hereby strike out with orders that costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Kithinji for Chimei for plaintiff.

No appearance for defendant.

Court Assistant- Sylvia

