



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL CASE NO. 17 OF 2020**

**KING INVESTMENT**

**MANAGEMENT CO. LTD .....PLAINTIFF/RESPONDENT**

**VERSUS**

**RIVATEX EAST AFRICA LIMITED.....DEFENDANT/APPLICANT**

**RULING**

The defendant/applicant filed a Notice of Motion application dated 28<sup>th</sup> April, 2021 under Certificate of Urgency. In the said application the Applicant seeks the following orders;

1. That the application be certified as urgent and service of the same be dispensed with in the first instance.
2. That the plaintiff/respondent a company purportedly registered in the people's Republic of China do give security of Kshs. 50,000,000/- for the defendant's costs or other amount to the satisfaction of the court.

The defendant/applicant also filed a Notice of Preliminary Objection dated 23<sup>rd</sup> April, 2021. The grounds of the defendant's Preliminary Objection were as follows;

1. That the plaintiff company is purportedly registered in the People's Republic of China and has no locus standi and the legal capacity to sue the defendant herein.
2. That the suit is filed by a non-existent entity or company as per the records obtained from the Registrar of Companies (Hong Kong) within the People's Republic of China.
3. That the plaintiff's company was wound up/ dissolved on 27<sup>th</sup> December, 2019.
4. That on 10<sup>th</sup> February, 2020 when the plaintiff filed this present suit against the Defendant, it had no legal capacity as it had been dissolved or struck off from the Registrar of Companies as at 27<sup>th</sup> December, 2019.
5. That the Deponent of the plaintiff company (Lucy Zhang) who executed the contract as the plaintiff's manager or Director is not holding any position of management or executive position of the plaintiff's company.
6. That the Verifying Affidavit sworn by the aforesaid Lucy Zhang ought to be expunged as per the provisions of Order 4 Rule 4 of the CPR hence striking out the plaint.
7. That this Honourable court lacks jurisdiction to hear and determine this matter arising out of the purported breach of contract or tender No. Real/38/2019-2020 for the supply and delivery of virgin polyster and viscose staple fibre.
8. That the contract agreement between the plaintiff company (king Investment Management Co. Ltd) and the Defendant Company (Rivatex EA Ltd) stipulates settlement of disputes mechanism clause to wit:

Resolution of disputes:-

*3:18:1 – The procuring entity and tenderer shall make every effort to resolve amicably by direct informal negotiations and disagreement or dispute arising between them under or in connection with the contract.*

3:18:2 – if after thirty (30) days from commencement of such informal negotiations both parties have been unable to resolve amicably a contract dispute, either party may require adjudication in an agreed National or international forum and/or international arbitration.

9. That Section 10 of the Arbitration Act limits court's intervention in arbitration process and specifically states that **“except as provided in this Act, no court shall intervene in matters governed by this Act.”**

10. That the plaintiff's company did not consider taking the matter to either agreed national, international forum and/or international arbitration nor did it notify the defendant company of exploring the same as provided for in the relevant clauses of the contact agreement.

11. That in light of the above and generality of the foregoing, the court do find that the suit herein is incompetent, bad in law and/or untenable in law, vexatious and/or abuse of court process hence should be struck out with costs to the defendant/applicant.

The application is premised on the grounds on the face of the application. It is further supported by supporting affidavit of Prof. Thomas Kipkurgat dated 27<sup>th</sup> April, 2021.

The Plaintiff/Respondent opposed the said Notice of Preliminary Objection and filed a Replying Affidavit sworn by Lucy Zhang on 3<sup>rd</sup> May, 2021.

The defendant/applicant also filed written submission on 11<sup>th</sup> May, 2021. The plaintiff/respondent did not file any written submissions.

### **ANALYSIS AND DETERMINATION**

I have carefully considered the Notice of Preliminary Objection, the substantive motion and the response thereto as well as the relevant statute and case law. The following issues arise for determination:

**i. Has the applicant put forth a competent preliminary objection?**

**ii. Whether a call for security of costs by the applicant should issue?**

Before I delve into other issues raised in the Notice of Preliminary Objection and the response thereto. I will first address the issue of whether this Honourable court has jurisdiction to hear and determine the dispute at hand. Counsel for the Applicant has argued that this court lacks the requisite jurisdiction to hear and determine this suit in the first instance as there was a clause in the agreement that required parties to go for arbitration before seeking the intervention of court.

The respondent on the other hand has refuted the said averments and has gone ahead to indicate that parties were required to settle disputes in accordance with clause 8 of the Contract dated 4/2/2020 executed by both parties.

Upon my perusal of the contract dated 4/2/2020 I do observe that the said clause 8 is ambiguous as it is not specific that parties were to attempt friendly negotiations before resorting to court. The way it is a party could resort to either. I also do find that the clause on arbitration is not on the contract that was executed by the parties but on the tender agreement.

That being the position, parties herein are before court and the latter alternative has been overtaken by events, calling for this court to determine the matter. It is my finding that parties are rightfully before court.

In the case of Garden Square Ltd –v- Kogo & Anor 2000 (KLR) 1695, Ringera J (as he then was) stated that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. This was in line with the decisions of the then Court of Appeal for East Africa in the case of Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd (1969) EA 696 in which Sir Charles Newbold, the President of that court stated as follows:-

**“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”**

The applicant has submitted that the respondent has no *Locus Standi* or capacity to institute this suit. That due to the lack of the said capacity, the suit is incompetent and should be struck out.

In the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that;

**“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others ..Vs.. City Council of Nairobi ( 1982) KAR 229, the Court also held that;-**

**“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi**

*means that he has no right to appear or be heard in such and such proceedings”.*

It is therefore evident that **locus standi** is the right to appear and be heard in court or other proceedings and literally, it means ‘**a place of standing**’. Therefore, if a party is found to have no **locus standi**, then it means he/she cannot be heard even if he has a weighty case. It is further evident that if this Court was to find that the applicant has no **locus standi**, then the applicant cannot be heard and that point alone would dispose of the entire suit.

The preliminary objection by the applicant is mainly that the respondent has no locus standi to institute the suit since the said company does not exist having conducted a search at the Companies registry in Hong Kong that revealed that the company in question was dissolved on 27/12/2019. The defendants further submit that the suit offends the provisions of *Order 4 Rule 1 (4)* of the *Civil Procedure Rules*. The respondent on the other hand has submitted that it operates under the name of KING INVESTMENT MANAGEMENT CO. LIMITED and not KING INVESTMENT MANAGEMENT LIMITED, the imaginary company indicate by the Applicant herein. The issue is therefore contested. In the circumstances and considering that the issue raised requires adducing of evidence, I find and hold that the Notice of Preliminary Objection dated 23<sup>rd</sup> April, 2021 does not raise pure points of law as it requires ascertainment of some facts. Instead, these are matters that are fit and proper for consideration in the substantive suit.

For the foregoing reasons, I do dismiss the Notice of Preliminary Objection dated 23<sup>rd</sup> January 2021 with costs to the respondent.

I now turn to the defendant’s/applicant’s application dated 28/5/2021 of which application seeks that the court does order the plaintiff/respondent to deposit security for costs on the ground that the plaintiff/respondent is a foreign company with its offices in the People’s Republic of China. The defendant/applicant suggests that the plaintiff/respondent do deposit a security of Kshs.50,000,000.00. The defendant/respondent has reasons to believe that the plaintiff/respondent will be unable to pay the defendant’s/applicant’s costs in the likely event that the defendant is successful in this suit.

An order for security for costs is a discretionary one as per the provisions of *Order 26 rule 1* of the *Civil Procedure Rules*. It confers discretion on the court, in recognition that there may be situations where a call for security for costs may be undeserved. In fact, even where a company is foreign or insolvent, the court may still decline to order for provision of security if circumstances do not merit the same. The discretion is however to be exercised judiciously by taking keen reference to the circumstances of each case. Such matters as;

- (a) absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs;
- (b) the general financial standing or wellness of the Plaintiff;
- (c) the bona fides of the plaintiff’s claim; or
- (d) any other relevant circumstance or conduct of the plaintiff or the defendant need be weighed; the list is not exhaustive. The court had this to say in the case of *GUFF ENGINEERING (EAST AFRICA) LTD v AMRIK SINGH KALGI*, at page 281 quoting the dictum of Lord Denning MR in *Sir Lindsay Parkinson & Co. Ltd (1973) 2WLR 632* and at page 284 quoting *Maughan L J in Gill All Weather Bodies Ltd Vs All Weather Motor bodies Ltd*.

**“...if there is reason to believe that the company cannot pay the costs, then, security may be ordered, but not must be ordered... Some of the matter which the court might take into account, such as whether the company’s claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again it will consider whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.**

**...the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company’s wand of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.**

In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay for costs. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proved. This was the holding in the case of *Kenya Education Trust Vs Katherine S.M. Whitton Civil Appeal No 310 of 2009*.

Guided by the foregoing legal principles, the issue for determination herein, is whether or not an order for security for costs is deserved against the plaintiff.

As observed above, one of the principles for consideration is the ability of the plaintiff to pay for costs in the event that he is not successful and that is the ground relied upon by the defendant/applicant herein.

In this instant case the defendant/applicant alleges to have conducted a search at the Companies registry in Hong Kong that revealed that the plaintiff is a non-existent company, having been dissolved on 27<sup>th</sup> December, 2019. The plaintiff has vehemently denied the said allegations and has gone further to state that it has no affiliations whatsoever with the company that the defendant/applicant conducted a search on. From the foregoing it is clear that there is contention on the issue of the existence of the plaintiff’s company. It is my view that this issue can only be fully deliberated upon by the case going for trial. It is also worth noting that the defendant/applicant has not adduced any evidence before this court to show the financial position on part of the plaintiff. It would therefore be unfair in the circumstances, to order the plaintiff to deposit the sought for, security for costs. Such if unchecked, can also limit access to justice.

The upshot therefore is that there is no reasonable cause as to why the court should exercise its discretion in favour of the defendant/applicant. The application therefore fails. Costs of the application shall be in the cause. Parties should take steps towards expeditious determination of the suit.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 29<sup>th</sup> day of June, 2021.**

In the presence of:-

Mr. Karita Mwanzia for the Plaintiffs/Respondent

Mr. Omboto for the first defendant/Applicant

Ms Gladys - Court assistant