REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION 379 OF 2018

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLE 40, 46, 47 AND 48 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION

IN THE MATTER OF TRAFFIC ACT, CHAPTER 403 LAWS OF KENYA

AND

IN THE MATTER OF KENYA ROADS ACT (2007)

BETWEEN

STEEL FORMERS LIMITED ....PETITIONER/APPLICANT

VERSUS

SGS (KENYA) LIMITED...1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY...................2ND RESPONDENT

JUDGMENT

PETITIONER'S CASE

1. The Petitioner pursuant to a Petition herein brought pursuant to **Articles 40, 46 and 48 of the Constitution** and duly filed on 2nd November 2018 seek the following prayers:-

> ***a) A declaration that the 1st and 2nd Respondents act of impounding and detaining the motor vehicle KCH 318H SHACMAN PRIME MOVER is illegal and unconstitutional.***
>
> ***b) An order directing the 1st and 2nd Respondents to unconditionally cause release of the motor vehicle KCH 318H SHCMAN PRIME MOVER to the Petitioner.***
>
> ***c) An order directed to the respondents to jointly and severally pay monetary compensation to the petitioner being Kshs.25,000/= per day for the days the Petitioner's motor vehicle has been out of business following the infringement of its rights to property as complained herein.***
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> ***d) General damages for loss of reputation be awarded to the Petitioner for breach of the Petitioner's complained herein.***
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> ***e) Exemplary and aggravated damages for the malicious, arbitrary and unconscionable conduct by the 1st and 2nd Respondents***

f) Costs of the Petition be awarded to the Petitioner.

2. The Petitioner’s case is that it is the owner of motor vehicle Registration No. KCH 318H Shacman Prime Mover which ownership was facilitated vide an asset financing arrangement with the National Industrial Credit Bank Limited, and which vehicle is subject of the Petitioner.

3. That on the evening of 18th October 2018 the said vehicle while in operation was impounded by the officers of the 1st and 2nd Respondents on the allegation of being overloaded in excess of 8100 kilogrammes vide a mobile weigh bridge machine performed by the 1st Respondent’s officers.

4. That subsequently upon challenge and protest by the managers of the Petitioner the impounded suit vehicle which was stationed at the Karen Police Station was driven under escort of officers form the 1st Respondents and Kenya Police to Mlolongo weighbridge to ascertain the correct reading of the actual weight of the motor vehicle by a more reliable immovable weighing machine. On 20th October 2018 after re-weighing the suit vehicle, it was established beyond peradventure that the suit vehicle had not exceeded the exile limit as such it had not overloaded as previously had been erroneously and malicious misrepresented by the officers of the 1st Respondent on the 18th October 2018.

5. That notwithstanding it is averred by the Petitioner that the suit vehicle was impounded at weighbridge yard in Mlolongo adjacent to Mololongo Police Station on account of the previous erroneous measurements and the Petitioner’s driver instructed to appear in Ngong Law Courts on 31st October 2018 to answer to charges of allowing / using the suit vehicle on the road with excess load of 8100 kilogrammes. It is averred that on 31st October 2018 the Petitioner’s driver upon appearing at Ngong Law Courts to answer to charges, if any, preferred against him, together with the advocates on record, on behalf of the Petitioner no charges were preferred against the petitioner’s driver.

6. The Petitioner contend that the Respondents actions of unilaterally, irrationally and arbitrary impounding the suit vehicle are unconstitutional, malicious and illegal. It is further urged that the Respondents jointly and severally lack the authority to illegally withhold the suit vehicle without following due process or without instituting any criminal charges in a court of law.

THE 1ST RESPONDENT’S RESPONSE

7. The 1st Respondent filed a Notice of Preliminary Objection dated 4th October 2010 having one single ground of objection thus:-

1. The first Respondent being an agent of a disclosed principal, to wit the second Respondent, is not liable and cannot be sued.

Further on 23rd July 2019 the 1st Respondent filed a further preliminary objection seeking the following:-

1) The first Respondent being an agent of the Second Respondent is not liable for acts done as such agent.

2) The Petition is incurably defective in that it has been brought without a resolution of the Company as required by law and generally without lawful authority of the Petitioner which is a limited liability Company.

8. The 2nd Respondent was duly served on 5th July 2018 as per affidavit of service by one Patrick Kimaile and todate the 2nd Respondent has only filed Notice of Appointment of Advocate through M/s Brenda RAO dated 6th November 2018 but no response has been filed thereafter.

9. By Courts Order issued on 7th November 2018 the Court ordered as follows:-

“1. That an order be and is hereby granted that the 1st and 2nd Respondents upon offloading the excess load if any by the Petitioner on motor vehicle KCH 318H SHACMAN PRIME MOVER presently held at Mlolongo Weighbridge yard to cause release of the said motor vehicle to the Applicant and the OCS Mlolongo Police Station to enforce compliance pending inter-partes hearing and determination of the application herein.

2. That the Respondents are granted 14 days to file and serve their respective response to the application and petition.

3. That mention be on 5th December 2018 for further directions.”

10. On 5th December 2018 the Court directed the parties to file responses and submissions to the preliminary objection. On 10th June 2019 when the matter came up for mention to confirm the position both parties were absent and matter was set for mention 23rd July 2019 and 2nd Respondent given time to file and serve response to the Petition and preliminary objection dated 4th December 2018. (now marked withdrawn) and preliminary objection dated 22nd July 2019. The Petition and Preliminary Objection were set down for hearing together by way of written submission. The Petitioner was granted 14 days from then to file and serve submissions and matter set down for highlighting on 23rd October 2019. On 23rd October 2019 the counsel for Petitioner sought more time to file submissions and was granted 21 days to do so. The highlighting was set down for 24/2/2020. On 24th February 2020 there was no appearance on part of the Petitioner nor were there any submissions filed on part of the Petitioner. Consequently the matter was set down for judgment on 25th June 2020.

ANALYSIS AND DETERMINATION

11. The only issues for determination in this preliminary objection and the Petition, are the two issues as per the 1st Respondents' Preliminary Objection as the Petitioner and 2nd Respondent did not file any submission as directed by the Court thus:-

i) Whether the 1st Respondent being an agent of the second Respondent is liable for acts done as an agent?

ii) Whether the Petition is incurably defective in that it has been brought without a resolution of the company as required by law and generally without the lawful authority of the petitioner, which is a limited liability company?

(i) WHETHER THE 1ST RESPONDENT BEING AN AGENT OF THE SECOND RESPONDENT IS LIABLE FOR ACTS DONE AS AN AGENT?

12. The 1st Respondent urges that it is a known principle of common law where there is a disclosed principal, that the agent cannot be sued for the acts done within the scope of its authority.

13. In the instant Petition, the 1st Respondent is admitted by the Petitioner is an authorized agent of the 2nd Respondent, who was a disclosed principal, at the time of impounding of the vehicle. The 1st Respondent was indeed as pleaded by the parties acting within the scope of its authority. The Petitioner no doubt acknowledges the principal – agency relationship existing between the Respondents by dirt of paragraph 2 of the Petition. It therefore follows from the pleadings that the Petitioner was aware of the 1st Respondent's principal, and thus proceeded to improperly enjoin the 1st Respondent to this Petition.

14. It is pleaded in the Petitioner's Petition that the 1st Respondent is a limited liability company registered under the Companies Act(Cap 486) Laws of Kenya which for purposes of this petition at the instance of the 2nd Respondent herein measures and assesses the weights, dimensions and capacities of vehicles using any road, and to provide measures to ensure compliance with rules relating to axle and load control under the provisions of the Traffic Act whose address for service for purposes of this Petition shall be care of ***M/s Onesmus Githinji & Co. Advocates, the Westery, 4th Floor, Mpesi Lane, off Muthithi Road, Opposite occidental plaza, P. O. Box 61579 – 00200 NAIROBI***.

15. In the ***City Council of Nairobi v. Wilfred Kamau Githua t/a Githua Associates & Another (2016) eKLR*** at page 9, paragraph 38 and 39, the Honourable Court stated;

> *"38. In ANTHONY FRANCIS WAREHEIM T/A WAREHEIM & 2 OTHERS V KENYA POST OFFICE SAVINGS BANK, CIVIL APPLN NOS. NAI 5 & 48 OF 2002, at page 10, this court unanimously held as follows:*
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> *"It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded a agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal."*
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> *39. In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal (the appellant). There is therefore no cause of action against the 2nd respondent.* ***The principle of common law is that where the principal is disclosed, the agent is not to be sued. In the circumstances of this case, the principal (the appellant) is disclosed and the agent (the 2nd respondent) cannot therefore be sued. There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinment of the 2nd respondent in this case is unwarranted."*** *(Emphasis mine)*

16. Further to the above in the case of ***Nepro Capital Investment Limited vs. S.G.S (Kenya) Limited and another (2018) eKLR*** the 1st Respondent filed a preliminary objection on the ground that it was an agent of a disclosed principal and in allowing the preliminary objection, the Honourable Court noted at page 5, paragraph 30 that;

> *"30. The petitioner argues that the 1st respondent cannot be separated from the 2nd respondent, and that the 2nd respondent was bound to inquire from the 1st respondent whether it had taken the appropriate action before forwarding the seized items to the 2nd respondent. The point, however, is that the actions of the 1st respondent are the actions of its principal, the 2nd respondent.* ***Any action of the 1st respondent, lawful or otherwise, is the act of the principal. The 1st respondent is accordingly improperly joined to these proceedings****. I will therefore in this petition consider the petitioner's claim against the principal, the 3nd respondent though I will make reference to the averments of th3e 1st respondent." (Emphasis mine)*

17. From the 1st Respondents preliminary objection on 1st ground and upon considering the law and authorities relied upon, I am satisfied that the 1st Respondent being an agent of the disclosed principal, the 2nd Respondent herein, the 1st Respondent an agent ought not to have been sued but the principal. I find no factors vitiating the liability of the disclosed principal to justify enjoinment of the 1st Respondent, the agent of the 2nd Respondent. I find the 1st Respondent is improperly joined and the claim against the 1st Respondent ought to be dismissed for these reasons.

(ii) WHETHER THE PETITION IS INCURABLY DEFECTIVE IN THAT IT HAS BEEN BROUGHT WITHOUT A RESOLUTION OF THE COMPANY AS REQUIRED BY LAW AND GENERALLY WITHOUT THE LAWFUL AUTHORITY OF THE PETITIONER, WHICH IS A LIMITED LIABILITY COMPANY?

18. The 1st Respondent argue that ***Order 4 Rule 1(4) of the Civil Procedure Rules 2010*** is relevant as regards its said preliminary objection. ***Order 4 Rule 1(4) Civil Procedure Rules*** provides as follows:

> *"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".*** *(Emphasis mine)*

19. The verifying affidavit where the plaintiff is a corporation is mandatory that it be sworn by an officer of the company duly authorized under the seal of the company to do so. In the instant Petition what is on record is a supporting affidavit by ***James Kamau Mwaura*** where by in paragraph 1 he states:-

> ***"That I am an adult male of sound mind an engineer by profession and the Managing Director of the Petitioner herein hence fully competent and duly authorized to swear this affidavit."***

20. The deponent avers that he was duly authorized by the petitioner to swear the affidavit but there is no evidence of his duly authorization under the seal of the company as provided under ***Order 4 Rule 1(4) of the Civil Procedure Rules***. In addition to this there is no attached copy of resolution of the Petitioner either approving the institution of this petitioner or appointing Mr. Onesmus Githinji and Company Advocates to institute the Petition on its behalf.

21. In ***Kenya Commercial Bank Limited vs. Stage Coach Management Ltd (2014) eKLR***, in making its determination to the Defendant/Applicants preliminary objection, the Court relied on the ***East African Portland Cement Ltd*** case where Justice Mumbi Ngugi, stated thus :-

> *"33. In Affordable Homes Africa Limited vs Ian Henderson & 2 Others HCCC No.524 of 2004, Njagi J observed that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers (see the decision of the Court in Automatic Self Cleansing Filter Syndicate v. Cuninghame [1906] Ch.34, CA.); that it was therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the company. The Court (Njagi J) observed that it was common ground that there was no authority from the board of Directors to institute the suit, and consequently, he held as follows:*
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> > *'**The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reasons, the preliminarily objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff'."*** *(Emphasis mine)*

22. The Court in ***Kenya Commercial Bank case*** *(supra)*, in allowing the applicant's preliminary objection at page 7 paragraph 13 & 14 ruled;

> *"As regards the necessity for a company Resolution to back the institution of the suit, Odunga J. in his Judgment in the Leo Investments case (supra) referred to the holding of Hewett, J. in Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000 as follows:*
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> *"**It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect**… As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."*
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> *14. In this case, there has been no such ratification even after the Plaintiff, through its advocates or otherwise, became aware of the preliminary Objection filed by the Defendant dated over a year ago now. In my view, the Plaintiff has been lackadaisical to say the least. As a result, I exercise my discretion to uphold the Defendant's Preliminary Objection and I dismiss this suit with costs to the Defendant." (Emphasis mine)*

23. Similarly ***Ibacho Trading Company Limited v. Samuel Aencha Ondora & 3 Others (2017) eKLR,*** in allowing the Applicant's preliminary objection the Court n toed at page 5, paragraph 32 and 33 as follows:

> *"32. In the instant case the plaintiff did not avail any written document before the court to show that the filing of the suit was authorized by the company under seal. Indeed the plaintiff did not produce any minutes or formal resolution of the company appointing M/s Ombachi & Co. Advocates to sue on behalf of the plaintiff company.*
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> *33.* ***Courts have held time and again that seekgin such authority before the institution of a suit is mandatory.*** *In East African Portland Cement Ltd vs. The Capital Markets Authority & 5 Others Petition No. 6000 of 2013 in which the Ugandan case of Bugerere Coffee Growers Ltd vs Seraduka & Another (1970) EA 147 was quoted, it was held,* ***in dismissing the suit, that when coman8ies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes but no resolution had been passed authorizing the proceedings in the case. The court further held that where an advocate has brought legal proceedings without an authority, the said advocate becomes personally liable to the defendants for costs."*** *(Emphasis mine)*

Hence, Okwany J. in ***Ibacho Trading Company Limited*** *case ruled as follows;*

> *"My humble view is that the plaintiff was lackadaisical in pursuing their case and **it is my finding that the failure to tender the company resolution authorizing the case dealt a fatal blow to their case."*** *(emphasis mine)*

24. The Courts have clearly spoken on the need of being armed with a resolution of the company as required by law before a party can purport to commence an action before Court. The board resolution sanctioning the commencement of a suit in its favour is always mandatory and necessary. It is not a walk in a park. Such a suit is dead at the first instance and cannot be revived by an amendment. I find the Petitioner's failure to respond to the 1st Respondent's submissions squandered an opportunity for the Petitioner to be heard. The Petitioner's failure to file the Company Resolution sanctioning the commencement of the action by the company, leads this Court to no other conclusion but to find and hold that this Petition is fatally defective and it is for striking out.

25. ***The upshot is that the Preliminary objection dated 22nd July 2019 succeeds. The Petitioner's Petition is accordingly fatally defective and the same is struck out with costs to the 1st Respondent to be borne by the Petitioner.***

Dated, Signed and Delivered at Nairobi on this **25th** day of **June, 2020.**

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J. A. MAKAU

JUDGE