



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 69 OF 2018

IDEAL LOCATIONS LTD.....PLAINTIFF

VS

1. NAKUMATT HOLDINGS LIMITED (UNDER NEW ADMINISTRATION)

2. PETER OBONDO KAHI

3. PKF CONSULTING LIMITED

4. ATUL SHAH.....DEFENDANTS

R U L I N G

1. For determination by the court is the Defendants' Notice of Preliminary Objection dated 7/9/2018 by which the defendant contends and prays that:-

i. "The Plaintiff, and indeed, the entire proceedings herein are fatally defective in light of the express Provisions of:-

a) Sections 5 and 6, Civil Procedure Rules, 2010, Laws of Kenya;

b) Sections 560, 567, 570, 576, 580, 584, 585, 586, 594, 620 and Section 5, Fourth Schedule, Insolvency Act, 2015, Laws of Kenya;

c) Sections 5, 6, and 7, Companies Act, 2015, Laws of Kenya;

d) Order 4 Rule 1(2), (4) and (6), Civil Procedure Rules, 2010, Laws of Kenya".

2. At the hearing ground (b) of the objection was abandoned and counsel opted to canvass and pursue grounds (a) (c) and (d). The gist and thrust of the objection is that the suit is bad in law for being an affront to the cited provisions of the law. Being so bad, the objection does not seek any specific action by the court, but it is axiomatic that if a suit is bad and found to be so bad by the court then the outcome must be that it gets struck out as the court has no justification to entertain a bad and untenable suit.

3. In urging the objection the Defendants filed a written submissions and a separate bundle of authorities 12/11/2018 and 9/11/2018 respectively. On its side the plaintiff filed submissions making reference to decided case but without availing such copies even though the citations were indeed provided.

4. I have had the benefit of reading the submissions and the case law cited as well as the statutory provisions and I have formed the opinion and view that the following issues isolate selves for determination by the court.

i. Whether or not the suit affronts the provisions of Section 5 & 6 of the Civil Procedure Act?

ii. Whether the suit sits in consonance and compliance with the provisions of Section 5, 6 & 7 of the Companies Act, 2015?

iii. Whether or not the provisions of Order 4 Rule 1(2) (4) & (6) of the Civil Procedure Rules have been affronted?

iv. What then is the fate of the suit upon the determination of the foregoing three issues?

5. I propose to deal with the three substantive issues seriatim and a determination thereof would then dictate the determination of the last issue including the issue of who pays the costs of the suit or the notice of preliminary objection depending on what the court determines the fate of the suit to be.

Sections 5 & 6 of the Civil Procedure Act

6. The two provisions of the Act, rather than the Rules as the objection asserts, are difficult to relate with the facts revealed before the court in this matter. Section 5 essentially provides the unlimited jurisdiction of the court save for situations where the same is barred expressly or by implication. There is no assertion that this court lacks jurisdiction by dint of any express enactment, by case law or by any implication. I therefore find no merit in that objection and declare that it be dismissed for having been improperly taken.

7. Equally Section 6, is the statutory enactment of the common law principle of *res sub-judice*. It bars a court from proceeding with the hearing of a matter whose subject matter of dispute is directly and substantially an issue in a formerly instituted matter between the same parties or parties under whom they claim. Where such is raised and proved, the court has the discretion to stay the latter suit pending the determination of the earlier suit unless it be proved that there has been outright abuse of court process of the court or design to overreach^[1].

8. Here, in this file, there is no material that there is a previously filed suit between the parties herein or parties claiming under their titles and concerning the issues pleaded for determination. This limb, I must say was equally improperly taken and does not amount to a preliminary objection properly so called. It cannot succeed but must be dismissed. This limb of the objection must be seen to have been half-heartedly taken because in both written and oral submissions nothing absolutely, was said in urging then. They were, as it were merely thrown unto the laps of the court for the court 'see what to make of them'. It is at such a time that I must remind counsel and their clients, as the Court of Appeal for Eastern Africa said some 50 years ago that, the proper raising of points as preliminary objection does nothing but to increase costs, confuse issues and delay determination of court disputes and must be stopped^[2].

9. I have equally looked at Sections 5 6 & 7 of the Companies Act 2015, and I must say without much ado that the same have no relevance to what constitutes a proper suit or how suits by companies need be instituted.

Order 4 Rule 2(1) (4) & (6)

10. Ample and elaborate submissions were made on this limb of the objection and court decisions cited to support the defendants' contention that a suit filed without a resolution of the company is incompetent and liable to be struck out. To make it clear from the onset, it is desirable that the provision be set out here. It provides:-

“Particulars of plaint (Order 4, rule 1)

2. The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

4. 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.

6. 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”.

10. I understand the rationale behind the introduction of this provision in the Rules to have been for the plaintiff to own the decision and all the averments in it including the fact that there is no suit pending and there has never been a suit between the parties over the same subject matter.

11. One of the mischiefs intended to be cured was the practice in personal injury claims where double claims would be filed some without the concurrence of the claimants. With the verifying affidavit, being an oath it was hoped that plaintiffs would appreciate the need to regard an oath seriously and be cautious not to lie in their pleadings with the obvious consequence of thus appurtenant that to me was the historical justification of the rule.

12. For this determination there cannot be a dispute regarding compliance with the dictates of Order 4 Rule 1(2) in that there is a verifying affidavit sworn by one **Anish Doshi** which states at paragraph 2 & 3 as follows:-

Paragraph 2: THAT I have read and understood

the contents of the plaint and do

hereby verify that the contents

therein are correct.

Paragraph 3: THAT there has been no other suit pending and

that there has been no previous proceedings in

any court between the Plaintiff and the

Defendant over the same subject matter.

13. I am in no doubt that there is due and unassailable compliance with Order 4 Rule 1 (2) of the rules. How about Rule 1(4) which demand that the verifying affidavit to be sworn by an officer of the corporation duly authorized under seal of the company to do so?

14. Indeed the law mandates that the authority by given under seal but there is no requirement that such authority be filed with the plaint or the verifying affidavit. Even the discretion given to court is not mandatory striking out. The court must under the new constitutional dispensation, strive to sustain suits for determination on the merits rather than terminating same summarily and in a technical manner that runs affront the constitutional dictate that justice be administered without undue regard to technicalities.^[3]

15. While I appreciate the reasoning in the cited persuasive decisions by the High Court and courts equal status cited to the effect that a suit filed without an authority under seal being exhibited is defective, I am aware of the binding decision by the Court of Appeal in **Kenya Commercial Finance Co. Ltd vs Richard A Onditi (2010)eKLR** for the proposition of law that a court of law should weigh the options available to a party before striking out an action. In this matter, I do not consider that the justice of the case would be served by striking out but rather the plaintiff ought to be given a chance to avail the resolution before the matter is fixed for hearing of the suit by taking of evidence. In my view, whether or not there was given authority under seal is a matter of evidence that cannot be resolved by the current preliminary objection.

16. I would reiterate the foregoing determination and find that even authority to the advocate can be filed at any time before the evidence is taken.

17. The upshot is that the preliminary objection was improperly taken and the same cannot be upheld but is dismissed with costs. Having so dismissed the objection it then follows that the suit must be considered on the merits.

Dated and delivered at Mombasa on this 30th day of April 2019.

P.J.O. OTIENO

JUDGE

^[1] Ladopharma Company Ltd and 2 others -vs- National Bank of Kenya Ltd,(2005)eKLR

^[2] Per Lord Sir Charles Newbold P: In Mukisha Biscuits vs West End Distributors Ltd [1969] E.A. 696 at 701 Para B

^[3] Trust Bank Ltd vs Amalo & Co. Ltd [2009] KLR 63