



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 228 OF 2001

R.M. PATEL & PARTNERS.....PLAINTIFF

VERSUS

RIFT VALLEY AGRICULTURAL

CONTRACTORS LIMITED.....RESPONDENT

RULING

[1] The Plaintiff herein seeks to recover the sum of **Kshs. 52,597,434.07** from the Defendant in respect of goods sold and delivered, work done, repair charges and spare parts supplied to the Defendant between **February 1996** and **September 1999**. The Defendant denied each of the specific allegations set out in the Plaintiff's Amended Complaint and lodged a Counterclaim for, *inter alia*, refund of some **Kshs. 22,475,709.80** that it allegedly paid the Plaintiff on account, and which had not been accounted for by the Plaintiff. It was in the light thereof that the Defendant filed the Notice of Motion dated **25 August 2017** pursuant to **Section 3A** of the **Civil Procedure Act, Order 1 Rule 10(2)** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010** for orders that:

[a] The Court be pleased to lift the corporate veil in respect of the Defendant to facilitate the joinder of its former director, **Maheshkumar Manibhai Patel**, as a party in this suit;

[b] That the Respondent **Maheshkumar Manibhai Patel** be enjoined in this suit as a Defendant or in any other capacity as the Court may deem just;

[c] That the costs of the application be costs in the case.

[2] In that application, the Defendant cited **Maheshkumar Manibhai Patel**, (hereinafter the Respondent) as a party. It was premised on the grounds set out on the face thereof and the affidavit sworn by **Benson Thiru Karanja** on **22 August 2017**; the main ground being that this suit is in respect of a myriad of transactions that took place at a time when the Respondent was a director of the Defendant and was therefore involved in active and exclusive management of the company. It was therefore the contention of the Defendant that most, if not all, of the transactions giving rise to the cause of action herein were sanctioned, overseen, authorized and or done by the Respondent without the authority, approval and/or knowledge of the Defendant through its Board of Directors.

[3] It was further the contention of the Defendant that, as one of its founding members, the Respondent is in possession of a wealth of information and documentation relevant to this case; and that his presence and participation in the suit as a party will enhance the effectual and complete adjudication of the questions involved in this suit. In the Defendant's view, no prejudice will be suffered by any of the parties if the application is allowed, as each party will have the opportunity to ventilate its case from a position of knowledge.

[4] Upon being served with the application, the Respondent instructed the law firm of **M/s Gumbo & Associates** to act for him herein; whereupon a Replying Affidavit was filed in response to the application along with a Notice of Preliminary Objection dated **19 September 2017**. This ruling is therefore confined to that Preliminary Objection, which was premised on the following grounds:

[a] The application is bad in law, having been instituted against the provisions of the **Limitation of Actions Act, Chapter 22** of the **Laws of Kenya**, hence divesting the Court of the requisite jurisdiction to hear and determine it;

[b] The application has been filed without the authority of the Defendant's Board of Directors;

[c] The application offends the doctrine of *sub judice* as the issues herein are the subject matter of another suit, being **Nairobi High Court Civil Suit No. 1535 of 1999**.

[5] Thus, it was on the basis of the aforesaid grounds that the Respondent prayed that the Defendant's application be struck out with costs. The Preliminary Objection was canvassed by way of written submissions pursuant to the Court's directions dated **18 July 2018**. Counsel for the Respondent, in his written submissions dated **27 July 2018**, developed the three strands of the Preliminary Objection and pointed out that the cause of action against the Respondent is hinged on allegations of fraud that were committed between **1992 and 1997**; and therefore that the same is barred by **Section 4(1) of the Limitation of Actions Act**. For this proposition, Counsel relied on **Solomon Curukia M'ibaya vs. Grace Ntakira & 3 Others [2014] eKLR**.

[6] In respect of the second ground, it was the submission of Counsel for the Respondent that the application was filed without the authority of the Defendant's Board of Directors or by a resolution in a general or special meeting of the Defendants members. The case of **East African Portland Cement Ltd vs. Capital Markets Authority & 4 Others [2014] eKLR** was relied on to augment the Respondent's assertion that, in the absence of a board resolution sanctioning the filing of the application, it is improperly before the court, and therefore, ought to be struck out with costs.

[7] The Respondent's last ground was premised on **Section 6 of the Civil Procedure Act** and the fact that there is another suit pending between the parties in which the issues raised herein, in particular, the allegations of fraud and improper conduct, are also in issue, namely, **Nairobi High Court Civil Case No. 1535 of 1999**; a suit filed by the deponent of the Supporting Affidavit. Thus, on the authority of **Kenya Planters Co-operative Union Limited vs. Kenya Cooperative Coffee Millers Limited & Another [2016] eKLR**, the Court was urged to find that the application offends the *Sub Judice* Rule.

[8] On the Defendant's behalf, written submissions were filed herein on **19 September 2018** by the law firm of **Mirugi Kariuki & Co. Advocates**. Counsel relied on **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** for their argument that the Respondent's Preliminary Objection fails to meet the applicable three-pronged test, namely:

- [a] That a preliminary objection should raise a pure point of law;
- [b] That it should be premised on the assumption that all the facts pleaded by the other side are correct; and
- [c] That it should not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

[9] It was further the contention of the Defendant that failure by the Respondent to cite, in a concise manner, the provisions of law being offended renders the Preliminary Objection fatally defective. Counsel relied on **HCCA No. 34 of 2005 (Msa) Guinness Construction and Housing Co. vs. Abdul Masor** and **HCCC No. 76 of 2009: Salim Said vs. Khatimy Group Ltd**. It was further the submission of the Defendant that, since a Supplementary Affidavit has since been filed evidencing the resolution to sue by the Defendant's Board of Directors, the Respondent's second ground has been overtaken by events; and that, in any event, that is a matter of fact and therefore outside the realm of a preliminary objection. Counsel similarly argued that the question as to whether or not the Defendant's cause of action against the Respondent is barred by limitation is a question of both law and fact, to be resolved by a consideration of the evidence; for which reason, reliance was placed on **Leputei Ole Koros & Another vs. Attorney General and 3 Others [2016] eKLR**; **A K N vs. J N M [2014] eKLR** and **Thiba Mining Hydro Co. Ltd vs. Joseph Karu Ndigwa [2013] eKLR**.

[10] As was well-explicated in **Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd [1969] E.A 696**, a preliminary objection consists of:

"...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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 the contract giving rise to the suit, to refer the dispute to arbitration."

[11] Accordingly, the first question to pose is whether the argument that the application is statute-barred is tenable. In this respect, there is no dispute that the suit was filed within time; and that the main parties, namely, the Plaintiff and the Defendant, have filed their pleadings. There is no assertion that either the Plaintiff's claim or the Defendant's counterclaim, is time-barred from the standpoint of **Section 4(1) of the Limitation of Actions Act**. To my mind, the Defendant's application dated **25 August 2017**, which seeks the joinder of the Respondent to the suit, does not purport to raise a new cause of action. To the contrary, it is explicit at paragraph 3 of the Grounds and from the averments set out in the Supporting Affidavit that the proposed joinder of the Respondent was premised on the simple fact that he was a director of the Defendant at the material time; such that his liability, if any, would be hinged on the same facts already pleaded herein by the Defendant. Accordingly, the argument that the Defendant's cause of action against the Respondent is barred by limitation is clearly untenable; more so because the Respondent is yet to be enjoined and therefore yet to plead its case.

[12] As was pointed out by Counsel for the Defendant, the argument that no resolution was given by the Defendant for the filing of the application has been overtaken by events, in that, in the Supplementary Affidavit filed herein on **19 July 2018**, sworn by **Benson Thiru Karanja** on behalf of the Defendant, does have annexed to it a Directors' Resolution dated **6 June 2017** sanctioning the filing of the application by the Defendant's Advocates on record. Likely, the Respondent had in mind the authority of **Bugerere Coffee Growers Ltd vs. Sebaduka & Another [1970] EA 147**, wherein it was held thus:

"When companies 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; no such resolution had been passed authorizing these proceedings."

[13] Similarly, in **Affordable Homes Africa Ltd vs. Henderson & 2 Others [2004] eKLR**, it was held that:

"... As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily

the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty...It is common ground that in the instant suit, there was no authority from the Board of Directors to institute this suit...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 reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff."

[14] However, it is noteworthy that in both cases, the authority in issue revolved around the companies' sanctioning the commencement of the suit itself. In this case the Defendant has been sued by the Plaintiff; and the application in issue is one of the Defendant's strategies in defending itself from liability; and is therefore a response to the issues raised in the Plaintiff's Plaint. Thus, whereas **Order 4 Rule 1(4)** of the **Civil Procedure Rules** expressly makes specific mention of situations "...where the Plaintiff is a corporation..." there appears to be no indication, either in that provision or elsewhere in the Rules, that such a requirement is applicable to corporate defendants. Indeed, in Saraf Limited v Augusto Arduin [2016] eKLR thus:

"...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (see Solomon & Solomon [1897] AC 22 (H. L.)) Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law. It has always been the law that directors are the persons who have authority to act for the company but the majority of the members of the company are entitled to decide, even to overrule, the directors..."

[15] In any event, the Bugerere Case has since been overruled and a different path charted by the Court of Appeal thus, in the case of Wanyiri Kihoro vs. Konahauthi Ltd [2017] eKLR:

The second issue seems to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147. The court in that case held:-

"When companies 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 this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."

However, the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court in the case of Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000 where the Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998. The latter case restated the law as follows:-

"... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."

[16] Thus, I take the view that the argument that a resolution by the Directors or Shareholders of the Defendant was a prerequisite for the filing of Notice of Motion dated 28 August 2017, is untenable. Moreover, the point was wrongly taken, in that it is not an agreed fact; and therefore would require proof, for the Court to rule on whether or not such authority was given. The words of Sir Newbold, P. in the Mukisa Biscuits Case are apt:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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."

[17] Similar expressions were made in Oraro vs. Mbaja [2005] 1 KLR 141 by Hon. Ojwang, J. (as he then was) thus:

"...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

[18] Regarding the argument that the matter is *sub judice*, it is a peremptory requirement of **Section 6** of the **Civil Procedure Rules** that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having

jurisdiction in Kenya to grant the relief claimed."

[19] The underlying rationale for this provision is not difficult to discern. It is to prevent courts of concurrent jurisdiction from simultaneously hearing two parallel suits in respect of the same subject matter. Hence, in **Kenya Airports Authority vs. Anthony Mutumbi Wachira [2015] eKLR**, the Court of Appeal took the view that:

"We think, as a matter of policy of the law that finds expression in Section 6 of the Civil Procedure Act for instance that no court should proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief claimed. The sound object behind that policy is to prevent courts of concurrent jurisdiction from simultaneously trying twoparallel suits or proceedings in respect of the same subject matter in issue."

[20] The question then, is whether the issue of *sub-judice* that has been raised herein by the Defendants as a Preliminary Point, has been pleaded, or whether it arises by clear implication out of pleadings. As has been pointed out herein above, the Respondent is yet to be enjoined herein. Also, it would require further inquiry for the Court to appreciate the nature of the dispute in **Nairobi HCCC No. 1535 of 1999** to enable it make a decision as to whether or not this suit is *sub judice*. It is manifest therefore that the ground was prematurely raised.

[21] All in all, it is my considered view that the Respondent's Preliminary Objection is entirely misconceived. The same is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST 2019.

OLGA SEWE

JUDGE