REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E100 OF 2018

MUTHATHI MUSYOKA MUNYAMBU.....1ST PLAINTIFF

MUSYOKA MUNYAMBU.....2ND PLAINTIFF

SHADRACK VUNDI MUSYOKA.....3RD PLAINTIFF

VERSUS

COUNTY CAPITAL LIMITED .....1ST DEFENDANT

CAROLINE MUMBI KIBARU.....2ND DEFENDANT

BENSON KARIUKI IRERI.....3RD DEFENDANT

RULING

Background

1. Through a plaint filed on 4th October 2018, the plaintiffs herein sued the defendants for breach of an Investment Agreement and sought the following orders:

a) The sum of Kshs 28,680,471.60:

b) Interest on kshs 28,680,471.60 at the rate of 48% per annum from 12th September 2018 until payment in full.

c) Cost of the suit plus interest thereof at court rates.

d) Such further orders as this Honourable court may deem just to grant.

2. The defendants defended the suit through a statement of defence and Notice of Preliminary objection filed on 9th November 2018. The defendant listed the following grounds in the said notice of preliminary objection (PO).

1. That the suit offends the mandatory provisions of the law.

2. That the suit is thus bad in law and fatally defective.

3. This ruling is in respect to the said notice of preliminary objection. Parties filed their respective written submissions which they highlighted at the hearing as follows:

The defendants' submissions.

4. Mr. Morara, learned counsel for the defendants submitted that the gist of the Preliminary objection is the fact that Mr. John Mulinge Musyoka has a power of Attorney (POA) donated to him by the plaintiffs and that under Order 9 Rule 2 of the Civil Procedure Rules, he was required to seek the leave of the court before filing the suit as one cannot exercise the power of attorney in court proceedings before obtaining the leave of the court.

5. Counsel relied on the decision in ***Carolyne Mpenziwe Chipande v Wanje Kazungu Baya Malindi*** HCCA No. 14 of 2013 wherein it was held that:

> ***"No party should presume to act or appear before the court merely on the basis of the power of attorney without first obtaining the court's approval, howsoever sought. The appellant believed himself properly authorized by the power of attorney alone to act on behalf of the donor. That was an erroneous understanding of the rules."***

6. Counsel cited the decision of Matheka J. in ***Beverly Wambari Kingori v David Kiprotich Arap Too & 2 Others*** Kakamega ELC Petition No. 23 of 2016 wherein it was held:

> ***"…I fully agree with the reasoning in these cases. The donee cannot seek the same retrospectively. I find that the proposed donee in this matter has signed the affidavit deponed by the applicant/petitioner which goes to the root issues in this matter. The petition and application was filed without the leave of the court. I find the preliminary objection has merit and uphold the same. The court orders that petition and notice of motion dated 6th March 2016 be struck off with costs to the 1st respondent."***

Plaintiff's submissions

7. Mr. Nyaburi, learned counsel for the plaintiff opposed the preliminary objection on the grounds that it is vague, raises contested issues of fact, is based on a provision that is not couched in mandatory terms and calls for the exercise of judicial discretion.

8. In a nutshell, counsel maintained that the preliminary objection does not meet the threshold of a preliminary objection as is envisaged in the celebrated case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd*** (1969) EA 696 on what constitutes a preliminary objection.

9. For the argument that the preliminary objection is vague, counsel relied on the decision in the case of ***Grace Mwenda Munyiri v Trustees of Agricultural Society of Kenya*** [2017] eKLR wherein the court held:

> ***" We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned. See the case of Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004) eKLR this court stated as follows:***
>
> ***We must point out from the onset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a preliminary objection and files in court a notice to that effect and is subsequently served on other parties to the suit. The preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that……the application is bad in law? Without saying more does not assist the other parties to neither the suit nor the court to sufficiently prepare to meet the challenge. It is only at the hearing that the preliminary objection is amplified and elaborated. It gets the other side unprepared and is reminiscent of trial by ambush."***

Determination

10. I have considered the preliminary objection raised by the defendants herein and the rival submissions made by the parties' respective counsel. The main issue that falls for determination is whether the preliminary objection is merited and if so, whether the plaintiffs' suit should be struck out for being fatally defective.

11. The preliminary objection is founded on the provisions of Order 9 Rule 2(a) of the Civil Procedure Rules(CPR)which stipulates as follows:

> ***"2 The recognized agents of parties by whom such appearances, applications and acts may be made or done are-***
>
> > ***(a) Subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearance and applications and do such acts on behalf of parties."***

12. In ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*** (supra) the court held that:

> ***''So far as I'm aware, 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."***

This was followed by the judgment of **Sir Charles Newbold** in the same case wherein he stated as follows:

> ***"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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"***

13. This court must now consider whether the issues raised in this Preliminary Objection are matters of fact or law. I note that the preliminary objection, as filed by the defendants was not clear on the nature of the objection raised to the plaint and it was only after the written submissions were filed that it became clear that the objection was in reference to the provisions of Order 9 Rule 2(a). Needless to say, the importance of providing sufficient particulars or details of the objection raised by a party to a suit cannot be gainsaid.

14. My finding is that the defendant's mere statement that the plaintiffs' suit is fatally defective was not enough as they needed to state the exact nature of the objection so as to enable the plaintiffs prepare to meet the challenge. Be that as it may, it is trite law that a preliminary objection, on a point of law, can be raised at any point during the proceedings and one can therefore say that the plaintiffs were made aware of the true nature of the defendants' objection upfront, through the defendants' written submissions and that they were therefore able to adequately respond to it.

15. Turning to the gist of the objection, it is not in dispute that the verifying affidavit to the plaint was sworn by a donee of a power of attorney, one **John Mulinga Musyoka** on behalf of the 1st and 2nd plaintiffs. At paragraph 1 of the verifying affidavit the donee avers as follows:

> ***"That I am a male adult of sound mind and understanding. In my capacity aforesaid I am fully conversant with the facts of this case and I am duly authorized to swear this affidavit on behalf of the 1st and 2nd plaintiffs, hence competent to do so. I annex hereto true copies of the General Power of Attorney issued by the 1st and 2nd plaintiffs marked "JMM-1".***

16. From the outset, it is worthy to point out that the deponent of the verifying affidavit is not one of the 3 plaintiffs in the suit. It is crystal clear that all that the donee did was to swear the verifying affidavit. It is also not disputed that the donee had not complied with the provisions of Order 9 Rule 2(a) of the Civil Procedure Rule as at the time that he swore the verifying affidavit.

17. The question which then arises is whether the failure by the donee to comply with the provisions of Order 9 Rule 2(a) of the Civil Procedure Rule renders the plaintiffs' entire suit fatally defective as suggested by the defendants.

18. I find that the answer to the above question is to the negative as courts have severally held the view that a defect in a verifying affidavit is curable through an order that a fresh and compliant affidavit be made and filed on record. This was the position taken by Ringera J. (as he then was) in ***Microsoft Corporation v Mitsumi Computer Garage Ltd & Another*** [2001] KLR 470 wherein it was held that:

> ***"According to the provisions of Order 3 Rule 2 an affidavit by a corporation can only be made by an officer thereof who is duly authorized by the corporation and this a matter of substance and not form as it is incompetent for any other person howsoever conversant with the averments in the plaint he may be to make an affidavit on behalf of the corporation…. A person employed by a corporation with broad responsibilities is obviously an officer of the corporation as neither the Companies Act not Civil Procedure Act and the Rules have assigned the term "officer" any special meaning…..The failure by the deponent to state that she makes the affidavit with the authority of the corporation is a substantial defect which renders the said affidavit incompetent and courts its being struck out……A Country Manager is an officer of a Corporation on proper interpretation of Section 2 of the Companies Act, Cap 486 and by extension Order 3 Rule 2© of the Civil Procedure Act…..Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fairly orderly and predictable manner, not fetter or choke it and where is it evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedures, which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments this affected and the court should rise to its higher calling to do justice by saving the proceedings in issue….The purpose of verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record."***

19. In the present case, I note that the plaintiffs have already taken steps to regularize the defect in the verifying affidavit by filing an application dated 24th June 2019 in which they seek, *inter alia*, orders for the court's approval of the plaintiff's said deponent of verifying affidavit. I am of the humble view that the defect in the verifying affidavit is not only curable but does not go to the substance of the case or prejudice the defendants' case in any manner whatsoever.

20. Consequently, I find that the defendants' preliminary objection is not merited and I dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 24th day of October 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Matata for Nyaburi for the plaintiff.

Court Assistant – sylvia