



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 25 OF 2014

IBACHO TRADING COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

SAMUEL AENCHA ONDORA1ST DEFENDANT

WILLIAM ONSONGO MAYAKA.....2ND DEFENDANT

MOSE AYIEKO.....3RD DEFENDANT

SAMUEL OMOKE MAGATI.....4TH DEFENDANT

JUDGMENT

1. Through its plaint dated 10th December 2014, the plaintiff herein, Ibacho Trading Company Ltd, sued the 4 defendants seeking the following orders:

a) Permanent injunction do issue against the Defendants by themselves, servants, agents or any person acting under their instructions or control from calling meetings of the plaintiff shareholders except in the manner provided under the Memorandum and Articles of Association of the Plaintiff, receiving rent, managing and/or interfering in any manner the running of affairs of the plaintiff.

b) A declaration that the Defendants are not duly elected directors of the plaintiff and have no mandate to act on behalf of the plaintiff in any manner whatsoever.

c) Costs of the suit.

2. The plaintiff's case was that on or about 2nd December 2014, the defendants unlawfully wrote to the plaintiff's directors asking them to cease acting as directors or declaring themselves as carrying on the management of the company. The plaintiff further claimed that the defendants had instructed the plaintiff's tenants to remit monthly rents, in respect to property known as **Nyaribari Masaba/Bomobea/1573** and **Kisii Town/Block III/120** (hereinafter "**suit properties**") to them.

3. The plaintiff claims that the defendants unlawfully and wrongfully called for meetings of shareholders of the company thereby causing confusion and interference with the running and management of the affairs of the plaintiff company.

4. The plaintiff further contends that the defendants' actions are likely to cause loss and injury to the company unless the defendants are stopped from interfering with the plaintiff's affairs.

5. In their defence filed on 19th January 2015, the defendants state their letter to the plaintiff's directors dated 2nd December 2014 was lawful and in line with the plaintiff's Memorandum and Articles of Association (MAA) and in accordance with the shareholders resolutions made at a Special General Meeting held on 18th November 2014.

6. The defendants contend that they were duly elected as directors of the plaintiff company and that they therefore had the mandate to manage the affairs of the plaintiff company.

7. The defendants' case was that no cause of action had been exhibited by the plaintiff and that they notified the plaintiff of their intention to raise a preliminary objection regarding on the competence of the suit before the court.

8. At the time of filing of the plaint, the plaintiff also filed an application, under certificate of urgency, seeking to stop the defendants from purporting to act/conduct the affairs of the plaintiff company whereupon ex-parte orders of injunction were issued pending the inter-partes hearing of the application.

9. During the inter-partes hearing however, both parties agreed to hold a Special General Meeting (SGM) so that elections of directors could be conducted which elections could have settled the company directorship dispute that appeared to be the main gist of the case before the court.

10. It was thereafter reported to the court that while one faction of the shareholders, led by the defendants herein attended the Special General Meeting where they were elected as directors, another faction composed of the former directors denied that any Special General Meeting was ever held and as a result, the parties agreed to list the main suit for hearing.

The plaintiff's case

11. The plaintiff presented the evidence of one witness PW1, John Kenyega Mochama who gave a brief background on the formation and registration of the plaintiff company, its properties and in the shareholders who included the defendants.

12. He stated that he was the chairman of the company having been elected to the said position in the year 2007 and that he was one of the directors that are currently registered with the registrar of companies according to the returns made in 2015

13. According to PW1, the claim before the court was that the defendants wrote a letter dated 2nd December 2014 to the plaintiff copied to the police at Ramasha and the Assistant County Commissioner in which they demanded that the directors cease from managing the affairs of the company. He produced the letter as Pexhibit 6 and stated that the same was written without minutes contrary to the company rules. He maintained that there had been no notice of elections or change of office holders.

14. He stated that at the time the contested letter was written, the company had already issued a notice of an Annual General meeting (AGM) that was slated for 18th December 2014 wherein elections was one of the items on the agenda.

15. On cross examination, PW1 stated that the plaintiff is a private company limited to 50 members while the register of members tendered before the court showed that the company had 1,738 members. He denied knowledge of the Special General Meeting held on 18th November 2014 wherein the defendants were allegedly elected as directors. He confirmed that the AGM slated for 18th December 2014 did not take place because of this case which was filed on 11th December 2014. He insisted that the defendants were not bona fide directors of the plaintiff company.

16. He conceded that he did not have the minutes of the meeting that authorized him to file this case in court. This marked the close of the plaintiff's case.

17. DW1 was William Onsongo Mayaka. His testimony was that he was member No. 664 in the plaintiff's company. He stated that after several failed attempts to secure a meeting with the directors of the plaintiff company, it was agreed that an (SGM) be held on 18th November 2014 and a notice of the said meeting was duly published. He added that on 18th November 2014, more than 500 members/shareholders of the plaintiff company attended the meeting whose agenda was the reading of the financial statement and elections. He contended that the elections were then held in which he was elected the chairman, while the 1st, 3rd and 4th Defendants were elected Secretary, Vice chairman and Treasurer respectively, after which they wrote a letter to PW1 informing him of the changes in the company's management.

18. The defendants' case was that they were duly elected as the new directors of the company and that they should be allowed to take over the running of the affairs of the company. DW1 added that his team was further re-elected in the re-election held in March 2015 when the parties, by consent agreed to conduct another election.

19. On cross examination, DW1 stated that the meeting held on 1st October 2014 was at the instance of PW1 when it was agreed that an SGM be held on 18th November 2014 wherein the new management was elected. He maintained that the meeting of 18th November 2014 was necessitated by the management vacuum that existed within the company in view of the fact that the old committee members had not handed over to the new team led by PW1 and therefore the shareholders mandated DW1 to call for an SGM to save the company from going to the dogs. He explained that the names of the newly elected management team had not been submitted to the registrar of companies because of this court case.

20. On cross examination, DW1 stated that the court directed the parties to conduct elections and report back on 19th March 2015. He added that the defendants were elected as directors in the march 2015 elections and prayed that plaintiff's suit be dismissed so as to enable the defendants take over the reigns of managing the company.

21. DW2 Samuel Monda Aencha Ondora testified that he was member No. 586 of the plaintiff company and that he was one of the people who attended the SGM of 18th November 2014 when the defendants were elected as the plaintiff's new management of the company. He confirmed that he recorded the names of all the 540 shareholders who attended the SGM.

22. On cross examination he was asked about the meeting that took place on 16th March 2014 wherein the defendants were allegedly re-elected and his response was that no elections were held on 16th march 2015.

23. On re-examination DW2 confirmed that he was elected secretary of the company in the November 18th 2014 election. This marked the close of the defence case after which the parties agreed to file written submissions before judgment.

Analysis and determination

24. Upon considering the pleadings filed herein, the evidence tendered by both parties during the hearing together with their respective written submissions, I note that the issues for determination are:

a) Whether the plaintiff's suit is properly before the court.

b) Whether the plaintiff has established its case against the defendants to the required standards.

c) What orders should the court make.

25. On the first issue, the defendants challenged the competence of the case before the court while stating,

in their pleadings and submissions, that the suit offends the provisions of the Companies Act and **Order 4 Rule 1 (4) of the Civil Procedure Rules**.

26. I have perused the verifying affidavit that accompanied the plaint and I note that at paragraph 1 of the said affidavit, the deponent John Kenyaga Mochama (PW1) states:

“That I am the director of the plaintiff duly authorized under seal to swear this affidavit.”

27. **Order 4 Rule 1 (4) of the Civil Procedure Rules** stipulates as follows:

“1 (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.”

28. The question which then arises in this case is whether the filing of the instant suit was duly authorized by the plaintiff company. In other words did the plaintiff, being a corporation, obtain the boards authorization to commence this suit?

29. The authorization envisaged by **Order 4 Rule 1 (4)** is written authority under seal, but courts have however held that the mere failure to file the resolution of the company together with the plaint did not invalidate the suit as such a resolution could be filed at any time before the suit is fixed for hearing. See **Leo Investments Ltd vs Trident Insurance Company Ltd [2014] eKLR** and **Republic vs Registrar General and others (2005) eKLR**.

30. In the instant case, the plaintiff did not file the resolution of the company authorizing the filing of the suit and the appointment of the advocates in which case, I find that there was non compliance with order 4 Rule 1 (4) of the Civil Procedure Rules. Upon cross examination on whether or not he had the authority of the company to institute the suit, PW1 stated as follows:

“I have minutes of the meeting that enabled me to file this case in court, but I do not have them in court here.”

31. I have perused the plaintiff’s Articles of Association which at Article 14 stipulates:

“The seal of the company shall not be affixed to any instrument except by authority of the resolution of the Board of Directors having majority votes or a committee of the Directors or of the Directors previously given and shall be affixed in the presence of three Directors or one Director and Secretary of the company or Chairman of the Board of Directors who shall sign every such instrument to which the seal is affixed. No instrument unless it is sealed and signed as herein authorized shall be binding on the company.”

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.

33. Courts have held time and again that seeking 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 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 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. See **Kenya Commercial Bank Ltd vs Stage Coach Ltd [2014] eKLR**.

34. From the above foregoing, it is crystal clear that the case before the court was filed without the

plaintiff company's written authorization as is envisaged by the law.

35. One may however argue that failure to file the plaintiff's written authorization is a procedural technicality which should not overshadow the substantive justice due to the parties to the case as envisaged under Article 159 (2) (d) of the Constitution. It has, however been reiterated in several instances that the provisions of Article 159 (2) (d) of the Constitution should not be used by litigants as a panacea to all irregularities and procedural technicalities. The court has cautioned that the same should not be used to trash procedural provisions as the rules are the handmaidens of justice. **See Joshua Werunga v Joyce Namuyak [2013] eKLR** wherein it was held inter alia:

“In the case of Raila Odinga v I.E.B.C & Others [2013] eKLR, the Supreme Court said that Article 159 (2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to the procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with the procedural imperatives as they seek justice from the courts.”

36. As regards the necessity for a company resolution to back the institution of the suit, it was held in **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** as follows:

“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.”

37. In this case, as I have already found, there has been no such ratification even after the Plaintiff, through its advocates or otherwise, became aware of the defendants' defence that contained a notice of intention to raise a Preliminary Objection on the competence of the suit. In my view, the Plaintiff had a chance, even at the hearing of the case, to demonstrate to the court that the suit had the blessings or ratification of the company through the production of the company resolutions. This was not done and as I have already observed in this judgment, PW1 stated that he had the minutes but did not bother to avail them to court.

38. 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 say their case.

39. My findings on the issue of authority to file the suit would have been sufficient to determine this case but I am still minded to deal with the issue of whether or not the plaintiff is entitled to the orders sought. An analysis of the evidence tendered by the parties in this suit paints a picture of a company that has reached a stalemate and is unable to conduct its own affairs such as the holding of elections to choose its directors when the same are due. This was evident from the court record when on 10th February, 2015 this court directed the parties herein to among other directions, call an AGM with one of the items on the agenda being elections. Quite unfortunately, however, the parties later reported back to court that they were unable to agree on any issue thereby prompting the court to list the main suit for hearing.

40. My take is that at the center of this case is the issue of the company directors' elections. This is an internal affair of the company which courts have held that they should not interfere with. My view is supported by the decision in the case of **Foss vs Harbottle (1843) 2 Hare 261** where it was stated that courts will interfere only where acts complained of is ultra vires, or is fraudulent or not rectifiable by an ordinary resolution. In the instant case, I find that the matters complained of do not border on fraud or ultra vires but are such that can be resolved by the company itself. My humble view is that the orders sought by the plaintiff in this case, to declare who is or who is not a duly elected director of the company

or who should call for meetings are clearly the company's internal affairs in which this court should not interfere.

41. My observation is that the only intervention that this court would have made in this case, bearing in mind the circumstances of this case, would have been to direct the parties herein to call for fresh elections of their directors, but then again, this is a road that this court has already travelled without any success. As I have already noted in this judgment, this court in February 2015 directed the parties herein to call for general meeting in which one of the items on the agenda was to be elections. A report was however later filed in court that the parties were unable to agree on any issue.

42. Clearly therefore, making another order that elections be conducted will be an exercise in futility and will be tantamount to this court attempting to micro-manage the plaintiff company by steam-rolling the parties herein into conducting the affairs of their own company against their own wishes.

43. In conclusion, having found that the plaintiff lacked the requisite authorization by the Board to file this suit and further, having found that the nature of the case is such that the court cannot interfere, the order that commends itself to me is the order to dismiss the case with no orders as to costs in view of the fact that both parties are responsible for the stalemate existing in the company.

Dated, signed and delivered in open court this 28th day of June, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Ombati for the plaintiff
- N/A for the Defendants
- Omwoyo: court clerk