



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL SUIT NO.1 OF 2016**

**JOSEPH KIPNGETICH KORIR.....PLAINTIFF**

**VERSUS**

**LITEIN TEA FACTORY LIMITED.....1ST DEFENDANT**

**KENYA TEA DEVELOPMENT AGENCY.....2ND DEFENDANT**

**RICHARD LANGAT.....3RD DEFENDANT**

**RULING**

1. The plaintiff **Joseph Kipngetich Korir** herein filed this suit challenging the declaration of the 3<sup>rd</sup> defendant **Richard Langat** as the director of Litein electoral area of Litein Tea Factory.
2. He simultaneously filed a Notice of Motion dated 7<sup>th</sup> January, 2016 seeking two main prayers;
  3. *That there be temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from inter alia declaring, announcing and or confirming the 3<sup>rd</sup> defendant as director dully nominated to represent Litein electoral area pending the hearing and determination of this suit.*
  4. *That the nomination and or election of the 3<sup>rd</sup> defendant as director representing Litein electoral area be nullified and the 1<sup>st</sup> and 2<sup>nd</sup> defendant be ordered to carry out a re-poll.*
3. Prayer (3) was granted on 18<sup>th</sup> January, 2016 by Justice J. Mulwa of Nakuru High Court. Before the application could be heard the Plaintiff raised a Preliminary Objection dated 10<sup>th</sup> February, 2016 and filed on 12<sup>th</sup> February, 2016. The said preliminary objection raises two issues;
  - (a) *The Defendants/Respondents advocate is not properly on record.*
  - (b) *The Defendants/Respondents Replying affidavit and the subsequent pleadings are invalid and fatally before the Court.*
4. Parties agreed to dispose of the Preliminary Objection by way of written submissions which they filed. Mr. Kiprono for the Plaintiff argued that Geoffrey Kiplangat Chepkwony had not filed any authorization enabling him to act on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. This he said is contrary to **Order 9 Rule 2 (c) of the Civil Procedure Rules**. On this he cited the case of **Rongai Workshop & Transport Ltd V Malindi Salt Works Ltd 2012 eKlr** page 1 and 2.

5. He also submitted that there was no written authorization for Geoffrey Kiplangat Chepkwony to swear an affidavit on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That this offended **Order 1 Rule 13** of the **Civil Procedure Rules**.
6. It was his further submission that the defendants advocates were not properly on record, as there was the same was not made vide a company resolution and seal. He cited the cases of;
  - i. **Kyanzavi Farmers Co. Ltd V Mangu Ngolo Milimani Nrb HCCC No.128 of 2008.**
  - ii. **Bugerere Coffee growers V Sebaduka & Anor. 1970 E.A 147.**
7. M/s Bett & Co. Advocates raised four (4) grounds in opposition to the Preliminary Objection. The grounds are;
  1. *That the Plaintiff's Notice of Preliminary Objection is legally untenable as it is not premised on pure points of law.*
  2. *That the Preliminary Objection raises factual issues that need further interrogation by the court before arriving at a determination on merits.*
  3. *That the Preliminary Objection is only designed to muddle the issues herein and unduly deny the defendants from being heard on the merits of their cases.*
  4. *That Preliminary Objection raised herein constitutes an abuse of the court process.*
8. Their submission is that the firms of M/s Bett & Gordon Ogolla Kipkoech & Co. Advocates are both appearing for the 3<sup>rd</sup> Defendant. Further that the Replying Affidavit of Geoffrey Kiplangat Chepkwony being challenged was filed by the 1<sup>st</sup> defendant's manager, in line with the case of **Rongai Workshop & Transport Ltd** (*supra*).
9. They also cited the cases of;
  - i. **Frubeco China Fushun V Naiposha Co. Ltd & 11 Others (2014) eKLR.**
  - ii. **United Assurance Co. Ltd V Attorney General SCCA No.1 of 1998.**
  - iii. **John Wanyama V KCB Ltd (2013) eKLR.**
  - iv. **Leo Investiments Ltd V Trident Insurance Co. Ltd (2014) eKLR.**
  - v. **R V Registrar General & 13 Others (2005) eKLR.**
10. It was further submitted by the defendants counsel that the Preliminary Objection raised herein did not meet the threshold set out in **Mukhisa Biscuit Manufacturing Co. Ltd V West End Distributors Co. Ltd (1969) E.A. 696.** That the present Preliminary Objection is premised on matters of fact and is thus not raised on a pure point of Law. It was submitted that to ascertain the representation of the defendants and the authority of Geoffrey Kiplangat Chepkwony to swear the replying affidavit on behalf of the defendants would require an interrogation of facts. It is therefore not a pure point of Law.
11. The court was referred to the case of **Oraro V Mbaya (2005)** and **Foundation & Anor. V E.A. Partnership Ltd & Anor. (2012) eKLR.**
12. Finally, Mr. Kiprono for the Plaintiff raised issue with the 3<sup>rd</sup> defendant's representation by M/s Gordon Ogola Kipkoech & Co. Advocates. He complained that the said firm had filed fresh pleadings thereby causing confusion. Mr. Koech for the defendants in response did not have any

- objection to the representation by M/s Gordon Ogola as the 3<sup>rd</sup> defendant had given both of them instructions.
13. I have considered the Preliminary Objection and the grounds of opposition to the same. I have equally considered the rival submissions filed.
14. The issues falling for determination are;
- i. **Whether the pleadings filed by M/s Gordon Ogola, Kipkoech & Co. Advocates are properly on record.**
  - ii. **Whether the Preliminary Objection herein satisfies the threshold set out in the case of Mukhisa Biscuits Manufacturing Ltd V West End Distributors Ltd.**
15. On the 1<sup>st</sup> issue, my finding is that a party has a right to choose an advocate of his choice to represent him/her. Nothing stops a party from having more than one advocate representing him or her.
16. In the instant case M/s Bett & Co. Advocates filed a notice of appointment of advocates dated 15<sup>th</sup> January, 2016 on 21<sup>st</sup> January, 2016. The notice indicates that the representation is for all the three (3) defendants. A joint defence for all the defendants dated 3<sup>rd</sup> February, 2016 was filed on the same date.
17. On 18<sup>th</sup> January, 2016 a memo of appearance dated 15<sup>th</sup> January, 2016 was filed by Gordon Ogola, Kipkoech & Co. Advocates at Nakuru Law Courts. It is not clear when it was received at Kericho Law Courts, but from the filing in the court record it was received well after 12<sup>th</sup> February, 2016. On 16<sup>th</sup> Feb, 2016 M/s Gordon Ogola, Kipkoech & Co. Advocates filed a statement of defence for the 3<sup>rd</sup> defendant.
18. Similarly in response to the Notice of Motion by the Plaintiff dated 7<sup>th</sup> January, 2016 Geoffrey Kiplangat Chepkwony swore a Replying Affidavit on behalf of all the defendants (3<sup>rd</sup> defendant included). It was drawn by M/s Bett & Co. Advocates and is sworn on 21<sup>st</sup> January, 2016 and filed on 3<sup>rd</sup> February, 2016. On 16<sup>th</sup> February, 2016 the 3<sup>rd</sup> defendant filed a Replying Affidavit drawn by Gordon Ogola Kipkoech & Co. Advocates. Its sworn on 9<sup>th</sup> February, 2016.
19. The above is a scenario creating confusion in this record. In as much as a party has the liberty to be represented by a team of advocates it does not call for each advocate to file separate pleadings for the party. It creates confusion making the rival party not to know which pleadings to respond to.
20. The 3<sup>rd</sup> defendant may have to sort out himself on the issue of representation. Meanwhile the Statement of Defence and Replying Affidavit drawn by M/s Gordon Ogola, Kipkoech & Co. Advocates both filed on 16<sup>th</sup> February, 2016 are hereby expunged from the record.
21. On the 2<sup>nd</sup> issue, as to what may be raised as a Preliminary Objection was stated in the case of **Mukhisa Biscuit** (*supra*) as;

*“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which is argued as a preliminary point may dispose off the suit.”*

In **Oraro Vs Mbaja (2005) 1 KLR 141** Justice Ojwang (*as he then was*) stated:

“..... 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 objection. 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.”

22. From the above it is clear that a Preliminary Objection will only succeed if it raises points of law which do not require proof by way of evidence. A perusal of the authorities cited herein shows that the trend after July 2012 is to give more room for the filing of Company or Directors resolutions.

23. There is no written requirement that when an advocate who has been appointed by a company/corporation is filing pleadings the same must be accompanied by a resolution or company seal. The affidavit of service sworn on 15<sup>th</sup> January, 2016 and filed by Joseph Chepkwony on the same day confirms at paragraphs 3 & 4 that indeed the 1<sup>st</sup> and 2<sup>nd</sup> defendants were served through their Company Secretaries. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are therefore aware of these proceedings. They have not raised any issues with representation.

24. The position prevailing here was the same as in the case of **Leo Investments Ltd Vs Trident Insurance Co. Ltd** (*supra*) where Gikonyo, J had this to say;

*“If a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic V Registrar General & 13 Others Misc. Application No.67 of 2005 (2005) eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore not fatal to the suit.”*

25. Before taking the drastic action advocated for by the Plaintiff this court must be alive to the overriding objectives of the **Civil Procedure Act** set out in **Section 1A and B** of the said Act. In the case of **Kenya Agricultural Research Institute (K.A.R.I) V Farah Ali, Chairman Isahakia self help group (sued on his own behalf and on behalf of members of the group) and Anor. NKR HCCC No.23 of 2011** Wendoh, J had this to say;

*“In the case of TRUST BANK LTD V AMALO CO. LTD (2009) KLR 63 where the Applicant's documents were expunged from the record by the Court and the appellant was denied the right to be heard in the application because of lack of diligence in the matter, the Court of Appeal while allowing the appeal held;*

*“ (1) The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.*

*(2) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”*

26. Wendoh J further stated as follows in the same case above;

*“In the instant case, this Court would be reluctant to strike out a suit just because an authority under seal has not been filed. This is because the Plaintiff can be allowed time within which the*

authority can be filed failing which the court can then take that drastic action of striking out the pleadings.”

27. The Plaintiff is also objecting to the Replying Affidavit because of failure to file the authority by the rest of the defendants. It has not been disputed that the deponent (Geoffrey Kiplangat Chepkwony) is a Manager of the 1<sup>st</sup> Defendant and duly appointed to the said position by the 2<sup>nd</sup> defendant. In the case of **Rongai Workshop & Transport Ltd** (*supra*) Emukule, J while referring to **Order 9 Rule 2 (c)** of the **Civil Procedure Rules** and **Section 2** of the **Companies Act** (Cap 486 Law of Kenya) found an officer of the Company to include a Director, Manager or Secretary. There is no suggestion made to the effect that the said Geoffrey K. Chepkwony is not a Manager of the 1<sup>st</sup> defendant and by extension of the 2<sup>nd</sup> defendant which appointed him.

28. He has indicated that he has been authorised to swear the affidavit on their behalf. He has also indicated that the 3<sup>rd</sup> defendant is a nominee to the 1<sup>st</sup> defendant's board of directors and the said 3<sup>rd</sup> defendant gave him the authority to swear the affidavit. It is therefore the deponent's word which should be or not be confirmed by the 3<sup>rd</sup> defendant. This would amount to establishing this or calling for evidence.

29. I associate myself with the finding of Odunga, J in **Presbyterian Foundation & Anor.** where he said;

*“The Civil Procedure Rules do not define what an authorised officer of a company is. If the Rules committee had intended that in cases involving corporations, affidavits be sworn by either directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word “authorise” which is defined by Oxford Dictionary as “sanction”, “give authority”, commission. That being the position whether or not the 2<sup>nd</sup> Plaintiff was given authority to swear the verifying affidavit in a matter of evidence and cannot certainly be the subject of a preliminary objection unless the fact is admitted.”*

30. Since the Plaintiff herein is the one challenging the authority given to Geoffrey Kiplangat Chepkwony to swear the Replying Affidavit, evidence will have to be availed from all the defendants to approve or disapprove the challenge by the Plaintiff. At that point the issue ceases to be a Preliminary Objection.

31. Flowing from what I have stated above I find that the Preliminary Objection is unmerited. This is a matter which should be heard and determined expeditiously, as it touches on the rights of the Litein Tea Farmers being represented on the 1<sup>st</sup> defendant's board of directors. Let the parties avoid interlocutory applications and move to the substance of the suit.

32. Save for what I have stated on the pleadings filed by M/s Gordon Ogola, Kipkoech & Co. Advocates, I dismiss the Preliminary Objection dated 20<sup>th</sup> February, 2016 with costs.

**DELIVERED, SIGNED AND DATED THIS 24th DAY OF March, 2016.**

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**H.I.ONG'UDI**

**JUDGE**