



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 544 OF 2010

DAMANI DRUMS LIMITED.....1ST PLAINTIFF

HEAN TEXTILES INDUSTRIES LTD..... 2ND PLAINTIFF

VERSUS

GEORGE KIMANI MBUGUA1ST DEFENDANT

FELIXKIMANI MBUGUA.....2ND DEFENDANT

MIRIAM WACHIRA MBUGUA.....3RD DEFENDANT

(Also sued as officials of Airport View Neighbours Group)

MICHAEL MACHARIA MUTEMBEI4TH DEFENDANT

RULING

Two applications filed by the Defendants are the subject of this ruling. Firstly, the application by the 1st, 2nd and 3rd Defendants dated 18th June 2014 seeks orders that the 1st, 2nd and 3rd Defendants and **Airportview Neighbours Group**, be struck out of the proceedings and/or removed from these proceedings and/or alternatively that the suit against the 1st, 2nd and 3rd Defendants, and **Airportview Neighbours Group** be struck out with costs. Secondly, the application by the 4th Defendant dated 16th July 2014 seeks orders that the suit be dismissed with costs and that judgment be entered as per the 4th Defendants counterclaim.

Application by the 1st, 2nd and 3rd Defendants

The 1st, 2nd and 3rd Defendants application is grounded on the grounds that appear on the face of the application and on the supporting affidavit sworn by one **George Kimani Mbugua** on 18th June 2014.

The Applicants set out the following grounds in support of the application:-

1. That 1st, 2nd and 3rd Defendants are not and have never been officials of **Airport Neighbours Group**.
2. No cause of action respecting the suit properties **L.R.NOS.9024/147** and **L.R.NO.9024/148** lies against the aforementioned **Airportview Neighbour Group**.
3. The suit is between the plaintiffs and the 4th defendant who have laid claim to the suit properties.
4. The 4th defendants were previous members of **Airportview Neighbours Group** who have now sought to pursue their claim as individuals, separate from the said **Airport view Neighbours Group**.

The applicants admit **Airportview Neighbours Group** had previously filed **HC ELC NO. 373 of 2009** claiming adverse possession of the suit properties but the suit was struck out on a technicality. The Applicants state **Airportview Neighbours Group** does not have any interest in the suit properties as a group but rather the individual persons who have an interest in the suit property and claim to have acquired title to the suit lands through adverse possession applied and were enjoined in the suit as the 4th Defendant. The Applicants state that to the extent that the individual persons who have an interest in the suit properties have come forth and have been enjoined as parties to the suit, the plaintiffs have no basis to sustain the suit against the 1st, 2nd and 3rd Defendants and **Airport Neighbours Group** who have no interest or claim in the suit properties and thus their names ought to be deleted or removed from the proceedings.

The plaintiffs through a replying affidavit sworn by **Bharat Patel** on 12th September 2014 oppose the application and aver that the 1st, 2nd and 3rd Defendants are sued as the officials of **Airportview Neighbours Group** whose members had claimed to be the legal owners of the parcel of land **L.R.NO.9024/147** and **L.R.NO.9024/148**. The plaintiffs cite and have annexed a copy of the ruling in **HC ELC NO. 373 of 2009** dated 6th July 2010 which struck out the suit where the 1st, 2nd and 3rd Defendants had described themselves as officials of **Airport view Neighbours Group** and thus the plaintiff aver that the applicants claim that they were wrongly enjoined to this suit is misleading.

The issue for determination in regard to the 1st, 2nd and 3rd Defendants application is whether they are competent parties to the suit or whether they are necessary parties to the suit. The Applicants state they have no interest in the suit property and argue that the persons who have an interest in the suit property have directly applied to be enjoined in the suit and have been so enjoined as the 4th Defendant represented by **Michael Macharia Mutembei** who they have authorized to plead on their behalf. It is not clear who **Airportview Neighbours Group** are although as per the affidavit sworn in support of the Application it is acknowledged that the 29 persons who have been enjoined as parties to the suit are members of the Group. Is it a registered Group? No evidence has been tendered to show that **Airportview neighbours Group** is a registered association so as to have any legal standing or status. If the group was registered it would have a certificate of registration and a list of duly registered officials. In my view the fact that the 1st, 2nd and 3rd Defendants may have commenced **HC ELC NO. 373 of 2009** describing themselves as officials of **Airportview Neighbours Group** would not of itself give the grouping legal standing if it was not registered. The 4th Defendants have come forward and claim to be entitled to the suit properties as individuals and not as **Airportview Neighbours Group**. It appears to me that Airport view Group is but an amorphous grouping without any legal status and in my view cannot sue or be sued and thus the instant suit is unmaintainable against the 1st, 2nd and 3rd Defendant who are described as officials of the Group. The 1st, 2nd and 3rd Defendants would need to be verifiable as officials of Airportview Neighbours Group and that could only be possible if it was a registered group.

In the premises I strike out the names of the 1st, 2nd and 3rd Defendants as well as **Airportview Neighbours Group** as parties to the suit and direct that the suit will proceed against the 4th Defendants as the sole Defendants. However as the 1st, 2nd and 3rd Defendants held themselves out as officials of **Airport view Neighbours Group** when they filed **HC ELC NO. 373 of 2009 (OS)** this was misleading and led the plaintiffs to believe they indeed represented the group. I will therefore not award the

Applicants the costs of the application or the suit and each party will bear their own costs.

4th Defendant's application

The 4th Defendant's application is grounded on the grounds set out on the body of the application and on the supporting affidavit sworn by **Michael Macharia Mutembei** on 16th July 2014. Interalia the 4th defendant aver that the plaintiffs amended plaint dated 25th February 2014 and filed in court on 26th March 2014 was accompanied by a verifying affidavit sworn by one **Bharat Patel** on 25th February 2014 which was defective. The 4th Defendants assert that the verifying affidavit did not comply with the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules as it was not sworn by an officer of either the 1st and 2nd plaintiff companies duly authorized under the seal of the said companies. The 4th Defendants contend that Order 4 rule 1 (4) is couched in mandatory terms and thus any failure to meet the requirement thereof would render the verifying affidavit fatally defective and consequently the suit would be incompetent. The 4th Defendants thus argue that as the verifying affidavit was not sworn by an officer duly authorized under seal it was fatally defective and the plaintiffs suit ought to be dismissed.

The 1st, and 2nd plaintiffs filed a replying affidavit sworn by **Bharat Patel** on 12th September 2014 in opposition to the 4th Defendants application. The answer to the 4th Defendants application is contained in paragraphs 4 and 5 of the replying affidavit which I reproduce hereunder:-

4. **That the 4th Defendant/Respondent assertion that the suit was filed without authority of the Board of Directors is misleading and aimed at delaying the cause of justice and indeed the Board of Directors by way of a special resolution dated 10th October 2010 authorised myself to swear and execute affidavits and the firm of Masire and Mogusu to act on our behalf. (Attached herein and marked as "BP1A" and BP-1b" are copies of the board resolution dated 12th October, 2010 and 19th October 2010 respectively).**
5. **That my advocates on record have informed me and which information I believe to be true that failure to file the said resolution was owing to an oversight on their part and we ought not to be condemned for the mistake of our Advocates and we urge that we be allowed to file the same out of time.**

The parties filed written submissions to ventilate their respective positions in the matter. The 4th Defendant maintains that the failure by the plaintiffs to authorize the deponent of the verifying affidavit under seal rendered the verifying affidavit fatally defective and the suit liable to be struck out. In support of their position the 4th Defendants referred the court to the cases of **Vista Holdings International Limited –vs- Span Image Ltd HCCC NO. 464 of 2011** where **Havelock J** (as he then was) quoting **Odunga J in HCCC NO. 335 of 2011** in the case of **Assheik Transporters Ltd & Another –vs- Barclays Bank of Kenya Ltd and 3 others** stated:-

“From the foregoing, it is clear that the document authorizing the deponent of the verifying Affidavit must be under seal. The reason for this requirement is not far fetched. A corporation is an artificial person who acts through its agents. Accordingly, in order for the court to be satisfied that the institution of the suit in question is genuine, the company must give the said authority and the only way to ensure that the authority is genuine is by ensuring that the same bears the signature of the company which is the seal”.

This exposition by **Odunga J** is correct exposition in as far as the company giving authority is concerned. The authority has to be under the seal of the company as that is the signature of the company. The 4th Defendant further referred the court to **Meoli J** decisions in the cases of **Shiaware Limited & another –vs- Planesi Gino (2012) e KLR** and **Samuel Katana Nzungu & 102 others –vs- Salim Abdalla Bakshwein & another (2013) eKLR** where the Judge held that the commencement of an action by a limited company must be authorized by a resolution of the said company and where there is no such resolution the action cannot stand.

The plaintiffs in their submissions have maintained that the companies had duly authorized the filing of the suit and the deponent of the verifying affidavit had the authority to do so albeit the resolution granting the authority was inadvertently not filed with the plaint by the companies Advocates on record. It is the plaintiffs submission that there is no requirement that the authority must be filed with the plaint and the verifying affidavit. The plaintiffs state the necessary resolution confirming the deponent had authority to swear the verifying affidavit has been produced in court and thus there would be no basis for the court to take the draconian action of dismissing the plaintiff's suit when it is clear that the company had indeed given authority as the law requires. The plaintiffs further submit that the 4th Defendant will suffer no prejudice and the court should be guided by the principle to do substantive justice as it is enjoined to do under **article 159 2 (d)** of the constitution and section 1A and 1B of the Civil Procedure Act. The court ought not to place undue regard to procedural technicalities and should rather apply the "**Oxygen Principles**" as epitomized under sections 1A, 1B and 3A of the Civil Procedure Act to render substantive justice.

In order to determine the primary issue whether or not failure to exhibit the authority made under the seal of the company rendered the verifying affidavit fatally defective and the suit incompetent it is necessary to review the appropriate legal provisions and I set them out hereunder:-

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.

Rule 1.(3)

Where there are several plaintiffs, one of them with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

Rule 1.(4)

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under seal of the company to do so.

Rule 1.(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-rules (2) (3)(4) and (5) of this rule.

The objective behind Order 4Rule 1 was to ensure that the persons who bring suits to court own them and to prevent the filing of fictitious suits where the actual plaintiffs do not even know of the existence of the suits. This was more so in running down suits where brokers or "**ambulance chasers**" would have a multiplicity of suits filed without the knowledge of the plaintiffs.

As relates to corporations the objective was to ensure the filing of the suit has been duly authorized and sanctioned by the company. The authorization under the seal of the company ensures the company has sanctioned the filing of the suit as by having the seal affixed, the company is deemed to have executed the document.

Order 4 Rule 1(4) does not expressly state that the authorization has to be filed with the verifying affidavit in court and in my view, provided the person swearing the verifying affidavit has been authorized by the company to do so, that constitutes sufficient compliance with the requirement. Thus where the person swearing the verifying affidavit is an officer of the company and he depones that he has been duly authorized by the company to swear the verifying affidavit, he is deemed to have been authorized in accordance with Order 4 Rule 1 (4). The provision does not require that the authority be filed in court with the verifying affidavit and the wording of the subrule leaves it open such that such

authority, provided it was granted before the suit was commenced could be furnished and/or filed at any stage of the proceedings. Of course to obviate the occurrence of a situation such as the present one the **“best practice”** would be where the authority is exhibited at the time the suit is filed and/or is filed as part of the plaintiff’s bundle of documents.

I agree with the observations of **Odunga J** as regards the effect of Order 4 Rule (1) (4) which he expressed in the case of **Insignia Limited –vs- Zadok & 3 others (2012) eKLR** referred to the court by counsel for the plaintiffs where he stated thus:

“On the issue of the competency of the verifying affidavit, under Order 4 Rule 1(4) of the Civil Procedure Rules, 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. Nowhere is it stated that such authority must be filed. The failure to file the same may be a ground for seeking particulars assuming the authority does not form part of the plaintiff’s bundle of documents which good sense dictates it should of course, if a suit is filed without a resolution of a corporation, it may attract 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 –vs- Registrar General and 13 others Misc. Application NO. 67 of 2005 (2005) eKLR and hold the position in law is that 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”.

In the present suit the deponent states he had the authority to swear the verifying affidavit and has exhibited the resolutions giving him authority in replying affidavit. Order 4 Rule 1 (6) grants the court the discretion to strike out or not strike out a suit for non compliance with the provisions of subrule 2,3,4 and (5) of Order 4 rule 1. In a situation such as the present one where the respondent has shown that authority had infact been given to bring the suit but not exhibited at the time of filing the suit the court will exercise its discretion and decline to strike out the suit.

The Defendant’s plea for judgment on the counterclaim was predicated on the striking out of the plaintiff’s plaint which the court has declined to do. However even if the plaint had been struck out the plaintiffs are entiled to defend the counterclaim in regard to which they have filed a defence.

The plaintiffs are presently the registered owners of the suit properties. The 4th Defendants by their counter-claim allege to have acquired title to the suit properties by virtue of being in adverse possession. This claim is denied by the plaintiffs and without doubt there are triable issues that arise out of the pleadings and there can be no basis to enter judgment in favour of the 4th Defendants. This is not a case where summary judgment would be entered as clearly there are triable issues that can only be determined after a full hearing/trial.

The upshopt is that I find no merit in the 4th Defendants application dated 16th July 2014 and the same is hereby dismissed with costs to the plaintiffs.

Ruling dated, signed and delivered this.....29thday of...January.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A..... For the Plaintiffs

Obwayo For the 1st, 2nd and 3rd Defendants

Nabeya for Naikuni for 4th Defendant