



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL CASE NO. 25 OF 2014
BEDROCK HOLDINGS LIMITED.....PLAINTIFF
VERSUS
MASENO UNIVERSITY.....1ST DEFENDANT
RILEY FALCON SECURITY SERVICES LIMITED.....2ND DEFENDANT
PUBLIC PROCUREMENT OVERSIGHT AUTHORITY.....3RD DEFENDANT

RULING

This is a ruling on the Preliminary Objection raised to this suit by the 2nd Defendant. The 2nd Defendant contends that the Plaintiff's suit ought to be struck out on the following grounds:-

1. **The suit is not authorized by the Plaintiff.**
2. **The deponent of the verifying affidavit is not authorized by the Plaintiff to swear the same.**
3. **The firm of Mwamu & Co. Advocates was not authorized by the Plaintiff to file suit on its behalf.**
4. **The suit discloses no reasonable cause of action.**
5. **The suit is scandalous and an abuse of Court process.**

The Plaintiff opposed the Preliminary Objection vide a replying affidavit sworn by Stephen O. Ayugi, its Director, on 14th July 2015.

The Preliminary Objection was canvassed by way of written submissions with parties appearing before me on 29th September 2015 to highlight the same.

Although Counsel for the 2nd Defendant had in the written submissions dealt with grounds 1 and 3 he did at the highlighting inform the Court that those two grounds no longer hold. What remains therefore are grounds 2, 4 and 5.

On ground 2 the 2nd Defendant's contention is that as the deponent of the verifying affidavit accompanying the Plaintiff has not exhibited the authority provided for under Order 4 rule 1(4) and Order 9 Rule 2 and Order 1 Rule 13(2) of the Civil

Procedure Rules then the affidavit is incompetent and for that reason the suit ought to be struck out for want of authority under seal.

He relied on 2 cases:-

1. **Scholarstica Nyaguthii Muturi V. Housing Finance Co. of Kenya Ltd. [2011] eKLR.**
2. **Sammy Achuchi Oduori & Others V. Ibeafrika Power (EA) Ltd. [2008] eKLR.**

On ground 4, Counsel submitted that the Plaintiff does not raise any triable issues as it does not for instance disclose why the 2nd and 3rd Defendants are necessary parties, or how they will be bound by the results of the suit or even how they will help in its resolution. He contended that no effort had been made to exhibit the resolution of the 1st Defendant in regard to the matter yet the gravamen on the Plaintiff is that the 1st Defendant is likely to terminate or interfere with the contract between itself and the Plaintiff. He submitted that this suit is incapable of any reasoned argument in view of Regulation 32(2) of the Public Procurement and Disposal Regulations 2006 which vests authority to terminate contracts in the Tender Committee. That as it does not also disclose that the impugned advice was instigated and in favour of the Defendants or the role played by the 3rd Defendant it is bound to fail at the full hearing. On this he cited the following cases:-

- **Tom Odhiambo Achillah t/a Achilla T. O. & Company Advocates V. Kenneth Wabwire Akide & Company Advocates & 3 Others [2015] eKLR.**
- **Elijah Sikona & George Pariken Narok on behalf of Trusted Society of Human Rights Alliance V. Mara Conservancy & 5 Others [2014] eKLR.**
- **Jennifer Wambura Kamau V. Humphrey Mbaka Nandi [2013] eKLR.**

On ground 5 Mr. Gachuba submitted that the suit is scandalous for bringing in children who are in no way connected to the matter before Court and for exhibiting medical records that are forgeries and which were obtained through theft. He contended that the exhibits are indecent, offensive, abusive, immaterial or unnecessary and in bad faith and on that ground the suit ought to be struck out. He relied on the case of **Tom Odhiambo Achillah (Supra)**.

Mr. Mwamu Advocate for the Plaintiff opposed the Preliminary Objection. He submitted, firstly, that this is not a Preliminary Objection as envisaged in the famous **Mukisa Biscuit Manufacturing Company Limited** case and pointed out that Mr. Gachuba had in his submissions given evidence and the minute that is done it ceases to be a Preliminary Objection.

On the verifying affidavit he submitted that the irregularity is not fatal as the Court can always order that a compliant one be filed as has been done in other cases. He contended that this Preliminary Objection contravenes the Oxygen principle and is only meant to delay the administration of justice.

As for the argument that the Plaintiff does not disclose a cause of action, he contended that Mr. Gachuba does not act for the other defendants and that should they be interested in disputing this suit they shall do so. He submitted that the evidence shall be called and witnesses shall be cross-examined which cannot be done through affidavits. He explained that the 1st Defendant's legal officer has been brought in because she is a spouse of the 2nd Defendant's Director and hence a conflict of interest arises and it is only upon hearing the parties that the issue can be determined. He disputed that this suit is scandalous and submitted that the proper forum to determine the issues raised is at the trial. He also drew the attention of this Court to the fact that the 2nd Defendant had instituted a Constitutional Petition in regard to the photographs and medical records alluded to by Mr. Gachuba and submitted that the matter ought to be ventilated there. He urged the Court to dismiss the preliminary objection.

For the 1st Defendant Mr. Wasuna Advocate associated himself with the submissions of the Plaintiff.

In reply Mr. Gachuba urged the Court to find that the Preliminary Objection meets the threshold in the **Mukisa Biscuits** case; that it raises serious legal issues and that as the Plaintiff has not traversed the issues raised it means they are admitted. He submitted that the purpose of a Preliminary Objection is to save time and costs. He also submitted that the sealing of the authority to swear the affidavit is not an irregularity and contended that although the Plaintiff herein has had ample opportunity to regularize the position she has not done so. He reiterated his submission that it is not clear why the 1st and 3rd Defendants are parties to this suit and hence the Plaintiff does not disclose a reasonable cause of action. He further submitted that he had demonstrated that the suit is scandalous, and contended that failure to comply with the Evidence Act renders the suit scandalous. He pointed out that today unlike in 1968 the rules are different. He urged the Court to uphold his Preliminary Objection.

For what constitutes a Preliminary Objection I need not look further than **Mukisa Biscuit Manufacturing Company Limited V. West End Distribution Limited [1969] E.A. 696** where Sir. Charles Newbold P. stated at page 701

"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 has to be ascertained or if what is sought is the exercise of judicial discretion....."

Moreover regarding the allegation that the suit is scandalous the persons affected have filed another matter in which they may litigate the issues raised by Mr. Gachuba.

Applying this test to the points raised it is clear that grounds 4 and 5 do not meet the threshold. Firstly, Mr. Gachuba does not suggest that the facts pleaded by the other side are correct. Secondly he has addressed himself to issues of fact which facts can only be ascertained through evidence. Order 2 Rule 15(1) provides for the manner in which a party should proceed where his argument is that the pleading of the other party does not disclose a reasonable cause of action or that it is scandalous as is argued by Mr. Gachuba here. This I believe is what Sir Newbold, P, refers to as the "normal manner" in the **Mukisa Biscuits'** case. As stated by law J.A. In the **Mukisa Biscuits** case:-

"The matter was raised in the guise of a preliminary objection, which it is not. It should have been raised in the form of an application by way of motion, as provided by Order 50"

Here too grounds 4 and 5 ought to have been raised in the normal manner.

Regarding ground 2 I am satisfied that the same was properly raised at this stage as a determination of the same as a preliminary point is one that may dispose of the suit. I do agree with Mr. Gachuba's submission that the verifying affidavit is defective.

Apart from stating that he is a Director of the Plaintiff and hence competent to swear the affidavit the deponent does not state that he is authorized to swear the affidavit let alone that he is so authorized under the seal of the company. The affidavit does not comply with Order 4 Rule 1(4) of the Civil Procedure Rules which states:-

"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."

Clearly the deponent of the verifying affidavit does not do so with the authority of the company.

Mr. Mwamu's submission to this is that the rule does not require the authority to be filed together with the Plaintiff and relies on the decision of Odunga J, in **Leo Investments Limited V. Trident Insurance Company Limited [2014] eKLR** where Odunga J held inter alia that the mere failure to file the resolution does not invalidate the suit. Odunga J, did however acknowledge that a suit filed without a

resolution of a corporation may attract some consequences. In that case however the director had deposed that he had the requisite authority to swear the affidavit. Here he has not at all and the case is on all fours with that of **Microsoft Corporation V. Mitsumi Computer Garage Ltd. And Another [2001] KLR 470** where Ringera J, as he then was, concluded that "such failure is a substantial defect which renders the said affidavit incompetent and courts its being struck out." The verifying affidavit in this case is clearly defective and incompetent and the same is for striking out and the only issue is whether that will be fatal to the case.

In the **Microsoft** case, Ringera J, saved the suit by allowing the Plaintiff leave to file a compliant affidavit. So did Nambuye J, as she then was, in the **Scholarstica** case where she gave leave to the Plaintiff to file the authority. In **East African Portland Cement Limited V. Capital Markets Authority & 4 Others [2014] eKLR** the Court dismissed the suit as there was no evidence of a proper resolution to file the Petition.

Mumbi Ngugi, J, noted at paragraph 19:

".....The objections center on the competence of the petition in that the company has not authorized the institution of the suit in accordance with the articles of association, and that the persons who have purported to swear documents in support of the petition have no authority to do so..."

In that case the resolution was for a certain firm of Advocates to institute a suit on behalf of the company and for a specific named person to swear the verifying affidavit. However the verifying affidavit was sworn by other persons other than the person named in the resolution.

In **Kenya Commercial Bank Limited V. Stage Coach Limited [2014] eKLR** where Havelock J, upheld the Preliminary Objection and dismissed the suit, there was no resolution at all approving the institution of the suit and as such the suit had been filed without the authority of the company. In the instant case Mr. Gachuba concedes that this suit was instituted with the authority of the company. It is indeed for that reason that he abandoned ground 1 and 3 of the Preliminary Objection. The only problem here therefore is the omission by the Director to depone that he has the authority of the company under seal to swear the affidavit and to annex that authority.

In the circumstances I would like, Ringera J, in the **Microsoft case** and Nambuye J, in the **Scholarstica** case strike out the verifying affidavit for being defective but save the suit by granting leave to the Plaintiff to file a compliant affidavit within seven (7) days of this ruling. Accordingly grounds 4 and 5 of the affidavit are overruled but ground 2 is partially upheld but with a rider that the Plaintiff shall within seven (7) days of this ruling file a compliant verifying affidavit failing which the suit shall stand dismissed. The costs of the Preliminary Objection to be in the cause.

It is so ordered.

Signed, dated and delivered at Kisumu this 29th day of October 2015

E. N. MAINA

JUDGE

In the presence of:-

Mr. K'Owinoh for Mwamu for the Plaintiff/Respondent

Mr. Gachuba for the 2nd Defendant

CA: Felix Magutu