



NO. 189/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO. 462 OF 2012
PIUS MUSEMBI KIVINDU.....1ST PLAINTIFF
KATAKI HOLDINGS LTD.....2ND PLAINTIFF
VERSUS
SYOKIMAU BRIGHT HOLDINGS LTD.....DEFENDANT

RULING

1. The plaintiffs herein filed a Notice of Motion under certificate of urgency on the 17th December 2012 pursuant to the provisions of Order 40 rules 1, 2, 3 and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act moving the court for an injunction order restraining the defendant from operating or transacting bank accounts stated in the body of the application pending hearing and determination of the application/suit.

2. When the application came up for hearing **Mr. Ngolya**, learned counsel for the defendant raised a preliminary objection on points of law to have the application as well as the main suit struck out based on four grounds that:-

1. The suit is fatally defective for failing to comply with the mandatory provisions of Order 4 rule 1(1)(f), 1(3) and 1(4) of the Civil Procedure Rules.
2. The 1st plaintiff lacks locus standi to institute the suit.
3. The application does not meet the legal threshold for grant of an injunction.
4. The application is purportedly supported by a grossly and fatally defective affidavit. The person who has sworn the affidavit lacks locus standi to do so.

3. **Mr. Ngolya** argued that the cause of action per the plaint does not relate to the plaintiffs. According to him the 1st plaintiff is not a director of the 2nd plaintiff and has not been authorized by the 2nd plaintiff to swear a verifying affidavit as required by Order 4 of the Civil Procedure Rules. Therefore he lacked locus standi to institute the suit.

4. Further, he argues that the 2nd plaintiff being a limited liability company, the 1st plaintiff could not purport to act on its behalf. He also argues that there is no verifying affidavit sworn by an officer duly authorized by the seal of the company which makes the suit defective.

5. In a reply thereto **Mr. Babu**, learned counsel for the plaintiff submitted that the 1st plaintiff instituted the suit on behalf of other participants who have authorized him to do so. That the matter in issue dates back when the 2nd plaintiff was non-existent. The 1st plaintiff being a director of the 2nd plaintiff has authority to depone affidavits on behalf of the 2nd defendant. Further, he argued that the application and the plaint can be cured by an amendment as provided under Order 8 rule 1 of the Civil Procedure Rules. He dismissed issues raised as technical issues that could not be relied on to obtain orders sought.

6. In the instant case the verifying affidavit in respect of the 2nd plaintiff is sworn by the 1st plaintiff who depones that he is authorized by the directors of the 2nd plaintiff. The issue raised by the defendant is that he did not expressly state that he is an official of the 2nd plaintiff and as such he was not competent to swear the verifying affidavit.

7. It is important to note that there is an authority to institute the suit dated 17th December 2012 filed. The said authority empowers the 1st plaintiff and one **Alex Kyalo Mutemi** to institute the suit on behalf of the participants and the 2nd plaintiff. Having obtained the power to institute the suit, he had power to swear a verifying affidavit.

In the case of **Mavuno Industries and Others versus Keroche Industries Limited HCCC (Commercial and Admiralty Division) No. 122 of 2011** the court stated thus:

“As properly submitted by the defendant, 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 or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff’s bundle of documents which common sense dictates it should. Of course, 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 or with the Registrar of Companies, as the requirement is extended by the defendant, 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 that the position in law is that such a resolution by the Board of Directors of a company may be filed any time 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, at least not at this stage.”

The suit would not be defeated following such a technicality.

8. It is argued that the 1st plaintiff is not an officer of the 2nd plaintiff. According to the joint venture agreement, the bone of contention, the 1st plaintiff is listed as one of the directors of the 2nd plaintiff. In the case of **Presbyterian Foundation & Another versus East Africa Partnership Ltd & Another (2012) eKLR**, the learned judge stated thus:

“The Civil Procedure Rules do not define what an authorized officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavit 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 “authorize”; “which is defined by Oxford Dictionary as “sanction”; “give authority”; “commission”. That being the position, whether or not the 2nd plaintiff was given authority to swear the verifying affidavit is a matter of evidence and cannot certainly be the subject of a preliminary objection unless the said fact is admitted.”

Being a director of the company it cannot be authoritatively said that he lacked authority. Lack of authority would be a matter of evidence.

9. According to Order 4 rule (3) of the Civil Procedure Rules where there are several plaintiff, one of them, with written authority filed with the verifying affidavit may swear the verifying affidavit on behalf of the others. It was the explanation of the plaintiff's advocate that the 1st plaintiff has brought the suit on behalf of participants pursuant to the agreement dated 15th September 2010. The said participants entered into an agreement with the defendant prior to incorporation of the 2nd plaintiff. The parties have therefore filed the suit as distinct plaintiffs.

10. Order 1 rule 9 of the Civil Procedure Rules is clear. The suit cannot be defeated just because a party is not properly before the court. Evidence must be called to enable the court decide on the controversy that is before it. Justice would call upon this court to deal with the substance of the matter. The suit is at the initial stage and if there is any misjoinder it can be cured by an amendment as provided for by Order 8 rule 1 of the Civil Procedure Rules.

11. It has been stated that the application does not meet legal threshold for grant of an injunction. Whether or not an application is meritorious can only be determined after both parties are given a hearing. This is not an issue that can be determined at this stage.

12. Finally, on the issue whether there was compliance with **Order 1 rule 1(f) of the Civil Procedure Rules**, an explanation has been rendered that it was as a result of existence of **HCCC No. 5 of 2013** which refers to the same subject matter. This fact should have been disclosed. But, can a suit be struck out due to that omission? The answer lies with **Section 6 of the Civil Procedure Act** which provides thus:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

It would call upon the court to stay one of the suits as the previous one proceeds.

13. Having perused HCCC No. 5 of 2013, it is worth noting that the matter in issue is directly and substantially in issue. Two (2) of the parties that is the 2nd plaintiff and the defendant herein are parties therein. But two (2) of the parties in HCCC 5 of 2013 do not appear in the instant suit. Relief sought is different. This kind of omission which can be rectified by way of amendment cannot result into the suit being struck out.

14. From the foregoing, the preliminary objection should fail in its entirety. However, for what is worth I would like to associate myself with remarks made by **Lord Templeman in Ashmore versus Corp. of Lloyds (1992) 2 ALL ER 486 (HL) at page 493** that:

“It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner.”

15. The preliminary objection is therefore rejected. Accordingly, it is dismissed with costs to the respondents. The application to proceed. A hearing date shall be fixed at the registry.

16. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JANUARY, 2014.

L.N. MUTENDE

JUDGE