



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL SUIT. NO. 365 OF 2012**

**NYAGUTHII TRANSPORTERS LIMITED ..... PLAINTIFF**

**VERSUS**

**MICHAEL KIMANI KARIUKI .....1ST DEFENDANT**

**HILARY KIPROTICH NGETICH .....2ND DEFENDANT**

**JANE KOSEN .....3RD DEFENDANT**

**THE COMMISSIONER OF LANDS .....4TH DEFENDANT**

**DISTRICT LAND REGISTRAR, NAKURU....5TH DEFENDANT**

**HON. ATTORNEY GENERAL ..... 6TH DEFENDANT**

**RULING**

1. Before the court is a Preliminary Objection by the 4th-6th Defendants dated 15th May, 2013. The objection to the Plaintiff's suit is on the basis that the suit offended the mandatory provision of **Order 4 Rule 1(4)** and **Order 4 Rule 1(6)** of the **Civil Procedure Rules**.

2. On 15th May, 2013 the learned Counsel for the 4th-6th Defendants sought directions on how to proceed with the preliminary objection. By consent, the parties agreed the preliminary objection be disposed off by way of written submissions. The matter was then scheduled for a mention on 3rd December, 2013 to confirm the filing of submissions by the parties. On that day **Mr. Njuguna** for the 4th -6th Defendants had not filed his submission. Despite this, I fixed a date to rule on the preliminary objection. I further directed the counsel to file his written submission within seven days thereof.

3. By the time of writing this ruling, counsel for the 4th-6th Defendants had not filed his written submissions. The Plaintiff's counsel filed his submissions dated 7th October 2013.

4. In his submission counsel contends that the suit does not offend Order 4 Rule 1 (4) of the civil procedure rules; that the said rule provides where a plaintiff is a corporation, the verifying affidavit be sworn by an officer of the company duly authorized under the seal of the company. However the

deponent herein is not an officer but the director of the plaintiff company; that the company has two directors, therefore the deponent does not require authority as he can authorize himself.

5. Further counsel submitted that under Order 19 Rule 7 of the said rules, it allows the court to receive any affidavit sworn for the purpose of being used in a suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or any technicality. He further relied on section 1A, 1B of the Civil Procedure Act and Section 159 of the Constitution in urging the court to administer substantive justice. He contended that the defect did not go to the root or substance of the cause herein and therefore the preliminary objection is unmerited.

6. I have considered the pleadings and the written submission by counsel. The issues for determination are firstly whether the preliminary objection is proper and secondly whether the suit offends Order 4 Rule 1(4) and 1 (6) of the Civil Procedure Rules.

7. A preliminary objection is a point of law when if taken would dispose off the suit. It is what was formerly known as a “demurrer”. The 4th-6th Defendants objection fits the definition of a preliminary objection per the leading case of **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Ltd (1969) EA 696**. In the celebrated case Law J.A. stated a preliminary objection to be thus:-

**“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.**

8. Sir Charles Newbold, President stated in the same judgment as follows:-

**“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.”**

9. The 4th-6th Defendants do not seek the exercise of judicial discretion. What the preliminary objection seeks to do is determine whether the suit is properly before the court. It is well taken because if it succeeds the court will be saved the costs of lengthy trial.

10. With regard to the contention by counsel for the Plaintiff that the issues raised are mere technicalities which the court should not take heed of in accordance with Article 159, I must respectfully disagree. Article 159 (2) (d) of the Constitution makes reference to **“procedural technicalities”**. The issue before me goes to the root of the matter because this is a suit instituted by Nyaguthi Transporters Limited, a Limited Liability Company whose operations are regulated by its Articles of Association and the provisions of the Companies Act Cap 486. It is not a procedural technicality to require that a company authorizes any proceedings brought in its name.

11. **Order 4 Rule 1 (4)** of the **Civil Procedure Rules** provides as follows:-

**“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.”**

12. It is not in dispute that the plaintiff is a body corporate and can only take an oath through the agency of a natural person in this case one Edward Njenga. He swore that he is a *“director of the Plaintiff herein ...and authorized to swear this affidavit”*. He however did not annex a copy of the resolution authorizing him to swear on behalf of the company. This by itself cannot be fatal to the suit as the same is curable. Such oversight on the part of the plaintiff is what amounts to a procedural technicality. However the 4th-6th Defendants having filed the preliminary objection did not prosecute it. It is not the duty of the

court to do so on their behalf. The court will take the averments on record to be uncontroverted facts in cases of no compliance with the court's directives. In this case, the deponent has expressly stated that he had the authority to swear the affidavit and in his view the verifying affidavit is valid.

13. I do therefore find that the 4th-6th defendants have failed to prove the preliminary objection. Accordingly the orders of this court is that the preliminary objection dated 15th May 2013 is dismissed with costs to the objector.

**Dated and Signed at Nakuru this 4<sup>th</sup> day of April 2014**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Murimi for the plaintiff

Mr Mwangi for 1-3<sup>rd</sup> defendants

Ms Katambi for 4<sup>th</sup> Defendant

CC: Emmanuel Maleo

**L N WIATHAKA**

**JUDGE**