



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 47 OF 2014

NAKURU WATER AND SANITATION

SERVICES COMPANY LIMITED.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAKURU1ST RESPONDENT

JAPHETH MUTAI2ND RESPONDENT

JOHN CHERUIYOT3RD RESPONDENT

DR. MAARA T. NELSON4TH RESPONDENT

JOSEPH MOTARI5TH RESPONDENT

RULING

1. **Nakuru Water and Sanitation Service Company Limited**, the applicant, filed a Notice of Motion dated 30th June, 2014. It is filed under a Certificate of Urgency on the ground that the Respondents had called for an extra ordinary general meeting slated for 2nd July, 2014 in contravention of the requisite 21 days' notice set under the companies Act. The application is supported by the affidavit of Ibrahim Osman sworn on 30th June, 2014. He deposes that he is the chairman of directors of the Applicant and has the authority of the board to make the affidavit.

2. The Applicants are seeking a temporary injunction restraining the Respondents by themselves or otherwise from holding the extra ordinary general meeting scheduled for 2nd July, 2014 or calling any other meeting in the name of extra ordinary general meeting pending the hearing of the suit

3. The Respondents filed a Notice of Preliminary Objection to the Applicant's Notice of Motion dated 2nd July 2014. The Preliminary Objection is on the grounds reproduced as follows:

a) The suit and application both dated 30th June 2014, are fatally defective and bad in law;

b) The applicant by dint of Article 69 of its Articles of Association does not have the requisite quorum in its board of directors to make any resolution much so to institute a suit;

c) The affidavits sworn by Ibrahim Osman in this proceedings are fatally defective and ought to be struck out for the following reasons:

i) He is stranger to the applicant company and does not have *locus standi* to sue on behalf of the Applicant Company by virtue of Article 69 of its Article of Association.

ii) The composition of the board alluded to by Ibrahim Osman is not recognized by Article 69 of the Articles of Association of the company hence it is illegal and cannot purport to transact any business of the company whether real or imagined under section 22 of the Companies Act Cap 486 Laws of Kenya.

d) The current suit is an abuse of the Court process as the extra-ordinary general meeting has been called pursuant to orders of courts with competent jurisdiction.

e) The extra ordinary meeting was called by legally recognized member of the board of the Applicant Company under Section 133 (3) (b) of the Companies Act, Cap 486 Laws of Kenya together with Article 43 (e) and 44 of the Articles of Association of the Applicant Company and therefore this Honorable court cannot interfere with bona fide operations of a General Meeting of the Company.

4. In response, the Applicant filed Grounds of Objection to the Preliminary Objection dated 7th July, 2014 as follows:

a) That the preliminary objection is defective as it does not state the mandatory provisions of the law that have been offended.

b) That the preliminary objection does not qualify as one under the law since some of the points raised are not point of law but of facts requiring the taking of evidence and that the preliminary objection is not capable of disposing off the suit as is required under the law;

c) That the entire claim or suit raises serious facts which cannot be determined by way of Preliminary Objection or in the exercise of judicial discretion.

5. It is the Respondents' said Notice of Preliminary Objection that is the subject of this ruling. In their written submission of even date, the Respondent submits that the **Ibrahim Osman** has no locus standi to institute the suit. According to counsel such authority only emanates from either a resolution made by the general meeting or a resolution of the board of directors. They aver that they are not aware of any general meeting held as such a meeting would have come to their attention since the applicant is fully owned by the County Government of Nakuru. Further there was no evidence to show a resolution was made by the board. Counsel relied on the case of **Ansapar Beverages Limited V. Development Bank of Kenya Limited & 5 Others** (HCCC No. 1155 of 2000) where the court held a company ought to exhibit in form of a resolution its sanction to institute a suit in its name.

6. Further counsel submitted that even if the board was to produce minutes of the resolution to institute the suit, the suit would still not be properly before the court as the current board is not recognized following an amendment to the company's Memorandum and Articles of Association. The amendment required the board of directors to be reconstituted before they could legally conduct any business on behalf of the Applicant Company. He urged the court to be guided by the decision of Gikonyo J. in the **Julius Nyarotho V. The Attorney General & 3 Others**, (2013) eKLR where he observed that any decisions made by an illegally constituted board were illusory and had no effect in law.

7. Counsel thus contended that the suit had been occasioned by illegal acts and by this court entertaining the suit, it shall be acting as a conduit in perpetuating an illegality. He urged the court to uphold the preliminary objection and strike out the suit with costs as against Ibrahim Osman and his advocates (M/S E.M. Juma & Ombui Advocates).

8. Prof. Ojienda the learned counsel for the Respondents made further oral submission in support of the Preliminary Objection. He stated that the suit offends section 34 of the Civil Procedure Act. The issues between the parties arise from a decree passed by the industrial court in Petition No. 4 of 2014 and therefore should be determined by that court and not by a separate suit. Moreover the applicant failed to declare that there was a pending suit touching on the same subjects contrary to Order 4 Rule 1 (i) (f) of the Civil Procedure Rules.

9. Mr. Ombuyi submitted for and on behalf of the applicant. He opposed the preliminary objection and relied on the grounds of objection filed in court. Counsel submitted section 34 of the Civil Procedure Act guides the court when executing a decree. However there was no decree before court and therefore section 34 does not apply in the instant suit.

10. Counsel further submitted that the preliminary objection raises both issues of law and fact and shall require the court to take evidence in order to determine it. He submitted that the Preliminary Objection does not meet the criteria set out in the case of **George Oraro V. Barak Eston Mbaja**, Nairobi HCCC No. 85 of 1992 that of a point of law not blurred with actual details.

11. Counsel contended that there was no requirement of a company to file a resolution before the suit was filed. It was his argument that pursuant to Order 4 of the Civil Procedure Rules, the averment as contained at paragraph 18 of the plaint was sufficient. Finally, counsel submitted that the parties in the instant suit are different to those in Petition 4 of 2014. He thus prayed the preliminary objection be dismissed with costs.

ISSUES FOR DETERMINATION

12. After hearing the submissions of both counsel, this court finds that the only issue for determination is:

- i) whether to uphold the Preliminary Objection.

ANALYSIS

13. On this issue, I shall rely on the renowned case of **Mukisa Biscuits Manufacturing Company Limited V. West End Distributors Limited**, (1969) EA 696.

14. The above case sets down the threshold for Preliminary Objections in that it must be on a pure point of law and when raised and argued as a preliminary point is capable of disposing of the suit.

15. The Preliminary point of law must not be blurred and must not require the court to take evidence in order to determine it.

16. The points raised by counsel for the Applicant questions the quorum of the Board of Directors as to when they met to pass the resolution to proceed to institute the suit.

17. Counsel also contends that the person mandated to sue and make the affidavits was a stranger to the Applicant Company and had no *locus standi*. Therefore for those reasons the proceedings before the court were totally defective, making the suit bad in law and that it ought therefore to be struck out.

18. The Preliminary Objection and point of law relates to the “*Locus Standi*” of the said Ibrahim Osman.

19. The issue of *Locus Standi* revolves around the resolution of the Plaintiff Company and this court is of the view that there is need to take in evidence to substantiate the following issues:

- i) Notice of the Extra Ordinary General Meeting
- ii) Service of Notice upon the members.

iii) List of names and of members who attended and who constituted the requisite quorum.

iv) Agenda and minutes of the meeting and deliberations.

v) Whether the meeting to pass the resolution was irregular and whether IBRAHIM OSMAN was mandated to act.

FINDINGS AND DETERMINATION:

20. This court finds that the Preliminary Objection does not meet the threshold set down in **Musika Biscuits** (supra) as the points raised on “*Locus Standi*” and the resolution giving the mandate to institute the suit have to be ascertained and determined by evidence.

21. The Preliminary Objection is hereby over-ruled.

22. Costs shall be in the cause

23. This court has judicial notice of related suits filed in the Industrial Court therefore for avoidance of conflicting orders, this suit is hereby transferred to the Industrial Court, to be mentioned on the 27th day of November, 2014 for directions.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 21st day of October, 2014.

A. MSHILA

JUDGE