REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 411 of 2012

KENYA AEROTECH LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

By a Notice of Motion dated 16th August 2012 expressed to be brought under the provisions of section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules, 2010, the plaintiff seeks the following orders:

1. That this Application be heard urgently and ex-parte in the first instance.

2. That pending the hearing of this application the court be pleased to order by way of mandatory injunction that the motor vehicle registration number KBA 492 V Toyota Regius be immediately and unconditionally released to the plaintiff or its nominees.

3. That pending the hearing and determination of this suit the said motor vehicle registration number KBA 492 V be released immediately and unconditionally to the Plaintiff or its nominees.

4. That pending the hearing and determination of the suit the Defendant be restrained by a prohibitory injunction from detaining any of the Plaintiff's motor vehicles including but not limited to motor vehicle registration number KBA 492V.

5. That pending the hearing and determination of the suit the Defendant be restrained by a prohibitory injunction from detaining any of the Plaintiff's motor vehicles including but not limited to motor vehicle registration number KBA 492V.

6. That the costs of this Application be provided for.

The application is based on the grounds that the Defendant has illegally detained the Plaintiff's motor vehicle registration number KBA 492V without justifiable cause and without any grounds in law and that the plaintiff is ready and willing to abide by any condition that the court may deem fit and just as a prerequisite for the grant of the interim relief sought.

The application is supported by an affidavit sworn by **Patrick C. Komen,** the plaintiff's Managing Director on 10th August 2012 in which it is deposed that on 10th August 2012 while the plaintiff's motor vehicle registration number KBA 492V a Toyota Regius was being driven along Uhuru Highway by the plaintiff's purchasing officer and authorised driver, the defendant's agents/officers stopped the said

vehicle and demanded that since the said vehicle was branded, the same ought to be paid for and ordered that the same be taken to the defendant's yard where the same was detained. According to the deponent, the plaintiff has been in operation since 1970 when it was established and provides ground and cargo handling services to various international airlines in all major airports within the Republic of Kenya. According to him the plaintiff has at all material times complied with the law and paid for all necessary licences required for the said operations and the issue of branding has never arisen as only the plaintiff's names are inscribed on its vehicles pursuant to the provisions of rule 39 of the Traffic Rules under the ***Traffic Act*** and the requirements of the Kenya Airports Authorities which require that the names be prominently inscribed for identity and security reasons. In the deponent's view, the inscribed names are not mean for advertisement since the plaintiff's business is solely confined to the airside of the airports and not beyond. In his view, the ***Traffic Act*** is a substantive law which cannot be overridden by the by-laws or the Physical Planning Act from which the said bye-laws emanate. It is therefore deposed that it is only mete and just that an order do issue as sought and further that the defendant be restrained from detaining the plaintiff's vehicles on the basis that they are not branded and that the plaintiff is ready and willing to comply with any terms deemed fit by the Court including the deposit of Kshs 13,000.00 which is the defendant's limit of the claim.

In opposition to the application, the defendant filed a notice of preliminary objection as well as a replying affidavit. According to the preliminary objection there is no authority (Plaintiff's resolution) authorising the institution of this suit and that the verifying affidavit and affidavit in support of the application have been endorsed by a stranger and as such are incurably defective.

On the facts the defendant filed an affidavit sworn by **Karisa Iha**, its Director Legal Affairs on 26th October 2012. According to him the application and the suit are incompetent, bad in law (substance and form) and fit for summary dismissal and further the suit is instituted by a stranger without any authority from the alleged plaintiff. In his view, the contested branding by-laws are a matter of public record and the fact that the Plaintiff has been breaching them for over 40 years is a further ground for dismissal of the application and the suit. The Kenya Airport, in his view, are subservient to the Defendant's by-laws once the Plaintiff's vehicles exit the precinct of the Airport. In any case the fact that the vehicle was being driven along Uhuru Highway contradicts the assertion that the vehicles are confined to the airside of the airport and not beyond. Accordingly the Court is urged to frown upon the plaintiff's attempt to be self excluded from the by-laws applicable to all and dismiss the suit. In the defendant's view the provisions of Rule 39 of the ***Traffic Act*** cannot be read in isolation to the Defendant's by-laws created under section 30(1) of the ***Physical Planning Act Cap 286***. In his view since the vehicle in question has been released there are no further interim orders to be granted in this application while the reliefs sought in prayers 4 and 5 are couched in such wide terms that if granted and liable to potential abuse or misuse and if granted shall set a dangerous precedent that may cripple lawful revenue collection/source(s) and day to day operation of the Defendant. According to the deponent since the existence of the by-laws is not disputed, their probity can only be exploited at the hearing hence the application ought to be dismissed and the main suit set down for hearing. The Kshs 13,000.00 that the plaintiff offers to pay, according to the deponent is per branded vehicle.

Although directions were given with respect to filing of written submissions, only the Defendant filed its written submissions. According to the defendant, the plaintiff being a limited liability company any action taken by a company's human agent must be sanctioned by a resolution of the directors. In this case, it is submitted there is no evidence of such a resolution authorising the alleged managing director to file the suit and swear affidavit on behalf of the plaintiff. Relying on **Gurcharin Singh & 2 Others vs. KBK Anne Ltd & 3 Others HCCC No. 612 of 2012**, it is submitted tat before a company can come to Court as a plaintiff, it is necessary that a resolution to that effect be passed, generally by the Board of Directors and in the absence of such authorisation resolution, a company cannot come to court as a plaintiff. In the defendant's view this issue suffices to dispose of the suit and the application which ought to be dismissed with costs. It is further submitted that the prayers as crafted by the Plaintiff are too wide and pre-empt the main suit. However, in the spirit of expeditious determination of the main suit, the defendant submits that it does not oppose a conditional limited prohibitory injunction pending the hearing and determination of the main suit on condition that the Plaintiff do list and provide details on record of all its motor vehicles that operate outside the Airport Authority precinct and deposits Kshs. 13,000.00 for each vehicle listed

annually as security pending the hearing and determination of the suit in which case it is submitted that the costs of the application be in the cause.

I have considered the foregoing. The first issue for determination is whether or not this suit and the application ought to be dismissed on preliminary objection for want of resolution. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J**(as he then was) expressed himself as follows:

"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. The first matter relates to 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"… The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute".

The issue whether or not there was a resolution of the Plaintiff company before this suit was instituted is, in my view, a matter of fact which must be proved by evidence. It cannot therefore properly speaking be made a subject of a preliminary objection unless it is agreed that there was no such authority with the result that the only issue for determination would be the legal consequences of the failure to secure the resolution. The mere fact that the resolution is not exhibited at this stage does not render the suit incompetent. I have had an occasion to deal with a similar objection in **HCCC (Commercial & Admiralty Division) No. 122 of 2011** between **Mavuno Industries & Others vs. Keroche Industries Limited** in which I expressed myself as follows:

"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 anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as he suit. Its absence, is therefore, not fatal to the suit, at least not at this stage.

On the merits of the application, on 17th August 2012, **Angawa, J** ordered that the vehicle registration no. KBA 492V be released to the applicant forthwith and that Kshs 13,000.00 be deposited by the close of business on 22nd August 2012. Accordingly the only prayers that fall for determination are prayers 4, 5 and 6 of the Motion in issue.

From the defendant's submissions, it is clear that the defendant does not seriously oppose the said orders save that the same ought to be granted on terms. Having considered the application, I am satisfied that the issue whether or not the inscription of the plaintiff's name on its vehicles constitutes branding under the provisions of the Physical Planning Act is not a frivolous issue and constitutes a prima facie case for the proposes of an interlocutory injunction. Whereas the damages or loss that the plaintiff stands to suffer if forced to pay for the said inscription is capable of being quantified, taking into account the fact that the plaintiff's contention is that the said demand is illegal and taking into account the fact that the law governing the grant of injunctive relief is nolonger cast in stone and the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before and that the Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injusticecoupled with the submissions made on behalf of the defendant, it is my view that this is a matter in which the principle of proportionality ought to take a central role.
Accordingly I grant prayers 4 and 5 of the Motion dated 16th August 2012 on condition that the plaintiff deposits Kshs 100,000.00 in court within thirty days from the date hereof.

Dated at Nairobi this 28th day of January 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties.