



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CIVIL SUIT 180 OF 2011**  
**MAMA DAY NURSERY AND PRIMARY**  
**SCHOOL.....PLAINTIFF/APPLICANT**  
**VERSUS**  
**GEORGE MWENDA MUTHURI.....DEFENDANT/**  
**RESPONDENT**

**R U L I N G**

In the application dated 13<sup>th</sup> September, 2011, the plaintiff/applicant seeks an injunction against the defendant. The application is brought by way of Notice of Motion and expressed to be brought under Sections 1,1A,3A and 3B of Civil Procedure Act and under Order 40 rules 1 and 2 of the Civil Procedure Rules.

The respondent, filed replying affidavit to that application and subsequently thereafter filed Notice of preliminary point of law dated 18<sup>th</sup> January, 2012. That the Counsel agreed to have both the application and preliminary point of law heard by way of written submissions. The counsel for applicant filed the applicant's submissions on 10<sup>th</sup> March, 2012 whereas the respondent's counsel filed the respondent's submissions on 27<sup>th</sup> February, 2012.

On 29<sup>th</sup> May, 2012 both counsel appeared before the court for highlighting on their submissions. The respondent's preliminary point of law is based on the following:-

- 1. That there was no authorization by the company by the way of a company resolution for lodging of the suit herein nor the application dated 13<sup>th</sup> December, 2011 hence rendering both the application and main suit fatally defective and both the application and main suit should be struck out with costs.***
- 2. There is no time the said Beatrice K. Mureithi has ever been a director of one of the Directors of the plaintiff's director.***
- 3. The affairs of the plaintiff are not "regular" thus has no "locus standi" to come to court.***
- 4. The verifying affidavit hereto and the supporting affidavit dated 13/12/2011 are defective/irregular.***
- 5. The suit as filed is an abuse of court process.***

The applicant in her application dated 13<sup>th</sup> December, 2011 sought the following orders:-

**1. That this Honourable Court be pleased to issue an order of temporary injunction restraining the defendant by himself, his relatives, agents, employees and/or locking and/or anyhow else whomsoever acting on his behalf from entering, remaining on, locking and/or anyhow else howsoever interfering with the plaintiff's operations until this application is heard and determined.**

**2. That this honourable court be pleased to issue an order of injunction restraining the defendant by himself, his relatives, agents, employees and/or anybody else whomsoever acting on his behalf from entering, remaining on, locking and/or anyhow else howsoever interfering with the plaintiffs operations until this suit is heard and determined.**

Which application is grounded on the following grounds:-

- i. That the plaintiff is a limited liability company duly registered in Kenya and operates a school at Naari area within North Imenti District.**
- ii. That the said school operates land parcel No.KIIRUA/NAARI/1698 which land is owned by the plaintiff.**
- iii. That the defendant is only a shareholder of the plaintiff having duly resigned as a director thereof in August, 2006.**
- iv. That the defendant has been interfering with the operations of the plaintiff's said school by inter alia insulting the Directors and the staff members hence causing tension in school culminating to, inter alia, resignations.**
- v. That in November, 2011 the defendant stormed the plaintiff's said school, removed the locks to the gates and doors and replaced them with others hence making the whole institution inaccessible by the Directors, members of staff and the other employees of the plaintiff.**
- vi. That the situation on the ground is very emotive and volatile as the plaintiff's employees cannot access their places of work.**
- vii. That there is a lot of work pending in respect of the pupils schooling in the said school and unless the court intervenes the plaintiff and the said pupils stand to suffer irreparably and a breach of the said pupils constitutional rights is imminent.**
- viii. That the defendant will not suffer any prejudice if the prayers herein are granted.**
- ix. That it is in the interest of justice and fairness that this application be allowed.**

The application is supported by applicant's affidavit dated 13<sup>th</sup> December, 2011, in which the applicant has stated that she is a director of the plaintiff company and has authority to swear this affidavit and that the plaintiff is private company incorporated and registered in Kenya as per attached certificate of incorporation annexed and marked "BKMI". That the plaintiff company operates a school at Naari within Imenti North District with currently a population of 200 pupils between nursery and standard VIII. That the defendant has been interfering with the operations of the school wrongfully, unlawfully and/or illegally by inter alia insulting, harassing and threatening the plaintiff's Directors, teachers/staff and employees of the school as per annexure "BKM3". That as a result of the defendant's said action some teachers have resigned as per annexure "BKM4". That the defendant's resignation as a director was accepted as per annexure "BKM6" on 6<sup>th</sup> September, 2006. That in November, 2011 the defendant stormed the plaintiff's school and replaced the locks to the gates, and doors with his own hence rendering the plaintiff's staff, employees and Directors unable to access their place of work and offices. That as a result of the defendant's acts the plaintiff school averred that it is suffering irreparable loss as it cannot access their place of work. That the plaintiff's pupils also stand to suffer irreparably as a result of

heartless and brutal acts of the defendant. That when the matter was referred to the area chief, District Education Officer and Police they advised the Plaintiff to seek court's orders. That the suit was subsequently filed after a resolution was made as per annexure "BKM6" being a copy of the extract of the meeting of the company held on 28<sup>th</sup> November, 2011. The applicant further deponed that the situation on the ground is already emotive and tense since the parents of the school pupils are worried about the academic welfare of their children. The applicant further deponed that the defendant will not suffer any prejudice if the application is allowed.

The respondent filed a replying affidavit which is undated and purportedly commissioned by Elijah K. Ogoti Advocate and commissioner for Oaths, who is the advocate for the respondent. The relying affidavit being not dated and being commissioned by the advocate for the respondent is incompetent for failure to comply with the provisions of Oaths and Statutory Declaration Act and Rules made thereunder and it is struck out. See **Rajput – V- BARCLAYS BANK OF KENYA LTD & 3 OTHERS(2004)2 KLR 393 in which Emukule J**, held:-

***“ Failure to comply with the provisions of the Oaths and Statutory Declarations Act and the Rules made thereunder is a matter of substance and not form. It is not a matter which is curable or about which the court should take a lenient view. The plaintiff’s affidavit in support of the second application was incompetent and it would be struck out.”***

I agree with the sentiments expressed by Honourable Judge in the above-mentioned case. Failure to indicate the date the affidavit was signed makes me come to the conclusion that the affidavit was not sworn before the Commissioner for Oaths and is of no value.

In case of **MUSA & SONS LTD & ANOTHER – VS- FIRST NATIONAL FINANCE BANK & ANOTHER(2002) 1KLR 581** Hon. Otieno, J, as he then was held:-

***“ The certificate of urgency accompanying the application was unsigned and the application should not have been certified as urgent. The certificate was null and void and of no legal effect.***

***The Affidavit in support of the application was defective as it did not comply with Section 5 of the Oaths and Statutory Declarations Act, as it failed to state in the jurat the place where it was sworn.”***

I agree with the findings in the above-mentioned case and find that failure to indicate the date of attestation and commissioning of the affidavit by the Counsel who appeared for the respondent was contrary to the provisions of the Oaths and Statutory Declarations Act(Cap.15) and the Replying Affidavit was incompetent and of no value in the application the same therefore stands struck out.

The applicant in her supplementary affidavit dated 12<sup>th</sup> January, 2012 referred to respondent purported affidavit dated 3<sup>rd</sup> January, 2012; I have used the word purported because in the court file there is no replying affidavit dated 3<sup>rd</sup> January, 2012 by the respondent and has stated as follows: That the deponent is a director of the plaintiff company having been appointed and registered as such as per annexure “BKMI” which annexure show that Charity Kithira Mbaabu and Beatrice Kigetumuriithi were appointed as Directors of the plaintiff company with effect from 20<sup>th</sup> May, 2008 and on the same date Evangeline MuthuriKambura, Eric MbaabuMuthuri and JaphetMuriithiMuthuri ceased to be Directors of the plaintiff company. That annexure “BKM2” a copy of the special resolution confirm Beatrice K. Muthuri is a director of the plaintiff company. That the defendant resigned as a director of the plaintiff company as per annexure “BKM2” a copy of defendant’s resignation letter, duly signed by the defendant. That the defendant locked school doors in mid-2010 leading to filing of this suit. That after resignation it is deponed the defendant never attends director’s meetings. That the defendant lives on land parcel No.Kiirua/Naari/1696 while the school is built on Kiirua/Naari/1698 each with separate titles as per annexure “BKM5” and “BKM6”.

That it is deponed the defendant won't be prejudiced in any way if the orders of injunction are granted. That the defendant had taken away school items which he returned on being threatened with

legal action.

When the matter came for hearing the learned counsel for the applicant Mr. Munene submitted that he was relying on the written submissions dated 10<sup>th</sup> March, 2012. He stated that the defendant is interfering with the operation of the plaintiff's school and if the respondent is not restrained the plaintiff's school would suffer irreparably as the parents would remove the children from the school. He submitted that any dispute between the parties can be resolved by the court. On the issue of the preliminary point of law he submitted the same is not merited as it does not raise any issue of law as held in the famous case of **MUKISA MANUFACTURING CO. LTD – VS – WEST DISTRIBUTORS LTD(1969) E.A. 696** in which court of appeal for Eastern Africa stated that:- “a *preliminary objection*” which it was not, so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which comes by clean implication out of the pleadings and if argued as a preliminary point may dispose of the suit.”

The applicant in its written submissions have averred that way back in 1843 a rule in company law was established commonly known as rule in FOSS VERSUS HARBOTTLE which is reported in (1843) 2 HARE 461. The rule in **FORSS VERSUS HARBOTTLE** states that in order to redress a wrong decree to the company or to the property of the company, or to enforce rights of the company, the proper plaintiff is the company itself and court will ordinarily entertain an action brought on behalf of the company by a shareholder. The plaintiff's counsel submitted that from the facts presented to the court in the instant case, it is clear the company is the one who was wronged and the proper plaintiff even if it sued a shareholder or a director. It was further submitted on behalf of the plaintiff/applicant that a resolution of the company allowing this case to be filed was given. That the resolution show the company seal and therefore there was proper resolution to file the suit in court through the firm of M/s MaitaiRimita & Co. Advocates.

The counsel for the applicant further submitted that a person who is appointed by a company to plead or sign documents in a suit on its behalf need not be a director. That any officer of the company duly authorized under seal of the company will suffice. That in the instant case the person authorized to plead and swear the affidavits on behalf of the company happens to be a director of the company, being one Beatrice K. Muriithi. That the applicant counsel argued that the defendant/respondent letter from the Registrar of companies tells half story of the plaintiff company. That plaintiff counsel argued that the companies are bound to make returns to the Registrar every year and failure to do so would result in the company being compulsorily wound up. That the list the defence sought from the Registrar of Companies as at 2006, and exhibited to court, is challenged by the plaintiff on the ground that the Directors listed thereto were dead by 2008 except two. That after the death of some of the director's notification of change of Directors was filed. That Beatrice K. Muriithi became one of the new Directors. That the change of Directors and the resolutions were received by the Registrar of Companies on 29<sup>th</sup> August, 2008. That acquisition of shares in the company followed a confirmation of grant in a Succession Cause. The plaintiff's counsel submitted that therefore Beatrice K. Muriithi has been a director since 2008. It is argued by the counsel for the plaintiff that when Registrar of companies was asked to confirm the shareholders and Directors for the company he used the latest annual return and did so in bad faith. He further argued the defendant resigned as a director but remains a shareholder as he was not expelled by the company. The plaintiff argued that the defendant intends to come back but through unlawful and criminal methods.

The plaintiff's counsel submitted that the defendant has completely misread and misunderstood what was stated in case of **HAPPYLAND INN LIMITED – V- NAIROBI CITY COUNCIL ENVIRONMENTAL AND LAND CASE NO. 481 OF 2009**(Nairobi).

He submitted what Honourable Lady Justice Sitati was re-affirming is a well-known position in company law; that is to say, the company is a separate entity from the Directors or shareholders and that a person acting for the company in a suit must have authority, hence the need for MINUTES OF MEETING for the purpose. He argued that the Honourable Judge did not say that the extracts of minutes are not acceptable. He argued a company's minutes could be having many other resolutions which could not be relevant and what is relevant is the particular minute giving authority. He therefore submitted from the word go the minutes authorizing the filing of this case through M/S MaitaiRimita & Co. Advocates were filed and the same minutes authorized Beatrice K. Muriithi to sign all necessary documents to file the

suit. He submitted that it is common sense and knowledge that a seal cannot be seen in a photocopy hence the applicant had to seek leave to file a supplementary affidavit to exhibit an original document which could reveal the company seal. The plaintiff's counsel concluded by seeking that the preliminary point of law be dismissed as it has no merits.

On the other hand, the learned Counsel for the respondent Mr. Ogoti in his oral submissions stated that he was relying on his written submissions dated 27<sup>th</sup> February, 2012. He added that Beatrice K. Muriithi had not been a Director of the plaintiff school. He referred to list of Directors in the respondent's affidavit purportedly dated 3<sup>rd</sup> January, 2012. The affidavit filed by the respondent herein I had found was not dated and was commissioned by the respondents counsel and I struck it out. I therefore would not refer to matters raised by respondent's counsel on the already struck out affidavit.

The respondent counsel in support of the preliminary point of law argued that Beatrice K. Muriithi was not a director of the plaintiff school. That she did not have authority from the other Directors to file this suit. He referred me to case of **HAPPYLAND INN LIMITED NAIROBI CITY COUCIL ENVIRONMENTAL & LAND CASE NO.481 OF 2009(NRB)** and argued that the plaintiff had not annexed any minutes of the Board of Directors or general minutes. He also argued the original six Directors, four of whom are already dead have not been replaced. He argued that "BKMI" confirms that the defendant is one of the Directors and submitted therefore the applicant cannot legally restrain a director who is in office. He argued the suit was filed without the authority of the Directors.

I have carefully considered the application, the preliminary point of law, the written submissions by both counsel and authority referred to me. The main issue for consideration in this application is whether the plaintiff has established a prima facie case with probability of success(See the often cited case of **GIELLA – VS – CASSMAN BROWN & CO. LIMITED(1973) E.A.358.**

The plaintiff in this case is a limited liability company as per the pleadings. The verifying affidavit was sworn by Beatrice K. Muriithi who has stated that she is a director of the plaintiff company and has authority to make and swear the affidavit. That "BKMI" notification of change of Directors and secretaries form NO.203A filed with registrar of company on 28<sup>th</sup> August, 2008 and Resolutions showed Beatrice K. Muriithi as one of the new Directors. That Beatrice K. Muriithi was given authority to sign all necessary documents including swearing the affidavits as per extract of meeting of company held on 28<sup>th</sup> November, 2011 in a special/ordinary resolution. This was a meeting of Board of Directors. That it was in the same meeting that the firm of M/S Maitai Rimita & Co. Advocates were resolved to be directed and instructed to take immediate court action and have the school premises opened and stop Mr. George Mwenda Muthuri from further interferences with smooth running of the plaintiff school. Beatrice K. Muriithi has exhibited the authority as annexure "BMK6" and "BKM a".

In cases by company it is clear that there is distinction between a company as a legal entity and the human persons who run the company; and as such every action taken on behalf of the company must be authorized in order to protect the company against the whims of Directors and/or shareholders. Beatrice K. Muthuri as I have found herein above had authority from the plaintiff company to institute this suit through the firm of M/S Maitai Rimita & Co. Advocates following Board of Directors meeting minutes, then as such the plaintiff's suit can be said to have a prima facie case with probability of success. In the case of **AFFORDABLE HOMES AFRICA LTD – VS – IAN HENDERSON & 2 OTHERS HCCC 524 OF 2004(NAIROBI), MILIMANI** Hon. L. Njagi, stated:-

***“ The upshot of these consideration is that in absence of board resolution sanctioning the commencement of this action by company the company is not before the court at all”***

The applicant further stated that the defendant ceased to be a director of the plaintiff's company and may not know what decisions are made in Board of Directors meetings. The respondent did not controvert this in anyway and I agree with the plaintiff the defendant may not know the resolutions made by the Directors in Board of Directors meeting.

Further the defendant is said to have locked the school and disturbed smooth running of the school and

interfering with education of the pupils at the plaintiff school. That the plaintiff has deponed if the defendant is not restrained by an order of court the plaintiff would stand to suffer irreparably. I agree that if injunction is not refused the plaintiff school stands to suffer loss or damage of such a nature and magnitude that damages will not adequately compensate the plaintiff school. Lastly the comparative mischief likely to result to the plaintiff school should the injunction be refused outweighs that which results to the defendant should it be granted.

The upshot of the matter is that the application dated 13<sup>th</sup> December, 2011 is allowed and I proceed to make the following orders:-

***1. That injunction orders be and are hereby issued restraining the defendant by himself, his relatives, agents, employees and/or anybody else whomever acting on his behalf from entering, remaining or, locking and/or anyhow else, howsoever, interfering with the plaintiff's operations until this suit is heard and determined.***

***2. Costs of the application to the plaintiff.***

***3.***

**DATED, SIGNED AND DELIVERED AT MERU THIS 28<sup>TH</sup> DAY OF JUNE, 2012.**

**J. A. MAKAU  
JUDGE**

**DELIVERED IN OPEN COURT IN PRESENCE OF:-**

1. Mr. Rimita for the applicant
2. Mr. Omari h/b for Mr. Ogoti for the defendant.

**J. A. MAKAU  
JUDGE**