



SIOKWEI TARITA LTD.....PLAINTIFF

VS

DR. CHARLES WALEKWA.....DEFENDANT

(Preliminary Objection raised by defendant – Question whether Plaint filed by a company requires a resolution to be attached to the Plaint- Affidavits -

Question of who may swear affidavit on behalf of a corporation- whether affidavit by corporation requires to bear the company seal- Whether authority to file suit is a matter that the defendant may question or whether it is an internal matter – jurisdiction of the Business Premises Rent Tribunal- whether sufficient material has been placed on record to verify that the transaction herein is a controlled transaction. Preliminary Objection dismissed)

RULING

A. PRELIMINARY

The matter for determination is a Preliminary Objection raised by the defendant. The preliminary objection is as follows :-

1. The suit is void ab initio and or ultra vires and bad in law in that the suit has been filed on behalf of a limited liability company without a resolution passed in a meeting of the company or in a board of Directors meeting.
2. The Honourable Court lacks jurisdiction to arbitrate over the matter by dint of the provisions of the landlord tenant/shops, Hotel and catering establishments Act Cap 301(sic).
3. The Application dated 8/11/2012 and the entire suit and proceedings herein are incompetent, misconceived, bad in law and a nullity ab initio.

Before I go to the substance of the Preliminary Objection, I think it is important that I set down the background to this dispute which will also shed light on the Preliminary Objection.

B. BACKGROUND

This suit was commenced by way of Plaint dated 8 November 2012 and filed on the 9 November 2012. In the Plaint, the plaintiff has laid out his relationship with the defendant which is a landlord/tenant relationship. The Plaintiff is the registered owner of the land parcel ELDORET MUNICIPALITY BLOCK 7/162 which is a commercial plot situated within Eldoret Municipality with several tenants and users. The premises is used variably and there is a petrol station and several shops. The defendant is one of the tenants and he operates a Chemist on the premises christened Dominion Chemist.

It is the plaintiff's case that the defendant has resorted to exposing the entire property to the risk of fire by erecting structures using PVC and wooden materials which are highly flammable and also by using candles as a source of lighting. It is the plaintiff's case that the defendant has since June 2011 declined to

allow the plaintiff to carry out comprehensive wiring of an electrical system. It is pleaded further that the defendant has frustrated efforts to have the Kenya Power & Lighting Company to approve a service line to the premises owing to the failure by the defendant to allow inspection and wiring. The plaintiff has further pleaded that there is danger “that the whole of the town of Eldoret being set ablaze as the petrol station within Eldoret Municipality Block 7/162 houses fuel tanks storing fuel running to several thousands of litres.”[1] This is because the defendant has despite demand “ignored to stop using candles and also to remove highly flammable materials from his leased premises.”[2] The plaintiff has further pleaded that “there is need for the court to compel the defendant by way of mandatory injunction to secure the entire property by way of insurance policy to protect the building Eldoret Municipality Block 7/162.”[3]

The plaintiff has disclosed an existing case Nairobi Civil Appeal No.535 of 2012[4] . To him the prayers sought in this Plaint cannot be granted in the existing case. In his prayers, the plaintiff has prayed for orders of mandatory injunction compelling the defendant to take up an insurance policy from a reputable insurance company to safeguard and/or protect property on Eldoret Municipality Block 7/162 and also to remove or evacuate all inflammable materials from the premises. He has also asked for “any other relief or order that the court may deem fit to grant.”

In line with the rules[5] , there was annexed to the plaint a Verifying Affidavit sworn by Barnabas Bargoria. I will set out the Verifying Affidavit in full because it has a bearing on the preliminary objection raised. It states as follows :

1. *THAT I am an adult male of sound mind hence competent to swear this affidavit.*
2. *THAT I am a director of the plaintiff company this suit has been filed on the behest of the company seeking the relief contained in the Plaint.*
3. *THAT I have read the plaint forwarded herewith and I confirm the correctness of all the averments made therein.*
4. *THAT what is deponed herein is true to the best of my knowledge, understanding and belief.*

Alongside the plaint, the plaintiff filed an application under Certificate of Urgency dated 8 November 2012. The application is brought under Order 40 Rules 1(a) of the Civil Procedure Rules and Sections 1A and B of the Civil Procedure Act “and all enabling provisions of the law.” In his application, the plaintiff has prayed for the following orders :-

1. *THAT the application be certified urgent and heard ex-parte in the 1st instance.*
2. *THAT pending the hearing and the determination of this suit a mandatory injunction do issue compelling the respondent to forthwith procure and or take a fire policy from a reputable insurance company for the leased premises on Eldoret Municipality Block7/162.*
3. *THAT pending the hearing and the determination of this suit a mandatory injunction to issue compelling the respondent to forthwith remove from the premise all inflammable materials i.e PVCs and wooden structures, from his leased premises on Eldoret Municipality Block 7/162.*
4. *THAT this Honorable court do fix time within which the respondent will comply with prayer 1 and 2 above.*
5. *THAT costs of this application be provided for.*

The application is supported by the Affidavit of Barnabas Bargoria. I will set out paragraph 1 of the affidavit as it has some influence on the Preliminary Objection. He has stated as follows :-

THAT I am a director of the applicant herein and well versed with all the facts of this matter and

therefore competent to swear this affidavit.

The deponent has set out the reasons for the injunction which are basically those set out in the Plaint.

The defendant entered appearance through the firm of M/S Alwang'a & Company Advocates on 16 November 2012. He filed a defence on the same date and a Replying Affidavit to the application of 8 November 2012. The defendant has of course resisted the plaintiff's suit and has asserted that the plaintiff is not entitled to the prayers sought. The defence is of 19 paragraphs some of which are fairly lengthy. I will only set out what I feel is important to the preliminary objection raised. These are paragraphs 16 and 17 of the Defence which are drafted as follows :-

16. The defendant while admitting the contents of paragraph 11 of the Plaint as to the existence of the appeal being Nairobi High Court Appeal No.535 of 2012 between the parties, which appeal seeks the affirmation of the Plaintiff notice to terminate tenancy with the defendant herein and therefore this suit cannot be maintained in view of the said appeal given that the two suits are seeking antagonistic reliefs namely over the suit premises. This suit is therefore an abuse of the court process.

17. The defendant avers that this suit is incompetent bad in law and void ab initio based on the following grounds ;-

- a) The suit herein is void ab initio and/or ultra vires as it has been filed by a limited liability without the requisite authority and resolution passed in a meeting of the company or in a board of Directors meeting.*
- b) That the Honourable court lacks jurisdiction to determine this dispute as the same is vested in the Business Premise Rent Tribunal.*
- c) That the pre-requisite for grant of a mandatory have not been met.*
- d) That in any event the orders being sought for are untenable as the court cannot rewrite agreement between parties and impose obligations which are not contractual by way of an order of specific performance.*
- e) That a Tenant cannot be compelled to procure a policy for the whole premises when it is the duty of the Landlord to do so and to order so is to breach conventional law and right to liberty.*
- f) That the proceedings herein are pre-mature in view of the pendency of Nairobi HCCA 535 OF 2012 seeking antagonistic reliefs.*
- g) That the multiplicity and duplicity of proceedings over the same subject matter is an abuse of the process of court.*
- h) That in view of the Applicants conduct, he is disentitled to an equitable relief as he has come to court with unclean hands.*
- i) That the entire proceedings are incompetent, bad in law and the preliminary objection shall be raised as to the propriety of the same.*
- j) That the Applicant has not given an undertaking as to damages.*

The Replying Affidavit has inter alia raised the issue of jurisdiction fairly similar to the reasons set out in paragraphs 16 and 17 of the Defence.

Together with the Defence and Replying Affidavit, the Defendant raised the Preliminary Objection which I set out at the beginning of this ruling.

The suit was initially filed in the High Court but was referred to the Environment & Land Court (ELC) on

21 November 2012 with a record that the matter be mentioned before the ELC on 26 November 2012. When the matter came before me on 26 November 2012, I gave the direction that the preliminary objection be heard first (since the same went to jurisdiction) and ordered that it be heard the following day on 27 November 2012. Before the preliminary objection was heard, the Plaintiff filed an Amended Plaint dated and filed the 27 November 2012. I actually did not see anything amended in the pleadings of the original plaint remained intact save that the same was titled “Amended Plaint” and a note of the date of the amendment put at the foot of the plaint. Filed alongside the “Amended Plaint” was a document titled “Amended Plaintiff’s List of Documents”. The said document contained a new entry No.8 being “A resolution dated 26th October 2012.”

C. ARGUMENTS OF THE PARTIES.

Mr. Alwang’a, learned counsel for the defendant urged me to allow the preliminary objection whereas Mr. Nyamweya, learned counsel for the plaintiff urged me to disallow the preliminary objection. I will first set out the arguments of the defendant then follow up with the response by the plaintiff.

(i) Arguments of the Defendant in Support of the Preliminary Objection.

(a) Ground 1.

In support of this ground, Mr. Alwang’a pointed out that there was no resolution annexed to the Plaint when it was first filed. He stated that before a company files suit, there must be a resolution to file the suit. He went further to argue that it is a requirement that such resolution be filed alongside the Plaint. It was his view that if such resolution is not filed with the Plaint, then the entire suit must fail. He also argued that the Verifying Affidavit and Replying Affidavit of Mr. Bargoria, should have borne the seal of the plaintiff company. He also stated that Mr. Bargoria has not sworn the affidavit with the authority of the company. He pointed out to me that there was no company seal in either of the two affidavits. His argument was that every legal action of the company must be under the company seal. To support this limb of the Preliminary Objection, Mr. Alwang’a referred me to two authorities being;

Davis Wafula Nakitare & 2 Others vs Agricultural Development Corporation[\[6\]](#) and *Affordable Homes Africa Limited vs Henderson & 2 Others.*[\[7\]](#)

(b) Ground 2.

It was the argument of Mr. Alwang’a that since the dispute herein touches on a matter between the landlord and his tenant, this court, the ELC, has no jurisdiction to determine the dispute. His position was that the authority to hear such dispute is vested in the Business Premises Rent Tribunal (BPRT) established by the Landlord and Tenant Shops Hotels and Catering Establishments Act (CAP 301) Laws of Kenya.[\[8\]](#) He referred me to the preamble of the said statute which provides that the same is “*An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.*”

On this point Mr. Alwang’a referred me to the case of *Kiliopa Omukakuba Okutonyi vs Telkom Kenya Limited*[\[9\]](#). He also referred me to a dictum from the case of *Peter Nganga vs Credit Bank*[\[10\]](#) which was quoted in the *Kiliopa* case. His view was that the current dispute ought to be arbitrated by the Business Premises Rent Tribunal and not the ELC.

(c) Ground 3

Mr. Alwang’a did not argue this ground as an independent ground but stated that it is a combination of grounds 1 and 2 and that the arguments in ground 1 and 2 cover ground 3. He had nothing more to add to his submissions.

(ii) Arguments of the Plaintiff in Opposition to the Preliminary Objection.

(a) Ground 1.

Mr. Nyamweya, in opposition started by saying that the preliminary objection is “premature and misconceived.” He stated that there is already on record an Amended Plaintiff which was filed and served upon counsel for the defendant. He stated that annexed to the Amended Plaintiff was a company resolution and that the amendment introducing the Company resolution extinguishes the argument that there was no company resolution annexed to the plaintiff. His view was that there was now no need to belabour this point any further, and his argument, as I took it, was that the first limb of the preliminary objection has now been overtaken by subsequent events.

As to the argument that the Affidavits sworn did not bear the company seal, Mr. Nyamweya argued that no law had been pointed out establishing that it is a requirement that the deponent of an affidavit on behalf of a company had to seal the affidavit with the company seal.

(b) Ground 2.

It was Mr. Nyamweya’s position, that this court has jurisdiction to try the matter. He argued that it is not all tenancies which are controlled and which fall under the jurisdiction of the BPRT. He pointed out that the BPRT only deals with certain tenancies and not all tenancies. He asserted that for the BPRT to have jurisdiction, the tenancy in question must be a controlled tenancy.^[11] He argued that the defendant has not given any evidence by way of a tenancy agreement which would demonstrate that we are dealing with a controlled tenancy.

To support this position, Mr. Nyamweya referred me to the case of *Beatrice Wambui Muriithi T/A Clock Wines & Spirits vs Wilson Cheruiyot & Another*^[12]. He also referred me to the case of *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited* ^[13]. He specifically referred me to a dictum in the latter case which provides that a preliminary objection “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.”^[14] He argued that the fact of the nature of the lease has not been exhibited and thus it has not been demonstrated for a fact that we are dealing with a controlled tenancy. According to Mr. Nyamweya, this fact (the nature of the tenancy), had first to be ascertained and that being the case, a preliminary objection cannot be raised since a fact first had to be established.

(iii) Reply by Counsel for the Defendant

In reply, Mr. Alwang’a argued that the amended plaintiff and the addition of the Company Resolution after the initial filing of the Plaintiff does not cure the defect and incompetence of the Plaintiff. To buttress this position, Mr. Alwang’a offered another authority from the bar, the case of *Kabundu Holdings Limited vs Patrick Mukiri Kabundu & 3 Others*.^[15] Mr. Alwang’a further argued that the purported resolution attached to the plaintiff’s amended list of documents, only limits the plaintiff to take action to allow the wiring of the premises and not the prayers sought in the plaintiff.

At that juncture of the proceedings, I offered opportunity to Mr. Nyamweya to peruse the authority given to me from the bar and make submissions on the same. Upon perusal Mr. Nyamweya did not wish to make any submissions on the said authority.

D. DECISION OF THE COURT

First Limb of the Preliminary Objection.

I have principally before me two grounds on the preliminary objection as the third ground is a combination of the first two grounds .

On the first ground, I need first to determine whether the plaintiff needed to be filed with a company resolution. If I hold so, I need then to determine whether the resolution annexed to the “amended plaintiff”,

or rather, the amended list of documents, cured that defect.

So is it a requirement that a plaint filed by a company must have annexed to it a resolution affirming that a resolution has been passed either by a Board of Directors or the General Meeting to file the suit ?

At the time this point was being argued, I asked both counsels if there was any statutory provision or subsidiary legislation in form of Rules which specifically provides that a suit filed by a company must be accompanied by a resolution. Both counsels stated that they are not aware of any such statutory provisions. However, Mr. Alwang'a offered that this point has emerged from case law and that it was now "standard practice". Mr. Nyamweya did not seriously object to Mr. Alwanga's position but argued that such defect was cured by the filing of the "Amended Plaint" (probably in reference to the amended list of documents as the plaintiff's company resolution was annexed to the amended list of documents and not to the Amended Plaint.)

It is a requirement by dint of the provisions of Order 3[16] , that the plaintiff do file a list of the documents he intends to rely on to support his case.[17] The initial list of documents filed by the Plaintiff contains seven items but the amended list of documents contains 8 items the 8th being a resolution of the Plaintiff company. It is Mr. Nyamweya's argument that the inclusion of the resolution in the amended list of documents cures the defect of not filing such resolution when the Plaint was initially filed. The position taken by Mr. Alwang'a is that the resolution to file suit by the Plaintiff company is supposed to be filed with the Plaint and that the subsequent filing of such resolution does not cure the defect of not having filed the same with the Plaint. His position, of course, is that the resolution is not an exhibit to be filed in the list of documents but is a demonstration of authority to file suit which must be filed alongside the Plaint to display to all and sundry that the company has duly authorized the filing of the suit.

I have agonized over this point but my research has not led me to any provision either in the statutes or in the Rules which requires that every Plaint filed by a company is supposed to be filed alongside a resolution authorizing the filing of the suit. Indeed both counsels as I pointed out earlier were agreeable that this requirement is not in any written law. My research pointed me to the provisions of Order 3, Order 4 and Order 9 of the Civil Procedure Rules. Order 3 Rule 2 provides that all suits filed under rule 1[18] shall be accompanied by :-

- (a) An affidavit referred to under Order 4 Rule 1(2).
- (b) A list of witnesses to be called at the trial.
- (c) Written statements signed by the witnesses excluding expert witnesses, and
- (d) Copies of documents to be relied on at the trial including a demand letter before action.

Order 4 Rule 1(2) provides that the Plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f).[19]

Under Order 4 Rule 1(4) 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.

Order 4 Rule 1(6) gives power to the court either on its own motion or on the application of a party to have any plaint or counterclaim which does not comply with sub-rules (2) , (3), (4) and (5) of Rule 1 to be struck out.

Order 9 sets out the recognized agents and advocates. Under Rule 2 of Order 9, the recognized agents of the parties by whom appearances, applications and acts may be done are :-

- (a)...
- (b)...

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

None of the provisions requires that a plaint filed by a company must be accompanied by a resolution.

I have also looked at the Companies Act[20], and there is nowhere in the Companies Act that provides that a plaint by a corporation must be accompanied by a resolution.

I am at a loss where the idea cropped up that it is a requirement that a plaint by a corporation must be accompanied by a resolution .

In his submissions, Mr. Alwang' a stated that this is a matter of "general practice". Mr. Nyamweya was of the same view and did not choose to attack the submission that the suit was incompetent for want of the company resolution, but rather opted to play safe, by filing an amended list of documents to include the resolution hoping that it will cure the "defect" in not having filed the resolution with the Plaint.

I have considered the case law provided to me which according to counsel brings out this requirement. The first case is that of *Nakitare & 2 Others vs ADC*. [21] This was a suit filed by three plaintiffs being, Davis Wafula Nakitare, Polly Noyce Nakitare as second plaintiff and Delata Crescent Camps and Safaris Limited as the 3rd plaintiff. The three plaintiffs had sought a permanent injunction to restrain the defendant Agricultural Development Corporation (ADC) from interfering with a land parcel LR No.5871 and LR No.1948/12. In their plaint, it was pleaded that the plaintiffs had grown some trees in the suit land which were destroyed by the defendant who had trespassed into the suit lands. The plaintiffs filed an application for injunction but before the same could be heard, a preliminary objection was taken by counsel for the defendant that the joint suit is misconceived and bad in law, inter alia in that the suit was filed in the name of the 3rd plaintiff, a limited liability company, without a resolution passed in a meeting of the company or in a board of directors meeting. The matter was raised in the Defence of the Defendant which in its defence asserted that "the plaintiffs suit is misconceived and bad in law for being filed in a manner that violates the mandatory provisions of the companies Act, and a preliminary objection shall be raised *in limine* praying that the suit be struck out with cost." Through a Reply to Defence, the plaintiffs stated that " a resolution authorizing the filing of the suit was passed on 21st May 2009, before the suit was filed" ; that "the suit was commenced in compliance with the memorandum and articles of association of the company"; and that "the issue can only be raised by an insider of the 3rd plaintiff and not the defendant." In deciding whether or not the suit was competent with regard to the 3rd plaintiff my learned brother Honorable Justice N. Ombija held as follows :

" It is non (probably meant "now") settled law that a company is not the agent of its members and a member as such is not an agent of the company. For the second plaintiff to have the requisite capacity to represent the company, there is need for a resolution of its members at a general meeting or its agents. Where there is in existence a board of directors or shareholders and members of the company the court should order for a board meeting with a view to ascertaining the corporate character in respect of the matter complained of, whether it has been supported by a majority or minority of the shareholders. If supported by a minority of shareholders, the suit becomes ultra-vires.

The resolution of the company, in my considered view ought to be filed with the plaint. Put in anther (probably "another") way, it should precede the filing of the action. In respect of this suit, there is no annexure attached to the plaint that at the time the plaintiff's suit was filed, the plaintiff had authority to file the suit by reason of absence of the resolution of the first plaintiff company (probably "3rd plaintiff") . In the premises the suit was void ab initio and/or ultra vires. It flows from that illegality that any subsequent steps taken in the matter is tainted with that illegality and in furtherance thereof. In the foregoing circumstances, I find and hold that the suit so far as it relates to the 3rd plaintiff is bad in law. Accordingly I strike out the claim of the 3rd plaintiff with costs to the defendant. "

With respect, it is not clear from the above dictum what considerations were taken by the court in arriving at this decision or how the court evaluated the argument of the plaintiffs that this is an issue that can only be raised by an insider. In the case of *Affordable Homes vs Henderson*[22], the plaintiff company filed

suit against the defendant who was one of its directors. The defendant raised a preliminary objection that the suit was untenable as no resolution to institute the same had been passed. Evidence was put forth that the authority to institute court proceedings was vested in the board of directors, or should be effected through a resolution of the shareholders in a general meeting. The court went through the Articles of Association of the company and held that the power to commence court proceedings was vested in the Board of Directors. The defendant was a director of the company and deponed that no such meeting authorizing the court proceedings had been held. These averments were not controverted and the court held that in the absence of the resolution then the suit was improperly filed.

The case of *Affordable Homes* is in my humble view unique and distinguishable to the case of *Nakitare*. In the former, a Director was sued, and since he was a member of the Board, it was within his knowledge that no resolution to file suit had been passed and therefore the suit was untenable. I have also looked at the case of *Kabundu*. Unfortunately the authority handed to me did not give me the ruling where the suit by the plaintiff company was struck out and I have not had the benefit of reading the decision where the plaintiff company was struck out of the proceedings. However, in so far as it appears from the facts of the case, the suit also involved a dispute between a company and its directors; the directors similarly would have been in a position to know whether or not there was sufficient authority to file the suit.

It is trite law, and I need not elaborate, that a company is a separate entity from its members and that it has a legal personality of its own. It can sue and be sued in its own name. Matters relating to suits, especially whether to commence or whether to defend a suit, are matters that are principally covered in the Articles of Association of a company. The Articles could authorize a suit to be commenced by an officer of the company independently, or require a resolution of the Board of Directors or even a resolution of the General Meeting or in any other way that the Company wishes. The Articles of Association of the plaintiff company have not been displayed to court by the defendant so as to demonstrate that there was a breach of the Articles of Association in the manner in which this suit was instituted. Unless some material is placed before me by the defendant clearly evidencing that the institution of this suit was contrary to the Articles of Association of the plaintiff company, I am not prepared to hold that this suit was instituted without the requisite authority by the plaintiff company. The defendant has stated that there is not annexed a resolution of the Board of Directors. However, I wouldn't know whether institution of the suit has to be by the resolution of the Board of Directors in respect to the Articles of the Plaintiff company. In fact, I do not know what the Articles require. I could import that the Articles of Association of the Plaintiff company require a resolution of the Board yet this may not be the position in the Articles of Association.

It is not for the court to speculate whether or not the requisite authority has been obtained by the company. In my view, it is also not for the court to demand a resolution by the plaintiff company, for the Articles of the company may probably not require one. Indeed the assumption should be that the suit has been duly authorized by the company and the court can only be put into inquiry if the defendant or an authorized agent of the company puts material before the court that the suit has not been duly authorized. This is because the authority to institute a suit is an internal matter of the company emanating from its Articles of Association.

To argue that a suit has not been instituted with the requisite resolution of the company in accordance with its Articles of Association, is to me, an argument that asserts that the suit has been instituted in violation of a company's Articles of Association. Articles of Association only bind the members *inter se*, and, the members and the company. They are a contract between members *inter se* and between the company and its members.^[23] As between the company and a person who is not a member, the Articles do not in any circumstances constitute a contract of which that person may take advantage. To put it simply, a 3rd party is not privy to the provisions in the Articles of Association. To argue that a suit has not been authorized by the company is to state that the institution of the suit is not in line with its Articles of Association. In my view, this is a complaint that can only be brought by an insider and not an outsider. This was indeed the situation in the case of *Affordable Homes*, which to me was correctly decided on its facts, as the issue was raised by an insider who happened to be the defendant.

There is no requirement that a suit instituted by a company be accompanied by a resolution and I am not

prepared to hold that a Complaint filed by a company must be accompanied by a resolution. This is not to say that a defendant, if he is an insider, or the Company itself, cannot demonstrate that the suit has not been filed in accordance with the Articles of Association of the company either by want of the appropriate authorization or otherwise. Such allegation however, must be accompanied by the appropriate evidence indicating that the suit was not so authorized by the company.

To specifically address the objection, I hold that this suit was properly instituted and it was not necessary to have annexed to the Complaint a resolution evidencing that the plaintiff company had authorized the institution of this suit. I need not therefore determine whether the resolution annexed to the amended list of documents cured the “defect” in not filing the complaint with a resolution, as in my view, there was no defect in the first place. It is with respect that I am not persuaded to follow the decision in the case of *Nakitare v ADC*.

The first ground of the Preliminary Objection has a second limb. It was the contention of Mr. Alwang that Mr. Bargoria was not authorized to swear the Affidavits herein and that the Affidavits were in any event defective as they did not bear the seal of the company. I will turn to the issue of the seal of the company a little later, after I address the question whether Mr. Bargoria was authorized to swear the Affidavits herein.

Of course, an affidavit by a corporation has to be sworn by the appropriate officer. Under Order 4 Rule 1(4) 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. Order 9 also provides for authorized agents and in respect of a corporation, the authorized agent is an officer of the corporation duly authorized under the corporate seal.

What comes out of these two provisions is that a person swearing on behalf of a corporation needs authority under the corporate seal of the company. But again this is an internal affair and unless there is protest supported by evidence that the person swearing the affidavit or acting on behalf of the company is not authorized by the company seal, on my part I do not see how this can be questioned by an outsider. This is especially so where the person swearing the affidavit is one who is ordinarily expected to act for the company, i.e. is vested with ostensible authority. I know of a line of authorities providing that there must be an averment in the affidavit that the deponent is authorized by the company seal to swear the affidavit.^[24] However, I take the position that it is the real authority which is important, a matter which is internal to the company and not a mere averment; for one can make the simple averment in an affidavit that he is duly authorized by the corporation seal to swear the particular affidavit, but that mere averment does not clothe him/her with authority that he/she never had in the first place. It is the actual authority which is important and my position is that the court should be slow to make inquiry as to the authority of the deponent unless there is sufficient material presented that the person has no authority or unless it is in the clearest of circumstances that the deponent/agent is not one who could ever be vested with such authority.

The appropriate officer authorized to swear an affidavit on behalf of a Company is known internally to the company under its Articles of Association. If an Affidavit is sworn by a person who is not authorized by the Articles of Association of the company, then this is a matter that touches on a violation of the Articles of Association. To state that an affidavit by a corporation is not properly sworn is to say that the same is not in line with the company’s Articles of Association which is a complaint that can only be entertained by an insider and not by an outsider for it is not the business of an outsider to assert that the internal affairs of the company have not been complied with.

In any event, the Affidavit herein has been sworn by a director of the company. Pursuant to principles of company law, a director is a known agent of a company.^[25] It is within the ostensible authority of directors to sign documents on behalf of a company, including Affidavits. Unless evidence is given that Mr. Bargoria acted outside the scope of his actual authority, I cannot hold that he was unauthorized to swear the Affidavits herein on behalf of the plaintiff company. No material has been placed before me that can make me take the position that Mr. Bargoria is not an agent of the plaintiff company and that he is not authorized to swear an affidavit on behalf of the plaintiff company. In the absence of such evidence

I cannot strike out the affidavit of Mr. Bargoria.

I will now turn to the issue that the affidavit herein needed to be sealed by the seal of the company. I have perused the statute books but have not seen any requirement that an affidavit sworn on behalf of a company requires to have the company seal on it. In the absence of such law, I cannot therefore hold that it is a requirement that an affidavit sworn on behalf of a company requires to have the company seal. I will say nothing more on that assertion.

I therefore disallow the first limb of the preliminary objection and hold that :-

- (a) It is not the law and there is no requirement that a Plaint filed by a company must be filed with a resolution evidencing that the company authorized the institution of the suit.
- (b) The appropriate officer to swear an affidavit is that authorized by a Company's Articles of Association, a matter which is internal to the company, and which can only be raised by an insider of the company unless there is evidence tabled that the person who has sworn the Affidavit was not so authorized by the company to swear the affidavit.
- (c) There is no requirement and it is not the law that an affidavit sworn by an agent of a company needs to bear the company seal.

Second limb of preliminary objection.

The second limb of the preliminary objection is to the effect that this court lacks jurisdiction to try this matter and that the tribunal vested with jurisdiction is the Business Premises Rent Tribunal (BPRT) established by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, CAP 301 Laws of Kenya. The jurisdiction of this court is laid out in Article 162(2) of the Constitution of Kenya, 2010 and Section 13 of the Environment and Land Court Act, Act No.19 of 2011.

I however do not think that I am being asked by the applicant to interpret the provisions of Section 13 of the ELC Act. The argument of the applicant is that this court ought to defer jurisdiction to the BPRT. For this to be plausible, the matter herein must be one that falls within the jurisdiction of the BPRT. The jurisdiction of the BPRT is contained in the Landlord & Tenant, (Shops and Catering Establishments) Act, CAP 301 Laws of Kenya. The BPRT has jurisdiction to hear disputes touching on what are referred to as "controlled tenancies".

Section 2 of CAP 301 defines a controlled tenancy as a tenancy of a shop, hotel or catering establishment -

- (a) which has not been reduced into writing; or
- (b) which has been reduced into writing and which -
 - (i) is for a period not exceeding five years; or
 - (ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
 - (iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

Subsection 2 provides that :-

- (2) The Minister may, by notice in the Gazette, specify, by reference to rent paid or rateable value entered

in a valuation roll under the Valuation for Rating Act, classes of shops, hotels or catering establishments tenancies of which shall be controlled tenancies regardless of the form or period of such tenancies.

The first thing I need to satisfy myself is whether the tenancy herein has been reduced into writing. If it is not in writing, then the BPRT would have jurisdiction as the tenancy would automatically be a controlled tenancy by virtue of it not being in writing. Secondly, if it is in writing, the term of the tenancy must not be one that is in excess of five years. Less than that and the tenancy becomes a controlled tenancy. It may also become a controlled tenancy if it is in writing and is of a term exceeding five years if it contains a provision for termination, otherwise than for breach of covenant, within five years from the commencement of the tenancy. The Minister is also empowered to categorize some classes of business premises to be controlled tenancies regardless of the term of such tenancies and regardless of whether or not they are in writing.

No material has been placed before me to indicate whether or not the contract herein has been reduced into writing. I do not know whether the subject tenancy is in writing or not.

The term of the tenancy has also not been laid out to me. I do not know whether the subject tenancy is for five years or less. I also do not know the terms of the contract of the tenancy. I do not know whether they contain a provision for termination otherwise than for breach of covenant, within five years of the commencement of the tenancy. Indeed I do not even know when the tenancy began. Neither do I know whether the Minister has classified the shop in question to be a controlled tenancy I have no knowledge of these material facts because neither plaintiff nor defendant has laid out any material before me that would have enabled me know the nature of the tenancy herein. These facts are important as it is only after an assessment of the same that I can be in a position to know whether or not the tenancy herein is a controlled tenancy.

The defendant in his preliminary objection has argued that the matter should be handled by the BPRT. He ought to have backed up this submissions by laying on the table the nature of the tenancy. In the absence of such material I cannot assume that I am dealing with a controlled tenancy. I have seen from the documents attached to the Replying Affidavit of the respondent that there was a matter touching on termination of the subject tenancy that was heard before the BPRT being Eldoret BPRT Case No. 62 of 2012. The dispute in this case was one in which the landlord (defendant herein) sought to have the tenancy with the plaintiff herein terminated. He lost and filed an appeal which is still pending hearing. The appeal is filed as Nairobi High Court Civil Appeal No. 535 of 2012. I cannot assume that the tenancy herein is a controlled tenancy just because there had been a dispute that was referred to the BPRT at some point. I have read the decision of the BPRT and nowhere does it allude to the nature of the tenancy in question.

In the absence of any supporting evidence, I cannot at this stage decide whether or not this suit is one which ought to be heard by the BPRT. Mr. Alwang'a referred me to the *Kiliopa vs Telkom* case. The issue in the *Kiliopa* case was whether the High Court ought to hear a matter touching on a labour dispute or whether jurisdiction should be deferred to the Industrial Court. The court held that it is the Industrial Court which is vested with jurisdiction to hear such suit. That case is clearly distinguishable to this suit. Principally neither party has provided material that this tenancy is controlled. If there was sufficient evidence that this is a controlled tenancy, I would probably have been inclined to defer jurisdiction to the BPRT. But in absence of such evidence, I cannot refer this matter to the BPRT. Either party is of course at liberty to make an application for the matter to be referred to the BPRT if they bring forth material indicating that the tenancy herein is a controlled tenancy. Following the case of *Mukisa Biscuit*, I find that a primary fact has not been established. A preliminary objection should be in the nature of a point of law and not a matter of fact. I therefore find the second limb of the preliminary objection unsupported. In the circumstances I cannot allow the same.

Mr. Alwang'a had submitted that the third ground is a combination of grounds 1 and 2 of the Preliminary objection. I need not therefore make a decision on the same and my decision above sorts out ground 3 of the preliminary objection.

The upshot of the foregoing is that I find the Preliminary Objection to be wholly unmerited. I disallow the same with costs to the plaintiff.

DATED AND DELIVERED THIS 19TH DAY OF DECEMBER 2012

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of :-

Mr. J.M Alwanga of M/S Alwanga & Company for the defendant.

Mr. J.K. Mokuia holding brief for Mr. Nyamweya of C.D Nyamweya & Company for the plaintiff.

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- [1] At Paragraph 8 of the Plaintiff.
- [2] At Paragraph 9 of the Plaintiff.
- [3] At Paragraph 19 of the Plaintiff.
- [4]
- [5] Order 4 Rule 1(2) of the Civil Procedure Rules, 2010.
- [6] , *Davis Wafula Nakitare & 2 Others vs Agricultural Development Corporation Kitale HCCC No.80 of 2009 (unreported)*.
- [7] *Affordable Homes Africa Limited vs Henderson & 2 Others (2004) 2KLR 473.*
- [8] The Business Premises Rent Tribunal is established by Section 11 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301, Laws of Kenya.
- [9] , *Kiliopa Omukakuba Okutonyi vs Telkom Kenya Limited, Kisumu HCCC No.107 of 2009 (unreported)*.
- [10] *Peter Nganga Muiruri vs Credit Bank Ltd & Others Nairobi Civil Appeal No. 203 of 2006 (unreported)*.
- [11] Supra note 8, Section 2.
- [12] *Beatrice Wambui Muriithi T/A Clock Wines & Spirits vs Wilson Cheruiyot & Another, Eldoret HCCC No. 126 of 2008 (unreported)*.
- [13] *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (1969) EA 696.*
- [14] Ibid, Page 701, Paragraph B.
- [15] *Kabundu Holdings Limited vs Patrick Mukiri Kabundu & 3 Others, Nairobi HCCC No.649 of 1996 (unreported)*.
- [16] Order 3 of the Civil Procedure Rules, 2010.
- [17] Ibid, Rule 2(d).
- [18] This is a suit filed by way of Plaintiff.
- [19] This is an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaintiff.
- [20] The Companies Act, Chapter 486 Laws of Kenya.

[21] Supra, note 6.

[22] Supra, note 7.

[23] See for example, *Hickman Vs Kent or Romney Marsh Sheep Breeders' Association* (1915) 1Ch 881 ; *Eley vs Positive Government Security Life Assurance Co* (1876) 1 Ex D 8, and *Rayfield vs Hands* 1960 Ch 1 , 2All ER 194.)

[24] For example *Mumias Sugar Co Ltd vs Oniango* (2005) 1KLR 373 and *Elite Earthmovers Ltd vs Krisha Behal & Sons* (2005) 1 KLR 379.

[25] See for example, Charlesworth & Cain, Company Law, 10th Edition, at P 262.