



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 40 OF 2007

**TROPICAL TRADING CO. LTD
HARDEV SINGH SAIMBHIPLAINTIFFS**

VERSUS

TROPICAL QUARRIES (KENYA) & 2 OTHERS.....DEFENDANTS

RULING

Pursuant to the provisions of order VI rule 13(b), (c) and (d) of the Civil Procedure rules, the defendants herein took out the summons dated 25th June 2010 in which they applied for the plaint to be struck out with costs. The plaintiffs relied on the replying affidavit of Hardev Singh Saimbhi to oppose the summons.

Mr. King'ara, learned advocate for the defendants, urged this court to strike out the plaint for the following reasons interalia:

First, that there is no entity named as Tropical Trading Co. Ltd hence the suit was filed by a non-existence suitor.

Secondly, that the defendants have not authorized the plaintiffs to file the suit. The directors have not passed resolutions to sanction the filing of the action.

Thirdly, it is argued that the 1st plaintiff's director used fake documents to file the suit.

Fourthly, that no meeting has been called to remove directors under S. 211 of the Companies Act. It is said that no notice of change of directors has been filed.

Fifthly, that since the dispute is between directors it can only be brought to court by way of a petition instead of a plaint.

Mr. Karweru, learned advocate for the plaintiffs urged this court to dismiss the summons for various reasons. First, it is argued that the application is resjudicata in that a similar application was heard and determined by Lady Justice Kasango on 4th February 2008. The learned advocate further pointed out that the defendants have preferred an appeal to the court of Appeal which appeal is still pending.

Secondly, Mr. Karweru further pointed out that the issue touching on forgeries cannot be determined through such an application but only through a trial.

Thirdly, that the plaintiffs' suit is competently before this court since it is a dispute in respect of a complaint based on fraud visited against the 1st plaintiff company.

Fourthly, that there is a proper plaintiff in court. It is argued that the failure to indicate "K" and or the word "Kenya" is not fatal. It is stated that the defendants know who the proper plaintiff is.

I have considered the rival submissions of learned counsels plus the material placed before this court. In the plaint dated 6th June 2007, the plaintiffs have sought for judgment against the defendants in the following terms:

a. A permanent injunction directed against the defendant's jointly and severally barring them from in any way alienating, wasting, using and or appropriating properties cited at paragraph 6 and 10 of the plaint to the benefit of anybody else other than the 1st plaintiff and the 2nd plaintiff respectively.

b. A declaration that the purported transfer of all the assets listed at paragraph 6(a) and (b) and or their appropriation by the 1st defendants herein was unlawful, illegal and void and an order for cancellation of any registration of title and verse to the 1st plaintiff's

c. An order that the defendants do account for all proceeds and profits for the use of assets listed at paragraph 6(a)(b) and 10 of the plaint from year 2001.

d. Any other order that the court may deem fit.

e. Costs plus interest.

The plaintiffs have complained that Inderjit Singh Saimbhi, the 2nd defendant herein, has purported to change the directorship of the Tropical Trading Ltd, the 1st plaintiff whereupon the 2nd plaintiff was removed as a director and replaced by Inderjit Singh Saimbhi, 2nd defendant who in turn caused his wife i.e. Sukhwinder Kaur Saimbhi, 3rd defendant to be made a director of the 1st plaintiff. The plaintiffs are before court seeking for the change of directorship to be cancelled and quashed for having been done fraudulently. The defendants have filed a defence to resist the plaintiffs' claim. They contended that the change of directorship they carried out was proper and legal hence no act of fraud was committed. The two main preliminary issues which appears to me to be outstanding from the reading of the summons

dated 25th June 2010 plus the response are first whether or not the application is resjudicata. According to the plaintiffs the issues raised in this application were raised, canvassed and determined by Lady Justice Kasango in a ruling on the preliminary objection argued by Mr. Simani, learned advocate on 9th June 2009 and vide the application for injunction giving rise to the appeal now pending before the court of Appeal. The plaintiffs are of the view that the application is both resjudicata and res-subjudice. The defendants are of the view that the principle of resjudicata and res-subjudice do not apply to interlocutory applications. I have carefully perused the ruling of Lady Justice Kasango, delivered on 4th February 2008 and it is quite clear that the issue as to whether or not the plaintiffs were authorized to file this suit was canvassed and determined. The issue was raised by the defendants while opposing the application for injunction. In fact the defendants had urged the court to strike out the suit on the basis of the aforesaid ground. There is no doubt, the learned Lady Justice Kasango made a finding on the issue. She rejected the defendants' preliminary point. It is not true to argue that the principle of resjudicata cannot be applied to interlocutory applications. Had the defendants' objections been sustained by Lady Justice Kasango, the entire suit would have been struck out. As long as Lady Justice Kasango's ruling stands, the objection remains res-judicata. Since there is an appeal preferred against Lady Justice Kasango's ruling, I think the applicable principle is that of res-subjudice.

The Second preliminary issue argued in favour of the application is the issue as to whether or not the suit was filed by a non-existent party known as "Tropical Trading Co. Ltd.;" whilst the company registered at Sheria House is "The Tropical Trading Co. (K) Ltd". The plaintiffs did not dispute the fact that the 1st plaintiff is wrongly referred to as Tropical Trading Co. Ltd." Instead of "Tropical Trading company (K) Ltd". The question is whether that defect is fatal. There is no doubt that the dispute between the parties herein revolves around the management, directorship and assets of Tropical Trading Company (K) Ltd which is wrongly described as "Tropical Trading Co. Ltd." The difference is that the 1st plaintiff does not have letter the name 'K' or 'Kenya'. The documents availed by the plaintiffs give the full names of the 1st plaintiff as Tropical Trading Co. (K) Ltd. In my view the defect is the common typographical error we make in our daily lives. The same can be corrected by an order of amendment. The defect is not a technical errors but it is a typographical error which this court can order corrected by applying the overriding objective principle.

Having disposed of the preliminary points, let me now consider the merits of the summons. The defendants are of the view that the 1st plaintiff's directors used forged papers to file this suit. With great respect, I do not agree with the submission of Mr. King'ara on this submission. The authenticity of the documents alleged to have been forged and annexed to the affidavit of Inderjit Singh Saimbhi can only be determined in a trial where the authors will have to be interrogated by cross-examination. This court will have denied the parties a right of hearing by way of a trial if the suit is ordered struck out yet the authenticity of the documents is in doubt. The other ground raised and argued by the defendants is to the effect that the suit should have been by way of a petition instead of a plaint. It is said the dispute is either between directors and or shareholders. It is said such a dispute can only be determined by arbitration. With respect, I am with the submissions of Mr. Karweru, that the dispute before this court relates to a complaint in respect of alleged fraudulent acts committed against the company. In this regard, a plaint is the most appropriate mode of suing. Where the dispute is between directors or shareholders, then the suit should be by way of a petition. The defendants have also said that this suit should have gone for arbitration. It is trite law that where a party intends to rely on an arbitration clause, he should not file any pleadings in answer to the claim. In this case, the defendants have filed a defence. They are deemed to have waived the right to rely on an arbitration clause. This position was laid bare by the court of Appeal in the case of Corporate Insurance Co. =vs= Loice Wanjiru Wachira C.A. 151 of 1995 (unreported) at pages 5 – 6 as follows:

"In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant

lost its right to rely on the clause.”

The final ground argued was that no meeting of members (shareholders) of the company has ever been requisitioned to discuss the removal of the 2nd and 3rd defendants nor has there been any attempt to comply with S. 132 of the Companies Act. Again, this is one of the issues which will be determined as an issue within the suit. The same cannot therefore be used at this stage to determine the entire suit yet there are many other issues to be determined at the trial.

In the final analysis, I see no merit in the application. The same is dismissed with costs to the plaintiffs.

Dated and delivered this 18th day of February 2011.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Karweru for plaintiffs. N/A Gichuki King'ara for Defendant.
Karweru: I pray for a mention dated. I will serve a mention notice.

Court: Mention on 11/03/2011.0 Mention notice to issue.

J.K. SERGON

JUDGE