



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 130 OF 2011**

**1. SUNRISE ORTHOPAEDIC AND  
TRAUMA HOSPITAL LTD.....1<sup>ST</sup> PLAINTIFF**

**AND**

**2. DAVID LANGAT.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**DR. LECTARY KIBOR KEIYO LELEI.....DEFENDANT**

**RULING**

In their plaint dated 25<sup>th</sup> July, 2011, the plaintiffs seek the following reliefs:-

- (a) An injunction restraining the defendant from transferring, leasing charging or in any way parting with possession of LR. No. Eldoret Municipality Block 8/90 (hereinafter “the suit property”).**
- (b) An injunction restraining the defendant from continuing with any construction and building works upon the suit property.**
- (c) An injunction restraining the defendant from opening the hospital erected and constructed upon the suit property.**
- (d) An order that full accounts be taken of the monies and building materials contributed by the plaintiffs and the defendant in the construction and building works undertaken upon the property.**

*(e) A declaration that the defendant holds the suit property in trust for Sunrise Orthopaedic Trauma Hospital Limited, the 1<sup>st</sup> Plaintiffs.*

*(f) An order that the defendant executes a transfer of the suit property in favour of the 1<sup>st</sup> plaintiff.*

The plaintiffs simultaneously filed a Notice of Motion seeking orders of temporary injunction in terms of prayers (a), (b) (c) and (d) of their plaint, pending determination of the suit. The application is based on three (3) grounds on the face of the application and is supported by an affidavit of the 2<sup>nd</sup> plaintiff. The substance of the grounds is that the 2<sup>nd</sup> plaintiff and the defendant are equal shareholders in the 1<sup>st</sup> plaintiff, **Sunrise Orthopaedic & Trauma Hospital**, but the defendant now claims exclusive ownership of the suit property together with the buildings and construction works thereon which, claim constitutes breach of trust, breach of fiduciary obligations and breach of contractual obligations.

The application is opposed and there is a replying affidavit sworn by the defendant. The defendant's advocates also filed a preliminary objection to the plaintiff's suit and application on the following grounds that:-

*(1) The suit and application offend the provisions of section 3 (3) of the Law of Succession.*

*(2) No cause of action relating to a purported interest in land can be instituted on the basis of an alleged oral agreement for the disposition of an interest in land.*

*(3) A limited liability company is a separate legal entity which can sue to enforce its perceived rights.*

*(4) There is no resolution that authorized the 1<sup>st</sup> plaintiff to file suit and or appoint an advocate to act for it in this suit.*

*(5) The verifying affidavit and the affidavit in support of the application for injunction are incurably defective.*

*(6) The Court cannot issue orders in respect of a property which is admittedly the subject matter of a charge to a bank.*

*(7) The suit and the orders sought would be in contravention of the provisions of the Registered land Act (Chapter 300 Laws of Kenya).*

It is the preliminary objection which was canvassed before me on 24<sup>th</sup> August, 2011 by **Mr. Gicheru**, learned Counsel for the defendant and **Mr. Amolo**, learned counsel for the plaintiffs. Counsel had, by consent, filed written submissions which formed the bedrock of their arguments.

I have considered the pleadings, the application, the affidavits, the annexures thereto, the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter.

The basis of objections 1 and 2 is **section 3 (3) of the Law, of Contract Act**. The defendant's argument is that the agreement relied upon by the plaintiffs was not in writing and therefore offends the said provisions. I think there is ample authority to support that proposition and the position is succinctly stated in numerous decisions of the Court of Appeal and this Court. (See **Machakos District Co-operative Union Limited –vrs- Philip Nzuki Kiilu [Machakos CA No. 112 of 1997] (UR)** and **Metra**

**Investments Limited –vrs- Gakwel Mohamed Warrakah [Milimani HCCC No. 54 of 2006]** (UR) among others.

The plaintiffs' claim, as expressed in the plaint however, goes beyond the provisions of section 3(3) of the Law of Contract Act. The reliefs sought as already stated above include an account, a declaration of a trust and alternatively the money equivalent of the value of building materials, labour costs, transport and interest. These reliefs distinguish this case from the cases referred to me by counsel for the defendant.

Objections 3, 4, and 5 are rooted in the corporate identity of the 1<sup>st</sup> plaintiff. In that capacity, it can sue and be sued in its own name. But how does it commence proceedings? Because of its artificial identity, it does so through its organs managed by men: its shareholders and or its directors. The recognized means by which a corporate personality expresses its decisions is by way of resolutions. The 1<sup>st</sup> plaintiff in its Articles of Association adopted part 1 of table "A" of the First Schedule to the Companies Act. That part has detailed provisions regarding making decisions which would be binding on it. Those decisions are made in validly convened meetings of the directors who in the case of the 1<sup>st</sup> plaintiff are also the only shareholders.

The argument by counsel for the 1<sup>st</sup> plaintiff that the 1<sup>st</sup> plaintiff required no resolution to commence these proceedings and also appoint counsel belies the 1<sup>st</sup> plaintiff's own Articles of Association. Counsel's reliance upon section 241 of the Companies Act is in my view unfortunate as that section does not advance counsel's proposition that no resolution was required to authorize the institution of this suit and the appointments of counsel. That section, with all due respect to counsel, does not govern the manner of conducting the business of the 1<sup>st</sup> plaintiff. That being my view of the matter, the defendant's objection to the 1<sup>st</sup> plaintiff's suit is not without merit. I say so, because the plaintiffs freely admit that this suit has been instituted without any authority to do so because the 1<sup>st</sup> plaintiff's Board of Directors could not meet to transact any business. It follows therefore that the 1<sup>st</sup> plaintiff could not verify the correctness of the suit filed on its behalf. It could also not authorize the filing of the affidavit supporting the Notice of Motion seeking interim reliefs.

That position in law is not without authority. In **Bugerere Coffee Growers Limited -Vs- Sebaduka & Another (1970) E.A 147**, it was held, *inter alia*, as follows:-

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***(i) When companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed by either a company or Board of Directors' meeting and recorded in the minutes;***

.....”

***(ii) Where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action.....”***

That decision has been followed by our courts from time to time. **Njagi J. in Affordable Homes Africa Limited -Vs- Ian Henderson & 2 others (Nairobi HC (Milimani) CC No. 524 of 2004)** rendered himself as follows:-

***“Counsel for the plaintiff submitted that since the managing director holds 75% of the company's share capital, the court need not make further enquiry. I agree with counsel for the defendant that no authority was cited for such a proposition. Indeed with respect, so to hold would set a very dangerous precedent as it would amount to relegating the company to the status of an alias for the majority shareholder.***

***Such a view was rejected in Salomon & Company Limited -Vs- Salomon (1897) AC 22 HL which is the very foundation of modern company Law.***

***Emukule J. was of the same view in East African Safari Air Limited -Vs - Anthony Ambaka Kegode & another (2006) e KLR.*** After concluding that some directors were appointed contrary to the company's Articles of Association, he held that they would not purport to pass resolutions appointing counsel and authorizing commencement of suit. In his own words: -

***“The purported appointment of Ogden and two others was ultra vires the company's articles of association and any subsequent decisions by such board, and in particular for the purposes of this case, the decision made at such Board meeting on 18<sup>th</sup> June, 2004 purporting to authorise the filing of action against the defendants were a nullity vis – a - vis the said articles of association . there was similarly no delegation by the general meeting of any such powers to the Board.”***

The upshot of my consideration of grounds 3, 4 and 5 of the defendant's preliminary objection is that, in the absence of a board resolution sanctioning the commencement of the action by the 1<sup>st</sup> plaintiff, the same is a nullity and so is the interim relief sought on its behalf in the Notice of Motion dated 25<sup>th</sup> July, 2011. The preliminary objection therefore partly succeeds and the action by the 1<sup>st</sup> plaintiff must be and is struck out.

The 2<sup>nd</sup> plaintiff's action is not however affected by that result and so is the Notice of Motion lodged by him. The two stand distinctly on their own.

Grounds 6 and 7 of the preliminary objection, in my view, do not merit a detailed consideration as registration of an encumbrance against a title perse does not vitiate claims upon the title. The defendant has further not sufficiently demonstrated the alleged contravention of the Registered Land Act (Cap 300 Laws of Kenya).

With regard to costs, the same shall follow the event. There is no doubt that the 2<sup>nd</sup> defendant sanctioned these proceedings. The costs of the struck out application and suit by the 1<sup>st</sup> plaintiff shall be borne by him.

If the 2<sup>nd</sup> plaintiff is convinced that the 1<sup>st</sup> plaintiff's claim is worth pursuing, he is at liberty to do so in more appropriate ways. He may, for instance, join the 1<sup>st</sup> plaintiff as a defendant and seek reliefs for its benefit in that capacity. I say so, because there is no love lost between the 2<sup>nd</sup> plaintiff and the defendant and a board decision to commence proceedings in the name of the 1<sup>st</sup> plaintiff is unlikely. In **Spokes - Vs- the Grosvenor And West End Railway Terminus Hotel Company Limited and Others (1897) IIQB. 124, Lord A. L. Smith** rendered himself as follows, at page 126 of the judgment:-

***“The proper plaintiff in such an action would obviously be the company; but in the circumstances, existing, this is not possible for the impeached directors who have the controlling power in the company do not assent to the company being made plaintiffs. To obviate this difficulty it has for many years been the practice of the Court of Chancery in circumstances such as present, to make the company parties to the action as defendants in which action the plaintiff shareholder asks for an order, not that damages recovered should be paid to him but to the defendant company; ....”***

The principle in the above case was applied in the case of **Musa Misango -Vs- Eric Musigire and others (1966) E.A: 390** in which it was held, *inter alia*, that a member of a company can bring proceedings when the acts complained of injure him or are either fraudulent or ultra vires. The court also, on application of the plaintiff, granted leave to join the company as a defendant.

I have made the above observations to illustrate that, notwithstanding the strained relationship between the 2<sup>nd</sup> plaintiff and the defendant, proceedings can still be instituted for the benefit of the 1<sup>st</sup> plaintiff.

For now however, its suit is incompetent and stands struck out as already stated with costs to be borne as already ordered.

**DATED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF OCTOBER 2011**

**F. AZANGALALA**  
**JUDGE**

**Read in the presence of:-**  
**Mr. Gicheru for the defendant**

**F. AZANGALALA**  
**JUDGE**

**12<sup>TH</sup> OCTOBER, 2011.**