REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Civil Case 263 of 2006

SIFA INTERNATIONAL LIMITED……..PLAINTIFF/RESPONDENT

-VERSUS-

N.S.S.F BOARD OF TRUSTEES……..…DEFENDANT/APPLICANT

RULING

The defendant came before the Court by Chamber Summons dated 29th September, 2009 and brought under Order VI, rule 13(a), (b) and (d) of the Civil Procedure Rules and s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The defendant was asking the Court to order the striking out of a plaint filed herein, "on the grounds that the same discloses no reasonable cause of action, is scandalous, frivolous or vexatious and the same is otherwise an abuse of the process of the Court". The application carried the prayer that this Court be pleased to "order the suit herein to be dismissed with costs".

The general grounds founding the application are, firstly, that the plaintiff-entity had been invalidly incorporated contrary to the provisions of s.186(1) of the Companies Act (Cap. 486, Laws of Kenya), and so its existence was a nullity *ab initio*. Secondly and in consequence, it was stated that the plaintiff lacked the capacity to enter into any legally binding or enforceable relationships including the lease agreement purportedly executed by it on 1st February, 2004 in respect of the suit premises. It was stated, thirdly, that the said lease was invalid, null and void *ab initio*. On those foundations it was stated, fourthly, that the plaint as filed, disclosed no reasonable cause of action against the defendant and the same was "scandalous, frivolous and/or vexatious and [was] otherwise an abuse of the process of the Court".

In the affidavit evidence, *Ms. Hope Mwashumbe*, the applicant's Deputy Corporation Secretary, depones that a fact material to this case had emerged in a case heard in Nairobi, namely, High Court Civil Case No. 709 of 2004 consolidated with High Court Civil Case No. 111 of 2008 – *Sifa International Limited & Another v. Koinange Investment Development Company Limited (company No. 2)& Others:* and this was the fact that the plaintiff was invalidly incorporated and had no *locus standi*; at the time of incorporation, two of its three directors were minors aged 12 and 13 years, contrary to the provisions of section 186(1) of the Companies Act.

The managing director of the plaintiff, *Lennah Catherine Koinange*, swore a replying affidavit on 12th October, 2009 deponing that the decision of the High Court at Nairobi which was being relied on by the applicant, was already the subject of an appeal in the Court of Appeal, and was not, in any event, binding on this Court as the High Court in Mombasa and the one in Nairobi are of concurrent jurisdiction.

The deponent states it to be within her knowledge, that "the plaintiff was duly and properly incorporated, and a certificate of incorporation issued after all the requirements had been met;" and that "it is on the basis of the said incorporation that the plaintiff had been in existence and operating". The deponent professed her knowledge that the plaintiff "has not been wound up or declared insolvent by an order of the Court".

The deponent deposes that none of her children, who are co-directors of the plaintiff, had executed the said lease agreement, but it had been executed by the deponent and the plaintiff's secretary as prescribed by law.

On the basis of the evidence, learned Counsel *Mr. Lumatete*, for the applicant, founded the thrust of his case on the Nairobi High Court ruling already mentioned. The words of counsel may be set out here:

> "*….in Nairobi High Court Civil Case No. 709 of 2004 which was consolidated with Nairobi High Court Civil Case No. 111 of 2008……it came to light that the plaintiff's directors at its inception comprised……the said Lennah Koinange and her two minor children.*
>
> "*Consequently it is the defendant's contention that the lease herein was executed solely by the said Lennah Koinange (being of majority age) and the same could thus not have been validly executed contrary to the provisions of sections 179 and 180 of the Companies Act……"*

Counsel came to the conclusion, through deduction,
that –

> "*…..by virtue of the lease herein not having been validly executed on the part of the plaintiff, the same is invalid and null and void ab initio and was incapable of creating any rights and/or obligations vis-à-vis the suit premises".*

Learned counsel *Mr. Mutuli*, for the plaintiff/respondent, contested the applicant's submissions, and urged in the first place that the evidence in the replying affidavit did carry facts favouring the respondent's case, which had remained unchallenged in every respect.

Looking at the record at large, *Mr. Mutuli* sought reliance on an interlocutory ruling by *Mr. Justice Sergon* made on 27th February, 2009: the learned Judge had found that the respondent herein had a *prima facie* case, and had granted the respondent an interim injunction, as against the defendant/applicant.

Relying on a Court of Appeal decision, *DT Dobie & Company (Kenya) Ltd. v. Muchina* [1982] KLR 1, *Mr. Mutuli* urged that the plaintiff's case could not be typified as lacking a "reasonable cause of action". The Judges of Appeal in that case held (*per* Madan, J.A. at p.9):

> "*The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits 'without discovery, without oral evidence tested by cross-examination in the ordinary way" [Sellers, L.J. in Wenlock v. Maloney and Others [1965] 1 WLR 1238]. As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."*

Madan, J went on to enunciate certain pertinent principles (p.9):

"*A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.*

"*No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it".*

Relying on the High Court decision (*Ringera, J*. as he then was) in *Mpaka Road Development Ltd. v. Kana* [2004] 1 E.A. 160, learned counsel urged that there was no basis to the contention that the suit in this case was scandalous, frivolous or vexatious.

Mr. Mutuli submitted that the plaintiff's suit entailed no abuse of the process of the Court: for the plaintiff was validly incorporated under the provisions of the Companies Act, as a *private* limited-liability company and a certificate of incorporation was duly issued in that regard; and the plaintiff had not been dissolved or wound up by an order of the Court or otherwise. Counsel urged that s.186 of the said Act, upon which the applicant was relying, was enacted in respect of *public*, but not *private* limited companies.

Counsel relied on the evidence from the replying affidavit: that the plaintiff had been duly incorporated as a limited-liability company, and a certificate of incorporation had been issued by the relevant office after all requirements had been met. On this evidence counsel constructed an argument of legal procedure: "If the conditions precedent to the incorporation of a…….limited liability company [had not been met] the Registrar of Companies would not in his/her wisdom have allowed its incorporation".

From the evidence, counsel urged that the lease in question had been executed by *Ms. Lennah Koinange* and the plaintiff's Company Secretary; the lease had been signed by two persons; there was no evidence that the lease was signed by a minor; under the Companies Act a legal document may be executed by two directors, or a director and a secretary.

Counsel submitted that the plaintiff company is still in existence and is able to transact business and own property; and counsel noted that the plaintiff had, over time, been paying rent to the defendant, and the defendant had been accepting the rent.

It is not contested that the Government's Companies Registry did register a private limited liability company by the name *Sifa International Limited*; the status of that company remains valid, and the registering authority has not, for one moment, questioned its validity. Sifa International Limited carries its certificate of incorporation, keeps banks accounts, and transacts business in its own name as a duly registered limited liability company. In that very capacity, the plaintiff has a tenancy relationship with the defendant/applicant, and it is not claimed that it (the plaintiff) has not performed the relevant contractual obligations.

When, in law, administrative arrangements, and recognized practice show an entity to be essentially lawful and valid, the Court, in a proper case, will apply the rule of presumption which is expressed in the maxim, *omnia praesumuntur rite et solemniter esse acta* (*i.e., all acts are presumed to have been done rightly and regularly*).

All indications, as regards the operations and status of the plaintiff as a company, are, in my opinion, that it was a duly incorporated company and which, therefore, could exercise that status generally.

From the foregoing conclusion, only one question remains to be determined: is this a proper case for striking out and dismissing the plaintiff's suit. I do not think so, especially in the light of distinguished authorities which have consistently held that the primary duty of

the Court is to listen to grievances brought by parties, and to resolve the relevant questions in a just manner. I have no doubts that the plaintiff in this case has a grievance, which ought to be fully ventilated, so that the Court may be guided by the evidence, in determining the outcome. I do not find that the suit discloses no reasonable cause of action, nor that it is scandalous, frivolous or vexatious, nor that it is otherwise an abuse of the process of the Court. The merits of the plaintiff's case properly fall to the trial Court, which will, in a focused manner, entertain the questions of law and evidence, and on that basis, determine the outcome.

The defendant's application by Chamber Summons dated 29th September, 2009 is dismissed, with costs to the plaintiff/respondent.

Orders accordingly

SIGNED

……

J. B. OJWANG

JUDGE

DATED and **DELIVERED** at **MOMBASA** this 19th day of February, 2010.

……..

JUDGE

Coram:
Court Clerk: ***Ibrahim***
For the Applicant/Defendant:
For the Respondent/Plaintiff: