



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Commercial Case 167 of 2005

KABUNDU HOLDINGS LTD.....1ST PLAINTIFF
JACOB MWONGO2ND PLAINTIFF
JASON KIMBUI3RD PLAINTIFF
BISHOP LAWI IMATHIU4TH PLAINTIFF

VERSUS

ALI KHALED AHMEDDEFENDANT

RULING

The substantive suit in this matter is expressed in the plaint dated 18th August 2005. In that plaint, Kabundu Holdings Ltd, Jacob Mwongo, Jason Kimbui and Bishop Lawi Imathiu being the 1st, 2nd, 3rd and 4th plaintiffs respectively prayed for judgment against Ali Khaled Ahmed, the defendant herein, as follows:

- (a) An order of eviction from their premises
- (b) Payment of rent arrears up to 31.10.2004
- (c) Mesne profits at the rate of Kshs.112,000/- p.m. w.e.f. 1.11.2004 until the date of vacant possession.
- (d) Damages for trespass.
- (e) Costs of the suit.

When served with the plaint and summons to enter appearance, the defendant filed a defence to oppose the plaintiffs' suit. The plaintiffs saw nothing that could go for trial and in pursuit of that belief, the plaintiffs filed the motion dated 27th July 2006 in which they prayed for an order to enter summary judgment. This motion is the subject matter of this ruling. The defendant filed a replying affidavit, grounds of opposition and a notice of preliminary objection to object to the motion. Where a preliminary objection is raised, it is always the practice to have it disposed of first before hearing the substance of the application or suit.

When the motion came up for interpartes hearing, only the applicant turned up for hearing. This court

was satisfied that the defendant was aware that the motion had been listed for hearing on 18.10.2006. The court record shows that the date was taken by consent. Consequently, the applicant was granted leave to prosecute the application *exparte*. This court directed the applicant to present arguments on the preliminary objection first.

The preliminary objection is expressed in a notice dated 20th September 2006 as follows:

“(i) That Mr. Patrick Mukiri Kabundu has no capacity to sign pleadings, act and or appear for the Respondent.

(ii) The 2nd, 3rd and 4th Respondents have no *locus standi* to bring this suit.

(iii) That the application dated 27.7.2006 and the entire suit herein is incompetent and an abuse of the process of this honourable court;”

At paragraph 14 of the defendant’s defence notice of preliminary objection against the suit is alluded as follows:

“14. The Defendant shall further aver and maintain that the suit herein is bad in law for illegality on the part of the 1st plaintiff and for lack of capacity on the part of the 2nd, 3rd and 4th plaintiffs and the Defendant shall raise an appropriate preliminary objection on or before the hearing hereof.”

In response to the above preliminary points Mr. Patrick Mukiri Kabundu told this court that he has a valid power of attorney to represent and or sue on behalf of the 2nd plaintiff. He further claimed that he has a valid power of attorney to represent and or sue on behalf of the 3rd and 4th plaintiffs who are majority shareholders.

He also averred that he has a valid power of attorney to represent and or act for the 1st plaintiff on the basis of a power of attorney given by the majority shareholders. He urged this court to dismiss the preliminary objection for lacking in merit.

Let me start with the last submission in respect as to whether or not Patrick Mukiri Kabundu is authorized to file pleadings on behalf of Kabundu Holdings Limited (1st Defendant). Annexed to the verifying affidavit purportedly executed by Jacob Mwongo, Jason Kimbui and Lawi Imathiu through Patrick Mukiri Kabundu on the basis of a power of attorney No. 5054 are Minutes of the 1st plaintiff dated 20th January 1997 in respect of the company’s ordinary General Meeting. That meeting gave Patrick Mukiri Kabundu a power of attorney to institute such proceedings. A close perusal of those Minutes will reveal that the meeting was attended by Patrick Mukiri Kabundu as a proxy representing Jacob Mwongo, Jason Kiamba Kimbui and Bishop Lawi Imathiu. In attendance also were Eliud Kirema Mukuongo and Baibere Mukuongo who are relatives to Patrick Mukiri Kabundu. In short it means the meeting was attended by Patrick Mukiri Kabundu alone. Hence there was no quorum to hold such a meeting. This lack of quorum is manifested at the end of the minutes in that the same were signed by Mr. Patrick Mukiri Kabundu alone. It was a one man show. This is not permitted in law hence whatever resolutions were recorded were resolutions of one person giving himself rights which the law cannot permit. It means that Patrick Mukiri Kabundu had no capacity to institute this suit on behalf of the 1st plaintiff and by extension the other plaintiffs who cannot exist independent of the company (the 1st plaintiff). The plaint in itself is accompanied by a defective affidavit purportedly sworn by Patrick Mukiri Kabundu on behalf of the deponents namely Jacob Mwongo, Jason Kimbui and Bishop Lawi Imathiu as a holder of their power of attorney. Patrick Mukiri Kabundu acted contrary to the provisions of order XVIII rules 3 and 5 of the Civil Procedure Rules. This renders the whole affidavit fatally defective. The same is ordered struck out *ex debito justitiae*. This leaves the plaint hanging and in contravention of order VII rule 2(2) of the Civil Procedure rules. In exercise of my discretion under order VII rule 2(3), I *suo moto* strike out the entire plaint. I have by chance while perusing the proceedings

herein, discovered that the Hon. Justice Mwera had made a finding on a similar preliminary point in Mombasa **H.C.C.C. No. 116 of 2004 between Kabundu Holdings Ltd. and Ali Ahmed t/a Sky Club Restaurant** in which the honourable judge came to the conclusion that Patrick Mukiri Kabundu had no capacity from the beginning to file a suit. I am in agreement with my learned brother that even in this suit the same position prevails in that Patrick Mukiri Kabundu has no capacity to bring this suit.

The power of attorney in his possession has given him no power or right to file this suit. He has exceeded his powers hence his action amounts to an abuse of the court process.

In the final analysis I uphold the preliminary objection and proceed to strike out the entire suit and the applications arising from it. Since the defence did not appear in court to argue, costs are denied.

Dated and delivered at Mombasa this 23rd day of February 2007.

J.K. SERGON

J U D G E

Mr. Oyoo for the defendant Patrick Mukiri Kabundu for all the plaintiffs on a power of Attorney.