



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1488 OF 2000

A.J. LIMITED.....1ST PLAINTIFF

RONALD SHOMPA.....2ND PLAINTIFF

VERSUS

CATERING LEVY TRUSTEES.....1ST DEFENDANT

BOARD OF TRUSTEES, NATIONAL

SOCIAL SECURITY FUND.....2ND DEFENDANT

DAVID KIBUI T/A KIBUI & CO.3RD DEFENDANT

NEWMAN INVESTMENTS LTD.4TH DEFENDANT

RULING

(a) Preliminary objection to verifying affidavit and to suit

The plaint dated 7th September, 2000 and filed on 8th September, 2000 was later amended, on 15th September, 2000 and filed on 19th September, 2000.

When this case came up for hearing on 8th March, 2005 counsel for the 2nd defendant raised a preliminary objection. His formal objection, dated 13th January, 2005 had already been filed on the same date.

The first point in the objection was that the verifying affidavit of the 2nd plaintiff sworn on 15th September, 2000 was incurably defective and should be struck out. The second objection was that the suit was incurably defective and incompetent and should be struck out. At an earlier appearance, on 24th January, 2005 a consent order had been made that the preliminary objection be dealt with at the beginning, before the trial began.

(b) Swearing affidavit on behalf of co-plaintiff

Learned counsel for 2nd defendant, **Mr. Lubulillah**, remarked that the 2nd plaintiff had not indicated whether he had authority from the 1st plaintiff to swear an affidavit on behalf of the 1st plaintiff as he purported to do. The effect, counsel submitted, was that there was no verifying affidavit for the 1st plaintiff in compliance with Order VII, rule 1(2) of the Civil Procedure Rules. That rule stipulates as

follows:

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

Counsel submitted, quite correctly, with respect, that the above rule was coined in mandatory terms; and O. VII rule 1(3) provided:

“The Court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with subrule (2) of this rule.”

Counsel submitted that the 1st plaintiff had failed to comply with the terms of O. VII, rule 1(2) and consequently the plaint should be struck out.

It is to be noted that whereas the requirement for a verifying affidavit accompanying the plaint, under O. VII, rule 1(2) is *mandatory*, whether the Court is to exercise its power and strike out the plaint under O. VII, rule 1(3) is expressed in *directory* terms. What is the right mode of construction, in such a case? My understanding is that, *prima facie*, an obligation rests upon the Court to strike out a plaint that is not accompanied by a verifying affidavit. However, a discretion is left in the hands of the Court to spare the affidavit for a highly limited range of causes, if the defaulting party shows the weightiest grounds for a different course.

(c) Statutory requirements for indorsement on documents relating to legal proceedings

Counsel also impeached the verifying affidavit sworn by the 2nd plaintiff, for not complying with s.35(1) of the Advocates Act (Cap.16). By that section it is mandatory for the drawer of a document relating to legal proceedings (including an *affidavit*) to indorse upon it the name and particulars of the person who drew the document. Such indorsement was missing from the 2nd plaintiff's verifying affidavit.

Mr. Lubulellah relied on the authority of *Barclays Bank of Kenya Ltd. v. Dr. Sollomon Otieno Orero*, HCCC No. 1736 of 2001. The Honourable *Mr. Justice Njagi*, there held as follows:

“Section 34(1) itself prohibits any unqualified person from drawing or preparing any document or instrument ‘relating to any other legal proceedings.’ An affidavit is a document relating to legal proceedings. It should therefore comply with the requirements of s.35(1) as to endorsement with the name and address of the drawer. That was not done in this case and, to that extent, the affidavit falls foul of s.35(1). Both subsections (1) and (2) of section 35 are couched in mandatory terms. Subsection (1) takes such serious cognisance of any omission to obey the dictates of the subsection that it criminalizes any such omission. In its turn, subsection (2) takes the issue so equally seriously that it enjoins the Registrar not to accept or recognise any document or instrument referred to in s.34(1) unless such document or instrument is endorsed in accordance with this section. Parliament has led the way by demonstrating the gravity with which it views matters under ss.34 and 35 of the Act. The least we can do is to emulate Parliament by treating these sections with the seriousness they deserve and obey them in observance.”

The learned Judge, in that case, struck out the affidavit in question. The respondent had maintained that the requirement of section 35 was a mere technical irregularity; but *Njagi, J* held that the failure to comply with section 35 was more serious than a technical irregularity, and that O. XVIII, rule 7 (under which an irregularity may be cured) could not override s.35(1) of the Advocates Act (Cap.16).

Counsel then relied on another High Court decision, *Johann Distelberger v. Joshua Kivinda Muindi & Another*, High Court. Misc. Application No. 1587 of 2003. Quite consistent with the *Sollomon Orero* case, *Nyamu, J* in that case held:

“The Oaths and Statutory Declarations Act (Cap.15) only requires the Commissioner for

Oaths to state in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. The Act is not helpful on this occasion.

“Returning to the question posed above as to whether failure to endorse an affidavit with the name and address of the drawer is a mere irregularity in form only and therefore excusable under Order 18, rule 7 it must be pointed out that the rules constitute subsidiary legislation and are therefore inferior to Acts of Parliament. Is a contravention of a provision of an Act an irregularity in form only? The answer is clearly ‘no’ because...Parliament intended to prevent unqualified persons from drawing legal documents as specified in the Advocates Act and also to prevent them from charging fees in respect of such documents. The overall object is to ensure that legal documents are drawn by qualified persons.”

Urging that the 2nd plaintiff’s verifying affidavit be struck out, **Mr. Lubulellah** submitted that in the event the Court made such an order, then only a bare plaint would be left which could not, on its own, stand up.

(d) Resolution of company to authorise commencement of suit

Counsel further challenged the suit as it stood in relation to the 1st plaintiff. He cited paragraph 9(c) of the amended plaint of 15th September, 2000; the same asserted:

“That at the time of the purported sale there existed a dispute between the 2nd plaintiff and his only co-director and shareholder Mr. Kisinane Njau and the dispute was within the knowledge of the firm of Kimbui & Company and each of the two directors/shareholders [was] represented by [a] different [firm] of advocates in that dispute which concerned the suit properties.”

Counsel submitted that the conclusion to be drawn from the above paragraph in the plaint, was that “a valid resolution for the litigation could not have been undertaken”. Counsel made reference to paragraph 10 of the amended plaint of 15th September, 2000. It states:

“The said transfer documents were drawn up and caused to be forged by the 3rd defendant or with his authority and in collusion with the late Kisinane Njau and without any instruction from the plaintiffs.”

He then submitted that, as the said **Kisinane Njau**, the only other shareholder and director of the 1st plaintiff, was thus already dead by the time of filing suit, there would have been *no valid board* to authorise commencement of proceedings - and so the present suit must be regarded as a nullity **ab initio**. Counsel submitted that the verifying affidavit by the 2nd plaintiff (dated 19th September, 2000) had not deponed that the 1st plaintiff had passed a valid resolution authorising the commencement of proceedings.

Mr. Lubulellah submitted that it had repeatedly been held by Courts that a valid resolution of a company requires the minutes of an annual general meeting. He relied on **Bugerere Coffee Growers Ltd v. Sebaduka & Another** [1970] E.A. 147. The relevant point is stated in the headnote (at p.147):

“...when companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes; no such resolution had been passed authorising these proceedings...”

Counsel submitted that the present proceedings, as they related to the affairs of a limited liability company, were a nullity, as they had not been sanctioned by a valid resolution of the company (1st plaintiff). He further submitted, on the basis of the principle urged, that the advocates on record for the 1st plaintiff from the commencement of the suit up to now be jointly and severally held liable to pay the costs of the proceedings.

(e) Filing suit without cause of action?

Counsel then, considering the content of the amended plaintiff (of 15th September, 2000) and the reply to the 2nd defendant's defence (dated 5th October, 2001 and filed on 26th October, 2001), submitted that no cause of action was shown against the 2nd defendant. It is stated in paragraph 7 of the said amended plaintiff that the 1st plaintiff was up to and including 7th October, 1988 the registered owner of the two pieces of land known as L.R. 209/297 and L.R. 209/296/1; and, counsel remarked, there was no pleading to the effect that the 2nd plaintiff owns those properties. It was only claimed that the 2nd plaintiff was a shareholder and a director of the 1st plaintiff. Counsel raised the question, I think, quite legitimately: "Is it competent for a director or shareholder to bring proceedings in his own name, with regard to the company's property?" He recalled the well known principle in *Salomon v. Salomon*, that directors or shareholders cannot sue on their own behalf in the name of the company. The principle, counsel submitted, was not limited to the historical past; as recently in *Omondi v. National Bank of Kenya and Others* [2001] E.A. 177 *Mr. Justice Ringera* had held that the appointment of a receiver renders all directors *functus officio*, and that even when they are in office, directors cannot sue in their own name with regard to a wrong done to the company; and any chose in action belonging to the company is a benefit the realisation of which must be at the instance of the company itself. In the *Omondi* case *Ringera, J* had thus stated (p.183):

"As regards whether the plaintiffs have *locus standi* to institute this suit, I am in complete agreement with the submissions made by the defendants' advocates that they do not. It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even where the directors happen to be the sole shareholders (see *Salomon v. Salomon & Co. Ltd* [1897] A.C. 22). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights. The contention by counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly the proper plaintiffs in this action is manifestly without legal foundation. And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors *functus officio*, it does not destroy the corporate existence and personality of the company."

Learned counsel also relied on the High Court decision in *Microsoft Corporation v. Mitsumi Computer Garage Ltd* [2001] 2 EA 460 for the proposition that a valid affidavit in support of the 1st plaintiff's case could only be made by an officer of the plaintiff. *Ringera, J* in that case held (p.461):

"...since P had not stated that she made the affidavit with the authority of Microsoft, her affidavit was substantially defective and incompetent and would be ordered struck out. L's affidavit would also be struck out for failure to disclose his authority."

Counsel prayed that his preliminary objection be sustained, with costs to the 2nd defendant.

(f) Preliminary objection and the question of evidence

Learned counsel for the plaintiffs, *Mr. Muriithi* contended that the preliminary objection was not properly taken, because whether or not there was a resolution of the company (1st plaintiff) authorising suit was a *matter of evidence, and thus not fit for a preliminary objection*. He argued that a prayer for the striking out of the plaint ought to be brought through a substantive motion, in which case evidence would then be adduced regarding the resolution of the 1st plaintiff company, if such exists. Counsel argued that a proper preliminary objection should be capable of being disposed of on the basis of *the pleadings alone*, without any evidence being necessary. He contested the submission of counsel for the 2nd defendant, that as the second director of the 1st plaintiff company was already dead when suit was filed, then it followed that there could not have been a company resolution authorising the commencement of proceedings. He

contended that it was necessary to have evidence relating to the death of the second director, and that this rendered a preliminary objection an inappropriate procedure.

(g) Can statute-related defects in affidavit be cured under subsidiary legislation?

Mr. Muriithi did concede that the required indorsement on the verifying affidavit, of the drawer and his particulars, was missing, but he then proceeded to make the curious submission that since the verifying affidavit came along with the plaint, the indorsement on the plaint itself gave sufficient cover for the affidavit as well. I do not myself regard such as a legal argument, but rather, a strenuous initiative on the part of counsel to show concern for the client's interests. **Mr. Muriithi** insisted that as, in his view, the indorsement on the plaint must be held to apply equally to the verifying affidavit, the affidavit therefore was not caught by the limitations of sections 34 and 35 of the Advocates Act (Cap.16). From that foundation he proceeded to argue that the defective verifying affidavit was amenable to curing under Order XVIII, rule 7 of the Civil Procedure Rules. Counsel submitted that the defect in the verifying affidavit should not be treated as a ground for striking out the suit.

Learned counsel, **Ms. Onyango**, who appeared for the 1st defendant gave support to the submissions made by **Mr. Lubulellah** for the 2nd defendant. She restated that the 2nd plaintiff had no authority to bring the suit in the name of the 1st plaintiff. She urged that the suit, as against the 1st defendant, be struck out.

(h) Preliminary objection, statements in pleadings - does it entail evidence?

In his reply, **Mr. Lubulellah** submitted that reliance be placed on **Mr. Muriithi's** submission, that the preliminary objection be decided strictly on the basis of points set out in the pleadings: and in that case, the plaint states (paragraph 10) that one of the only two directors of the 1st plaintiff company was already dead when the suit was filed. This raised an immediate question as to how authority was given for filing suit on behalf of the 1st plaintiff company. Learned counsel submitted that those pleadings spoke for themselves, and no need for any evidence arose.

Mr. Lubulellah disputed the contention by **Mr. Muriithi** that the defective affidavit only, and not the suit might be struck out. He restated the mandatory nature of Order VII rule 1(2) which authorised the striking out of an affidavit for defects such as those in this case. He then submitted that once the affidavit is struck out, "it leaves a bare plaint behind; and hence the plaint becomes also liable to be struck out."

(i) Analysis and Orders

While it is for certain that the Court will always be anxious to hear litigants on the merits of their suit, this does not excuse them from complying with the procedural law which regulates the conduct of hearings. If parties entirely ignore the laws that accord them *locus standi*, or that regulate the process of hearing, they cannot expect the doors of the Court to be still open to them, and in this regard it will not matter the magnitude of the claims they are making. These are the basic principles on which the submissions of counsel in this matter must be assessed.

It is trite law, just as counsel for the 2nd defendant has eloquently submitted, that the shareholders or directors of a company are, in their individual capacities, not the company. The company has a corporate legal personality, has its seal, and has the right to sue and be sued; and in this respect it is for the company to issue appropriate instructions in relation to any suit in which it is involved. The device for the issuance of such instruction, it is well established in case law (see *Salomon v. Salomon & Co. Ltd* [1897] A.C. 22; *Bugerere Coffee Growers Ltd v. Sebaduka & Another* [1970] E.A. 147; *Microsoft Corporation v. Mitsumi Computer Garage Ltd* [2001] 2 EA 460), is the *general meeting*, or the company's *board of directors*.

Therefore, when counsel for the 2nd defendant (supported by counsel for the 1st defendant) submits that there was no decision of legal validity taken to authorise commencement of suit, this cannot be wished

away. The submission is bound to succeed, unless it is shown that this is not a legal challenge testable on the basis of the legal documents on file, but is instead a matter that can only be proved by *evidence*. If there were a valid objection of that nature (and counsel for the plaintiff has contended that there is), then the preliminary objection would have been shown not to be a true preliminary objection. For the fact-foundation of a preliminary objection must never be in dispute; it must be an objection only in point of law; it must not be subject to trial evidence - for such evidence would have to await the trial itself.

Now, what dispute on facts, in relation to authorisation of suit by the 1st plaintiff, exists? In paragraph 10 of the plaintiffs' amended plaint dated 15th September, 2000 they themselves say the second of the only two directors of the 1st plaintiff is dead. Who would want this assertion in the pleadings to be established by evidence? The plaintiffs? No, for this is their case, and they concede the fact that the deceased, **Kisinane Njau**, is indeed dead. Would the 2nd defendant need proof of that fact of the death? No. Counsel has not disputed it, and so there will be no need to prove it during trial. But learned counsel has contended that since **Mr. Kisinane Njau** was already dead before commencement of suit, there was no valid forum of the 1st plaintiff corporate body to authorise the proceedings. **Mr. Lubulellah** submitted that the suit was filed by counsel for the plaintiffs without due authority; and therefore, in law, costs must be borne by counsel for the plaintiffs personally (**Bugerere Coffee Growers Ltd v. Sebaduka & Another** [1970] E.A. 147). I think the legal force of this argument is unanswerable.

A related point is whether the 2nd plaintiff could validly swear a verifying affidavit on behalf of the 1st plaintiff company. Counsel for the 2nd defendant sought to know what authority the 2nd plaintiff had from the 1st plaintiff, to swear such an affidavit. It is, of course, already clear that the 1st plaintiff appears to have been denuded of the capacity to give any kind of instructions. But in addition, it is an objective fact that there was not a single attempt by the 1st plaintiff to confer any authority at all on the 2nd plaintiff to swear the affidavit. And it follows, in these circumstances, that the 1st plaintiff had no verifying affidavit accompanying the plaint, and the 1st plaintiff was thus in breach of Order VII, rule 1(2); and on this account the Court *may* strike out the plaint. Has any reason been given why the Court should not exercise its discretion to strike out the plaint? I do not think so.

Counsel also disputed the validity of the 2nd plaintiff's affidavit: it carries no indorsement, as required under sections 34 and 35 of the Advocates Act (Cap.16), of the name and particulars of the drawer. Although conflicting authority exists on the effect of such defect in an affidavit, I have become convinced that the correct legal position is that every document relating to legal proceedings (and every affidavit) must comply with the requirements of sections 34 and 35 of the Advocates Act (Cap. 16) which, being an Act of Parliament, is superior to the provision of the Civil Procedure Rules which would allow curing for an irregular document. The defect in question goes beyond mere irregularity, and entails breach of the substantive law. The preponderance of authority now shows that to be the settled position of the High Court; and this should guide me in this matter, as no differing position by the Court of Appeal has come to my attention. In an illuminating recent ruling, in a matrimonial property case, **Virginia Wanjiku Njoroge v. Francis Njoroge**, HCCC No. 2125 of 2000 (OS), **Kamau, J** thus held:

“In my considered view therefore, the words contained in section 35(1) [of the Advocates Act (Cap.16)] are absolute, explicit and peremptory, and it is not unjust or inconvenient to expect rigorous observance thereof. The said provision under section 35 of the Advocates Act vests a specific statutory duty non-observance of which has further been criminalized, the caveat imposed on the Registrar notwithstanding. The said mandatory statutory provisions are calculated to maintain and sustain good and orderly administration of professional legal services expected of all persons and in particular, advocates as officers of the Court.

“I concur with the submissions of counsel...that in the present matter, this Court cannot invoke the exercise of its unlimited original jurisdiction in civil matters and admit the entire application as filed because...the said unlimited original jurisdiction is, though unlimited, not limitless since the Court must exercise such jurisdiction in accordance with the law as expressly provided under section 60 of the Constitution, the law in the instant case being the

Advocates Act (Cap. 16, Laws of Kenya).”

The logical conclusion is that the verifying affidavit of the 2nd plaintiff will serve neither him nor the 1st plaintiff – and consequently it must be struck out. Once the affidavit is thus struck out, the amended plaint of 15th September, 2000 is left standing in clear violation of Order VII, rule 1(2) of the Civil Procedure Rules.

There are thus several legal grounds upon which the suit stands to be struck out.

Learned counsel for the 2nd defendant also raised as an objection the point that the suit had been filed against his client without a cause of action. Every suit ever filed will proceed on the basis that it is believed to be supported by a cause of action. As the very substance of any suit is an alleged cause of action, it is, I think, improperly pre-emptive to seek a striking out of any suit at all for want of cause of action *on a preliminary objection*. In its essence, a preliminary objection is in certain respects like the old demurrer in which the objector contends: even if your assertions were proved, they would confer upon you no legal rights as against me! This is slightly different from the more detailed and probably more contentious process of identifying the *cause of action* which is the basis of the suit. On this account, I think, the question of whether or not the plaintiffs have a cause of action against the 2nd defendant should only be contested on a substantive motion. Therefore I would not accept the submission made for the 2nd defendant in this regard.

But in the result I cannot but uphold the preliminary objection. Accordingly I hereby strike out the amended plaint of 15th September, 2000 as against the 2nd and 1st defendants, the costs being borne by counsel for the plaintiffs who clearly have filed suit without valid authority.

Orders accordingly.

DATED and DELIVERED at Nairobi this 22nd day of April, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiffs: Mr. Muriithi, instructed by M/s. Muriithi & Co. Advocates

For the 1st Defendant: Ms. Onyango, instructed by M/s. Oraro & Co. Advocates.

For the 2nd defendant: Mr. Lubulellah, instructed by M/s. Lubulellah & Associates Advocates

3rd & 4th defendants not represented