REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
MISC APPLICATION 67 OF 2005

IN THE MATTER OF AN APPLICATION FOR A WRIT OF CERTIORARI

AND

IN THE MATTER OF COMPANIES ACT CAP, 486 LAWS OF KENYA

REPUBLIC……..……..…..APPLICANT

AND

REGISTRAR GENERAL…….RESPONDENT

AND

NDEFFO COMPANY LTD……...……SUBJECT

AND

DANIEL THUKU MWONDU & 11 OTHERS…INTERESTED PARTIES

RULING

The applicants in this application were granted leave by this court to institute judicial review proceedings against the respondent for the purposes of removing into this court the notice convening the subject company's annual general meeting which was to be held on the 14th of January 2005 and quashing the same. The applicants further sought the order of this court to expunge any record that could have been filed with the Registrar General as a result of the said meeting endorsing the interested parties as directors of the subject company. The notice of motion filed pursuant to the order of this court granting the applicants leave was supported by the annexed affidavit of Charles Chiira, who deponed that he was a director and the secretary of the subject company *(hereinafter referred to as "the company").* When the respondent was served with the application, he filed a notice of preliminary objection to the application filed by the applicants. The grounds raised on preliminary objection were that the affidavit of Charles Chiira sworn on the 3rd of February 2005 and the verifying affidavit of Charles Chiira sworn on the 27th of January 2005 were fatally defective, incurably incompetent and inadmissible. The respondent further stated that there were no facts in support of the notice of motion dated the 3rd of February 2005 as mandatorily required by **Order LIII Rule 2 of the Civil Procedure Rules.** The respondent further contended that the application for leave by way of chamber summons dated the 27th of February 2005 was fatally defective, incurably incompetent and ought to be struck out. The respondent finally stated that the applicants had not issued a proper notice to the registrar as required by **Order LIII Rule 3 of the Civil Procedure Rules.**

This court allowed the parties to this application to argue the preliminary objection. Mr Adera, Learned

Counsel for the respondent submitted that the affidavit of Charles Chiira was defective, irregular and inadmissible for failing to disclose the source, grounds of information and belief as stated in paragraph 8 of his affidavit. Learned Counsel referred to several authorities in support of this argument. He further submitted that, as the application before the court sought final orders, the affidavit in support of the application could not be based on information and belief; such an affidavit should be based on facts known to the deponent. He further submitted that no notice to the Registrar was issued before leave was sought as mandatorily required by Order LIII rule 1(3) of the Civil Procedure Rules. He submitted that the application for judicial review before the court was therefore incompetent.

He further submitted that there was no evidence in support of the application seeking leave to file an application for judicial review. He argued that the verifying affidavit in support of the application seeking leave was fatally defective and incurably incompetent for failing to disclose the source and grounds of information relied on. He took issue with the fact that the said affidavit had been sworn in plural without disclosing who the other parties were who swore the affidavit. He further submitted that the law firm of Waiganjo & Company Advocates did not have the authority of Ndeffo Company Ltd (the company) to commence the proceedings now before the court. He contended on behalf of the respondent that there was no resolution of the Board of Directors of the Company authorizing the said suit to be filed.

On the statement of facts filed by the applicants, Learned Counsel submitted that the applicants had masqueraded as directors of the company, yet they had been voted out of office and the interested parties installed as directors of the company. He argued that the applicants did not therefore have authority to commence or file the proceedings herein. Finally, Mr Adera submitted that the affidavit in support of the application was wrongly headed in that it did not disclose who the other eleven applicants were. He argued that the failure to set out the names of the applicants in full in the said affidavit rendered the same to be incompetent and abuse of the due process of the court. He urged the court to uphold the preliminary objection and strike out the application for judicial review now before court.

Mr Nyamwange, Learned Counsel for the Interested parties supported the preliminary objection raised by the respondent.

Mr Waiganjo, Learned Counsel for the applicants opposed the preliminary objection. He submitted that the preliminary objection was brought in bad faith. He submitted that it was raised purposely to protect the respondent who had been adversely mentioned in the affidavit sworn by the applicants on the 3rd of February 2005. He submitted that the affidavit which the respondent has sought to impeach was exhibit and could not form the basis upon which it could be struck out as a pleading of this court. He submitted that the affidavit in question had not been served upon the respondent and therefore it could not attack the same. He wondered why the respondent was raising matters of facts in the preliminary objection yet the respondent had not filed a replying affidavit to the allegations made by the applicants. He submitted that the respondent could not allege that Mr Charles Chiira, the deponent on behalf of the applicants was not a director of the company, yet no affidavit had been filed to dispute or contradict what Mr Chiira had deponed in his affidavit that he was a director of the company.

He further submitted that it could not be said that the applicants were not directors of the company because the real issue in controversy between the applicants and the Interested party is who between them were the legitimate directors of the company. He submitted that the applicants were challenging the meeting purportedly held by the company on the 14th of January 2005 that led to the purported election of the interested parties as directors of the company. The applicants were also questioning the conduct of the respondent who appeared to be favouring the interested parties in their quest to wrest the leadership of the company from the applicants. He contended that the affidavit which the respondent has sought to impeach was competent and was prepared and filed in accordance with the law.

He further submitted that the statement of facts filed was accordance with the law. He further argued that **Order LIII rule 2 of the Civil Procedure Rules** had been complied when the applicants sought the leave of the court to file the current applicant for judicial review. In his view, the respondent was not at liberty to raise the issue now that that aspect of leave had been granted and was already spent. He submitted that notice to the registrar was issued as required by the law before leave of the court was

sought. On the issue as relates to the heading of the affidavit, he submitted that the title of the affidavit cannot be raised to defeat the substantive issues raised in an affidavit. He relied on the provisions of **Order XVIII rule 7 of the Civil Procedure Rules.**

Learned Counsel conceded that his firm (Waiganjo & Company Advocates) did not annex the authority of the company to file the application. However he submitted that the fact that the said resolution or authority was not filed was not fatal to the application as the same would be cured by the applicants filing a further affidavit pursuant to **Order LIII rule 4(2) of the Civil Procedure Rules.** He confirmed that his firm had the authority of the company to act on its behalf and file the application now before court. He submitted that the court should allow the applicants to argue the substantive issues before the court, particularly as relates to the election of the interested parties as directors of the company and should not be prevented by the respondent raising unnecessary legal technicalities.

Mr Waiganjo submitted that Mr Adera, Counsel appearing for the respondent, had supervised the contentious elections and had written correspondences on behalf of the respondent. In his view, Mr Adera was an interested party in the suit and therefore should not be allowed to act for the respondent as there was bound to arise issues of conflict of interest. The applicants submitted that ideally the respondent should have appointed another counsel to act on its behalf instead of Mr Adera. Learned Counsel for the applicants further argued that the affidavit filed by the applicants disclosed all sources of information unlike the position in the decisions referred to the court where the litigants in question had failed to disclose their sources of information. Mr Waiganjo submitted that this court should consider the substantive and the merits of the case so that the ends of justice may be met. He submitted that it would be punitive to condemn him personally to pay the costs of the suit were the preliminary objection to be upheld. He otherwise urged the court to dismiss the preliminary objection as the same lacked merit in law.

In response, Mr Adera for the respondent submitted that the Interested parties were already registered as the directors of the company. He argued that under **Order LIII rule 4(1) of the Civil Procedure Rules,** an applicant cannot deviate from the grounds stated in the statement of facts. He stated that the applicants had admitted that in the statement of facts that the Interested parties were elected as directors of the company. In the circumstances therefore he submitted that the applicants did not have authority to file suit on behalf of the company. He argued that issues of affidavits were issues of substance and not firm and could not therefore be cured by the provision of **Order XVIII Rule 7 of the Civil Procedure rules.**

I have anxiously considered the preliminary points of law that have been raised by the respondent and the response to it made by the applicants. The respondent has raised the said preliminary objection to the applicant's application for judicial review in its bid to have the said application struck out with costs as being incompetent or otherwise an abuse of the due process of the court. I will tackle each point raised in objection and give my reasons for either upholding or dismissing the same. The first point of objection regards the affidavit sworn by Charles Chiira on the 3rd of February 2005 and the verifying affidavit sworn on the 27th of January 2005. The respondent has argued that the said affidavits were fatally defective, incurably incompetent and inadmissible. I have carefully read the said affidavits. In the first instance the said applicant did not file a verifying affidavit in support of the notice of motion; rather he annexed the verifying affidavit which he had sworn when he sought the leave of the court to make the application for judicial review which is currently before this court. The said verifying affidavit was thus an annexture to the affidavit sworn by the said Charles Chiira on the 3rd of February 2005. In my view the applicant annexed the said verifying affidavit and the statement of facts in the substantive application to pre-empt the respondent and the Interested parties making such demand as provided by **Order LIII rule 4(1) of the Civil Procedure Rules**. The said verifying affidavit being an annexture, it cannot be impeached by way of a preliminary objection. The respondent can only challenge its contents by either swearing an appropriate replying affidavit or by making submissions in opposition during the hearing of the substantive motion. For that reason, I agree with the applicants that the verifying affidavit annexed to the said Charles Chirra's application cannot be impeached at this stage but rather during the substantive hearing of the motion.

I have looked at the affidavit sworn by the said Charles Chiira on the 3rd of February 2005. The said

affidavit consists of eight paragraphs. The said applicant has basically reiterated the contents of the statements of facts and the verifying affidavit filed in support of the application seeking the leave of the court to file this substantive motion. Having read the said affidavit, I do not see anywhere where the said applicant has deponed to facts which are not within his knowledge or based on information which he failed to disclose. The facts deponed in the said affidavit discloses the source of information and further expresses the applicant's hope that his case will be positively considered by the court. Further even though the applicant has headed the said affidavit as having been filed, inter alia, against one Interested party and eleven others, that is an issue of form which does not go to the root of the affidavit and thus render it incompetent. I do not therefore find merit in this preliminary objection raised and consequently disallow it. The authorities quoted are not applicable to this case. The second preliminary point is that the applicants had been granted leave of this court to file this substantive motion for judicial review when the applicants had not given notice to the Registrar pursuant to **Order LIII rule 1(3) of the Civil Procedure Rules.** I have perused the file where the applicants sought leave to file this notice of motion. The applicants did on the 25th of January 2005 file notice to the Deputy Registrar of this court signifying their intention to seek the leave of this court to quash the notice of the annual general meeting which was convened by the Registrar General on the 14th of January 2005. The applicants then filed the application seeking the leave of this court on the 27th of January 2005. Leave was granted on the 31st of January 2005. In the premises therefore there is no merit whatsoever with this preliminary point of law raised. The said preliminary point is disallowed.

The third point of law raised is that the firm of Waiganjo & Company Advocates have no authority of the company to file the motion for judicial review on behalf of the applicants. It was contended that no resolution of the Company was annexed to the application to prove that the said firm of advocates had authority to file the suit on behalf of the company *(whom the applicants are claiming to be its directors).* The applicants have conceded that no such resolution has been filed. They have however stated that the anomaly could be cured by a further affidavit being filed annexing such authority. I agree with the applicants. I think the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the substantive motion is fixed for hearing. There is no requirement that such resolution granting a firm of advocates authority to file suit on behalf of a company has to be filed at the same time that the said suit is filed. I do therefore hold that even if the said firm did not file such authority, when the substantive motion was filed, such authority can be filed any time before the hearing of the substantive application for judicial review. The absence of such authority is therefore not fatal to the applicants suit. That preliminary point raised is likewise dismissed.

Finally an issue as been raised concerning the fact that Mr Adera who appeared on behalf of the respondent during the hearing of the preliminary objection also presided over the annual general meeting and wrote correspondences which the applicants have sought to have quashed in these proceedings. The applicants have complained that issues of conflict of interest between the two roles played by the said counsel may arise during the hearing of the substantive application for judicial review. I agree with the applicants. Learned Counsel has put himself in a situation where he will be seen to be defending his personal decision as an officer at the Registrar- General's officer instead of defending the respondent as an impartial advocate who has no interest in the matter in dispute. It would be advisable if Learned Counsel would let another counsel in the Registrar-General's office handle this case so that he may not expose himself to a situation where a conflict of interest may arise. I hope Learned Counsel will heed the advice of this court.

I would conclude by raising my concern on the recent proliferation of a practice by litigants of raising preliminary objections in a bid to scuttle suits filed by the opposing parties. I would advise them to heed the warning issued as long as 1969 when Sir John Newbold, the then President of the Court of Appeal of East Africa stated at page 701 in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- WestEnd Distributors Ltd [1969]E. A. 696**, that;

> ***"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has***

to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop".

In the premises therefore, the preliminary objections raised do not have any merit. The same are disallowed with costs to the applicants. The applicants are at liberty to list the substantive motion for hearing in any other court other than this court.

DATED at NAKURU this 21st day of September 2005.

L. KIMARU

JUDGE