REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 82 of 2004

ALI K. AHMED T/A SKY CLUB RESTAURANT……..APPELLANT

Versus

KABUNDU HOLDINGSLTD.……...…….RESPONDENT

RULING

On 12th April 2005 Counsel for the Appellant filed a Notice of Preliminary objection stating:-

> **1. "THAT PATRICK MUKIRI KABUNDU has No capacity in Law to act for the Respondent.**
>
> **2. THAT the Respondent has no locus standi to defend the proceedings herein.**
>
> **3. THAT the subject matter of the proceedings herein does not belong to Respondent."**

On 12th May 2005 when two of the several applications filed herein came up for hearing, Mr. Malombo, counsel for the Appellant argued the first ground of the preliminary objection that Mr. Kabundu who has been appearing in this appeal on behalf of the Respondent company and has filed several applications on its behalf lacks legal capacity to act for the Respondent. He argued that the Respondent company had not passed any resolution authorizing Mr. Kabundu to act on its behalf. He rubbished the resolution dated the 14th March 2005 as being of no consequence as it was signed by Mr. Kabundu himself and one Jacob Mwongo purporting to be but are actually not directors of the company as they did not hold any shares in the company.

On 10th June 2005 I overruled that preliminary objection on the ground that the Appellant had not placed before court anything to show that the Articles of Association of the company requires its directors to hold shares in the company.

Following on that ruling the Appellant has now filed a formal application under Order 6 Rule 13(d) of the Civil Procedure Rules seeking the striking out of the Respondents applications dated 26th April 2005 and 22nd June 2005 on the ground that both of them have been filed by Mr. Kabundu who has no capacity to act for the Respondent.

In support of that application the Appellant has sworn an affidavit to which he has annexed a copy of the Articles of Association of the Respondent Articles 12 of which provides that:-

> **"The qualification of a director shall be the holding of at least one share in the company."**

Mr. Kabundu, plethoric with authorities some of which are not relevant to the matter in issue strongly contended that the matter was *res judicata.*

On his part Mr. Malombo argued that *res judicata* only arises where substantive rights of the parties have previously been decided by a court of competent jurisdiction. According to him substantive rights of parties are not decided in applications. If there are defects in one application a party can rectify that in a subsequent application. In this case, he further contended, the ruling of 10th June 2005 was on a preliminary objection. He said that the authority in **Kanorero River Farm Ltd and others – Vs – National Bank of Kenya Ltd (2002) and KLR 207** in which it was held that the doctrine of *res judicata* applies to both suits and applications, whether interlocutory or final, is distinguishable in that what was decided on in the ruling of 10th June 2005 was on preliminary objection and not on a suit or an application.

I cannot accept this argument. Section 7 of the Civil Procedure Act states that "No court shall try any suit or issue…" between the same parties which has been determined by a court of competent jurisdiction. Applications and preliminary objections determine issues or even rights. The argument that a party can correct a defect in an application by a subsequent but similar application was rejected by the Court of Appeal in **Mburu Kinyua – Vs – Gachini Tuti (1978) KLR 69**.

In this matter what was determined by the ruling of 10th June 2005 was the issue as to whether or not Mr. Kabundu has a *locus standi* to file applications and generally appear in this appeal on behalf of the Respondent company without a proper resolution of the company authorizing him to do so. That is the same issue raised by this application. The only difference is that the Appellant has now placed before court a copy of the Articles of Association of the Respondent which was not before court when it considered the preliminary objection. There is no reason given why it was not exhibited earlier. Instead of arguing the preliminary objection the Appellant should have filed this application and exhibited the said Articles of Association. Parties should follow explanation No. 4 of Section 7 of the Civil Procedure Act and plead the whole of their cases at once. They should not be allowed to litigate by instalments.I fully with the decision of Kuloba J. in **Njagu –Vs – Wambugu HCCC No. 2340 of 1991 (unreported**) where he said:

> **"If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a court, then I do not see what use the doctrine of res judicata plays.**"

I would have stopped here and dismissed this application as being *res judicata*. I am however concerned about Mr. Kabundu's continuing to appear on behalf of the Respondent in this appeal in view of the revelation that he has no *locus standi* and his actions are illegal. I am therefore constrained to consider this revelation as a special circumstance ousting the application of the doctrine of res judicata to the peculiar facts of this case. Support for this view is to be found in the dictum of Wigram V-C, in Henderson – Vs – Henderson (1843) 67 ER 313, 319, which the Privy Council described as the locus classicus of this aspect of res judicata in **Yat Tung Investment Co. Ltd – Vs – Dao Heng Bank Ltd (1975) AC 581, 590** where he said:

> **"…where a given matter becomes the subject of litigation in an adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.The plea res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."**

Mr. Kabundu did not seriously dispute the fact that he is not a shareholder of the Respondent company. The gravamen of his argument was that the issue of his standing in this matter is res judicata, though he also argued that besides the impugned resolution of 14th March 2005 he has a power of attorney donated to him in 1997 by the company.That power of attorney has, however, been held by Mwera J to be spurious in **Kabundu Holdings Ltd – Vs – Ali Ahmed t/a Sky Club Restaurant Mombasa HCCC No. 116 of 2004** as Mr. Kabundu alone conducted what he called "the extra ordinary general meeting," wrote the minutes and signed them himself donating to himself the power of attorney. As recently as 21st July 2005 the learned Judge also found in the same case, that the purported resolution of 14th March 2005, touted by Mr. Kabundu as giving him authority to act on behalf of the Respondent company in this appeal, is of no legal consequence the same having been passed by the self-same Mr. Kabundu and Mr. Mwongo both of whom are not directors of the Respondent.

In the circumstances and for the reasons given I hold that Mr. Kabundu has no locus standi in this matter and is therefore debarred from appearing for the Respondent in this appeal. I also strike out the applications dated the 26th April 2005 and 22nd June 2005 filed by him. As I have allowed the application on grounds other than those addressed by the Appellant I order that each party bears its own costs.

DATED and delivered this 6th day of September 2005.

D. K. MARAGA

JUDGE