Midland Emporium Limited v Housing & Industrial Development Contractors & another (Civil Suit 77 of 2007) [2024] KEHC 711 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 711 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL SUIT 77 OF 2007

PJO OTIENO, J

JANUARY 19, 2024

BETWEEN

MIDLAND EMPORIUM LIMITED ..... APPELLANT

AND

HOUSING & INDUSTRIAL DEVELOPMENT CONTRACTORS .... 1ST DEFENDANT

MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY (FORMERLY WESTERN UNIVERSITY COLLEGE OF SCIENCE & TECHNOLOGY) ..... 2ND DEFENDANT

RULING

1. Before the Court for determination is the 1st defendant's notice of motion application dated 3rd December, 2022 brought pursuant to orders 50 rules 14(1) and 2 and Order 34 Rule 8 of the *Civil Procedure Rules* and section 1A,1B, 3 and 3A of the *Civil Procedure Act* seeking the orders that; the suit herein is incompetent, inept, ambiguous and was improperly filed in gross abuse of the process of the honourable court; that the honourable court lacks total jurisdiction to entertain the hearing and disposal of this suit for which reason the honourable should forthrightly dismiss this suit with costs to the 1st defendant.

2. The only reason put forth, on the face of the motion and in the affidavit of support, for the assertion that the court lacks jurisdiction and that the suit is incompetent is the requirement of a Board resolution application pursuant to Order 4 rule 4(1) of the *Civil Procedure Rules*. The supporting affidavit of Lawrence Ngugi Mwangi, sworn on 3rd December, 2022, in his capacity as counsel for the 1st defendant, reiterates the grounds on face of the motion and avers that the subject suit was filed without the authority of the Board of Directors of the plaintiff company and neither is there an authority of the lawyers who filed the suit and hence the suit is not properly before this court. He then claims, that as a result of the blunder, that the court lacks the jurisdiction to entertain this suit. He explains that during

the pendency of this suit he travelled to the united states of America for further studies and left the matter with the firm of J.B. Shilenje & Co. Advocates to take conduct of the suit and file a preliminary objection and it appears that the firm did not do the same.

3. The Applicant additionally filed an affidavit called further supporting affidavit on the 8.12.2022 sworn by Lawrence Ngugi Mwangi on 27th January, 2023. the court notes that such an affidavit is unknown to law for the law only anticipates a supplementary affidavit mandated by Order 51 Rule 14(4) and the court orders made on 8.12.2022 granting leave. It is still good law that the rules as handmaids of justice be adhered to so that only names given to documents are used with parties retaining no liberty to craft own names for litigation documents. The court will treat the affidavit as one supplementing the Supporting Affidavit.

4. That said, the said affidavit affidavit is evidently a rebuttal of the Replying affidavit sworn on behalf of the plaintiff for the deponent asserts that the suit was filed on 12/10/2007 by the firm of Ameyo Guto & Co. Advocated and not M/S L.G. Menezes & Co. Advocates as alleged by Mr. Njoga; denies having explicitly admitted jurisdiction but contested same and that there is no law that a contest on the jurisdiction of the court can only be by way of a preliminary objection and not a Motion. He then riterates that the suit is incompetent and thus a candidate for dismissal.

5. The application was resisted by the Replying Affidavit of Dancan Otieno Njoga, advocate for the plaintiff, sworn on 16th December, 2022. in the affidavit the deponent avers that the firm of L.G. Menezes & Company Advocates was instructed to file this suit on 10/10/2007 culminating in the plaint filed on 12/10/2007. He then alleges that the 1st defendant has not been active in prosecuting this suit and the subject application is just but another tactic to delay the matter and adds that applications on questions of jurisdiction ought to be by way of a preliminary objection and not a notice of motion application. The deponent then adds that the question of lack of jurisdiction has been brought belatedly and against the pleadings filed by the applicant which tacitly admitted jurisdiction as pleaded at paragraph 15 of the plaint reiterates that the application was a ploy at delay and illustrated the instances of such delay. He then exhibited a copy of the defence by the applicant, the advertised service upon the 1st defendant and an authority by the plaintiff to one Mr Divyesh Ramesh Kotecha.

6. There was also filed replying affidavit of Linda Omenya, assistant legal officer for the 2nd defendant sworn on 9th February, 2023, which supports the subject application and avers that the subject suit violates the provision of order 4 rule 1(4) of the civil procedure rules which requires that where the plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. She further asserts that in the absence of a board resolution, the subject suit is incompetent. Again, order 5 Rule 14(1) only permits a respondent who is served and wishes to oppose the application to file the itemised responses. It is not envisaged that a party who wishes to supports an application to file a Replying Affidavit. Because the law denies the 2nd respondent to file an affidavit supporting the application, even if disguised as a replying affidavit, I find the affidavit to have been improperly filed and order it struck out.

7. The application was directed to be canvassed by way of written submissions and all the parties have so complied. The rival positions taken by each of the three parties may be summarised as below.

8. It is the submission by the 1st defendant/applicant, rather ambivalently, that the plaintiff and its advocates do not have authority or locus standi to have instituted and progressed with this suit and that it is only the company that has the capacity to take action to enforce its legal rights and cites the case of *Salomon v Salomon & Co. Ltd* (1897) AC 22 for the position of the law that the company, being a separate and distinct entity from its promoters, must sue and be sued in its own name.

9. It is further argued and contended that it is trite law that a suit instituted for and on behalf of a company must be founded upon a resolution to that effect and cites the decisions in *Philomena Ndanga Karanja & 2 others v Edward Kamau Maina* (2015) eKLR, *Affordable Homes Africa Limited v Ian Henderson & 2 others* (2004) eKLR and *AJ Limited & another v Catering Levt Trustees & 3 others* (2005) eKLR where the suits were struck out on account of want of resolution.

10. For the 2nd defendant, submissions were offered to the effect that the plaintiff's verifying affidavit sworn on 12th October, 2007 by Ramesh Kotecha did not indicate that he was duly authorized contrary to the requirement set out in Order 4 Rule 1(4) of the Civil Procedure Rules and placed reliance on the case of *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* [2015] eKLR where the court held;

> "In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it. It was therefore sufficient for the deponents to state that "they were duly authorised." It was then upto the appellants to demonstrate by evidence that they were not so authorised."

11. It is thus added and contended that this omission is not a mere procedural technicality to be cured under article 159 of the Constitution and that though the plaintiff may argue that there is no time limitation for filing an authority, the same ought to be filed before a matter is set down for hearing, they claim this matter was set for hearing on 8/12/2022 and cite the case of *Mavuno Industrial Limited & 2 others v Keroche Industries Industrial Limited* (2012) eKLR where it was held;

> "Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeing particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic v Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage."

12. It is, flowing from the cited decisions, then contended that without the company resolution sanctioning the filling of the suit, the suit is incompetent and a good candidate for being struck out or dismissed.

13. For the plaintiff, the submissions take the position that they have produced a letter of authority dated 9/7/2011 authorizing one Divyesh Ramesh Kotecha, General manager, to attend court and give evidence in the company's claim. They further argue that the intent of order 4 rule 1(4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf and it is not a ground to strike out suits. In that regard they rely on the court of appeal decision in *Spire Bank Limited v Land Registrar & 2 others* (2019) eKLR where it was held as follows;

> "It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court.

> The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

14. The plaintiff further submits that the 1st defendant's application which raises a preliminary point and filed sixteen years after the filing of the suit is unmerited and affected by laches and thus ought to be dismissed.

Issues, Analysis and Determination

15. The court has perused the subject application, the response thereto and the submissions by the parties and the only issue that arises for determination is whether the plaintiff company authorized the filing of this suit and if not; whether lack of such authority divests the court of its jurisdiction and if the suit ought to be struck out or dismissed for such failure.

16. In coming to the issues, the court is well cognisant of the fact that the 1st defendant has in both the Motion and submissions sought the outright dismissal of the suit rather than striking out. striking out and dismissal, even when both may result in termination of a matter, must be distinguished and not confused for each other. This is important because the effect of termination by either invite different consequences.

17. A matter is only dismissed after it has been determined on the substantive merits. Where a matter is determined in limine, say by way of a preliminary objection as sought here, and where the court does not go to the merits of the dispute in the suit, the matter cannot be dismissed but only struck out. Where a matter is struck out on such a technicality, the litigant has the right to correct the blunder and approach the court appropriately. Of course, where the suit is dismissed, the doors remain closed and only a challenge by appeal can be entertained.

18. The motion is indubitably premised on the provisions of order 4 rule 1(4) of the *Civil Procedure Rules*. It faults the suit and seeks its termination for failure to exhibit a resolution by the company sanctioning its institution. The provision stipulates that where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

19. The plaintiff has explained that the plaintiff company authorized the institution of this suit and exhibited a letter of authority dated 9/7/2011, under the company seal, authorizing one Divyesh Ramesh Kotecha, General manager, to attend court and give evidence on the company's claim. The 2nd defendant has not disputed the authenticity of that letter but contends that as at the date the suit was fixed for hearing the same had not been filed.

20. The court has seen the plaintiffs list of documents but the letter is not so listed as a document to be used at trial. The court is however appreciative that the letter was prepared in 2011 while the suit was filed in the year 2007. The court is persuaded by the decision in Mavuno Industrial Limited (supra) that a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. I find that the filing of the letter of authority by the plaintiff's in the year 2011 is not fatal to this suit to warrant it to be struck out. The court is equally persuaded by the decision in *Microsoft Corporation v Mitsumi Computer Garage*(2001)KLR 470, for the proposition that deviation from the form prescribed which goes not to the court's jurisdiction and which does not prejudice the opposing side ought not be treated

as nullifying the document and that the court must always strive to do substantial justice by saving the document and thus the dispute for determination on the merits so that even if the defect be in the verifying affidavit, the court may order that a compliant affidavit be filed. Before the court there is no allusion to any prejudice being visited upon any of the defendant just as much as there is no evidence that the company does not support the suit.

21. More importantly, the court is bound and well guided on the purpose and the import of order 4 rule 1(4) of the *Civil Procedure Rules*, 2010 as was explained by the Court of Appeal in *Spire Bank Limited* (supra) to be for safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. Here, by direction of the court given on the 7.10.2022, the matter is to start denovo. During the hearing, it shall be open for the question of sanction to be interrogated by evidence and cross examination.

22. To this court, the need for a resolution sanctioning the institution of a suit targets the corporate and its governance organs as the beneficiaries. That requirement ought not to be used by a debtor of the corporate to gag it from pursuing a due debt. In this matter, no evidence has been tendered to demonstrate that Divyesh Ramesh Kotecha, the Managing Director, was not authorized to represent the plaintiff company just as there has not been challenge on the authenticity of the authority exhibited in the replying Affidavit to the motion. In the absence of such evidence, the court finds that the suit is not merited to be terminated at this stage. To terminate it will fall short of the dictate that legal disputes pursued under the *Civil procedure Act* are so pursued in a just, expeditious, proportionate and affordable fashion. Those values are fully appreciated by the applicant who has invoked the oxygen principles as founding the application. Applying the same oxygen principles, and so that the hearing is not disrupted unduly, it is directed that the plaintiff shall, within 30 days from the date of this decision, file and serve a resolution of the company sanctioning the continuance of the suit.

23. Accordingly, for the reasons set out above, I find the notice of motion application dated 3rd December, 2022 to lack merit and the same is dismissed with costs to the plaintiff.

24. Mention on 6.3.2024 to fix a hearing date.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JANUARY, 2024.

PATRICK J O OTIENO

JUDGE

In the presence of:

Mr. Menezes for the Plaintiff

No appearance for the Defendants

Court Assistant: Polycap