REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 55 OF 2021

WATAMU SAILFISH LIMITED.....PLAINTIFF

VERSUS

EMMANUEL CHARO TINGA.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

This ruling is in respect of a notice of motion dated 2nd June 2021 by the plaintiff/applicant seeking the following orders:

1. **Spent.**

2. **That pending the hearing and determination of this application inter-parties, there be issued an interim injunction restraining the respondents, their employees, servants and/or agents from making any further entries on, transferring, altering or dealing with the title deed of the land known as land reference No. 944 (Original Number 655/1 Watamu Township).**

3. **That pending the hearing and determination of this suit, there be issued an interim injunction restraining the respondents their employees, servants and/or agents from making any further entries on, transferring, altering or dealing with the title deed of the land known as land reference No. 944 (Original Number 655/1 Watamu Township).**

4. **That pending the hearing and determination of this application inter-parties, there be issued an interim injunction restraining the 1st Respondent, his employees, servants and/or agents from advertising, continuing to advertise, selling, and/or dealing with the suit property in any manner.**

5. **That pending the hearing and determination of this suit, there be issued an interim injunction restraining the 1st respondent, his employees, servants and/or agents from advertising, continuing to advertise, selling, and/or dealing with the suit property in any manner.**

6. **That the costs of this application be provided for.**

In response to the application the 1st Defendant filed a Notice of Preliminary Objection dated 30th June 2021 seeking to strike out the notice of motion and the entire suit for being instituted without a board resolution of the directors of the Plaintiff contrary to Order 4 Rule 1 (4) of the Civil Procedure Rules, 2010.

Counsel canvassed the both the preliminary objection together with the notice of Motion vide written submissions which were duly filed. I will therefore deal with the preliminary objection first since it touches on the suitability of the suit as presented before the court. If the preliminary objection succeeds, then there would be no need of determining the application.

1ST DEFENDANT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

Counsel for the 1st defendant submitted that the Plaintiff lacks the locus standi to institute the suit for being instituted in the absence of board

resolutions as required by Order 4 Rule 1 (2) (4) and (6) of the Civil Procedure Rules 2010 which provides: -

> **Order 4, rule 1.] (1) The plaint shall contain the following particulars—**
>
> > **(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.**
> >
> > **(4) 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.**
> >
> > **(6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.**

It was counsel's further submission that the purported power of attorney dated 23rd July 2020 granted to one **JOSEPH JOSSEPPE NGUMBAO KIPONDA** annexed to the said supporting affidavit to the Plaintiff's Notice of Motion application dated 12th June 2021 is not legally competent as it does not emanate from the Plaintiff. That the Plaintiff has not given any authority to the said **JOSEPH JOSSEPPE NGUMBAO KIPONDA** to institute the suit and swear affidavits on its behalf as the said power of attorney relates to directors of the company **ANDREA GIUSEEPE GEORGIO STRAMEZZI** and **LANCROIX WASOVER STEPHANE GEORGES.**

Mr Mbura submitted that the 1st Defendant being a director and or member of the company is privy to the provisions in the Articles of Association of the company and is fully aware that no resolutions have been made by the company to institute this suit against him.

Counsel relied on the case of **Affordable Homes Africa Ltd v Henderson & 2 others [2004] eKLR** where where the Court held as follows: -

> **"It is common ground that in the instant suit, there was no authority from the Board Directors to institute this suit. In paragraphs 3 and 4 of his replying affidavit, the first defendant, Mr. Ian Henderson, avers-**
>
> > **"3. That I am a director of the plaintiff company herein and I swear of my own personal knowledge that prior to the institution of this suit, no meeting of the board of directors was held and consequently no resolution was passed authorizing the firm of Oluoch-Olunya & Company, Advocates to institute this suit in the name of the Company.**
> >
> > **4. That I am advised by my said advocates, which advice I hold to be true, that both the verifying affidavit and the supporting affidavit are incompetent as the same were sworn by the said Raymond Hugh Chisholm without the authority of the company."**

These averments have not been controverted in any way. As if to confirm that there was indeed no resolution of the board, Mr. Chisholm says in paragraph 3 of his verifying affidavit-

> **"That I have instructed the firm of Oluoch- Olunya & Co. Advocates to institute this suit on our behalf and to conduct proceedings thereof."**
>
> **Clearly, it was Mr. Chisholm, the managing director and principal shareholder of the plaintiff company who gave instructions for commencement of this suit in the company's name rather than the company itself. In so doing, the managing director usurped the powers of the board, and that is irregular. In the case of <u>SHAW & SONS (SALFORD) LTD. v. SHAW</u> (supra), Greer L.J. said in relation to this aspect of the law-**
>
> > **"A company is an entity distinct from its shareholders and its directors."**
> >
> > **Even a majority shareholder therefore, is not and cannot purport to be the company. His votes alone may ensure the passing of an ordinary resolution, or even a special resolution, which would constitute an act of the company. But until then, the company cannot be said to have acted in a particular manner merely because that is the intention of the majority shareholder. His wishes remain wishes unless and until they are translated into an act of the company by an appropriate resolution at an appropriate forum.**

Counsel for the plaintiff submitted that since the managing director holds 75% of the company's share capital, the court need not make further enquiry. I agree with counsel for the defendant that no authority was cited for such a proposition. Indeed, with respect, so to hold would set a very dangerous precedent as it would amount to relegating the company to the status of an alias for the majority shareholder. Such a view was rejected in **<u>SALOMON & CO.LTD. v. SALOMON</u> [1897] A.C. 22 H.L.,** which is the very foundation of modern company law. If such a view were to hold sway, there would be nothing to prevent a majority shareholder from getting up any morning and undertaking all manner of actions in the company's name with an utter contempt to the interests of the other shareholders. Even if the minority are certain to be out voted, it is their right to vote.

The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff"

Counsel urged the court to uphold the preliminary objection and strike out the application together with the suit.

PLAINTIFF'S SUBMISSIONS THE PRELIMINARY OBJECTION

Counsel opposed the preliminary objection and submitted that Order 4 Rule 1 (4) of the Civil Procedure Rules does not state explicitly that the said resolution must be filed at the time of filing the suit. This therefore can be cured by ratification any time before the suit has been set down for hearing as was held in the cases of **Leo Investments Ltd vs. Trident Insurance Co. Ltd (2014) eKLR and Republic vs. Registrar General and 13 others (2015) eKLR**, Odunga J. and Kimaru J. respectively rendered that the legal position is that a resolution of the Board of Directors of a company may be filed at any time before the suit is fixed for hearing.

Counsel further relied on the Court of Appeal case of **East Africa Safari Air Ltd vs. Antony Ambaka Kegodre & Another (2011) eKLR** which dealt with the issue of board resolution and submitted that it is established by case law that proceedings can be ratified after filing a case by a meeting of the shareholders or by authority of the Board as such failure to file the authority together with the petition cannot lead to nullification of the proceedings.

Counsel therefore urged the court to dismiss the preliminary objection with costs to the plaintiff.

PLAINTIFF'S SUBMISSION ON APPLICATION FOR INJUNCTION

Counsel relied on the supporting affidavit of the plaintiff whereby the plaintiff deponed that it was at all material times the registered owner of the land known as land reference No. 944 (Original Number 655/1 Watamu Township) (the suit land) and that around May 2021, through their attorney, they discovered that there were developments on the suit land being advertised for sale and lease. Upon enquiries with the 2 nd Defendant, they established that the said activities were carried out by the 1st Defendant.

Counsel also cited the **Giella Casman Brown** case on injunctions and submitted that the plaintiff has established a prima facie case with probability of success as it was the registered owner of the suit land. That the 1st Defendant has failed to prove that he has any rights on the suit property as he is not an innocent purchaser.

Counsel therefore urged the court to allow the application as prayed as the plaintiff will suffer irreparable loss if the orders sought are not granted.

1ST DEFENDANT'S SUBMISSIONS ON NOTICE OF MOTION

Counsel relied on the 1st Defendant's Replying Affidavit dated 4th August 2021 wherein he exhibited a copy of certificate of incorporation of Watamu Sailfish Limited and deponed that he is a genuine director of the Plaintiff Company. He admitted reporting the lost title and making an application for a provisional title and annexed a copy of the Police abstract and a copy of board resolutions dated 21st May 2018 authorizing him to follow up on the issue. He added that the Plaintiff Company later transferred the suit property to him at a consideration of Kshs. 10,000,000/- and deponed that the transfer was legal and procedural.

It was the 1st defendant's case that the suit property is vacant and there are no any developments thereon.

Counsel submitted that the Plaintiff has not established a prima facie case to warrant the court to grant an interlocutory injunction and further that it has failed to demonstrate ownership of the suit land. Counsel also submitted that the 1st defendant is the registered owner of the suit land therefore is entitled to enjoy the benefits and rights under Article 40 of the Constitution, 2010 and sections 24, 25, and 26 of the Land Registration Act, 2012.

It was counsel's submission that the Plaintiff has failed to show that it would suffer irreparable loss that cannot be compensated by an award of damages, if the interlocutory injunction is not granted and relied on the case of **American Cyanamid v. Ethicon Limited [1975] AC 396**. On the contrary, counsel submitted that the 1st defendant stands to suffer irreparable loss and damages if the injunction is granted.

Ms Mwania further submitted that the photographs adduced by the plaintiff were not of the suit property and that in any event, the same were not accompanied by a certificate as envisaged under section 106B of the Evidence Act, Cap 80 and urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

There are two issue to be determined by the court namely:

1. **Whether failure to file board resolutions at the institution of a suit on behalf of a company is detrimental to a suit.**

2. **Whether the Plaintiff has satisfied the conditions for grant of interlocutory injunction.**

On the issue whether failure to file a board resolution with the plaint is fatal to the suit, in the case of **Mavuno Industries Limited& 2 Others Vs Keroche Industries Limited [2012] eKLR** the court held as follows

> **"As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, 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. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense 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 vs. 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 anytime 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".**

The above case fortifies the fact that such a failure may attract some consequences but does not in itself invalidate a suit. The resolution can be filed before the hearing commences.

Striking out of suits is a draconian measure which should be used sparingly and only in hopeless cases as was held in the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** where the court held that:

> **"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.**
>
> **No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, *and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."***

The court has discretion on whether or not to strike out any pleading that is non-compliant and further Article 159 of the Constitution of Kenya, 2010 obliges the court to deliver justice without undue regard to technicalities. In the case of **Stephen Boro Gitiha v Family Finance Building Society & 3 others [2009] eKLR** Nyamu, JA while expounding on the said Overriding Objective stated:

> **"On 23rd July 2009 both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate sections 1A and 1B in the Civil Procedure Act and sections 3A and 3B in the case of the Appellate Jurisdiction Act. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective… The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".**

Parties should be geared towards hearing the main suit not making many applications and many objections that do not assist in the real issues. Preliminary objections should be filed on pure points of law which in effect can terminate the case but not for prolonging litigation of buying time. These objections have the effect of creating backlogs in the court system and increasing litigation costs to the parties.

In the case of **Faith & Hope Properties Kenya Ltd v James Muchiri Waweru & another [2021] eKLR** the court held that:

> **"This court is in agreement with above pronouncements. The mere fact that the Plaintiff did not file its resolutions authorizing the swearing of the Verifying Affidavit by one of its Directors and the firm of S. J. Nyang and Company advocates to file the suit on its behalf cannot be a ground for invalidating the suit."**

Similarly, in the case of **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000** it was held that:

> **"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect……As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."**

In the **Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Limited (1969) EA 696, 701** case preliminary objections cannot be successfully raised where what is sought is the exercise of judicial discretion. Newbold P explained thus:

> **"A Preliminary point 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 the 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..."**

From the plaint and the affidavits in support of the case and the notice of motion, it clear that the plaintiff has deponed that he is one of the directors The plaintiff deponed that they were ready to comply with the provision and such failure should not be fatal to the plaintiff's case

I find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiff.

The preliminary objection having been dismissed, the next issue for determination is whether the plaintiff/applicant has satisfied the conditions for grant of interlocutory injunctions.

The principles to be considered in an application for grant of interlocutory injunctions are well settled as per the **Giella vs Cassman Brown & Company Limited (1973) E A 358,** where the court expressed itself as follows:

> **"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

Further, in **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another, (1990) eKLR** *the court held as follows:*

> **"To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."**

It is the plaintiff's case that the 1st Defendant illegally and fraudulently transferred the suit land to himself without any authority of the directors of the Plaintiff. The 1st Defendant's case is that he is one of the directors of the Plaintiff Company and that he acquired the suit land for a consideration from the Plaintiff.

In the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** the court observed as follows:

In the celebrated case of *Giella Vs Cassman Brown and Co. Ltd* the Court set out the principles for Interlocutory Injunctions. These principles are: -

> **i. The Plaintiff must establish that he has a prima facie case with high chances of success.**
>
> **ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.**
>
> **iii. If the court is in doubt, it will decide on a balance of convenience.**

The above principles were authoritatively captured in the famous Canadian case of *R. J. R. Macdonald Vs. Canada (Attorney General)* where the three part test of granting an injunction were established as follows: -

> **i. Is there a serious issue to be tried?;**
>
> **ii. Will the applicant suffer irreparable harm if the injunction is not granted?;**
>
> **iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").**

It is not disputed that the suit land was at one point registered in the Plaintiff Company name thus the issue is how was it transferred to the 1st defendant? The purpose of temporary injunctions is to preserve the substratum of the case so as not to be rendered nugatory or an academic exercise if the subject matter of the suit has ceased to exist.

The Plaintiff averred that the 1st defendant has erected houses on the suit land and placed an advertisement for sale of the said houses by attaching photographs in support. The contents of the photographs were disputed by the 1st defendant in his replying affidavit. The 1st defendant claimed that no developments have been undertaken on the suit property hence there would be no need for the court to issue an order of injunction.

This is a dispute between the plaintiff company and one of the directors the 1st defendant who claims to have bought the suit land legally. It is the plaintiff's word against the defendant's. It is also not in dispute that the suit land was originally registered in the plaintiff's name and subsequently transferred legally or illegally to the 1st defendant.

From the pleadings and the averments of the parties it is evident that there is a valid issue to be determined and that the substratum of the

case should be preserved in the interest of justice.

Order 40 Rule 1 of the Civil Procedure Rules requires proof that the suit property in dispute is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situation obliged to grant a temporary injunction to restrain such acts.

In the current case, is the property in dispute in danger of being alienated or sold to other third parties. Is the property likely to be wasted? There are two conflicting positions on the what is happening on the property. The plaintiff says that there are developments being offered for sale and the 1sts defendant says the contrary that there are no developments. Which version should the court believe.

If there is no development as the 1st defendant claims, then there would be no harm if the court orders that a status quo be maintained pending the hearing and determination of this suit to preserve the substratum of the case. The parties should fast track the hearing of the main suit.

The final orders are the 1st defendant's preliminary objection is hereby dismissed with costs to the plaintiff. An order of status quo is hereby issued pending the hearing and determination of the main suit. Parties to fast track the hearing of the main suit. Costs of the application in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF OCTOBER, 2021

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.