



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
PETITION NO. E011 OF 2021

WINSTON INTERNATIONAL LTD.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

JOSEPH EMATHE MAMURA.....1ST INTERESTED PARTY

RICHARD EMORU OBOO.....2ND INTERESTED PARTY

MARK AWESI EWOL.....3RD INTERESTED PARTY

FRANCIS ESIMIT EDAPAL.....4TH INTERESTED PARTY

SHAKESPEARE LOMOE.....5TH INTERESTED PARTY

PETER LOBALL.....6TH INTERESTED PARTY

ANTHONY APALIA EKAKORON.....7TH INTERESTED PARTY

JAMES EKARANG.....8TH INTERESTED PARTY

MOHAMMED AKRAM KHAN.....9TH INTERESTED PARTY

NAWEED AKRAM KHAN.....10TH INTERESTED PARTY

RULING

[1] This is a matter that was initially filed before the Constitutional and Human Rights Division of the High Court in Nairobi by the petitioner through the law firm of **M/s Ondieki & Ondieki Advocates**. The petitioner prayed for the following orders:

[a] An order of certiorari to call into the High Court **Anti-Corruption Case No. 002 of 2021** in Eldoret Chief Magistrates Court for the purpose of quashing the said case against the petitioner and the 10 interested parties;

[b] A permanent injunction restraining the respondents by themselves, their agents, servants or howsoever from charging the petitioner with corruption offences and/or infringing on their right to pursue happiness until such time that this matter will be finally adjudicated;

[c] A declaration that the rights of the petitioner have been violated, denied, or threatened with infringement by the conduct of the respondents;

[d] An order for compensation by the petitioner for violating the petitioner's fundamental rights and freedoms as protected by the Constitution;

[e] Any other order, declaration, writ or remedy or redress that the Court may deem fit and convenient to grant taking all the exceptional circumstances of this case into account;

[f] Costs of the Petition.

[2] The cause of action, as set out in the Petition, was that, having refunded the **Kshs. 20,180,050/=** to the County Government of Turkana, which was the subject of **Anti-Corruption Case No. 002 of 2021**, the petitioner wrote a letter dated **6 April 2021** to the Director of Public Prosecutions (DPP) seeking that the criminal matter be withdrawn and resolved as a civil dispute vide **Milimani High Court Civil Case No. 384 of 2018**; wherein a finding has been made that there were no criminal aspects to the subject transaction. Thus, alongside the Petition, the petitioner filed a Notice of Motion dated **3 June 2021**, seeking orders that:

[a] the application be certified as extremely urgent and service thereof be dispensed with in the first instance as the subject of the application will be defeated unless it is heard expeditiously;

[b] the Court be pleased to issue conservatory orders restraining the respondents by themselves, their agents or servants from charging the petitioners with corruption related crimes and/or offences in **Anti-Corruption Case No. 002 of 2021** at Eldoret Chief Magistrate's Court until the motion is heard *inter partes*;

[c] the Court be pleased to issue conservatory orders restraining the respondents by themselves, their agents or servants from charging the petitioners with corruption related crimes and/or offences in **Eldoret Chief Magistrates Anti-Corruption Case No. E002 of 2021** pending the hearing and determination of the Petition;

[d] The Court be pleased to issue conservatory orders suspending the proceedings in **Anti-Corruption Case No. E002 of 2021** in Eldoret Chief Magistrate's Court pending the hearing and determination of the application and thereafter the Petition;

[e] the Court be pleased to issue any such or further orders or directions as it may deem fit and convenient in the exceptional circumstances of this case, taking into account that the petitioner has already remitted the money, i.e. **Kshs. 20,180,050/=**, to the respondent's account at the first instance of account details having been made available and as directed by the Court in **Civil Case No. 384 of 2018** by **Hon. Muigai, J.**;

[f] costs of the application be in the cause.

[3] In addition to the Replying Affidavits filed herein by the respondents, the 1st respondent filed a Notice of Preliminary Objection dated **28 June, 2021** on grounds that:

[a] There is no legal authority by way of lawful resolution, or any other legal instrument, under the seal of WINSTON INTERNATIONAL LTD duly executed by the known directors and accompanied by the requisite minutes that have been availed before and filed in this Honourable Court authorising the institution of the instant Petition against the Respondents herein with respect to intended prosecution in **Eldoret CM ACC E002/2021**.

[b] There is no legal authority by way of a lawful resolution, or any other legal instrument, under the seal of WINSTON INTERNATIONAL LTD duly executed by the known directors and accompanied by the requisite minutes that have been availed before and filed in this Honourable Court authorising **NAWEED KHAN** to swear the Supporting Affidavit sworn on the **6 June, 2021** on behalf of the Petitioner.

[c] The Supporting Affidavit of **NAWEED KHAN** is inadmissible and bad in law and the same should be struck out.

[d] The 1st-10th Interested Parties enjoined themselves to the suit in a manner unknown in law and without leave of this Honourable Court.

[e] Other Grounds and reasons as may be adduced at the hearing thereof.

[4] The court gave directions on the **29 June, 2021** that the Notice of Preliminary Objection be canvassed by way of written submissions. Consequently, the 1st Respondent/Applicant filed his written submissions dated **2 July, 2021** whilst the 1st-8th Interested Parties filed written submissions dated **5 July, 2021**. The 1st Respondent/Applicant filed further submissions dated **12 July, 2021** to which the petitioners responded by filing Further Submissions dated **7 July 2021**.

[5] It was the submission of the 1st Respondent that the Petition herein was brought before Court without the authority of Petitioner, which is a body corporate incorporated under the **Companies Act**. This argument was hinged on the *locus classicus* case of **Salmon vs. Salmon & Co. Ltd** [1897] AC 22HL. Thus, counsel for the 1st respondent, **Mr. Mugun**, submitted that a company is a distinct and separate entity from its shareholders and directors, and thus can only make decisions through special or general meetings in accordance with the provisions of the

Company's Articles of association. Hence, **Mr. Mugun** cited **Bugerere Coffee Growers Ltd vs. Sebaduka** [1970] EA 147 and **Affordable Homes Africa Ltd vs. Henderson & 2 others** [2004] eKLR for the proposition that when companies authorize the commencement of legal proceedings, a resolution has to be passed either at a company's or Board of Directors' meeting and recorded in the minutes. He took issue with the fact that neither the minutes of the company meeting nor resolutions of its board have been annexed to the Petition to prove that indeed the petitioner authorized both the filing of the Petition in the company's name, and the appointment of the firm of **M/s Ondieki & Ondieki Advocates** to act for the petitioner. In his view, this Petition was brought in the name of a company by only one of the directors without the authority of the company; and is therefore incompetent and ought to be struck out.

[6] The second argument by **Mr. Mugun** was that **Naweed Khan**, who signed the Supporting Affidavit on behalf of the petitioner, lacked the *locus standi* to swear the same without accompanying company resolutions and minutes as proof that indeed the petitioner authorised the initiation of the litigation before court. It was the 1st Respondent's submission that the other Replying Affidavit deposed by **Joseph Emathe Namuar** (the 1st Interested Party) signed on behalf of the 2nd -10th Interested Parties similarly lacks proof of authority; and is consequently incompetent.

[7] With regard to the enjoinder of the 10 interested parties, it was the submission of **Mr. Mugun** that 1st-10th interested parties were required by law to seek leave of court either orally or through a formal application, to be enjoined in the suit herein. He referred the court to **Rule 2 and Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rule, 2013** for the definition of an interested party and the need for leave for an interested party to be enjoined in a suit. Hence, it was the submission of **Mr. Mugun** that, in so far as no leave was sought or obtained by the interested parties to be enjoined to this Petition, their joinder is improper and therefore ought to be nullified forthwith.

[8] Lastly, **Mr. Mugun** submitted that, even if the Court were to overlook the fact the interested parties were improperly enjoined to the Petition, they no longer have any identifiable stake in the suit because the Petition is *res judicata*. Counsel submitted that the petitioner and the interested parties filed **Kapenguria Judicial Review Misc Application No. E007/2021: Richard Emoru & Others vs. The Director of Public Prosecutions and Eldoret HC Misc. Application No. E044/2021: Richard Emoru & Others vs. The Director of Public Prosecutions**; and that the 1st respondent has acknowledged the said suits were withdrawn. He further pointed out that the suit herein is the third application seeking to stay proceedings in **Eldoret CM ACC No. E002/2021**; and that the reasons cited in all the applications have been the same. Counsel explained that, in **Kapenguria High Court Judicial Review Misc. Application NO. E002 of 2021**, the applicants unsuccessfully sought orders to, *inter alia*, stay plea taking; and that after **Hon. Bwonuonga, J.** declined to issue the orders, the applicants opted to file another suit, being **Eldoret High Court Civil Application No. E044 of 2021**, seeking the very same orders they applied for earlier, instead of appealing the decision. He added that, upon the Court being informed that the interested parties were engaged in abuse of the Court process, they hastily withdrew the suits. Hence, counsel wondered what other identifiable stake they had worthy of determination by the Court.

[9] With regard to costs, **Mr. Mugun** relied on **East African Portland Cement Ltd vs. Capital Markets Authority & 4 Others** [2014] eKLR in which **Hon. Mumbi, J.** (as she then was) held that:

“With regard to costs, it is my view that in the circumstances of this case, the petitioner should not bear the costs of an unmerited application that was clearly intended to protect the personal interests and position of a director. In the circumstances, the costs of this application shall be borne personally by Mr. Mark Ole Karbolo.”

[10] Counsel further referred to the case of **Bugerere Coffee Growers Ltd** (supra) and **Affordable Homes Case** to buttress his argument that counsel for the petitioner ought to be penalized in costs, for having filed the suit without authority. He consequently urged the Court to allow the Preliminary Objection and strike out the Petition with costs.

[11] On behalf of the 1st to 8th interested parties, it was the submission of **Mr. Omwenga** that the interested parties are all co-accused persons in **Anti-Corruption Case No. 002 of 2021**; and that they have since filed their Replying Affidavits in support of the Petition as well as the application dated 3 June 2021. Hence, **Mr. Omwenga** proposed the following issues for determination:

- [a] Whether the failure to avail the legal authority from the authorizing the institution of the Petition is fatal to the Petition;
- [b] Whether **Naweed Khan** had authority to swear the Supporting Affidavit on behalf of the petitioner;
- [c] Whether the interested parties were enjoined to the Petition procedurally;
- [d] Whether the Court had a duty to do substantive justice to the parties by invoking the overriding objective?

[12] Counsel for the interested parties submitted that a preliminary objection cannot be raised unless it involves a point of law which has been pleaded or which arises by clear implication out of the pleadings which, if argued as a preliminary point may dispose of the suit. Counsel relied on **Mukisa Biscuit Company vs. West End Distributors Limited** [1969] EA 696 for the holding that:

“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 the facts pleaded by the other side are correct.”

[13] Hence, it was the submission of **Mr. Omwenga** that the Preliminary Objection filed by the 1st respondent does not meet the threshold set out in the above cited authority. According to him, the Notice of Preliminary Objection filed herein raises mere technicalities that can be cured by **Article 159 (2) (d) of the Constitution of Kenya**. The Court was, consequently, invited to look at the cases of **Leo Investments Limited vs. Trident Insurance Company Limited** [2014] eKLR and **Republic vs. Registrar General & 13 others** [2005] eKLR for the proposition that there was no requirement to file a resolution with a suit; and that the same can be filed at any time before the suit is fixed for

hearing.

[14] Reliance was further placed by the interested parties on the case of **Kenya Ferry Services Limited vs. Mombasa County Government & 2 others** [2016] eKLR wherein the court stated that the lack of resolution cannot be a proper defence for the Respondent in the absence of fraud; that the same is a mere technicality, and is therefore curable under **Article 159 (2) (d) of the Constitution**.

[15] On whether **Mr. Naweed Khan** had authority to swear the Supporting Affidavit on behalf of the Petitioner, it was submitted that he swore the Affidavit as one of the directors; and that he had indeed been authorized to sign it. **Mr. Omwenga** submitted that the 1st respondent has not brought anything to the contrary by way of evidence to show that **Mr. Naweed Khan** was not authorized to swear the Affidavit on behalf of the petitioners. Reliance was placed on the case of **Ajiwa Shamji Limited vs. Kenya National Highways Authority & another** [2018] eKLR in which the Environment and Land Court, in dismissing a similar preliminary objection, held that:

“I am inclined to agree with the position taken by the Plaintiff which is quoted in the decision of D.K. Maraga (Ag. Judge as he then was, now Chief Justice) in the case of Mombasa HCCC No. 496 of 1995: Peter Onyango Onyiego vs. Kenya Ports Authority. ...that anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation. To suggest therefore, that everybody who testifies for and on behalf of a corporation has to have authority from the corporation given under seal as required by Order 3 Rule 2(c) is in my view not correct...Mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears the affidavit does not invalidate the affidavit. That is an irregularity Courts can under Order 18 Rule of the Civil Procedure Rules ignore.”

[16] On whether they were procedurally enjoined to this Petition, the 1st-8th interested parties submitted that they did not require leave to be enjoined in the suit herein as it is the Petitioner who enjoined them at the point of filing the Petition. They placed reliance on the case of **Centre for Human Rights and Mediation vs. County Government of Uasin Gishu & another; Commission on Revenue Allocation (1st Interested Party) & another** [2019] eKLR in which it was held that:

“...at the onset of a constitutional petition, nothing precludes the petitioner from joining an interested party, where it is doubtful whether it has been instituted in the name of the right petitioner and/or the determination of the court may affect the interested party. It is only once the matter comes to court and an interested party has not been jointed, that the issue of obtaining leave from the court would arise. I find that the 1st interested party has an identifiable stake or legal interest, or duty in the proceedings.”

[17] In the light of the foregoing, the Court was urged to do substantive justice to the parties by invoking the overriding objective as envisaged under **Section 1A and 1B** of the **Civil Procedure Act**. The Court was further implored to bear in mind that striking out of pleadings should be a measure of the last resort. Counsel relied on **Trust Bank Ltd vs. Amalo Company Ltd** [2002] eKLR and submitted that justice should be administered without undue regard to technicalities. Hence, **Mr. Omwenga** prayed that the Preliminary Objection be dismissed with costs as it only seeks to obstruct justice and delay the determination of not only the interlocutory application but also the Petition.

[18] I have carefully considered the pleadings and submissions filed herein. In my view, the following issues fall for determination:

[a] Whether the Petition is incurably defective for having been brought without a resolution of the company accompanied by requisite minutes from the Petitioner.

[b] Whether there is need for a resolution of the company accompanied by requisite minutes from the Petitioner giving **Mr. Naweed Khan**, authority to swear the Supporting Affidavit to the Petition.

[c] Whether the 1st-10th interested parties enjoined themselves to the suit in a manner unknown in law;

[19] As was well-explicated in **Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd** (supra), a preliminary objection consists of:

“...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

[20] Accordingly, a Preliminary Objection ought not to be raised where reliance is placed on disputed facts which are yet to be proved; or where, to arrive at its determination on the preliminary points raised, the Court must embark on an inquiry to ascertain the underlying facts. Hence, **the expressions of Sir Newbold, P. in the Mukisa Biscuits Case are apt. Here is what he had to say:**

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually raised 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.”

[21] The 1st respondent's main argument is that that both the application and Petition offend the requirements of the law, namely, that the authority of petitioning company to institute the suit, as well as authorizing the deponent to swear the Supporting Affidavits, ought to have been exhibited herein. The 1st respondent averred that, since the instant Petitioner is a limited liability company, a resolution together with

minutes of any special or general meeting sanctioning the institution of the Petition ought to have been availed. It is manifest therefore that, for the Court to ascertain whether or not a resolution was passed by the petitioner sanctioning the filing of this Petition, it must conduct an inquiry by way of examination of the pertinent evidence; which would involve travelling beyond the bounds of a preliminary objection.

[22] In the case of Oraro vs. Mbaja [2005] 1 KLR 141 Hon. Ojwang, J, (as he was then) expressed himself as follows: -

“...The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

[23] Moreover, no specific provision of the law was brought to my attention stipulating that a board of resolution be given for the filing of a constitutional petition by a limited liability company. Hence, I concur with the position taken by Hon. Justice Makau in the case of Offshore Trading Company Limited v Attorney General & 2 others [2021] eKLR that:

“... the matter pending before this Court is a Constitutional Petition in which Civil Procedure Rules are not applicable in regard to filing of Constitutional Petitions. The applicable law and procedure of filing Constitutional Petitions is provided for under “The Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013, otherwise known as Chief Justice Mutunga Rules which provide the procedure for filing of Constitutional Petitions and which have no requirement that the Petitioner must exhibit a board resolution or swear a verifying Affidavit. In addition thereto the Constitution abhors technical objections of this nature expressly at Articles 22, 3(b)(d) and 159 of the Constitution...”

[24] Further to the foregoing, it is now trite that failure to file a board resolution is no ground for striking out a suit, as such a resolution may be filed at any time before the suit is fixed for hearing. The cases of Mavuno Industries Limited & 2 Others vs. Keroche Industries Limited [2012] eKLR; Republic vs. Registrar General & 13 others [2005] eKLR; as well as Leo Investments Limited vs. Trident Insurance Company Limited [2014] eKLR are explicit enough that there is no requirement to file a resolution with a suit; and that the same can be filed at any time before the suit is fixed for hearing.

[25] I have likewise considered the 1st respondent’s argument that Mr. Naweed Khan is incompetent to swear the Supporting Affidavit on behalf of the Petitioner for lack of authority to do so and find it bereft of merit. This is because at Paragraph 1 of the Supporting Affidavit, there is an express averment to the effect that Mr. Naweed Khan, a director of the Petitioner, is duly authorized to swear the Affidavit for and on behalf of the Petitioner. I am therefore in agreement with the case of Offshore Trading Company Limited (Supra) that:

“...In the instant Petition, I note that the deponent of the Supporting Affidavit has expressly deponed at paragraph 1 of the supporting affidavit that he is duly authorized by the Board of Directors of the Petitioner to swear the Affidavits. The 3rd Responded cannot question that averment without offering contrary evidence. The Turquand Rule in Company Law enjoins third parties dealing with a company to presume that the company has complied with all its internal requirements and procedures. There is therefore no basis for the 3rd Respondent’s objection in the absence of evidence to the contrary...”

[26] Moreover, this second limb of the 1st respondent’s objection cannot be resolved without a consideration of the evidence; and therefore, whichever way one looks at it, it is plain that the objection before court does not raise a pure point of law that can dispose of the suit, as evidence is required to prove that the Petitioner has not complied with all its internal requirements. It is also my considered view and finding that lack of board of resolution is not sufficient reason to strike out a petition filed by a corporation.

[27] The last issue for consideration is the question whether the 1st-10th interested parties enjoined themselves to the suit in a manner unknown in law. An interested party, for purposes of constitutional petitions, has been defined under rule 2 (b) of the Mutunga Rules as follows:

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;

[28] Rule 7 of the Mutunga Rules provides: -

(1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

(2) A court may on its own motion join any interested party to the proceedings before it.

[29] It is clear therefore that, if a party wants to be enjoined in a suit as an interested party, the party may seek leave of the Court either orally or via a formal application. The Court may also enjoin a party *suo moto* if it deems it fit to do so. In this case, the interested parties were impleaded at the inception of the Petition. Under those circumstances, they were in no position to seek leave. I therefore entirely agree with the position taken by Hon. Omondi, J. (as she was then) in Centre for Human Rights and Mediation (Supra) that:

“...I think that at the onset of a constitutional petition, nothing precludes the petitioner from joining an interested party, where it is doubtful whether it has been instituted in the name of the right petitioner and /or the determination of the court

may affect the Interested Party. It is only once the matter comes to court and an interested party has not been joined, that the issue of obtaining leave from the court would arise. I find that the 1st Interested Party has an identifiable stake or legal interest, or duty in the proceedings...”

[30] I note that copious submissions were made by counsel to the effect that the instant Petition is *res judicata*, it being the 3rd such petition by the petitioners. Although this is a point that was not raised in the Notice of Preliminary Objection dated **28 June 2021**, my view of it is that it would also require investigation of evidence. Additionally, from the written submissions filed on behalf of the 1st respondent, it appears that the previous cases were withdrawn and thus not determined on merit. In the circumstances, I need not belabour the point.

[31] It is in the light of the foregoing reasons that I find no merit at all in the 1st respondent’s Preliminary Objection. The same is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF DECEMBER, 2021

OLGA SEWE

JUDGE