REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 116 OF 2016

REGIONAL CONTAINER FREIGHT STATION LIMITED.....1ST PLAINTIFF

AKABA INVESTMENT LIMITED.....2ND PLAINTIFF

TRANSOUTH CONVEYORS COMPANY LIMITED.....3RD PLAINTIFF

VERSUS

ZUM INVESTMENT LIMITED.....DEFENDANT

R U L I N G

1. By Notice of Motion dated 7th February 2018 and filed in court on 8th February 2018 the Applicant prays for the following orders:-

> ***a) This honourable Court be pleased to strike out the defendant's statement of defence and counterclaim both dated 3rd April 2017 and Replying Affidavit of one Nedim Mohamed Ibrahim Mohamed deponed on the 3rd April 2017.***
>
> ***b) That upon grant of prayer 1 above, this Honourable Court be pleased to enter Judgment as prayed for in the Plaint dated 30th November 2016.***
>
> ***c) The Defendant do hereby pay for the costs of this Application.***

2. The application is supported by the grounds on the face of the Application, the Supporting Affidavit sworn on the 7th February 2018 and a Supplementary Affidavit sworn on the 4th May 2018 by **Abdulkarim Saleh Muhsin** who is described as a director of the 1st and 2nd Plaintiffs.

3. In the two affidavits the deponent avers and asserts that he is the chairman and majority shareholder of the Defendant company which is a corporate entity duly incorporated under the companies Act and at no time whatsoever did the Defendant's Board of Directors pass any valid resolution to neither defend the instant suit nor authorize one **Nedim Mohamed Ibrahim** to swear any document /Affidavit on behalf of the Defendant company.

4. He further avers that the special resolution to defend the instant suit required a special notice to be issued as provided under Section 142 of the Companies Act (repealed), that there was never such notice and therefore, the alleged resolution passed and whose extract is exhibited as **NMI1** in the Replying

Affidavit is of no legal effect as no special notice was issued nor served.

5. He then added that the extract of minute furnished by the defendant are not a resolution of the Defendant and there being no valid resolution passed by the Defendant, there is no resolution capable of being filed in this Court at any time before the suit is set down for hearing.

6. The Defendant opposed the Application via a Replying Affidavit and further Affidavit deponed on the 6th April 2018 and 18th June 2018 respectively by **Nedim Mohamed Ibrahim** who is described as a director of the Defendant.

7. He avers that vide board meeting held on 3rd April 2014 the board duly authorized him to institute, defend, prosecute any claim by or against the company and the Defendant's advocate was issued with an authority to Act which was duly filed.

8. He further avers that a Board of Directors resolution may be filed any time before the suit is fixed for hearing as there is no requirement for the same to be filed at the same time the suit is filed.

9. He further stated that the shares currently recorded as allotted to **Abdulkarim Muhsin** are Fraudulent as per the investigation report dated 28th March 2018. Therefore, the claim by **Abdulkarim Muhsin** to shareholding and directorship in the Defendant company is an issue pending before the registrar of companies and the High Court in HCCC. No. 25 of 2015. Consequently, the same ought to be litigated in that forum.

10. The Application was argued by way of written submissions. Plaintiff's submissions were filed on 9thMay 2018 while the Defendant's submissions were filed on 20thJune 2018. I have considered the application, the affidavits, submissions and authorities cited.

Analysis & Determination

11. Preliminarily, it is noteworthy that the prayers sought by the Plaintiffs are for the Defence, Counter-Claim and Replying Affidavit sworn by **Nedim Mohamed** on the 3rd April 2017 to be struck out. I will restrict myself to the aforementioned issues. The issue of fraudulent transfer of share and fraudulent removal of a director are issues which, as rightly stated by the Defendant, can be dispensed with in in HCCC. No. 25 of 2015 which was pending determination on the date I heard the parties but has since been determined and the issue of shareholding settled.

12. The Plaintiffs seek striking out of the Defence, Counter-Claim and the Replying Affidavit sworn on behalf of the Defendant by **Nedim Mohamed** on the 3rd April 2017. I bear in mind that striking out of pleadings is a draconian remedy that should only be resorted to in the clearest of the clear cases as was rendered by Madan JA in**D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR**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."***

13. That however is not to say that a party can be vexed and put to the expense of defending a claim or defence that has no prospect of sustainability. There is no benefit towards end of justice in maintaining a claim that is outrightly destined for failure or where it manifests an element of abuse of the court process and otherwise not arguable[1]. The court is duty bound to not only safeguard the integrity of its processes

and stature but also safeguard the litigants from vexation or being scandalized by each other. In pursuit of that duty, the court has the inherent power and discretion to terminate any proceeding that furthers the known notions and norms of justice. **Hon. Gikonyo J** in the case of **Ajit Singh Virdi v J.F. McCloy [2014] eKLR** while underscoring when a court would strike out a pleading observed that**:**

> ***"… Prejudice to the plaintiff entails delayed benefits of the law and unnecessary costs being occasioned on the plaintiff. Prejudice to the administration of justice entails wasting of court's precious time and impediment to the court's ability to deliver on the overriding objective; i.e. a fair, just, affordable, proportionate and expeditious resolution of disputes."***

14 In this instant case, the Plaintiff states that there is non-compliance with the mandatory provisions of Order 4 rule 1(4) of the Civil Procedure Rules 2010 to the extent that the deponent of the Replying Affidavit sworn on the 3rd April 2018 has not and could not exhibit any valid authority under seal to do so and instead opted to rely on minutes of an alleged meeting held on the 3rd April 2017, which do not constitute a company resolution that has to be made under seal. Consequently, the lack of authority to defend the suit goes to the very root of the pleadings.

15. I have perused the Verifying Affidavit and the Replying Affidavit sworn by **Nedim Mohamed** on the 3rd April 2017. He describes himself as a director of the Defendant. Therefore, the deponent of the Verifying Affidavit and the Replying Affidavit sworn on the 3rd April 2017 was required to exhibit an authority under seal of the Defendant Company pursuant to Order 4 rule 1(4). I see no such authority annexed to the Verifying Affidavit but the deponent deposed and annexed minutes of the Defendant's Board meeting held on the 3rd April 2014 duly authorizing him to Act on behalf of the Defendant. The minutes show that in attendance to pass the same were **Nedim Ibrahim Mohamed** and **Sara Abdella Abdulsemed**. The two people are indeed directors of the Defendant but the document exhibited in the Further Supplementary Affidavit of **Abdulkadir Saleh Muhsin** and marked **ASM1** together with various letters and documents from the Registrar of Companies show unequivocally that the two only hold 49,950 share out of the 150, 000 issued share with the rest being held by **Abdulkadir Saleh Muhsin**. The efficacy and validity of the said minute can only be ascertained by finding out how the business of the company ought to have been transacted. The Defendant is admittedly a private company. In the absence of the Articles of Association being exhibited to this Court, a resort must be made to the Act and it subsidiary legislation, Table A, Companies Act (now repealed). There having not been exhibited to court any evidence of appointment of any of the members as a director, I treat the members as running the company as such members. In that context there participation in the decision making processes of the company is weighed by their shareholding. I would find that a decision of the company to hold sway must reflect the will of the majority. I will thus bear this fact in mind in interrogating whether there was a decision by the company to comply with Order 4, civil Procedure Rules

16. Order 4 rule 1(4) sates:

> ***Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under theseal of the company to do so***.

Order 4 rule 1(6) states:

> ***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***.

17. This is a path well-travelled by our courts. In **Affordable Homes Africa Limited vs Ian Henderson & 2 Others HCCC No. 524 of 2004, Njagi J** observed:-

> **"that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot**

interfere in the exercise of those powers (see the decision of the Court in *Automatic Self-Cleansing Filter Syndicate v. Cuninghame [1906] Ch.34, CA.);* that it was therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the company."

18. In the matter at hand the documents exhibited by both sides refer to the three persons claiming control of the defendant as Shareholders/Directors. I thus take it that the composition of the Board of Directors was the same as that of the General Meeting.

19. The same position was amplified by **Odunga J.** In **Leo Investments Ltd v Trident Insurance Company Ltd(2014) eKLR referred to the holding ofHewett, J.inAssia Pharmaceuticals v Nairobi Veterinary Centre LtdHCCC No. 391 of 2000as follows:**

"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…In that event the onus of proving lack of instruction would be on the person alleging the same.

20. **Ombija J** in **ASPANI PROPERTIES v ROBERTO CAMELLINI [2007] eKLR** held as follows…

"There must be a specific resolution of a company board of directors authorizing any act the company engages in. Minutes of the board, generally speaking, are a true reflection of what has been resolved at board meetings or general meetings."

21. I find that Order 4 rule 1(4) does mandate that a company authorizes court actions taken on its behalf. I am of the view that the minutes produced by the Defendant are not a true reflection of the resolution by the Defendant members' meeting. Not true reflection because those in attendance did not make a quorum and the resolution thus passed could not have been the decision of the majority. This may just be the further manifestation of the bitter boardroom fight between the shareholders with a minority section doing everything to elbow out the majority. In my view the prospects of such mischief is the need for the democracy in corporate governance demanding that the decision of the company be done by resolution and that in the absence an agreement or consensus a vote is taken. My understanding of company law coded under Sections 133 and 134 as read with Regulations 50, 52, 53, 54 and 61, Table A is that a meeting called by the company must be notified to member for a period of not less than 21 days. Nothing was shown to court that such meeting was called and notified to the members including the deponent of the Plaintiffs' Affidavits. It having been asserted that there was no meeting and a valid resolution, it was the duty of the Defendant under Section 112 of the Evidence Act to prove the occurrence of the meeting and the validity of the resolution thereby passed.

22. During the hearing of the application, parties severally referred me to the existence of HCC 25 of 2015 in which the shareholding in the Defendant was in issue. On account of such submissions, I sought to know what determination was made by the trial court, **Njoki Mwangi J**. I did lay my hands on the decision in HCCC. 25 of 2015 in which my sister **Hon. Justice Njoki Mwangi** in her ruling dated 18th October 2019 found that **Mr. Abdulkarim Muhsin** is the majority shareholder of the Defendant Company. The judge said:-

'In this case the plaintiff is the majority shareholder. That fact is supported by the document examiner's report'

23. With that finding, it follows that for a resolution of the company to have the value and efficacy as a

resolution disclosing the intention and decision by the company, it had to be with the participation of the Plaintiff. The document shown to court dated 3rd April 2017 and headed '**AUTHORITY TO ACT'** has not been shown to have been passed with the participation or indeed the notice and knowledge of the plaintiff. It also follows that when the counsel who filed the Defence and Counter- Claim was instructed there was no valid decision of the company passed with the participation of the Plaintiff. Consequently, there was no decision by the company to defend the suit or file the counter-claim and the document filed cannot thus rightly be deemed to have the blessing of the Defendant.

24. I do finally find that in the absence of a valid resolution by the company and failure to exhibit the authority under seal negates all actions taken on behalf of the company and that the documents thus filed were filed without the requisite authority and are thus liable for striking out. I thus accede to the request in the application to strike out the Defence and Counter-Claim dated 3rd April 2017. I therefore order that the defence and counterclaim be and are hereby struck out with costs.

25. Having struck out the Defence, the Plaintiffs' claim remains unchallenged, with no reasonable prospects of challenge, in that the majority shareholder in the Defendant remains in control of the Plaintiffs. Without a Defence, the suit succeeds and I therefore enter judgment for the Plaintiff in terms of prayers **f, g** and **h** plus costs and interests at court rates from the date of the suit till payment in full.

26. On general damages, I have not received any evidence to support the same and hence there is no basis to award any.

Dated and **delivered** at **Mombasa** this **11th** day of **November 2019.**

P J O OTIENO

JUDGE

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[1] Per Danckwerts, L.J. in Nagle v. Fielden (1966) 2 Q.B.D.633 at p. 646.