



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO 433 OF 2017

PRIVATE DEVELOPMENT CO. LTD.....PLAINTIFF

VERSUS

REBECCA NGONYO.....1ST DEFENDANT

SAMUEL KAMAU MACHARIA.....2ND DEFENDANT

AND

JACKSON NJENGA NJOROGE.....INTERESTED PARTY

RULING

(Application seeking to have the plaintiff's suit struck out on the ground that the plaintiff is non-existent; that the verifying affidavit is defective and there is no authority to institute the suit; clear evidence that the plaintiff is a registered limited liability company; verifying affidavit filed by a person who mentioned that he is a director which is not contested by the plaintiff company; no requirement for authority to be filed with the suit; authority not contested by the company; application dismissed)

1. The application before me is that dated 7 November 2017 filed by the 2nd defendant. It is an application brought pursuant inter alia to Order 2 Rule 15 (1) (b); and Order 4 Rule 4 and 6, of the Civil Procedure Rules. The applicant has applied that the suit and/or plaint dated 11 October 2006 be struck out and that the costs of the suit be borne personally by Hosea Kimotho Gitonga and James Macharia, the purported directors of the plaintiff. The application is based on the following grounds :-

(a) The plaintiff is a non-existent company and therefore has no locus standi to bring the current proceedings before this Honourable Court;

(b) The plaint dated 11 October 2006 contravenes the mandatory provisions of Order 4 Rule 4 of the Civil Procedure Rules, which provides that where the plaintiff is a corporation, which the plaintiff herein was not, the verifying affidavit shall be sworn by an officer of the corporation duly authorized under the company seal to do so;

(c) As held in Bugerere Coffee Growers Ltd vs Sebaduka & Another (1970) EA 147, when companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes; no such minutes/resolution has been exhibited authorizing the institution of the suit;

(d) The suit therefore is bad in law and incompetent and he same ought to be struck out with costs;

(e) This Honourable Court lacks jurisdiction to hear the same;

(f) The 2nd defendant has suffered and continues to suffer loss and prejudice by continued prosecution of this suit against him;

(g) It is in the interest of justice that this application be allowed.

2. The application is supported by the affidavit of Samuel Kamau Macharia. Apart from contending that the plaintiff is purporting to be a limited liability company and has not annexed any resolutions to file this suit, he has also deposed that the suit property, Nakuru Municipality Block 4/46 is charged to Royal Credit Limited of which he is a shareholder and director. He has averred that Royal Credit Limited advanced to the former registered proprietor one Lucy Mwihaki Macharia, a loan of Kshs. 800,000/= in order to purchase the suit property. A charge was then registered, but the said Lucy Mwihaki, defaulted and the property was sold to the 1st interested party by way of a public auction conducted in the year 1998. He has stated that subsequently, Lucy Mwihaki challenged the charge and auction vide the suit Nairobi HCCC No. 694 of 2005 and that the said suit was dismissed on 3 May 2017.

3. The application is opposed by the plaintiff through a replying affidavit sworn by James Macharia. He has deposed inter alia that it is untrue that the plaintiff is a non-existent company. He has stated that the company was incorporated on 26 August 1993 under Certificate No. C55405 and he has displayed a copy of the said certificate. He has also averred that it is not true to allege that the suit was instituted without a resolution or authority. He has averred that there was an authority annexed when this case was filed in the year 2006 but the original court file has been missing and it would not be surprising that the said authority cannot be traced. He has averred that this is the reason why no such issue had been raised earlier in the proceedings.

4. Before the application could be canvassed, and since an issue about the existence of a company had been raised, I thought it wise to hear from the Registrar of Companies and I issued summons for his/her attendance. An officer, one Peterson Wachira attended, and he did state under oath, that Private Development Company is duly registered under Certificate No. C55405. There was also a change of directors in the year 1998, vide which James Gachiengu Macharia and Lucy Mwhaki Macharia were appointed directors in place of Daniel Kibotho Mwangi and Charles Njuguna Waigi, who resigned.

5. Both counsel for the applicant and counsel for the plaintiff made submissions and referred me to several authorities all of which I have considered in arriving at my decision.

6. The application herein is based on three broad limbs, the first being that the plaintiff company does not exist ; the second being the lack of a proper verifying affidavit; and the third being that there is no company resolution authorizing the commencement of this suit.

7. I have no difficulty in dispensing with the first limb of the application. I have sufficient evidence, through the Certificate of Incorporation displayed in the replying affidavit, and the statement under oath of the representative of the Registrar of Companies, that Private Development Company Limited, the named plaintiff in this suit, does actually exist as an incorporated limited liability company. I see no substance in the allegation that the said company is non-existent and there is no point in saying more.

8. On whether or not there is on record a proper verifying affidavit, I have seen that the plaint was accompanied by a verifying affidavit sworn by one Hosea Kimotho Gitonga, who stated that he is a director of the plaintiff company, and has authority to swear they said affidavit. Now, I have nothing displayed by the applicant, that Hosea Kimotho Gitonga, was not a director of the plaintiff company at the time the suit was instituted and that he had no authority to swear the verifying affidavit. That to me would be an internal matter in the company and I do not see how an outsider would want to contest that authority, when the company, which is the named plaintiff, has no issue with it. I find the contention that the suit is not accompanied by a proper verifying affidavit to have no substance.

9. I associate myself with the sentiments of Odunga J, in the case of **Leo Investments Limited vs Trident Insurance Company Limited (2014) eKLR**, cited by counsel for the plaintiff, where the learned judge stated as follows on the provisions of Order 4 Rule 1 (4) :-

"...nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, 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 that 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 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 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."

10. In my own view, unless there is serious contention by an insider of the company, that the company could not have issued a resolution to institute the suit, then the court ought to be slow to infer that the company which has commenced the suit, had no authority to do so, especially where a director or directors have sworn affidavits affirming that they have indeed authorized commencement of the case. In our instance, Mr. Macharia, a director of the company, has sworn an affidavit stating that the company has authorized the institution of this suit. If a director of the company has said so, and nobody else within the company has contested such statement, I do not see how an outsider, or the court, can now infer that no such authority exists.

11. I have gone through the authorities relied upon by counsel for the applicant. One of the cases referred me is that of **Standard Resource Group Ltd vs Attorney General & 2 Others (2016) eKLR**, but I wonder why it was cited as I have not seen its relevance. The said case does not concern issues of authority of a company to institute suit but appears to have been a dispute over retention of certain goods for custom fees. The other cases cited, including the case of **Housing Finance Company of Kenya vs Embakasi Youth Development Project** emphasized the point that only a juristic person has locus standi, but that is not what we have here, as it is apparent that the plaintiff is a registered company hence clothed with legal personality.

12. From the foregoing, I see no substance in this application and it is hereby dismissed with costs to the plaintiff.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 8th day of May 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Ndungu holding brief for Mr. Karanja Munyori for the 2nd defendant/applicant.

Ms. Ngugi holding brief for Mrs. Mukira for the plaintiff/respondent.

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU