



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 9 OF 2018.

MATHEW CHEBOI KORE.....PLAINTIFF/APPLICANT

VERSUS

THE SECRETARY GENERAL OF THE ASSOCIATION OF PUBLIC

HEALTH OFFICERS KENYA (APHOK).....1ST DEFENDANT/RESPONDENT

THE ASSOCIATION OF PUBLIC

HEALTH OFFICERS, KENYA (APHOK).....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff's Preliminary Objection dated 22nd May 2018 seeks Orders that the 1st Respondent's replying dated 15th May, 2018 sworn by **MOHAMED ABDUBA** and any other documents filed herein by the firm of **Okubasu & Munene Advocates** on behalf of the Respondents be expunged from the record on grounds that;

- a) The firm of **Okubasu & Munene** are improperly on record for the Respondents since there was no resolution passed by the Respondents appointing and/or authorizing the said firm to represent the Respondents herein.
- b) The documents filed by the firm of **Okubasu & Munene** are invalid for want of authority from the Respondents.
- c) The Replying affidavit sworn by the 1st Respondent is improper for want of authority to swear the same from the 2nd Respondent.

2. **Mr. Kagunza** in support of the preliminary objection stated that there is no resolution filed by the respondents appointing Mr. **Okubasu** to represent them. He pointed out that the deponent of the said affidavit described himself as the **SECRETARY OF THE ASSOCIATION OF PUBLIC HEALTH WORKERS** hence authority and resolution ought to have been filed.

3. He also stated that the supporting affidavit filed by the respondent is improperly on record as there is no letter of authority allowing the 1st respondent to depone on behalf of the 2nd respondent. Lastly, he stated that the documents filed are improperly on record and ought to be expunged out.

4. In opposing the preliminary objection **Mr. Okubasu** submitted that the affidavit had been signed by the secretary general of the association who had also been sued in the matter.

5. He argued that **Article 12(3) (iii)** of the rules of the organization mandates the secretary general to sign all documents for the organization. That in any event the secretary general has been sued in his official capacity and is expected to appear in his official capacity and so he does not have to provide a resolution.

6. That even if the 1st respondent was to address court strictly on the application on his behalf, he will still be speaking on behalf of the organization. It was his contention that the applicant is the vice chair and acting chair of the organization and his intention is to defeat the 2nd respondents right to be heard.

7. He urged the court to dismiss the P.O with costs to the respondents and that should the court find that they are not properly on record, then it ought to sustain the replying affidavit on record as the 1st respondent is swearing the affidavit on his own behalf.

The issues for determination are;

i. **Whether the Preliminary Objection herein satisfies the threshold set out in the case of Mukhisa Biscuits Manufacturing Ltd V West End Distributors Ltd.**

ii. **Whether the pleadings filed by M/s Okubasu & Munene Advocates are properly on record.**

8. On the issue, as to what may be raised as a Preliminary Objection, it was stated in the case of **Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696.;**

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which is argued as a preliminary point may dispose off the suit.”

In **Oraro Vs Mbaja (2005) 1 KLR 141** Justice Ojwang stated that:

“..... 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 objection. 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.”

9. From the above it is clear that a Preliminary Objection will only succeed if it raises points of law which do not require proof by way of evidence- that does not seem to be the case here as there would have to be evidence presented to demonstrate that such written authority had been obtained

10. Is there a legal requirement that when an advocate who has been appointed by a company/corporation is filing pleadings the same must be accompanied by a resolution or company seal?

11. The position prevailing here was the same as in the case of **Leo Investments Ltd Vs Trident Insurance Co. Ltd** where Gikonyo, J had this to say;

“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 V Registrar General & 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.”

12. Before taking any action, court must be alive to the overriding objectives of the **Civil Procedure Act** set out in **Section 1A** and **B** of the said Act. In the case of **Kenya Agricultural Research Institute (K.A.R.I) V Farah Ali, Chairman Isahakia self-help group (sued on his own behalf and on behalf of members of the group) and Anor. NKR HCCC No.23 of 2011** Wendoh, J had this to say;

“In the case of TRUST BANK LTD V AMALO CO. LTD (2009) KLR 63 where the Applicant's documents were expunged from the record by the Court and the appellant was denied the right to be heard in the application because of lack of diligence in the matter, the Court of Appeal while allowing the appeal held;

“(1) The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.

(2) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

Wendoh J further stated as follows in the same case above;

“In the instant case, this Court would be reluctant to strike out a suit just because an authority under seal has not been filed. This is because the Plaintiff can be allowed time within which the authority can be filed failing which the court can then take that drastic action of striking out the pleadings.”

13. In the case of **Rongai Workshop & Transport Ltd** Emukule, J while referring to **Order 9 Rule 2 (c)** of the **Civil Procedure Rules** and **Section 2** of the **Companies Act** (Cap 486 Law of Kenya) found an officer of the Company to include a Director, Manager or Secretary.

14. The finding of Odunga, J in **Presbyterian Foundation & Anor vs. East Africa Partnership Ltd & Another** that;

“The Civil Procedure Rules do not define what an authorised officer of a company is. If the Rules committee had intended that in cases involving corporations, affidavits be sworn by either directors or company secretaries nothing would have been easier than

*for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word “authorise” which is defined by **Oxford Dictionary** as “sanction”, “give authority”, commission. That being the position whether or not the 2nd Plaintiff was given authority to swear the verifying affidavit in a matter of evidence and cannot certainly be the subject of a preliminary objection unless the fact is admitted.”*

The requirement for written authority is not contained in a statute but in the organization’s regulations-it is a procedural requirement which does not go to the substance of the dispute. It means that before the main suit is heard, the applicant can apply for and obtain the written authority so as to conform to the organization’s internal regulations. To uphold the preliminary objection would in essence defeat the spirit of Article 159 (2) (d) of the Constituion of Kenya which provides that:-

In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

d) justice shall be administered without undue regard to procedural technicalities

The upshot is that the preliminary objection has no merit and is dismissed with costs to the respondents.

Delivered and dated this 11th day of October at Eldoret

H. A. OMONDI

JUDGE