



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL PETITION NO. 27 OF 2011

1. MIDLAND FINANCE AND SECURITIES LTD

2. INFOTALENT LIMITED.....PETITIONERS

VERSUS

KENYA ANTI-CORRUPTION COMMISSION.....RESPONDENT

JUDGMENT

BACKGROUND

0. The Petition describes the petitioners as international limited liability companies. They filed this petition on 29th April 2011 against the then Kenya Anti Corruption Commission (KACC), an autonomous statutory body established under the Anti Corruption and Economic Crimes Act (ACECA). The ACECA provides for the prevention, investigation and punishment of corruption, economic crimes and related offences and for matters incidental thereto and connected therewith. [Parliament disbanded KACC on 24th August 2011, in line with the requirements for change as stipulated in the new Constitution]. The Ethics and Anti-Corruption Commission (EACC) was established after the Ethics and Anti-Corruption Act was signed into law on 29th August 2011. The EACC replaced the KACC, taking over all of KACC's property, assets, rights, liabilities, obligations, agreements and other arrangements vested in, acquired, incurred or entered into by or on behalf of the Kenya Anti-Corruption Commission.
0. The petitioners were aggrieved that in the course of their function, the KACC director had requested for Mutual Legal Assistance from the Federal Office of Justice and Police in Berne, Switzerland. The requests complained of were contained in two letters both dated 6th May 2008 requiring the procurement of information on each of the petitioners' bank accounts in Switzerland.
0. The Swiss authorities are said to have called for confirmation that the coercive actions requested for in the letters were legally available to KACC in Kenya, so as to be eligible for Mutual Legal Assistance. According to the petitioners, "*The Respondents in their reply justifying the request misrepresented facts of their having undertaken process and obtained court orders in the matter and distorted the legal position pre-passage of the Constitution and post-passage of the Constitution.*" (paragraph 7, Petition dated 29th April, 2011). The petitioners therefore prayed for six orders for:
 - a. Four declarations –
 - i. one, that the KACC is unconstitutional in so far as it seeks to usurp the powers of the National Police Service;

- ii. two, that the KACC's right to request for Mutual Legal Assistance is an invasion of the petitioner's privacy and contrary to the constitution;
 - iii. three and four, that the two requests for Mutual Legal Assistance, both dated 6th May 2008 were a violation of Article 47 of the Constitution.
 - b. An order of Certiorari to quash the two letters of request for Mutual Legal Assistance.
 - c. An injunction to restrain the KACC from further carrying out investigations on the petitioners and persons named in the two letters of request for Mutual Legal Assistance (MLA) independent of the National Police Service/ Office of the Director of Public Prosecution (DPP)
0. The petition was defended. The respondent filed a Replying Affidavit sworn on 25th May 2011 by Kevin Njuguna, a forensic investigator with the KACC. In its defence, the respondent stated that the petitioners are not natural persons, and questioned their legal existence. It was established through the annexed affidavit of the registrar of companies that the petitioners were not registered in Kenya. The respondent further challenged the locus of Patrick Onjoro, who had deposed an affidavit on behalf of the petitioners. It was admitted that the respondent had, pursuant to its mandate, commenced investigations concerning alleged suspicion of corruption involving contracts entered into between the government of Kenya and the petitioners in 2003.

CHAMBER SUMMONS DATED 29TH APRIL 2011

0. The petition was filed during the High Court vacation alongside the Chamber Summons dated 29th April 2011, and under Certificate of Urgency. The petitioners' counsel obtained leave to be heard during the vacation and the matter was certified as urgent on 29th April 2011. However, owing to the sensitive nature and implication of the orders sought, the court declined to issue interim orders of injunction as prayed for in the Chamber Summons dated 29th April 2011. The inter-parties hearing of the Chamber Summons dated 29th April 2011 was adjourned on 16th May 2011 at the instance of counsel for KACC, who submitted that owing to the petitioner's delay in serving the petition, the KACC had had less than 7 days to respond, and needed more time. The application was adjourned on 3 more occasions after that.

PRELIMINARY OBJECTION & NOTICE OF MOTION DATED 25TH MAY 2011

0. In the meantime, the KACC filed a Notice of Preliminary Objection and a Notice of Motion both dated 25th May 2011. The application sought for the assignment of a three judge bench to hear the matter, while the preliminary objection challenged locus and legal personality of the petitioners. That Preliminary Objection and the Notice of Motion of 25th May 2011 were not heard on the 8th June as scheduled and subsequent directions by the Court set a later application by the respondent for striking out of the petition dated 7th October 2011 for hearing first.

NOTICE OF MOTION DATED 7TH OCTOBER 2011

0. On 13th October, 2011, the KACC filed a Notice of Motion application dated 7th October 2011 ("the application"), seeking to strike out the petition for being fatally defective. On 18th October 2011, the court directed that this application be disposed of first since it affects the jurisdiction of the court. The application was set for hearing on the 8th November 2011, and despite opportunity granted through their counsel to respond to the said application, the Petitioners did not file any replying affidavit or attend court for its hearing.
0. The record of proceedings demonstrate the chronology of events leading the hearing of the application. On the 8th November, the Court was informed by Ms. Muthee for Mr. Balala, advocate for the petitioners that Mr. Balala was unable to proceed with the application of 7th October as he had no instructions and was therefore unable to file a replying affidavit, and that Mr. Balala prayed for time to file an application to withdraw from acting. The court granted an adjournment to the 29th November 2011 and Mr. Balala was "given 7 days within which to file and serve and prosecute their application to withdraw failing which the respondent will be at liberty to proceed with their application."

0. On the 29th November 2011, Miss Muthee held brief for Mr. Balala and this time sought for a further mention of the matter to enable her “file an application for service upon the petitioners by substitute service.” The mention was set for 15th December 2011. On that date, the matter was by consent of Counsel – Ms. Muthee for the petitioner and Mr. Kagucia for the respondent - fixed for hearing on 5th April 2012 after Ms. Muthee informed the court that –

“I have information that the applicant is about to instruct another advocate to take over the matter. I pray that the respondent’s application be fixed for hearing and in the meantime the applicant will have regularized representation.”

0. The matter next came up in court on the 21st August 2012 when Counsel for the Petitioner did not attend, although the date had been fixed in the registry by consent of the representatives of counsel for the petitioner and respondent present. Counsel for the respondent, Mr. Murei appeared and the court granted another date – the 30th October 2011 - for the hearing of the Notice of Motion dated 7th October 2011.
0. On 30th October 2012, Mrs Kipsang advocate held brief for M/S Balala Abed for Petitioners and Mr. Murei appeared for the Respondent. Mrs. Kipsang advocate informed the court that –

“The advocates for the petitioners seek to cease acting for the petitioners. They have been unable to trace the petitioners. They seek to file for service by substituted service. The application is dated 10/11/11.”

The Court granted an adjournment to the 13th November 2012, and ordered that the petitioners file the application for substituted service by certificate of urgency of within 7 days.

0. On 13th November 2012, Mr. Kariuki advocate held brief for Mr. Murei counsel for the Respondent and there was no appearance for the petitioners. Mr Kariuki informed the court that –

“[The purpose of the] Mention [was] to confirm that the advocates for the petitioners had advertised their application to cease acting. We have no information whether the advocates have advertised. We therefore pray that the respondent be allowed to proceed with the application.”

The court set the hearing of the application dated 7th October 2011 for hearing on the 13th December 2012, and directed that Hearing Notice be served upon the petitioners’ counsel who were absent.

0. On the 13th December 2012, Mr. Murei for the respondent attended court but the petitioner’s advocates did not attend, despite service upon them on the 14/11/12 as shown on the dated stamp on the original of the hearing Notice dated 13th November 2012 served upon them and attached to the Affidavit of Service of Fred O. Mangoli of P. O. Box 838 Mombasa sworn on the 22nd November 2012. Being satisfied as to the service of the hearing notice upon the counsel for the petitioners the court directed that the matter proceeds to hearing notwithstanding the absence of the petitioners who were the respondents in application dated the 7th October 2011.
0. Counsel for the respondent, Mr. Murei, then made submissions as follows, highlighting their written submissions dated 3rd November 2011. Ruling was reserved.

“Mr. Murei:

Application of 7th October 2011 [is] supported by affidavit of Kevin Njuguna. I have filed written submissions dated 3/11/11. I rely on the list of authorities of 19/8/2011. The case relates to Anglo-leasing type contracts with some entities which did not exist. They were claimed to have been registered in Switzerland and they did not exist. The addresses given were also non-existent. The companies are also not registered in other jurisdictions such as the U.K. We filed a replying affidavit. The onus shifts to the applicant to show that the

companies exist. There is no affidavit from the applicant. The advocate seeks to withdraw from acting for reason of failure to obtain instructions. There are no proper parties before the court and the duty of the court is to determine whether there are parties before it. The only conclusion is that the applicants do not exist and proceed to strike it out. I cite Judicial review NO. 64 of 2011, **Apex Finance and Anglo-leasing Finance Ltd. v. Kenya Anti-Corruption Commission**. Emukule, J. ruled that the applicants did not exist. I rely on the decision which is on all fours with the application. See pp. 22-38.

As regards costs, I submit that the purported agents for the companies, one Patrick Onjoro be made to bear the costs. There is no resolution to institute the suit and the purported agent has not been given a power of attorney. The application has been done another advocate in Switzerland and one does not see the hand of the petitioners. I pray that the court finds that the applicants do not exist or the proceedings are defective and costs to be paid by one Patrick Onjoro.”

0. There was, regrettably, a delay in delivering the ruling as scheduled, owing to the court's deployment to hear election petitions in Kisii, the Criminal Service Week as well as other duties of the court upon return to Mombasa, effectively in 2014.

ISSUE FOR DETERMINATION

0. The investigation that was being carried out by KACC is related to a series of transactions now infamously referred to as the “Anglo-Leasing”. The issue before the court in the Notice of Motion dated 7th October 2011, is whether the petitioners are juristic persons capable of filing this petition. The determination of the issue will affect the jurisdiction of the court, and it may render the petition incompetent and liable to be struck out.

DETERMINATION

0. The application is supported by grounds on the face of it and on the affidavit of Kevin Njuguna, investigator, EACC, sworn on 7th October 2011. It is claimed that from the investigations by KACC/EACC, there is reason to suspect that the petitioners are neither juristic persons, nor are they registered in the jurisdiction in which they claim to be domiciled. It is also contended that the petitioners are faceless, non-existent, ghost companies deficient of any capacity or legal capacity to enjoy or lay claim on constitutional rights as envisaged under Article 22 (1) of the Constitution of Kenya. As such, the petitioners are said to be incapable in law of instituting any legal proceedings in their names, and are equally incompetent to authorize any person to act or plead on their behalf. It has also been stated that despite being put on notice, the petitioners have not demonstrated their juristic status.
0. The second ground, related to their legal personality, is the position and legality of the agent who purported to have been instructed to plead and act on behalf of the petitioners (Patrick Onjoro, Advocate), since the court's approval had not been sought, nor had a power of attorney executed in his favor produced. The letter of instructions was termed to have fallen short of the requirement under Order 9 Rule 2 of the Civil Procedure Rules in so far as recognized agents are concerned.
0. The third ground was on mis-joinder of parties. It was stated that the action complained about in the petition – the letters of request – had addressed the inquiries for each of the petitioners separately. It was therefore claimed that in the absence of a nexus between the petitioners, it was un-procedural for the petition to have been prosecuted jointly.

Whether failure, if any, by the Petitioners to demonstrate their Juristic Personality is fatal to the Petition

0. The respondent argues that the juristic personality of the petitioners must be determined at the outset so as to satisfy the court that proper parties are before the court. For this they referred to the case of **Meir Mizrahi And Stanley Kinyanjui Suing for and on behalf of Outdoor Advertizing Association of Kenya v. Nairobi City Council and 2 Others**, Nairobi HCCC (Milimani) No. 131

of 2003.

0. The Nigerian Supreme Court case of **Goodwill & Trust Investment Ltd and Another v. Witt & Bush Ltd.**, Supreme Court of Nigeria Holden at Abuja, SC.266/2005 (25.03.2011) was cited. In that case, the plaintiff had failed to conclusively establish the issue of its incorporated status before the trial court to the standard of their Evidence Act. It was held that this failure was fatal to the entire claim. The court held that:

“It is trite law that for a court to be competent and have jurisdiction over a matter, proper parties must be identified. Before an action can succeed, the parties to it must be shown to be the proper parties to whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the court as it goes to the foundation of the suit in limine.....”

The law is that where the legal personality of incorporated company is called into question and issue joined thereon, the onus is on the party claiming the status of juristic person derived from such incorporation to establish it and the corporate status of a body is established by the production of its certificate of incorporation.”

0. The respondent also relied on the Kenyan case of **Housing Finance Company f Kenya Ltd v Embakasi Youth Development Project** (2004) 2 KLR 548. In that case, the plaintiff after suing the defendant had filed a notice of discontinuance three months after the defendant had entered appearance. The defendant then filed a request for costs. The plaintiff challenged the defendant's entitlement to costs owing to the defendant's lack of legal personality. The plaintiff's reference was declined, but the court held that *“only a juristic person can have locus standi before the court and can be the subject of such rights and liabilities as may be declared by the court”*. The court in that case considered and followed the cases of **Fort Hall Bakery Supply Co. v Fredrick Muigai Wangoe** (1959) EA 474 and **Francis Karani Elijah & 2 Others v. Chairman (Kanu) & 2 Others**, Misc. Civil Case No. 238 of 2002.
0. In **Norwich Pharmacal Co & Others v Commissioners of Customs and Excise** (1973) 2 ALL ER 943 (HL), the issue was whether the court may compel one who is not a party to a suit to make discovery. The court found that discovery was obtainable in certain circumstances, where it would not result in self-incrimination of the provider of such information.
0. In **Meir Mizrahi & Stanley Kinyanjui (Suing for and on behalf of) Outdoor Advertizing Association of Kenya v Nairobi City Council & 2 Others**, HC MILIMANI COMMERCIAL COURT CASE NO. 131 OF 2003: A corporation whose registration has ceased (in the country of origin) ceases to be a juristic person and remains but a name only with no legal existence. A suit instituted by a corporation that has no legally existing plaintiff is therefore a nullity. In that case, the plaintiff was on record stating that it had 7 members by the time of filing whereas statute demands a minimum of 10 members for an association. The court struck out the suit with costs, vacating and discharging all previous orders made in the suit stating-

“I am keenly aware that Courts are enjoined under Section 3 of the Judicature Act Cap 8 Laws of Kenya to decide cases according to substantial justice without undue regard to technicalities and dismissal of suit on a technicality leaves behind a very sour taste in the mouth of the litigants(s). Rules of Law must however be observed.

Where for instance the law provides that an association to be lawful must have a certain number of members and it fails to maintain that number, then the association is legally nonexistent, notwithstanding it has in existence a Certificate of registration. That was the case in point here. It declared its members in the suit. It was contra statute. It could not sue. The suit filed and dated 13-03-2003 was therefore a nullity as the plaintiff was nonexistent.”

0. In **Apex Finance International Limited & Another v KACC, Nakuru** HC JR NO. 64 OF 2011, Anyara Emukule, J, held that once there is challenge on the legal existence of the applicants, the

evidential burden of proof shifts to the applicants. This was also an “Anglo-Leasing” Case. The court applied section 112 of the Evidence Act, and found that there was no proper application before the court and the suit was accordingly struck out.

FINDINGS

0. As I understand the matter, a party before a court must on a point of fact exist; if the person named as a party in a suit does not exist, and is only fictitious, the court does not have a competent suit before it for want of parties. The Civil Procedure Act cap. 21 laws of Kenya defines a suit as “all proceedings commenced in any manner prescribed.” The Petition is the procedure prescribed for constitutional litigation and a ‘person’ is defined in the Interpretation and General Provisions act, cap. 2 laws of Kenya as including “a company or association or body of persons, corporate or incorporate.” Where, as here the persons are described as incorporated companies, there must be evidence of such incorporation if their existence as such is challenged.
0. I respectfully agree with Emukule J. on the application of section 112 of the Evidence Act to require a party who has peculiar knowledge of a matter to prove it, as with the act of incorporation and registration of the petitioner companies herein being in the special knowledge of the petitioners. Section 112 of the Evidence Act provides

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

0. It is not disputed that a foreign company may sue in Kenya and it need not be registered in Kenya for that purpose. See **Microsoft Corporation v. Mitsumi Computer Garage & Anor.** (2001) KLR 470 per Ringera, J, (as he then was) and **Kanti & Co. Ltd. v. Oriental, Fire and General Insurance Co. Ltd.** (1973) EA 203 where it was held that a foreign company can continue to exist when it has no place of business here, and can do business through agents. However, in suing in Kenya as elsewhere it must show that the company in fact exists.
0. A company is identified by incorporation and registration in accordance with the company laws of the particular jurisdiction. As a company acts through resolutions of its board of directors, a company that sues or defends a suit must demonstrate a resolution of the board to conduct the litigation. See the two Ugandan cases of (1) **Bugerere Coffee Growers Ltd. v Sebaduka and Anor.** (1970) EA 147 where Youds, J. held *inter alia* that –
 - i. 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; and
 - ii. Where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action (**Danish Mercantile Co. Ltd. v. Beaumont** (1951) 1 Ch. 680, adopted);

and (2) **Buikie Estate Coffee Ltd. v. Lutabi** (1962) EA 328 where Bennett, J. considered, agreeing with Roche, L.J. In **John Shaw & Sons Ltd. v. Shaw** (1935) 2 K.B. 112, that the objection as to want of authority to institute proceedings in the name of accompany should be raised before the hearing by an interlocutory application to strike out the suit.

0. In Kenya, Njagi, J. in **Affordable Homes Africa Ltd. v. Ian Henderson and 2 Ors.**, Nairobi HCCC NO. 524 OF 2004 has put this aspect of company law litigation neatly in these words:

“As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company’s name in litigation so that the company can properly come to court....

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.”

0. In this case, the petitioners were, as shown in the record of the proceedings set out above, afforded ample time to demonstrate their legal status but they have failed to do so. In the absence of evidence of registration of the petitioner companies and their resolutions to file the Petition, their suit herein is incompetent even if the companies did in fact exist. While the court may not with certainty find the companies **do not exist**, the companies, if they do exist did not demonstrate before the court that they existed as juristic persons capable of suing and being sued and to whom the court may grant the reliefs sought in the petition.

ORDERS

0. Accordingly, for the reasons set out above, the Notice of Motion dated 7th October 2011 is allowed and the Petitioners' Petition herein together with the Chamber Summons filed there-under both dated 29th April 2011 are struck out with costs to the Respondents.
0. Before making the direction for the payment by one Patrick Onjoro, advocate, as an agent of the petitioners, of the costs awarded to the Respondent, the court shall hear any representations that he may be minded to make, and for that purpose Summons will issue to the said Patrick Onjoro to attend court on a date to be fixed in consultation with Counsel.

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Ndege for Mr. Balala for the Petitioners

No appearance for the Respondent

Mr. Murimi - Court Assistant.