



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC PETITION NUMBER NO. 19/2019

IN THE MATTER OF PETITION UNDER ARTICLES 10,40 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF LAND PARCEL KNOWN AS ELDORET MUNICIPALITY/BLOCK 6/302

BETWEEN

SPACEMATIC SYSTEM LIMITED.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE COUNTY LAND REGISTRAR UASIN-GISHU....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

This ruling is in respect of a preliminary objection dated 13th January 2020 raised by the 1st respondent on the grounds that the petition offends the provisions of Order 4 rule 1 of the Civil Procedure Rules, as the petition was filed without a Board resolution and further that there was also no resolution by the Company to appoint the firm of Wambua Kigamwa & Co. Advocates to institute these proceedings on its behalf.

Counsel agreed to canvass the application vide written submissions whereby the respondent complied but the applicant did not file any submissions.

PETITIONER'S SUBMISSIONS

Counsel for the petitioner opposed the preliminary objection and submitted that the preliminary objection was devoid of merit since the petition was not governed by the Civil Procedure Rules but by the Constitution of Kenya Protection of Rights and Fundamental Freedoms (Practice and Procedure Rules) 2013. Counsel further submitted that the rules do not state that a resolution has to be passed in order to appoint an advocate and cited the case of **Deluxe Trading Company Ltd v. Maxwell Africa Limited & Anor[2015] eklr** where Justice Olga Sewe held that:

“I take the view that order 4 rule 1(4) of the Civil Procedure Rules does not encompass the requirement that a resolution authorizing the institution of the suit be annexed to the plaint at the time of filing suit...A mere failure to file such authority does not invalidate the suit, and that such a resolution may be filed any time before the suit is fixed for hearing.”

Mr. Mogambi submitted that failure to file the resolution was not fatal as the same could be rectified as was held in the case of **Space Geo Enterprises Ltd v. Kenya National Highways Authority [2019] eklr**. In addition, counsel submitted that the 1st respondent lacked locus standi to raise the objection since the same could only be raised by an insider company as was held in **Siokweli Tarita Ltd. v. Dr. Charles Walekwa (2012) eklr**.

Counsel also submitted that once the respondents had been sued, they could not raise an issue of resolution as was held by the Court of

Appeal in **Saraf Ltd v. Augusto Arduin (2016) eKLR**, where the court held that,

“the law on the position where one is dealing with a limited liability company shows that one cannot probe into the internal affairs of a company. A party dealing with a limited liability company which has instituted a suit against him/her seeking relief or making a claim cannot go behind what ex facie appears to be legitimate and fail to answer the allegation on the claim and instead question legality of the action against him, that is to say, whether there was a resolution of the Board of Directors or a resolution of the general meeting. He must proceed on the footing that ex facie the action was commenced with authority of the board or the general meeting”

Finally Mr. Mogambi submitted that the issue that there has to be a resolution to appoint an advocate has been overruled by the courts that it was no longer good law and relied on the case of **Arthi Highways Developers Ltd v. West End Butchery Ltd & 6 ors[2015] eKLR**.

ANALYSIS AND DETERMINATION.

The issue for determination is whether this preliminary objection has merit. The 1st respondent raised a preliminary objection on the ground that the petitioner’s counsel did not seek and obtain a Board resolution to be appointed to file this petition on their behalf.

Counsel relied on the Constitution of Kenya Protection of Rights and Fundamental Freedoms (Practice and Procedure Rules, 2013 which provide under Section 3(2) as follows:

“The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.”

Order 4 rule 1 (4) provides that

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

I notice that the verifying affidavit was sworn by the director which is in line with the above law. The court is obliged to be cognizant of the overriding objective on the issue of procedural technicalities. The overriding objective of the Civil Procedure Act the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B of the same Act, on the other hand provides for the duty of court and states:

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

The objective is to ensure access to justice without undue procedural technicalities that do not go to the root of a claim.

In the case of **Trust Bank Limited v Amalo Company Limited [2002] eKLR** where the court held that:

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.”

“... 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.”

The striking out of this petition on the ground that a board resolution was not sought and obtained before appointing the advocates on record would be a miscarriage of justice on a technicality as the same can be ratified if it had not been done already.

In the case of **Mavuno Industries Limited & 2 Others Vs Keroche Industries Limited**[2012]eKLR;

“As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff’s bundle of documents, which commonsense dictates 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 or with the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit”.

This ruling would not have had a different outcome had the applicant filed submissions in support of the preliminary objection. I find that the preliminary objection lacks merit and is therefore dismissed with costs to the petitioner

DATED and DELIVERED at ELDORET this 5TH DAY OF AUGUST, 2020

M. A. ODENY

JUDGE