



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 371 OF 2013

ALL TEAM CONTRACTS LIMITED.....PLAINTIFF

VERSUS

ELESER LIMITED.....1ST DEFENDANT

GUARDIAN BANK LIMITED.....2ND DEFENDANT

RULING

1. On 27th August 2013, the plaintiff, **ALL TEAM CONTRACTS**, filed suit against **ELESER LIMITED**.
2. By the suit, the plaintiff sought an injunction to restrain the defendant and its directors from making withdrawals from the plaintiff's bank account at the Guardian Bank.
3. Apparently, there was an agreement pursuant to which all payments due to the plaintiff were supposed to be paid to the plaintiff's account at Guardian Bank. However, the plaintiff was prompted to come to court because there had been an attempt by the 1st defendant to vary the mandate at Guardian Bank. The plaintiff was fearful that the intended alteration of the mandate would enable the 1st defendant to siphon money from the plaintiff's Bank account.
4. In those circumstances, the plaintiff proposed to ask the court to grant an order directed against the Bank Manager of Guardian Bank's Biashara Branch, telling him that he should not permit withdrawals from the plaintiff's bank account without the written consent of the lawful signatories.
5. At the same time when the plaint was filed, the plaintiff also filed an application for an interlocutory injunction. The injunction was intended to stop all withdrawals from the bank account No. 0612018685 at Guardian Bank, Biashara Street, Nairobi.
6. Justice Kimondo granted the interlocutory injunction on 28th August 2013.
7. Thereafter, on 3rd September 2013 the plaintiff filed an Amended Plaintiff in which there were now 2 defendants, namely, **ELESER LIMITED** and **GUARDIAN BANK LIMITED**.
8. Secondly, in the Amended Plaintiff, the plaintiff was cited as **ALL TEAM CONTRACTS LIMITED**.

9. Before the plaintiff had filed the Amended plaint, **ELESER LIMITED** had filed a Preliminary Objection on 2nd September 2013. The Preliminary Objection was in the following terms;

- “a) The plaintiff has erroneously referred to itself as ALL TEAM CONTRACTS, whereas it is a corporation known as ALL TEAM CONTRACTS LIMITED as in paragraph 1 of the Plaintiff.**
- b) The suit is bad in law and incompetent and the same ought to be struck out with costs.**
- c) The verifying affidavit is incurably defective and incompetent and consequently the same ought to be struck out.**
- d) The supporting affidavit of NARAN Vs. ARJAN is admissible in law and the same should be expunged from the Record.**
- e) The application is incompetent and bad in law and same ought to be struck out.**
- f) Other grounds and reasons as may be adduced at the hearing hereof.**
- g) Consequently Ex-parte Orders granted on 28th August be set aside”.**

10. For completeness of the record, it is to be noted that the Preliminary Objection above-quoted was in relation to the plaint.

11. After the plaint was amended, the 2nd Defendant, **GUARDIAN BANK LIMITED**, also filed a Notice of Preliminary Objection. That Preliminary Objection was in relation to both the Plaintiff and the Notice of Motion dated 23rd August 2013.

12. The bank's Preliminary Objection was in the following terms;

- “1. There exists a misjoinder of parties to these proceedings with regard to the inclusion of the 2nd Defendant as a party to these proceedings.**
- 2. That the Amended Plaintiff and the Notice of Motion Application filed herein discloses no reasonable cause of action against the 2nd Defendant”.**

13. After those Notices of Preliminary Objection were filed, the parties made concerted efforts to try and attain a negotiated settlement.

14. When the direct negotiations did not yield positive results, the parties decided to try and find a solution through Arbitration. However, that route did not lead to any settlement. It was in those circumstances that the parties decided to proceed with the case.

15. As a first step, the parties agreed to deal with the Preliminary Objections. This Ruling is in relation to the said 2 Preliminary Objections.

16. In their submissions, M/s Bali – Sharma & Bali – Sharma advocates submitted that the suit was null and void because the plaintiff had misled the Court by not disclosing that it was a limited liability company.

17. Secondly, as the plaintiff was a company, the verifying affidavit violated the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules which stipulates as follows;

“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”.

18. **ELESER** states that the plaintiff, as a company was not before the court, therefore there was no suit against that defendant.

19. **ELESER** also stated that because the verifying affidavit was fatally defective, the suit ought to be struck out.

20. Meanwhile, **GUARDIAN BANK**'s position was that they ought not to have been enjoined to the suit as there was no cause of action against them.

21. Therefore, the bank deems this to be a clear case of misjoinder.

22. It is common ground that on 28th August 2013 the court granted an interim injunction to restrain **ELESER LIMITED** from withdrawing money held in Account Number 0612018685 at **GUARDIAN BANK LIMITED**, Biashara Street, Nairobi.

23. In effect, the person against whom the order was directed was **ELESER LIMITED**.

24. The only connection between **ELESER LIMITED** and **GUARDIAN BANK LIMITED** was that **ELESER** was a customer of that bank.

25. In the amended plaint, the plaintiff made no claim at all against the bank. To that extent, it can be concluded, as I hereby do, that the plaint does not disclose any cause of action against **GUARDIAN BANK LIMITED**.

26. The presence or otherwise of a cause of action is purely a point of law. And in this case, it is being determined on the basis of the facts as pleaded by the plaintiff. Nonetheless, it is clear that the Amended Plaint discloses no cause of action against **GUARDIAN BANK LIMITED**. Accordingly, the Preliminary Objection by the 2nd Defendant is upheld.

27. There would be no legal basis for allowing the case to proceed against **GUARDIAN BANK LIMITED** when there was no cause of action against the bank. I therefore strike out the claim against the 2nd Defendant, forthwith.

28. The plaintiff is ordered to pay to the 2nd defendant the costs of the suit together with the costs of the Preliminary Objection.

29. Meanwhile, as regards the bank's contention that there was a misjoinder in the suit, the provisions of Order 1 Rule 9 of the Civil Procedure Rules provides a complete answer to that Preliminary Objection raised by the bank. The said Rule stipulates as follows;

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

30. In the circumstances, if the Preliminary Objection had been solely predicated upon the contention that there was a misjoinder, the court would not have hesitated from overruling such an objection.

31. I will now revert to the Preliminary Objections raised by the 1st defendant. As a first step in determining those issues, I will first seek to define the meaning of the term “Preliminary Objection”. To aid me in the said definition, I wish to recite, with approval, the following words of Ojwang J. (*as he then was*) in **ORARO Vs MBAJA [2005] 1 KLR 141**;

“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 principle, a true preliminary objection which the court should allow to proceed.

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..."

32. If the points raised by the 1st defendant are tested against that definition, it would mean that the status of the plaintiff could not be a proper preliminary objection. By status I mean the question about whether the plaintiff was or was not a corporation.

33. If the plaintiff was required to prove its status, that would require evidence.

34. However, and in any event, the plaintiff had lodged an Amended Plaintiff in which it specified that it was a limited liability company.

35. The 1st defendant had intimated that whereas the plaintiff had originally failed to describe itself as a corporation in the title of the case, the description in the body of the plaintiff implied that the plaintiff was a corporation.

36. To my mind, there had been obvious confusion between the status of the plaintiff implied from the case title and the description of the plaintiff in the body of the plaintiff. The confusion was of a factual nature.

37. After the Plaintiff was amended, the confusion was removed altogether. Therefore, even if the 1st defendant could have initially had a point, the same no longer existed.

38. We now know that the plaintiff is a limited liability company.

39. By dint of the provisions of 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".

40. In this case, the plaintiff was filed together with a verifying affidavit sworn by **NARAN Vs. ARJAN**. Mr. Arjan described himself as one of the Directors of the plaintiff.

41. As a Director of the plaintiff, the deponent was an appropriate person to swear the verifying affidavit.

42. However, the deponent did not indicate that he had been duly authorized under the seal of the company to swear the verifying affidavit. Would that render the verifying affidavit fatally defective?

43. In the case of **REPUBLIC Vs. REGISTRAR GENERAL & 13 OTHERS Misc APPLICATION No. 67 of 2005**, Kimaru J. held that there was no legal requirement that the resolution by the company's Board of Directors, authorizing an officer of the company to swear a verifying affidavit must be filed with the verifying affidavit.

44. On his part, Odunga J. stated as follows in **MAVUNO INDUSTRIES LIMITED & 2 OTHERS Vs KEROCHE INDUSTRIES LIMITED Hccc No. 122 of 2011**;

"Nowhere is it sated 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 common-sense dictates it should. The mere

failure to file the same with the plaintiff or with the Registrar of companies, as the requirement is extended to the defendant, does not invalidate the suit”.

45. I am in full agreement with my 2 learned brothers. I say so because there is no requirement that the authority be filed with the verifying affidavit. Secondly, the existence or otherwise of the authority from the Board of Directors is a matter of fact, which can only be proved through evidence. Accordingly, it cannot be the foundation for a Preliminary Objection.

46. In the final analysis, I find no merit in the 1st defendant’s Preliminary Objection. Accordingly, the same is overruled in every respect.

47. The 1st defendant will pay to the plaintiff, the costs of the Preliminary Objection.

DATED, SIGNED and DELIVERED at NAIROBI this 2nd day of November 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Chege for Mrs. Muigai for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.