



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 29 OF 2019

JCQUELINE MACH DAMON.....1ST PLAINTIFF

MAWE MBILI LIMITED2ND PLAINTIFF

VERSUS

THE RIGHT HONOURABLE HUGH GEORGE

CHOLMONDELEY FIFTH BARON.....1ST DEFENDANT

JONATHAN SEWART.....2ND DEFENDANT

PHILIP COULSON.....3RD DEFENDANT

NICHOLAS CUMMINGS.....4TH DEFENDANT

MICHEAL DAVID STANFORD TUCK.....5TH DEFENDANT

DELAMERE ESTATES LIMITED6TH DEFENDANT

R U L I N G

1. The 1st plaintiff and the 2nd plaintiff vide a joint plaint dated 27th February 2019 filed the instant suit through the law firm of Agimba & Associates Advocates. On 23rd September 2019 the 2nd plaintiff filed a Notice of change of Advocates appointing the law firm of Wangwe & Co. Associates Advocates to represent it in the suit. On the same date the 2nd plaintiff filed a Notice to withdraw as plaintiff in the suit. On 24th September 2019 when the suit was fixed for hearing of the plaintiffs interlocutory application, the Court made an order marking the suit as it related to the 2nd plaintiff as withdrawn against the defendants.

2. The Court's Order of 24th September 2019 marking the 2nd plaintiff's suit withdrawn as against the defendants provoked the plaintiff/applicants application dated 23rd October 2019 filed on 4th November 2019. This is the application the subject of this ruling. By the application expressed to be brought under Section 80 of the Civil Procedure Act, Cap 21 and Order 45 of the Civil Procedure Rules, 2010 the applicant prays for the following orders:-

1. That the Court be pleased to review and vary its order issued on 24th September 2019.

2. That the Applicants be allowed to pursue this suit in the style of the orders issued on the 4th October 2019 vide Misc. Civil Application No.E.157 of 2019 for purposes of consideration of the grounds set herein, pending the hearing and determination of this application.

3. That this Honourable Court sets aside the order issued on the 24th September, 2019 pending hearing and determination of this application.

4. That the costs of this application be in the cause.

3. The application was supported on the grounds set out on the body of the application and on the affidavit sworn in support of the application by Jacqueline Mack Damon though as per the application the affidavit is said to be sworn by Sophie Njeri Chege. The applicants aver that the Court order issued on 24th September 2019 was made at the instance of one Jean Francois Raymond Lonis Damon who was one of the Directors of the 2nd Applicant/plaintiff. The applicant avers that the Court was misled into making the order by non-disclosure of facts as the said Director, Jean Francois. RaymondLonis Damon lacked the authority to act as he did when he purported to withdraw the 2nd plaintiff/applicant from the instant suit by virtue of Nairobi Misc Civil application No.E.157 of 2019 where the Court had restrained the said Director from executing such acts. The applicant averred that vide a ruling delivered in the said Miscellaneous application on 4th October 2019 the 1st Applicant was authorized to represent the 2nd Applicant in Civil Proceedings whereas vide an earlier order in the Miscellaneous application the Court had restrained Jean Francois Raymond Lois Damon from undertaking any act that would in any manner affect any assets belonging to the 2nd plaintiff/applicant pending the hearing and determination of the Miscellaneous application.

4. The 1st plaintiff/applicant averred that the said Jean Francois Raymond Louis Damon in contravention of the orders made in Misc. Civil Application No. E.157 of 2019 proceeded to have a board meeting of the 2nd Applicant convened at which a resolution to withdraw the present suit by the 2nd plaintiff against the defendants was passed and that on 24th September 2019 misled this Court to have the current suit as it related to the 2nd plaintiff against the defendants withdrawn. The 1st plaintiff/applicant avers that the suit by the 2nd plaintiff was irregularly withdrawn and seeks a review/setting aside of the order of withdrawal of the suit.

5. The 2nd plaintiff filed grounds of opposition to the application dated 18th November 2019. The 2nd plaintiff contended that it regularly withdrew its claim against the defendants vide a Notice of withdrawal dated 23rd September 2019 as provided under Order 25 Rule 1 of the Civil Procedure Rules 2010. The 2nd plaintiff maintained it had the right to discontinue or withdraw its claim or part of it against the defendants. The 2nd plaintiff stated the 1st plaintiff had unilaterally filed the suit in her name and the name of the company (2nd plaintiff) without any authorization by the 2nd plaintiff's Board of Directors. The 2nd plaintiff stated that the withdrawal of the suit was duly authorized by a board of directors resolution. The 2nd plaintiff further stated Misc. Civil application No.E 157 of 2019 has no application to the present suit and did not and could not affect the conduct of the present suit.

6. The defendants/respondents also filed grounds of opposition dated 15th November 2019 on 18th November 2019. The Defendants averred that the application was misconceived, scandalous, vexatious and an abuse of the Court's process. The defendants further averred that the order withdrawing the suit was recorded in the presence of all the parties and was akin to a consent order and there were no valid reasons to set the same aside. The defendants contended the 2nd plaintiff being a limited liability company had a separate legal identity from the directors and in law could lawfully make its own decisions and there could be no basis to force it to be a party to a suit that it had elected to withdraw.

7. Jean Francois Louis Damon filed a detailed replying affidavit sworn on 24th January 2020 in which he outlined events before the filing of the present suit which he claimed was filed by the 1st plaintiff without consulting with the board of directors of the 2nd plaintiff. He stated the board of directors only became aware of the suit after several months after it had been filed and that prompted the convening of the board meeting on 4th September 2019. An application by the 1st plaintiff dated 27th August 2019 filed in Misc Civil application No.E157 of 2019 (Nairobi) was not heard as the Court declined to hear the same as there was a pending preliminary objection in the Misc Civil Application. The application by the 1st plaintiff was seeking to have the convening of the board meeting of the 2nd plaintiff restrained. As the application was not heard, there was no bar to the 2nd plaintiff holding the scheduled board of directors meeting on 4th September 2019.

8. The 1st plaintiff/applicant filed a further affidavit on 20th February 2020. The 1st plaintiff in the further affidavit challenged the Notice of change of advocates filed on behalf of the 2nd plaintiff by the firm of Wangwe and Company Advocates as irregular and illegal as it did not comply with the provisions of Order 9 Rules 5 & 6 of the Civil Procedure Rules 2010 which provide for change of Advocates by any party to a suit. The 1st plaintiff maintained Mr. Damon was aware of the pendency of Nairobi Misc Application No.157 of 2019 and still went ahead to convene an irregular meeting of the 2nd plaintiff. The 1st plaintiff averred that the withdrawal of the suit was in bad faith and was effectuated by use of a resolution that was invalid as there was no properly convened meeting of the 2nd plaintiff.

9. That although the Court on 25th February 2020 directed the parties to canvass the Notice of Motion dated 23rd October 2019 by way of written submissions as at 30th July 2020 when the matter was mentioned to confirm filing of submissions only the defendants/respondents had filed their submissions. As sufficient time had been afforded to the parties to file their submissions, the Court reserved the matter for ruling on 1st October 2020 having regard to the impending Court recess that was to commence on 1st August 2020.

10. The singular issue in the instant application is whether the 2nd plaintiff had validly withdrawn the suit against the defendants, and if so, whether the applicant has made out a case to warrant the Court to exercise its discretion to set aside its order of 24th September 2019 marking the suit by the 2nd plaintiff withdrawn and to order its reinstatement. On 23rd September 2019, the 2nd plaintiff caused to be filed a Notice of change of Advocates dated on the same date signifying that it had appointed M/s Wangwe & Company Advocates to represent it in place of M/s Agimba & Associates advocates. Together with the Notice of change of Advocates, the 2nd plaintiff filed a Notice to withdraw as a plaintiff in the suit and an extract of the resolution of the board of directors of the meeting held on 4th September 2019 which inter alia authorized the withdrawal of the 2nd plaintiff from the suit and the appointment of M/s Wangwe & Company Advocates to represent it in the suit and to file the requisite documents to effectuate the withdrawal of the 2nd plaintiff from the suit.

11. The present suit was filed on 27th February 2019 by the 1st plaintiff in her own name and the 2nd plaintiff company. The 1st plaintiff swore the verifying affidavit accompanying the plaint. The 2nd plaintiff has averred that it never authorized the institution of the suit in its name. The court record does not show there was a resolution by the board of directors of the 2nd plaintiff authorizing the institution of the suit and/or authorizing the 1st plaintiff to swear the verifying affidavit and/or any documents or pleadings on behalf of the 2nd plaintiff.

12. Order 4 rule 1(4) of the Civil Procedure Rules, 2010 provides:-

“ 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”

13. Where a suit by a corporation is instituted without the express authority of the Corporation as required such authority may subsequently be filed before the suit is fixed for hearing. See the cases of **Leo investments Ltd -vs- Trident Insurance Co.Ltd (2014) eKLR** and **Republic -vs- Registrar General & 13 others (2005) eKLR** where Odunga, J and Kimaru, J respectively held that where a suit is commenced without the appropriate authorization, the company could ratify the institution of such suit by filing of the board of directors resolution before the hearing of the suit. In the present suit the 2nd plaintiff under resolution number 1 of the extract of the resolution of the Board of Directors at the meeting held on 4th September 2019 resolved not to ratify the act of the 1st plaintiff of filing the suit without authorization. The company further under resolution number (2) resolved to withdraw from the suit.

14. Under Order 25 Rule 1 of the Civil Procedure Rules a plaintiff is at liberty to withdraw a suit or discontinue the suit at any time before the suit is set down for hearing. Order 25 Rule 1 provides as follows:-

Withdrawal by plaintiff [Order 25, rule 1.]

At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

15. The right of a plaintiff to withdraw a suit or part of the claim is unfettered. All such a plaintiff is required to do is to give a notice in writing and to serve all the parties with the notice. The rationale to require to have the notice in writing and to serve the notice on all the parties is so that the Court and the other parties have notice that the plaintiff does not intend to proceed with the suit and /or part of the claim, as the case may be.

16. The 1st plaintiff has contended that at the time the order of withdrawal of the suit by the 2nd plaintiff was made, the 2nd plaintiff had not been served with the notice of withdrawal. On that account the 1st plaintiff argues the order was not regularly made as service had not been effected on all the parties. The 1st plaintiff has further contended that there was a Court order issued in Nairobi Misc. Civil application No. E 157 of 2019 which restrained any acts that would have affected the status of the 2nd plaintiff pending the hearing of the application in the Miscellaneous cause.

17. My understanding of Order 25 Rule 1 is that a plaintiff is free at any time before a suit is fixed for hearing to withdraw a suit and once that right is exercised by a plaintiff, the Court has no discretion not to permit the withdrawal. In the instant matter the 2nd plaintiff gave the notice in writing which was duly filed. All the parties were represented on 24th September 2019 and the notice of withdrawal was served in Court and/or was brought to the Notice of all the parties. The Court having been satisfied the 2nd plaintiff had filed a notice of withdrawal of the suit that was in writing and all the parties had notice of the withdrawal proceeded to mark the 2nd plaintiff's suit as against the defendants as withdrawn.

18. It is evident from the annexures to the 1st plaintiff's affidavit in support of the application that Nairobi Misc Civil Application No.E.157 of 2019 was filed on 9th May 2019 after the instant suit had been filed. There was no reference in the Miscellaneous application to the present suit and in my view any order that may have been issued in the said application could not have any application to the present suit. Besides the present defendants were not parties in the Miscellaneous application and could not be affected by any orders that may have been issued by the Court in such application.

19. The 2nd plaintiff has demonstrated that the instant suit was instituted without its authorization and in my view the 2nd plaintiff was entitled to take corrective action, either to ratify the institution of the suit; or to seek to have to be withdrawn as a party to the suit. The 2nd plaintiff chose the latter option and I do not think it can be faulted.

20. Upon my evaluation of the application dated 23rd October 2019 I find no basis upon which I can grant the orders sought. There is no relationship between the instant suit and Nairobi Misc. Application No.E 157 of 2019 so that this Court would be beholden to any orders that may have been issued in the latter suit. Further there are no grounds to warrant the Court to set aside the order made on 24th September 2019. Simply no error or mistake apparent on the face of the record has been demonstrated and nor has it been shown there has been any discovery of new matter or evidence to warrant a review. The conditions for review under Order 45 Rule 1 have not been satisfied and I decline to grant review of the order.

21. Accordingly, the applicant's application dated 23rd October 2019 is dismissed. I direct that each party bears their own costs of the application.

21. Orders accordingly

Ruling dated signed and delivered virtually at Nakuru this 1st day of October 2020.

J M MUTUNGI

JUDGE