



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 191 OF 2019

THE WASHUMBU (D.A.) COMPANY LIMITED.....PLAINTIFF

VERSUS

1. GERALD NZAMO

2. LEONARD MWANYASI

3. PHILIP MWADIMEDEFENDANTS

RULING

1. The ruling is in respect of the defendants notice of preliminary objection dated 23rd January, 2020 and filed on 24th January seeking to have the plaintiff's suit struck out with costs on the following grounds:

i. That the plaintiff has no locus standi to institute this suit since there is no board resolution under seal sanctioning the commencement of the action in the name of the company.

ii. That the suit offends mandatory provisions of Order 4 Rule 1(4) of the Civil Procedure Rules.

iii. That the application and the entire suit is scandalous, frivolous and vexatious and an abuse of the process of the court.

iv. That the suit discloses no reasonable cause of action.

2. The preliminary objection was canvassed by way of written submissions which were duly filed by both parties. In their submissions dated 11th March 2020 and filed in court on 13th March 2020 by Richard O & Co. Advocates the defendants submitted that the plaintiff company known as "The Washumbu (D.A) Company Limited" does not exist. The defendants Advocates submitted that after exercising due diligence on their part, they found out that no such company exists. It is therefore their submission that the plaintiff is fictitious and the upshot is that there is no plaintiff in this suit thus the matter cannot proceed further and ought to be struck out with costs.

3. It was further submitted that if at all the plaintiff exists, then the suit was filed without the resolution of the Board of Directors authorizing the appointment of Hezron Gekonde & Company. Secondly, that there is no resolution that has been passed by the plaintiff authorizing the appointment of Hezron Gekonde & Company Advocates to represent it in these proceedings. It was submitted that a company can only sue in its own name with the sanction of its Board of Directors by a Board Resolution at the inception of the suit. The defendants advocates relied on the case of **East African Portland Cement Ltd –v- The Capital Markets Authority & 5 Others in which the Ugandan case of Bugerere Coffee Growers Ltd –v- Seraduka & Anor (1970)EA 147** had been referred to and in which it had been held in dismissing the suit.

“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, but no resolution had been passed authorizing the proceedings in this case. The court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

4. The defendants’ counsel submitted that it is now settled law that where a suit is to be instituted for and on behalf of a company, there should be a company resolution to that effect. They relied on the case of **Affordable Homes Ltd –v- Henderson & 2 Others (2004)eKLR** where Njagi, J observed and held as follows:

“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 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.”;

5. It was the defendants’ submission that in the absence of a board resolution, the plaintiff has no legal standing to commence this action and the inevitable conclusion is that the suit as instituted cannot stand but ought to be struck out with costs. The defendants counsel also cited the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules which 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.” They submitted that since no resolution had been passed authorizing the commencement of this suit in the name of the company, it follows that the verifying affidavit is incompetent for lack of authority. That it would therefore be proper to say that the plaint herein is not accompanied by a valid verifying affidavit. It was the defendants’ submission that the suit must fail and the application and the entire suit be struck out with costs.

6. In their submissions dated 9th March, 2020 and filed in court on 16th March 2020, Messrs Hezron Gekonde & Company Advocates for the plaintiff submitted that the preliminary objection is an abuse of the process of the court and is frivolous and vexatious. It was their submission that the plaintiff in this suit is a limited liability company and it cannot be said to lack requisite competency to institute proceedings thus the locus standi as alleged by the defendants, unless there is evidence that it is not registered and therefore does not exist. It was submitted that on the affidavit of James M. Kinusa sworn on 28th October 2019 in support of the notice of motion dated 28th October, 2019, the Certificate of Incorporation for the plaintiff was annexed as annexure “JMK-2” and a search to confirm that the plaintiff is a running company was exhibited as annexure “JMK -2”. It is their submission that in paragraph 1 of the said supporting affidavit, the deponent was very clear and categorical that he was duly authorized to swear the affidavit to the motion. That in the plaintiff’s list of documents dated 28/10/2019 and filed in court on 28th October, 2019, the certificate of extract of a resolution passed by the Board of Directors of company held on 19th October, 2019 at clause 5 is one of the documents of the plaintiff. It is submitted that the resolution of the company has a seal which cannot be easily seen and the plaintiff shall seek leave of the court to show to the court the original copy for verification. That Order 4 Rule 1(4) was duly complied with and therefore the defendant’s preliminary objection has no merit. Counsel for the plaintiff relied on the case of **Muiruri –v- Kimemia (2002)2KLR** and submitted that preliminary objection is unfounded and that having raised a counter-claim, the defendants impliedly confirm that there are issues that call for determination. Counsel for the plaintiff urged the court to dismiss the preliminary objection with costs.

7. I have considered the preliminary objection raised and the submissions made. The issue for determination by the court at this stage is whether the preliminary objection taken by the defendants is sustainable or not.

8. In the case of **Garden Square Ltd –v- Kogo & Anor 2000 (KLR) 1695**, Ringera J (as he then was) stated that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. This was in line with the decisions of the then Court of Appeal for East Africa in the case of **Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd (1969)EA 696** in which Sir Charles Newbold, the President of that court stated ad follows:

“A preliminary objection is in the nature of what used to be a “demurrer”. It raises a pure point of law which is argued on the assumption aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by ways of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. The improper practice must stop.”

9. In the same case. Law J.A. stated thus:

“So far as I am aware , a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings dispose of the suit. examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

10. The preliminary objection by the defendants is mainly that the plaintiff has no locus standi to institute the suit since there is no board resolution under seal sanctioning the commencement of the action in the name of the plaintiff company. The defendants further submit that the suit offends the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules. The plaintiff have submitted that there is an extract of a resolution passed by the board of directors in a meeting held on 19th October, 2019. I have perused the list of documents filed by the plaintiff on 28th October, 2019. The fifth document in the said list is a Certificate extract of a resolution. The issue is therefore contested. In the circumstances and considering that the issue raised requires adduction of evidence, I find and hold that the Notice of Preliminary Objection dated 23rd January, 2020 does not raise pure points of law as it requires investigation of some facts. Instead, these are matters that are fit and proper for argument in the substantive suit.

11. For the foregoing reasons, I am inclined to dismiss the notice of preliminary objection dated 23rd January 2020 with costs to the plaintiff.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 18th day of November 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE