



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 13 OF 2017

SMART SHOP LIMITED.....PLAINTIFF/ RESPONDENT

VERSUS

DANIEL KARANJA MUTITU.....DEFENDANT/ APPLICANT

RULING

1. The present matter was initiated by way of an Originating Summons on the 11th July 2011 wherein directions were taken on the 14th May 2013 for parties to proceed with the hearing by way of viva voce evidence. Parties were directed to file their statements and list of documents wherein the hearing was scheduled for the 23rd October 2015.

2. Subsequently an application dated the 17th December 2014 seeking injunctive orders as well as leave to substitute the defendant one Mutitu Ruraya with the present defendant the was filed wherein the court allowed the application for substitution and by consent parties agree to maintain the status quo.

3. On the 18th June 2015, directions were issued for the defendant to file his defence and counterclaim wherein the matter remained dormant up to the 28th June 2017 when the same was certified ready for hearing.

4. Upon this matter being confirmed ready for hearing of the Originating Summons and while awaiting the hearing date, the Defendant/Applicant herein filed a notice of Preliminary Objection dated 24th September 2018, seeking that the suit be dismissed with costs on the grounds that:

- i. The Plaintiff herein Smart Shop Limited did not authorize the filing of the suit.
- ii. That the suit is incurably defective for lack of resolution by the Plaintiff Company to institute the present suit.
- iii. That the firms of Kinoti & Kibe Co. advocates and M/s Waichungo Martin & Co Advocates have no authority to file institute and /or appear in this suit for and on behalf of the Plaintiff Company.
- iv. That this court lacks the jurisdiction to hear this suit.
- v. That Ms. Susan Gathoni Maina has no authority from the company to swear affidavits on behalf of the Plaintiff, or appear.
- vi. That the suit be dismissed with costs payable by the firms of Kinoti & Kibe Co. advocates, M/s Waichungo Martin & Co Advocates and the said Susan Gathoni Maina jointly and severally for acting without authority.

5. On 2nd October 2018, by consent parties agreed to have the application on the Preliminary Objection disposed of through written submissions and thereafter highlight on the same wherein the court obliged them and directed them to file their respective submissions within 14 days from the said date. The matter was thus scheduled for highlight on the 3rd December 2018.

6. Whereas the Defendant/Applicants filed their submissions in support of the Preliminary Objection on 22nd October 2018, the Plaintiff/Respondent had not filed their written submissions by the time the matter came up for highlighting.

7. The court having noted that directions to the Preliminary Objection were taken by consent, scheduled a date for the ruling, the absence of the Plaintiff's written submissions and/or response notwithstanding.

8. The Applicant's Preliminary Objection is premised on the fact that the Plaintiff herein, being a co-operation ought to have passed a

resolution to institute the suit before the filing of the present suit. That no such resolution was filed. That the instant suit was filed as an Originating Summons dated the 11th July 2011 by the firm of Kinoti & Kibe Advocates. The same was later amended on the 19th December 2014 wherein the supporting affidavit was sworn by Ms. Monica Wanjiku Wachira who deponed that she had the authority of the Company to swear the same.

9. Later, the firm of Waichungo Martin & Company Advocates came on record stating that they were acting alongside the firm of Kinoti & Kibe Advocates who were acting for the company.

10. That no company resolution has ever been produced either through the supporting affidavit or as part of the list of documents authorizing the filing of the action, swearing of the affidavits on behalf of the company or the authorization of advocates on record to act for the Company.

11. That even after the preliminary objection was raised, there was no application made seeking to regulate the anomaly. That lack of a resolution means that the company is not before the court as it never filed the present suit. The party was therefore not properly before the court hence the court had no jurisdiction to hear the suit.

12. Secondly that neither the Law firm of Kinoti & Kibe Advocates who filed this suit on 11th July 2011, nor the law firm of Waichungo Martin & Company Advocates who also came on record for the Plaintiff on the 17th December 2014 had the authority or instructions of the Plaintiff to represent or continue with these proceedings in its name or on its behalf

13. It was Defendant's further submission and while relying on the decided cases of **East Africa Portland Cement Ltd [2014] eKLR** and **Bugerere Coffee Growers Ltd vs Sebaduka & Another [1970] E.A. 147**, that where a firm of advocates or other person institutes a suit on behalf of a company without authority as in the present instance, they should be held personally liable to pay the costs.

14. The Plaintiff herein did not file their response to the Application on preliminary objection and neither did they file their submission within the stipulated period.

15. I have considered the Defendants application on a point of Preliminary Objection to the effect that the suit should be dismissed for reasons that there was no resolution passed by the board of directors authorizing the institution of the proceedings in this case and therefore the court lacked jurisdiction over this matter.

16. In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

“---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 point may 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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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 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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

17. The Matters for determination are:

- i. Whether the proceedings herein were authorized through a resolution of the company.
- ii. Whether Counsel on record representing the Plaintiff had the authority to represent it.
- iii. Whether the Preliminary Objection raised is sustainable.

18. This suit was commenced by Smart Shop Limited vide the Originating Summons dated 11th July 2011 and amended on the 19th December 2014. From the annexed certificate of incorporation, it is clear that the Plaintiff is a limited liability company registered in Kenya. The supporting affidavit was sworn by Monicah Wanjiku Wachiuri who described herself as the Director of the Plaintiff Company.

19. The decision to have a resolution to authorize the filing of the suit in the name of the company emanated from a decision of the Uganda High Court in the case of **Bugerere Coffee Growers Ltd v Sebaduka & Another (1970) 1 EA 147**. which decision has been followed and applied in this country for a long time; The court in that case held:-

“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.

20. In the case of **Omondi v. National Bank of Kenya and Others [2001] E.A. 177 Mr. Justice Ringera** had held that;

As regards whether the plaintiffs have locus standi to institute this suit, I am in complete agreement with the submissions made by the defendants' advocates that they do not. It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even where the directors happen to be the sole shareholders (see Salomon v. Salomon & Co. Ltd [1897] A.C. 22). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights. The contention by counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly the proper plaintiffs in this action is manifestly without legal foundation. And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors' functus officio, it does not destroy the corporate existence and personality of the company.

21. In the case of **Affordable Homes Africa Limited vs Ian Henderson & 2 Others**, [2004] eKLR, Njagi J. found that the Board of Directors had not passed a resolution to authorize the institution of the suit. In the circumstances, the learned Judge held;

“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”.

22. In the case of **Philomena Ndanga Karanja & 2 Others vs Edward Kamau Maina**, [2015] eKLR, Gacheru J. had this to say;

“I have considered the rival submissions, and it is obvious that the suit herein was filed without the resolution of the Board. The 1st plaintiff tried to justify that position. However, it is trite law that where a suit is instituted for and on behalf of a company, there should be a company resolution to that effect”.

23. **The decision in Affordable Homes Africa Limited (supra) is in** agreement on the issue that in the absence of a board of directors' resolution to commence a suit, a company, which is an artificial person, as in this case, cannot be capable of instituting a suit in court, and that such a suit should be struck out.

24. In the case before me, the plaintiff had not lodged in court, the resolution authorizing the institution of the suit. The plaintiff had also not exhibited the letter of authority, pursuant to which the Supporting Affidavit was sworn. I therefore find that the proceedings, as they relate to the affairs of a limited liability company, were a nullity, having had not been sanctioned by a valid resolution of the company.

25. On the second issue as to whether the law firms of Kinoti & Kibe Advocates who filed this suit on 11th July 2011, and the law firm of Waichungo Martin & Company Advocates who also came on record for the Plaintiff on the 17th December 2014 had the authority or instructions of the Plaintiff to represent it;

26. **In the case of Raila Odinga v I.E.B.C & Others (2013) eKLR, the Supreme Court held that Article 159(2)(d) of the Constitution simply meant that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.**

27. **In the case of A.J. Limited & Another –V- Catering Levy Trustees & 3 Others (2005) the court held as follows;**

While it is for certain that the Court will always be anxious to hear litigants on the merits of their suit, this does not excuse them from complying with the procedural law which regulates the conduct of hearings. If parties entirely ignore the laws that accord them locus standi, or that regulate the process of hearing, they cannot expect the doors of the Court to be still open to them, and in this regard it will not matter the magnitude of the claims they are making. These are the basic principles on which the submissions of counsel in this matter must be assessed.

28. In the case of **Bugerere Coffee Growers(supra)** the court held 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.”

29. Flowing from the finding above, it follows that there is no valid suit before the court. In the absence of a board of directors' resolution to commence a suit, then a company, which is an artificial person, cannot be capable of instituting a suit in court.

30. For reasons set out herein above, the Preliminary Objection raised on the 24th September 2018 is sustainable, the suit commenced by Smart Shop Limited, (Plaintiff), against Daniel Karanja Mutitu (Defendant), vide the Originating Summons dated 11th July 2011 and amended on the 19th December 2014 is hereby struck out with costs to the Defendant/Applicants.

Dated and delivered at Nyahururu this 17th Day of January 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE