



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**MISC. APPLICATION NO. 45 OF 2018 (OS)**

**VIPINGO PROPERTIES LTD.....APPLICANT**

**VERSUS**

**RANDOLPH TINDIKA.....RESPONDENT**

**THE REGISTRAR OF TITLES.....INTERESTED PARTY**

**RULING**

1. For determination is the Respondent's Preliminary Objection dated 28<sup>th</sup> November 2018. The Preliminary Objection raised the following grounds;

**(a) That the Application is grossly incompetent, bad in law, lacking in merits and otherwise an abuse of the due process of the court.**

**(b) That there was no resolution by the Directors of the Applicant neither authorising the filing of the proceedings herein nor authorising the deponent to swear the supporting affidavit and thus supporting affidavit ought to be struck out and expunged from the pleadings herein and consequently, the applicant/suit should be dismissed with costs.**

**(c) That the applicant has failed to fulfil its part of the bargain with regard to the agreement for sale dated the 2<sup>nd</sup> June 2017, and the application herein is a ploy to mislead this Honourable Court to rubber stamp the said default.**

**(d) That having made an application to the Registrar to have the cautions removed and the Respondent having replied to the same as per the law, this Honourable Court has no jurisdiction to hear this matter until the issues herein are heard and determined by the Registrar.**

**(e) That the applicant did not avail the Completion documents as alleged and the Respondent will insist that the Applicant must specifically perform its part of the agreement for sale dated 2<sup>nd</sup> June 2017.**

**(f) That in the premises, the application dated 16<sup>th</sup> October 2018, ought to be dismissed with costs to the Respondent.**

2. The parties argued the Preliminary Objection by filing respective detailed submissions which were highlighted on 2<sup>nd</sup> April 2019. The Respondent took issues with the framing of the heading of the Originating Summons. That the application as filed is not in conformity with the mandatory provision of the law.

3. Order 37 rule 14 provides thus; **“An Originating Summons shall be in form no 26 or 27 of Appendix A with such variations as circumstances may require and shall be prepared by the applicant or his advocate and shall be filed in court; service where necessary shall be effected in accordance with order 5.”** The Originating Summons as filed on the face of it is in compliance with form 26 save for the inclusion of the word **“Miscellaneous”**. In the case of **Rodolfo Grecci –versus- Rimondi Gabriella (2007) eKLR**, the court noted that the Originating Summons was neither issued or served. According to the Respondent, an Originating Summons is a suit which cannot be filed as a Miscellaneous Application. The applicant on her part relied on the provisions of article 159(2)(d) of the Constitution for curing the defect if any.

4. In my determination, I find that the Originating Summons herein has been served and the Respondent has duly filed his replying affidavit. Secondly Order 37 rule 14 allowed for variation as the circumstances may require. The issues in dispute is removal of a caution which is in the nature of a dispute that does not necessarily require taking of oral evidence meaning it can be resolved by affidavit evidence thus leave room for change of format from form 26 or 27. Order 37 rule 14 provideing for a variation in the form of coming to court. Secondly Article

159(2)(d) clearly states that justice shall be administered without undue regard to procedural technicalities. The nature of the objection being taken by the Respondent in **ground 1** is a procedural technicality.

5. In the case of **D. T. Bobie (K) Ltd –versus- Muchina (1982) KLR 1**, the Court of Appeal held that a court should aim at sustaining a suit rather than terminating it. That a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by way of amendment, it should not be struck out. In the instant case, the procedural fault can easily be corrected by removing the word “**Miscellaneous.**” I therefore find **ground 1** of the objection as lacking in merit and dismiss it.

6. The second ground raised is the lack of board resolution authorising the filing of these proceedings. The Respondent relied on the provisions of Order 4 rule 1(4) of the Civil Procedure Rules which states thus, “**Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so.**” The Respondent further relied in the holding in the case of **Affordable Homes Arica Ltd –versus- Handerson & 2 Others (2004) eKLR** amongst others.

7. In countering this, the applicant submitted that this ground calls for facts and cannot be raised in a Preliminary Objection. That the law has since been restated by the Court of Appeal in the case of **Arthi Highway Developers Limited –versus- West End Buthery Ltd & 6 Others C. A No. 246 of 2013 (2015) eKLR**. At page 42 of this case, the Court of Appeal mentioned the case of **Bugere Cofee Growers Ltd –versus- Sebaduka & Another (1970) 1EA 147** which discussed the issue of passing of company resolution authorising filing of proceedings. The Court of Appeal noted that the principles enunciated in the Bugere case has since been overruled by the Ugandan Supreme Court in the case of **Tatu Naiga & Emporium –versus- Virjee Brothers Ltd & A. G SCCA No. 1 of 1998**.

8. The Tatu Naija & Emporium case held that, “**It is now settled as the law that it does not require a board of directors resolution or even the general meeting of members to sit and resolve to instruct counsel to file proceedings on behalf of and in the name of a company. Any director who is authorised to act on behalf of a company unless the contrary is shown has the powers of the board to act on behalf of that company.**” That this position has since been applied in the Kenyan Courts, for example in **Fubeco China Fushun –versus- Naiposha Company Ltd & 11 Others (2014) eKLR**. The Court of Appeal thus has settled the question that board resolutions is not a mandatory requirement before filing a suit. On the authority of the person who signed the verifying affidavit to verify facts in the Originating Summons is a question of fact requiring proof thus does not meet the test of a Preliminary Objection.

9. The last issue is on whether this court lacks jurisdiction to hear this matter under the provisions of Section 73(4) of the Land Registration Act No. 3 of 2012. Section 73(1) provides that; “**A caution may be withdrawn by the cautioner or removed by order of the court or subject to sub-section (2) by order of the Registrar.**” My reading of this Section gives me the impression that it provides for 3 ways in which a caution can be removed; that is;

(a) **The cautioner himself withdrawing it.**

(b) **Order of the court.**

(c) **The Land Registrar.**

10. The applicant moved this court under the provisions of Section 73(1) of the Land Registration Act. Section 73(4) is only applicable where the Registrar is asked to remove the caution and evoking such a step cannot be interpreted to oust the jurisdiction of this court because Section 73(1) does not state which of the three steps takes priority.

11. In light of the explanation given in the body of this ruling, I hereby make a finding that the Preliminary Objections raised by the Respondent is without merit. The same is dismissed with costs to the Applicant.

**Dated, Signed and Delivered at Mombasa this 18<sup>th</sup> day of July 2019.**

**A. OMOLLO**

**JUDGE.**