



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 306 OF 2018

CURLY KLURLY LTD.....PLAINTIFF

-VERSUS-

MTOI MWERO MTOI

ABBAKAR MWERO

HAMISI TSUMA MWERO

MBOGA MWANYIRO.....DEFENDANTS

RULING

1. This ruling us in respect of the preliminary objection dated 19th March 2019 by the defendants on the grounds that the plaint and indeed the entire proceedings herein are fatally defective in light of the express provisions of Section 5 of the Civil Procedure Act, Sections 5, 6 and 7 of the Companies Act, 2015 and Order 5 rule 1 and 8 of the Civil Procedure Rules.

2. In their submissions filed on 25th April 2019, M/s Ngonze & Ngonze Advocates for the defendants submitted that the plaint and the entire pleadings presented by the plaintiff are fatally defective for contravention of and/or non-conformity with numerous express and mandatory provisions of the law, namely section 5 of the Civil Procedure Act, Section 6 and 7 of the Companies Act and Order 5 Rule 1 and 8 and Order 9 Rule 2 of the Civil Procedure Rules. They cited the case of **Affordable Homes Africa Ltd –v- Henderson & 2 Others (2004) eKLR** in which it was held that in the absence of a board resolution sanctioning the commencement of the action by the company, the company is not before the court. Counsel also cited the case of **East African Portland Cement Ltd –v- Capital Markets Authority & 4 Others (2014)eKLR**; **Philomena Ndanga Karanja & 2 Others –v- Edward Kamau Maina (2015) eKLR**; **Kenya Commercial Bank Ltd –v- Stage Coach Management Ltd (2014) eKLR**; all which dealt with the necessity for a company resolution to back the institution of the suit, and the case of **Grace Wairimu Mungai –v- Catherine Njambi Muya (2014)eKLR** in which the plaintiffs suit was struck out because no summons were served on the defendant within the prescribed period.

3. The defendants counsel submitted that by dint of the foregoing, it is clear beyond peradventure that the totality of acts and/or omission inherent in the plaintiff’s plaint and pleadings, generally, as presented before this court renders the entirety of the pleadings so filed inherently fatally defective and urged the court to strike out the verifying affidavit annexed to the plaint and consequently strike out the plaint and dismiss the entire suit with costs to the defendants.

4. The plaintiff's advocates did not file their submissions in response to the objection within the time allowed or at all.

5. I have considered the submissions filed. This suit was filed on 31st December 2018. In the plaintiff's list of documents dated 31st December, 2018 what are listed are:

i. Authority to swear

ii. Copy of title deed

iii. Copy of an order issued on 15th October 2015.

iv. Copy of Assistant Chief letter.

v. Copy of Burial permit dated 2/12/16

vi. Copy of the order issued on 24/7/17 and a letter from the Director of survey dated 26/3/18.

vii. Copy of application

viii. Copy of O.B.

6. There is no dispute that in the above list, there was no resolution of the Board of Curly Wurly Limited, the plaintiff herein. It is trite 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. (See the above cited cases). It is obvious that the suit herein was filed without the resolution of the board. The plaintiff has not contested the objection raised as no submissions in opposition have been filed. The suit herein has filed without the resolution of the Board. That is contrary to the well settled law. I note that among the documents filed by the plaintiff at the time of filing of suit is the authority under seal of the plaintiff authorizing Ateet Jetha to executive any document, swear any affidavit and do all acts which are required to be done in respect of the suit. Indeed the said Ateet Jetha signed the verifying affidavit. However, in my view, that authority cannot amount to a resolution of the Board to file the suit. There is no resolution that has been exhibited. I will therefore concur with the defendants submissions that is evident that no resolution was passed by the Board of Directors of the plaintiff company authorizing the filing of the instant suit. As already stated, the objection herein is not opposed. Therefore the company is not before the court and this court will not hesitate to strike out the suit with costs.

The court proceeds to strike out the entire suit and the interlocutory application dated 31st December 2018 with costs to the defendants. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 18th day of November 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ojwang holding brief for Ngonze for defendant

No appearance for the plaintiff.

Esther Court Assistant

C.K. YANO

JUDGE