



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO 51 OF 2017.

MOHAMED SULEIMAN SHEE

BAKARI OMARI CHALA.....PLAINTIFFS

VERSUS

SULEIMAN OMARI CHALA.....1ST DEFENDANT

ALI OMARI CHALA.....2ND DEFENDANT

(Sued as the Representatives of OMARI

BAKARI MWACHALA (Deceased)

AND

ALLIANCE HOTELS LIMITED.....APPLICANT/AGGRIEVED/INTERESTED PARTY

RULING

1. This is the Notice of Motion dated 14th September, 2017. It is brought under Section 1A, 1B, 3A 68, 80 of the Civil Procedure Act Chapter 21 Laws of Kenya, Order 45 Rule 1, Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. It seeks orders;

1) Spent.

2) Spent.

3) That upon inter partes hearing, the Honourable Court be pleased to review the order and decree issued herein on 6th March, 2017 and to recall quash, vacate, annul and cancel the said order/Decree and all other consequential orders and/or decrees.

4) That the Honourable Court be pleased in the exercise of its inherent jurisdiction to grant and issue other further appropriate order/declaration and to punish and censure the Plaintiffs and the Defendants herein for gross abuse of the court's process and integrity as may be just and appropriate in the circumstances.

5) That costs of this Application be provided for.

3. The grounds are on the face of the application and are listed as in paragraph 1-12. I do not need to reproduce them here.

4. The application is supported by the affidavit sworn by Raymond D.V.N. Matiba, a director of the Applicant/interested party sworn on the 14th September, 2017 and a supplementary affidavit sworn on the 19th January, 2018.

5. The application is opposed. There is a replying affidavit sworn by Mohamed Suleiman Shee, the 1st Plaintiff. There is also a replying affidavit sworn by Suleiman Omari Chala, the 1st Defendant sworn on the 24th November, 2017. There is a notice of preliminary objection by the Plaintiffs dated 29th September, 2017 and the grounds of opposition dated 29th September, 2017. There is also a notice of preliminary objection by the Defendants dated 24th November, 2017.

6. On the 16th October, 2017, the court directed that the preliminary objection be heard together with the notice of motion dated 14th September, 2017.

7. I have considered the preliminary objections by the Plaintiff's and Defendants together with the notice of motion dated 14th September, 2017. The issues for determination are;

i) Whether the two preliminary objections are merited.

ii) Whether the Notice of motion dated 14th September, 2017 is merited.

8. The preliminary objection by the Plaintiff's is dated 29th September, 2017. The grounds are;

i) That the Interested party herein is not a party to this suit as it has not sought leave of this Honourable Court to be enjoined as a party.

ii) That this Honourable Court is *functus officio* having marked the matter was settled on 6th March, 2017.

iii) That the application is brought and the affidavit is sworn by an individual without any authorization and/or resolution of the Interested party which is a limited liability company thereby offending the provisions of the Companies Act No. 17 of 2015.

9. The Defendants have also filed a preliminary objection dated 24th November, 2017 on the grounds that;

a) It was filed without due authority form the Affected/Aggrieved party.

b) There is no resolution or no valid resolution of the Aggrieved/Affected party approving the filing of the application.

c) There is no resolution or valid resolution by the Affected/Aggrieved party appointing M/s Asige, Kiverenge And Company Advocates to file this application on behalf of the affected party.

d) The filing of the suit by the said firm of Advocates is invalid for want of authority form the aggrieved/affected party.

10. I have considered the two preliminary objections and the Notice of motion dated 14th September, 2017, the oral submissions by counsel and the authorities cited.

11. A preliminary objection was clearly described in the case of *Mukisa Biscuits Manufacturing Company Limited –versus- West End Distributors Limited (1969) EA 696* where Sir Charles Newsbold 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 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 an exercise of judicial discretion.”

In the same authority Law J A. stated;

“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 and which if argued as a preliminary objection may dispose of this suit.....”

I am guided by the above authority in finding that the preliminary objections by the Plaintiffs and the Defendants are preliminary objections as they raise part as of law.

12. The first ground is that the Applicant/Interested party is not a party to the suit as it has not sought leave of this Honourable Court to be enjoined as a party. It is the Plaintiffs and the Defendants case that the Applicant/Interested party is not a party to these proceedings as it did not seek leave to be enjoined.

The Applicant/Interested party on the other hand state that the objections are mis informed. They are based on form and not substance as the Applicant has substantial/material interest in the proceedings that took place on 6th March, 2017.

13. Order 1 Rule 10(2) of the Civil Procedure Rules states;

“The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.

I have gone through the proceedings herein. There is no doubt that the Applicant/Interested party was not a party to the suit. It did not seek leave to be enjoined in these proceedings. Even in the application dated 14th September, 2017 there is no prayer to be enjoined in this suit.

14. In the case of *Zepher Holdings Limited-versus- Mimosa Plantations Limited And Jeremiah Matagaro & Another, Nairobi HC Misc. Civil Application No. 248 of 2012.* Gikonyo J. held that;

“Upon a thorough perusal of the court record, it is apparent that the 1st Interested party did not seek the leave of the court to be enjoined in this suit. The application before court does not in itself have a prayer for his joinder or that of the 2nd interested party, as parties to the suit. Further the court did not order *suo moto* for the joinder of either the 1st or the 2nd interested party. It is my considered view therefore that the 1st Interested party is not properly before the court. He ought to have sought the leave of court to be enjoined in the suit first before moving on a spree for other far reaching orders.”

15. I am guided by the above authority in finding that Applicant/Interested Party did not seek leave of the court to be enjoined in this suit nor did the court order *suo moto* that it be enjoined. I find that the Applicant/Interested party is improperly before court.

16. Another ground of objection is that the affidavit is sworn by an individual without any authorization and/or resolution of the interested party which is a limited liability company thereby offending the provision of the Companies Act NO 17 of 2015.

That the affidavit of Raymond D. V. N. Matiba is in contravention of Order 4 Rule 4 of the Civil Procedure Rules. It is however the Applicant’s response that nothing can bar the Applicant from prosecuting this application as Order 4 Rule 4 of the Civil Procedure Rules talks of filing a suit. Order 4 Rule 4 of the Civil Procedure Rules states;

“Where a 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.”

17. At the time of filing this application, there was no resolution filed to show that the company had authorized the deponent Raymond D.V.N. Matiba to swear affidavit on behalf of the company. However, in his supplementary affidavit sworn on 19th January, 2018 there is annexed a resolution marked “RM1” authorizing him to institute legal proceedings. The same is dated 4th June, 2017 but lacks the seal of the company which is a mandatory requirement under Order 4 Rule 4 of the Civil Procedure Rules. The resolution ought to have been filed together with the application dated 14th September, 2017.

18. In the case of *Foss –versus- Harbottle (1843) 2 Hare 461* it was held that;

“The company and the company alone is the proper Plaintiff that can sue to redress the wrong.”

In *Shaw & Sons (Satford) Limited –versus- Shaw Greer L.J.* held;

“A company is an entity distinct from its shareholders and its directors.’

I have quoted the above authorities to show the importance of a company resolution before instituting legal proceedings.

19. Section 2 of Civil Procedure Act states; **“a suit”** means all Civil Proceedings commenced in any manner prescribed.” I therefore do not agree with the Applicant/Interested party’s counsel that what is before court is not a suit but an application.

I find that Order 4 Rule 4 of the Civil Procedure Rules is set in mandatory terms and the Applicant/Interested party has not complied. In the case of *Affordable Homes Limited –versus-Ian Henderson and 2 Others (2004) eKLR L.* Njagi J. held;

“In the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before court at all.”

20. I am of the view that as at filing of the notice of motion dated 14th September, 2017 the resolution of the Board of directors was not attached. Even the one annexed to the supplementary affidavit of Raymond D.V.N. Matiba (filed without leave of court) though dated 4th June, 2017 does not bear the seal of the company. I find that in the circumstances it is right to say it is not the company which has brought this application.

I also agree with Miss Onyango for the Defendants that there is no resolution authorizing the firm of M/s Asige, Kiverenge And Company Advocates to institute those proceedings on behalf of the company.

I find that rules were meant to be observed. Article 159 (i) (d) does not give parties permission to disregard rules of procedure.

21. Order 45 of the Civil Procedure Rules refers to review by a person who was already a party to the suit. It is also important to note that it sets the grounds upon which a review may be allowed. None of those grounds is available to the Applicant/Interested party. Order 45 of the Civil Procedure Rules should be read as a whole and not some sections in isolation. I find that the Applicant/Interested party herein has failed to demonstrate that it is properly before court.

22. The Applicant seeks to review and to set aside the consent judgment of 6th March, 2017. The said consent judgment arise out of a decision of the National Land Commission issued on 23rd November, 2016. The said decision was not challenged. It cannot be challenged in these proceedings as the National Land Commission is not a party to these proceedings. The way I see it the only avenue for the Applicant/Interested party to seek judicial review under Order 53 Rule 2 of the Civil Procedure Rules. Order 53 Rule 2 of the Civil Procedure Rules provides that;

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act, and where the proceeding is subject to appeal and a time is limited, by a law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined on the time for appealing has expired.”

23. In my humble view, the Applicant/interested party can apply for a judicial review proceedings under Order 53 of the Civil Procedure Rules.

24. I find that this court is *functus officio* after it adopted the consent judgement dated 6th March, 2017 and filed in court on the same day. I will not go into the illegality or otherwise of the said consent judgment since this is an issue which will be dealt with in the judicial review proceedings.

25. In conclusion, I find that the preliminary objections herein are merited and the same are upheld.

The upshot of the matter is that the Applicants/interested party’s notice of motion dated 14th September, 2017 is hereby dismissed with costs to the Plaintiffs/Responent Defendants/Respondents.

It is ordered.

Dated, Signed and Delivered at Mombasa on the 18th day of April 2018.

L. KOMINGOI

JUDGE

18/4/2018.