



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC NO 380 OF 2016

SALEH OMAR BA MAHDI.....PLAINTIFF

VERSUS

MOHAMED SALIM BAHHRIZ.....1ST DEFENDANT

REHAB TRADING COMPANY LTD.....2ND DEFENDANT

LAND REGISTRAR MOMBASA.....3RD DEFENDANT

RULING

1. The Plaintiff, Saleh Omar Ba Mahdi, sued the 3 defendants, Mohamed Salim Bamahriz, Rehab Trading Company Limited and the Land Registrar, Mombasa seeking various reliefs as appears in the Plaint dated 6th December, 2016. The 1st Defendant filed a statement of Defence dated 18th January 2017 in which he denies the Plaintiff's claim.

On 20th June 2017, the 1st Defendant filed a Notice of Preliminary Objection in which he raised objection to the hearing of this Suit for the reason that the proceedings contravene the express provisions of Section 5 and/or 7 of the Civil Procedure Act, Cap 21 Laws of Kenya as read with various Sections of the Companies Act, 2015 which Sections are listed in the said Notice. He also cited some Provisions of the Companies Act, Cap 486, (repealed) as well as Section 16 of the Government Proceedings Act, Cap 40, Laws of Kenya. It is the 1st Defendant's contention that the Plaintiff's claim as drafted ought to be dismissed with costs. When the Suit came up for hearing, the 1st Defendant sought to have the said Preliminary Objection heard first and the Court granted that request. This ruling therefore is in respect to that Preliminary Objection.

2. In his submissions, Mr. Mutiso, Counsel for the 1st Defendant submitted that the Preliminary Objection is premised on the trite law that a Preliminary Objection is raised on issues of law as captured in a party's pleadings where allegations of fact are not specifically controverted by the other party. He referred the Court to the contents of paragraphs 1, 2 and 3 of the Plaint and emphasized paragraph 3 thereof where the 2nd Defendant is described as a Limited Liability Company and paragraph 7 which lays out the fact that the Plaintiff and the 1st Defendant were the only Directors/Shareholders of the 2nd Defendant. The learned Counsel also pointed out paragraphs 24, 25 and 26 of the Plaint and in particular paragraph 24 which states that the Suit Property is registered and being held in the name of the 2nd Defendant. Mr. Mutiso also referred the Court to the 1st Defendant's statement of defence and in particular singled out paragraph 2 thereof in which the description of the parties is admitted and paragraph 3 in which the 1st

Defendant avers that the 2nd Defendant is under liquidation by virtue of an order given on 25th September 2015 by the High Court in Mombasa in Winding Up Petition No.3 of 2014. He also pointed out the fact that paragraphs 38 and 39 of the said statement of defence refers to the existence of the Winding Up Petition and states that the Plaintiff's grievances, if any, can only be addressed through the pending Winding Up Cause. Counsel submitted that the 1st Defendant being a director and only other shareholder of the 2nd Defendant, the Plaintiff lacks the requisite locus to sue the 1st Defendant in his individual capacity. Mr. Mutiso further submitted that the Plaintiff's Reply to the 1st Defendant's defence does not specifically controvert the averments in the 1st Defendant's statement of defence, and in particular the issue of *res judicata* in respect of existence of the Winding Up Cause. He cited the case of **Karia & Another –vs- Attorney General & Other (2005) IEA 83** and the case of **Trade Bank Limited –Vs- LZ Engineering Construction Limited (2000)IEA 266** and submitted that a party is not authorized to re-litigate the same issue once a decision has been given by a Court of competent jurisdiction between same persons over the same subject matter. Mr. Mutiso also cited the case of **Murri –Vs- Murri & Another (1999) IEA 212** in which it was held that the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the Court process or is unarguable, and has nothing to do with a case being complex or difficult. He further relied on the cases of **Priamit Enterprises Ltd –Vs- Attorney General (2003)IEA 236, R-V- Wan Arthur Camps (1962) IEA 403 and Corporate Insurance Brokers Ltd (2002) IEA 41** on the issue of company law vis-à-vis the liability of company director, and submitted that corporate veil of a company may only be lifted were it is shown that the company was incorporated with or was carrying on business as no more than a cloak, mask or sham to enable the directors to hide themselves from the eye of equity. He further submitted that if there is a pleading as to fraud, it has to be particularized and there has to be a pleading of the existence of proceedings of a criminal nature in respect to the director alleged to be complicit to fraudulent activities. Counsel also submitted that the prayers sought against the 1st and 3rd Defendants in prayers 1 and 7 of the Plaint are not enforceable in law in view of the provisions of Section 16(1) of the Government Proceedings Act. The learned Counsel submitted that the Plaint as filed cannot withstand legal scrutiny and cannot be maintained to a logical conclusion in respect of the Defendants generally and particularly the 1st Defendant. He sought to have the suit dismissed with costs at this stage despite any submissions as to the complexity of the matter.

3. Mr. Mogaka learned Counsel for the Plaintiff opposed the Preliminary Objection raised. He submitted that striking out a Suit is a draconian measure which can only be exercised very sparingly and in very clear cases in which the Plaint or Suit cannot be injected with life by way of amendment. He cited the case of **D.T. Dobie vs- Muchina (1978) LLR 9**. He pointed out that the amendments can be done at any stage of the proceedings to remove that which is not necessary and to bring that which is necessary. While relying on the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors Ltd (1969)EA 696**, Mr. Mogaka submitted that a Preliminary Objection must be a finer point of law that can determine the matter in finality. He added that ordinarily, a Preliminary Objection once raised, it is presumed that the facts as presented are undisputed or admitted and the Courts are bound by the pleadings filed. The learned Counsel stated that in pleadings, if facts are pleaded and they are not admitted, it means there is a rejoinder. He submitted that the Reply to defence specifically denied the existence of the Winding Up Cause No.3 of 2014, and parties have to adduce evidence to prove its existence and added that the Court cannot presume issues. Counsel pointed out that in the Plaint, the Plaintiff is seeking 10 reliefs against the Defendants and therefore the Court cannot dismiss the entire suit because of only 3 reliefs impugned by the 1st Defendant in the Preliminary Objection. Moreover, he submitted, the 1st Defendant is not acting on behalf of the 2nd and 3rd Defendants and therefore has no capacity to purport to argue the case on their behalf. Mr. Mogaka further submitted that the issue of *res judicata* has not been proved as the 1st Defendant has not adduced evidence by way of affidavit or documents. It was counsel's submission that the issues of Company Law and *res judicata* cannot be decided by this Court as the same fall within the jurisdiction of the High Court which deals with commercial matters. He pointed out that page 18 of the Plaintiff's Bundle of Documents is a Declaration of Trust in respect of the Suit Land and is made between the 1st Defendant and the Plaintiff and in the Plaint, the Plaintiff is seeking a Declaration of Trust among others. The learned Counsel added that the reliefs sought by the Plaintiff in the Plaint are mainly against the 1st Defendant and the 2nd and 3rd Defendants are only necessary parties. He submitted

that the authorities cited by the 1st Defendant in support of the Preliminary Objection are all inconsequential. He added that if there was material placed before the Court, the worst the Court can do is to stay the suit. He otherwise urged the Court to dismiss the 1st Defendant's Preliminary Objection.

4. In reply, Mr. Mutiso submitted that although the **D.T. Dobie case** states that striking out is a draconian measure that should be exercised sparingly, he nonetheless pointed out it is a measure that is available to Courts without fettering their discretion. He also submitted that although a Plaintiff may be amended to inject life into it, a course of action cannot be amended as it is either available or not. He maintained that the facts have not been controverted and pointed out that the plaintiff has made a claim against the 2nd Defendant. On the issue that the Preliminary Objection cannot agitate for the rights of the 2nd and 3rd Defendants, the learned Counsel submitted that the law remains the same and that the Court itself can even move *suo motto* where the suit is not maintainable or the order sought are unenforceable. He urged the Court not to delve into the issues of evidence regarding the status of the Winding Up Cause and decide the Preliminary Objection purely on points of law.

5. I have considered the rival submissions of all the Counsel and the authorities placed before me. In his notice of preliminary objection, the 1st Defendant states that these proceedings contravene the express provisions of Section 5 and/or 7 of the Civil Procedure Act as read with various Sections of the Companies Act, 2015. Sections 5 and 7 of the Civil Procedure Act provide as follows:

“5. Any Court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.

7 No Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

As earlier outlined in this ruling, the Plaintiff's claim is seeking various reliefs against the Defendants herein. This includes an order declaring the Declaration of Trust, a Mandatory Injunction and an Order for Accounts among others against the 1st Defendant. The 1st Defendant had submitted *inter alia*, that the suit is *res judicata* because the matter was dealt with in High Court at Mombasa **Winding Up Petition No.3 of 2014**.

6. In his ruling in **Garden Square Ltd –vs- Kogo & Another (2002) LLR 1695 Ringera J**, (as he then was) said 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 entirely. This was in line with the decision of the then Court of Appeal for East Africa in the case **of Mukisa Biscuit Manufacturing Ltd – vs- West End Distributors Limited (1969)EA 696** in which Sir Charles Newbold, the President of that Court 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 points by ways of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

7. The Preliminary Objection by the 1st Defendant is mainly that the suit is *res judicata* and that the Plaintiff does not have the capacity to bring the suit. Counsel for the 1st Defendant was very clear that the issues raised are not controverted and are not disputed. I have perused the pleadings filed herein. The 1st Defendant, in response to the Plaintiff's claim, filed his defence dated 18th January 2017 in which he

avers *inter alia* that the 2nd Defendant is under liquidation by virtue of an order given on 25th September 2015 by the High Court in Mombasa in Winding Up Petition NO.3 of 2014. The 1st Defendant also averred that being a director and only other shareholder of the 2nd Defendant the Plaintiff lacks capacity to bring this suit. In response to the 1st Defendant's defence, the Plaintiff filed a reply to 1st Defendant's defence dated 26th January 2017 in which he joins issue with the 1st Defendant's statement of defence and also specifically denied the averments in the said defence. The claim of existence of a Winding UP Petition before the High Court is a matter of fact. There is no evidence before this Court showing its existence. Such matter of fact can only be established by evidence before the application of the law. The legal issue of the matter having been determined before another Court hinges on the availability of that fact. To my mind, that is not a purely legal issue that can be determined summarily without first having ascertained the factual position. In deciding whether this matter is *res judicata*, there must be evidence of the previously determined case. This is crucial before one considers whether the matter is *res judicata* or not. But of even greater importance is whether the issues decided in that Petition cause are the same matters now in this matter. Even in the case **Karia & Another (supra)** cited by the 1st Defendant, it was the opinion of the Court that the proper practice normally is that where *res judicata* is pleaded as a defence, a trial Court should, where the issue is contested, try that issue and receive some evidence to establish that the subject matter of the dispute between the parties has been litigated upon between the same parties, or parties through whom they claim.

To this extent therefore, it is neither practical nor logical to accept the submission from the bar that there was a case in the High Court which has been decided without evidence. It becomes even more difficult where the other party has denied the existence of that fact in the pleadings.

8. In addition it is also my view that some of the arguments advanced under the Preliminary Objection touching on the 2nd Defendant such as who are its directors/shareholders do not properly constitute grounds of Preliminary Objection. Instead, they are matters that are fit and proper for arguments in the substantive suit.

9. For the foregoing reasons, I am inclined to dismiss the Preliminary Objection and decline to dismiss the suit in limine as requested. The Plaintiff shall have costs.

Ruling dated, signed and delivered at Mombasa this 9th day of October 2017

C. YANO

JUDGE