



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 828 OF 2013

TAPASIYA BHAVAN LTD PLAINTIFF

VERSUS

SAMUEL KARANJA KARIUKI 1ST DEFENDANT

PETER NGUGI KABARA 2ND DEFENDANT

JACINTA WAMBUI KARIUKI3RD DEFENDANT

ORDER

In the course of considering the plaintiff/applicant's Notice of Motion dated 17th December 2013 seeking a temporary injunction to restrain the defendants/respondents from in any manner dealing with land parcel No. THIKA MUNICIPALITY BLOCK 29/270 pending the hearing of this suit, It has emerged that the verifying affidavit filed together with the plaint herein is sworn by one BENSON IRUNGU MWANGI who describes himself as an employee of the plaintiff/applicant.

The plaintiff/applicant is a company and with regard to verifying affidavits where a party is a company, the law under **Order 4 Rule 1 (4) of the Civil Procedure Rules** provides as follows:-

“Where the 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”

The verifying affidavit sworn by the said BENSON IRUNGU MWANGI is brief and I will reproduce the four (4) paragraphs therein:-

- 1. “That I am an employee of the plaintiff herein duly authorized to swear this affidavit and hence competent to do so***
- 2. That the averments in the plaint are true and correct***
- 3. That I swear this affidavit in verification of the averments in the plaint***
- 4. That what is herein deponed is true to the best of my knowledge, information and belief”***

In his affidavit in support of the Notice of Motion, the said BENSON IRUNGU MWANGI has deponed in paragraph 1 as follows:-

“That I am an employee of the plaintiff herein well versed with the facts of the case herein, duly authorized by the plaintiff to swear this affidavit and hence competent to swear this affidavit”

The defendants/respondents counsel has taken issue with whether BENSON IRUNGU MWANGI, being only an employee of the plaintiff/applicant, can swear such an affidavit. The **Civil Procedure Act and Rules** do not define the term “**Officer of the Company**”. An officer of a company is defined in **Section 2 of the Companies Act to include “a director, manager or secretary”**. Would an employee therefore quantify as an officer of a company”? This issue was considered by Ringera J. in **MICROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE LTD & ANOTHER 2001 K.L.R 470** where the Judge took the view that the definition of officer in **Section 2 of the Companies Act** is inclusive rather than exhaustive and therefore persons other than those expressly identified are included and that the ordinary meaning of the word is “**a person holding a position of authority or trust**”. The Judge then went on to find that an employee of a company and who held a position of trust and authority was therefore an officer of the company. The Judge however went on to strike out the employee’s affidavit because the deponent had not sworn that she swore the affidavit with the authority of the Company.

I would take the same view as Ringera J. did in the **MICROSOFT** Case (Supra) and find that since the definition of officer in the **Companies Act** is inclusive rather than exhaustive, then an employee such as the deponent in this case can swear such an affidavit if it is demonstrated that he has authority within the organization. In the case of BENSON IRUNGU MWANGI, there is a letter from the plaintiff (**Annexure BIM**) which confirms that he is the caretaker of the Company and adds in paragraph two (2) and paragraph three (3) as follows:-

“We hereby confirm that Mr. BENSON IRUNGU MWANGI is the caretaker of TAPASIYA BHAVAN LTD. The property is located in Thika Municipality and is Thika Municipality Block No. 29/370. He is authorized to ensure that there is no encroachment or trespassing on the property”.

Clearly therefore, BENSON IRUNGU MWANGI not only enjoys the plaintiff’s trust in protecting the Company’s property but he is also duly authorized to do so. On that basis, I am satisfied that the said BENSON IRUNGU MWANGI is an officer as defined in the law.

However, there is only one hurdle that BENSON IRUNGU MWANGI’s affidavit has not over-come. Under **Order 4 Rule 1(4) of the Civil Procedure Rules**, such affidavit shall be “**under the seal of the Company**”. This affidavit bears no such seal. A **Corporate Seal** is defined in **BLACK’S LAW DICTIONARY 9th Edition** as follows:-

“A seal adopted by a Corporation for executing and authenticating its Corporate and legal instruments”

In the absence of the plaintiff’s seal, the affidavit of BENSON IRUNGU MWANGI is defective.

The defendant/respondent’s counsel has submitted that since the verifying affidavit of BENSON IRUNGU MWANGI is defective, I should dismiss the application. **Order 4 Rule 6 of the Civil Procedure Rules** provides as follows:-

“The Court may of its own motion or on the application by the plaintiff or defendant order to be struck out any plaint or counter-claim which does not comply with Sub-rule (2) (3) (4) and (5) of this rule” – emphasis added.

The use of the word “**may**” means that the Court has the discretion to strike out the suit but that is not mandatory. Courts have taken the route that it is in the interest of justice to reject and strike out the defective affidavit and direct that a proper affidavit be filed.

I therefore order that the verifying affidavit of BENSON IRUNGU MWANGI filed with the plaint herein is defective as it does not bear the plaintiff’s seal. It is accordingly struck out and a proper affidavit bearing the plaintiff’s seal be filed within 15 days of the giving of this order. Thereafter, the Court will deliver its ruling on the Notice of Motion dated 17th December 2013. The plaintiff/applicant will meet the defendants/respondents’ costs.

B.N. OLAO

JUDGE

27TH JULY, 2015

27/7/2015

Before

B.N. Olao – Judge

Gichia – CC

Ms Momanyi for Waiganjo for Plaintiff – present

Mr. Wakahu for Defendant – absent

COURT: Order dated 27th July 2015 is hereby read to Ms Momanyi for Plaintiff

Mr. Wakahu for Defendant absent.

B.N. OLAO

JUDGE

27TH JULY, 2015