



REPUBLIC OF KENYA



Mutungi & 6 others v Vil Limited; Kaumbuthu & 4 others (Contemnor) (Cause 225 of 2017) [2022] KEELRC 4019 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4019 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 225 OF 2017
CN BAARI, J
SEPTEMBER 29, 2022**

BETWEEN

MICHAEL KINYUA MUTUNGI & 6 OTHERS CLAIMANT

AND

VIL LIMITED RESPONDENT

AND

**ROBIN MWENDA KAUMBUTHU T/A MWENDA KAUMBUTHU & CO.
ADVOCATES CONTEMNOR**

**STEPHEN KIMANI T/A KINYURU MRCHANTS
AUCTIONEERS CONTEMNOR**

**MICHAEL KIPRUTO KANDIE T/A EMINING QUARRY
LIMITED CONTEMNOR**

**KEVIN NZIOKA T/A SKYVIN LIMITED & ASOP ENTERPRISES
LIMITED CONTEMNOR**

**ERIC MWENDA KANYURU T/A SYDNEY PRIDE (K)
LIMITED CONTEMNOR**

RULING

1. By a Notice of Preliminary Objection dated November 15, 2021, Kevin Mutiso Nzioka, the 3rd contemnor/respondent herein, objected to the claimants/applicants application of September 28, 2021, on the grounds that: -
 - a. the Supporting Affidavit lacks any letter of Authority despite allusion to authority being given, making the Affidavit fatally defective and incompetent in law;



- b. the claimants/applicants have not properly joined the contemnors to the suit as they have not sought leave to join the contemnors to these proceedings;
 - c. the claimants/applicants have not sought leave and no leave has been granted to lift the corporate veil of the contemnors/respondents.
2. The claimants/applicants opposed the Preliminary Objection vide a further affidavit sworn by one Jackson Mulili on November 18, 2021, wherein, he avers that he had the authority of his co-claimants to pursue the contempt application pending before court, and which is subject of the instant Preliminary Objection.
 3. Parties canvassed the objection by way of written submissions. Submission were filed for the 3rd and 4th contemnor/respondents as well as for the claimants/applicants.
 4. The submissions have been duly considered.

Analysis and Determination

5. I have considered the Preliminary Objection, the reply and the submissions by parties.
6. The 3rd and 4th contemnors/respondents argued that a party can only respond to a Preliminary Objection vide a replying affidavit or grounds of opposition, and not through a further affidavit, as the latter connotes that an affidavit is being sworn in support of an earlier affidavit.
7. The contemnors further argue that for reason espoused in paragraph 6 above, coupled with the fact that the supporting affidavit is not accompanied by a letter of authority to swear, the applicants application is fatally defective and should be struck out.
8. The 3rd and 4th contemnors further assert that the applicants have joined them to the suit without leave of the court and therefore the application dated September 28, 2021, ought to be struck out.
9. It is their further argument that the rules of the court demand that a party be notified of any proceedings against them or in the very least, leave be sought to join a party to an existing suit.
10. The contemnors further argue that they are separate legal persons from their respective companies, and therefore any claim against the company should be against the company only, and not against the individual unless the corporate veil has been lifted, and only after the applicants have moved court for orders to lift the corporate veil. They relied on *Salomon v Salomon & Co* (1897) AC 22 where Lord Macnaghten opined thus:

“The company is at law a different person altogether from its subscribers....and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.”

11. In *Mukisa Biscuit Manufacturing Co Ltd –vs- West End Distributors Ltd* [1969] EA 696, the court stated thus on a point of preliminary objection: -

“...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 point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation,



or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...”

12. In *Garden Square Limited vs Sammy Boit Kogo & Another Nairobi (Milimani) HCCC No 1266 of 2003* [2003] KLR 20, the court held that a preliminary objection is a pure point of law which if successfully taken, would have the effect of disposing the suit or application in its entirety.
13. Mr Jackson Mulili contend that none of the claimants have questioned his authority to swear the affidavit on their behalf, and that they have all appended their signatures as a assign of approval for the deponent to swear the affidavit on their behalf.
14. In *Brownstone Agencies Ltd & another v County Government of Bomet & another* [2022] eKLR also cited by the applicants, the court stated:

“It is clear that it was sufficient for the authorized person to depose that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority”.
15. To strike out the applicants’ application for the mere reason that they responded to the Preliminary Objection through a further affidavit instead of a replying affidavit, is an affront to article 159(2)(d) of the *Constitution* that demands that courts administer justice without undue regard to procedural technicalities.
16. In *Yaya Towers Limited vs. Trade Bank Limited* (In Liquidation) Civil Appeal No 35 of 2000, the court expressed itself thus:

“No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”
17. The applicants have in their application sought that the court lifts the veil of incorporation of the contemnors/respondents to enable them execute the decree and orders of the court. By allowing this prayer, the court will have joined the contemnors/respondents individually as parties to the suit.
18. I find and hold that the issues subject of the instant Preliminary Objection, are not pure points of law as to have the effect of disposing off the applicant’s application in its entirety.
19. Consequently, the 3rd and 4th contemnors/respondents Preliminary Objection dated November 15, 2021, is dismissed with costs to the claimants/applicants.
20. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2022.

CHRISTINE N BAARI

JUDGE.

Appearance:

N/A for the Claimant/Applicant

Mr Khamala present for the 3rd & 4th respondents/contemnors



Ms Christine Omollo-C/A

