



Bakamoyo Limited v Nathoo & 3 others (Environment & Land Case 43 of 2021) [2024] KEELC 7207 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 43 OF 2021
LL NAIKUNI, J
OCTOBER 31, 2024**

BETWEEN

BAKAMOYO LIMITED PLAINTIFF

AND

TAJDIN ALIBHAI NATHOO 1ST DEFENDANT

**JOHN BARASA FWAMBA (SUIING ON BEHALF OF THE ESTATE OF HADI
BAHADURALI HASHAM 2ND DEFENDANT**

DIRECTOR OF CRIMINAL INVESTIGATION MOMBASA 3RD DEFENDANT

MOMBASA DISTRICT LAND REGISTRY 4TH DEFENDANT

RULING

I. Introduction

1. This Honourable Court was called upon to make a determination onto a filed Notice of Preliminary objection dated 6th August, 2024 by John Barasa Fwamba (Suing On Behalf of the estate of Hadi Bahadurali Hasham), the 2nd Defendant herein.

II. The 2nd Defendant's case

2. The 2nd Defendant raised a preliminary objection on a point of Law to the effect that the suit herein was bad in law and was an abuse of the Court process having been filed contrary to the mandatory provisions of the *Companies Act*, 2015 and the *Civil Procedure Act* and Rules. It was stated that there was no resolution to file this suit made by the Directors nor to appoint Mohamed Ahmed Anwar to sign documents on behalf of the company and to appoint the Advocates as the Plaintiff's Advocates.



III. Submissions

3. On 17th September, 2024 while all the parties were present in Court, they were directed to have the Notice of Preliminary objection dated 6th August, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not as yet accessed any of the filed submission. Nonetheless, the Court proceeded to render the decision on its own merit.
4. Pursuant to that, a ruling date was reserved for 31st October, 2024 by the Honourable Court accordingly.

IV. Analysis and Determination

5. I have keenly read the pleadings herein with regard to the Notice of Preliminary objection dated 6th August, 2024 by the 2nd Defendant/Applicant herein, the appropriate and applicable provisions of *the Constitution* of Kenya, 2010 and the Law.
6. In order to reach an informed, fair and just decision, the Honorable Court has framed the following three (3) issues for determination:-
 - a. Whether the Notice of Preliminary objection dated 6th August, 2024 meets the fundamental threshold of a preliminary objection.
 - b. Whether the Preliminary objection as raised on the lack of resolution of the board of the Plaintiff is merited
 - c. Who will bear the Costs of the Notice of Preliminary objection?

Issue No. a). Whether the Notice of Preliminary objection dated 6th August, 2024 meets the fundamental threshold of a preliminary objection.

7. Under this Sub – heading, the Honourable Court will deliberate on the issue of a preliminary objection. Thus, in determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description. Various Courts have expended a great deal on this jurisprudence and hence there will be no need to re – invent the wheel here.
8. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
9. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696”, the court observed that: -

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue.”



10. The same position was held in the case of “Nitin Properties Limited – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989 [1995-1998] 2EA 257” where the Court held that;
- “ A preliminary Objection 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 facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
11. Similarly, in the case of “United Insurance Company Limited – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;
- “ A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
12. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCC Misc. App No. 247 of 2003” where the Court held that;
- “ A Preliminary Objection cannot be raised if any facts has to be ascertained.”
13. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR”:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
14. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 2nd Defendant herein which is founded on the provision of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection is compliance of the Company laws as required by the Civil Procedure Rules, 2010.

Issue No. b). Whether the Preliminary objection as raised on the lack of resolution of the board of the Plaintiff is merited

15. Having stated the legal parameters, the Honourable Court will now endeavor to apply it to the instant case. From the record, the preliminary objection raised by the 2nd Defendant herein is founded under the dictum of the provision of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010. The Applicant is seeking that the suit be struck out on the ground that the Plaintiff did not comply with the aforesaid provisions of the law to the extent that no resolution was filed appointing the deponent of the filed pleadings. According to the Applicant there neither resolution by the Directors to file this suit, to appoint Mohamed Ahmed Anwar to sign documents including the verifying Affidavits on behalf of



the company nor to appoint the Advocates as the Plaintiff's Advocates. For these reasons the Applicant urge the Court to struck out the suit altogether with costs.

16. The provision of Order 4 Rule 1 (4) 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.’

17. On the onset, this Honourable Court fails to concur with that position at all and particularly this being a land matter. In saying so, I will seek refuge from several legal propositions and decided cases. From the filed records, the Plaintiff describes itself as a limited liability company and therefore the deponent of the verifying affidavit ought to annex the authority as provided for under Order 4 Rule 1(4) of the Civil Procedure Rules, 2010. In the case of “Leo Investments Ltd – Versus - Trident Insurance Company Limited (2014) eKLR” Odunga, J was in agreement with the decision of Kimaru J in the case of “Republic – Versus - Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR” where the court stated:-

“.....such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.”

18. Further in the Court of Appeal in the case of “Spire Bank Limited – Versus – Land Registrar & 2 others [2019] eKLR” also stated as follows:-

“.....It is essential to appreciate that the intention behind Order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

19. In the present matter the Plaintiff at the time of filing the Plaint filed on 20th March, 2021 also filed a letter of authority attached to the bundle of documents appointing and authorizing Mr. Mohamed Ahmed Anwar to execute all documents including any Verifying Affidavit and/or supporting and Replying Affidavits and witness statements. This letter was under the letter head of the Plaintiff’s company and was duly executed under seal in the presence of another director of the Plaintiff company. In the premises there cannot be any doubt that Mr. Mohamed Ahmed Anwar was authorized to plead on behalf of the Plaintiff and that the Verifying Affidavit accompanying the plaint was properly signed by him.

20. Although the said letter of authority was strictly not in the form of a resolution of the Board of directors, it is clear evidence that the directors of the company had authorized the suit to be commenced and had appointed Mr. Mohamed Ahmed Anwar, a director of the company to represent the company.

21. Having found that the company (Plaintiff) had indeed authorized the filing of the suit, the mere fact there was no board resolution that was filed together with the Plaint sanctioning the filing of the



suit cannot render the suit fatally defective, See the case of:- “Leo Investments Ltd – Versus - Trident Insurance Co. Limited (Supra)” where Odunga, J held that failure to file a resolution authorizing filing of the suit does not invalidate the suit as the defect can be rectified by filing the resolution before the suit was heard. To hold otherwise would be to elevate procedural technicalities to a point where they would be an impediment to the administration of justice. The provision of Article 159 (2) (d) of *the Constitution* of Kenya, 2010 upon which the provision of Section 19 (1) of the *Environment and Land Court Act*, No. 19 of 2011 echoes, enjoins the court to administer justice expeditiously and without undue regard to technicalities of procedure. Additionally, the inherent powers of the Court as founded under the provision of Sections 1, 1A, 3 & 3A are spot on with regard to this. Section 3A of the *Civil Procedure Act* provides that:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

22. The said Section 3A of the *Civil Procedure Act* gives court inherent powers to issues such orders as may be necessary to meet the ends of justice. Various courts have held such a resolution can be filed at any time before the hearing of the case. The preliminary objection was intended to bar the plaintiff from making amends to any omissions that may have occurred in the institution of the case. I would opine that just as parties are permitted to amend their pleadings in the course of the proceedings, a party ought to also be permitted to correct a misstep in the procedure adopted in the institution of the suit when no prejudice and/or injustice is occasioned to the opposing party. The significance of a board resolution authorizing the filing of a suit by a corporate entity is to ensure that they do not have unauthorized persons instituting suits on behalf of companies in respect of which the companies may have no knowledge about yet when liabilities ensue they would be expected to shoulder the same
23. It is my view that the law has elaborately made provisions which cushion the court from leaning on technicalities at the expense of doing justice. The courts will determine disputes on the merits and lean on the principle of natural justice which guide all courts, that is, a party in a dispute must be given an opportunity to be heard. From the foregoing, I find that the objection by the 2nd Defendant cannot be sustained.

Issue No. c). Who will bear the Costs of the Notice of Preliminary objection?

24. It is trite law that the issue of Costs is the discretion of the Court. Costs mean any award that is granted to a successful party in any legal action, process or proceedings in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 provides that costs follow the events. By event it means the results or outcome of the said legal action, process or proceedings in any litigation. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.



25. In the case of:- “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp – Versus - Gibbon & Co., 1913 ADD 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

26. In the present case, the 2nd Defendant has not succeeded in the Notice of Preliminary Objection. I therefore dismiss the same and hold that the Plaintiff is entitled to costs thereof.

V. Conclusion & Disposition

27. Upon considering all the framed issues herein, this Honorable Court on preponderance of probability, I proceed to make the following findings: -

- a. That the Notice of Preliminary Objection dated 6th August, 2024 by the 2nd Defendant/Applicant is found to be unmeritorious and thus the same be and is hereby overruled.
- b. That an order be and is hereby made by this Honourable Court “Suo moto” and for good order directed at the Plaintiff to file a resolution by its board within the next 14 days of this Ruling.
- c. That for expediency sake, there be a mention on 19th February, 2025 for conducting a Pre – Trial conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. Thereafter, the matter to be fixed for hearing on 20th March, 2025.
- d. That the costs of the Notice of Preliminary Objection dated 6th August, 2024 be awarded to the Plaintiff herein.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 31ST DAY OF OCTOBER 2024.

HON. MR. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:-

M/s. Firdaus Mbula – the Court Assistant.

No appearance for the Plaintiff & 1st Defendant.

Mr. Mr. Andolo Advocate for the 2nd Defendant.

