



**Varma & another v Uniken Limited & 2 others; Athi Stores Limited (Proposed Interested Party)
(Miscellaneous Application E026 of 2021) [2023] KEELC 393 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 393 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E026 OF 2021**

**A NYUKURI, J
JANUARY 25, 2023**

BETWEEN

SUNIT SINGH VARMA 1ST APPLICANT

**SUDARSHAN SINGH VARMA & SONAL SURYAKANT RAVAL (SUING IN
THEIR CAPACITY AS THE EXECUTOR OF THE ESTATE OF THE LATE
SANTOSH KUMARI VARMA 2ND APPLICANT**

AND

UNIKEN LIMITED 1ST RESPONDENT

ATHI MINERALS LIMITED 2ND RESPONDENT

SPARE TECH LIMITED 3RD RESPONDENT

AND

ATHI STORES LIMITED PROPOSED INTERESTED PARTY

RULING

Introduction

1. Before court is a chamber summons application dated October 15, 2021 filed by the proposed interested party seeking the following orders;
 - a. Pending the hearing and determination of this application, this honourable court be pleased to stay any further proceedings in the matter.
 - b. That in the first instance and thereafter pending hearing and determination of this application, Athi Stores Limited be joined to these proceedings as an interested party.



- c. Upon grant of prayer (2) above, the honourable court be pleased to grant the interested party leave to file a response to the application dated April 20, 2021.
 - d. The costs of this application be provided for.
2. The application is premised on the supporting affidavit of Shammit Niranjandass Ghai. The applicant's case is that they have been in exclusive possession of the property known as LR 18696/55 and are the legal and beneficial owner of that property measuring 20 acres which was part of LR No 11895/1 (suit property). Further that the notice to vacate dated December 16, 2020 was addressed to the applicant and that the applicant has an identifiable stake in the suit because the respondent is an affiliate of the applicant.
 3. The application is opposed. Sunit Singh Varma the 1st applicant/respondent filed a replying affidavit sworn on April 4, 2022. The respondent's case is that he is the registered owner in common with the late Madam Mohan Singh Varma and Santosh Kumari Varma, of land known as LR No 11895/1 (suit property). He opposed the joinder of the applicant to the suit on ground that it is a moribund entity that has lost its legal status having coupled one Mr Shammit Niranjandass Ghai with the sole aim of defrauding shareholders.
 4. He further stated that he was one of the directors of the applicant company and majority shareholder thereof and that the company had not authorized Shammit Niranjandass Ghai to institute any legal proceedings and that the application was meant to derail this matter. That for 20 years the company has not operated any business, or held annual general meetings or complied with statutory reporting requirements to the Registrar of Companies and that the eviction is meant to stop Mr Shammit from using the respondents to defraud the shareholders.
 5. The deponent stated that it was the respondent who was in illegal occupation of the suit property. Further that the respondents are not affiliates of the applicant as they are separate legal entities registered by Mr Shammit Ghai as a front to cover up the conflict of interest in the applicant's activities.
 6. The application was canvassed by way of written submissions. On record are the proposed interested party's submissions filed on May 13, 2022 and the applicant/respondents submissions filed on August 19, 2022.

Submissions

7. Counsel for the proposed interested party submitted that the interest of the proposed interested party is that it is a beneficial owner of the suit property and that they have an identifiable interest over the ownership and occupation of the suit property. Reliance was placed on the cases of *Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR* and *Francis Kariuki Muruatetu & Others v Republic of Kenya National Commission of Human Rights & 3 Others [2016] eKLR*.
8. Counsel for the proposed interested party argued that the respondents were invited into the suit property by the proposed interested party and that therefore the occupier is the proposed interested party. Counsel contended that the question of ownership between the applicant and the proposed interested party ought to be determined so that all the issues will be settled in the suit. It was counsel's submissions that joinder will protect the rights of the proposed interested party who would otherwise be adversely affected by the decision of the court and that it will prevent proliferated litigation.
9. On their part, counsel for the respondent submitted that the application by the proposed interested party was incompetent for want of a written resolution and authority to depone on behalf of the



company. Counsel submitted that there ought to be a written authority to plead. Reliance was placed on the cases of *Fidelity Commercial Bank Limited v Simon Maina Gachie [2016] eKLR* and *Republic v Registrar General & 130 Others [2015] eKLR*. Counsel argued that Sharmmit Niranjandass never filed authority or resolution to depone despite having been challenged on that aspect. The court was also referred to the cases of *Pamella Jebichii Koskei v Horizon Coach Co Ltd, Board of Trustees National Social Security Fund v Michael Mwelo [2015]* and *Makula International Limited v Eminence Cardinal Nsubuga & Another [1982] HCB II*, for the proposition that the chamber summons is irregular for want of capacity and authority to depone.

10. On whether the proposed interested party met the threshold for joinder, counsel submitted that the applicant must meet the threshold set in the Supreme Court decision of *Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR*. Counsel argued that the proposed interested party had not placed any material before court to demonstrate the relevance of the joinder.

Analysis and Determination

11. I have carefully considered the chamber summons, the response thereto and the submissions. The issues that arise for determination are;
 - a. Whether the application is incompetent for want of resolution to institute the proceedings herein.
 - b. Whether the proposed interested party has met the threshold for joinder.
12. The respondent contended that the application was incompetent as the applicant failed to file the resolution authorizing him to depone on behalf of the company and authorizing the institution of the proceedings herein. Should there be a resolution of the board of directors of a company authorizing institution of the proceedings before such proceedings are commenced? My view is that there ought to be such resolution before a suit is commenced and such resolution filed in court.
13. I share the position taken by the court in the case of *Affordable Homes Africa Limited v Ian Henderson & 2 Others* HCCC No 524 of 2004, where the court held as follows;

“That as an artificial body, a company can take decisions only through the agency of its organs, the board of directors and the shareholders; and that where a company’s powers of management are, by the articles vested in the board of directors, the general meeting cannot interfere in the exercise of those powers..... The upshot of these considerations is that in the absence of board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs to be borne by the advocates for the plaintiff.”
14. Similarly, in the case of *Bugerere Coffee Growers Limited v Sebaduke & Another* [1970] EA 147, the court held as follows;

“When companies authorise the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or board of directors; meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings;”



15. Also in the case of *Yussuf Abdi Adan v Hussein Ahmed Farah & 3 Others [2017] eKLR*, the court held as follows;

“A managing director, a company secretary and/or majority shareholders cannot give instructions for the commencement of a suit on behalf of the company. The same would be a nullity, an illegality and usurpation of the powers of the board.

16. Essentially therefore, as a company is an artificial person, the authority to institute legal proceedings must be evident and must be given by the organ that runs the company which is a board of directors, where the company has more than one director.

17. In the instant application, the respondent was categorical that he is the majority shareholder of the applicant company and that the deponent of the supporting affidavit did not get any authorization to commence these proceedings. Where lack of resolution to file proceedings is raised by one of the directors of the company, then the applicant ought to file the resolution to show that indeed there was a resolution for institution of the legal proceedings and that even though the same were not filed at the institution of the suit, it is filed before the suit is set down for hearing. In this case, even after being challenged to avail the resolution to file the current proceedings, none were filed and there was no denial of the allegation that there was no resolution to file these proceedings.

18. In view of the above reasons, it is my finding that the application for joinder for purposes of participating in these proceedings and claiming a stake herein, were not authorized by the board of directors of the applicant company hence the application is incompetent and the same is hereby struck out with costs to the respondent.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF JANUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A NYUKURI

JUDGE

In the presence of;

Mr Njoroge for the applicants

Ms Dave for interested party

Josephine – Court Assistant

