



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
CASE No. 334 OF 2012

LESSAN HARDWARE LTDPLAINTIFF

VERSUS

SETTLEMENT FUND TRUSTEE & 2 OTHERS.....DEFENDANTS

RULING

1. This ruling is in respect of the preliminary objection raised by the 2nd and 3rd defendants at paragraph 12 of their statement of defence dated 9th July 2012 and filed in court on the same date. The preliminary objection is pleaded in the following terms:

12. The 2nd and 3rd defendants contend that the suit is fatally defective incompetent and instituted without authority and the 2nd and 3rd defendant shall raise a preliminary objection that the entire suit be struck out with costs.

2 Parties opted to dispose of the preliminary objection by way of written submissions. The 2nd and 3rd defendants filed their submissions on 10th April 2017 while the plaintiff filed its submissions on 2nd June 2017. The 1st defendant opted not to file any submissions, instead opting to associate itself with the submissions of the 2nd and 3rd defendants.

3. The 2nd and 3rd defendants distilled their objection into the following five points as captured in their written submissions:

1. *The suit was filed without due authority from the plaintiff company;*
2. *There is no resolution or valid resolution of the plaintiff company approving the institution of this suit.*
3. *There is no resolution or no valid resolution of the plaintiff company appointing Ikua, Mwangi & Co. Advocates to institute this suit for and on behalf of the plaintiff company.*
4. *The filing of this suit by the said firm of advocates is invalid for want of authority from the plaintiff company.*
5. *The plaintiff company did not authorize JANE CHEROTICH CHEPKOWNY to swear the verifying affidavit.*

4. The 2nd and 3rd defendants contend that the suit was filed without the authority of the plaintiff, a

corporation, contrary to the provisions of Order 4 rule 1(4) of the Civil Procedure Rules. The 2nd and 3rd defendants further submit that there was no resolution of the board of the plaintiff company authorizing the filing of the suit or even the swearing of the verifying affidavit by Jane CherotichChepkwony. Consequently, the 2nd and 3rd defendants urge the court to dismiss the case for being fatally defective.

5. The plaintiff in its submissions has termed the preliminary objection as premature since the issue of whether or not the suit was filed with authority is an issue of fact to be proved at the trial. The plaintiff has also argued that the court should aim at determining the suit on its merits as opposed to striking it out on technicalities.

6. I have considered the preliminary objection, the submissions in support and in response to it. From the onset it is important to restate the law on preliminary objections. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696 Law JA*, stated that

So far as I'm aware, 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.

Similarly Sir Charles Newbold stated in the same case that:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.

7. It is plain therefore that a preliminary objection should not be one that requires determination of disputed facts. The question of whether or not there was resolution of the board of the plaintiff company authorizing the filing of the suit or the swearing of the verifying affidavit is an issue of fact that requires on analysis of evidence for determination. It cannot therefore be the basis of a preliminary objection.

8. In the end, I find that the preliminary objection has no valid basis. It is dismissed. Costs to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 31st day of July 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Ikua for the plaintiff/applicant

No appearance for the 1st defendant

Mr. Langat for the 2nd and 3rd defendants/respondents

Court Assistant: Gichaba