



**Solai Ruyobei Farm Ltd v Cherutich & another (Environment & Land
Case 52 of 2022) [2023] KEELC 16359 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16359 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 52 OF 2022**

**FM NJOROGE, J
MARCH 22, 2023**

BETWEEN

SOLAI RUYOBEI FARM LTD PLAINTIFF

AND

KIPKOECH CHEBET CHERUTICH 1ST DEFENDANT

JACKSON TUITOEK 2ND DEFENDANT

RULING

1. This ruling is in respect of the defendants Notice of Preliminary Objection dated 6/12/2022 and filed on the same date which is on the following grounds:
 - a. That the suit was filed without due authority from the plaintiff.
 - b. That there is no resolution or valid resolutions of the plaintiff approving the institution of this suit.
 - c. That there is no resolution or no valid resolution of the plaintiff appointing the law firm of A. Mukira and Company Associates to institute this suit for and on behalf the plaintiff.
 - d. That the filing of this suit by the said firm of advocates is invalid for want of authority from the plaintiff.
 - e. That the plaintiff did not authorize Richardson Bundotich to swear verifying affidavit and other documents and support including witness statement.
2. The preliminary objection was canvassed by way of written submissions. The defendants filed their submissions dated 31/01/2023 on the same day while the plaintiff filed its submissions dated 7/02/2023 on 08/02/2023.



3. The defendants in their submissions relied on Order 4 Rule 1(4) of the *Civil Procedure Rules*, the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and submitted that it is settled in law that where a suit is to be instituted for and/or behalf of a company, there should be a resolution to that effect.
4. The defendants further relied on the cases of *Affordable Homes Ltd v Henderson & 2 Others* [2004] eKLR, *East African Portland Cement Ltd v The Capital Markets Authority & 5 Others* [1970] EA 147 and submitted that in the absence of a board resolution, the plaintiff herein has no legal standing to commence this suit against the defendants and that it should be struck out with costs. The defendants also relied on the case of *East African Safari Air Limited v Anthony Kegode & Another* (citation not given) and submitted that they are the current directors of the plaintiff and were handed the Provisional Certificate of title for LR No. 20229/1, IR 67258 which is the subject matter of this case pursuant to a court ruling dated 1/02/2018 in Nakuru ELC 532 of 2013 *Simon Kandie & 6 Others v Richardson Kipkoech Bundotich and 5 others* (citation not given) which orders have never been challenged or set aside.
5. The defendant also submitted that the group led by Richardson Kipkoech Bundotich who was the defendant in Nakuru ELC 522 of 2013 have filed the present suit against them and have annexed a copy of CR 12 to the plaint which they have allegedly fraudulently acquired in an attempt to change the directorship of the plaintiff without the participation of the shareholders. That the said CR 12 is subject to challenge in court in Nakuru High Court Civil Application No. E26 of 2022 *Cheruiyot Arap Chamgwony & Another v Registrar of Companies & 9 Others*. The defendant also submitted that it is clear that the issue of directorship of the plaintiff is highly contested and therefore it required special care from the firm of A. Mukira and Associates to get necessary authorization by way of clear resolutions of the board prior to filing this suit. They concluded their submissions by stating that the plaint is fatally defective and should be struck out with costs to the defendants.
6. The plaintiff in its submissions identified two issues for determination which are whether the defendants' preliminary objection met the requirements of a preliminary objection and whether the failure to file and/or obtain authority to file the suit is fatal.
7. On the first issue, the plaintiff relied on the cases of *Mukisa Biscuit Co. v West East Distributors Ltd* [1969] EA 696, *Spire Bank Ltd v Land Registrar and 2 Others* (citation not given) and submitted that the issue of filing an authority is factual and evidence must be called to prove the same hence the preliminary objection is premature.
8. On the second issue, the plaintiff relied on the case of *Leo Investment Ltd v Trident Insurance Company Ltd* [2014] eKLR and submitted that the court should find that failure to file the authority with the initial pleading does not make the suit fatal as to warrant striking it out as it can be rectified. The plaintiff further relied on the cases of *Eve Company (K) Ltd v Erastus Rotich T/A Vision Express* [2021] eKLR, *Spire Bank Ltd v Land Registrar & 2 Others* [2019] eKLR and submitted the suit as filed is proper and the preliminary objection does not meet the requirements of the law.

Analysis and determination

9. After considering the preliminary objection and the submissions filed, the only issue that arises for determination is whether the suit should be struck out for failure of the plaintiff to file a resolution approving the institution of the suit and failure of the firm of A. Mukira and Associates to file a valid resolution by the plaintiff appointing them to institute this suit on behalf of the plaintiff.



10. Order 4 Rule 1(4) of the [Civil Procedure Rules](#) provides as follows:

“(4) 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.”

11. Ancient authorities exist on this point including *Bugerere Coffee Growers Ltd v Seraduka & Anor.* (1970) EA 147 where it was held that when companies authorise the commencement of legal proceedings, a resolution has to be passed either at a company or Board of Directors’ meeting and recorded in the minutes and where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action. However, more recent case law has softened the approach given to failure to file company resolutions authorising filing of suits or lawyers to act.

12. The court in the case of [Leo Investments Limited v Trident Insurance Company Limited](#) [2014] eKLR stated as follows:

“On the issue whether or not the suit is defective, it was contended that there was no authority given by the plaintiff company authorising the institution of these proceedings contrary to the provisions of the [Civil Procedure Act](#). Order 4 rule 1(4) of the [Civil Procedure Rules](#) provides:

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.

Clearly from the foregoing provision, nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff’s bundle of documents which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of Kimaru, J in *Republic v Registrar General and 13 Others* Misc. Application No. 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime 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.”

13. The defendants allege that there is no valid resolution filed by the plaintiff herein approving the institution of the present suit. The plaintiff on the other hand argues that failure to file the resolution is not fatal to warrant the striking out of the suit, and that the same can be rectified. A perusal of the documents attached to the plaint show that the plaintiff did not file the resolution approving the institution of the suit. As was held in the case of [Leo Investments Limited v Trident Insurance Company Limited](#) (*supra*) cited above, failure to file the company resolution is not fatal to the suit to warrant it to be struck out. The preliminary objection on that ground fails.

14. The defendants further argued that there is no resolution of the plaintiff appointing the law firm of A. Mukira and Associates to institute this suit on its behalf. They also argue that the directorship of the plaintiff is contested and that it was necessary for the firm of A. Mukira and Associates to get the necessary authorization from the board before filing the present suit. The plaintiff did not address this portion of the preliminary objection.



15. I have considered the dicta of the court in the case of *Leo Investments Limited v Trident Insurance Company Limited* (*supra*) (Per Odunga J.) which stated as follows:

The next issue is that there was no company resolution to institute the instant suit and instruct the firm of Mutembei, Gichuru & Company Advocates to act for the plaintiff. It is trite that advocates can only act in a matter where they have been instructed either expressly or by implication. It is also trite that an incorporated person is but just a legal person in the eyes of the law. It is therefore axiomatic that an incorporated body has of necessity to act through agents who are usually its Board of Directors by way of resolutions passed thereby. Where for example it is proved to the satisfaction of the Court that legal proceedings were commenced by or on behalf of an incorporation by an advocate contrary to or in the absence of the instructions of an incorporation it is trite in this jurisdiction that such proceedings are liable to be struck out with costs being borne by the advocate concerned. This was the position in *Tavuli Clearing & Forwarding Limited v Charles Kalujjee Lwanga Nairobi* (Milimani) HCCC No. 585 of 2004 where Kasango, J held that under section 27 of the *Civil Procedure Act* the Court has wide discretion to make orders in respect of costs and an advocate is liable to pay costs personally for filing a suit he is not authorised to so file and in the case of an incorporated company such authority can only be by resolution or resolutions passed either at a company or board of director's meeting, recorded in the minutes. It follows that if the firm of Mutembei, Gichuru & Company Advocates had no instructions either expressly or by implication in this matter all the pleadings filed by the said firm would be liable to be struck out with costs to be borne by the said firm. It is however to be noted that an action commenced without authority is capable of being ratified. As was held by Hewett, J in *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd.* Nairobi (Milimani) HCCC No. 391 of 2000:

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

In this case, PW3 testified that though the decision to file the suit was made by one of the directors, Rahim, his elder brother, he was involved in the decision after the issue was raised at a Board of Directors' meeting at which a verbal resolution was passed. He said that the firm of advocates on record is in their panel and it was Rahim who made the decision that they be given the work in their presence. In my view, where there is a general retainer given to an advocate by a client, it does not fall in the mouth of the client to argue that there were no instructions given to the advocate in respect of a particular matter falling within the series in which there was a general retainer unless it is shown that there were express instructions given to the advocate not to act in that particular matter. In that event the onus of proving lack of instruction would be on the person alleging the same.



Accordingly, I am not prepared to hold that this suit was commenced without authority of the plaintiff as to do so would amount to turning this Court into an academy of law rather than a court of justice. See *Anthony Edward Cumming v Queen's Hotel* Civil Appeal No. 28 of 1934 [1935] 2 EACA 25.

16. In the case of *Spire Bank Ltd v Land Registrar & 2 others* the Court of Appeal held that the provision requiring that only an authorized officer could institute proceedings on behalf of a corporation 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 authorized.
17. The question also arises as to the approach the court should take when after the preliminary objection no resolution has been filed to correct the situation. In the case of *Kenya Commercial Bank Limited v Stage Coach Management Ltd* [2014] eKLR Havelock J stated as follows:

“In this case, there has been no such ratification even after the Plaintiff, through its advocates or otherwise, became aware of the Preliminary Objection filed by the Defendant dated over a year ago now. In my view, the Plaintiff has been lackadaisical to say the least. As a result, I exercise my discretion to uphold the Defendant’s Preliminary Objection and I dismiss this suit with costs to the Defendant.”
18. I have not seen the defence of the defendants in this matter so as to assess its merits as none had been filed by the time the notice of preliminary objection was lodged. The above approach by Havelock J in *Kenya Commercial Bank Limited v Stage Coach Management Ltd* [2014] eKLR does not detract from the fact that the objection raised herein still remains a technical objection that does not go into the merits of the dispute between the plaintiff and the defendants.
19. It is clear that from the documents filed that the two defendants herein alongside one Simon Kandie received the provisional certificate of title to the plaintiff’s land only because they were plaintiffs in Nakuru ELC 532 of 2013 and their names appeared in a letter from the Registrar of Companies dated 19/12/2017 identifying them as directors of the plaintiff then. None of them has in the instant case presented any recent document to show that they are still directors. The plaintiffs have on the other hand attached a letter from the Registrar of Companies dated 24/8/2021 in which none of the defendants appear as directors.
20. I am inclined to go by the more recent Registrar’s letter as prima facie evidence of who is in control of the plaintiff company and since the defendants are not named therein, their claim that there is no company resolution must for now be taken with a pinch of salt as a technicality, an unsubstantiated claim and an instinctive defence mechanism adopted merely to save their skin from the plaintiff’s wrath. It is this court’s view therefore that the defendants’ preliminary objection dated 6/12/2022 lacks merit and it is hereby dismissed.
21. The plaintiff shall file and serve the requisite resolutions before the matter is set down for hearing. This suit shall be mentioned on 26/4/2023 for confirmation of compliance with the foregoing order and also Order 11 of the *Civil Procedure Rules* and for issuance of a hearing date.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

