



REPUBLIC OF KENYA



**Mogusii Farmers Group Co Ltd & another v Mose & 27 others;
Momanyi & 2 others (Interested Parties) (Civil Case 5 & 4 of 2021
(Consolidated)) [2023] KEHC 3755 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL CASE 5 & 4 OF 2021 (CONSOLIDATED)**

WA OKWANY, J

APRIL 27, 2023

BETWEEN

MOGUSII FARMERS GROUP CO LTD 1ST PLAINTIFF

MOGUSII TEA CO. LTD 2ND PLAINTIFF

AND

HUDSON MOSE 1ST DEFENDANT

CHARLES ONDARI ACHOKI 2ND DEFENDANT

SAMWEL MOGENI MAROKO 3RD DEFENDANT

ISAAC MANONO ACHOKI 4TH DEFENDANT

MILKA MOTITO 5TH DEFENDANT

BILLIAH ONGERA 6TH DEFENDANT

PASTOR ISALIAH AGWATA OKEMWA 7TH DEFENDANT

WILLIAN BIRAI 8TH DEFENDANT

YOBESH OPENDA MOKAYA 9TH DEFENDANT

STEVE KAKA KIMORI 10TH DEFENDANT

DANCAN OMENGE ONDARI 11TH DEFENDANT

PETER OKERIO 12TH DEFENDANT

JUSTUS OBINO 13TH DEFENDANT

ELIZAPHAN NYAKUNDI NYATUKA 14TH DEFENDANT

CHARLES BARONGO 15TH DEFENDANT



STEPHEN MBOGA	16 TH DEFENDANT
MESHACK OCHENGO MOKUA	17 TH DEFENDANT
ATOMIC NYASINGA NYAKUNDI	18 TH DEFENDANT
RICHARD AYIERA OGETO	19 TH DEFENDANT
DANIEL MOKAYA	20 TH DEFENDANT
JOHNSTONE SAGWE	21 ST DEFENDANT
FREDRICK GOCHI	22 ND DEFENDANT
ALFRED ONSOMU	23 RD DEFENDANT
JAMES MOKUA	24 TH DEFENDANT
STANLEY MISATI	25 TH DEFENDANT
IRENE NYAKUNDI	26 TH DEFENDANT
DANCAN ABUGA	27 TH DEFENDANT
STEVE ORINA	28 TH DEFENDANT

AND

HON. BEN ORORA MOMANYI	INTERESTED PARTY
THE COUNTY COMMISSIONER NYAMIRA COUNTY .	INTERESTED PARTY
THE DEPUTY COUNTY COMMISSIONER BORABU SUB-COUNTY	INTERESTED PARTY

RULING

1. This ruling is in respect to the Defendants’ Preliminary Objection (PO) dated 27th November 2022 wherein the Defendants object to the Plaintiff’s suit on the following grounds: -
 1. That the instant suit, as filed and presented before the Honourable Court, is incurably defective for non-compliance with the mandatory provisions of the Law, to wit, Order 4 Rule 1 (4) of the *Civil Procedure Rules*.
 2. That the suit herein was filed without authority from the Plaintiff’s company and neither is the deponent of the verifying affidavit duly authorized under the seal of the Plaintiff’s company to swear the same.
 3. That there is no resolutions as to the appointment of the firm of Nyagaka Mosota, Isaboke, Kerosi Ondieki & Associate Advocates authorizing them to file the instant suit.
 4. That in the circumstance, the suit herein is procedurally and substantively bad in law, hence suitable to be dismissed and/or struck out with costs to the Defendants.
2. The Defendants’ case is that Order 4 Rule 1 (4) of the *Civil Procedure Rules* is couched in mandatory terms and must be complied with when filing a suit on behalf of a company.



3. The Defendants submitted that the Preliminary Objection is on a pure point of law as the Plaintiffs did not anchor their authorization under the seal of the company as such authorization has not been filed in court.
4. It was the Defendants' case that a claim filed by a company must be backed by resolutions authorizing the said filing and that the person swearing an affidavit in support of the suit has to be authorized to do so under the seal of the company. It was further submitted that the law firm instituting the suit on behalf of the company must have been appointed to do so vide a resolution of the company. According to the Defendants none of the above requirements had been fulfilled by the Plaintiff.
5. For this argument, the Defendant cited the decision in *Steel Formers Ltd v SGS (Kenya) Ltd* [2020] eKLR where it was held that:

“The verifying affidavit where the Plaintiff is a corporation is mandatory that it be sworn by an officer of the Company duly authorized under the seal of the Company to do so. In the instant Petition, what is on record is a supporting affidavit by James Kamau Mwaura where by in paragraph 1 he states: -

That I am a male adult of sound an engineer by profession and the managing director of the Petitioner herein hence fully competent and duly authorized this affidavit.

The deponent avers that he was duly authorized by the Petitioner to swear the affidavit but there is no evidence of his duly authorization under the Seal of the Company as provided under Order 4 Rule 1 (4) of the *Civil Procedure Rules*. In addition to this, there is no attached copy of resolution of the Petitioner either approving the institution of this petition or appointing Mr. Onesmus Githinji and Company Advocates to institute the Petition on its behalf.”

6. The Plaintiffs did not file any response to the Preliminary Objection and as at the time of writing this ruling, they had not filed or served their written submissions. I will nonetheless deliver the ruling based on the law and the pleadings availed before me.
7. The Preliminary Objection is founded on alleged non-compliance with the provisions of Order 4 rule 1(4) of the *Civil Procedure Rules* which provides that: -

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.

8. The Defendants' case was that there was no authority given by the Plaintiff companies authorizing the institution of these proceedings contrary to the provisions of the *Civil Procedure Rules*. As I have already stated in this ruling, there was no rejoinder to the Preliminary Objection from the Plaintiffs and it is therefore not clear if they were authorized to file the suit or not.
9. Courts have however held that the mere failure to file the authorization with the Plaintiff does not necessarily invalidate the suit as such authorization can be filed at any time before the suit is fixed for hearing. This is the position that was taken in *Republic v Registrar General and 13 Others* Misc. Application No. 67 of 2005 [2005] eKLR where it was held that 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. I therefore find that the absence of the Boards resolution to file the suit is not fatal to the suit at this point in time when the suit has not been fixed for hearing as parties are yet to take the pretrial directions.



10. The Defendants also raised the issue that the person who swore the affidavit in support of the suit was not authorized to do so under the seal of the company. A reading of the provisions of Order 4 Rule 1 of the Civil Procedure Rules does not however indicate that there is a requirement that the authority given to the deponent of the verifying affidavit be filed with the Plaintiff. This, in my view, means that such authorization may be filed at any point before the hearing of the suit.
11. Regarding the claim that there was no company resolution to institute the instant suit, I find that it is trite that an incorporated company is a legal person in the eyes of the law. An incorporated body ordinarily acts through agents who are usually members of its Board of Directors. In Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd, Nairobi (Milimani) HCCC No. 391 of 2000 it was held that: -
- “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.”
12. In the instant case, a perusal of the record reveals that no company resolution was filed. However, as was stated in the Assia Pharmaceutical Case (supra), an action commenced without authority is capable of being ratified. I find that it would not be in the interest of justice to dismiss this suit on the ground merely that there was no authority filed to institute the suit as that is a defect that does not go to the jurisdiction of the court, and is an omission that is curable. The same view was expressed in Microsoft Corporation v Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460 where the court held as follows:
- “...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaintiff but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaintiff may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”
13. Guided by the dictum in the above cited case, I find that even if I was to find that the verifying affidavit in question is defective in form for want of authority under the company seal, which is not the case as I have already found herein above, such a defect cannot and should not warrant the striking out of the suit as sought in the Preliminary Objection.
14. For the reasons that I have stated in this ruling, I find that the Preliminary Objection is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.



15. It is so ordered.

Ruling dated, signed and delivered at Nyamira via Microsoft Teams this 27th day of April 2023.

W. A. OKWANY

JUDGE

