Hass Petroleum Co Limited v Country Motors Limited (Commercial Case 156 of 2012) [2023] KEHC 19657 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19657 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

COMMERCIAL CASE 156 OF 2012

RE ABURILI, J

JUNE 30, 2023

BETWEEN

HASS PETROLEUM CO LIMITED ..... PLAINTIFF

AND

COUNTRY MOTORS LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide Plaint dated 28th September, 2012 and filed on the even date seeking the following reliefs:

    i. The claim of Kshs 22,922,130.35 (Kenya Shillings Twenty-Two Million, Nine Hundred and twenty-Two Thousand, One Hundred and Thirty and Thirty-Five Cents) as itemized at paragraph 9.

    ii. Costs of this suit.

    iii. Interest on (a), (b) and (c) above at court rates from the date of default until the date of payment in full.

    iv. Such other or further relied as this Honourable Court deems fit to grant.

2. The Plaintiff's case is that it supplied the Defendant with petroleum products on credit terms worth a total of Kshs. 124,112,374.65 out of which there was an outstanding balance of Kshs. 22,922,130.35.

3. It was the plaintiff's case that on or about the 29th August 2012, the defendant made cheques in favour of the plaintiff to the tune of Kshs. 2,970,000 but the said cheques were dishonoured on presentation due to insufficient funds in the Defendant's bank account.

4. In support of its case, the plaintiff called one Mohammed Yusuf Salah, its area manager for Western Kenya who adopted his witness statement dated 2nd February 2023, asserting the plaintiff's supply of

petroleum products to the defendant on credit. The witness also produced several documents as filed by the plaintiff, as exhibits.

5. In cross-examination, PW1 stated that the plaintiff supplied the defendant with petroleum on credit terms over a period of time during which time the defendant had made some payments and what was owing was Kshs. 22.92 million.

6. It was his testimony in cross-examination that there was a letter dated 27th August 2012 by the defendant signed by one Odhiambo confirming the debt. PW1 further testified that the plaintiff had produced acknowledgement of debt and bounced cheques issued by the defendant.

7. PW1 further stated that the defendant would send trucks to the plaintiff's station to pick fuel after which a Local purchase Order-LPO and delivery notes would issue to the defendant together with the statement. In re-examination, PW1 stated that part of the Kshs. 124 million was settled leaving a balance of Kshs. 22.92 million as the defendant continued picking petroleum from its stations.

8. The Defendant opposed the Plaintiff's suit through a Statement of Defence dated 29th October, 2012 and filed on 31st October, 2012. In its Defence, the Defendant averred that no authority to sue and/or board resolution of the Plaintiff had been demonstrated in the suit and further that the Defendant never entered into any credit agreement with the Plaintiff for the supply of petroleum products hence denied the allegation that it acknowledged the balance of Kshs. 22,922,130.35. The Defendant only admitted the sum of Kshs. 2,970,000.

9. The defendant called Prithpal Singh Pandhal, its Manager as DW1 who adopted his witness statement dated filed on the 24th February 2013 and also produced documents as filed, as exhibits.

10. In cross-examination, DW1 admitted that the confirmation officer on the letter dated 22nd August 2012 was J. Odhiambo and though it was indicated that he was an accountant, Odhiambo was not an accountant but a driver. DW1 further stated that stamp and seal on the letter dated 22nd August 2012 were not the official stamp and seal of the defendant and thus the letter claiming that they admitted the claim was a forgery. DW1 testified that Odhiambo left employment in 2010. It was his testimony in cross-examination that he communicated severally to the plaintiff's not to bank the cheques, which cheques were for the payment for supply of oils and petroleum.

11. In re-examination DW1, stated that Odhiambo was his driver before 2012 and that he used to pick fuel from the plaintiff. It was his testimony that they admitted owing the plaintiff 2.9 million but when the plaintiff went to court claiming for Kshs. 22 million, they recalled the cheques.

12. The parties filed written submissions.

The Plaintiff's Submissions

13. It was submitted that at the time of filing its suit, the same was accompanied by its witness statement and documents in support of its pleadings, copies of cheques drawn by the Defendant in favour of the Plaintiff, being an admission of an existing debt between the two, that copies of returned cheques which were the same cheques drawn by the Defendant and the same were returned because the Defendants account had insufficient funds, a delivery note dated 28th August 2012 as proof of the Plaintiff's transaction with the Defendant and a copy of financial statement of the Defendant dated 19th July 2012 showing the transactions between the parties that amount to the decretal sum which the Plaintiff has deducted an amount that was previously settled by the Defendant and an admission letter dated 27th August 2012 by one J. Odhiambo, who the Defendant admitted was its employee.

14. The plaintiff submitted that the said document was an admission to a sum of Kshs. 22, 922, 130. 35, was duly signed by a representative of the Defendant and duly stamped with the Defendant's official stamp.

15. It was submitted that the Defendant had a responsibility to pay for the supply of petroleum and if an allegation is raised and evidence provided to the same, it is their duty to give evidence to the contrary, which they did not.

16. The plaintiff submitted that that the Cheques issued by the Defendant were an admission of debt as was held in the case of Starline General Supplies Ltd v Discount Cash & Carry Ltd [2006] eKLR.

17. The plaintiff submitted that the evidence it had presented was not controverted by the Defendant and that the explanation by the defendant as to why it recalled the cheques were not clear.

18. It was submitted that the failure by the Defendant to controvert any of the allegations by the plaintiff with evidence left the Plaintiff with a hearing similar to a formal proof hearing wherein the plaintiff's sole duty was to prove "on a balance of probabilities" that a debt was owed to it, and that through its documents, the Plaintiff fulfilled this burden whereas the Defendant on the other hand refused to respond.

19. The plaintiff submitted that the Defendants did not support any of their denials with any evidence, making their defence mere denial whereas the plaintiff had demonstrated to the Honourable Court through the documents filed, one of which was the financial statement and the admission of debt, and as such it was the Defendant's duty to demonstrate otherwise and he was unable to.

20. It was submitted that the drawn cheques were an admission of the debt owed by the Defendant to the Plaintiff. Reliance was placed on the case of Maimuna Mohammed (suing as the legal representative of the late Stephen Maina Kariuki) v Kenya bus services [2004] eKLR where it was held interalia that where upon issuing a cheque by a Defendant, the burden of proof automatically shifts from the Plaintiff and has to be borne by the Defendant.

The Defendant's Submissions

21. It was submitted that the question whether the Defendant was indebted to the Plaintiff in the sum of Kshs. 22, 922,130.35 was to be decided upon confirming whether the suit was a liquidated claim and if so, whether the same has been specifically pleaded and proved. Reliance was placed on the case of Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya Ltd [2015] eKLR where it was held that a claim for special damages must be specifically pleaded and proven.

22. The defendant submitted that the statement of accounts relied upon by the Plaintiff, copies of cheques, letter admitting indebtness as well as one delivery note did not amount to proof of special damages or liquidated claim and cconsequently, since the entire claim was based on the said documents which were produced as exhibits, the entire claim for Kshs. 22,922, 130.35 must fail for failure to provide proof.

23. It was submitted that the Plaintiff held the suit over the Defendant like the veritable "Sword of Damocles" for over a decade hence should bear the costs arising from the suit.

Analysis and Determination

24. I have considered the pleadings, the court records, the rival written submissions, the cited authorities. In my view, the issue for determination is whether the plaintiff merits grant of the orders sought in its plaint dated 28th September 2012.

25. The plaintiff herein claims Kshs. 22,922,130.35 from the defendant being the balance of payment for supply of petroleum products to the defendant. The claim is denied by the defendant who only admitted owing Kshs. 2,970,000.

26. The burden of proof in Civil cases is on a balance of probability. In Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

27. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

28. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Court of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
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> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

29. From the evidence on record, it is clear that there was an arrangement whereby the plaintiff fueled the defendant's trucks on credit terms and would subsequently issue an LPO and delivery note for payment.

30. The same was evidenced by the copy of a delivery note dated 28th August 2012 that was produced by the plaintiff as proof of its transaction with the Defendant and a copy of financial statement of the Defendant with the plaintiff dated 19th July 2012 showing the transactions between the parties that amount to the decretal sum sought in the plaint.

31. It is for the aforesaid reason that the defendant in its statement of defence admitted to owing the plaintiff only Kshs. 2,970,000 on which this court entered judgement on admission vide its ruling dated 6th November 2015.

32. The plaintiff pleaded that there was an outstanding amount of Kshs. 22.92 million which the defendant had not settled and the plaintiff produced in evidence of a copy of financial statement of the Defendant dated 19th July 2012 showing the transactions between the parties hereto amounting to the decretal sum which the Plaintiff has deducted an amount that was previously settled by the Defendant.

33. On its part, the defendant did not offer any evidence contravening the allegations by the plaintiff other than the denials in its statement of defence. It was the Defendant's case that he issued the cheques in question in this suit that bounced but that the same were drawn after the filing of this suit. The defendant further tried to explain the bouncing of the cheques by stating that upon disagreement over the amount owed, the said cheques were called back. Upon inquiry by the Honorable Court, DW1 could not answer why the Cheques were dated before filing of the suit. Further, the Defendant could not explain the reason in the return of cheques showing insufficient funds and not cheques stopped by drawer.

34. It is also worth noting that the statement of accounts between the plaintiff and defendant as produced by the plaintiff in evidence showing the nature of transactions between them and the accrued sum as a result of their dealings. Was never controverted by the defendant.

35. It is settled law in civil cases, that a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.

36. In Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997, it was held that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

37. Thus, a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading is not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence supporting the case or defence means that the evidence adduced by the plaintiff remains uncontroverted and therefore unchallenged. In such a situation, the plaintiff is taken to have proved its case on balance of probability in the absence of the defendant's evidence.

38. In the instant case, although the defendant called a witness, the testimony of the said witness did not substantiate the defendant's defence. In my view, the defendant's defence amounted to a mere denial.

39. The plaintiff in my mind proved its case on a balance of probabilities.

40. The defendant claimed in defence and submissions that the person who acknowledged the indebtedness was not authorized to do so and that the seal of the company was not on the acknowledgment. However, having admitted that the said person was its employee, and in the absence of evidence of fraud or misrepresentation on the part of the said person, or evidence that the stamp used on the acknowledgement was forged, I find the claim by the defendant just an allegation that could not be substantiated. The defendant's evidence in chief also materially contradicted what was

pleaded as to why the cheques issued to the plaintiff were dishonoured. In the pleading, the defendant claimed that the it experienced unexpected financial crisis asked the plaintiff not to bank the cheques but the plaintiff went ahead and banked them. In evidence in chief, the witness for the defendant stated on oath that the cheques were stopped after the plaintiff filed suit in court which again was not the case because the cheques were dishonoured long before the suit herein was instituted.

41. The defendant did not adduce any evidence to prove that the person who signed the acknowledgment of debt left its employment as at the time of the said acknowledgment and if so, why the defendant never reported the alleged forgery to the police since the amount acknowledged was not just pocket money, is only known to the defendant. Nothing precluded the defendant from calling this person as a witness since he was their employee and in addition, if the person could not be traced, nothing stopped the defendant from producing a letter of separation between the defendant and the said employee. I am not persuaded that the plaintiff's detailed statement of account with the defendant dated 19th July 2012 as produced in exhibit was made up with the intention of reaping from the defendant unjustly.

42. On lack of the resolution to file suit herein, 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."

43. That is the requirement of the law as a company is not a natural person. In this case, there is a verifying affidavit sworn by Abdi Hakim Haji on 26th September, 2012 stating that he was the legal manager of the plaintiff company and that he was duly authorized to swear the verifying affidavit by the Board of directors of the plaintiff company. There is no contrary view that the deponent was authorized to swear the affidavit for purposes of filing of this suit.

44. This court had the opportunity to deal with a similar issue in Livestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) where I stated as follows in extenso, citing other persuasive and binding authorities:

> " On the merits of the respondents' claim that the appellant lacked authorization to file suit
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> 30. The respondents submitted before the trial court that there was no authority given by the appellant company authorizing the institution of these proceedings contrary to the provisions of the Civil Procedure Rules. It was on the basis of that submission that the trial magistrate, despite finding that the plaintiff/ appellant had proved its case against the respondents on a balance of probabilities on the pecuniary claim, he nonetheless dismissed the plaintiff/ appellant's suit on the ground that there was no authorization by the plaintiff/ appellant's Board to institute the court proceedings. Order 4 rule 1(4) of the Civil Procedure Rules 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."
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> 31. It is clear that from the foregoing provision, there is no requirement that the authority given to the deponent of the verifying affidavit be filed. The failure to file the authorization, therefore, 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 commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract

some consequences. However, the failure to file the same with the plaint does not invalidate the suit.

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

33. The appellant submitted that the requirement for a board resolution before filing of suit only applied to companies registered under the *Companies Act* which the appellant was not as it was governed by an Act of Parliament and further that in any event, lack of a board resolution was not fatal and could not be basis for dismissal of a suit as was held in the case of Peeraj General Trading (supra).

34. I have perused the case cited by the appellant above. Peeraj General Trading (supra) and my understanding of what the Honourable Judge meant was that mere failure to file the authorization from the company board did not invalidate the suit as the same could be filed at any time in the suit.

35. Peeraj General Trading supra is distinguishable from the instant case as in this case the case was concluded without the appellant filing any authorization whereas in Peeraj, the applicants merely sought dismissal of the suit and the case was still proceeding and had not come to a conclusion.

36. I have also perused the *Kenya Agricultural and Livestock Research Act*, 2013 and note that at section 3(2), it provides that the organization is a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of suing and being sued. In essence, the Act provides that the appellant is a corporation for purposes of its operations.

37. The *Companies Act* defines a "body corporate" to includes a firm that is a legal person under the law by which it is governed and a "company" to mean a company formed and registered under the Act or an existing company

38. Order 4 rule 1(4) of the Civil Procedure Rules does not distinguish between a "government corporation' and a corporation formed and registered under the *Companies Act* but simply provides for the requirement of authorization. I am thus persuaded that Order 4 rule 1 (4) was applicable to the appellant contrary to its submissions.

39. The question is whether the suit before the trial court was filed without authority of the Board and if so, what are the consequences thereof? In Makupa Transit Shade Limited & another v Kenya Ports Authority & another [2015] eKLR, the Court of Appeal held that:

> "In our view, the Authority, as with other corporate bodies, has its affidavits deposed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was

therefore sufficient for the deponents to state that "they were duly authorized."

It was then up to the appellants to demonstrate by evidence that they were not so authorized".

20. The same position was echoed in the persuasive authority in the case of Eye Company (K) Limited v Erastus Rotich T/a Vision Express [20201]e KLR where Ngetich J held that:-"In view of the above, it is clear that it was sufficient for the authorized person to depose that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority."

40. In Spire Bank Limited v Land Registrar & 2 others [2019] eKLR, the Court of Appeal interpreted the law thus:

> "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." [emphasis added]

41. This court is bound by decisions of the Court of Appeal unless there is justifiable reason to distinguish such decisions. It is however clear from the above binding decision in the Makupa Transit Shade Limited &another v Kenya Ports Authority case that the absence of a Resolution to institute a suit or authority to swear an affidavit is not fatal to a suit. The Respondents' contention that the appellant failed to attach a Resolution or authority to swear an affidavit is true. However, such omission was not fatal to the suit. This is because the deponent of the verifying affidavit stated on oath that he was authorized by the appellant and being the Director General of the appellant corporation, unless the contrary was shown that he had no such authority to swear the verifying affidavit, which evidence the Respondents did not adduce, I find that there was no basis upon which the trial court dismissed the appellant's suit, having found that the appellant had proved its case against the respondents on a balance of probabilities. [emphasis added]

42. In my view, the dismissal of the plaintiff's suit was on a technicality which was easily curable by application of the principle in the Makupa Transit Shade

Limited (supra) case, a mere procedural defect which does not go to the core of the suit which the trial court found that the appellant had proved on a balance of probabilities. That defect is and was further curable by application of Article 159(2) (d) of *the Constitution* which enjoins courts to administer justice without undue regard to procedural technicalities.

43. Moreover, the court has discretion on whether or not to strike out any pleading that is non-compliant but Article 159 of *the Constitution* of Kenya, 2010 obliges the court to deliver justice without undue regard to procedural technicalities. The court is also called upon to apply the overriding objectives of the law in determining cases before it. In Stephen Boro Gitiha v Family Finance Building Society & 3 others [2009] eKLR Nyamu, JA expounded on the Overriding Objective and stated that:"On 23rd July 2009 both the *Civil Procedure Act* and the *Appellate Jurisdiction Act* were amended to incorporate sections 1A and 1B in the *Civil Procedure Act* and sections 3A and 3B in the case of the *Appellate Jurisdiction Act*. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective... The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible."

44. Further, the Court of Appeal in Nairobi Civil Appeal No. 42 of 2007 East African Safari Air Ltd v Anthony Ambaka Kegode [2011] eKLR stated as follows on the question of whether a suit would be fatally defective and amenable for striking out for failure to file an authority by the advocate to file suit on behalf of the plaintiff:""It is our view that the proper thing for the High Court to have done was not to strike out the proceedings (for want of authority by the advocate to file suit) but to stay the same pending ratification if it was of the view that the evidence of ratification was not clear. Here is what Palmer states: -"If an individual shareholder, without authority to do so, initiates litigation in the name of the company, the normal practice upon a motion to strike out the company's name is for the court to adjourn, whilst ordering that a meeting of the shareholders be held to see if the company supports the litigation, if it does not, the motion will succeed and the solicitor

who commenced the proceedings without authority of the company will be personally liable for the Defendant's costs."

45. In D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR the court held that:"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

46. In the case of Faith & Hope Properties Kenya Ltd v James Muchiri Waweru & another [2021] eKLR the court held that:"This court is in agreement with above pronouncements. The mere fact that the Plaintiff did not file its resolutions authorizing the swearing of the Verifying Affidavit by one of its Directors and the firm of S. J. Nyang and Company advocates to file the suit on its behalf cannot be a ground for invalidating the suit."

47. Similarly, even before 2010, in the case of 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."[emphasis added].

48. In Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, the Court of Appeal cited the case of United Assurance Co. Ltd v Attorney General: SCCA NO. 1 of 1998 where the Supreme Court of Uganda held that:"...it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company." [emphasis added].

49. In Fubeco China Fushun v NaiposhaCompany Limited & 11 others [2014] eKLR, Gikonyo J. while dealing with a case where a director's powers to authorize the filing of an application on behalf a company had been challenged, stated that:"In the case before me, Caroline Wairimu Kimemia is a director of the Defendant Company and she duly authorized the Advocates on record to commence this Application. That fact is not denied and I am surprised the

person laying the objection is the Plaintiff and not the Defendant Company. The Plaintiff has also not presented any material or affidavit from the other directors denying the authority of Caroline Wairimu Kimemia as a director in the Defendant Company. As such, I do not think the Court is in any position to dispute the authority of Caroline Wairimu Kimemia or the instructions to the advocate on record to defend the interest of the company. Therefore, in the absence of evidence to the contrary, I find the affidavits filed to be in order and the advocate herein to be properly on record for the Defendant."

50. In the instant case, the verifying affidavit was sworn by on 17th July, 2019 by Dr. Eliud Kirenger, the Director General of the plaintiff/appellant herein and he deposed as follows: "That iam an adult of sound mind and disposition, retained in the employment of the plaintiff herein in the capacity of Director General duly authorized and competent to make and swear this affidavit."

51. It follows therefore, that in the absence of any evidence that the deponent was never authorized by the appellant corporation to swear that verifying affidavit and or to instruct counsel on record to file suit on its behalf, I find and hold that the trial court erred in dismissing the appellant's suit "for failure to comply with the mandatory provisions of Order 4 Rule 1 (4)," having found that the plaintiff had proved that the defendants had failed to account for the sums of money pleaded in the plaint.

52. This court appreciates that the intention behind order 4 rule 1 (4) of the Civil Procedure Rules was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. However, in the present case, the Director General having sworn an affidavit that he had authority to swear the affidavit verifying the correctness of the averments in the plaint, and in a case where the Director General was safeguarding the interests of the Corporation, the question is, who else would be the one complaining of lack of authorisation? See the Court of Appeal decision in the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR."

45. The upshot of the above is that I find the contention by the defendant that there being no resolution to file suit by the plaintiff was fatal to be without merit.

46. In the end, I find and hold that the plaintiff's suit was properly before this court and that the plaintiff proved its case on a balance of probabilities against the defendant and merits the orders sought in the plaint dated 28th September 2012.

47. Accordingly, I enter judgment for the plaintiff against the defendant in the sum of Kshs 22,922,130.35 (Kenya Shillings Twenty-Two Million, Nine Hundred and twenty-Two Thousand, One Hundred and Thirty and Thirty-Five Cents) together with interest thereon at court rates from the date of filing suit in court until payment in full. The plaintiff shall also have costs of this suit.

48. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JUNE, 2023

R.E. ABURILI

JUDGE