



REPUBLIC OF KENYA



KENYA LAW
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Rafiki Microfinance Kenya Limited v Conier Limited & 2 others (Civil Case E003 of 2021) [2023] KEHC 21018 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL CASE E003 OF 2021
CM KARIUKI, J
JULY 27, 2023**

BETWEEN

RAFIKI MICROFINANCE KENYA LIMITED PLAINTIFF

AND

CONIER LIMITED 1ST RESPONDENT

MICHAEL KINYUA KIBAKI 2ND RESPONDENT

NANCY MUTHONI RUOTA 3RD RESPONDENT

RULING

1. Before this Honourable Court is the Defendants' Notice of Motion application dated November 3, 2021 seeking the following reliefs from this honorable court:-
 - I. That this Honourable Court be pleased to strike out the entire suit with costs.
 - II. That the costs of this Application be in the cause.
2. It is supported by a supporting Affidavit Sworn by Michael Kinyua Kibaki, the 2nd Defendant herein, on November 3, 2021. Plaintiff opposed the said Application vide a Replying Affidavit sworn by Raphael Kitila on March 17, 2023, wherein the plaintiff prayed for the Application to be dismissed with costs.
3. When the matter came up on March 6, 2023, the Court directed that the Application be canvassed by way of written submissions after granting the plaintiff leave to file a replying Affidavit.
4. The Plaintiff filed the instant suit vide a Plaint dated October 22, 2020 seeking Judgment against the Defendants:-
5. The sum of Kshs. 24,191,264.15/= the amount due from the Defendants to the Plaintiff regarding loan account number 00112xxxxx037 as of 13th February 2019 as per the said agreement.



6. Interest on (a) above at the rate of 21% KBRR+11.87) per Annum compounded monthly with effect from 13th February 2019 until payment in full; and Cost of the suit together with interest thereon at court rates.

Defendants /applicant Submissions

8. The applicant submits that there is no resolution passed by the plaintiff authorizing the firm of S I Mawaura & Co. Advocates to file this suit and that the suit offends mandatory provisions of Section 7 of the Civil Procedure Act as it is res judicata ELC No. 205 of 2005.
9. Under order 4, rule 1 (4) of the Civil Procedure Rules, 2010 provides. A corporate body such as the plaintiff can only sue in its name with the sanction of its Board of Directors or through a resolution in its general or special meeting.
10. Thus, M/s Jane Warau was not authorized to swear the verifying affidavit and file this suit. A company is an artificial person who speaks and stamps its authority through resolutions and a cause of action for or against the corporate body by passing a resolution to sue or defend such a body.
11. Therefore, it suffices to say this Court is divested of jurisdiction to hear the matter as the corporate body Rafiki Microfinance Company Limited is not properly before the court, thus calling for striking out this suit. Reliance is made on Nairobi High Court Commercial & Admiralty Division Civil Case No. 45 of 2012; Kenya Commercial Bank Limited Vs. Stage Coach Management Ltd where the court held:-

“There is no evidence before this court that the said John Oringo has been authorized by resolution under seal. The wisdom of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 is meant to safeguard members of the public from scrupulous litigants with vested interests who may use corporate bodies to defraud members of the public. Where a litigant defends a suit purportedly filed by a corporate body and obtains a judgment against such a corporate body, it will be hard to enforce any decree passed since the corporate entity id does not authorize the institution of such a suit.” Also, reliance was made on the Court of Appeal at Nairobi Civil Appeal No. 49 of 2012. Samuel Mureithi Murioki & Another Vs. Kamahuha Limited, where the court held”

Plaintiff's /respondent- Submissions

Issues for determination and the Applicable Law

- i. Whether failure to file a Resolution is fatal to the suit and/or whether the defendants have proven that Jane Warau and SI. Mwaura & Co. Advocate were unauthorized/lacked instructions to act on behalf of the Plaintiff?
- ii. Whether the instant suit herein is res judicata?
12. It is trite evidence Law that whoever alleges must prove. The defendants allege that Jane Warau lacks the requisite authority o swear the verifying affidavit on behalf of the plaintiff but has not produced any evidence before this honorable court to support the allegations. Instead of evidence to support their claim, the defendant's allegations are unfounded, baseless, and mere allegations and ought to be treated as such.



13. In the case of Makupa Transit Shade Limited & another v Kenya ports Authority & .another[2015] eKLR.

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by a person 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. Ee also In Spire Bank Limited V Land Registrar & 2 others [2019], eKLR

14. Additionally, in the case of Leo Investments Limited vs. Trident Insurance Company Limited [2014], eKLR Odunga J. (as he then was) held that there is no requirement for a resolution of the board of directors to be filed together with the plaint this committing to filing a Resolution is not fatal to the suit as the overriding objective comes in to cure the alleged defect:

15. On the issue of Res judicata; the case of John Florence Maritime Services Limited & another Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR.

Held; “For res judicata to be invoked in a civil matter, the following elements must be demonstrated: a) There s a former judgment or order which was final; b) the judgment or order was on merit; c) the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d) there must be between the first and the second action identical parties, subject matter and cause of action. (See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and see the decision of the Court of Appeal in Nicholas Njeru V Attorney General & 8 others Civil Appeal 110 of (2013) eKLR).

Issues, Analysis And Determination...

17. After going through the pleadings and submissions filed, I find the issues are; Whether failure to file a Resolution, lodge an instant suit, and appoint advocates is fatal to the instant suit. Whether the instant suit herein is res judicata? What are the orders as to costs?
18. The Plaintiff filed the instant suit vide a Plaint dated 22nd October 2020 seeking Judgment against the Defendants:-The sum of Kshs. 24,191,264.15/= the amount due from the Defendants to the Plaintiff regarding loan account number 0011xxxxx0037 as of February 13, 2019 as per the said agreement. Interest on (a) above at the rate of 21% KBR+11.87) per Annum is compounded monthly with effect from February 13, 2019 until payment in full and the Cost of the suit together with interest at court rates. The requisite resolution Under order 4, rule 1 (4) of the Civil Procedure Rules, 201., was not lodged along with the pleadings, thus attracting instant application.
19. In the case of Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR Odunga, J agreed with Kimaru J's decision regarding Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR where the court stated: -

“...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. Its absence is, therefore, not fatal to the suit.”



20. The Court of Appeal in the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR also stated as follows:-

“...It is essential to appreciate that Order 4 rule 1 (4) intended to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This addressed 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 an 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.”

21. It is trite evidence Law that whoever alleges must prove. The defendants allege that Jane Warau lacks the requisite authority to swear the verifying affidavit on behalf of the plaintiff but has not produced any evidence before this honorable court to support the allegations.

22. In the case of Makupa Transit Shade Limited & another v Kenya ports Authority & another[2015] eKLR.

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by a person 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.” And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such an 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.”

23. In the case of John Florence Maritime Services Limited & another Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR, the court held that; “The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economical use of the court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes the stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability, which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.’

24. Thus, for res judicata to be invoked in a civil matter, the following elements must be demonstrated:

- a) There is a former judgment or order which was final;
- b) the judgment or order was on merit,
- c) the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and



d) there must be identical parties between the first and the second action, subject matter, and cause of action.

(See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and see the decision of the Court of Appeal in Nicholas Njeru V Attorney General & 8 others Civil Appeal 110 of (2013) eKLR).

i. The above elements have yet to be established by the applicant. Thus, the application has no merit, dismissed with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 27TH JULY 2023.

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CHARLES KARIUKI

JUDGE

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