



REPUBLIC OF KENYA



**Mawe Mbili Limited v Equity Bank Kenya Limited & another (Civil Suit 70 of 2018)
[2022] KEHC 150 (KLR) (Commercial and Tax) (17 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 70 OF 2018
JN MULWA, J
FEBRUARY 17, 2022**

BETWEEN

MAWE MBILI LIMITED PLAINTIFF

AND

EQUITY BANK KENYA LIMITED 1ST DEFENDANT

JEAN FRANCOIS RAYMOND LOUIS DAMON 2ND DEFENDANT

RULING

1. By a Notice of Preliminary Objection dated 6th October, 2021, the 2nd Defendant seeks that the Plaintiff's suit be dismissed on the following grounds:
 1. THAT the suit and/or proceedings have been commenced without a resolution and/or authority of the Plaintiff and that no authority has been conferred to Jacqueline Ruth Damon to sue in the name of the Plaintiff.
 2. THAT the suit contravenes Order 4 Rule 1(4) of the *Civil Procedure Rules 2010*.
2. The Preliminary Objection was canvassed by way of written submissions which have been duly considered together with the authorities cited by both parties. The issues that arise for determination are:
 - i. whether the preliminary objection was properly raised;
 - ii. whether this suit should be struck out on the ground that there is no resolution by the Plaintiff authorizing the institution of the suit; and
 - iii. whether this suit should be struck out on the ground that the Verifying Affidavit offends the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules.



- a. Whether Preliminary Objection was properly raised
3. As regards this issue, the Plaintiff contended that the 2nd Defendant's Preliminary Objection does not meet the threshold set out in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Ltd [1969] E.A 696* and *Oraro v Mbaja [2005] eKLR*. The Plaintiff submitted that the issues raised by the 2nd Defendant requires the court to examine the particulars and details of the Plaintiff's Articles of Association as well as the procedure for appointing an agent to act on the company's behalf.
 2. In *Mukisa Biscuit Manufacturing Company Limited v West End Distribution Limited [1969] E.A. 696*, Sir. Charles Newbold P described a preliminary objection as:

“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...”
 5. Similarly, Ojwang J. in the case of *Oraro v Mbaja[2005] eKLR* observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
 6. In my considered view, the preliminary objection herein was properly raised as it relates to the competence of the suit and matters of procedure. The grounds raised by the 2nd Defendant in this regard can easily be borne out from the Verifying Affidavit to the Plaint filed herein and do not require an investigation of the facts of the case to be determined. See *Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR*.
 - b. Whether this suit should be struck out on the ground that there is no resolution by the Plaintiff authorizing the institution of the suit;
 7. On this issue, the 2nd Defendant contended that his co-director Jacqueline Ruth Damon, commenced the proceedings herein without a resolution of the Plaintiff Company under seal authorizing the filing of the suit. He submitted that the said Jacqueline Ruth Damon had no locus standi to sue on behalf of the Plaintiff, notwithstanding the fact that she and the 2nd Defendant are the majority directors therein jointly owning 98% of the shares.
 8. The 2nd Defendant relied on various decisions namely *Affordable Homes Africa Ltd v Henderson & 2 others [2004] eKLR*, *Philomena Ndanga Karaja & 2 others v Edward Kamau Maina [2015] eKLR* and *Leo Investments Ltd v Trident Insurance Co. Ltd (2014) eKLR* for the proposition that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.
 9. On the other hand, the Plaintiff submitted that the 2nd Defendant has clearly misconstrued the matter and based his preliminary objection on a false premise. In this regard, it was contended that Jacqueline



Ruth Damon did not sue on behalf of the Plaintiff as it is clear that the Company sued in its own name and on its own behalf. According to the Plaintiff, the actions taken by the said Jacqueline towards the institution of this suit were proper in any event, since she is a director of the company. For that reason, the Plaintiff took issue with the 2nd Defendant for failing to adduce any evidence to show that Jacqueline did not have the requisite authority.

10. The Plaintiff cited the decisions in *Fubeco China Fushun v Naiposha Company Limited & 11 others* [2014] eKLR; *Bethany Vineyards Limited & Another v Equity Bank Limited & 2 Others* [2020] eKLR, *Dakianga Distributors Limited v Nicholas Buri Onkeo* [2017] eKLR in support of the position that a board resolution authorizing the institution of a suit is not a mandatory requirement before filing a suit in the name of a corporation.
11. In the Verifying Affidavit that accompanied the Plaintiff's Complaint filed herein on 16th February 2018, the deponent Jacqueline Ruth Damon stated inter alia that she is a director of the Plaintiff Company and that she instructed the firm of Messrs W.G Wambugu & Co. Advocates to institute the proceedings herein against the Defendants.
12. 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.”
13. In *Fubeco China Fushun v Naiposha Company 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.”
14. From the above authorities, I gather that a director is duly authorized to act in the interest of a company unless the contrary is shown. In the instance case, the 2nd Defendant has not tendered any evidence before the court to show that his co-director Jacqueline Ruth Damon, did not have the authority to act in any way on behalf of and in the interest of their company, the Plaintiff herein. Such evidence would have taken the form of the Plaintiff's Articles of Association showing that directors do not have such authority or even a Board Resolution. In any case, the court is well aware that even where proceedings are started without proper authority, the same may subsequently be ratified.



15. The upshot therefore is that it was not mandatory that a board resolution under seal authorizing the institution of the suit be filed by the Plaintiff at the commencement of these proceedings. The absence of the same is therefore not a ground for striking out the Plaintiff's suit at this point.
- c. Whether this suit should be struck out on the ground that the Verifying Affidavit offends the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules.
16. As regards this issue, the 2nd Defendant submitted that the suit contravenes Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 as the Plaintiff's Board of Directors did not authorize Jacqueline Ruth Damon to swear the Verifying Affidavit that accompanied the Plaintiff on behalf of the company. The 2nd Defendant argued that the aforesaid provision is couched in mandatory terms yet to date, no sealed board resolution has been filed in court to that effect meaning therefore that there is no valid Plaintiff before the court.
17. The 2nd Defendant relied on the case of *Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR* where Havelock J. dismissed a suit since the Plaintiff therein failed to file a resolution of the company's members or its Board of Directors despite being aware of a preliminary objection filed in that regard over a year earlier. According to the 2nd Defendant therefore, this suit is incompetent and a waste of judicial time hence should be struck out with Jacqueline Ruth Damon paying costs in person.
18. The Plaintiff on part maintained that Jacqueline was duly authorized to swear the Verifying Affidavit and that it was not mandatory to file the authority alongside the Plaintiff.
19. Order 4 Rule 1(4) of the Civil Procedure Rules provides as follows:
- “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.”
20. In this case, it is common ground that the Plaintiff has so far not filed a resolution of the company under seal authorizing Jacqueline Ruth Damon to swear the verifying affidavit to the Plaintiff herein. Be that as it may however, Order 4 Rule 1(4) of the Civil Procedure Rules does not demand that such authority be filed together with the Plaintiff. Further, it is now well settled that the failure to file the same at the commencement of a suit cannot invalidate the suit because this can be done at any time before the suit is fixed for hearing. This was the position held by the courts in *Leo Investments Ltd v Trident Insurance Co. Ltd [2014] eKLR* and *Republic v Registrar General and 13 others [2005] eKLR*.
21. For the foregoing, the Notice of Preliminary Objection dated 6th October, 2021 is unmeritorious. It is dismissed with costs to the Plaintiff.
22. The Plaintiff is at liberty to file and serve the two resolutions and/or authorizations at any time before the suit is fixed for hearing.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

J.N. MULWA

JUDGE

