First Assurance Co. Ltd v Osienala (Friends of Lake Victoria) & another (Civil Appeal 55 of 2020) [2022] KEHC 350 (KLR) (20 April 2022) (Judgment)

Neutral citation: [2022] KEHC 350 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 55 OF 2020

FA OCHIENG, J

APRIL 20, 2022

BETWEEN

FIRST ASSURANCE CO. LTD .... APPELLANT

AND

OSIENALA (FRIENDS OF LAKE VICTORIA) .... 1ST RESPONDENT

SBM BANK (K) LTD .... 2ND RESPONDENT

(Being an appeal arising from the Ruling of the Hon. R. K. Ondieki (SPM) delivered in Kisumu CMCC No. 609 of 2012 on 10th August 2020)

JUDGMENT

This appeal arises from the decision made by the learned trial magistrate, when he rejected the 2nd Defendant's Preliminary Objection.

1. By the impugned ruling, the trial court also rejected the contention that the suit was incompetent because the Plaintiff had not filed the Board Resolution to authorize the deponent of the Verifying Affidavit, to swear the said affidavit.

2. The Appellant has invoked the provisions of Order 4 Rule 1 (4) of the *Civil Procedure Rules*. The said rule stipulates 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."

3. Based upon that rule, the Appellant submitted that a replying affidavit sworn by a person who had not been authorized by a Board resolution, was defective and should be struck out.

4. Secondly, the Appellant submitted that proceedings which are supported by an affidavit which was defective was null and void.

5. In this case the verifying affidavit was sworn by Javan Onano Tolo. At paragraph 2 of the said affidavit, Mr. Tolo deponed, inter alia, that he had been authorized to swear the affidavit.

6. The Respondents conceded that the Plaintiff had not filed in court, the affidavit demonstrating the authorization which the company had given to Mr. Tolo, to swear the verifying affidavit.

7. Nonetheless the Respondents submitted that the failure to file documents to show that the deponent was duly authorized, was not fatal.

8. In my considered opinion, there is a dispute concerning the question whether or not the deponent had been duly authorized to swear the affidavit.

9. If the Appellant is taken to have accepted the "fact" as stated by the deponent; that would imply that the Appellant had accepted that Mr. Tolo had authority to swear the verifying affidavit.

10. If, on the other hand, the Appellant was challenging the assertion by Mr. Tolo, concerning the authority which he said he had obtained, it would follow that there was a disputed fact.

11. The Appellant has, correctly, recognized that the leading authority on matters of preliminary objection is the case of *Mukhisa Biscuits Company Ltd. Vs West End Distributors* [1969] E.A. 696. In that case, it was resolved that a Preliminary Objection consists of a 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."

12. It is one thing to have no authority at all; and quite a different thing when a party fails to exhibit the authority which the said party has been given.

13. Pursuant to Order 4 Rule 1 (4) of the Civil Procedure Rules, the deponent of the verifying affidavit is required to have the requisite authority from the corporation: and that is exactly what the deponent said, (in the affidavit), that he had been given.

14. There is no explicit requirement, in the Rule, that the authority must be filed in court, at the time when the Plaint was being filed.

15. I do appreciate that if the deponent does not make available the document embodying the authority, neither the Court nor the Defendant would be able to verify whether or not such authority had been given to the said deponent.

16. But the failure to file the document embodying the authority is not necessarily synonymous with the total lack of such authority.

17. And when the deponent expressly states that he had been given the requisite authority, it would be wrong for the Defendant to found a preliminary objection on the grounds that there was no authority at all.

18. Accordingly, the trial court did not err when it rejected that aspect of the preliminary objection.

19. But even if it were true that the deponent had not been given the authority to swear the verifying affidavit, on behalf of the Plaintiff, that would not necessarily render the Plaint incompetent. There are two schools of thought on the issue. One school of thought holds the view that the pleadings should

be struck out; whilst the other school of thought is of the view that the court may allow the Plaintiff an opportunity remedy the omission.

20. In *Peeraj General Trading & Contracting Company Limited & Another Vs Mumias Sugar Company Limited* [2016]eKLR, Justice Olga Sewe held that the failure to file resolutions of the Board together with the Plaint, does not necessarily invalidate the suit.

21. The learned Judge was of the considered view that;

> " .... an action commenced without authority is capable of being ratified. It would therefore not be in the interests of justice to dismiss the suit on the ground merely that there was no authority filed to institute the suit. That is a defect that does not, in my view, go to the jurisdiction of the court, and is an omission which is curable."

22. I note that even in the case of *Kenya Commercial Bank Limited Vs Stagecoach Management Limited*, HCCC No. 45 of 2012, (which was cited by the Appellant herein), Havelock J. recognized that proceedings which had been started by a corporation, without proper authority may subsequently be ratified.

23. The learned Judge went ahead, in that case, to uphold the preliminary objection, only because the Plaintiff had been so lackadaisical, that it had not taken steps to ratify the decision to institute the proceedings.

24. The point I am making is that where there are 2 schools of thought, and the trial court associated itself with one or the other school of thought, that would constitute a perfectly acceptable exercise of discretion.

25. A court would be in error if it determined an issue in a manner that was inconsistent with the well-settled decisions of courts of higher jurisdiction. But it is not a mistake for the Court to choose one between two schools of thought.

26. Accordingly, I reject the Appellant's invitation to this court, to strike out the plaint.

27. Instead, I do hereby direct the Plaintiff to file and serve the requisite verifying affidavit, together with a copy of the resolutions of the Plaintiffs' Boards of Directors, which authorized the deponent to swear the verifying affidavits.

Time-Barred

28. The subject matter of the dispute between the parties herein is a Contract of insurance.

29. It is well settled that a Plaint barred by the law of limitation cannot be entertained by the Court: it must be rejected.

30. Pursuant to Section 4 of the *Limitation of Actions Act*, an action founded on contract may not be brought after the end of 6 years from the date on which the cause of action accrued.

31. According to the Appellant, the cause of action arose "sometimes in 2012." Therefore, as the suit herein was filed in 2019, the Appellant submitted that it was time-barred, because it had been filed 7 years after the cause of action arose.

32. In the case of *Hassan Nyanje Charo Vs Khatib Mwashetani & 2 Others*, Civil Application No. 23 of 2014, the Supreme Court of Kenya stated thus;

> "Indeed, it is to be recognized that the Supreme Court entertains no notion that the prescribed time-lines are anything but a matter of substantive law – not a technicality."

33. Therefore, the Court reiterated that the Petition which had been filed out of time, cannot be sustained. The Court said;

> "The High Court lacked jurisdiction to admit and determine it; the proceedings before that Court were a nullity ab initio, and so are the subsequent proceedings emanating therefrom."

34. In effect, when the statute prescribed the period within which a suit may be instituted, it is a matter of substantive law that any person wishing to institute proceedings must comply with.

35. Upon the lapse of the stipulated period, the Court ought not to entertain the claim, because the law operates to bar the court from granting any relief or remedy which the Plaintiff may be seeking.

36. In this case, the Plaint asserted that;

> "In or about the year 2013, the said M/S Chase Bank (Kenya) Limited provided an Insurance Premium Financing facility to the Plaintiff on terms that the Bank would finance the full premium of Kshs 3,116,157/= to M/S First Assurance Co. Ltd, who would then insure the Plaintiff's employees and their dependants."

37. In my understanding of that assertion, it denotes the date when the Plaintiff entered into a contract with the 2nd Defendant.

38. The contract became the subject matter of the relationship between the parties. Each of the parties to the contract had obligations and rights.

39. The date of execution of the contract is indicative of the "birth" of the relationship between the parties to the said contract. The said birth of the relationship is not, ordinarily, the date when a cause of action would accrue.

40. In the case of *South Nyanza Sugar Co. Limited Vs Dickson Aoro Owuor*, HCCA No. 86 of 2015, Mrima J. expressed himself thus;

> "It is only when one of the parties happens to be in breach of the contract that cause of action arises, as at that date of the alleged breach, and not at the end of the contract period."

41. I am in agreement with my learned brother, Mrima J., that when parties to the contract were meeting their respective obligations, they would be said to be giving effect to the contract.

42. At a time when each of the parties was doing what was expected of him or her, neither of them would have reason to institute legal proceedings in court.

43. If one or the other party did something deemed by the other party as being a breach of the contract, then the aggrieved party would have reason to take legal action.

44. From the Plaint, I have not found any specific date in 2012, which can be deemed as the date when the cause of action accrued.

45. Indeed, at paragraph 25 of the 2nd Defendant's Defence, it is asserted as follows;

> " The 2nd Defendant states that it is unable to plead/respond to the contents and allegations contained in the plaint with specificity and particularity, in view of the total lack of any material particulars as regards the alleged policy and reserves its right to amend its defence."

46. The absence of a particular specified date, when the 2nd Defendant allegedly breached the contract has made it difficult for this Court to pinpoint the exact date when the cause of action accrued.

47. In the circumstances, the Court is unable to share the Appellant's contention, that the suit was time-barred, yet it has not even been ascertained when exactly the cause of action accrued.

48. Accordingly, there is no merit in the appeal, and it is therefore dismissed. The Appellant will pay to the 1st Respondent, the costs of the appeal.

DATED, SIGNED AND **DELIVERED** AT **KISUMU** THIS **20TH** DAY OF **APRIL** 2022

FRED A. OCHIENG

JUDGE