Kenya Agricultural and Livestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEHC 3302 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL 36 A OF 2021

RE ABURILI, J

JUNE 29, 2022

BETWEEN

KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANIZATION ..... APPELLANT

AND

LEAH OKOKO ..... 1ST RESPONDENT

JOSEPH OWUOR GOGO ..... 2ND RESPONDENT

(An appeal arising out of the judgement and decree of the Honourable J.P. Nandi in the Principal's Magistrate's Court at Bondo delivered on the 25th June 2021 in Bondo CMCC No. 97 of 2019)

JUDGMENT

Introduction

1. The appellant herein Kenya Agricultural and Livestock Research Organization (KALRO) sued the respondents herein Leah Akoko and Joseph Owuor Gogo before the trial court vide an amended plaint dated 20/1/2020 seeking judgment for ksh 314,446.34 as well as costs of the suit on the grounds that the respondents had failed to account for the aforementioned sums issued under a sub-grant agreement between the respondents and the Coffee Research Institute.

2. In their defence, the respondents denied the plaintiff's claim and contended among others that there was no proper accounting for the disbursed amount and that the same happened at a time when they were not members of the said organization.

3. In his judgment which is impugned, the trial magistrate found that in as much as the defendants failed to account for the ksh 314,446.34, he dismissed the appellant's suit on account that the appellant lacked the requisite authorization by the Board to file the suit.

4. Aggrieved by the trial court's determination, the appellant filed its memorandum of appeal dated 23rd July on the same date. The appellant raised the following 10 grounds of appeal seeking to set aside the trial court's finding and to allow their claim against the respondents as prayed:

   a) That the trial magistrate erred in law and fact in considering and determining the issue of fatality of the case and lack of resolution to file the case that did not emanate from the pleadings neither as it agreed between the parties thus denying the appellant the right to a fair hearing.

   b) That the trial magistrate erred in law and fact in admitting new evidence and/or issues in the respondent's submissions when the same had not been raised during the trial thus denying the appellant a fair hearing as pertains the issue of necessity of resolution of Board before filing the suit.

   c) That the trial magistrate erred in law and fact in proceeding to write and deliver its judgement without ensuring that the appellant had been served with the respondent's submissions and without according the appellant its secured right to file responding submissions and went ahead to deliver the judgement thus denying the appellant the chance to respond to th same thus resulting to unfair hearing to the appellant.

   d) That the trial court erred in law and in fact in entertaining legal arguments going to the court's jurisdiction and competence of the raised and argued suit *exparte* by the respondent, post hearing which issues had not been raised in the pleadings as required by the *Civil Procedure Rules* and which issues were not raised prior to the hearing to accord the appellant an opportunity to adduce evidence about the same thus arriving at an erroneous judgement that ought to be set aside.

   e) That the trial magistrate erred in law and fact by failing to have due regard take into account and appreciate the substantive issued of law and facts raised by the appellant during the hearing and in the submissions, authorities and other documents on record.

   f) That the trial magistrate erred in law and in fact in finding that the appellant's claim was not meritous when there was abundant evidence pointing to the contrary.

   g) That the trial magistrate erred in law and fact in finding that the appellant lacked the requisite authorization by the Board to file the suit when there was no such requirement in law and or fact and when that issue was not an issue before the court as revealed from the pleadings of the parties or the issues agreed between the parties for determination before court.

   h) That the trial magistrate erred in law and fact in ignoring the appellant's pleadings, evidence and submissions when there was ample justification to uphold the same.

   i) That the trial magistrate erred in law and fact by taking into account irrelevant facts and failing to take into account relevant facts thus arriving at an erroneous conclusion.

   j) That in all the circumstances of the case, the magistrate's court erred in law and fact in dismissing the appellant's case when there was abundant evidence on record in allowing the appellants case thereby occasioning a miscarriage of justice.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. On behalf of the appellant, its counsel submitted that the requirement for a board resolution before filing of suit only applies to companies registered under the *Companies Act* which the appellant was

not as it was governed by an Act of Parliament and that therefore, the respondent's submission before both the trial court and this court only applied to companies registered under the *Companies Act*. The appellant further submitted that even for companies incorporated under the *Companies Act*, lack of a board resolution was not fatal and could not be a basis for dismissal of a suit. Reliance was placed on the case of *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited* (2016) eKLR where it was held *interalia* that it was not in the interest of justice to dismiss a suit merely on the ground that there was no authority filed to institute the suit, a defect that did not go to the jurisdiction of the court but was a curable omission.

7. It was submitted that the appellant's verifying affidavit was sworn by its Director General who stated that he was duly authorised and competent to swear the affidavit and that the respondents did not challenge the Director General's competence and that neither did they raise the issue at any point in the trial and as such the respondents were employing guerrilla tactics.

8. The appellant's counsel submitted that Order 15 of the *Civil Procedure Rules* provides that points of law ought to be affirmed by one party and denied but the other to form legal issues for determination by the court.

9. The appellant's counsel relied on the case of *China Wu Yi Limited & another v Irene Leah Musau* (2022) eKLR where the court in considering the relevance of pleadings stated *inter alia* that:

> " The point of pleadings was to secure that both parties were aware of the points in issue between them so that they can each prepare their evidence in support of their case and that a relief not founded on the pleadings will not be given."

10. On the binding nature and relevance of pleadings, the appellant further relied on the case of *Geoffrey Kamau Ndishus & anor v Peter Muchiri Murungi* eKLR where the court held *interalia* that a court has no power to make an order, unless by consent, which is outside the pleadings.

11. The appellant submitted that the issue of requirement of resolution of the board before filing suit was not raised in the respondents' defence which meant that the appellant was not accorded an opportunity address the same as it was raised in the respondents' submissions.

The Respondents' Submissions

12. Counsel for the Respondents submitted that their submissions in the lower court were attached and served via the appellant's advocate email address and that consequently, the appellant had the opportunity to rebut the submissions therein.

13. It was further submitted that the appellant's proceedings that were filed without resolution could have easily been rectified by seeking leave and filing a supplementary record of appeal and that the appellant was very relaxed and made no efforts to rectify the same. It was further submitted that the court did not dispense with the necessity to have a resolution annexed.

Analysis & Determination

14. I have considered the appeal, submissions by counsel for the parties and the authorities relied on. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. This is the principle espoused in section 78 of the *Civil Procedure Act*.

15. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing

in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that:

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

16. The Appellant's case before the trial court was that through an agreement entered and executed between one of its subsidiaries, the Coffee Research Institute, and the respondents' organization, PARADEP, on 20th August 2014, the respondents were granted ksh 3,402,270 through a disbursement that was made on the 15/9/2014 and subsequently only accounted for only ksh 3,087,823 leaving a balance of ksh 314,446.34 which was the subject of its claim against the respondents.

17. The respondents denied the appellants claim with the 1st respondent testifying that he was simply a project manager up to 2015 when he resigned after giving a report covering one-year implementation of the project and showing that the claimed sum of ksh 314,446.34 had not been spent as it was for the following year which he was not involved in as he had resigned by then and the signatories of PARADEP had changed.

18. The 2nd respondent testified as dw2 stating that he joined the organization sometime in January 2018 – July 2018 long after the research and engagement process with the appellant had ended and could thus not be held liable for acts that were done in her absentia. However, in cross-examination the 2nd respondent also confirmed that at the time the 1st respondent was leaving PARADEP ksh 132,000 was left in the bank as part of the ksh 314,000 had been utilized though she did not provide any proof by way of documentation to that effect.

19. In effect the remaining amount of ksh 314,000 was never accounted for by the two respondents who it emerged were both actively involved in the project in the manner of a report such as the one the 1st respondent had prepared for the appellant with regard to how ksh 3,087,823 had been utilized.

20. In their submissions before the trial court, the respondents stated that the appellant had not provided evidence of authority from its Board for institution of the suit contrary to the provisions of Order 4 Rule 1 (4) of the *Civil Procedure Rules* and it is on that basis that the trial court dismissed the appellant's case on the grounds that it was fatally defective thus leading to the instant appeal. Having considered all the above, I find the issues arising for determination before this court to be:

    a) Whether the trial court ought to have entertained the respondents' submissions that the appellant lacked authorization to file suit considering that the same was not pleaded;

    b) The merits of the respondents' claim that the appellant lacked authorization to file suit.

    c) What orders should this court make

On Whether the Trial Court Ought to Have Entertained the Respondents' Submissions that the Appellant Lacked Authorization to File Suit

21. It was pleaded and submitted by the appellant that the trial court erred in law and fact by considering the respondents' submission that it lacked authorization to file suit as the same was not pleaded by the respondents in their defence.

22. The general rule is that courts should determine a case on the issues that flow from the pleadings and therefore a court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination and therefore it is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. See *Galaxy Paints co Ltd v Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 Others* Civil Appeal no 37 of 2003 [2004] 2 KLR 183.

23. However, in *Odd Jobs v Mubia* [1970] EA 476, it was held that the court can base its decision on an unpleaded issue if the parties had left the issue to the court for determination. The Court of Appeal in the case of *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR stated that *Odd Jobs* (*supra*) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue, the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings.

24. In his submissions before this court, the appellant submitted that the issue of requirement of resolution of the board before filing suit was not raised in the respondents' defence which meant that the appellant was not accorded an opportunity to address the same as it was only raised in the respondents' submissions.

25. I observe that in his instruction to the parties herein when the matter came up to confirm filing of submissions on the 21/5/2021 before the trial court, the trial magistrate directed the appellant to serve the respondent with its submissions after which the respondents had 14 days to file submissions with the plaintiff being granted 7 days to file supplementary submissions, the same being filed by 11/6/2021 as judgement would be on the 25/6/2021.

26. The respondents produced additional evidence before this court showing that they served the appellants with their submissions via their official email on the 14/6/2021 thus demonstrating that the appellant was indeed served with the said submissions and had sufficient time to respond to the said submissions.

27. In the court below, although the issue of necessity of board authorization to file suit was never pleaded, but it was a central issue that seemed to have been left for determination by the court and therefore it is my view that the trial court did not err in law or fact by considering it.

28. In addition, the question of board authorization is a matter of law on capacity or *locus standi* of parties that institute proceedings before the court. A matter of law is not a matter that must be pleaded and a court of law can on its own motion determine such issue of law even where parties have not pleaded it. This is so because the court is deemed to know the law. In *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal stated:

> "23. The High Court is presumed to know the law. That is why the *Constitution* has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3)(a) jurisdiction to develop the law and in Article 20 (3) (b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come up with the law and authorities including the Treaty and the case-law. But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly..."

29. It is therefore my finding that the trial court did not err in entertaining the issue of the plaintiff/ appellant herein not having filed authority for institution of suit.

On the Merits of the Respondents' Claim that the Appellant Lacked Authorization to File Suit

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."

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 organisation 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 deponed 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* [2021]eKLR 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."

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.

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 *DT 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 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."

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.

53. For all the above reasons, I find this appeal meritorious. I allow it and set aside the judgment of the trial court that dismissed the appellant's suit and substitute that order of dismissal with an order that judgment be and is hereby entered for the plaintiff/appellant herein against the defendants/respondents herein in the sum of ksh 314,446.34, as prayed together with interest at court rates from the date of filing suit until payment in full. The appellant corporation shall also have costs of the suit in the lower court.

54. I order that costs of this appeal shall be borne by each party to this appeal for the reasons that had the appellant's counsel been vigilant upon being served with submissions by the respondents' counsel, they would have raised issues that they have raised in this appeal and the same would have been resolved by the court below.

55. This file is now closed after decree is issued.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT SIAYA THIS 29TH DAY OF JUNE, 2022 VIRTUALLY

R.E. ABURILI

JUDGE