



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E191 OF 2020

KAISER INVESTMENTS LIMITED.....APPELLANT

VERSUS

HUA RUN COMPANY LIMITED.....1ST RESPONDENT

YIN XINGCHENG.....2ND RESPONDENT

HONG TAI COMPANY LIMITED.....3RD RESPONDENT

VANCI ENGINEERING COMPANY LIMITED.....4TH RESPONDENT

(Being an appeal against the Ruling of the Chief Magistrate's Court at Milimani

delivered on the 4th September 2020 by Honourable D.W. Mburu (Mr)

Senior Principal Magistrate in CMCC No. 300 of 2020).

JUDGMENT

The appellant filed its suit before the Milimani Chief Magistrate's court seeking rent arrears and damages for breach of contract. The suit was accompanied by an application dated 30th July 2020 which sought temporary orders. On 4th September, 2020 the trial court delivered a ruling which struck out the suit and the application on the ground that the appellant had not filed a resolution authorizing the filing of the suit. The appeal is against the ruling which struck out the suit. The appellant filed another suit after the first suit was struck out and this necessitated the amendment of the memorandum of appeal. The grounds of appeal as per the amended memorandum are that:-

- 1. The Honorable Magistrate erred in fact and in law in striking out the Plaintiff's suit and Application dated 30th July 2020 on the grounds that the Plaintiff had not filed a resolution authorizing the filing of the suit.**
- 2. The Honorable Magistrate erred in fact and in law in failing to note that the Plaintiff had in fact on 17th August 2020 filed a resolution confirming and ratifying the suit and all actions taken in the suit to the date of passing the resolution.**
- 3. The Honorable Magistrate erred in fact and in law disregarding all the irregularities in the Replying Affidavit of the Defendants.**
- 4. The Honorable Magistrate erred in fact and in law in awarding the costs of the suit and Application dated 30th July 2020 to the defendant.**

The appeal was determined by way of written submissions. Mr. Ataka, Counsel for the appellant submitted that the appellant's application dated 30th July, 2020 had *inter alia* sought *mareva* injunctions against the respondents. The respondents filed a replying affidavit in response to that application sworn by Hongding Qian which affidavit was sworn before Mr. Samuel Akolo Akoti Wanyanga advocate who is practicing in the same firm of advocates defending the respondents. It is submitted that the replying affidavit was defective as it was drawn and sworn before the same firm of M/S P.C. Onduso Advocates who were on record for the respondents contrary to the provisions of Section 4(1) of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya which states:-

“A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

Mr. Ataka referred to the case of **LEE NJIRU –V- J.K. LOKORIO & ANOTHER (2019) eKLR** where the court stated:-

“Context must also be given to the substantive legislation, the Oaths and Statutory Declarations Act under which a Commissioner for Oaths can commission any documents for use in judicial proceedings but cannot commission documents and affidavits where he is conflicted being part of the law firm attending for one of the parties. The Rules being subsidiary to the legislation cannot have an overbearing effect to the law as held in *Anthony Wandeto Mwangi versus Agba Motors Limited, Cause No.369 of 2012*. Rules of procedure cannot override the mandatory provisions of a statute.

As submitted by the respondents, in the case of *James Francis Kariuki & Another versus United Insurance Co. Ltd Civil Appeal No. 1450 of 2000* the court held that;... *the verifying affidavit sworn by the plaintiffs is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory proviso of Section 4(1) of the Oaths and Statutory Declarations Act.*

This position is reiterated in the case of *Kenya Federation of Labour & Another versus Attorney General & 2 Others Cause No. 735 of 2012* and the findings that;

... *it would be against the provisions of the Oaths and Statutory*

Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declaration Act.

The claimant herein having filed the suit with a Verifying Affidavit commissioned by an advocate from the same law firm representing him in these proceedings contravened the mandatory provisions of section 4(1) of the oaths and Statutory Declarations Act. the person of Ndeke Gatumu is unauthorised to commission the verifying affidavit. This cannot be cured by application of Article 159 of the constitution. I agree with position taken in *James Mangeli Musoo versus Ezeetec Limited [2014] eKLR* held that;

A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.”

It is further contended that there was no preliminary objection before the trial court. The trial magistrate converted the defective replying affidavit to a preliminary objection and proceeded to struck out the suit. Counsel relies on the case of **ORARO –V- MBAJA (2005) I KLR 141** where the court dealt with the issue of preliminary objection as follows:-

A “preliminary objection”, correctly understood, 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 processes 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. I am in agreement with learned counsel, Mr. Ougo , that “*where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.*” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.”

It is the appellant’s case that in fact a resolution of the company authorizing the filing of the case had been filed in court on 17th August, 2020. The resolution was filed even before the respondents filed their replying affidavit. Further, it is maintained that even if no resolution had been filed, the trial court erroneously struck out the suit since failure to file such a resolution is not fatal as the omission can be cured any time before the suit is fixed for hearing. Order 4 Rule 1(4) does not make it a mandatory requirement that the resolution be filed together with the case. Counsel referred to the case of **LEO INVESTMENT LIMITED –V- TRIDENT INSURANCE COMPANY LIMITED (2014) eKLR** where Justice Odunga states:-

“On the issue whether or not the suit is defective, it was contended that there was no authority given by the plaintiff company authorising the institution of these proceedings contrary to the provisions of the Civil Procedure Act. 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.

Clearly from the foregoing provision, nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, 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. The mere failure to file the same with the plaintiff does not invalidate the suit. "

Mr. Ataka also referred to the case of **EAST AFRICAN SAFARI AIR LIMITED –V- ANTHONY AMBAKA KEGODE & ANOTHER [2021] eKLR** where the Court of Appeal stated as follows:-

"It is our view that the proper thing for the High Court to have done was not to strike out the proceedings, 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 shareholder's 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."

Cordery's Law Relating to Solicitor states that:

"Proceedings will not be set aside because the solicitor acted without authority, if the party on whose behalf they were taken adopts what has been done, but ratification of an agent's act can only be effective where, at the time of the act, the principal was himself competent to perform it, or to authorize its performance, and a plaintiff cannot so adopt an action after having apparently repudiated it to the defendant."

We think we have said enough to show that the High Court erred in striking out the suit at that stage, instead of giving the appellant the opportunity to demonstrate that the appointment of its advocates, even if irregular at the beginning, had been regularized."

Mr. Onindo appeared for the respondent. It is submitted that the effect of the amended Memorandum of Appeal is that the prayer for reinstatement of Civil Suit Number Milimani Commercial Court 300 of 2020, has been abandoned. The appellant is only seeking for the prayer that the application dated 30th July, 2020 be allowed to the extent of costs being awarded to the plaintiff. Since there is no prayer for reinstatement of the suit, the application cannot be granted as the suit was struck out. Further, the other prayers being sought in the application dated 30th July, 2020 cannot be granted for lack of an existing suit. The grounds of appeal are at variance with the prayers being sought.

Technically, this appeal has been overtaken by events. The appellant's suit, number Milimani Commercial Court No. 300 of 2020, was struck out for reasons that there was no valid resolution of the plaintiff company to institute the suit. The appellant filed this appeal but at the same time filed a second suit namely Civil Suit No.MC COMMSU E547 of 2020. The prayer for reinstatement of the suit was abandoned and the appellant is now only seeking costs of the application dated 30th July, 2020.

From the record of appeal, the respondent did not file any Notice of Preliminary Objection. The ruling of the trial court at paragraphs 4 and 5 captures what transpired as follows:

1. All four Defendants duly entered appearance and filed responses to the application. In their replying affidavit, the defendant's challenged the validity of the Plaintiff's suit that the same be struck out on the following grounds:

a. That there is no resolution and/or valid resolution of the Plaintiff Company authorising Dorothy Mbithe to institute this suit on behalf of the Plaintiff Company.

2. The Plaintiff subsequently filed a Supplementary Affidavit sworn by Dorothy Mbithe on 20th August, 2020 but did not respond to the issue of her authority to institute suit or swear verifying affidavit on behalf of the Plaintiff Company. Parties through their respective advocates on record filed written submissions which are in the court record. The defendants' submissions substantively addressed the issue of validity of the suit. This in my view is a preliminary issue which goes to the root of the suit and qualifies to be considered as a preliminary objection.

I do agree with the position taken by the appellant that no preliminary objection was filed. The trial court converted the averments in the replying affidavit to be a preliminary objection. A preliminary objection ought to be raised as a distinct and separate issue. Normally by way of separate notice. It should not be brought by way of an averment by a litigant who is not well versed with the legal issues at hand. The trial court erred by dealing with the application by the plaintiff as well as the issue of the need for a resolution by the company together. The plaintiff filed submissions in relation to its application seeking interim reliefs and did not expect the trial court to strike out the suit. There was no prayer for striking out the suit by the respondent in form of a formal preliminary objection.

The appellant maintain that the resolution was filed on 17th August, 2020. The trial court made reference to some decided cases where lack of a resolution authorizing the filing of a case was considered to be fatal. Such cases include **KENYA COMMERCIAL BANK LIMIED – V- STAGE COATH MANAGEMENT LTD (2014) eKLR** and that of **LEO INVESTMENT LIMITED & REPUBLIC –V- TRIDENT INSURANCE CO.** (supra), a decision by Justice Odunga. These are High Court decisions. Further, the holding in Leo Investment is that failure to file a resolution or authority is not fatal and may only raise the need to request for particulars. The Court of Appeal in the **EAST AFRICA SAFARI AIR LIMITED** case (supra) was clear that the proper procedure is not to strike out the proceedings but to stay the matter pending ratification. I do agree with this position as striking out a suit is a draconia exercise which lead to extra expenses on the part

of a litigant and its effect at times is to limit access to justice. The plaintiff would have been called upon during the hearing to establish whether there was authority to file the suit.

The appellant has raised the issue of the replying affidavit in relation to the application dated 30th July 2020. I do not wish to dwell on that issue now that the appellant filed a separate suit. In my view, the proviso to Section 4(1) of the Oaths and Statutory Declaration Act can be the subject of different interpretation. Where a firm of Advocates has several lawyers and only one of them is appearing in a matter, a party who swears an affidavit before a different advocate within the same firm may justify such an action. All what is contained in such affidavits is averments known to the deponent and striking out the affidavit might be another draconian exercise. Advocates are given the Commissioner of oaths right as individuals and not as a group in one firm. The Commissioner for Oath takes the personal responsibility of ensuring that the deponent is telling the truth as per the affidavit. That responsibility is not a joint or communal duty of a firm of advocates. It can be argued that good practice would entail having affidavits drawn by firm on record in a matter sworn before a different firm of advocates. In my view, failure to do so does not mean that the averments are totally false or defective.

I am satisfied that there was no preliminary objection to be determined by the trial court. The trial court ought to have dealt with the appellant's application dated 30th July 2020 and either grant or dismiss it. The fact that a resolution authorizing the filing of the suit was not filed contemporaneously with the plaint was not fatal to warrant the striking out of the suit.

Counsel for the respondent is of the view that the suit was struck out and the prayers being sought cannot be granted. However, counsel taxed his bill of costs and the sum of Kshs.268,967/90 is being demanded from the appellant. The appellant cannot simply pay the cost since its suit was struck out and a fresh one filed. I do find that the appellant is entitled to pursue the appeal. If the court uphold the appeal it can equally terminate the suit and deal with the issue of costs.

The upshot is that the appeal is merited and is hereby allowed in the following terms:-

i. Civil suit number Chief Magistrate's Commercial Court 300 of 2020 is hereby marked as withdrawn and replaced by Civil Suit No. E547 of 2020.

ii. The order of the trial court granting costs to the respondent is hereby set aside and replaced with an order that parties shall meet their own respective costs of Civil Suit No. 300 of 2020.

iii. Parties shall meet their respective costs of this appeal.

Dated and signed at Nairobi this 27th day of **May**, 2021

S. CHITEMBWE

JUDGE