



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E449 OF 2019

MAGIC GENERAL CONTRACTORS LIMITED.....PLAINTIFF

-VERSUS-

KENYA UTALII COLLEGE.....DEFENDANT

RULING

(On Defendant's Preliminary Objection dated 30th October, 2020)

1. This Ruling is in respect to a Preliminary Objection that was raised by the Defendant against the Plaintiff's suit vide a Notice of Preliminary Objection dated 30th October, 2020. The Defendant contends that the Plaintiff's suit is fatally defective and incompetent for the reason that the affidavit verifying the Plaintiff is not sworn by an officer of the Plaintiff with authority under the seal of the Plaintiff yet it is a company. It contends that this is an express requirement of **Order 4 Rule 1(4)** of the **Civil Procedure Rules 2010** which has been disregarded with impunity. The Defendant therefore prays that the Plaintiff be struck out in its entirety and costs of the suit as well as those of the Preliminary Objection be awarded to it.
2. The Preliminary Objection was canvassed by way of written submissions.
3. In its written submissions dated 14th April, 2021, the Defendant submits that the parties had agreed to arbitration as the dispute resolution mechanism. It was submitted that the parties have already appeared before an arbitrator who declined jurisdiction and terminated the arbitration proceedings on account of the Plaintiff's non-compliance with clause 45.3 of their contract which prescribed the period within which to institute such proceedings in case of a dispute. In the Defendant's view, this is a further demonstration of the Plaintiff's lackadaisical approach to this matter.
4. According to the Defendant, when the Plaintiff instituted this suit, it failed to exercise the vigilance and diligence expected of a party that had just had its arbitration proceedings terminated due to its own laxity and indolence. It was submitted that despite the Plaintiff being a corporation, it failed to comply with the mandatory requirement under **Order 4 Rule 1(4)** of the **Civil Procedure Rules 2010** which requires the Verifying Affidavit in such a case to be sworn by an officer of the company duly authorized under the seal of the company to do so.
5. The Defendant further contended that the Plaintiff was given an opportunity to rectify the defect when the Defendant raised the anomaly in its Defence. However, this notice did not even prompt the Plaintiff to jolt into taking any corrective action in light of the history of the matter in the arbitration proceedings. The Defendant noted that at the case conference of 10th September, 2020, the Plaintiff informed the court through its Advocates that it had complied with pre-trial requirements and was fully ready for hearing. This, in the Defendant's view, means that the Plaintiff had no intention of filing the authority under seal and would be proceeding with the hearing without the same. It also noted that to date, no such authority under seal has been filed by the Plaintiff.
6. It was submitted by the Defendant that a Corporation cannot act on its own but must give authority to its officers. It reiterated that the rules require that such authority be given under seal which can only be confirmed by the authority being exhibited to the Court and other litigants for verification. It argued that where no such authority is exhibited, it can only be concluded that the suit has not been filed by the corporation but rather, by an impostor without any authority from the company. The Defendant was emphatic that the Plaintiff has therefore been utterly lackadaisical in its approach to this matter starting with the arbitration. It stated that the authority by the corporation is a fundamental requirement in suits by Corporations and lack of it only means that this suit is suitable for striking out.
7. The Defendant relied on various cases in which courts held that the requirement under Order 4 Rule 1(4) of the Civil Procedure Rules 2010 is mandatory and upheld preliminary objections raised in that respect. These include **Mohamed Suleiman Shee & Another v**

Suleiman Omari Chala & 2 Others [2018] eKLR; Ibacho Trading Company Limited v Samuel Aencha Ondora & 3 Others [2017] eKLR; Steel Formers Limited v Sgs (Kenya) Limited & Another [2020] eKLR; and Urban Technical Services & Another v James Wainaina Ndugu & 2 Others [2017] eKLR.

8. It was also noted that from the authorities relied on, it is clear that courts have been emphatic that Article 159 of the Constitution is not a panacea for overt violation of rules of procedure. The Defendant thus faulted the Plaintiff for exhibiting wanton disregard for mandatory rules and urged that the same should not be countenanced by this court as it would defeat the overriding objective of efficient and expeditious disposal of matters. In view of the foregoing submissions, it urged that this suit be struck out with costs.

9. The Plaintiff on its part formulated two issues for determination in its written submissions dated 29th January, 2021. The first issue was whether the Affidavit conforms to the requirements under **Order 4 Rule 1(4)** of the **Civil Procedure Rules 2010**. On this, it was submitted that the Plaintiff authorized one Wilson Gatimu Mbaria to sign and verify its claim against the Defendant but the said authority was inadvertently excluded during filing of the claim.

10. The Plaintiff submitted that be that as it may, the position in law is that such authority or 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 the suit. It argued that the absence of such authority is therefore not fatal to the suit, at least not at this stage. The Plaintiff cited the case of **Wama Pharmarey (K) Ltd v Monsanto Kenya Ltd [2020] eKLR**, where the court relied on the case of **Mavuno Industries Limited & 2 Others v. Keroche Industries Limited [2012] eKLR**, in which it was stated that the mere failure to file the same with the Plaintiff does not invalidate the suit. Reliance was also placed on the case of **Republic v Registrar General & 13 Others [2005] eKLR** where the court held a similar view.

11. Further, the Plaintiff urged the Court to be guided by the sentiments of Madan, JA in **D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] Eklr**, *inter alia*, that a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal even where such a suit exhibits the slightest semblance of a cause of action.

12. The Plaintiff stated that it seeks for a seat at the table of justice and equity by being allowed to correct the anomaly through filing a further affidavit annexing such authority.

13. The second issue according to the Plaintiff relates to whether this court has jurisdiction to entertain the matter. The Plaintiff's submits that there is a valid claim arising as of right against the Defendant which was to be heard and determined by an Arbitrator in accordance with the Agreement but, the arbitral proceedings were terminated before the Arbitrator could hear the parties herein and issue the final Award. It was contended that the Plaintiff was not accorded any opportunity to be heard and that the termination by the Arbitrator has rendered the Plaintiff incapable of meeting the ends of justice.

14. The Plaintiff urged that this situation can only be saved if this Honourable Court intervenes and hears this matter in exercise of its original and unlimited jurisdiction donated by **Article 165** of the **Constitution of Kenya, 2010**. In support of the question of jurisdiction, the Plaintiff relied on the locus classicus case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**.

15. In addition, the Plaintiff submitted that **Article 50 (1)** of the **Constitution of Kenya, 2010** entitles any person who has any dispute that can be resolved by the application of law to have the same decided in a fair hearing before a Court.

16. The Plaintiff thus urged that it be allowed to file a further affidavit annexing the authority and further, that the costs of the application be borne by the Defendant.

ANALYSIS AND DETERMINATION

17. **Order 4 Rule 1 (4)** of the **Civil Procedure Rules 2010** 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.”

18. In the present case, it is not disputed that there is nothing on record to show that the Plaintiff, a limited liability company, authorized one **Wilson Gatimu Mbaria** to swear the Verifying Affidavit that accompanied the Plaintiff filed herein. I concur with the Defendant's contention that such a verifying Affidavit renders the suit herein incompetent since the above provision is couched in mandatory terms. Similarly, I am in agreement with the Plaintiff's submission that there is no requirement for the authority by an officer of a corporation to be filed at the time of filing the suit. The general practice is that the same may be filed any time before the suit is set down for hearing.

19. In **Mavuno Industries Limited & 2 Others v Keroche Industries Limited [supra]** Odunga J stated as follows:-

“Nowhere is it stated that such authority or resolution must be filed. The failure to file the same 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.....I associate myself with the decision of Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR and hold 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, at least not at this stage.”

20. The Defendant has urged that the suit be struck out as the Plaintiff has exhibited a lackadaisical attitude by failing to regularize the Verifying Affidavit despite being notified of the defect vide its Statement of Defence. On this, I take note of the provisions of **Order 4 Rule**

6 of the **Civil Procedure Rules** which state as follows:-

“The Court may of its own motion or on the application by the plaintiff or defendant order to be struck out any plaint or counter-claim which does not comply with Sub-rule (2) (3) (4) and (5) of this rule” – emphasis added.

21. In my considered view, the word “**may**” as used in the above provision means that striking out is not a mandatory consequence in a case where a Verifying Affidavit has been sworn without proof of authorization under the company seal. Such an action is subject to the exercise of court’s discretion. In any event, it is well settled that the discretion of courts to strike out suits or pleadings for whatever reasons should be used very sparingly in the interest of justice.

22. In **Daylight Drycleaners Limited v Samchi Telecommunications Limited & Another [2015] eKLR**, Kamau J stated that:

“...courts have moved from striking out suits where verifying affidavits do not conform to the mandatory provisions of the law. The primary objective of courts has been to seek to sustain suits rather than terminate suits by striking out irregular affidavits and instead exercising their wide and unfettered discretion to order that fresh verifying affidavits that comply with the law be filed within a given time. This is to ensure that they achieve the objectives of Section 1B of the Civil Procedure Act that seek to further the timely disposal of proceedings before them.”

23. In **D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [Supra]** the court stated as:

“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.”

24. Guided by the above authorities, I find that the failure to file the resolution by the Plaintiff Company that authorized one Wilson Gatimu Mbaria to swear the Verifying Affidavit cannot be considered as fatal to the suit at this stage. The Plaintiff still has an opportunity to correct the defect and this, of course, is important in order to give the Plaintiff a fair chance of presenting its case in court as envisaged under **Article 50(1)** of the **Constitution** of Kenya.

25. As regards the question of jurisdiction, I hold no doubt that this court can entertain this suit. **Article 165** of the **Constitution** donates to this court original jurisdiction to hear and determine civil cases and the same cannot be limited by an agreement between parties which has been overtaken by events. In **Football Kenya Federation v Kenyan Premier League Limited & 4 others [2015] eKLR**, the court while dealing with a question of jurisdiction stated as follows:

“Clearly, there is no express provision ousting the jurisdiction of the High Court from entertaining the dispute herein.... that jurisdiction of this court is conferred by the Constitution and enacted statutes and therefore only the Constitution or statute can limit such jurisdiction, not by parties to a suit or bodies’ constitutions...”

26. In the premises, the orders that commend themselves to this court and which I hereby make are as follows:

- a. The Verifying Affidavit of Wilson Gatimu Mbaria filed with the Plaintiff herein is accordingly struck out.
- b. A proper Verifying Affidavit bearing the Plaintiff’s seal shall be filed and served within ten (10) days from the date of this Ruling.
- c. The costs of the Preliminary Objection shall be borne by the Plaintiff.

27. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST MAY, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr.Mburugu for the Defendant/ Applicant(Objector).
2. Mr.Kokembe for the Plaintiff/Respondent.