



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NUMBER E337 OF 2020

NEXTGEN MALL MANAGEMENT COMPANY LIMITED.....PLAINTIFF

VERSUS

NETCOM INVESTMENTS LIMITED.....1ST DEFENDANT

SOUK BAZAAR LIMITED.....2ND DEFENDANT

RULING

NOTICE OF MOTION

The 2nd Defendant filed a Notice of Motion Application dated **24th September 2020** for orders that; -

1. The Complaint dated **31st August 2020** be struck out.

Which Application is supported by the Affidavit of **Mr. Navinchandra Nathoo Shah** on the following grounds; -

2. The Plaintiff's two Board of Directors have not authorized the suit herein to be filed and the Advocate who filed the suit has no authority from the Board of Directors to file suit on the Company's behalf.
3. The Verifying Affidavit and the witness statement have been filed by a total stranger with no legal authority and/or permission.
4. The Complaint is frivolous, vexatious and an abuse of the court process.

REPLYING AFFIDAVIT

The Plaintiff opposed the Application vide the Replying Affidavit of Samuel Mwangela dated **14th October 2020** as follows; -

1. The Plaintiff's actions are premised on the grounds that they act as the representatives of the Unit Owners Committee as evidenced by Clause 4 of the schedule in the Memorandum and Articles of Association dated 24th May 2010.
2. The subsidiary management company has been established for the principle purpose of managing the Block facility and collecting service charge, garbage collection, security charges on monthly basis for the units erected on ALL THAT piece of land known as Land Reference Number 209/18648 (original Number 209/11368/2)
3. The Respondent states that Clause 47 read together with Clause 49 of the Memorandum and Articles of Association states that the Board may delegate any of its powers to committees as it thinks fit and any document giving such authority to a committee be in writing and signed by the Directors shall be as valid and effectual as a resolution passed at a meeting by the board.
4. Further, the Directors did authorize the Plaintiff, its employees and/or agents to file the suit as is evidenced by the letter dated 21st April 2020 which was executed by both Directors and attested to.

4. The Plaintiff did issue instructions to the firm of Diro Advocates LLP to have the conduct of this suit.

6. The Plaintiff is committed to the rule of law and has complied with all procedural laws as per the Memorandum and Articles of Association above mentioned and the Companies Act.

7. The Defendants have not denied the existence of the debt that is due and owing to the Plaintiff by themselves which forms the basis of the whole suit

8. It is in the in interest of justice that the Application be dismissed as the Applicant is attempting to rewrite the procedures and delay the course of justice.

1ST AND 2ND DEFENDANTS' SUBMISSIONS

It was the Defendants submission that the aforesaid Plaint was filed without proper instructions from the company. At no time has the Board of Directors of the Plaintiff company deliberated and passed a resolution to authorize the Plaintiff, its employees, agents and/or servants to file the suit herein and neither have they authorized the firm of Diro and Company Advocates to file the suit.

In **Yussuf Abdi Adan versus Hussein Ahmed Farah & 3 others [2017] eKLR** it was held that; -

‘A managing director, a company secretary and/or majority shareholder cannot give instructions for the commencement of a suit on behalf of the company. The same would be a nullity, an illegality and usurpation of the powers of the board.’

Further, it is settled law that an advocate ought to exercise special care to ensure and confirm that his firm or the advocate has necessary authorization by way of clear resolutions of the Board of Directors to institute the suit. (**see Kenya Commercial Bank limited versus Stage Coach Management limited [2014] eKLR**).

Proper authorization to file a suit on behalf of a company is mandatory. Consequently, the Plaint should be struck out as the instant suit is a nullity and the Plaintiff company is not before the court.

PLAINTIFF'S SUBMISSIONS

Whether the Plaintiff has authority to file the suit?

The Plaintiff submitted that the Officer of the Plaintiff's company swearing the Verifying Affidavit was duly authorized under the seal of the company, an authority that is evidenced and filed together with the suit.

Authority to Diro Advocates LLP

In clear compliance with Article 56 of the Articles of Association, all referenced and produced authorities to act in this matter or swear affidavits have been sealed by a common seal of the company and signed by the director of the company. As such, the reference of the authorized officer of the company and the advocates on record as strangers is baseless and mere allegations.

What are the requisite orders?

In the Application, the Defendants sought to have the suit struck out in its entirety. Striking out of the pleadings would be a draconian step that would deny the Plaintiff justice and monies due and owing to them. It was the Plaintiff's submission that the only proper requisite order is to direct the suit to proceed to its just and fair determination.

DETERMINATION

After considering the pleadings and submissions by the parties herein the issue for determination is whether the suit herein should be struck out.

Order 2 Rule 15 of the **Civil Procedure Rules** provides as follows: -

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

In the case of *Bugerere Coffee Growers Limited -versus- Sebaduka & Another [1970] EA 147* it was held:

“(i) when companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors; meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings;

(ii) where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the Defendants for the costs of the action.

(iii) the advocates should be ordered to pay the costs.”

It was the Plaintiff’s case that its actions were premised on the grounds that they act as the representatives of the Unit Owners Committee as evidenced by Clause 4 of the schedule in the Memorandum and Articles of Association dated **24th May 2010**.

Further, **Clause 49** of the **Memorandum and Articles of Association** dated **24th May 2010** states that; -

“A resolution in writing signed or approved by letter, telegram or telex by all the directors (or their alternate directors) or by all the members of a committee of directors shall be as valid and effectual as a resolution passed at a meeting of the board or, as the case may be, of such committee duly called and constituted. Such resolution may be contained in one document or in several documents in like form each signed by one or more of the directors or members of the committee concerned.”

It was the Applicant’s case that the Plaintiff’s two Board of Directors have not authorized the suit herein to be filed and the Advocate who filed the suit has no authority from the Board of Directors.

The Plaintiff’s Advocate has also produced a letter where the Directors did authorize the Plaintiff, its employees and/or agents to file the suit as is evidenced by the letter dated 21st April 2020 which was executed by both Directors (**Ramesh Amlani and Navin Shah**) and attested to with the company seal.

In addition, the Plaintiff did issue instructions to the firm of Diro Advocates LLP to have the conduct of this suit vide a letter dated **20th July 2020**.

Order 4 Rule (1) (4) of the **Civil Procedure Rules**. The Order deals with particulars to be contained in a Plaint, and states that: -

4(1) (4) “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.”

The Plaintiff authorized **Samuel Mwongela** to swear its Verifying Affidavit and the same was authorized under the seal of the Plaintiff company.

In light of the above, the Notice of Motion Application dated **24th September 2020** fails to have the Plaint struck out and is hereby dismissed.

DISPOSITION

1. The Notice of Motion Application fails and is hereby dismissed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JUNE 2021

(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

KHADIJA FOR AHMEDNASIR, ADBIDAKIR & CO. ADVOCATES FOR THE DEFENDANTS.

M/S DIRO ADVOCATES LLP FOR THE PLAINTIFF.

COURT ASSISTANT TUPET.