



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL SUIT NO. 17 OF 2019**

**LAXSTONES LIMITED.....PLAINTIFF**

**VERSUS**

**SKYSTONES LIMITED.....DEFENDANT**

**RULING**

1. The Plaintiff herein, **Laxstone Limited** sued **Skystones Limited** the Defendant, to recover the sum of Kshs. 23,000,000/= arising from a contract allegedly executed between the parties in 2015. Upon being served with the plaint and summons, the Defendant filed a notice of preliminary objection dated 1<sup>st</sup> August 2019 to the following effect:

**“TAKE NOTICE that the Defendant shall at or before the hearing of this case seek the court’s indulgence and urge the following grounds of preliminary objection;**

**1. THAT the entire suit is totally incompetent because it was filed without any resolution or any valid and/or written resolution of the Board of Directors of Laxstones Limited.**

**2. THAT as held in: - NAIROBI HC (MILIMANI) CIVIL CASE NO. 345 OF 2014 EAST AFRICA SAFARI AIR LIMITED V. ANTHONY AMBAKA KEGODI & ANOTHER- “This suit is incompetent ab initia for failure to file the Company’s Board of Directors’ resolution to institute the case, to appoint the lawyers for purposes of appointing HARSHAD HIRANI to swear any affidavits.**

**REASONS WHEREFORE the Defendant shall seek that the Plaintiff’s suit to be struck out with costs.” (sic)**

2. On 30<sup>th</sup> August 2019, the Plaintiffs filed a further list of documents including a Special Ordinary Resolution of the Board of Directors of Laxstones Company Ltd dated 6<sup>th</sup> May, 2019 appointing and authorizing the firm of **J. O. Juma & Company Advocates** to represent the company and to file a suit against Skystones Limited for the recovery of Kshs. 23,000,000/= and further authorizing **Harshad Hirani** to execute all documents on behalf of the Plaintiff company in relation to the suit. The resolution is signed by three directors of the Plaintiff company.

3. Thereafter, the Plaintiff company’s advocate set down the preliminary objection (PO) for hearing on 18<sup>th</sup> November, 2019 and filed submissions by the said date when directions issued to the Defendant to also file submissions. When the matter next came before the Court on 19/10/2020 the Defendant was absent though served, and once more, the court granted the Defendant more time to file submissions failing which ruling would be delivered on 4/03/2021. No submissions were filed by the Defendant in support of their preliminary objection as directed by the Court.

4. The court has considered the Plaintiff’s submissions. The submissions firstly correct the citation of the case relied on in the preliminary objection and secondly indicate that the said decision had since been overturned by the Court of Appeal in **Nairobi Civil Appeal No. 42 of 2007 EAST African Safari Air Ltd V. Anthony Ambaka Kegode (2011] eKLR**. The Plaintiff argued that the preliminary objection does not satisfy the definition of a preliminary objection as stated in **Mukisa Biscuit Manufacturing Company Ltd Vs. West End Distributors Ltd [1969] EA 696** as it raises issues of fact. This point is no longer tenable as the Plaintiff’s act of subsequently filing the resolution of the Plaintiff’s Board of Directors is an admission of the defect raised in the preliminary objection. In the circumstances, even though ideally a motion rather than a bare preliminary objection ought to have been filed in this case, the court is of the view that the preliminary objection in this instance could still be considered as a point of law.

5. The Plaintiff then proceeded to submit on the exercise of the court’s power to strike out pleadings generally, and under Order 2 Rule 15 of the Civil Procedure Rules, citing several authorities on the point including **Blue Shield Insurance Company Ltd V. Joseph Mboya Oguttu (2009) eKLR** where the court cited the locus classicus on the issue namely, **Dt Dobie & Company (Kenya) Limited v Muchina (1982] KLR 1**. On the question whether the failure to file the resolution of the Board of Directors of the Plaintiff with the plaint justifies the striking

out of the plaintiff, the Plaintiff submitted that such failure does not invalidate the suit and that the said resolution can be filed any time before the suit is set down for hearing. For this proposition several authorities were cited, including **Ndung'u Mugoya & 473 Others V. Stephen Wang'ombe & 9 Others [2005] eKLR** and the decision of the Court of Appeal in **East African Safari Air Limited Versus Anthony Ambaka Kegode** (above).

6. As earlier stated, the Plaintiff did file the Board of Directors' Special Ordinary Resolution appointing and authorizing counsel to file the instant suit on behalf of the Plaintiff company. In the appeal by **East African Safari Air Limited** (supra) appeal against the High Court decision, the Court of Appeal held that where a suit is filed by an advocate without proper or any authority of the company, the company could subsequently ratify the act of the advocate in accordance with the law of principal and agent and the ordinary doctrine of ratification. And that once that was done, the defect in the proceedings is cured.

7. The Court of Appeal proceeded to state that:

**“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.“**

8. The decision of **Kimaru J** in **R. V. Registrar General and 13 Others [2005] eKLR** also speaks poignantly to the point. In that decision the learned Judge stated that:

**“The third point of law raised is that the firm of Waiganjo & Company Advocates have no authority of the company to file the motion of judicial review on behalf of the applicants... that no resolution of the company was annexed to the application to prove that the said firm of advocates had authority to file the suit on behalf of the company (whom the applicants are claiming to be its directors).**

**The applicants have conceded that no such resolution was filed. They have however stated that the anomaly could be cured by a further affidavit being filed annexing such authority. I agree with the applicants. I think the position in law is that such a resolution by the Board of Directors of company may be filed any time before the substantive motion is fixed for hearing. There is no requirement that such resolution granting a firm of advocates authority to file suit on behalf of a company has to be filed at the same time that the suit is filed. I do therefore hold that even if the said firm did not file such authority when the substantive motion was filed, such authority can be filed any time before the hearing of the substantive application... the absence of such authority is therefore not fatal to the applicant's suit. That preliminary point is likewise dismissed.”**

9. Similarly in this case, although the company's resolution was not filed together with the plaintiff, the Plaintiffs have now regularized the position by filing the said before the hearing of the suit. Indeed, the preliminary objection preceded the filing of the Defendant's defence statement. Accordingly, the preliminary objection is dismissed with costs to the Plaintiff. The parties are directed to proceed to comply with the provisions of Order 11 of the Civil Procedure Rules to perfect the suit for hearing.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29<sup>TH</sup> DAY OF JULY 2021**

**C. MEOLI**

**JUDGE**

**In the presence of:**

**Mr Baraka for the Plaintiff**

**N/A for the Defendant**

**Kevin: Court Assistant**