



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE E 108 OF 2019

IBRAHIM HUSSEIN MAHADI1ST PLAINTIFF

MAHADI ENERGY LIMITED 2ND PLAINTIFF

VERSUS

FIRST COMMUNITY BANK LTD.....DEFENDANT

RULING

1. The Court is asked to consider and determine the Notice of Motion dated 30th May 2019 for the following main prayer;

2. The Honourable Court be pleased to strike out High Court Civil No. E108 of 2019 dated 29th April 2019 together with the Notice of Motion application of even date and the Plaintiffs' advocates the firm of Prof. Albert Muma & Company Advocates be condemned to pay costs personally.

2. In a Plaint presented to Court on 30th April 2019, Ibrahim Hussein Mahadi (Ibrahim) avers that he is the beneficial owner and chairman of the board and Managing Director of Mahadi Energy Limited (Mahadi). In that pleading Ibrahim and Mahadi have filed suit against First Community Bank Limited (the Bank) for the following prayers;

a) A declaration that the Defendant's 90 days Statutory Notices dated 20th December 2018 and issued to the Plaintiff on or about 7th January 2019 together with the statutory notices dated 21st March 2019 and served upon the Plaintiffs on or about 29th March 2019 are premature, irregular and unlawful.

b) The Defendant Bank be compelled to restructure the Plaintiffs facilities herein and allow the Plaintiffs to repay the same within the agreed period.

c) The Defendant Bank be compelled allow the 2nd Plaintiff settle all the financial facilities with the Bank by entering into the proposed partnership agreement with Jingmen Hongtu Special Aircraft Manufacturing Company Ltd.

d) An account as at 29th April 2019 of all the monies paid by the Plaintiffs and the License towards the loans account and all the monies deducted from the Plaintiffs account towards the loan repayment.

e) A permanent injunction be and is hereby issued restraining the Defendant by itself, agents, servants, employees or otherwise however from selling, disposing, alienating and/or any manner whatsoever dealing with the properties known as Nairobi Juja Road, LR Nos. 25764, 209/5082 and 209/2389/95, Nairobi South C. LR. Nos. 209/5061 and Title No. Nairobi /Block 103/434 and Mombasa LR. No. MN/VI/4689 and subdivision 998, LR. No. 2428/VI/MN contained in CR. 46162, 8844/1 and 14493.

f) Costs.

g) Any other relief the Court may deem just and appropriate including all further necessary or appropriate accounts, enquiries and directions.

3. Two of the properties sought to be protected in the proceedings are LR. No. Mainland North Section VI/4689 and Subdivision number 998

(both herein called the Mahadi properties). It is the contention by the Bank that the suit has been filed without due authority from Mahadi. That there is no resolution or valid resolution of the Company authorizing the institution of the suit or appointing the firm of Prof. Albert Mumma and Co. Advocates to present this suit on behalf of Mahadi. Lastly, that Mahadi did not authorize Ibrahim to swear the verifying affidavit on behalf of the Mahadi.

4. In support of the application before Court are the affidavits of Yahya Dahir of 30th May 2019 and 13th June 2019. Annexed to the first affidavit are the affidavits of Hussein Amin (Hussein) and Dor Mohamed Dor. Hussein states that he is a Director of Mahadi by virtue of a Power of Attorney by one Abdi Hassan Amin. Dor too says that he is a Director of the Company.

5. Hussein and Dor make reference to a Board resolution of 2nd February 2016 in which the Company gave the Bank authority to sell the Mahadi properties by way of private treaty so as to pay off some facilities which were overdue. The two deny that Mahadi passed a resolution to bring the current suit.

6. The application is resisted through a replying affidavit sworn on 10th June 2015 by Ibrahim. He states that Mahadi gave instructions for the filing of the suit and that the verifying affidavit accompanying the Plaint was duly executed by one of its directors being Adan Abdullah Alow (Adan). Further, that the Bank does not deny that he (Ibrahim) is the beneficial owner, Chairman or Managing Director of the Mahadi. He also asserts that some of the properties which form the subject matter of the suit are in his names and he therefore has an interest in the matter. He raises other issues which are more relevant to a discussion as to the merit of the cause of action before court but which are peripheral to the core issue raised by the application before court which is whether or not the suit by Mahadi was instituted with due authority of its board of directors.

7. This Court has given due regard to the submissions made by counsel. Before making known its view of the matter, it deals with one preliminary issue.

8. At the hearing of the Motion, Mr Agwara appearing for the Plaintiffs objected to the use of the further affidavit of Hussein sworn on 24th June 2019 to support the Motion. The Court upheld the objection and promised to give its reasons in this decision.

9. In paragraph 2 of that further affidavit, Hussein depones as follows:-

2. I am a director of 2nd Plaintiff by virtue power of attorney by my brother Abdi Hassan Amin who is a director of the 2nd Plaintiff and I am aware that the 2nd Plaintiff borrowed money from the Defendant. Annexed herewith and marked HHA1 is the said power of attorney by Abdi Hassan Amin.

10. Annexed to the affidavit of Yahya Dahir also sworn in support of the application is a search of the records of Mahadi as at 4th June 2019. The names of directors and shareholders is given as follows:-

<u>Name</u>	<u>Share</u>
Adan Abdullah Aliow Director/shareholder	200
Abdi Hassan Amin Director/shareholder	200
Dormohamed Mohamed Dormahamed Director/shareholder	200

It is therefore clear that even if Hussein held a valid power of attorney on behalf of his brother, he (Hussein) is not a director of the Company and would not have the legal authority to speak as a director of the Company. The power of attorney cannot cloth him with directorship. In the affidavit that was struck out by Court he purports to make assertions as a director of Mahadi which is factually disproved by the search. Hence the decision of the court.

11. The application before is simply that this suit has been brought without authority of the board of directors of Mahadi and that there is no resolution to that effect.

12. In response the Plaintiffs make three propositions. First, that where there is disharmony among the directors then it is unnecessary to insist on a resolution. Second, it is not the business of an adversary to investigate the authority of the other side in respect to the presentation of the suit. Lastly that should the Court come to the conclusion that the resolution is necessary then it should stay the suit and give opportunity for the resolution to be filed instead of making a striking out order. This court turns to consider each of the arguments.

13. I would think it is correct that, ordinarily, it is not the business of an adversary to inquire whether a Company has due authority of its board to institute or defend a suit. This in fact is the holding in Saraf Limited –vs- Augustot Arduin [2016] eKLR where the Court of Appeal held:

“We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (see **Solomon & Solomon** [1897] AC 22 (H. L.)) Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law. It has always been the law that directors are the persons who have authority to

act for the company but the majority of the members of the company are entitled to decide, even to overrule, the directors”.

14. Having said that there is something unique about the circumstances obtaining in this matter. The suit is instituted, partly, in challenge of the Bank’s attempt to sell the Mahadi properties whose sale was expressly authorized by the Company a through a resolution of it’s board of directors. The Bank was therefore entitled to inquire about the apparent change of heart and if in doing so it turned out that the suit may have been instituted without due authority then it was perfectly in order to press for proof of a resolution.

15. Sometimes there will be a disagreement between directors of a company as to whether or not a company should commence or defend a suit. If the circumstances are that a shareholder is of the strong view that it is the interest of the company to institute a suit but is unable to marshal a resolution then it is open for a member to commence a derivative action in the name of the company so as to protect the supposed interest of the company. The concept of a derivative action now has statutory underpinning in part XI of the Companies Act, 2015. If Ibrahim felt handicapped because of inability to summon a board resolution then he was not without recourse.

16. The simple question is whether Ibrahim has proved the existence of a board resolution to bring this suit. The search presented by Ibrahim shows the directors of the company to be Adan Abdullah Aliow, Abdi Hassan Amin and Dormohamed Mohamed Dormohamed. Even upon challenge, he has not produced that resolution. It matters not that he may be beneficial owner or chairman of Mahadi. Once the issue of the board resolution was raised then he ought to have brought proof a pre-suit resolution or post filing ratification.

17. Given this finding, is the solution to strike out the Company’s suit against the Bank? In considering the suitability of such an order I first observe that striking out of a suit is not doubt a very drastic order to make (D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaiza Muchira & Another [1980] eKLR. It must be because of the dire consequence of such an order that the Plaintiffs’ counsel asks this Court to stay the suit instead of striking it out if the Court came to a finding that there was a false start in the commencement. Counsel Agwara asked the Court to give the Company an opportunity to furnish the necessary resolution.

18. Mr Kenyariri on the other hand took the view that the Plaintiff was presented with opportunity to furnish the resolution by the very application before Court.

19. Recognizing, however, the finality of a striking out order, this Court is inclined to grant further opportunity to the Company to present a resolution authorizing or ratifying the commencement of this action. In doing so the court takes a cue from the Court of Appeal in East Africa Safari Air Limited vs Anthony Ambaka Kegode and Another [2011] Eklr in which it held:-

“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”.

20. The Court will shortly appoint the time within which the resolution shall be filed failing which the suit by the Company shall stand struck out. In that event costs shall be met by the 1st plaintiff who would have instigated a suit without proper sanction. I see no reason to condemn the advocates representing him.

21. These are the final orders;

a) Mahadi shall within (seven) 7 days of this order file a proper resolution authorizing or ratifying the commencement of this suit failing which the suit by the 2nd plaintiff shall stand struck out without the necessity of a further court order.

b) In the event of striking out, costs of the suit shall be to the Defendant borne by the 1st plaintiff.

c) Costs of the Notice of motion dated 30th May 2015 to the Bank.

Dated, Signed and Delivered in Court at Nairobi this 27th Day of September 2019

F. TUIYOTT

JUDGE

PRESENT:

Kenyariri for Defendant

Agwara for Plaintiff

Court assistant: Nixon