



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 228 OF 2014

MASOLE ENTERPRISES LIMITED.....1ST PLAINTIFF

BAIA ENTERPRISES LIMITED.....2ND PLAINTIFF

GILERA LIMITED.....3RD PLAINTIFF

KOIT DEVELOPERS LIMITED.....4TH PLAINTIFF

SAMAN DEVELOPERS LIMITED.....5TH PLAINTIFF

KENETE ENTERPRISES LIMITED.....6TH PLAINTIFF

MARIMO ENTERPRISES LIMITED.....7TH PLAINTIFF

LISALA ENTERPRISES LIMITED.....8TH PLAINTIFF

VERSUS

SHAKHALAGA KHWA JIRONGO.....1ST DEFENDANT

BETHLEHEM TRADING COMPANY LIMITED.....2ND DEFENDANT

RULING

[1] On the **17 November 2017**, a Notice of Preliminary Objection was filed herein by **M/s Ligunya Sande & Associates** on behalf of the Plaintiffs giving notice of their intention to raise a Preliminary Objection, for determination *in limine*, to the Defendant's Notice of Motion application dated **17 October 2017**, at the hearing thereof. The Preliminary Objection was premised on the grounds that:

[a] The application was filed without due authority from the 2nd Defendant Company.

[b] There is no valid resolution of the 2nd Defendant Company approving the filing of the said application.

[c] There is no valid resolution of the 2nd Defendant appointing the firm of **M/s Wagara, Koyyoko & Company Advocates** to make the present application and defend this suit for an on behalf of the 2nd Defendant.

[d] The filing of the application dated **17 October 2017** by the said firm of Advocates is invalid for want of authority from the 2nd Defendant Company.

[e] The 2nd Defendant Company did not authorize **Harun Omeke Mokomba** to swear the Supporting Affidavit in the said application.

[2] The 2nd Defendant countered the Plaintiffs' Notice of Preliminary Objection by similarly filing a Notice of Preliminary Objection dated

21 November 2017 on **22 November 2017**. The 2nd Defendant gave notice thereby that it would, at the hearing of the Plaintiffs' Preliminary Objection, raise a preliminary objection and pray for the entire suit to be struck out with costs on the grounds that:

[a] There are no valid resolutions of the Plaintiffs appointing **Ligunya Sande & Associates Advocates** to file this suit on behalf of the Plaintiffs.

[b] The filing of the Plaint dated **27 May 2014** by the firm of **Ligunya Sande & Associates Advocates** is invalid for want of authority from the Plaintiff Companies.

[3] **Whereas the 2nd Defendant's Preliminary Objection is valid from the standpoint of the Plaintiffs' pleadings herein, it is uncommon, if not altogether unprocedural, for a Preliminary Objection to be resisted by a Preliminary Objection. Indeed, the Supreme Court of Kenya has pronounced itself on such a scenario in *The Matter of the National Gender and Equality Commission, Reference No. 1 of 2013* and here is what it had to say:**

“[27] Though not forming part of the issues for determination, a matter arose in the course of filing the pleadings that caught our attention. Upon the institution of the reference, the Interested Party (IEBC) filed a notice of preliminary objection. Upon being served with the notice, the applicant proceeded to file what it termed as “a notice of preliminary objection to the notice of preliminary objection”. Ordinarily, a party files grounds of opposition in response to a preliminary objection. However, counsel for the applicant argued that he was justified in filing a parallel notice of preliminary objection: because the preliminary objection as filed by the IEBC was “bad in law”, as it did not seek to raise a pure point of law.

[28] It is our position that parties should not endeavour, in their pursuit of creativity, to introduce ‘new pleadings’ unknown to the law. The rules of procedure are a handmaid to the course of justice, and should be followed with fidelity.” (Emphasis provided)

[4] Hence, **Mr. Koyyoko** ought to have filed Grounds of Opposition and not a counter-Notice of Preliminary Objection, in opposition to the Plaintiffs' Preliminary Objection. Be that as it may, Learned Counsel for the parties, **Mrs. Ligunya** and **Mr. Munyua** for the Plaintiff and **Mr. Koyyoko** for the Defendant, urged their respective client's standpoints in their oral submissions, made herein on **22 November 2017**. **Mrs. Ligunya** relied on **Order 2 Rule 15** and **Order 51** of the **Civil Procedure Rules, 2010**, (which I however found to be of little relevance to the Preliminary Objection) contending that the Supporting Affidavit filed along with the Notice of Motion dated **17 October 2017** was filed without a resolution from the 2nd Defendant authorizing the deponent to make the deposition and to file the application on its behalf. She also cited the case of **Kenya Commercial Bank Ltd vs. Stage Coach Management Ltd [2014] eKLR** in support of her arguments and further submitted that since the 2nd Defendant is irregularly on record, its Preliminary Objection should not be entertained; but ought to be dismissed with costs. Accordingly, she prayed for the striking out of the 2nd Defendant's Notice of Motion dated **17 October 2017**.

[5] **Mr. Koyyoko** opposed the Plaintiff's Preliminary Objection contending that it does not qualify as a preliminary objection for it calls upon the Court to make an inquiry as to facts; and that the issue of whether there is a resolution or not cannot be said to be a pure point of law. He pointed out that the Plaintiff had not challenged the fact that the deponent of the subject Supporting Affidavit is a director of the 2nd Defendant; and argued that where a company has been sued, as is the case herein, it has the obligation to defend itself, and is not comparable to a situation where authority is a prerequisite for the lodgement of a cause of action, which is what the precedent that was cited by the Plaintiff's Counsel was about. **Mr. Koyyoko**, thus, urged the Court to dismiss the Plaintiff's Preliminary Objection or, in the alternative, give directions that a resolution be filed, as authorities abound for the proposition that the resolution can be filed at any time. He further submitted that the requirement for a resolution is specific to the filing of Plaintiff and Verifying Affidavit; and that there is no similar provision for the filing of a Defence. Accordingly, **Mr. Koyyoko** urged the Court to dismiss the Plaintiff's Preliminary Objection and to uphold the 2nd Defendant's Preliminary Objection and find that the suit is itself incompetent for want of resolutions from the Plaintiff companies appointing the firm of **Ligunya Sande & Associates Advocates** to act herein or file the suit on their behalf.

[6] I have given due consideration to the grounds raised in support of the parties' respective Notices of Preliminary Objection as well as the submissions made herein by Learned Counsel. The brief background of this matter is that the Plaintiffs filed this suit on **30 May 2014** against the **Shakhalaga Khwa Jirongo** and the 2nd Defendant praying for Judgment in their favour in the sum of **Kshs. 700,000,000/=** in enforcement of an agreement that was allegedly made between the parties on **12 September 2013**. All the Plaintiffs are limited liability companies, as is the 2nd Defendant.

[7] As far as the court record shows, the Defendants were duly served with Summons to Enter Appearance and Plaintiff but did not respond thereto within the period stipulated in the Summons. Accordingly, a default judgment was recorded herein by the Deputy Registrar on **28 July 2014**. The 1st Defendant subsequently successfully challenged the default judgment and had the same set aside on **23 October 2017** to enable him defend the suit. The 2nd Defendant similarly lodged its application dated **17 October 2017** on **30 October 2017** for similar orders as were granted the 1st Defendant. It is that application that is the subject of the Plaintiff's Preliminary Objection.

[8] Although not expressly stated, it is indubitable that the Plaintiff's Preliminary Objection was predicated on **Order 4 Rule 1(4)** of the **Civil Procedure Rules**. It is premised on the grounds that no resolution was exhibited to show that the 2nd Defendant Company authorized the appointment of the firm of **M/s Wagara, Koyyoko & Company Advocates** to make the present application and defend the suit for and on its behalf; and further that no authority was shown to confirm that **Harun Omeke Mokomba** was authorized by the Defendant to swear the Supporting Affidavit. **Order 4 Rule 1(4)** provides that:

"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."

[9] Hence, a pertinent argument was raised by **Mr. Koyyoko** for the 2nd Defendant, namely, whether the points raised by the Plaintiff are valid points to raise way of Preliminary Objection. What amounts to a Preliminary Objection is now well settled. It should be that point or points of law which, if raised as a preliminary objection, would dispose of the entire suit. This was well explicated in the case of **Mukisa Biscuits Manufacturers Ltd v. West End Distributors Ltd [1969] E.A 696**, thus:

“... a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

[10] It is manifest and there is no gainsaying that the point taken by the Plaintiff's Counsel does involve an inquiry of facts. It is, to my mind, a question of fact as to whether or not the 2nd Defendant passed a resolution authorizing the appointment of the firm **Wagara Koyyoko & Company Advocates** to act for it herein. Similarly, it is a question of fact as to whether the deponent of the Supporting Affidavit to the 2nd Defendant's application was authorized so make that deposition. Consequently, I would, in this respect agree with the position taken by **Odunga, J.** in **The Presbyterian Foundation & Another vs. East Africa Partnership Limited & Another [2012] eKLR** that:

"The Civil Procedure Rules do not define what an authorised officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavits be sworn by either the directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word "authorise" which is defined by Oxford Dictionary as "sanction"; "give authority"; "commission". That being the position, whether or not the 2nd Plaintiff was given authority to swear the verifying affidavit is a matter of evidence and cannot certainly be the subject of a preliminary objection unless the said fact is admitted."

[11] There is no concession herein by the 2nd Defendant that no such resolution was made. Indeed, it was the 2nd Defendant's alternative prayer that, should the Court find such a resolution necessary, then it should be afforded some time to avail the same. Secondly, it is plain from the record that the question as to whether there exists a resolution for the filing of the instant application is certainly not a matter that arises out of the pleadings. It is therefore not capable of disposing of the suit, let alone the Notice of Motion itself. More importantly however, is the pertinent question as to whether **Order 4 Rule 1(4)** of the **Civil Procedure Rules**, which expressly makes specific mention of situations **"...where the Plaintiff is a corporation..."** is applicable to defendant corporate entities. It is noteworthy that, although this point was raised by **Mr. Koyyoko** in his submissions, it was not responded to by Counsel for the Plaintiffs; and having looked at the case of **Kenya Commercial Bank Limited vs. Stage Coach Management Ltd** (supra) that was relied on by the Plaintiffs to buttress their Preliminary Objection, it is plain to me that that authority does not support their argument either. In that case the preliminary objection was taken by the Defendant on the grounds, *inter alia*, that the Plaintiff had been filed without authority, as there was no resolution of the Plaintiff Company, either approving the institution of the suit or appointing the firm of **S.N Gikera & Associates** to institute that suit on behalf of the Plaintiff Company. It was also a ground in that case that the Plaintiff Company did not authorize one **John Oringo** to swear the verifying affidavit or the affidavit in support of the Notice of Motion filed with the Plaintiff therein.

[12] In the instant case, the Notice of Preliminary Objection dated **16 November 2017** was filed by the Plaintiff, not in respect of any pleading by the Defendant, but in connection with the Notice of Motion dated **17 October 2017**, noting that the 2nd Defendant is yet to file a Defence. Thus, no provision of the law or precedent was brought to my attention and none was revealed by my own research to support the argument that, a defendant company once sued, is obliged to file a resolution of the company authorizing the appointment of counsel, or giving authority to any of its officers to swear any necessary affidavit.

[13] Thus, I can do no better than reiterate the expressions of the Court of Appeal in **Saraf Limited v Augusto Arduin [2016] eKLR** that:

"...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. In Shaw and Sons (Salford) v. Shaw [1935] 2 KB 113, Greer LJ reiterated that –

“if powers of management are vested in the directors, they and they alone can exercise these powers...”

He also observed what Solomon v. Solomon had much earlier held, namely, that –

“a company is an entity distinct from its shareholders and directors.”

[14] In the Supporting Affidavit, **Harun OmekeMokomba** disclosed the fact that he is a Director of the 2nd Defendant and was duly authorized to swear the affidavit. That, to my mind, would suffice for purposes of the Notice of Motion. As to whether or not he was indeed so authorized would not only involve an inquiry as to the facts, but would also be an abrogation of **the Turquand Rule**. In the light of the foregoing, I find no merit in the Plaintiffs' Preliminary Objection and would dismiss it accordingly with attendant costs.

[15] The 2nd Defendant's Notice of Preliminary Objection dated **21 November 2017**, on the other hand, seeks the striking out of the Plaintiff's suit on the ground that that no resolution was filed with the Plaintiff dated **27 May 2014** demonstrating that the Plaintiff Companies gave authority for the filing of the suit and for the appointment of **Ligunya & Associates Advocates** to file the suit and act for it in this

matter. I have looked at the record and confirmed that there is no such resolution given. However, there are on record a set of documents under seal annexed to the Plaint under the rubric "**Authority to Act**" and Specific Power of Attorney instruments donated by the Plaintiffs to **Sammy Boit Kogo**, authorizing him to act as their representative in connection with this suit, and to execute all documents as shall be necessary to prosecute this suit. That would, in my view suffice for purposes of **Order 4 Rule 1(4)** of the **Civil Procedure Rules**.

[16] In any event, it is now trite that such an omission need not necessarily invalidate a suit. This is because **Order 4 Rule 1(4) of the Civil Procedure Rules** is silent on whether or not such a resolution should be filed along with the Plaint. Thus, I would agree with the position taken by **Odunga, J** in **Mavuno Industries Limited & 2 Others vs. Keroche Industries Limited [2012] eKLR** that:

"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...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 or with the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit. 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 the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage."

[17] In the premises, I would come to the conclusion, which I hereby do that the 2nd Defendant's Preliminary Objection is totally lacking in merit, and is similarly dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2018

OLGA SEWE

JUDGE