REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

CIVIL CASE NO 91 OF 2011

KAKAMEGA PAPER CONVERTERS LIMITED.....PLAINTIFF

VERSUS

MOHANLAL ARORA.....1ST DEFENDANT

SUSHILA MOHANLAL ARORA.....2ND DEFENDANT

PASPULATI JAYASURYA SUNIL RAJ.....3RD DEFENDANT

EAST AFRICA PAPER CONVERTERS LTD.....4TH DEFENDANT

BANK OF BARODA (KENYA) LTD.....5TH DEFENDANT

RULING

1. The 1st, 2nd and 4th Defendants filed a Notice of Preliminary Objection on 1st December 2015. The objection was predicated upon the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules, in that, the Plaintiff'sBoard of Directors resolution authorizing Mr. Dipak Panachand Shah to swear the verifying affidavit on behalf of the company had not been filed.

2. In response to the objection, the Plaintiffs filed a replying affidavit and a Notice of Motion both on 16th December 2015. In the replying affidavit, it was contended that the Plaintiff had, by a board resolution passed during a meeting held on 21st February 2011, resolved to institute a suit against the Defendants, and further, that there was to be an authorized individual to execute any documents in relation to the filing of the suit on behalf of the company.

3. Further, and by the Notice brought under the provisions of Order 4 Rule 1(4), as well as Order 50 Rules 6 & 9(1) of the Civil Procedure Rules, the Plaintiff sought in its prayers, that the verifying affidavit filed on 14th March 2011 be deemed to be properly on record, or in the alternative, the Court to enlarge time for the Plaintiff to file the verifying affidavit accompanied by the Plaintiff's authority as given in the minutes and resolution of the company.

4. There was no rebuttal filed by neither the 3rd nor the 5th Defendants.

5. I have considered the preliminary objection and the response thereto, and the dispositions made by the parties and further, to the submissions filed. In **Mavuno Industries Limited & 2 Others v Keroche**

Industries Limited (2012) eKLR, it was held that;

> ***"However the practice that where there are two application on record, one seeking to summarily terminate the proceedings while the other attempting to keep the proceedings alive, is to start with the one seeking to breathe life into the suit."***

In rendering himself as such, Odunga, J in his ruling had relied on the case of **Salesio M'aribu v Meru County Council Civil Appeal No 183 of 2002** and **Nova Industries Limited & 2 Others v Fidelity Commercial Bank Ltd Civil Application No Nai 315 of 1998**. He held that, it was only plausible for the application seeking to breathe life into the suit that should be determined first, lest the entire suit was dismissed without knowing what it was all about (see **Salesio M'aribu v Meru County Council** (supra)). It would therefore follow that the Court would consider the application by the Plaintiff dated 16th December 2015 first.

6. The said application was predicated upon the grounds that there had been a resolution that had been passed by the Plaintiff authorizing both the filing of the suit and conferring upon one of its directors, one Dipak Panachand Shah, the authority to swear the relevant verifying affidavit. In as so far as they admitted that the said resolution and minutes of the meeting had not been filed along with the Plaint on 14th March 2011, nevertheless they could, with the leave of the Court, file the said resolution and minutes to be in conformity with the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules.

7. Further, it was contended that the failure to file the resolution together with the Plaint was not in bad faith, and that in any event, no prejudice had been occasioned upon the Defendant who had not brought any objection prior or soon thereafter the commencement of the suit, and had let the matter progress substantially.

8. The affidavit deposed to on 15th December 2015 in support of the application reiterated the contentions adduced by the Plaintiff in the grounds.

9. The 5th Respondent filed its Grounds of Opposition dated 25th January 2016, and it which it was contended, albeit tacitly and briefly, that the said application by the Plaintiff was misconceived, mischievous, bad in law and an abuse of the process of the Court.

10. Under the provisions of Order 4 Rule 1(4) it is provided 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'**

Pursuant to the above provisions, with regards to the filing of a Plaint, it is provided that that if a Plaint is filed by a corporation, the same shall be accompanied by a verifying affidavit sworn by an officer of the company duly authorized under the seal of the company to do so. It does not, however, state that the authorizing document shall accompany the Plaint or the verifying affidavit, as it would be assumed that the same had been complied with by the corporation.

11. While contending that they had not filed and/or provided a resolution by the board of directors accompanying the Plaint and verifying affidavit, the Plaintiff nonetheless reiterated that the directors had held a meeting on 21st February 2011, and in which it was resolved that;

> **6.2That the common seal of the company be affixed to the resolution to file suit against the said parties and any two (2) directors and one (1) director and the secretary of the company be and are authorized to witness the affixing of the common seal of the company to the said resolution and also execute other documents relating to the suit on behalf of the company.**

As it stands, the resolution of the company under its seal was obtained before the filing of the suit on 14th March 2011. As per Odunga, J in **Mavuno Industries Limited & 2 Others v Keroche Industries Ltd**

(supra), he held as follows with regards to the issue of filing a resolution and/or authority;

> ***"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 resolution does not form part of the Plaintiff's bundle of documents which commonsense dictates it should. 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 Plaint 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 v Registrar General & 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. In absence, it is therefore, not fatal, at least not at this stage."***

12. The Plaintiff has been able to adduce evidence before the Court that indeed there was a resolution that had been passed on 21st February 2011 in which the Plaintiff authorized for the filing of the suit against the Defendants, and further, that the verifying authority shall be filed on authority of a duly appointed and/or authorized official of the company. This position is dissimilar to the situation that was enunciated in the case of **East African Portland Cement Ltd v Capital Markets Authority & 4 Others (2014) eKLR** where the Court held that the company was not before the Court as there was no board resolution authorizing the same. (See also **Macfoy v United Africa Co. Ltd [1961] 3 All ER**). As was reiterated in **Mavuno Industries Ltd & 2 Others v Keroche Industries Ltd** (supra), the failure to file the authority with the bundle of documents or with the Registrar of Companies was not fatal, as there was no mandatory requirement to do so. In the event that such a resolution was passed, the Court would allow for the same to be filed at any time, before the matter was set down for hearing. Further, the Defendants have not shown what prejudice they would stand to suffer should the application by the Plaintiff be allowed by the Court.

13. In **Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR**, Gikonyo, J had rendered that;

> ***"It has been held that a Court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue had been left to the Court for a decision. The failure to plead facts though an irregularity is not fatal to the judgment if cured by the course of events taken at the trial, which shifted from the pleaded cause of action to the un-pleaded cause of action, a shift which did not cause prejudice to the other party who was prepared to meet the un-pleaded cause of action. See Dhanji Ramji v Rambhai & Company [1970] EA 515, Transworld Safaris (K) Limited Robin Makori Ratemo Civil Appeal No 78 of 2005; [2008] KLR 339."***

The Court would therefore, be minded to allow for the cure of any irregularity, actual or perceived, provided that the same was not prejudicial to the other party, and that in the event of allowing such cure, there was no shift in the cause of action that had been plead before the Court. There is no conceivable prejudice that may be occasioned to the Defendants if the Court was minded, as it indeed is, to allow for the application by the Plaintiff.

14. In consideration of the foregoing, therefore, the Court finds that the application by the Plaintiff is meritorious, and that the same is allowed as prayed. In order to further expedite the matters, the resolution by the board of directors of the Plaintiff is to be filed within seven (7) days of this ruling, and the same be duly filed and registered with the Registrar of Companies within the same period. Costs are allowed in favour of the Plaintiff.

15. Turning to the preliminary objection filed by the 1st, 2nd and 4th Defendants, the same is found to be bereft of merit, and the same is dismissed with costs to the Plaintiff.

Dated, signed and delivered in court at Nairobi this 23rd day of March, 2016.

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C. KARIUKI

JUDGE