REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 76 OF 2014

FIDELITY COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

SIMON MAINA GACHIE.....DEFENDANT

RULING

1. The defendant's application dated 25th June 2014 seeks the striking out of the suit. On the face of the application it is asserted that the reasons for asking the court to strike out the suit are as follows;

> **"a) That the suit herein was filed by Mr. Antony Mwangi who alleges to be an employee of the plaintiff contrary to the law.**
>
> **b) That Mr. Antony Mwangi has no legal capacity to file a suit for and on behalf of the plaintiff.**
>
> **c) That there was no resolution passed by the plaintiff to commence the current proceedings.**
>
> **d) That there was no resolution passed by the plaintiff to appoint the firm of Philip Muoka & Company Advocates to file the current suit.**
>
> **e) That the entire suit does not disclose a reasonable cause of action against the Defendant?.**

2. The application is supported by the affidavit of the defendant, **SIMON MAINA GACHIE.**

3. He depones that because the vehicle which he had offered as security, had been repossessed and sold to recover the outstanding loan, there was no reasonable cause of action disclosed by the plaint.

4. As far as the plaintiff was concerned, the entire loan was paid off, upon the sale of the security.

5. In answer to that contention the plaintiff points out that the application was not founded upon the correct provision of the law.

6. This application was brought pursuant to Order 4 Rule 1 (4) and Order 51 of the Civil Procedure Rules. The defendant also cited Sections 3 and 3A of the Civil Procedure Act and *"All Enabling Provisions of the Law?.*

7. In so far as there is an express provision of the law which addresses the question of striking out plaints which do not disclose any reasonable cause of action, the defendant who is desirous of seeking such orders, ought to invoke Order 2 Rule 15 of the Civil Procedure Rules.

8. The citation of the phrase *"All Enabling Provisions of the Law?,* must be discouraged completely. I so find because the respondent who is faced with an application founded upon *"All Enabling Provisions of the Law?* is put at a distinct disadvantage, because he does not have any way of ascertaining the ingredients or requirements of the provisions informing the application facing him.

9. There are some applications in respect to which affidavits or any other evidence are not permissible. If therefore, an applicant invokes that omnibus phrase of *"All Enabling Provisions of the Law?,* while urging an application which ought not to be supported by evidence, he may escape the strictures of the appropriate rule. Indeed, that would appear to be the very situation in which the defendant finds himself in this case. That is because an application for the striking out of an pleading which does not disclose any reasonable cause of action or defence in law, is supposed to be made in accordance with Order 2 Rule 15 (1) (a) of the Civil Procedure Rules.

10. By dint of the provisions of Order 2 Rule 15 (2);

> **"No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made?.**

11. Notwithstanding that provision, the defendant filed an affidavit in support of the application. And the affidavit was not limited to addressing other aspects of the application. The affidavit expressly stated that the plaint does not disclose any reasonable cause of action.

12. By bringing an affidavit to support the application to strike out the plaint on the grounds that it did not disclose any reasonable cause of action, the defendant violated the rule governing such applications. For that reason, the court is obliged to strike out that aspect of the defendant's application.

13. The second aspect of the application relates to the capacity of Anthony Mwangi in *"filing the suit on behalf of the plaintiff?.*

14. The suit is clearly in the name of **FIDELITY COMMERCIAL BANK LIMITED,** as the plaintiff. Therefore, it was erroneous of the defendant to assert that the suit was filed by **ANTONY MWANGI.**

15. As the suit was not filed by Antony Mwangi, it does not fall for determination whether or not he had authority to file the suit.

16. The defendant asserted that Antony Mwangi was not authorized under seal to sign any proceedings on behalf of the plaintiff.

17. The only document which Antony Mwangi signed in this case is the Verifying Affidavit.

18. On my part, I believe that unless a defendant has information obtained from within the plaintiff company, the said defendant should be very slow to depone that the company had not given to any particular person, the requisite authority to swear a Verifying Affidavit. I say so because the passing of resolutions such as those;

> **1) to authorize an advocate to represent the plaintiff;** or
>
> **2) to authorize the advocate to institute proceedings;** or
>
> **3) to authorize an officer or a director of the company to swear a Verifying Affidavit;**

are all matters which happen within the scope of the ordinary management of the company. In other

words, they are not the kind of events which an outsider would get to know about easily. Therefore, when the defendant deponed that Anthony Mwangi was never authorized to sign any proceedings on behalf of the company, the court wonders how he can be so sure about that fact, to the extent that he stated it on oath.

19. In **TRANS NZOIA TEACHERS ENTERPRISE CO. LTD Vs BEN K. SIBOE & ANOTHER Hccc No. 39 of 2010** *(At Kitale),* the learned Judge noted as follows;

> **"The 1st defendant is a member of the plaintiff, and claims that he is not aware of any resolution passed by the plaintiff to file a suit against its own member?.**

20. In such a scenario, it is easy to understand how the defendant obtained information which enabled him to positively depone that the plaintiff did not pass a resolution for the institution of the proceedings.

21. Secondly, the suit was filed by **WILLIAM NATWATI,** who was the chairman of the plaintiff. In other words, the company did not instruct an advocate to file that suit; it did so in its own name. It is only at a later date that the company instructed advocates to act for it.

22. In those circumstances, the court could held that;

> **"…a company cannot file a suit in its own name but through an advocate or the board of directors. The suit must be authorized by a board resolution. There was no resolution authorizing William Natwati to file this suit?.**

23. It was on the basis of all those flaws that the suit was struck out.

24. But in the case before me, the defendant submitted that no resolution had been passed by the plaintiff prior to the institution of the suit. The basis for that contention was, the failure by the plaintiff to annex to the plaint, the resolution.

25. The plaintiff demonstrated, through the Replying Affidavit sworn by **STELLA MBULI,** that on 17th October 2011, which was prior to the commencement of the suit, the Board of Directors had passed a resolution;

> **a) appointing Philip Muoka & Company Advocates as the lawyers for the bank;**
>
> **and (b) giving authority to Antony Mwangi to swear affidavits on behalf of the company.**

26. This case is thus distinguishable from **AFFORDADLE HOMES AFRICA LTD Vs IAN HENDERSON & 2 OTHERS Hccc No. 524 of 2004,** in which the decision to institute proceedings was made by the Managing Director, **RAYMOND H. CHISHOLM.**

27. Whereas Mr. Chisholm was the Managing Director and also the principal shareholder, *(with 75% of the shares),* it was still mandatory that the decision be made by the company.

28. The plaintiff in this case did not file the resolution in court, at the time of filing the plaint.

29. In that respect, I share the following view expressed by Odunga J. in **PRESYBETARIAN FOUNDATION & ANOTHER Vs EAST AFRICA PARTNERSHIP LIMITED & ANOTHER Hccc No. 314 of 2012;**

> **"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, which common sense dictates it should?.**

30. A similar position was taken by Judge Kimaru **in REPUBLIC Vs REGISTRAR GENERAL & 13**

OTHERS RE: NDEFFO COMPANY LIMITED Misc. APPLICATION No. 67 of 2005, *(at Nakuru).* In that case, the resolution which sanctioned the institution of the proceedings, had not been filed.

31. The directors reasoned that the resolution could always be filed even after the suit had been instituted.

32. The learned Judge said;

> **"I think the position in law is that such a resolution by the Board of Directors of a company may be filed anytime 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?**

33. In the result, the defendant's application dated 25th June 2014 has no merit. It is therefore dismissed, with costs to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **19th day** of **December** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kosgei for the Plaintiff

Ongwae for the Defendant

Collins Odhiambo – Court clerk.