



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 521 OF 2015

DELUXE TRADING COMPANY LIMITED....PLAINTIFF/APPLICANT

VERSUS

MAXWELL AFRICA LIMITED.....1ST DEFENDANT/RESPONDENT

ANTI-COUNTERFEIT AGENCY.....2ND DEFENDANT/RESPONDENT

RULING

1. When this suit was instituted on **9th October, 2015** it was filed contemporaneously with the Notice of Motion dated 9th October, 2015. That Notice of Motion was filed under certificate of urgency for orders, *inter alia*, that the Respondents, Maxwell Africa Limited and Anti-counterfeit Agency, be restrained from seizing the Plaintiff/Applicants **“Seven Star”** rubber patches and/or interfering with their sale, distribution and retailing, pending the hearing of the application and ultimately the suit. Although the application was certified urgent no interim orders have been made thus far. The application was fixed for hearing on 10th November, 2015.

2. In the intervening period, the 1st Defendant, Maxwell Africa Limited also filed an application under Certificate of Urgency. The said application is dated 23rd October, 2015 and it too seeks restraining orders against the Plaintiff from using the Trade Mark **“Seven Star”** on the ground that the logo, colours and design of those rubber patches are currently being used by it. The Court gave directions that this second application be similarly heard on 10th November, 2015. However, the 1st Defendant having given a notice of Preliminary Objection that was filed on 26th October, 2015, this point was taken up on 10th November, 2015 and is the subject of this Ruling.

3. According to the 1st Defendant/Respondent the Plaintiff's suit is defective as it offends the mandatory provisions of Order 4 Rules 4 and 5 of the Civil Procedure Rules and is therefore an abuse of the process of the Court. Mr. Bosire, Counsel for the 1st Defendant/Respondent argued that a Company being an artificial person, can only take decisions through resolutions made by its Board of Directors or Shareholders in a meeting, properly convened for that purpose. That in so far as no resolution has been exhibited herein authorizing the filing of this suit the verifying affidavit as well as the entire suit are incompetent and should be struck out. He relied on the case of ***Affordable Homes Africa Limited Vs Ian Henderson & 2 Others*** in urging the Court to find that this suit is incompetent and ought to be struck out with costs.

4. Mr. Mutua, Counsel for the Plaintiff/Applicant urged the Court to dismiss the Preliminary Objection

contending that it is itself an abuse of the process of the Court granted that in the Verifying Affidavit attached to the Plaint and the Supporting Affidavit, the deponent averred that he has authority to swear the affidavit. That even if no such authority had been exhibited, the Plaintiff has since corrected matters by annexing the requisite authority to the Further Affidavit filed on 9th November, 2015. He urged the Court to give effect to Section 1A of the Civil Procedure Rules by going to the substance of the dispute rather than allowing itself to be side-tracked by technicalities. He relied on the following cases:

1. **Edna S. Ouma Vs The Government of the Arab Republic of Egypt Nairobi HCCC NO. 160/2004.**
2. **Kohlenburg & Another Vs. The Standard Chartered Bank Nairobi HCCC NO. 618/1999**
3. **Kinyanjui Ng'ang'a & 2 Others Vs Wallace Gathua Kang'ethe & 2 Others.**

5. I have given careful consideration to the pleadings filed herein, the subject Notice of Motion and the annexures thereto, as well as the submissions made before the Court on 10th November, 2015 by Learned Counsel. The Preliminary Objection is expressed to be hinged on Order 4 Rules 4 and 5 of the Civil Procedure Rules which state thus with regard to Plaints:

“4. Where the Plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the Defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases, it shall be stated how that capacity arises.

5. The plaintiff shall show that the Defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the Plaintiff's demand.”

6. In the instant case, the Plaintiff is Deluxe Trading Company Limited and it is described in the plaint as a Limited Liability Company duly incorporated under the Companies Act Chapter 486 of the Laws of Kenya. In Paragraph 5 of the plaint it is stated that the Plaintiff has sued in its own capacity as the importer and distributor of “**Seven Star**” rubber patches. There is no indication that the suit has been brought in a representative capacity for some other entity or group of persons. Similarly there is no indication that the 1st Defendant has been sued in a representative capacity in the manner envisaged by Rule 4 of Order 4 of the Civil Procedure Rules.

7. With regard to Order 4 Rule 5 of the Civil Procedure Rules, the Plaint in Paragraphs 5 sets out the nature of the two Defendants interest in the subject matter and the basis upon which the Plaintiff seeks redress against them. Accordingly the objection taken by the Defendant is clearly misconceived and is destined for dismissal.

Even assuming that Counsel intended to rely on the provisions of Order 4 Rule 1 (4) and (5) of the Civil Procedure Rules, it is noteworthy that Sub-rule (4) merely prescribes who should swear the verifying affidavit on behalf of a body corporate. That provision reads:

“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.”

8. Sub-rule (5) provides that the foregoing requirement applies *mutatis mutandis* to counterclaims. There appears to be no requirement in these provisions that authority to institute suit on behalf of a Company be filed along with the plaint.

9. I have perused and considered the decision of the Court in the case of **Affordable Homes Africa Limited Vs Ian Henderson & 2 Others** and I would agree with Mr. Mutua, Counsel for the Plaintiff, that the case is distinguishable in so far as it was a dispute between the Directors of the Plaintiff Company. One faction went to Court in the name of the Company against the other Directors. Accordingly the Defendants were insiders who were possessed of the knowledge that no resolution had been made by the Board to have the suit filed. The case is further distinguishable in the sense that the Articles of Association were exhibited before the Court and were examined to ascertain that the suit was filed in disregard thereof.

10. In this respect, I fully endorse the decision of the Court in **Siokwei Tarita Limited Vs Dr. Charles Walekwa (2012) eKLR** in which the court observed that;

"The case of Affordable Homes is in my humble view unique and distinguishable... a Director was sued and since he was a member of the Board, it was within his knowledge that no resolution to file suit had been passed and therefore the suit was untenable... A 3rd party is not privy to the Provisions in the Articles of Association. To argue that a suit has not been authorized by the Company is to state that the institution of the suit is not in line with its Articles of Association. In my view this is a complaint that can only be brought by an insider and not an outsider."

11. I take the view that Order 4 Rule 1 (4) of the Civil Procedure Rules does not encompass the requirement that a resolution authorizing the institution of the suit be annexed to the Plaintiff at the time of filing suit. There is a line of authorities to show that the mere failure to file such authority does not invalidate the suit, and that such a resolution may be filed anytime before the suit is fixed for hearing (**See Republic Vs Registrar General & 13 Others Misc. Application No. 67 of 2005 and 40 Investments Limited Vs Trident Insurance Company Limited (2014) eKLR**). In any event, it is evident that after this issue was brought up, the Plaintiff on the 9th November, 2015 caused a Further Affidavit to be filed herein to which a Resolution dated 8th October, 2015 was annexed, thus demonstrating that the filing of this suit was authorized by the Company and that **Vishal Barot** who swore the verifying affidavit is authorized to sign all relevant Court documents pertaining to this suit.

12. The foregoing being my view of the matter I would dismiss the Preliminary Objection as being misconceived and hold that the case is competently before the court and that the application dated 9th October, 2015 should be proceeded with to hearing and disposal on the merits in the spirit of Article 159(2) (d) of the Constitution as read with Section 1A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

Orders accordingly.

It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF NOVEMBER 2015

OLGA SEWE

JUDGE