



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 150 OF 2015

YUKSEL ELEKTROTEKNIK SAN. VE TIC. LTD STI.....PLAINTIFF

VERSUS

CABLE CONECTORS LIMITED.....1ST DEFENDANT

RAJU KHALSA.....2ND DEFENDANT

RULING

1. The plaintiff, **YUKSEL ELEKTROTEKNIK SAN. VE TIC LTD STI**, filed suit against the defendants on 26th March 2015. The suit was filed against **CABLES AND CONNECTORS LIMITED** and **RAJU KHALSA**.
2. After the Defendants were served with the plaint, they lodged a Notice of Preliminary Objection, asserting that the suit was defective and bad in law. The grounds upon which the preliminary objection was lodged were stated thus;

“1. It was filed without due authority of the Plaintiff Company;

2. There is no resolution or valid resolution of the plaintiff company approving either the institution of the suit or appointing the firm of Amin and Company Advocates to institute this suit for or on behalf of the plaintiff Company; and

3. There is no resolution or valid resolution by the plaintiff Company to authorize Mustafa Bahadir Silifke to swear the Verifying Affidavit in this suit?.

3. It is the defendant’s position that the suit was filed without a resolution by the company, authorizing the institution thereof.

4. The defendants submitted that the plaintiff ought to have annexed the minutes of the meeting of the plaintiff’s Board of Directors, which resolved;

a) to institute these proceedings;

b) to instruct the law firm of Amin & Company Advocates to institute the proceedings; and

c) to have Mustafa Bahadir Silifke to swear the Verifying Affidavit.

5. The plaintiff submitted that the preliminary objection was defective because it was neither founded upon a pleading nor was it a matter which arose by clear implication from the pleadings.

6. The plaintiff submitted that if the defendants had raised the issue through the Defence, that would have given an opportunity to the plaintiff to respond through a Reply to Defence, and thus be able to demonstrate that there were resolutions made by the plaintiff's Board of Directors.

7. The plaintiff's position was that the preliminary objection herein was founded upon speculation, because there was no way that the defendants could have become aware about whether or not the plaintiff's Board of Directors had passed the resolutions which are now in issue.

8. In the case of **AFFORDABLE HOMES AFRICA LIMITED Vs IAN HENDERSON & 2 OTHERS Hccc No. 524 of 2004**, Njagi J. held as follows;

“As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty. As to which of these two organs should give the necessary sanction depends, in the case of registered companies, entirely on the construction of the company's articles of association?”

9. The learned Judge went on to emphasize the fact that in each case it was necessary to examine the particular company's articles of association, to ascertain wherein lies the power to manage the company's affairs, for therein lies the power to sanction the commencement of court actions in the name of the company.

10. In that case, it was clear that the organ of the company which had power to manage the affairs of the company was the board of directors. Secondly, it was clear that the board of directors did not pass any resolution to authorize the commencement of court proceedings.

11. In those circumstances, the learned Judge upheld the preliminary objection, and struck out the action.

12. In this case the defendants assert that there was no board resolution to authorize the filing of the case.

13. That submission first presupposes that in the plaintiff's articles of association, it was the board of directors which had the power to manage the affairs of the company. Secondly, the defendants have made the presumption that the board of directors did not pass any resolution to authorize the commencement of the court action.

14. Whether or not the plaintiff's board of directors has power to manage the affairs of the company, is a matter of fact.

15. It is also a matter of fact as to whether or not the board of directors did or did not pass a resolution authorizing the plaintiff to commence these proceedings.

16. The defendants insist that there was no board resolution. But the plaintiff says that there was a board resolution.

17. In effect, there is a dispute on matters of fact, which form the foundation of the defendants' preliminary objection.

18. In the celebrated case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED Vs WEST END DISTRIBUTORS LIMITED** [1969] E.A. 696, at page 701, Sir Charles Newbold P. said;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion?”.

19. Of course, there was no pleading by the plaintiff, to the effect that the suit was filed after the company’s board of directors had passed a resolution authorizing it.

20. Similarly, the defence did not contain a pleading to the effect that there was no resolution by the plaintiff’s board of directors, authorizing the filing of the suit.

21. In the circumstances, it cannot be said that the issue concerning the authority for the plaintiff to bring this action arose by clear implication from the pleadings.

22. If the plaintiff was going to have any opportunity to respond to the issue, which was first raised in the Notice of Preliminary Objection, it could only do so in its answer to the said Objection. It would therefore be wrong to suggest that the plaintiff be barred from making available material to answer to the preliminary objection because such material would constitute an afterthought.

23. It is important to note that the plaintiff categorically denied the defendants’ contention, that its board of directors did not authorize the institution of this case. Indeed, the plaintiff insisted that the board of directors had passed the requisite resolution. That means that the preliminary objection was not founded upon the assumption that the facts as stated by the plaintiff were correct.

24. The existence or otherwise of the board resolution is a fact which needs to be ascertained by the court. Therefore, based on the ruling by Sir Charles Newbold P. in the case of **MUKISA BISCUIT MANUFACTURING Co. LIMITED Vs WEST END DISTRIBUTORS LIMITED** (above) it was not open to the defendants to raise a preliminary objection, founded upon facts which needed to be ascertained.

25. The facts which need to be ascertained relate to;

a) the resolution by the board, authorizing the institution of these court proceedings;

b) the resolution mandating the law firm of Amin & Company Advocates to represent the company in the proceedings; and

c) the resolution authorizing Mustafa Bahadir Silifke to swear the Verifying Affidavit.

26. Accordingly, I find that the Preliminary Objection has no merit. It is therefore overruled. The defendants will pay to the plaintiff, the costs of the preliminary objection.

27. However, in order to ensure that all the requisite facts are made available to the court, I do direct the plaintiff to file in court and to also serve the defendants with all the requisite resolutions within the next **SEVEN (7) DAYS**.

28. In the event of failure to file and to serve the requisite resolutions within the prescribed period, it will be presumed that the resolutions were never made by the appropriate organ of the

plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of December 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mvuko for for the Plaintiff

Ondari for the 1st Defendant

Ondari for the 2nd Defendant

Collins Odhiambo – Court clerk