REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 45 OF 2012

KENYA COMMERCIAL BANK LIMITED ……. PLAINTIFF

VERSUS

STAGE COACH MANAGEMENT LTD. …….. DEFENDANT

R U L I N G

1. What is before this Court is the Preliminary Objection of the Defendant in relation to the Plaintiff's Notice of Motion dated 15th May 2013 seeking Orders that the Defence herein be struck out and judgement be entered as prayed in the Plaint. That Application was brought under the provisions of **Order 2 rule 15 and Order 51** of the *Civil Procedure Rules* as well as **section 3A** of the *Civil Procedure Act*. The said Preliminary Objection of the Defendant was dated 6th June 2013 and sought of the Court that the entire suit herein be struck out the following grounds:

> **"1. It was filed without due authority from the plaintiff company.**
>
> **2. There is no resolution or valid resolution of the plaintiff company approving the institution of this suit.**
>
> **3. There is no resolution or no valid resolution of the plaintiff company appointing S. N. Gikera & Ass. Advocates to institute this suit for and on behalf of the plaintiff company.**
>
> **4. The filing of this suit by the said firm of advocates is invalid for want of authority from the plaintiff company.**
>
> **5. The plaintiff company did not authorize JOHN ORINGO to swear the verifying affidavit and neither the supporting affidavit for the said application".**

2. At this stage, the Court does not think it necessary to go into the details of either the Affidavit in support of the Plaintiff's said Notice of Motion or the Replying Affidavit thereto sworn by **Mary Kibe** also on 6th June 2013. What however was pertinent to the Preliminary Objection was the Replying Affidavit of **Stella Musembi** sworn with the leave of the Court, on 3rd April 2014. The deponent is an Advocate of this Court whose firm has the conduct of this matter on behalf of the Plaintiff. The said Replying Affidavit was disturbing in that the deponent spent time exploring sections of the Evidence Act in a bid to impress this Court that the letter of instructions emanating

from the Plaintiff herein for her firm to act on its behalf, was privileged. Further, in relation to the extract of the minutes of the 536th Board Meeting of the Plaintiff, the deponent maintained that she could not be compelled to produce the rest of the minutes apart from the one minute that authorised one **John Oringo** to swear a verifying affidavit on behalf of the Plaintiff bank. Be that as it may, the certified copy of the minutes of the said meeting held on 28th April 2011 did indicate that Staff No. 2 John Oringo was authorised, amongst others, to swear verifying affidavits on the Defendant's behalf in relation to filing or defending suits in conformity with the new *Civil Procedure Rules, 2010*. The Advocate went on to say that there was no requirement that the authority given to the deponent of a verifying affidavit need be filed as per **Order 4 rule 1 (4)** of the *Civil Procedure Rules, 2010*. She maintained that the Preliminary Objection did not meet the threshold as laid down in the case of **Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors (1969) EA 696**. Here again the deponent was detailing matters relative to submissions rather than of fact. Finally, the deponent annexed to her said Affidavit, copies of letters from the Defendant to the Plaintiff seeking indulgence as to the repayment of borrowings. She maintained that the only reason that the Defendant raised the Preliminary Objection before Court was to avoid meeting its financial obligations to the Plaintiff.

3. The Defendant's submissions filed herein on 10th June 2014 set out the grounds of the Preliminary Objection. As regards the first ground namely that there was no resolution of the Plaintiff authorising the filing of the suit, the Defendant submitted that a company could only sue in its own name with the sanction of its Board of Directors or by a resolution in general or special meeting. The Plaintiff had failed to produce such before this Court. In this connection, the Defendant referred to **HCCC No. 609 of 2004 Kariuki Njoroge & Ors v Stephen Mugo Mutothori & Ors, Impak Holdings Co. Ltd. v Come-cons Africa Ltd & Anor. HCCC No. 605 of 2012** as well as **Affordable Homes Africa Ltd v Ian Henderson & 2 Ors HCCC No. 524 of 2004**.
4. Turning to the authorisation of the firm of S.N. Gikera & Associates, Advocates to institute this suit for and on behalf of the Plaintiff, the Defendant noted that the Plaintiff had not annexed minutes or a formal resolution appointing the said advocates to sue on behalf of the Plaintiff. It maintained that the Courts had reiterated on a number of occasions that seeking such authority was mandatory. To this end, it referred this Court to **Petition No. 600 of 2013 East African Portland Cement Ltd v The Capital Markets Authority & 5 Ors** in which the Ugandan case of **Bugerere Coffee Growers Ltd v Seraduka & Anor. (1970) EA 147** had been referred to and in which it had been held in dismissing the suit:

"When companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorising the proceedings in this case. The Court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."

The Defendant went on to further refer to the case of **East African Safari Air Ltd v Anthony Kegode & Anor** in which **Emukule J.** had detailed:

"When an Advocate is however instructed to file a suit, particularly against current or sitting directors or immediate former directors of the company, special care is required on the part of the Advocate or his firm that necessary authorisations by way of clear resolutions of the Board had been taken to institute the suit."

In the Defendant's view, the advocates acting for the Plaintiff herein did not act with due diligence to establish that they had that the relevant authority to institute this suit.

5. Continuing its submissions, the Defendant maintained that the deponent to the Verifying Affidavit to the Plaint, **John Aringo** did not have the requisite authority to sign and swear the said affidavit on behalf of the Plaintiff. In this regard, the Defendant referred the Court to 2 cases being **HCCC No. 347 of 2003 Donwoods Company Ltd v Chemusian Company Ltd** and **HCCC No. 588 of 2011 Bactlab Ltd v Bactlabs EA Ltd & 5 Ors**. Finally, the Defendant took issue with the

capacity of the said **Stella Musembi** to swear and file an affidavit on behalf of the Plaintiff relating to matters of fact. The Defendant noted that the deponent did not state that she had been authorised by the Plaintiff to swear the Affidavit for and on its behalf. She had sworn the affidavit on the basis that she had the conduct of the suit on behalf on the Plaintiff and was well versed with the facts relating to the same. The Defendant submitted that such averment was not based on counsel's belief that what was expressed as a factual statement of truth was not within her knowledge. In this regard, the Defendant referred the Court to the cases of **HCCA No. 228 of 2004 Lavington Security Services Ltd v Thomas Okeyo** (citing the authority of **Civil Appeal No. 121 of 1993 David Kinyanjui & 2 Ors v Meshack O. Monyoro**) as well as **Kisya Investment Ltd & Ors. v Kenya Finance Corporation Ltd HCCC No. 3504 of 1993** and **Albany Taylor & Anor. v Christopher Taylor (2008) eKLR**.

6. The Plaintiff's submissions in respect of the Defendant's Preliminary Objection were filed herein on 28th May 2014. Having summed up the contents of the Preliminary Objection, the Plaintiff set out what it termed the brief facts of the case and identified what it saw the issues in relation to the Preliminary Objection as follows:

> **"a) Whether the Defendant's Notice of Preliminary Objection meets the threshold set in the leading case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696.***
>
> **b) Whether the suit is fatally defective for failure to be accompanied by a competent affidavit on the ground of lack of authority by the Plaintiff and also whether the firm of Advocates for the Plaintiff did not have instructions to file the present suit.**
>
> **c) Does the Court had a duty to do substantive justice to the parties by invoking the overriding objective under section 1 A and 1B of the Civil Procedure Act."**

As regards a) above, the Plaintiff set out the findings of both **Law JA** and **Sir Charles Newbold (P)** in the **Mukisa Biscuit** case (supra). The Plaintiff submitted that the Preliminary Objection was not based purely on a point of law and the position was that the matter was contested with disputed facts that were still in the process of being litigated upon. The Defendant had been relying upon and maintaining this position since inception of the suit. As regards the Plaintiff's alleged failure to file a competent Verifying Affidavit, it referred this Court to **Order 4 rule 1 (4)** which reads:

"Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so."

The Plaintiff submitted that the rule did not state that the authority given to the deponent of the said affidavit had to be filed together with the same or at all. The Defendant referred to the finding of my learned brother **Odunga J.** in the case of **Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR**. In that suit, the learned Judge found that the mere failure to file the resolution of the Corporation together with the Plaint did not invalidate the suit and the associated himself with the decision of **Kimaru J.** in the case of **Republic v Registrar General & 13 Ors (2005) eKLR** where he found that the legal position was that such a resolution of the Board Directors of a company may be filed at any time before the suit is fixed for hearing. The Defendant's Preliminary Objection was premature and was solely meant to derail the hearing and determination of the suit.

7. As regards the Defendant's complaint that there had been no resolution for the Plaintiff appointing the firm of S. K. Gikera & Associates, it noted that instructions had been received from the Plaintiff by letter dated 7th July 2011. The Plaintiff maintained that the letter of instructions contained confidential information protected by advocate/client privilege and, accordingly, the Plaintiff's advocates could not be compelled to present such information before Court. The

Plaintiff again referred to the **Leo Investments** case (supra) in this regard. The Plaintiff went on to say that the said John Oringo had been duly authorised by it, through a Board resolution of the 536th board meeting of the Plaintiff Company, as one of its staff members with authority to swear a verifying affidavit. The extract of those minutes had been annexed to the Replying Affidavit sworn on 11th March 2014. Finally in this connection, the Plaintiff pointed to **Order 4 rule 1 (6)** of the *Civil Procedure Rules* which gave the Court the discretion to strike out any Plaint or counterclaim which did not comply with the provisions of the immediately aforementioned sub-rules. It referred the Court to **HCCC No. 153 of 2002 M'Impwi M'Ikiugu v Joseph Kithinji & Anor.** in which **Ouko J.** had adopted the Court of Appeal's decision in the case of **Jonathan N. Kata v the Attorney General & Anor HCCC No. Mld 21 of 2004** where the Court had stated that the Rules Committee by the use of the word "may" gave the Court the leeway to consider, in the circumstances of each case, whether to strike out the suit or not.

8. As regards the Court's duty to do substantive justice to the parties, the Plaintiff set out in full the provisions of the **sections 1A and 1B** of the *Civil Procedure Act* and maintained that the Courts have often expressed themselves that striking out pleadings is the last resort. It pointed to the decision of the Court of Appeal in **Trust Bank Ltd v Amalo Co. Ltd (2009) KLR 63** where the Court detailed:

> **"(1) The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.**
>
> **(2) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so."**

In the Plaintiff's opinion, this Court had a duty to look at alternative avenues available to the party before striking out proceedings referring to **Civil Appeal No.Nai. 329 of 2009 Kenya Commercial Finance Company Ltd v Richard A. Onditi**. The Plaintiff also referred to the decision of the **Ringera J.** in the **Microsoft Corporation v Mitsumi Computer Garrard Ltd & Anor. (2001) KLR 470.**

9. Attached to the Replying Affidavit of the Plaintiff sworn by the said Stella Musembi on 3rd April 2014 as Exhibit "SM-1" was a copy of the Plaintiff's bank minutes of its 536th Board Meeting held on 28th April 2011. They detail that under the new Civil Procedure Rules, the Board had noted the recommendation for the staff members detailed in the minutes to swear verifying affidavits on the Bank's behalf in relation to filing or defending suits. The name of John Oringo is noted as no. 2 on the list. As a result, I endorse the Plaintiff's submission that he was properly authorised by Board resolution to swear the Verifying Affidavit annexed to the Plaint herein as sworn on 27th January 2011. That would dispose of the ground no. 5 of the Defendant's said Preliminary Objection save that sub-rule 4 details that the deponent of a verifying affidavit must be so authorised under the seal of the company to do so. There is no evidence before this Court that the said John Oringo has been so authorised by resolution under seal. (Emphasis mine).
10. Further, I do not agree with the Plaintiff as regards its submission that the Preliminary Objection is based on facts not law and is therefore improperly before this Court. In my view, all 5 grounds of the Defendant's Preliminary Objection relate to matters of procedure and have nothing to do with the facts of the case. Turning to mandatory requirements, there is no denying the necessity for a company, which is filing suit, to have an authorising Resolution so to do either from the Board of Directors of the company or by members of the company in General Meeting. Such are the proper decisions in the cases of **Kariuki Njoroge** and **Impak Holdings** (supra) as cited to this Court by the Defendant. The Plaintiff has answered such necessity by pointing to the decisions of both **Kimaru J.** and **Odunga J.** in the **Leo Investments** and **Republic v Registrar General** cases as aforesaid. Both those learned Judges had found that such company resolution need not be filed at the same time as the suit but may be filed any time before the suit is fixed for hearing. In

contrast to their findings, I do find it surprising that in this case, the Plaintiff, in answer as to whether the said John Oringo was authorised to swear the Verifying Affidavit in relation to the Plaint, was able to annex the Resolution of the Plaintiff's Board of Directors so authorising (but not under seal). However, the Plaintiff did not exhibit to its Replying Affidavit, a copy of the Resolution of the Plaintiff company authorising firstly, the institution of this suit and secondly, the appointment of the S. N. Gikera & Associates, advocates to represent it in these proceedings. In my view, this gives to Court the clear implication that there exists no such Resolution to this end.

11. My opinion in this regard, is strengthened by the fact that the Plaintiff, in its submissions before Court, spent considerable time arguing that the said firm of advocates had been appointed through a letter of instruction dated 7th July 2011 (not a Board Resolution) but that such was privileged as it contained confidential information as between advocate and client. In my view, the **Leo Investments** case is distinguishable from the one before this Court in that there was no preliminary objection raised as regards the filing or otherwise of a company resolution, **Odunga J.** reached his decision by way of Judgement based on issues raised by the parties in relation to the pleadings. In this matter, the Defendant has deliberately raised objections which in my view, the Plaintiff has failed to answer satisfactorily. As above, there is no authority by way of Resolution of the company's members or its Board of Directors as to the institution of this suit. There is no resolution as to the appointment of S. N. Gikera & Associates, advocates authorising them to file this suit. In the 2014 **East African Portland Cement Ltd** case as cited to Court by the Defendant (supra), **Mumbi Ngugi J.** summed up what she considered that the law provided with regard to suits filed without the authority of the company. The learned Judge detailed as follows:

> **"33. In Affordable Homes Africa Limited vs Ian Henderson & 2 Others HCCC No. 524 of 2004, Njagi J observed that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers (see the decision of the Court in Automatic Self-Cleansing Filter Syndicate v. Cuninghame [1906] Ch.34, CA.); that it was therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the company. The Court (Njagi J) observed that it was common ground that there was no authority from the board of Directors to institute the suit, and consequently, he held as follows:**
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> ***'The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff'.***
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> **34. I believe a similar situation obtains in the present suit. Article 92 of the company's Memorandum and Articles of Association (annexure KT3 annexed to the undated affidavit of Mr. John Maonga filed in Court on 24th December 2014) provides that the business of the company shall be managed by the Directors who may do on behalf of the company all such acts and exercise all such powers as may be exercised by the company. As already stated, Article 110 of the company's Articles provides for the passing of resolutions of directors in writing, such resolutions to be as effective as those passed at meetings of the Board of directors. As has also been found, the resolution purportedly authorizing the present petition was not passed in accordance with Article 110. Consequently, there was no resolution for the filing of this matter.**

35. In Bugerere Coffee Growers Ltd vs Sebaduka & Another (supra), it was held, in dismissing the suit, that when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in the case. The Court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action".

12. In order to endorse its position that the Preliminary Objection herein was unsustainable, the Plaintiff maintained that the Court has a duty to do substantive justice to the parties by invoking the overriding objective. This Court is only too well aware of the provisions of **section 1A and 1B** of the *Civil Procedure Act* just as it is aware of the provisions of *Article 159 (2) (d)* of the *Constitution* that justice shall be administered without undue regard to procedural technicalities. However, it has been reiterated in several instances, as in **Joshua Werunga v Joyce Namuyak (2013) eKLR** (see also **Hunker Trading v Elf Oil (K) Ltd Nai. Civil Appl. No. 6 of 2010**) that the provisions of Article 159(2)(d) should not be used by litigants as a panacea to all irregularities and procedural technicalities. The Courts have cautioned that the same should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however also been reiterated, as was the case in **Raila Odinga v I.E.B.C & Others (2013) eKLR**, that the Court should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. It was reiterated in **Joshua Werunga v Joyce Namunyak** (supra) i*nter alia*:

"In the case of Raila Odinga v I.E.B.C & Others (2013) eKLR, the Supreme Court said that Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

13. As regards the necessity for a company Resolution to back the institution of the suit, **Odunga J.** in his Judgement in the **Leo Investments** case (supra) referred to the holding of **Hewett, J.** in **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** as follows:

"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect…….. As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

14. In this case, there has been no such ratification even after the Plaintiff, through its advocates or otherwise, became aware of the Preliminary Objection filed by the Defendant dated over a year ago now. In my view, the Plaintiff has been lackadaisical to say the least. As a result, I exercise my discretion to uphold the Defendant's Preliminary Objection and I dismiss this suit with costs to the Defendant.

DATED and delivered at Nairobi this 7th day of July, 2014.

J. B. HAVELOCK

JUDGE