



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 555 OF OF 2011

MULGOLD LIMITED PLAINTIFF

- VERSUS -

1. MAIMUNA ABDULLAHI MOHAMED

2. ABUBAKAR SALIM MOHAMED

3. MANGALE DZOMBO NGOKA

4. KENGA GIBSON KAHINDI

5. SAMMY MOCHU DAVID

6. EMERY MIHAKI KARIUKIDEFENDANT

RULING

[1] The 4th defendant in this case raised a preliminary objection on this suit. He asked the court to strike out its suit for being fatally and incurably defective. Mr Kenga Learned Counsel for the 4th defendant said that the suit was filed without the mandatory resolution of the Board of Directors at the filing of the suit. He argued that an attempt was made to have that resolution admitted on 17th July 2014 when the plaintiffs further affidavit was filed. He stated that move was irregular. The 4th respondent relied on the case of ***Bugerere Coffee Growers Ltd v Sebaduka and another High Court of Uganda at Kampala Civil suit 546 of 1968.***

This case stated that when companies authorize the commencement of civil proceedings a resolution or resolutions have to be passed either at company or Board of Directors meeting and recorded in the minutes. The 4th defendant also relied on ***HCCC NO. 116 of 2004 (Mombasa) Kabundu Holdings Ltd - vs- Ali Ahmed T/a Sky Club Restaurant.*** That sat Mr Patrick Kabundu had no capacity to file the suit since he had no resolution of the company to file the suit consequently all pleadings filed by him were a nullity. This was the position taken in ***Malindi HCCC No. 29 of 2011 OS*** where Meoli J declared the proceedings a nullity because the proceedings had been commenced without a resolution and/or authority.

Equally Justice H A Omondi in ***Malindi Civil Suit No. 41 of 2011, Likiso Ltd vs Yerry Kombe and 3***

others stated that lack of capacity to sue goes to the root of the proceedings and cannot be cured by later attempts of bringing the so called resolution at a later stage.

Ms Abuodha Learned Counsel for the plaintiff conceded that the suit was filed without the resolution or consent from the shareholders, She however in court discovered a resolution of the company authorizing filing the suit attached to one of her copies of the plaint. She attempted to show it to the court and Mr Kenga learned Counsel for the 4th defendant would not accept her to put it in.

She argued that this is a technical objection and technical objections should not be raised in court under Article 159 of the Constitution. She stated that not filing a resolution which was there before the suit was filed was a mistake of counsel and that should not be visited on the client.

Mr Shimaka Learned Counsel holding brief for Mr Gikandi for the 3rd defendant associated himself with the sentiments of Mr Kenga.

The law on requirement of companies resolution(s) or authority from shareholders is far from settled. In **Nakuru Miscellaneous Application No. 67 of 2005 Republic v Registrar General and Ndeffo Company Limited and Daniel Thuku Mwundu & 911 others interested parties** Justice Kimaru stated;

"The applicants have conceded that no such resolution has been filed. They have however stated that the anomaly could be cured by a further affidavit being filed annexing such authority. I agree with the applicants. 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 said suit is filed. I do therefore hold that even if the said firm did not file such authority, when the substantive motion was filed, such authority can be filed any time before the hearing of the substantive application for judicial review. The absence of such authority is therefore not fatal to the applicants suit."

In **Nairobi High Court Civil Suit No. 411 of 2012 Kenya Aerotech Ltd v City Council of Nairobi** Judge Odunga agreeing with the decision of Kimaru J stated;

*"As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, 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. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same maybe 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. 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 plaintiff or with the 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 vs Registrar General and 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 anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage."*

And in **Milimani Law Courts Civil Case No. 314 of 2012 The Presbyterian Foundation v East African Partnership Ltd & another** Odunga J said;

"As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, 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. 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. 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 vs Registrar General and 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 maybe 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. Its absence, is therefore,not fatal to the suit, at least not at this stage."*

It is therefore evident that failure to file a resolution with the suit can be subsequently ratified . Ms Abuodha, in this case had been handed the resolution by her instructing clients. She unfortunately did not file the same with the suit. She attempted to introduce it by an affidavit, her efforts were resisted by counsel for the 4th defendant. I will exercise my discretion and allow her to ratify the situation. This she will do within 30 days from the date hereof. This will allow the real issue between the parties to be canvassed and a solution of the dispute between the parties to be achieved. The Preliminary Objection is dismissed with no order as to costs.

Dated and delivered in open court at Mombasa this 30th day of October 2014.

S. MUKUNYA

JUDGE

30.10.2014

In the presence of:

Mr. Gikandi advocate for 1st and 2nd respondent.

Mr. Mkhan holding brief for J.A. Abuodha Advocate for the plaintiff.

Mr. Shimaki Advocate for the 4th respondent.