



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE NO. 166 OF 2010
ORIGINATING SUMMONS

**IN THE MATTER OF ORDER XXXVI RULE 3A AND ORDER XXXVI RULE 8 OF THE
CIVIL PROCEDURE RULES AND SECTION 4 OF THE CIVIL PROCEDURE ACT CAP 21 OF
THE LAWS OF KENYA**

AND

**IN THE MATTER OF LIQUIDATED DAMAGES IN THE LAW OF CONTRACT AND IN THE
MATTER OF SECTION 120 OF THE EVIDENCE ACT CAP 80 OF THE LAWS OF KENYA**

BETWEEN

JOHN WANYAMA BENJAMIN PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD. DEFENDANT/RESPONDENT

R U L I N G

The plaintiff has raised a **Preliminary Objection** dated 18/1/2012 against the replying affidavit of **Eliud Siganga** sworn on 7/11/2011 in reply to the Originating Summons filed herein on the following point of law:-

“Eliud Siganga the Kakamega Branch Manager of the Defendant has no *Locus Standi* to defend the suit on behalf of the defendant which is a corporation because there is no annexure of documentary evidence on his replying affidavit that he had been duly appointed by the resolution of the board of directors of the defendant under its corporate seal and the same signed by a director and counter signed by the company secretary as provided for the Companies Act Chapter 486 of the Laws of Kenya and so the defendant has not complied with the orders of this court made on 25/10/2011 by Hon. Justice Luka Kimaru.”

The Preliminary Objection was argued before me on 31/1/2012.

The plaintiff in his submissions argued that since the defendant is a limited liability company incorporated in the Republic of Kenya under **Cap 486 Laws of Kenya**. According to the plaintiff, whoever appears on behalf of a company must have been given the Power of Attorney by the Management of the Company under a resolution of the board of directors giving authority under its seal. The plaintiff submitted that there is annexed resolution of the board of directors appointing the said **Eliud Siganga** to make the replying affidavit in question.

The plaintiff relied on the following authorities:-

- i. **Commercial Bank Ltd –vs- Paradise Court Ltd HCCC 1735/00 Milimani Commercial Court.**
- ii. **Chris Mahinda t/a Nyeri Trade Centre –vs- KPLC 2005 Eklr.**
- iii. **Order 9 rule 2 (c) Civil Procedure Rules.**

It was argued for the defendant by **Mr Osango Advocate** of **Shitsama & Company Advocates** for the defendant that the same Preliminary Objection was raised on 24/10/2011 and a ruling made by **Justice Kimaru** disposing of the Preliminary Objection and that the court is now *functos official*. The court was referred to **Section 1A** and **1B** of the Civil Procedure Act and **Section 159** of the **Constitution** and urged to hear the case on merits as opposed to technicalities.

Mr Osango referred the court to the following authorities:-

- i. **Patel –vs- EA Cargo Ltd. (1974) E ALR 75.**
- ii. **The Companies Act Cap 486 Laws of Kenya.**

I have considered the Preliminary Objection and the reply to the same. I have also considered the submissions of the parties.

On 24/10/11 when the application dated 23/4/2011 was heard before **Hon. Justice Kimaru**, the plaintiff raised the issues regarding the defendant’s representation by the firm of **Shitsama & Company Advocates** and raised issues about the filing of a resolution of the company appointing the firm of **Shitsama & Company Advocates** to act for the company. He referred the court to **Order 9** and **Order 7** of the **Civil Procedure Rules**. Honourable **Justice Kimaru** in his ruling dated on 25/10/11 relied on page 4 of the ruling as follows:-

“Upon evaluation of the rival arguments of the parties on this point, it is clear to the court that the issue as to whether the defendant’s advocate has authority or not to act for the defendant is an issue between the defendant and the said advocate. That issue is an issue of internal management. The defendant has not challenged the authority of its advocate to act on its behalf. The plaintiff cannot in the circumstances complain about the validity of an appointment by the defendant of its advocate.”

Although the previous Preliminary Objection related to the advocates representing the defendant unlike the current Preliminary Objection which is on the issue of the deponent of the replying affidavit, the issue is essentially the same. That is whether a resolution of the company ought to have been exhibited herein. The affidavit in question clearly states in the 1st paragraph that **Eliud Siganga** was **“duly authorized by the bank to swear this affidavit on its behalf”**. That was sufficient authority for purposes of swearing the affidavit.

None of the authorities cited by the plaintiff points out any requirement to annex a resolution of the company giving such authority.

In the case of **Commercial Bank Ltd** (supra) the issue dealt with was the annexing of the draft defence in an application seeking for extension of time within which to file the defence.

In the **Chris Mahinda** Case (supra), it was the Court of Appeal **Rules** that were the issue. **Order 9 rule 2 (c)** of the Civil Procedure Rules provides for recognized agents of parties in respect of a corporation which is totally different from a deponent in an affidavit.

I agree with the defendant’s counsel that the parties ought to be heard on merits as opposed to dwelling on technicalities. The Preliminary Objection has no merits and I dismiss the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kakamega this 18th day of April 2013.

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SAID J. CHITEMBWE

JUDGE