



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO.588 OF 2011**

**BACTLAB LIMITED .....**  
**PLAINTIFF/APPLICANT**

**VERSUS**

**BACTLABS EAST AFRICA LIMITED..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GREGORIOS SMARAGDIS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MARGRETVILLE ASAMI MACHIO.....3<sup>RD</sup>**  
**DEFENDANT/RESPONDENT**

**ARHELAOS GIKONYO MAINA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**HENRY FIGONDO..... 5<sup>TH</sup> DEFENDANT/RESPONDENT**

**MICHAEL LUVEMBE.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

Notice of Preliminary Objection was filed in this case by the firm of Biwott Korir & Company Advocates listing 4 points of objection.

In their submissions led by Mr. Musati he states that the Plaintiff (suit) is not property before the court and it is invalid and fatally before the court. It is not authorized by a resolution of the company (Plaintiff). At the time of filing the Plaintiff no company resolution was filed with the plaintiff, no authority was given to Farah Mohamed Awad to file suit or to swear verifying affidavit what was filed as authority to swear affidavit marked "FA" and to have authority to represent the Plaintiff (BACT LAB LTD) in the suit was signed by Farah Mohamed himself and one Sofia Assali.

The submission is that there was no resolution of the company authorizing the filing of the present suit. The requirements and the Civil Procedure Rules are, plaintiff be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaintiff. The court may on its own motion or on application of the Defendant order to be struck out of plaintiff which does not comply with that requirement. It is therefore the desire of the Defendants objectors that this court do strike out this suit.

The Plaintiff being a registered company under the companies Act Cap.486 has its Articles of

Association which sets out the terms of management of the affairs of the company. The present articles incorporates the provisions of Table A of the companies Act Section 80 of the Act which empowers the directors to manage the business of the company. Disqualification of directors is provided for under Article 18 of the Articles of Association of this company.

From the submissions of the objectors it is clear that there is objection that Farah Mohamed Awad was not authorized to file this suit on behalf of company and that the authority he has attached is not adequate to authorize him to swear verifying affidavit and to represent the Plaintiff. That the authorities need to be supported by two resolutions of the company. This is serious non-disclosure and his suit ought to be dismissed. It is sworn that no meeting of directors was held on this matter.

In his replying affidavit Farah Mohamed Awad has disclosed the directors are 3 and one non director shareholder. Mr. Farah himself holds 10 shares. It is clear that Mr. Farah does not disclose that there was a meeting of directors called to decide that this suit be filed. It is settled law that directors must conduct the affairs of the company in instituting suit by resolution. In the case of **Bugerere Coffee Growers Ltd. –vs- Sebaduka 1970 EA at 147** the court held

***“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.”***

Therefore here there are directors one saying he was authorized to file suit and the other saying no authority was given. It would be for the Farah Mohamed Awad who swore a verifying affidavit to exhibit such a resolution but the court has not been shown any.

It is not enough that authority to file suit is sealed and signed by two directors, there must be a meeting in which resolution is passed.

I have read the authorities cited by counsel

1. Ruling in **Nairobi HCCC No.524 of 2004** in which the court (L. Njagi) struck out the suit on a preliminary objection.

In this circumstances it is my view that as at the time the plaint was filed there was no board of directors resolution to undertake proceedings. This suit was not authorized by the company. The seal was witnessed by Mr. Farah who was giving himself powers and it cannot be said witnesses to affix seal were two but one Assali. There was no authority to file suit or to represent the company.

I therefore find that this suit was not authorized by the company and therefore I do strike it out with the costs to be met by the said Farah Mohamed Awad who was the mover of these proceedings.

Orders accordingly.

Dated and delivered at Nairobi this 9<sup>th</sup> day of February, 2012

J.N. KHAMINWA

JUDGE

Any interim orders are discharged.

**J.N. KHAMINWA**

**JUDGE**