REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURT)

Civil Case 464 of 2011

VISTA HOLDINGS INTERNAITONAL LIMITED.....PLAINTIFF

VERSUS

SPAN IMAGE (K) LIMITED.....DEFENDANT

R U L I N G

1. The Defendant herein filed a Notice of Motion dated 20 March 2012 in which it sought that the Plaint dated 17 October 2011 be struck out as it had failed to comply with the mandatory provisions of **Order 4 Rule 1 (1) (d) and (f)** of the *Civil Procedure Rules*. The Application was supported by a short Affidavit sworn by **Mohamed Ali Taib**, a director of the Defendant Company. The said Affidavit referred to the Plaint and verifying Affidavit both dated 17 October 2011. The deponent detailed that as presently drawn, those documents should be struck out for being a gross violation of the provisions of **Order 4** and that such were not capable of being cured by amendment. The violations complained of were as follows:

(a) there is no averment as to the place where the cause of action arose;

(b) there is no averment that there have been no previous proceedings in any court relating to the same subject matter;

(c) there is no averment that the cause of action relates to the plaintiff named in the plaint;

(d) the Verifying Affidavit sworn by Faisal Maolin has not exhibited any authority under the Seal of the Plaintiff Company permitting the filing of the suit.

2. The Application is defended and the Plaintiff has filed a Replying Affidavit sworn by the said **Faisal Maolin** on 4 June 2012. The first point made by the deponent was that the present proceedings before court had been sanctioned by a valid resolution of the company. He annexed a copy of a resolution marked "FM1" which he maintained authorised him, as a shareholder of the company, to deal with all legal pleadings, court matters etc particularly with regard to the trade mark SPAN IMAGE. The deponent stated that the Plaintiff had instituted the suit in Nairobi where the cause of action had arisen. He then stated that the Applicant had not demonstrated or stated if he had knowledge of or examined the company\'s Articles of Association to ascertain where the power to manage the company\'s affairs lie, as well as the power to sanction the commencement of court actions in the name of the company. Thereafter the deponent detailed a number of paragraphs in which he had been advised by the Plaintiff\'s advocates as to questions of law as well as stating that the Applicant had not demonstrated how it was likely to

suffer prejudice in any material respect. Further, he noted that the Applicant had not denied infringing the Plaintiff\'s trademark. Finally, he commented that striking out this suit would be a Draconian exercise which should only be ruled upon in plain and obvious cases.

3. In addition to the Replying Affidavit, the Plaintiff also filed Grounds of Opposition on 24 May 2012. The Grounds of Opposition detailed as follows:

"1. The application is incurably defective and the same does not lie.

2. The provisions under which the application is brought cannot be the basis for this Honourable Court to grant the prayers sought.

3. The application is grave abuse of the due process of this Honourable Court.

4. The applicant inexcusably omitted to comply with mandatory provisions of the law before filing the present application.

5. The Defendant's/Applicant's Supporting Affidavit is incurably defective for failure to comply with various substantive and procedural legal requirements and the same cannot be the basis for granting the Orders sought.

6. The application is incompetent as drawn and an abuse of the Court process.

7. the Defendant's/Applicant's application is grossly misconceived in law, fatally defective and ought to be struck out".

Counsel for the parties appeared before me on 4 July 2012. Mr. Omolo for the Defendant detailed that the Application before court relied solely upon the mandatory requirements of **Order 4 Rule 1 (4)** of the *Civil Procedure Rules*. He pointed out that the provision states that the Verifying Affidavit shall be sworn under Seal. He submitted that for the provision to have been complied with, the authority under Seal must accompany the Plaint and the other documents. He stated that it was admitted that the authority was never provided as per the Replying Affidavit dated 4 June 2012. He referred to exhibit "FM 1" as annexed to the Replying Affidavit. He maintained that "FM 1" was a purported resolution made at an Extraordinary General Meeting. He noted that the names of the persons attending that meeting were not disclosed. He further stated that the Resolution was only signed by one person, the deponent to the Replying Affidavit – Faisal Maolin. He submitted that the Resolution must be signed by the Officers of the Company being either 2 directors or 1 director together with the Company Secretary.

4. Mr. Omolo further commented that the document entitled *"Written Authority"* which accompanied the Resolution is what is described as needed under **Order 4 Rule 1 (5)**. In his opinion, that provision has nothing to do with the issue before court. He maintained that the two documents had been prepared only to meet the exigencies of the Application that was before court. To this end, he referred me to the List of Authorities filed by the Defendant on 7 May 2012 detailing the case of **Sunrise Orthopaedic & Trauma Hospital & Anor. V Dr.L. Lelei** *HCCC No. 130 of 2011* (Eldoret). He pointed at page 6 of that decision and submitted that the first Plaintiff therein was not able to show to the court that he had a prior resolution signed by two directors authorising the filing of the suit. The court had no hesitation in striking out the name of the second plaintiff in that suit. Counsel commented that at page 9 of the Replying Affidavit, it was contended that authority was given to file suit. The question is whether it was prior or post the filing of the Plaint. If it was post, then the authority had no value. Further, Mr. Omolo commented that there was nothing on the face of the Resolution document dated 11th of August 2011 authorising the said Faisal Maolin to present this suit to court.

5. In his turn, Mr. Osundwa put forward his opinion that if one looked at paragraph 3 of the Affidavit in Support of the Application the contents thereof invited the court to look at **section 15 (c)** of the *Civil Procedure Act* and paragraph 24 of the Plaint. Further, he urged the court to peruse paragraph 3 (b) of the Supporting Affidavit as well as paragraph 29 of the Plaint. He also invited the court to look at paragraphs

nos. 5, 8, 13, 14, 16, 17, 18, 20, 21, 25 & 26 of the Plaint. He noted that as per paragraph 3 (d) of the Replying Affidavit the deponent had exhibited the authority to act as well as the Resolution of the Plaintiff Company. He further relied upon paragraphs 1-3 of the Verifying Affidavit. He submitted that the Plaintiff was authorised to institute these proceedings. It had exhibited the authority to indicate that this was a valid suit before court. He submitted that there was no requirement in the Civil Procedure Rules that the names of the persons present at a meeting at which a Resolution was passed to be detailed and there is no need for 2 signatures. There had been no challenge from the Defendant that the said Faisal Maolin was not a director or that he didn\'t have the authority to swear the affidavits before court. Further, the Defendant had not shown that the Plaint is bogus or does not show a reasonable cause of action, which is key to any application for the suit to be struck out. He noted that this court had power under *Article 159* of the Constitution to decide the matter without taking into consideration technicalities. He also maintained that the court had further powers under **sections 1A, 1 B, 3 and 3A** of the *Civil Procedure Act* to determine the dispute on merit and not on a technicality. He then detailed that no evidence had been put forward of pending proceedings and he remarked that, at times, companies have power to the ratify the actions of its directors, that is not in dispute. Mr.Osundwa stated that the Plaintiff had filed a list of authorities on 5 June 2012 upon which he relied. Lastly, the submitted that the supporting Affidavit sworn by Mr. Taib on 26 March 2012 is bad in law in that it does not comply with the provisions of **Order 19 Rule 3**. He also noted that no Defence had been filed by the Defendant denying liability, presumably because it could not resist the Plaintiff\'s claim. He asked the court to dismiss the application by saying that all parties should be heard on merit.

6. Mr. Omolo in a brief reply, stated that there had been no Defence filed for the very simple reason that there is an agreement between the parties that any dispute should go for disposal by way of arbitration. It is trite law, he said, that when a matter should go to arbitration, a Defence is not deliverable. He noted that there is an application on record by the Defendant dated 26 October 2011 to refer this matter to arbitration. The moment a Defendant submits a Defence, his right to arbitration is waived. He noted that the Plaintiff is a juristic person and for it to file suit, the Rules are clear as to what it must do. The comparative scenario is tantamount to bring a suit when the Plaintiff is a minor or a lunatic which is brought without the authority of the best friend. A Resolution is convened by the persons present at the meeting who considered the resolution. Finally, Mr. Omolo submitted that the rule of thumb is that the Plaintiff must disclose in the Plaint, a specific paragraph that the cause of action belongs to the Plaintiff. He referred once again to **Order 4 Rule 1 (1)** at the tail end of paragraph (f) in this connection.

7. I have perused the authority put before court by the Defendant being the **Sunrise Orthopaedic** case (supra). That was a case involving prayers seeking orders of temporary injunction. The defendant\'s advocate therein filed a preliminary objection which amongst other things put forward the proposition that a limited liability company is a separate legal entity which can sue to enforce its perceived rights. In that suit it was maintained that there was no resolution that authorised the company to file suit and/or appoint an advocate to act for it in the suit. Further, the preliminary objection detailed that the verifying affidavit and the affidavit in support of the application for injunction were incurably defective. **Azangalala J.** in the course of his ruling stated:

"Objections 3, 4, and 5 are rooted in the corporate identity of the first plaintiff. In that capacity, it can sue and be sued in its own name. But how does it commence proceedings? Because of its artificial identity, it does so through its organs managed by men: its shareholders and or its directors. The recognized means by which a corporate personality expresses its decisions is by way of resolutions. The first plaintiff in its Articles of Association adopted part 1 of table "A" of the First Schedule to the Companies Act. That part has detailed provisions regarding making decisions which would be binding on it. Those decisions are made in validly convened meetings of the directors who in the case of the first plaintiff are also the only shareholders. The argument by counsel for the first plaintiff that the first plaintiff required no resolution to commence these proceedings and also appoint counsel belies the first plaintiff\'s own Articles of Association. Counsel\'s reliance upon section 241 of the Companies Act is in my view unfortunate as that section does not advance counsel\'s proposition that no resolution was required to authorise the institution of this suit and the appointments of counsel. That section, with all due respect to counsel, does not govern the manner of conducting the business of the first plaintiff. That being my view of the

matter, the defendant\'s objection to the first plaintiff\'s suit is not without merit. I say so, because the plaintiffs freely admit that this suit has been instituted without any authority to do so because the first plaintiff\'s Board of Directors could not meet to transact any business. It follows therefore that the first plaintiff could not verify the correctness of the suit filed on its behalf. It could also not authorise the filing of the affidavit supporting the Notice of Motion seeking interim relief."

The learned judge went on to quote the authority of **Bugerere Coffee Growers Ltd v Sebaduka & Anor. (1970) EA 147.** In that Ugandan case, it was held that when companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed by either a company or Board of Directors' meeting and recorded in the minutes.

8. Somewhat conflicting with that authority were the large number (15 in all) of authorities submitted to court by the Plaintiff\'s counsel. However, before I get to that it is necessary that I detail the relevant Rules under **Order 4**, under which the Application has been grounded. Such are **Order 4 Rule 1 (1) (d) and (f)** together with **Rule 1 (2) and (4)** of the *Civil Procedure Rules, 2010*. I set out these as below:

"1. (1) The Plaint shall contain the following particulars –

(d) the place where the cause of action arose;

(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

Rule 1 (2) The Plaint shall be accompanied by an affidavit sworn by the Pliantiff verifying the correctness of the averments contained in rule 1 (1) (f) above."

Rule 1 (4). 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".

Sufficient to note that all the Rules under **Order 4** are expressed with the word "shall" indicating that they are all mandatory. In my perusal of the Plaint, it is not specifically stated as to the place where the cause of action arose. However, there are various references in paragraph 24 for example that the Defendant\'s infringing advertisements are being aired in all leading supermarkets in all parts of the country. Further, paragraph 29 of the Plaint quite clearly details that there are no proceedings between the parties hearing over the same subject matter pending in any other Court in Kenya. What that paragraph does not say is that there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the Plaint. As regards **Order 4 Rule 1 (2)**, the Plaint is accompanied by the Verifying Affidavit of the said Faisal Maolin in which the deponent does verify the correctness of the averments as detailed in the Plaint. As I understand the Defendant\'s objection in that regard, it is that the deponent did not have the authority of the Plaintiff to swear the said Verifying Affidavit. Similarly, as regards **Order 4 Rule 1(4)**, I understand that the Defendant\'s submission here is that the deponent of the Verifying Affidavit was not an officer of the company duly authorised under the Seal of the company to do so.

9. The **Microsoft Corporation v Mitsumi Computer Garage Limited** case **(2001) 2 EA 460** is a landmark authority as regards the requirement for a Verifying Affidavit to be sworn on behalf of a Corporation by someone who is an officer of the company. The inspection of the Verifying Affidavit dated 17 October 2011 details in paragraph 1 thereof that the said deponent is the Managing Director of the Plaintiff Company and that he has been authorised by resolution of the Board to institute the suit and to swear the affidavit on behalf of the Plaintiff Company. The said Verifying Affidavit details that it has been sworn in Nairobi so that there is no omission as to the place of swearing on the jurat of the affidavit. **Ringera J** (as he then was) found in the **Microsoft Corporation** case (supra), that:

"Order III, rule 2 of the Civil Procedure Rules (now Order 4 rule 1 (4)) **requires an affidavit sworn on behalf of a Corporation to be made by an officer thereof. This is a matter of substance, not form,**

and it is incompetent for any other person, no matter how conversant with the averments of the plaint, to make a verifying affidavit on behalf of the Corporation. The definition of "officer" in section 2 of the Companies Act (Chapter 486) is not an exhaustive one. Thus in addition to "director, manager or secretary", an employee with broader responsibility who holds a position of trust within the company may also be an officer for the purposes of the Rules."

10. Later on in the learned Judge\'s Ruling in the **Microsoft Corporation** case in regard to errors manifest in a verifying affidavit he stated:

"In the matter at hand I am of the view that the error manifest in a verifying affidavit neither goes to the jurisdiction of the court nor prejudices the defendants in any fundamental respect. Indeed no prejudice has been alleged. Being of that persuasion, I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit while at the same time putting right the lapses in the offending affidavit. I am fortified in this view of the matter by two considerations. First, subrule (3) of rule 1 of Order VII itself seems by the usage of the word "may" to leave the striking out the plaint which is not accompanied by a verifying affidavit within the realm of discretion. If a discretion can be exercisable in the case of an omission of the verifying affidavit, a *fortiori* it is also exercisable in the event of such an affidavit being incompetent. Secondly, and to me this is equally important, an appreciation of the mischief which the rule was meant to cure inclines me to the same conclusion. In that respect, I think that Juma J though speaking extra-judicially, correctly fingered that mischief to be the hitherto unseemly spectacle of legal multi-representation of plaintiffs by advocates particularly in accident cases. Verification of the contents of the plaint was conceived as a cure for that mischief as the Plaintiff would be required to make an affidavit and he could not, it was thought, make two or more affidavits in respect of the same cause of action. If it be the case that the rule was intended to cure any other mischief, the same is not manifestly obvious. However, the rule having been framed in broad terms verification of the plaint is now necessary in every type of action originated by a plaint. The broad purpose of the verifying affidavit is thus to verify the contents of the plaint. That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record."

Similarly, in **Oduor v Afro Freight Forwarders (2002) 2 KLR,** my learned brother **Onyancha J** held that a court will in the exercise of its discretion accepting an affidavit in evidence or proceeding notwithstanding some irregularities on its face provided that such irregularities are not fundamental. He found that the exercise of the court\'s discretion will be guided on the basis of what is best in the ends of justice and that the irregularity being excused in no way prejudices the opposite party. He went on to say:

"even if the court were to finally affidavit improper and to strike it out, the court would nevertheless rise to the higher calling of doing justice to the parties by not striking out an otherwise valid suit and instead giving the plaintiff an opportunity to rectify the situation by filing a proper verifying affidavit."

11. Other authorities dealt with the question of defects in the verifying affidavit to a plaint. In **Kyangavo v Kenya Commercial Bank Limited & Anor. (2004) 1 KLR 126** my learned brother **Njagi J** had this to say at page 146:

"I don\'t think the plaint is defective merely for not stating where the cause of action arose. Since the jurisdiction of the court is admitted, it follows that the cause of action must have arisen within the jurisdiction of the court. And under the Constitution, the High Court has jurisdiction throughout the country."

Of course, the landmark case so far as the striking out of pleadings is concerned is that of **D. T. Dobie & Company (Kenya) Limited v Muchina (1982) KLR 1.**The dictum of **Madan JA** (as he then was) is oft repeated in case after case in respect of pleadings. His two quotations are well worth repeating as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without

embarking upon a trial thereof before dismissing the case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra)). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."

And later in his judgement:

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real-life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

12. The Plaintiff put forward other cases as regards the striking out of pleadings including **Coast Projects Ltd v M. R. Shah Construction (K) Ltd (2004) 2 KLR 119** as well as **Muhuni & Another v Patel & another (1990) KLR 228** and **Time Magazine International Ltd & 2 others v Rotich & another (2000) KLR 544**. I do not believe that any of these cases lent anything further to my decision-making process as they were all decided along similar lines to the **D. T. Dobie** case. Then there was the **Manibhai Bhailalbhai Patel v Mehal Singh & Anor. c**ase**EACA 1956 Volume XXIII.** I didn\'t find that this case cited by the plaintiff was in any way relevant to the application apart from the editorial note which stated:

"In its judgement the Court again drew attention to the unnecessarily complicated and often obscure provisions of the law of Kenya relating to civil procedure."

Similarly, in the **Court of Appeal,** *Civil Application No. NAI 165 of 1999* **Sarah Hersi Ali v Kenya Commercial Bank Limited, Akiwumi J** stated:

"rules are handmaidens of this Court but we must be careful that handmaidens do not become harsh mistresses."

There is no doubt that the Defendant\'s major complaint herein is that the said Faisal Maolin was not authorised by Resolution of the Plaintiff to institute this suit and swear the Verifying Affidavit. In this regard I had some concern on the issue of non-compliance with the provisions of **Order 4 Rule 1 (4)** as set out above. I drew some assistance from the wise words of my learned brother **Odunga J** in his well thought out Ruling in *HCCC No. 335 of 2011* **A. S. Sheik Transporters Ltd & Anor. v Barclays Bank of Kenya Limited & 3 Ors** (unreported). At page 19 of his Ruling and referring to **Rule 1 (4)** he stated:

"From the foregoing, it is clear that the document authorising the deponent of the verifying affidavit must be under seal. The reason for this requirement is not far-fetched. A corporation is an artificial person who acts through its agents. Accordingly, in order for the court to be satisfied that the institution of the suit in question is genuine, the company must give the said authority and the only way to ensure that the authority is genuine is by ensuring that the same bears the signature of the company which is its seal."

As regards the other authorities put before court by the Plaintiff, I did not find such to be of any great assistance insofar as my thoughts are concerned in relation to this application.

13. I should first of all state that I have looked closely at the Plaint filed herein on the 18 October 2011.Although, as the Defendant says, that there may be no specific averment as to the place where the cause of action arose, there is plenty in the Plaint to show that the averments therein were relating to matters in Kenya. The jurisdiction of this court has been admitted by the Defendant despite the fact that it

has not filed any Defence to date. It has participated in a number of applications in relation to this suit quite apart from the one presently before me. As my learned brother **Njagi J** observed in the **Kyangavo** case (supra), under the Constitution, the High Court has jurisdiction throughout the country. Similarly, the fact that there has been no specific averment that there have been no previous proceedings in any court relating to the same subject matter or that there has been no averment that the cause of action relates to the Plaintiff named in the Plaint, I find that such is easily curable by amendment and have no hesitation in allowing the Plaint herein to go forward bearing in mind that I am bound in this regard by the ruling of the Court of Appeal in the **D. T. Dobie** case (supra).

14. I have also carefully perused the two documents exhibited as "FM1" to the Replying Affidavit of Faisal Maolin. We have no way of knowing as alleged by the Defendant\'s counsel, whether these documents have been produced as an afterthought to this Application, no doubt that will come out in evidence at the hearing of the suit in due course. For my part however, and bearing in mind that the Plaintiff company herein is incorporated in the British Virgin Islands, there is the Seal of the Plaintiff Company endorsed on both the documents put before court. I am in agreement with the submission of the Defendant\'s counsel that the same are signed by the said Faisal Maolin solely but this court has no way of knowing what are the formal requirements in that regard in the British Virgin Islands' jurisdiction. We don\'t know for example whether it is a requirement or otherwise that the names of the persons attending the meeting at which the Resolution was passed need to be stated on the Resolution document. We have no way of knowing that the Resolution need be signed by two officers of the Company or whether one signature will suffice. Certainly, the Defendant has produced nothing before this court to show that the two documents are inadequate so as far as the Company law applicable in the British Virgin Islands. Consequently, I am not satisfied that the Plaintiff has breached the mandatory provisions of the **Order 4 Rule 1(4)**. If there have been minor breaches then such are curable by way of amendment, at least to the Plaint. I note that the Verifying Affidavit sworn by Faisal Maolin on 17 October 2011 bears the Seal of the Plaintiff Company.

15. The outcome of all the above is that I strike out the Defendant\'s Application by way of Notice of Motion dated 20 March 2012 and filed herein on the 27 March 2012, with costs to the Plaintiff.

DATED and delivered at Nairobi this 25th day of July 2012.

J. B. HAVELOCK
JUDGE