



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

Civil Case 167 of 2007

FREE HOLIDAY LIMITED..... PLAINTIFF

VERSUS

OZ NETZAN DEFENDANT

RULING

This is a Notice of Motion dated 19th November 2007 filed by the Defendant/Applicants seeking inter alia the following orders:-

- “2. THAT this Honourable Court be pleased to strike out this suit for being an abuse of the process of the court and for having been brought without authority.**
- 3. THAT the ex-parte orders granted herein and subsequently extended thereafter be vacated and/or set aside”**

In his supporting affidavit one OZ Nitzan the Defendant/Applicant in this case avers that the verifying affidavit sworn by one Mr. Yehuda Sulami in support of the plaint dated 17th July 2007 is a falsehood. Further the said Mr. Yehuda Sulami not being a director of the Plaintiff company has no authority to institute this suit. The Applicant therefore argues that the present suit having no basis in law or fact must of necessity be struck out. The application was opposed by the Plaintiff/Respondent who filed his Grounds of Opposition on 15th October 2007. The matter was listed before court for inter partes hearing on 10th June 2009. By consent both counsel agreed to put in written submissions which they sought to rely on entirely. These submissions were duly filed and are on record.

In support of his application the Applicant annexed a letter from the department of the Registrar-General dated 5th September 2007 which letter lists the names of the two directors of the Plaintiff company Free Holiday Limited as –

§ **Yosef Guzi**

§ **Catherine Mwihaki Ngambi**

It is trite law that a company is indeed an artificial person and may only act through its duly registered office bearers. The Plaintiff is indeed a company and as such may only sue or be sued through its directors. Mr. Kiarie Kariuki in his submissions on behalf of the Applicant dated 18th June 2009 argues that the Respondent has not availed any evidence to show that he had authority to bring the suit. With respect this is not the correct position. In his replying affidavit to this application dated 4th December 2007 the Plaintiff has attached **YS3** which is a Notification of Change of Directors indicating that with effect from 29th May 2009 Yehuda Sulami and Hanan Adini were appointed as Directors of the Plaintiff company. There is evidence that this Notification was received by the office of the Registrar of Companies and was receipted on 9th July 2007. Therefore by 17th July 2007 when the Plaintiff swore his verifying affidavit he was infact a bona fide director of the company and had taken all necessary steps to have that change registered. The failure of the Registrar to record this change cannot in any way be blamed on the Plaintiff.

The issue of a company resolution authorizing the institution of the suit is in my view a matter of evidence and which in any event does not render the suit so defective as to be struck out. It is enough that the Plaintiff was a bona fide director at the time the suit was filed. The Plaintiff is at liberty to avail the necessary resolutions at the hearing of the suit. I therefore find that this suit is properly filed and is properly before court. The application to strike out is hereby dismissed in its entirety and I do direct that the matter proceed to hearing. Costs in the cause.

Dated and Delivered at Mombasa this 14th day of December 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Mutugi holding brief for Mr. Munyithya for Plaintiff/Respondent

Ms. Obura holding brief for Mr. Kiarie for Applicant

M. ODERO

JUDGE

14/12/2009