

**REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 187 OF 2000**

COLOUR PRINT LIMITEDPLAINTIFF

VERSUS

PRE-PRESS PRODUCTIONSDEFENDANT

RULING

The plaintiff decree holder presented to court a Notice of Preliminary Objection, which is now the subject of this ruling.

The objection is dated 28th September 2004 and is in the following terms: -

“Take notice that at the hearing of the application by Chamber Summons dated 6th August 2004 the Decree holder will raise preliminary Objection that the supporting affidavit of JAMES KARIUKI sworn on 6th August 2004 be struck out as the said JAMES KARIUKI is incompetent to swear the Affidavit”.

The Plaintiff’s counsel argued that the said deponent is incompetent because under Order 3 Rule 2 (c) he is not an officer of the corporation duly authorized under the corporate seal. He said that the deponent of the affidavit, in support of the Chamber Summons dated 6th August 2004, stated that he was a director of the Objector but he failed to state that he was authorized by the company to swear the affidavit. Counsel relied on the case **HCCC NO 1735 of 2000 COMMERCE BANK LTD – V – PARADISO COURT LTD & OTHERS**. This is a judgment of my brother Justice Anyara Emukule. In this case a Preliminary Objection was raised objecting to an affidavit sworn by a credit officer of a corporation without complying with Order 3 rule 2 (c).

The Judge upheld the Preliminary Objection and some quotes from his Ruling are as follows: -

“All that the deponent need to say in this particular affidavit is to swear that he was duly authorized to swear the Affidavit. It sounds so trivial and yet so important. He did not however depone that he had authority to swear the affidavit. He was therefore not competent to swear the Supporting Affidavit and his affidavit was therefore totally defective, and the same shall be struck out. It is so ordered.”

The objector’s counsel opposed the Preliminary Objection by saying that Order 3 talks of authorized agent where the word authorized must appear to validate an affidavit. Counsel submitted by the Plaintiff’s counsel related to employee who had sworn the affidavit not a director, as is the case here. He said that the deponent in this matter, that is JAMES KARIUKI had described himself as director of the objector company and that he said was good enough.

The Plaintiff’s advocate responded by arguing that a director is an officer and employee of corporation so Order 3 Rule 2 (c) applies.

I am inclined to accept the objector’s counsel’s argument. Indeed unless the decree holder can prove otherwise, which he did not do, I will accept as stated in the affidavit that the deponent is a director of the objector company. That being the case, directors are defined in the Blacks Law dictionary as “Persons appointed or elected according to Law, authorized to manage and direct the affairs of a corporation or

company”. (Underlining mine).

In other words by definition they are authorized to manage and direct the company’s affairs. The power, which authorizes the directors to carry out the affairs of the company are to be found in the Companies Act and in the Articles of Association. Nothing was presented before me to show that the Directors had exceeded their power donated by the aforesaid documents. Indeed I accept the contention of the objector’s counsel that this case is distinguishable with the one relied upon by the decree holder. That case related to an employee swearing an affidavit but in our present case the deponent is the director of the company.

I do find, for the reasons aforesaid, that the decree holder has failed to prove the preliminary objection.

Accordingly the orders of this court is that the preliminary objection dated 28th September 2004 is dismissed with costs to the objector.

Dated and delivered this 8th day of November 2004.

MARY KASANGO

AG JUDGE