



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E003 OF 2020

FAITH & HOPE PROPERTIES KENYA LTD.....PLAINTIFF/APPLICANT

VERSUS

JAMES MUCHIRI WAWERU.....1ST DEFENDANT/RESPONDENT

SUSAN NTHAMBI MUSEI.....2ND DEFENDANT/RESPONDENT

RULING

Introduction:

1. This Ruling is in relation to the Defendants' Notice of Preliminary Objection dated 28th September, 2020, in which the Defendants are seeking for the striking out of the entire suit on the following grounds:

a) That there is no resolution and/or valid resolution of the Plaintiff's Company as by law stipulated appointing the firm of S. J. Nyang & Company Advocates to institute the suit on its behalf.

b) That the Verifying Affidavit deponed by one David Ruthia Kabogo offends the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules 2010.

2. The Preliminary Objection proceeded by way of Submissions.

Submissions:

3. Counsel to the Defendants submitted that a Preliminary Objection consists of a point(s) of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit as was held in ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696 at page 700.*** Counsel cited the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules 2010 which provide as follows:-

“Where the Plaintiff is a Corporation the Verifying Affidavit shall be sworn by an officer of the Company duly authorized under the seal of the Company to do so.”

4. The Defendants' counsel submitted that the implication of Order 4 Rule 1(4) is that the Plaintiff being a Company ought to have, by a resolution, authorized the deponent of the Verifying Affidavit to execute the pleadings relevant to the instant suit on its behalf and that there was no authority under seal instructing the firm of S.J Nyang to file the suit on behalf of the Plaintiff.

5. Learned counsel for the Defendants cited the case of ***Kenya Commercial Bank Limited vs. Stage Coach Management Ltd [2014] eKLR*** where the court found a suit to be defective because the Verifying Affidavit and the advocates on record were not properly instructed under the seal of the Company. Counsel for the Defendant also relied on the case of ***Directline Assurance Company Limited vs. Tomson Ondimu [2019] eKLR*** where the court struck out a suit filed by the Plaintiff's Company on the ground that the advocates on record were not properly instructed under seal for the Company.

6. The Defendants' counsel further relied on the case of ***East African Portland Cement Ltd vs. Capital Markets Authority & 4 Others [2014] eKLR***, cited in the case of ***Directline Assurance Company Limited vs. Tomson Ondimu (supra)*** in which Mumbi J. concurred with the reasoning of the court in ***Affordable Homes Africa Limited vs. Ian Henderson & 2 others HCCC No. 524 of 2004*** in which the court held as follows:

“...that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the

shareholders; and that where a company's powers of management are, by articles, vested in the Board of Directors, the general meeting cannot interfere in the existence of those powers.... The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs such costs be borne by the advocates of the Plaintiff."

7. Counsel submitted that in view of the foregoing, the suit in its entirety is defective and urged this court to allow the Notice of Preliminary Objection and strike out the suit with costs to the Defendants.

8. The Plaintiff's counsel submitted that it is true that Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 stipulates that where the Plaintiff is a Corporation, the Verifying Affidavit shall be sworn by an officer of the Company duly authorized under the seal of the Company to do so. However, it was submitted, nowhere is it stated that such authority or resolution must be filed.

9. Counsel relied on the decision in **Republic vs. Registrar General & 13 Others Misc. Application No. 67 of 2005 [2005] eKLR**, where it was held that a resolution of the Board of Directors of a Company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit.

10. Counsel submitted that there is no written requirement that when an advocate who has been appointed by a Company/Corporation is filing pleadings the same must be accompanied by a resolution under a Company seal.

11. The Plaintiff's counsel also relied on the case of **Leo Investments Ltd vs. Trident Insurance Co. Ltd (2018) eKLR** where Gikonyo J. held as follows:-

"If a suit is filed without a resolution of a Corporation, it may attract some consequences. The mere failure to file the same with the Plaintiff does not invalidate the suit. I associate myself with the decision of Kimaru, J. in Republic vs. Registrar General & 13 Others Misc. Application No.67 of 2005 (2005) eKLR and hold that the position in law is that such a resolution by the Board of Directors of a Company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore not fatal to the suit."

12. Counsel urged this court to dismiss the Preliminary Objection and direct the Defendants to file their Replying Affidavit to the substantive Motion.

Analysis and findings:

13. I have considered the Notice of Preliminary Objection, the submissions by counsel and the cited authorities. The only issue for determination is whether this suit should be struck out on the ground that there is no resolution by the Plaintiff authorizing the law firm of S.J. Nyang and Company advocates to institute the suit on its behalf and that the Verifying Affidavit offends the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules which provides as follows:

"Where the Plaintiff is a Corporation, the Verifying Affidavit shall be sworn by an officer of the Company duly authorized under the seal of the Company to do so."

14. In the Verifying Affidavit that accompanied the Plaintiff's Plaintiff, the deponent deposed as follows:

"1. That I am one of the Directors of the Plaintiff herein having been authorized by my co-directors to swear this Affidavit for and on behalf and as well conversant with the facts of this case hence competent to make and swear this Affidavit."

15. The issue of whether it is mandatory to file alongside the Plaintiff a resolution of a Company under seal authorizing a particular Director to swear a Verifying Affidavit and appointing an advocate to file the suit on behalf of the Company has now been settled by the court. In the case of **Space Geo Enterprises Limited vs. Kenya National Highways Authority [2019] eKLR**, Muchemi J. held as follows:

"32. Clearly from the foregoing provision, nowhere is it required that the authority given to the counsels instituting suit be filed. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaintiff does not invalidate the suit."

*33. In **Leo Investments Ltd vs. Trident Insurance Co. Ltd (2014) eKLR** and **Republic vs. Registrar General and 13 Others (2015) eKLR**, Odunga J. and Kimaru J. respectively rendered that the legal position is that a resolution of the Board of Directors of a company may be filed at any time before the suit is fixed for hearing. This is the same position by the Court of Appeal in **East Africa Safari Air Ltd vs. Antony Ambaka Kegodre & Another (2011) eKLR** where the Court reversed the decision of the High Court of striking out the suit instead of giving the appellant the opportunity to demonstrate that the appointment of its advocates, even if irregular at the beginning, had been regularized."*

34. It is therefore established by case law that proceedings can be ratified after filing a case in a meeting of the shareholders or by authority of the Board. This means that failure to file the authority together with the petition cannot lead to nullification of the proceedings."

16. This court is in agreement with above pronouncements. The mere fact that the Plaintiff did not file its resolutions authorizing the swearing of the Verifying Affidavit by one of its Directors and the firm of S. J. Nyang and Company advocates to file the suit on its behalf

cannot be a ground for invalidating the suit.

17. The two resolutions by the Plaintiff can be filed and served at any time before trial. For those reasons, I find the Notice of Preliminary Objection dated 28th September, 2020 to be unmeritorious. The Notice of Preliminary Objection dated 28th September, 2020 is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF MARCH, 2021.

O.A. ANGOTE

JUDGE