



**Aspire Limited v Zedka Technical Services Ltd & 2 others (Environment & Land Case 2 of 2021) [2024] KEELC 6734 (KLR) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6734 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 2 OF 2021  
EO OBAGA, J  
OCTOBER 14, 2024**

**BETWEEN**

**ASPIRE LIMITED ..... PLAINTIFF**

**AND**

**ZEDKA TECHNICAL SERVICES LTD ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, UASIN GISHU ..... 2<sup>ND</sup> DEFENDANT**

**HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated April 30, 2024 filed under Certificate of Urgency, the Applicant sought the following orders:-
  - a. Spent
  - b. That the honourable court do find the instant suit incompetent and strike out with costs.
  - c. That in the Alternative, the 1<sup>st</sup> Defendant's/Applicant's Preliminary Objection dated 6<sup>th</sup> of May, 2022 be heard before the conclusion of the Plaintiff's case.
  - d. That costs of this suit be provided for.
2. The application is premised on the grounds on its face and on the Supporting Affidavit sworn by Martin Siwa Chemonges, a director of the 1<sup>st</sup> Defendant. It is his contention that he learned of the ex-parte judgment entered in this matter in 2022. He then perused the court file, made copies and instructed his Advocate on record to represent them; his Advocate also perused the Court file. It is his claim that at the time of perusing the court record, the Company Resolution dated 11<sup>th</sup> January, 2021 was not part of the court record.



3. Subsequently, he instructed his advocate to file and serve the Preliminary Objection dated 6<sup>th</sup> May, 2022. However, when the Advocate went to fix the P.O. for hearing, they found that the P.O. was not on the court record but the said resolution had been inserted among the Plaintiff's documents.
4. He deponed that he instructed a document examiner to compare the stamp impressions on the resolution against the one on the other pleadings and he found that the stamp impressions were different, and he attached the report of the document examiner. It is therefore his claim that the resolution was clearly inserted in the file without leave of court, thus the suit is incompetent for being filed without the same. The Forensic Document Report was annexed to his supporting affidavit.
5. Further, it was his contention that the suit is defective because the Verifying Affidavit was not sealed with the Plaintiff's Corporate Seal as required under Order 4(4) of the *Civil Procedure Rules*. In addition, that the person who swore the Verifying Affidavit was not an officer of the Plaintiff company.
6. He raised issues of conflict of interest on the part of the plaintiff's advocate on record on the basis that he is the one who drew the agreement for sale and represented the Plaintiff in the sale of the land. He is therefore a witness in the case and should not act in the matter. Also, that the person who filed the suit on behalf of the Plaintiff had no capacity to do so, instead he misrepresented that he was a director thereof when he was not. The suit is therefore incompetent and he prayed that the same be resolved at this preliminary stage.
7. The Application was opposed through the Replying Affidavit sworn on 27<sup>th</sup> May, 2024 by Nganga Kamau and another sworn by Njeri Kamau; in his capacity as a Director of the Plaintiff. It was his contention that he was duly authorized through a resolution signed by the other directors of the Company to depone to the verifying affidavit and testify on its behalf. He maintained that he is one of the Directors of the plaintiff company and annexed a copy of the CR12 as proof of the same.
8. He further deponed that there is no legal requirement requiring that a resolution be passed by the company to instruct a firm to represent the Plaintiff. He pointed out that there was no order of the court authorising the forensic audit. Further, that there is no Affidavit from the Court's registry staff to show that the stamp complained of does not belong to the court.
9. On the issue of representation and the alleged conflict of interest; it was his contention that the same had already been dealt with and the court made a finding, thus the same is res judicata. He dismissed the Application and the P.O. as lacking merit and being an abuse of the court process.
10. On the Replying Affidavit sworn by Njeri Kamau, one of the directors of the plaintiff; it was her assertion that the plaintiff company passed a resolution on the 11<sup>th</sup> January, 2021 duly authorizing Ng'ang'a Kamau to swear and execute all documents relating to the civil suit to be filed in court.
11. She maintained that at the time of filing the suit, the said Nganga was one of the Directors of the company and dismissed the allegations made by the applicant as being misconceived and an abuse of the court process. She urged the court to dismiss the case.
12. The Application was disposed of by way of written submissions, both parties filed their respective submissions and authorities which I have read and taken into account in arriving at my ruling as hereunder;
13. This court is of the view that the main issue arising for determination is whether the Application is merited and plaintiff's suit should be struck out.
14. It is common ground that at the time of filing the instant application, there was a resolution of the company to institute the civil suit and authorize Nganga Kamau to swear and sign all documents



pertaining to the same. What however is at the center of this application is whether at the time of instituting the suit the resolution by the company had been filed and whether the failure to file the same at the time was fatal to warrant the striking out of the plaintiff's suit.

15. The applicant contends that no resolution by the company was filed at the time of filing the suit; that he perused the court record and confirmed that there was none, he was however shocked to later find out that a resolution had been sneaked into the court file. To support his assertion, he annexed a Forensics Report which concluded that the stamp impression on the resolution of the company document was different from that of the other pleadings.
16. The respondent on his part maintained that a resolution of the company was duly signed and filed when instituting the suit. It was his contention that there is no proof from a staff of the court stating that the stamp on the said document did not belong to the court. He thus stated that the onus is on the applicant to prove that the stamp does not belong to the court.
17. I have carefully perused the court record; I have seen the said resolution as forming part of the plaintiff's documents. However, from a cursory look at the same against the stamp on the rest of the documents filed on the same day, the same appears different as was noted by the document examiner. No evidence was adduced by the respondent to rebut the said evidence of the document examiner. It is therefore safe to conclude that there was no resolution in the court record at the time of filing the suit.
18. The question that follows is whether the said failure is fatal to warrant the striking out of the plaintiff's suit. Odunga J. in the [Leo Investments Ltd v Trident Insurance Company Ltd](#) (2014) eKLR referred to the holding of Hewett, J. in [Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd](#) HCCC No. 391 of 2000 and stated as follows:

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

19. This position was reiterated by the Court of Appeal in the case of [East African Safari Air Limited - V- Anthony Ambaka Kegode & Another](#) [2021] eKLR where it was held as follows: -

“It is our view that the proper thing for the High Court to have done was not to strike out the proceedings, but to stay the same pending ratification if it was of the view that the evidence of ratification was not clear. Here is what Palmer states: “If an individual shareholder, without authority to do so, initiates litigation in the name of the company, the normal practice upon a motion to strike out the company's name is for the court to adjourn, whilst ordering that a meeting of the shareholder's be held to see if the company supports the litigation. If it does not, the motion will succeed and the solicitor who commenced the proceedings without authority of the company will be personally liable for the defendant's costs.”



20. Striking out of a suit is a draconian act that should only be exercised as a measure of last resort. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the court expressed itself as follows: -

A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.

21. Guided by the Court of Appeal decision and that of Odunga J. stated above; I am of the considered view that the failure to file the resolution by company at the time of filing the suit is not fatal and the same cannot invalidate the suit. Powers to strike out of suit is discretionary in nature and court in exercising such discretion ought to take into account all the circumstances of the case and exercise the same judiciously. It is imperative to note that the suit herein has taken off for hearing, with the plaintiff calling 3 witnesses.
22. On the allegations that one Nganga Kamau is not a director of the plaintiff company, I wish to state that on a perusal of the copy of CR12 filed on 4/10/2023, the same confirms that the said Nganga Kamau is indeed one of the directors of the plaintiff company.
23. On the issue of conflict of interest; I wish to state that the same was addressed vide a ruling delivered on 20/8/2021 by M. Odeny J. and whose effect was to dismiss the P.O. The learned judge stated that the applicant did not outline the prejudice that he is likely to suffer or proved any possibility of the advocate using any privileged information in relation to the sale agreement to his detriment. I will therefore disregard the said ground.
24. In view of the foregoing, it is the finding of this court that the applicant has not made out a proper case to warrant the striking out of the plaintiff's suit in entirety, the failure to file the resolution by the company is not fatal.

**Conclusion:**

25. In the upshot, I accordingly find that the Application dated April 30, 2024 is not merited and the same is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN ELDORET THIS 14<sup>TH</sup> DAY OF OCTOBER, 2024.**

**E. OBAGA**

**JUDGE**

In the virtual presence of: -

M/s Chepkwony for Mr. Nyamweya for the Applicant

M/s Satia for the Respondent.

Court Assistant – Laban



14<sup>th</sup> OCTOBER, 2024.

