



Misty on the Moors Limited v Fairmont Mount Kenya Safari Club; K&K Amman Limited & 2 others (Interested Parties) (Environment and Land Appeal E009 of 2023) [2024] KEELC 6816 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E009 OF 2023
AK BOR, J
OCTOBER 8, 2024**

BETWEEN

MISTY ON THE MOORS LIMITED APPELLANT

AND

FAIRMONT MOUNT KENYA SAFARI CLUB RESPONDENT

AND

K&K AMMAN LIMITED INTERESTED PARTY

KENIMO SA INTERESTED PARTY

KENYA WILDLIFE SERVICE INTERESTED PARTY

JUDGMENT

1. This is an appeal against the ruling of the Honourable Chief Magistrate, Honourable Kithinji A.R. in Nanyuki CM ELC no. 15 of 2020 delivered on 17/3/2023 vide which the Learned Magistrate dismissed the plaint dated 2/4/2020 for want of authority to institute the suit as sought by the Respondent in the notice of motion dated 15/2/2021.
2. The grounds of appeal are, firstly, that the Learned Magistrate misdirected himself on the law by holding that the resolution dated 14/7/2020 was not exhibited in the trial court proceedings yet the Applicant had exhibited it as annexure LC-2 to the affidavit in support of its application dated 15/2/2021; secondly, by dismissing the Appellant's suit yet no such prayer was made on the basis that the powers under Order 4 rule 1 of the Civil Procedure Rules only contemplate the striking out of a plaint and that that the Learned Magistrate dismissed the suit instead of staying the proceedings to give the Appellant's counsel time to seek ratification of the proceedings and what the trial court considered to be wanting in the resolution dated 14/7/2020.



3. Thirdly, that the trial court erred in law and fact by holding that a foreign company must have a natural director yet such companies are not incorporated under the laws of the Republic of Kenya; fourthly, that the trial court failed to appreciate that the meetings of a foreign company are governed by the rules of the country of incorporation and nothing in the *Companies Act* 2015 prevented shareholders from convening a meeting and passing a resolution.
4. The Appellant also faulted the trial court for holding that a resolution altering the directorship of a foreign company was only capable of legal effect and validity upon filing of the annual returns yet there was no such requirement for foreign companies. He was also faulted for failing to appreciate that the statutory obligation imposed on a foreign company to file annual financial statements could not be the process through which changes in the officials of a foreign company are to be notified to the Registrar of Companies, and for holding that a resolution of a company was not valid and had no legal effect unless it was communicated to the Registrar of Companies.
5. The background to this dispute is that vide the Amended Plaintiff dated 12/5/2020, the Appellant sought a declaration that the Respondent's actions of erecting and maintaining gates along the common public access road to its own and the Appellant's premises known as L.R Numbers 20646 and 20647 was unlawful. It claimed that the Respondent's gates had imposed illegal restrictions and limitations to its licensees, shareholders, guests and employees. It sought an order directing the Respondent to remove the offending gates from the public access road and a permanent injunction to restrain the Respondent through its servants, agents or employees from restricting the movement of the Appellant, its tenants, shareholders, employees, licensees and guests from using the access public road leading to the Appellant's premises. It also sought general damages.
6. The Amended Plaintiff was filed alongside an application for temporary injunction supported by the affidavit of Perry Sally Anne, the Appellant's Property Manager. The application was premised on the grounds that the road in question was a public road and the Respondent had no powers to close it, regulate its users or in any way limit access to that road; that the Appellant stood to suffer irreparable loss and that its rights of access to its premises could not be curtailed by a private entity.
7. Ms. Perry Sally Anne deponed that the Appellant did not have an alternative access to its property save through the public access road. She averred that through emails exchanged from 24/1/2020 her partner, Mr. Franco Paglieri wrote to the Respondent expressing disapproval over the Respondent's placing of gates locked by chains and padlocks on the public access road. The Respondent's representatives responded to the emails but she maintained that the responses were casual, lackluster and non-committal. She annexed several emails exchanged between her partner and representatives of the Respondent. She also annexed a copy of a map and a surveyor's report on the public access road.
8. She deponed that on several occasions, she had been stopped by the Respondents' security guards and added that she suffered from a life threatening medical condition and that the acts of the Respondent restricting movement along the public access road posed grave danger to her. She annexed a bundle of her medical records.
9. The Respondent denied the allegations of the Appellant and averred that the road in issue was a private road and not a public road to which the Appellant, the Respondent among others are interested parties and that the road begins at Nanyuki Water and Sewerage Company water treatment plant and not from Nanyuki town through Kanyoni Village as alleged by the Appellant. The Respondent expounded that the gates on the private road were erected with the consensus of the residents.
10. In his replying affidavit filed in court on 30/4/2020, Laurent Chaudet, the General Manager of the Respondent clarified that the Respondent hotel was owned by Mount Kenya Safari Club Limited and



- operated under a hotel management agreement by AccorHotels Middle East and Africa FZ-LLC under the Fairmont brand. He averred that neither Accor nor Fairmont owned any real or personal property relating to the hotel and that Accor operated the hotel as an agent and on behalf of the hotel owner.
11. Mr. Laurent Chaudet conceded that the road in issue is not on the property owned by the Respondent despite the fact that the gates in question are owned and operated by the Respondent. However, he insisted that the road was a private road created pursuant to an approval for subdivision and change of user for land parcel L.R. 10776/2 by the Commissioner of Lands. The subdivision gave rise to the Appellant's premises among other parcels. He emphasised that the road in question was a private road giving access only to the parcels resulting from the subdivision. Further, that the road had never been demarcated as a public road nor had it been surrendered to the Government of Kenya for use as such. He referred to special condition no. 6 of the approval dated 31/7/1986 which gives the Grantee the onus of constructing and maintaining all roads, drainage and sewers serving the plots, including the Appellant's plot.
 12. Mr. Laurent Chaudet further deponed that in 1993 a resident moved to the High Court seeking to change the special conditions in the letter of approval but the case and subsequent appeals were dismissed. Further, that in 1992 and 1993 various residents opposed the conversion of the road from private to public. He maintained that the road remained private. He explained that there had been various security incidents affecting residents who reside on the plots created by the subdivision including the Appellant which prompted the residents to agree to have gates erected at various points of the road. He stated that the gates are for the common good and security of all the residents including the guests of the Respondent. He added that it was necessary in the current global security and terrorism environment to have security arrangements governing access to a tourist facility such as the Respondent.
 13. Further, Mr. Laurent Chaudet deponed that the land through which the road passes was populated by wild animals and the manned gates were necessary to ensure that no animals escaped and harmed members of the public. Moreover, the Appellant had been aware that the gates were erected for security and even contributed to payments for security. He annexed a copy of a letter and a cheque from the Appellant to that effect. He denied that the Respondent had denied the Appellant or its visitors access to their property. He contended that the members of public and residents were comfortable with the security arrangements. He annexed copies of email correspondences with some of the residents. He stated that this matter also affected the owners of 48 other parcels of land and the public at large and contended that it is the Appellant who is acting against the security interests of the public and other residents.
 14. There was an exchange of several further and supplementary affidavits between the parties and the Interested Parties who joined the matter, as well as a preliminary objection and t rulings resting with one delivered on 3/12/2020 vacating the injunctive orders issued on 3/4/2020 and directing the parties to fix the suit for hearing.
 15. Subsequently, the Respondent filed the impugned application dated 15/2/2021 vide the notice of motion indicated to have been brought under Order 4 rule 1(4) and Order 51 rule 1 of the Civil Procedure Rules, 2010, Article 40 (5) of *the Constitution* of Kenya, Section 981 of the *Companies Act* and sections 1A, 1B and 3A of the *Civil Procedure Act*. It sought orders that the suit be struck out for want of authority from the Appellant.
 16. The Learned Chief Magistrate summarized the evidence of the parties as follows: Mr. Laurent Chaudet averred that while filing the suit, the Appellant did not file an authorization from its directors allowing them to sign pleadings under the seal of the company and that the Appellant only filed an authority to



institute the matter on 14/7/2020 stating that they had authority from Remix Capital Corporation, the sole director. That a search at the Companies Registry dated 25/7/2022 showed that the director of the Appellant, which is a company incorporated in the British Virgin Islands and issued with a certificate of compliance in Kenya in the year 2006, is Premix Capital Corporation, a British entity and that the local representative was Osmond Keith Howard who was a Kenyan.

17. Laurent Chaudet contended that according to Section 979 of the *Companies Act*, the Appellant should have had Mr. Osmond act for them rather than filing a ratification authority signed by Remix Corporation which is neither a director nor a legal representative. He contended that the resolution filed by the Appellant was a forgery since the company records showed that the entity that signed the resolution was neither a shareholder nor the local representative.
18. Laurent contended that the affidavits signed by Sally Perry Anne and Franco Paglieri were fatally defective and ought to be struck out and that the irregularity rendered the suit null and void ab initio. He added that it would be inconsiderate to continue entertaining a suit where liability fell on the local representative who was unaware of the suit. He was emphatic that the Appellant's advocate should be made personally liable for costs for having brought this suit without the authority of the Appellant.
19. In opposition to the application, the Appellant's advocate Mr. Joseph Mwangi swore the replying affidavit on 2/11/2021 stating that he was the local representative of the Appellant, having been appointed vide the Resolution made on 21/5/2020. He denied knowledge of the entity known as Premix Capital Corporation and averred that the known director of the Appellant was Remix Capital Corporation which is allowed to do business in Kenya. He averred that the previous local representative of the Appellant, Mr. Osmond, died on 26/5/2015.
20. Mr. Mwangi stated that the resolution dated 14/7/2020 was authentic and duly certified by the director, Remix Corp and that the current suit is authorized by the Appellant whose shareholders are Franco Paglieri and Sally Perry who duly swore affidavits while in Kenya. He stated that nothing in the *Companies Act* 2015 prevented the shareholders of a foreign company from being present in Kenya and holding a general meeting in Kenya. He urged the trial court to dismiss the notice of motion dated 15/2/2021. To this affidavit Mr. Mwangi annexed copies of a resolution, Notice of Change of Particulars Relating to Registered Foreign Company, official search, certificate of compliance and a gazette notice of petition for grant.
21. Parties filed their respective submissions on the application as directed by the Learned Magistrate. The Respondent submitted that in the absence of any resolution from the Appellant authorising Sally Perry and Franco Paglieri to institute it, the suit was void ab initio. It cited the decisions in *Affordable Homes Africa Limited v Ian Henderson & 2 Others* HCCC no. 524 of 2004; *East Africa Portland Cement Limited v Capital Markets Authority & 4 others* Petition No. 600 of 2013 [2014] eKLR and *Kenya Commercial Bank Limited v Stage Coach Management Ltd* Civil Case No. 45 of 2012 [2014] eKLR. The Appellant conceded that it had not approached the Registrar of Companies to effect changes after Osmond's death and prior to the suit.
22. The issue which the Learned Chief Magistrate considered was whether the suit was properly before the trial court. He observed that Remix Capital and K.N. Osmond (now deceased) were the directors of the Appellant with the late Osmond serving as the local representative. The trial court analysed paragraph 9(a) of the affidavit sworn by Joseph Mwangi which stated that the resolution dated 14/7/2020 was authentic and duly certified by the director, Remix Capital Corp. The Learned Magistrate pointed out that that resolution dated 14/7/2020 which would have given 'authenticity and legitimacy' to Remix's authority to change the local representative was not produced as an exhibit by the Appellant. The Learned Magistrate opined that in view of the fact that Remix Capital Corporation is a legal person



- and the only natural director K.N. Osmond was deceased at the time of the alleged resolution dated 14/7/2020, it is legally impossible to say that the alleged resolution is authentic and duly certified.
23. Further, the trial court found that the resolution passed on 21/5/2020 which was exhibited by the Appellant was null and void because Remix Capital Corporation, the sole existing director of the Appellant, was not legally present in the meeting of 21/5/2020. Furthermore, that the resolution of 21/5/2020 was not communicated to the Registrar of Companies until 9/9/2020 when the annual returns were filed, meaning that Osmond, though deceased, remained the local representative of the Appellant and that J.M Mwangi's capacity as local representative before 9/9/2020 was null and void.
 24. The Learned Magistrate quoted Section 129(1) of the Companies Act 2015 which provides that a company must have at least one director who is a natural person and found that at the time of filing suit and the subsequent meetings it had, the Appellant company did not have a natural director following the demise of Osmond. Based on these findings, the trial court saw merit in the notice of motion dated 15/2/2021 and issued the impugned orders.
 25. The court directed that the appeal would be canvassed through written submissions. Parties filed their written submissions which the court has considered. The Appellant faulted the Learned Magistrate for holding that the resolution of 14/7/2020 was not exhibited in the proceedings. It submitted that in its application, the Respondent was challenging the resolution on the basis that the director of the Appellant is not Remix Capital Corporation, but Premix Capital Corporation. It urged that the court ought not to have indicated that the document which had been exhibited was not annexed. It was further submitted that no one alleged that the resolution purported to give 'authenticity and legitimacy' to Remix's authority to change the local representative. That the trial court erred in conflating the issues addressed in the resolution of 14/7/2020 with those in the resolution of 21/5/2020 which appointed Mr. Joseph Mwangi as the local representative in place of the late Osmond.
 26. The Appellant submitted that Part XXXVII of the Companies Act sets out the provisions for registration of foreign companies to carry on business in Kenya and that since the parties are not incorporated in Kenya, the question of whether or not they can operate without a natural director ought not to have been a relevant matter. The Appellant challenged the trial court's holding based on Section 129(1) of the Companies Act that it is impossible for a company to act without natural directors. It contended that the section is inapplicable because the word 'company' as defined under Section 3 of the Act does not include the Appellant, which is defined as a 'foreign company' under the same section.
 27. The Appellant argued that Section 129(1) of the Companies Act 2015 could only refer to a company that is both registered and formed under the Act or repealed statutes and that the expressions 'company' and 'foreign company' whenever they appear under the Act are used in distinct senses, not as synonyms. It was submitted that it is the law of incorporation that should determine whether foreign companies can operate without natural directors.
 28. The Appellant submitted that the trial court erred by holding that no meeting was held to result in the resolution on 21/5/2020 as there was no proxy for Remix Capital Corporation and for not taking into account that the meeting was attended by the shareholders of the Appellant, Franco Paglieri and Sally Perry.
 29. The Appellant argued that the requirement for a foreign company to file annual returns is not provided for in the Companies Act. That Section 987 of the Companies Act addresses the issue of annual financial statements and not notices of changes of officials of foreign companies. It contended that there is no requirement for filing of annual returns of a foreign company under the Companies Act. That



any changes are communicated to the Registrar of Companies through Form FC5, that is, Notice of Change of Particulars Relating to Registered Foreign Company.

30. The Appellant submitted that the trial court dismissed the suit before it instead of striking out the plaint as provided under Order 4 rule 1 of the Civil Procedure Rules which the Respondent's application was based on. It argued that the words 'striking out' and 'dismissal' have distinct meanings under the rules. To buttress this point, the Appellant relied on the decisions in Benjamin G. Ndegwa v C.N. Murungaru [2009] eKLR and Enock Kirao Muhanji v Hamid Abdalla Mbarak [2013] eKLR.
31. The Appellant submitted that whenever an issue as to the authority of a company to institute a suit arises, the proper course is to stay the proceedings pending ratification. It argued that the trial court should not have dismissed its suit but stayed it pending ratification or evidence on any matters it deemed unclear. It relied on the decision in East African Safari Air Limited v Anthony Ambaka Kegode & another [2011] eKLR. The Appellant urged the court to allow the appeal, set aside the ruling of the trial court and substitute it with an order dismissing the Respondent's application dated 15/2/2021 with costs and to reinstate the suit before the trial court.
32. On its part, the Respondent contended that the suit before the trial court was filed without authority from the Appellant's company and that there was no valid resolution approving the filing of the suit or appointment of J.M Mwangi & Company Advocate. Additionally, that there was no resolution authorising Sally Perry Anne and Franco Paglieri to swear the verifying and supporting affidavits in the suit. It contended that after it raised the issue, the Appellant attempted to sanitize its suit by filing an authority to institute the suit on 14/7/2020, several months after institution of the suit.
33. The Respondent emphasised that the search dated 23/7/2020 conducted at the Companies Registry showed that the director of the Appellant is Premix Capital Corporation, not Remix Capital Corporation. In addition, that the fact that its sole director, Osmond died on 26/5/2015 confirmed that there was no one available to authorise the suit since the Appellant failed to avail evidence showing the change of directorship. The Respondent was emphatic that the resolution appointing Mr. Joseph Mwangi as the local representative on 21/5/2020 was signed by Remix Capital Corporation, an unnatural person. Moreover, that the resolution indicated that Franco Paglieri and Sally Perry were present as shareholders yet no evidence was adduced to show that they were shareholders.
34. The Respondent submitted that its application was brought under Order 4 Rule 1(4) of the Civil Procedure Rules which provides that where the plaintiff is a corporation, the verifying affidavit should be sworn by an officer of the company duly authorised under the seal of the company to do so. It submitted that Section 979 of the *Companies Act* requires that every company that sets up shop in Kenya as a branch must appoint at least one local representative who shall at all times act as an officer. Further, that Section 981(1)(a) specified that the local representative is answerable for the doing of all acts, matters and things that the company is required to do under the Act, among them, to commence and defend litigation and that Section 981(1)(5) provides that the local representative was personally liable to a penalty imposed on the company for failure to comply with the Act.
35. The Respondent thus reasoned that only the local representative could ratify the institution of a suit and not foreign shareholders since any liability would personally fall on the local representative. Further, that a resolution by a foreigner could only be notarized in that jurisdiction. The Respondent emphasized that any changes in directorship or local representation only took effect after the Registrar of Companies was notified.
36. The Respondent contended that the Appellant's argument that the court should not have dismissed their case but instead directed them to ratify their position was an admission of liability. The Respondent argued that the decision to strike out or dismiss a suit for want of authority is purely



- directional as provided under order 4. It argued further that there is no trite law on the subject. That a litigant should not dictate how a court ought to make decisions. It was further argued that the Appellant failed to demonstrate how the trial court wrongly exercised its jurisdiction and now wished to dictate what is to be done as was pointed out in *Harrison Otiende & 5 others v Badari Sacco Limited & 3 others* [2009] eKLR.
37. Regarding the failure of the Appellant to demonstrate authority at the time of institution of the suit, the Respondent stated that courts have continually struck out cases for want of authority and relied on *Kenya Council of Employment and Migration Agencies v Nyamira County Government & 10 others* [2024] KECA 313 (KLR). The Respondent also relied on *Kortica (U) Limited & another v Kenya Ports Authority* [2008] eKLR. It urged the court to uphold the ruling made on 17/5/2023.
 38. The 1st and 2nd Interested Parties reiterated their contention that the suit is void ab initio, dead on arrival and could not be reinstated since there was no valid resolution approving institution of the suit or appointing its advocates or representatives. They submitted that contrary to the provisions of Order 4 rule 1(4) of the Civil Procedure Rules, the verifying affidavit sworn on 2/4/2020 by Perry Sally Anne did not indicate her relationship with the Appellant or where her authority to swear the affidavit and institute the suit had emanated from. Further, that the Appellant did not annex a resolution by the company directors authorising her to act as the Appellant's deponent.
 39. The 1st and 2nd Interested Parties conceded that although the court allowed for ratification in *Kenya Commercial Bank v Stage Coach Management Ltd* (supra) as cited in *Leo Investment Limited v Trident Insurance Ltd* (2014) eKLR, the Appellant did not approach the court with clean hands. They emphasized that the Appellant attempted to sanitize the suit by filing the authority to institute the suit months after the institution of the suit signed by the Appellant in its own capacity contrary to Section 979 of the *Companies Act*.
 40. They referred to the two searches conducted by the Respondent at the Companies' Registry and asked the court to scrutinize the admission by the Appellant that the local representative had passed away on 26/5/2015 noting that the application to change the local representative's particulars was lodged on 21/5/2020, five years after his demise and months after the institution of the suit. The 1st and 2nd Interested Parties' expounded that under Section 980(3) of the *Companies Act*, a company should lodge with the Registrar a notice to the effect that a person had ceased to be a local representative within one month of the person's death, resignation or cessation to act.
 41. The 1st and 2nd Interested Parties submitted that the Appellant did not exhibit the resolution dated 14/7/2020 authenticating the change of particulars which were passed without the presence of a natural person in contravention of Section 129(1) of the *Companies Act*. They invited the court to recognize that a company was an artificial person and could not act for itself and conducts business through agents who are usually members of its Board of Directors. They contended that the requirement for a resolution is intended to protect companies from unauthorized court processes and to ensure that the company is properly in court, not by an action by unauthorized individuals. To this end they relied on the case of *Spire Bank Limited v Land Registrar & 2 others* [2019] eKLR.
 42. Regarding the shareholding of the Appellant, the 1st and 2nd Interested Parties submitted that the Appellant did not file a copy of records evidencing its shareholding and directorship. They submitted that the Appellant lacked locus standi at the lower court.
 43. The 3rd Interested Party pointed out that in the resolution dated 14/7/2020, Remix Capital Corporation is termed as the sole director of the Appellant and the only person present in the meeting. The 3rd Interested Party reproduced the provisions of order 4 rule 1(4) on the swearing of the verifying



affidavit and order 4 rule 1 (6) on the court striking out any plaint or counterclaim that does not comply with sub-rules (2), (3), (4) and (5) of order 4 rule 1 of the Civil Procedure Rules.

44. The 3rd Interested Party conceded that it is cognizant of the position of the courts over the years that the absence of a resolution to institute a suit or authority to swear an affidavit was not fatal to a suit as the same may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the time of the suit as in *Brownstone Agencies Ltd & another v County Government of Bomet & another* [2022] eKLR. However, the 3rd Interested Party submitted that the *Brownstone* case relied on *Spire Bank Limited v Land Registrar & 2 others* (supra) where the court spoke to the intention behind order 4 rule 1(4) to safeguard the corporate entity from unauthorized persons instituting proceedings.
45. The 3rd Interested Party contended that the trial court dismissed the plaint mainly because the resolutions filed by the Appellant were found to be invalid because they cite Remix as the sole director of the Appellant, meaning the Appellant had no natural director at the time of filing the suit in contravention of Section 129 (1) of the *Companies Act*. It contended that the resolutions are invalid because the sole director was not legally present when Perry Sally Anne was being authorized since a legal person can only be present through a natural person. It emphasized that the verifying affidavit sworn on 2/4/2020 by Perry Sally Anne was defective for want of authority.
46. The court has considered the appeal, parties' respective submissions and authorities relied upon by the parties which have been helpful and the findings of the trial court. The issue for determination is whether the court should set aside the ruling and orders of the trial court dated 17/5/2023 and substitute it with an order dismissing the Respondent's application dated 15/2/2021 with costs, and thereby reinstate the suit before the trial court.
47. The Respondent's application was based on, among other statutory provisions mentioned above, Order 4 rule 1(4) of the Civil Procedure Rules and Section 981 of the *Companies Act*. Section 981 deals with the liability of a local representative. Order 4 Rule 1(4) provides that 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. The verifying affidavit to the plaint was sworn by Sally Perry Anne on 2/4/2020, who described herself as the Appellant's property manager and duly authorized by the Appellant to swear the affidavit. She also deponed that the Appellant had instructed the firm of M/S J.M. Mwangi & Co. Advocates to institute the suit.
48. The resolutions appointing the advocate to act and the one appointing the local representative in place of Osmond and indicating that Perry Sally Anne and Franco Paglieri were shareholders were made months after the suit had been instituted. This means Perry Sally Anne did not have authority to swear the affidavits and that James Mwangi lacked the authority to act as the Appellant's local representative when the suit was filed.
49. Upon close examination of the documents on record, the court observes that the resolution dated 14/7/2020 was not exhibited by the Appellant, but was annexed to the affidavit of Laurent Chaudet sworn on 15/2/2021. The resolution stated that the member present in the meeting was Remix Capital Corporation as the sole director. The resolution ostensibly gave Perry Sally Anne authority to plead in the court case and authorized the firm of J.M Mwangi Advocates to act as the company's advocate in the proceedings. It was certified by the director of Remix and signed by Remix Corporation. This raises the question as to who was actually present in the meeting, passed the resolution and signed the document. It is trite that companies though embodying legal personhood, have to act, attend and conduct meetings and also deliberate and pass resolutions through human beings.



50. The court agrees with the findings of the Learned Magistrate that pursuant to Section 129(1) of the *Companies Act*, it is impossible for a company to conduct any business without at least one natural director. In light of the death of Osmond Keith Howard, the Appellant did not have a natural director and there was therefore no authority to commence the proceedings until the resolution of 14/7/2020 was passed and it was filed with the Registrar on 9/9/2020.
51. Since the Appellant company is foreign, the law requires it to have a local representative pursuant to Section 979 of the *Companies Act*. Section 992 of the *Companies Act* gives the Registrar power to strike out registered foreign companies from the Register of Foreign Companies for various reasons including carrying on business without a local representative.
52. The Appellant acted in an extremely reticent manner with regards to updating its records with the Registrar of Companies contrary to Section 986(1)(d) which enjoins a registered foreign company to give a month's notice of change of a local representative. Section 986(2) gives the Registrar power to extend this time in certain circumstances with notice. There is no evidence that the Appellant undertook this, nor did it claim to have done so. Mr. Osmond died on 26/5/2015, which was several years before the suit was lodged.
53. Section 981(3) of the *Companies Act* provides that if a registered foreign company fails to lodge a notice of a change of the kind referred to in subsection (1) with the Registrar, the company and each officer of the company who is in default, commit an offence and on conviction would be liable to a fine not exceeding two hundred thousand shillings. The court agrees with the Respondent and Interested Parties that the Appellant attempted to sanitize the suit by filing the exhibited resolutions as an afterthought only after they were challenged on the issue. The court is not inclined to interfere with the Learned Magistrate's holdings on the validity of the meetings and resolutions as well as the authority to act.
54. Regarding the dismissal of the Appellant's suit, the court notes that Order 4 rule 1(6) of the Civil Procedure Rules specifically provides for striking out of the suit and not its dismissal. This is reinforced by the decisions in Benjamin G. Ndegwa v C.N. Murungaru (supra) and Enock Kirao Muhanji v Hamid Abdalla Mbarak (supra) which addressed the distinct meaning and intention of striking out suits as opposed to dismissal.
55. Order 4 Rule 1(6) of the Civil Procedure Rules empowers the court to strike out any plaint or counterclaim which does not comply with subsections 2 to 5 of the rule, either of its own motion or upon the application of either party to the suit.
56. The court agrees with the contention of the Appellant that the trial court ought not to have dismissed its suit but should have stayed it pending ratification or evidence on any matters it deemed unclear as stated in East African Safari Air Limited v Anthony Ambaka Kegode & another (supra).
57. The appeal is partially allowed only to the extent that the order dismissing the Appellant's suit is set aside and substituted with an order striking out the Appellant's suit before the trial court. The costs of the appeal shall be borne by the Appellant.

DELIVERED VIRTUALLY AT NANYUKI THIS 8TH DAY OF OCTOBER 2024.

K. BOR

JUDGE

In the presence of:

Mr. Mwangi Muthoni for the Appellant



Ms. Amamu Chiyechi for the Respondent

Ms. J. Ngumbao holding brief for Mr. V. Ataka for the 1st and 2nd Interested Parties

No appearance for the 3rd Interested Party

