



**Said Bin Seif Properties (2016) Limited v Hamumi (Appeal  
13 of 2020) [2022] KEELC 3116 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3116 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
APPEAL 13 OF 2020**

**M SILA, J**

**MAY 5, 2022**

**BETWEEN**

**SAID BIN SEIF PROPERTIES (2016) LIMITED ..... APPELLANT**

**AND**

**MOHAMED SALIM ALI HAMUMI ..... RESPONDENT**

*(Being an appeal against the ruling of Hon. Ndegwa, Senior Principal Magistrate, delivered on 18 June 2020, in Mombasa Chief Magistrate's Court ELC Case No. 169 of 2019)*

**JUDGMENT**

(Appeal challenging decision of the Magistrate which expunged the Memorandum of Appearance, affidavits and other documents filed by the appellant; the appellant, a company, having been sued by the respondent; respondent together with the plaintiff filing an application for injunction; memorandum of appearance, defence and counterclaim, and replying affidavit to the application filed; respondent raising a preliminary objection and seeking the striking out of all documents filed by the appellant on ground that no company board resolution was filed alongside the documents; preliminary objection allowed and also the Honourable Magistrate striking out the counterclaim because no verifying affidavit was annexed; on appeal, held inter alia that there is no law requiring that corporation must file a board resolution before it appears or files documents in a case; no law requiring that a memorandum of appearance in respect to a corporation must be filed together with a board resolution; if court was of view that it needed to see a written resolution or authority, opportunity to provide one needs to be given; in any event, within the suit, a board resolution subsequently filed before the preliminary objection was heard; wrong for the trial magistrate to strike out the pleadings and documents of the appellant; on the verifying affidavit, held that it was drastic to strike out the counterclaim for want of a verifying affidavit and proper recourse ought to have been to give opportunity for one to be filed; appeal allowed)



1. The genesis of this appeal is that through a plaint filed on 17 October 2019, the respondent filed suit against the appellant and Beyond Auctioneers. He averred that he (respondent) was the owner of a house without land known as House Number A122 situated on the land parcel Mombasa/Block XLV/54, Mombasa Island (hereinafter referred to as “the suit premises”). He pleaded that the appellant is a holding company managing the properties of the estate of Said Seif Bin Salim (deceased). He averred that on 8 August 2016, the appellant purported to issue notice increasing ground rent from Kshs. 900 to Kshs. 27,500/= per month with effect from 1 October 2016. He objected to this increase and referred the dispute to the National Land Commission (NLC) which gave recommendations in March 2019. It was pleaded that on 25 September 2019, the 2<sup>nd</sup> defendant issued a proclamation attaching the suit premises claiming arrears of rent of Kshs. 990,000/= and auctioneer’s fees of Kshs. 108,000/= . The respondent contended not to be in any arrears of rent. In the suit, he asked for a declaration that the rent payable is Kshs. 900/= per month and a permanent injunction to stop the appellant from selling the suit premises. The appellant entered appearance and filed defence. It did not refute issuing the notice in question but added that there was an option given to the respondent to purchase the suit premises. It was pleaded that the NLC had no jurisdiction in the dispute and that it rightfully distressed for rent arrears amounting to Kshs. 990,000/= as rent was Kshs. 27,500/= per month. The appellant also lodged a counterclaim for this amount and mesne profits of Kshs. 27,500/= per month.
2. Alongside the plaint, the respondent filed an application for injunction to stop any sale or dealings over the suit premises pending hearing of the suit. To oppose the motion, the appellant filed a replying affidavit sworn by Saif Said Al Busaidy. He described himself as a director of the appellant and competent to swear the affidavit. He thereafter proceeded to contest the application. Subsequently, on 21 January 2020, the respondent filed a preliminary objection, contesting this replying affidavit and the memorandum of appearance filed on behalf of the appellant by the law firm of M/s Lumatete Muchai & Company Advocates, in the following terms :-
  - a. The deponent has no capacity and/or authority to swear the affidavit for failure to produce board resolution appointing and authorizing him to plead on behalf of the company.
  - b. The advocate on record has no capacity to appear for the 1<sup>st</sup> defendant for failure to annex board resolution appointing them to represent.The respondent prayed that the appellant’s Memorandum of Appearance and Replying Affidavit be struck off record.
3. On 18 February 2020 a copy of a resolution of directors dated 14 November 2019 was filed as the appellant’s list of documents. It was drawn in the following terms :-

The Company is given authority to institute a civil action at the Mombasa Chief Magistrate’s Court against Mohamed Salim Al Hamumi in the Land Case Number 169 of 2019.

Saif Said Al Busaidy, the Company’s Managing Director, is authorized to plead and act on behalf of the company in the litigation proceedings.
4. The preliminary objection was heard and precipitated the impugned ruling of 18 June 2020. In the ruling, the Honourable Magistrate stated that the resolution of directors was not filed alongside the replying affidavit but was filed on 18 February 2020 long after the notice of preliminary objection had been lodged on 20 January 2020. He held that it could not validate the replying affidavit which was filed without the resolution. He proceeded to find the replying affidavit incompetent and struck it out. He gave the same treatment to the Memorandum of Appearance filed on 24 October 2019 and the



Statement of Defence and Counterclaim filed on 17 November 2019. He added that the counterclaim does not comply with the provisions of Order 7 Rule 5 (a) and Order 4 Rule 1 (2) of the [Civil Procedure Rules](#), which requires a counterclaim to be accompanied by a verifying affidavit. He further declared it incompetent because no resolution was filed which authorised the law firm of M/s Lumatete Muchai & Company Advocates to file it on behalf of the appellant. He proceeded to allow the application for injunction as unopposed.

5. Aggrieved, the appellant filed this appeal, basically faulting the Honourable Magistrate for the action that he took. It is averred that the Magistrate placed an over-reliance on a procedural technicality and also failed to appreciate that the deponent was a director of the appellant. In this appeal, the appellant seeks to overturn the ruling of the Honourable Magistrate and be granted leave to file a verifying affidavit to the counterclaim.
6. I directed that the appeal be heard by way of written submissions and I have taken note of the submissions filed by counsel for the appellant. None were filed by counsel for the respondent.
7. I am persuaded to allow the appeal.
8. First, it will be seen that the objection raised was that the deponent of the replying affidavit was not authorised to do so because no board resolution had been annexed. My position in such instances has been to frown on an allegation that the deponent is not authorised by the company to swear the affidavit when there is no evidence forthcoming to support such assertion. It is the company which knows who has been authorised to swear the affidavit and you would expect that a director is a person who would ordinarily be authorised by a company to appear on its behalf. In our case, the deponent deposed that he was a director of the company, and there was no evidence provided that the deponent was not a director, which evidence could have been available if the respondent had availed the CR 12 of the company, which was not done. A director would ordinarily be expected to be acting on behalf of the company. I do not see on what basis the respondent was thus claiming, through a preliminary objection without offering any evidence, that the deponent was not authorised by the company to swear the affidavit, despite him being a director. The respondent did not purport to know of the internal affairs of the company so that he may authoritatively state that the deponent was not duly authorised. Without evidence, I am of the opinion that it was wrong for the Honourable Magistrate to come to the conclusion that the deponent was not duly authorised or could not be a person who could be duly authorised by the appellant to swear the affidavit.
9. In the same vein, on what basis did the Honourable Magistrate come to the conclusion that the law firm of M/s Lumatete Muchai & Company was not authorised to appear for the appellant? I have looked at Order 6 of the [Civil Procedure Rules](#) which provides for the filing of memoranda of appearance. Nowhere does it state that where a Memorandum of Appearance is being filed on behalf of a corporation, then such Memorandum of Appearance must be accompanied by a resolution of the company, that the advocate filing the appearance has been so authorised to do so. It was wrong for the Honourable Magistrate to import such a provision into the rules. In fact, prima facie, unless evidence to the contrary is shown, or unless there is something that would put the court into suspicion, when a law firm files a Memorandum of Appearance for any party, and that goes for a company as well, the assumption must be that such law firm is duly authorised to appear for such a party. It is not for the other party to cast doubt on such a Memorandum of Appearance, without bringing forth any evidence, that the law firm is not duly authorised. The court of course reserves discretion to order production of the authority or resolution, if it is minded to do so, but to strike out pleadings before giving the corporation a chance to avail such authority is draconian and completely against the rules. If a party to the suit, or the court, is in doubt about the person appearing for a corporation, or requires that such authority be demonstrated for the avoidance of any doubt or suspicion, the reasonable thing to do is



to request for proof that the person appearing is duly authorised by the corporation, not to proceed to strike out the corporation's documents without first giving the corporation the opportunity to tender such evidence.

10. I am not sure where the concept that a corporation needs to file a board resolution or authority together with its pleadings stemmed from and I doubt that it has the backing of the law. A company has its own internal workings. It may very well be the case that within its internal workings, it is not necessary for a Board resolution to be made before filing or defending a case. It may very well be that a company, in its own wisdom, has within its Articles of Association, or other internal workings and mechanisms, decided that suits can be filed or defended without a Board resolution. These days, we even have one man/woman owned companies. If the one man/woman who owns the company files suit, or defends a suit, on behalf of the company, will you now ask him for a Board resolution ? Isn't it clear that he is the sole authorised agent of the company ?
11. Whatever the case, I would frown at the practice of striking out pleadings without giving a chance to the corporation to provide evidence of authority to file suit or to defend suit, or authority to swear an affidavit or be a witness, if indeed it is thought that it is necessary to have the said authority on record. I am not alone in such reasoning. Gikonyo J held as much in the case of *Fubeco China Fushun v Naiposha Company Limited & 11 Others (2014)* eKLR, where an objection not too dissimilar to that which was raised in the subject case was taken. In the suit, an objection was taken that a company had not appointed the advocates purporting to appear for it in the case and that no authority had been annexed by the person who swore an affidavit on behalf of the company. While dealing with the matter, the Honourable Judge stated as follows :-

- (17) These issues that the application before the court is improper by virtue of the fact that the affidavits of Caroline Wairimu Kimemia did not disclose that she had authority to act on behalf of the Company and the other directors: and further that there was no board resolution instructing the advocate on record to act on behalf of the Defendant; apply to both applications. Let me be emphatic on this issue that, I am aware of ample decisions of the court, and I can cite an example; the case of *BUGERE Coffee Growers Ltd v Sebaduka & others (1970)* EA 147 where the court held that a company authorizes the commencement of proceedings by resolution of the company or by way of minutes of its board of directors. However, I find a lot of persuasion in the thread of thinking in the *Ugandan case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998* where the Supreme Court of Uganda held that it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company. In the case before me, Caroline Wairimu Kimemia is a director of the Defendant Company and she duly authorized the Advocates on record to commence this Application. That fact is not denied and I am surprised the person laying the objection is the Plaintiff and not the Defendant Company. The Plaintiff has also not presented any material or affidavit from the other directors denying the authority of Caroline Wairimu Kimemia as a director in the Defendant Company. As such, I do not think the Court is in any position to dispute the authority of Caroline Wairimu Kimemia or the instructions to the advocate on record to defend the interest of the company. Therefore, in the absence of evidence to the contrary, I find the affidavits filed to be in order and the advocate herein to be properly on record for the Defendant.



12. The above decision of Gikonyo J, was approved by the Court of Appeal in the case of *Artbi Highway Developers Limited v West End Butchery Limited & Others*, Nairobi Civil Appeal No.246 of 2013 (2015) eKLR. The Court of Appeal *inter alia* stated as follows :-

44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time;Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147.The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

45. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is *Tatu Naiga & Emporium v Virjee Brothers Ltd* Civil Appeal No 8 of 2000.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General*: SCCA NO.1 of 1998.The latter case restated the law as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others*[2014] eKLR.

13. I am in agreement with the above. There is no law that says that an advocate acting on behalf of a corporation must file an authority or resolution of the company together with the Memorandum of Appearance. There is also no law that says that before an affidavit can be filed on behalf of a corporation, then the deponent must first produce a Board resolution that he is so authorised to swear the affidavit. The same goes for a witness. I reiterate that it is the company which knows who it has authorised, and I think that unless there is material produced to demonstrate prima facie that the deponent cannot be so authorised, I think courts should be slow to doubt the authority stated by the deponent in his affidavit or testimony. But if the court, in its discretion, is persuaded that such authority needs to be demonstrated then opportunity should be given for this to be provided. To strike out pleadings of a corporation on a preliminary objection such as that which was taken in this case is in my opinion very wrong.

14. In any event, within the subject suit, and after the preliminary objection had been filed but not yet decided, the appellant did file the resolution of the company showing that it has given authority to the law firm of Lumatete Muchai & Company Advocates to act for her, and to Saif Said Al Busaidy to plead and act on behalf of the company. If there was a question that there was no board resolution,



that question was already answered by the filing of the board resolution ; there was no question to be determined. There was therefore no sound basis for striking out the pleadings of the appellant on the ground that there was no board resolution.

15. On the striking out of the counterclaim because there was no verifying affidavit to it, this was nothing but a technicality, which could be cured by the appellant being allowed an opportunity to file the verifying affidavit. There is a chain of authorities that have held that failing to file a verifying affidavit together with a counterclaim is not fatal and that the defect can be cured by subsequently filing one. One is the case of *Michael Muuthoka Makau (suing as personal representative of the Estate of Ernest Daudi (deceased) v Simon Nganga Mbugua & Another*, (2018) eKLR. In the suit, a preliminary objection was raised that a defence and counterclaim is not supported by a verifying affidavit. The court, after reviewing various authorities, declined to strike out the defence and counterclaim. I am in agreement. If there has been an omission in filing a verifying affidavit together with the counterclaim, the defendant should be granted the chance to cure the irregularity by filing one, as no prejudice is caused to the plaintiff. The starting point should not be to dismiss the counterclaim. Article 159 (2) (d) of the *Constitution*, 2010, requires courts to dispense justice without undue regard to procedural technicalities. In our case, the correct path that the Honourable Magistrate needed to take was to give time to the appellant to file the verifying affidavit, an opportunity that the Honourable Magistrate did not provide. He elevated technicality to a point where it was causing injustice to the appellant, as the result of striking out everything filed by the appellant, would have resulted in the appellant not being given a hearing in the case, which would in turn be a breach of the principles of natural justice.
16. From the foregoing, it will be seen that I find merit in this appeal. I allow it. I reinstate all the pleadings and documents of the appellant that were expunged by the Honourable Magistrate. I further direct the appellant to file the verifying affidavit to the counterclaim within the next 14 days.
17. The appellant will have the costs of this appeal.
18. Judgment accordingly.

**DATED AND DELIVERED THIS 5 DAY OF MAY 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

