



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 509 OF 2017**

**THOME FARMERS COMPANY NO. 4 LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**FARM OF FAITH INVESTORS LTD.....DEFENDANT/APPLICANT**

**RULING**

1. Upon being served with the Plaintiff and the Plaintiff's Notice of Motion application dated the 7<sup>th</sup> November 2017, the Defendant/Applicants filed their Preliminary Objection dated 26<sup>th</sup> April 2018 to the Plaintiff's application, for reasons that the same was incompetent, inept, fatally defective and an abuse of the court process as the Plaintiff had not satisfied the principles set out in the case of **Giella vs Cassman Brown** therefore orders sought therein could not be granted.

2. The court then directed that the said application be disposed of by way of written submissions wherein the highlighting of the same was scheduled for the 26<sup>th</sup> April 2018.

3. Came the day for highlighting, none of the parties had filed their written submissions. Neither the Plaintiff nor its counsel were present in court wherein the court directed for parties to file their submissions within 14 days and gave the matter another hearing date for the 16<sup>th</sup> July 2018 on which date there were neither submissions filed nor the Plaintiff and its Counsel in court. The court dismissed the Application dated the 21<sup>st</sup> November 2017 for want of prosecution and directed parties to comply with the provisions of order 11 of the Civil Procedure Rules so that the matter could proceed for hearing of the main suit.

4. It was after the above directions had been issued that the Defendant filed its Notice of Preliminary Objection dated the 12<sup>th</sup> February 2019 to which they raised the following issues.

- i. That the Plaintiff, Thome Farmers Company No. 4 Ltd did not authorize the filing of the suit.
- ii. That the suit is incurably defective for lack of a resolution by the Plaintiff's Company to institute the present suit.
- iii. That the firm of Lawrence Mwangi & Mwangi Advocates has no authority to file, institute and or/appear in this suit for and on behalf of the Plaintiff's company.
- iv. That this court lacks jurisdiction to hear the suit.
- v. That John Kangethe Ngugi has no authority from the company to swear affidavits on behalf of the Plaintiff or appear.
- vi. That the suit should be dismissed with costs payable by the firm of Lawrence Mwangi & Mwangi Advocates and the said John Kangethe Ngugi jointly and severally for acting without authority.

5. On 25<sup>th</sup> February 2019, the court directed parties to first dispose of the application on the Preliminary Objection through written submissions wherein on the 1<sup>st</sup> April 2019, the Defendant/Applicants filed their submissions in support of their Preliminary Objection whereas the Plaintiff/Respondents did not file their submissions.

6. The gist of the Defendant/Applicant's submissions in support of the Preliminary Objection is that it is trite law that for a Co-operative to institute suit, the same must pass through a resolution to that effect and which resolution must be filed at the point of filing the suit. In the present case, this resolution was not filed by the firm of advocates representing the Plaintiff to which case the company was not before the court and the Advocates on record as well as the person purporting to have sworn affidavit on behalf of the Company were all busy bodies. The Defendant relied on the decided case of **Kenya Commercial Bank Ltd vs Stage Coach Management Ltd [2014] eKLR** to support their submission.

7. That this meant that the court was divested of jurisdiction to hear the matter as the Company was not properly before it.

8. That further, since the firm of Lawrence Mwangi & Mwangi Advocates had instituted the said suit on behalf of the company without authority, they were personally liable to pay the cost as was held in the case of **Kenya Commercial Bank Ltd (Supra)** and in the decided case of **Bugerere Coffee Growers Ltd vs Sebaduka & Another**.

9. The Plaintiff herein neither filed their response to the Application on preliminary objection nor their submission within the stipulated period.

10. I have considered the Defendants application on a point of Preliminary Objection to the effect that the suit should be dismissed for reasons that there was no resolution passed by the board of directors authorizing the institution of the proceedings in this case and therefore the court lacked jurisdiction over this matter.

11. In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

*“---a preliminary objection consists of a point 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.*

In the same case Sir Charles Newbold, P. stated:

*“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.*

12. The Matters for determination are:

- i. Whether the proceedings herein were authorized through a resolution of the company.
- ii. Whether Counsel on record representing the Plaintiff had the authority to represent it.
- iii. Whether the Preliminary Objection raised is sustainable.

13. This suit was commenced by Thome Farmers Company No. 4 vide a Plaint dated the 7<sup>th</sup> November 2017. From the annexed certificate of incorporation, it is clear that the Plaintiff is a limited liability company registered in Kenya. The supporting affidavit was sworn by John Kang’ethe Ngugi who described himself as the Director of the Plaintiff Company.

14. The decision to have a resolution to authorize the filing of the suit in the name of the company emanated from a holding in the Uganda High Court in the case of **Bugerere Coffee Growers Ltd v Sebaduka & Another (1970) 1 EA 147**. which decision has been followed and applied in this country for a long time; 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.*

15. In the case of **Omondi v. National Bank of Kenya and Others [2001] E.A. 177** Mr. Justice Ringera had held that;

*As regards whether the plaintiffs have locus standi to institute this suit, I am in complete agreement with the submissions made by the defendants’ advocates that they do not. It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even where the directors happen to be the sole shareholders (see **Salomon v. Salomon & Co. Ltd [1897] A.C. 22**). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company’s property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights. The contention by counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly the proper plaintiffs in this action is manifestly without legal foundation. And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors’ **functus officio**, it does not destroy the corporate existence and personality of the company.*

16. In the case of **Philomena Ndanga Karanja & 2 Others vs Edward Kamau Maina, [2015] eKLR**, Gacheru J. had this to say;

*“I have considered the rival submissions, and it is obvious that the suit herein was filed without the resolution of the Board. The 1<sup>st</sup> plaintiff tried to justify that position. However, it is trite law that where a suit is instituted for and on behalf of a company, there should be a company resolution to that effect”.*

17. In the case of **Affordable Homes Africa Limited vs Ian Henderson & 2 Others, [2004] eKLR**, Njagi J. found that the Board of Directors had not passed a resolution to authorize the institution of the suit. In the circumstances, the learned Judge held;

*“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 to be borne by the advocates for the plaintiff”.*

18. The decision in **Affordable Homes Africa Limited (supra)** is in agreement on the issue that in the absence of a board of directors' resolution to commence a suit, a company, which is an artificial person, as in this case, cannot be capable of instituting a suit in court, and that such a suit should be struck out.

19. In the case before me, the Plaintiff had not lodged in court, the resolution authorizing the institution of the suit. The plaintiff had also not exhibited the letter of authority, pursuant to which the Supporting Affidavit was sworn. I therefore find that the proceedings, as they relate to the affairs of a limited liability company, were a nullity, having had not been sanctioned by a valid resolution of the company.

20. On the second issue as to whether the law firm of Lawrence Mwangi & Mwangi Advocates who filed the suit on the 7<sup>th</sup> November 2017 had the authority or instructions of the Plaintiff to represent it; I find that in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR**, the Supreme Court held that Article 159(2)(d) of the Constitution simply meant that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.

21. **In the case of A.J. Limited & Another –V- Catering Levy Trustees & 3 Others (2005)** the court held as follows;

*While it is for certain that the Court will always be anxious to hear litigants on the merits of their suit, this does not excuse them from complying with the procedural law which regulates the conduct of hearings. If parties entirely ignore the laws that accord them locus standi, or that regulate the process of hearing, they cannot expect the doors of the Court to be still open to them, and in this regard it will not matter the magnitude of the claims they are making. These are the basic principles on which the submissions of counsel in this matter must be assessed.*

22. In the case of **Bugerere Coffee Growers(supra)** the court held that;

*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.”*

23. In the case of **Kyanzavi Farmers Company Limited vs. Mangu Ngolo HCCC No. 128 of 2008 Milimani Commercial Courts**, the Learned Judge held, *inter alia*:

*“Where an advocate is appointed to undertake the conduct of any proceedings on behalf of the company as a recognized agent such appointment must be made under the company seal. In this case it had been alleged that there was no such authority to institute these proceedings. It would have been a simple matter for the advocate who has instituted these proceedings to swear an affidavit verifying the source of his authority. However no such affidavit has been availed nor has any resolution of the company appointing him as an agent been availed. The sum total is that no authority to institute these proceedings in the name of the company has been demonstrated to this court and the suit is therefore incompetent.”*

24. Flowing from the finding above, it follows that there is no valid suit before the court. In the absence of a Board of directors' resolution to commence a suit, then a company, which is an artificial person, cannot be capable of instituting a suit in court.

25. For reasons set out herein above, the Preliminary Objection raised on the 12<sup>th</sup> February 2019 is sustainable, the suit commenced by Thome Farmers Company No. 4 (the Plaintiff), against the Defendant, vide the Plaint dated the 7<sup>th</sup> November 2017 is hereby struck out with costs to the Defendant/Applicants.

26. Costs to be met by the firm of Lawrence Mwangi & Mwangi Advocates and John Kangethe Ngugi jointly and severally for acting without authority.

**Dated and delivered at Nyahururu this 2<sup>nd</sup> day of July 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**