



Nycety General Supplies Limited v Spinners & Spinners Limited & another (Miscellaneous Civil Case E088 of 2024) [2025] KEHC 2121 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CASE E088 OF 2024
FN MUCHEMI, J
FEBRUARY 13, 2025**

BETWEEN

NYCETY GENERAL SUPPLIES LIMITED APPLICANT

AND

SPINNERS & SPINNERS LIMITED 1ST RESPONDENT

BEMAC AUCTIONEERS 2ND RESPONDENT

RULING

1. The application dated 19th June 2024 seeks for orders of leave to file an appeal out of time against the judgment in Ruiru Small Claims Court SCCCOMM No. E130 of 2024 delivered on 15th March 2024.
2. The respondent opposed the application and filed a Replying Affidavit dated 11th December 2024.

Applicant's Case

3. The applicant states that judgment in Ruiru SCCCOMM No. E130 of 2024 was delivered on 15th March 2024 whereas the trial court found in favour of the 1st respondent. Being aggrieved with the said judgment, the applicant deposes that he intends to lodge an appeal against the said judgment but the statutory period allowed has lapsed.
4. The applicant states that following the delivery of the judgment, the Honourable Court on 4th June 2024 issued warrants of attachment and sale of its factory machinery and other goods. The applicant is apprehensive that its factory machinery shall be sold in satisfaction of the decree. The applicant further avers that the factory machinery is his source of livelihood and his tools of trade.
5. The applicant avers that they could not file the suit as they had no financial resources to proceed with the same and once they acquired resources they sought to appeal the decision of the trial court. The



applicant further avers that it had not obtained certified copies of proceedings and judgment to enable them file an appeal in the matter.

6. The applicant states that it has an arguable intended appeal with high chances of success and the same ought to be heard on merit.

The 1st Respondent's Case

7. The 1st respondent states that the supporting affidavit by the applicant has been drawn contrary to Order 19 Rule 5 of the Civil Procedure Rules which is worded in mandatory terms that an affidavit shall be drawn in the first person. Thus the 1st respondent argues that the affidavit should be struck out. Further, the 1st respondent states that the deponent of the affidavit by the applicant did not produce any evidentiary material to show that she is a director/shareholder of the applicant and that she had been bestowed upon with the authority to depone the affidavit dated 19/6/2024 on behalf of and to bind the applicant company. The 1st respondent states that having not done so, the entirety of the supporting affidavit dated 19/6/2024 and the attendant notice of motion itself are null and void ab initio.
8. The 1st respondent states that the applicant has deponed falsehoods as the preliminary objection referred to by the applicant neither has a receipt stamp from the relevant court nor a time indication of the judiciary e-filing central tracking system (CTS) and that it is dated 14/3/2024 which is irrefutable proof in itself that it could not have possibly been filed a day earlier on 13/3/2024 as alleged by the applicant.
9. The 1st respondent avers that paragraphs 4, 5, 6, 7, 8, 16, 17, 18 and 19 of the supporting affidavit are irrelevant to the matter and ought to be struck out as the deponent of the affidavit purports to be the applicant company yet the company and the applicant are two separate legal entities.
10. The 1st respondent avers that filing of a memorandum of appeal does not require one. Neither is it unaffordable for a party to obtain such proceedings. The 1st respondent further states that the applicant ought to have furnished the court with the relevant invoice to assist the court to determine whether the amount indicated was such as to prevent the filing of a memorandum of appeal.
11. The 1st respondent states that the intended appeal is dead on arrival as the grounds of appeal are quite unfounded and speculative. The 1st respondent further states that leave to file an appeal out of time is not a matter of right but one of judicial discretion. Thus it is upon the applicant to furnish the court with serious, weighty and compelling reasons that would justify its being unable to file the proposed appeal within the statutory period.
12. The 1st respondent states that it stands to suffer extreme prejudice as it is entitled to enjoy the fruits of its success in litigating at the trial court.
13. Directions were issued that the application be canvassed by way of written submissions. The record shows that the respondent opted not to comply. The applicant on the other hand did not file submissions.



The Law

Whether the application is fatally defective for want of filing an authority authorizing Beatrice Waweru to plead on behalf of the applicant.

14. The respondent seeks for orders of striking out this application on the ground that the deponent Beatrice Waweru did not file authority authorizing herself as a director and shareholder of the applicant company to swear the affidavit on their behalf.
15. Courts have consistently held that a board resolution or authority may be filed at any time before a suit is fixed for hearing. In the case of *Leo Investments Ltd vs Trident Insurance Company Ltd* (2014) eKLR where the court stated:-

....such a resolution by 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. Its absence is, therefore not fatal to the suit.

16. The Court of Appeal in the case of *Spire Bank Limited vs Land Registrar & 2 Others* [2019] eKLR stated as follows:-

It is essential to appreciate that the intention behind Order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.

17. On perusal of the record, the deponent of the supporting affidavit in this application did not annex any authority or resolution of the applicant authorizing her to swear the said affidavit on its behalf. Failure to comply with the law is not curable under Article 159(2) (d) of *the Constitution* as argued by the applicant. It is my considered view, the failure to comply with obtaining the requisite authority renders the affidavit of Beatrice Waweru incompetent. The said affidavit is hereby struck out. In the absence of a supporting affidavit, the application dated June 19, 2024 is defective and is hereby struck out with cost to the respondent.
18. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY 2025.

F. MUCHEMI

JUDGE

