



**Geminia Insurance Company Limited v Swiss International Airlines Limited
(Civil Appeal 970 of 2022) [2025] KEHC 7506 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 970 OF 2022**

**REA OUGO, J
MAY 15, 2025**

BETWEEN

GEMINIA INSURANCE COMPANY LIMITED APPELLANT

AND

SWISS INTERNATIONAL AIRLINES LIMITED RESPONDENT

*(An appeal from the judgment and decree of the Chief Magistrate's Court,
Milimani Commercial Courts(Hon L.B Koech made on 30th October 2022)*

JUDGMENT

1. The respondent (the plaintiff) filed a plaint dated 19th February 2020, suing Africair Management and Logistic Limited (the 1st defendant) and Geminia Insurance Company Limited (the 2nd defendant) for the sum of US \$31,850.29, representing charges for the air carriage of various consignments of goods for which the 1st defendant contracted the services of the appellant on credit terms around September and October 2018. The appellant issued an insurance guarantee in favour of the respondent to secure payment for the credit terms granted to the respondent by the 1st defendant concerning various consignments of cargo transported to the respondent by air at the express order and request of the 1st defendant. The appellant filed a defence dated 6th October 2020, denying any obligation to make the payment and putting the respondent to strict proof. The appellant (the 2nd defendant) stated in paragraph 10 of the defence that the respondent's suit violated mandatory provisions of the law, was legally flawed and fatally defective, and that it would raise a preliminary objection to have it struck off.
2. In a judgment dated 31 October 2022, the trial magistrate determined that the respondent's suit was appropriately before the court, which provoked this appeal.
3. In a Memorandum of Appeal dated 28th November 2022, the appellant lists the following grounds of appeal;



- i. The learned trial magistrate erred in law and fact by entering judgment in favour of the respondent against the appellant when no sufficient evidence had been adduced to sufficiently prove the respondent's case.
 - ii. The learned trial magistrate erred in law by upholding the suit despite the fact that the respondent had not authorized its filing as required by law, which decision is untenable and unjust to the appellant.
 - iii. The appellant shall upon receipt of the typed proceedings file a supplementary memorandum of appeal to include the other grounds and reasons that may become apparent therein.
4. The appellant seeks that the judgment of the trial court be set aside and that the respondent's suit in the trial court be dismissed/ struck out, and that the appellant be awarded the costs of the trial court and the appeal herein.
 5. The appeal was canvassed through written submissions. The appellant submitted the following: there are two issues for determination: whether the suit before the lower court was proper and what appropriate orders the court should make. Regarding the propriety of the suit, it was submitted that the respondent is a limited liability company or a corporation. Order 4 Rule 1 (4) of the Civil Procedure Rules provides, "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." It was submitted that the verifying affidavit was sworn by one Charles Kenji, the respondent's witness during the trial. There was no evidence attached in the form of a board resolution under the seal of the company authorising Mr. Kenji to swear the verifying affidavit. The letter that was availed was written by Mr. Kitesh Ambasana, the respondent's Senior Manager of Finance & Business Administration, purporting to authorise Mr. Kenji to testify on its behalf. However, the letter is not a letter of authority. It was further submitted that the trial magistrate erred in holding that the letter saved the situation and that it cannot be a mere technicality cured by Article 159 (2) of *the Constitution* 2010. The appellant relied on the case of Nairobi HCCC No. 34 of 2018, Directline Assurance Cp. Ltd vs Tomson Ondimu, where the court held:

"Drawing therefrom, what comes out clearly is the fact that in instances of a company, the institution of a suit can only be instigated by way of a resolution. This is in due appreciation that a company is a legal entity whose operations are driven by the relevant authorized officers. In the present instance, there is no indication that a company resolution was passed prompting the institution of the suit before me". Reliance was also made in the following cases, Nairobi HCCC No. 524 of 2004, Affordable Homes Ltd vs Ian Henderson & 2 Others and Milimani (Commercial & Admiralty) Division, Civil Case No. 45 of 2012, KCB Ltd vs Stage Coach Management Ltd, to support the appellant's argument that the institution of a suit can on be done by way of a resolution of the company.

6. The respondent submitted as follows: the main issues for determination are whether the suit was properly before the trial court and what are the proper orders in this appeal. On the first issue, it was submitted that in the affidavit of Mr Kenji sworn on the 12th of April 2022, he depones that he was duly authorized to testify on behalf of the plaintiff in the suit. This includes any evidence he has given either in the form of affidavits he has sworn(including affidavit) or viva voce evidence. The appellant did not plead or prove that its defence to the suit is based on an alleged defect in the verifying affidavit or the alleged lack of authority of Charles Kenji to testify in the suit for the Plaintiff. The respondent relied on the case of Eye Company (K) Limited vs Erastus Rotich t/a Vision Express [2021]eKLR, the case of Spiral Bank Limited vs Land Registrar & 2 Others [2019] eKLR and the case



of Presbyterian Foundation & Another vs East Africa Partnership Ltd & Another [2012] eKLR. It was further submitted that the appellant is bound by its pleading. The appellant demonstrated no valid defence to the respondent's suit either in fact or law.

7. This being the first appellate court, I am required to re-evaluate evidence adduced before the trial court and make an independent determination (see *Selle & Another Vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”

8. I have carefully considered the pleadings before the subordinate court, the evidence, the rival submissions, and the law. The issue for determination in this appeal is whether the respondent has a valid suit. The respondent filed suit against the appellant and the 1st defendant. Interlocutory judgment was entered against the 1st defendant after it failed to file a defence. The suit proceeded against the appellant, and during the hearing, the respondent's witness adopted his statement. During cross-examination, he informed the court that he had the authority to swear the affidavit on behalf of the company and that he was the manager at the time. The appellant argues that the respondent is a limited liability company or a corporation. Order 4 Rule 1(4) of the Civil Procedure states that “where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company, duly authorized under the seal of the company to do so.”

9. The respondent maintains that the appellant failed to plead or prove that its defence to the suit was grounded on an alleged defect in the verifying affidavit, particularly concerning the supposed lack of authority of Charles Kenji to testify in the suit on behalf of the respondent.

10. The provisions of Order 4 Rule 1 (4) are mandatory. It states that where the plaintiff is a corporation, as is the case here, the verifying affidavit must be sworn by an officer of the company duly authorised under the company's seal to do so. The appellant notified the respondent in paragraph 10 of its defence that the respondent's suit, which violated the mandatory provisions of the law, was without merit and fatally defective, and that it would raise a preliminary objection to have it struck off. The respondent's witness was cross-examined on this issue, and he asserted that he had the authority to swear the affidavit on behalf of the company, which he reiterated during re-examination. At the conclusion of the respondent's case, his lawyer indicated that the letter of authority could be presented, and the court ruled that the letter of authority should be filed and served on the appellant. The parties agree that the letter was filed. The letter dated 17th February 2022, written by the respondent's Senior Manager of Finance & Business Administration, signed by Mr. Kitesh Ambasana, and addressed to the respondent's counsel, states as follows:

“Dear Sir,

Re: Chief Magistrates Court Civil Case No. 1146 of 2020

Swiss International Airlines Limited vs Africair Management and Logistic Limited & Geminia Insurance Company Limited

We refer to the above matter and your email to us dated 3rd February 2022 in that regard when you informed us that the trial hearing of the above referred suit is scheduled to take place on Tuesday 8th March 2022.



Please note that Swiss International Airlines Limited wound up its operations in Kenya with effect from 31st December 2021.

However we hereby instruct you to proceed with prosecuting the above-referred suit to its conclusion. We also hereby notify you that Mr. Charles Kenji is competent and authorised to testify on behalf of Swiss International Airlines Limited at the said Trial Hearing and in the said suit generally.

Kindly let us know if you need any further information.

Yours sincerely

Swiss International Air Lines Ltd.

Kitesh Ambasana

Senior Manager Finance & Business Administration

11. The contents of the above letter authorised Mr. Charles Kenji to testify on behalf of the respondent. However, it is not a Board Resolution from the respondent, as required under the provisions of Order 4 of the Civil Procedure Rules. In the case of Nairobi HCCC No. 34 of 2018, Directline Assurance Co. Ltd- Tomson Ondimu (Supra), the court held as follows:

“.. what comes out clearly is the fact that in instances of a company, the institution of a suit can only be instigated by way of a resolution. This is in due appreciation that a company is a legal entity whose operations are driven by authorised officer” .

12. The trial court aligned itself with the aforementioned decision but erred in asserting that the letter dated 17th February 2022 salvaged the situation. The respondent was required to comply with the mandatory provisions of the law as specified under Order 4 Rules 1(4). This situation could not be rectified by the provisions of Article 159(2) of *the Constitution* of Kenya 2010. I concur with the appellant’s submissions that a verifying affidavit in a suit initiated by a corporation must be deponed to by an officer authorised through the seal of the company. This is not merely a procedural technicality but a substantive requirement to ensure that only actions authorised by the corporation are filed. In the absence of a board resolution sanctioning the commencement of the action by the company, the company was not properly before the court (see Nairobi HCCC No. 524 of 2004, Affordable Homes Ltd vs Ian Henderson & 2 Others (supra). The respondent was afforded an opportunity to rectify the situation, yet it failed to do so despite being given the chance. The cases relied upon by the respondent can be distinguished from the case before the trial court. In the case of Eye Company (K) Limited vs Erastus Rotich t/a Vision Express, the issue of the board resolution was raised at the submission stage. In the present case, it was raised during the trial, and the respondent was given an opportunity to salvage its case.
13. I find, therefore, that the suit before the trial court was filed without the necessary authority from the company and was, consequently, invalid. I set aside the judgment of the trial court and strike out the respondent’s suit, with costs awarded for both the trial court and this appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 15TH DAY OF MAY 2025.

R.E.OUGO

JUDGE

In the presence:



Mr. Mugambi - For the Appellant

Miss Misaro - For the Respondent

Wilkister - C/A

