



**Beverage Edge Limited v Machara & 2 others (Civil Suit 232 of 2017)
[2024] KEHC 95 (KLR) (Commercial and Tax) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 95 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 232 OF 2017
A MABEYA, J
JANUARY 17, 2024**

BETWEEN

BEVERAGE EDGE LIMITED PLAINTIFF

AND

ANTHONY MWANGI MACHARA 1ST DEFENDANT

BEVERAGE THREE SIXTY LIMITED 2ND DEFENDANT

THE REGISTRAR OF COMPANIES 3RD DEFENDANT

JUDGMENT

1. The plaintiff is a limited liability company incorporated in Kenya carrying on the business of the sale and distribution of beverage products, beverage vending machines installation and repairs among other items.
2. The 1st defendant is an adult male of sound mind and a shareholder/director of the plaintiff. The 2nd defendant is a limited liability company incorporated in Kenya while the 3rd defendant is a statutory office created under the *Companies Act* No.17 of 2015 charged with the responsibility of registering and maintaining a register of companies.
3. Vide a plaint dated 30/5/2017, the plaintiff instituted this suit against the defendants. Its case was that sometime in 2016, disagreements occurred amongst the directors of the plaintiff with regard to the manner in which the plaintiff was carrying on its business which prompted its bankers, Bank of Africa Limited, to freeze its account.
4. That following the dispute, the 1st defendant filed an insolvency petition seeking to wind up the plaintiff and in the process obtained temporary orders freezing the bank accounts held by the plaintiff.



5. The plaintiff contended that without its knowledge, the 1st defendant incorporated the 2nd defendant and commenced business in competition with it offering similar services to those offered by the plaintiff and used the same get up, logo and other designs that closely resembled those of the plaintiff. That the 1st defendant informed the customers of the plaintiff that it changed its name to Beverage Three Sixty Limited and thereby deceived them to believe that they were dealing with the plaintiff.
6. In its reply to defence dated 4/7/2019, it denied that the word beverage was an ordinary English word and that in the circumstances of this case, it was used to deceive the plaintiff's customers and the public.
7. The plaintiff thus prayed for a permanent injunction to restrain the 1st and 2nd defendant from carrying on beverage sale, vending or distribution under the name Beverage Three Sixty Limited, an account of the profits made by the 2nd defendant as a result of the passing off and payment of any sums found due together with interest thereon at court rate.
8. Further, the plaintiff prayed for an order to transfer all funds held in Account Number 08241830003 held with Bank of Africa Limited Ngong Road Branch and any other accounts in any bank in Kenya in the name of Beverage Three Sixty Limited to the plaintiff and an order directing the 3rd defendant to deregister the 2nd defendant from the register of companies and/or an order to compel the 2nd defendant to change its name to a name not strikingly similar to that of the plaintiff.
9. The plaintiff relied on 1 witness to buttress its case, one Richard Waithaka Mburu. He was one of its directors who adopted his witness statement dated 30/5/2017 and produced the plaintiff's bundle of documents dated 30/5/2017 as his evidence in chief.
10. His evidence basically mirrored the allegations contained in the plaint. In cross examination, he testified that besides the name being similar, other things such as colour, stationary and merchandise were the same between the plaintiff and 2nd defendant. That the 1st defendant was a 10% shareholder in the plaintiff and he registered the 2nd defendant to take over the customer base of the plaintiff. That the customers did not know the difference between the plaintiff and the 2nd defendant. That no settlement of whatever nature had been reached between the parties.
11. The 1st and 2nd defendant relied on their joint statement of defence dated 3/6/2019 to oppose the plaintiff's claim. They contended that the 1st defendant had been solely entrusted with the management and day to day running of the plaintiff as its managing director. That the other shareholders and directors purportedly called a board meeting where a resolution was made to remove him as the managing director of the plaintiff and as a signatory to the bank account of the plaintiff domiciled at Bank of Africa, Ngong Road Branch, Nairobi.
12. That upon change of the mandates to the bank account, the said shareholders/directors proceeded to withdraw money from the account which led the 1st defendant to notify the bank of the illegal action by the directors/shareholders which compelled the bank to freeze the account.
13. They contended that there was an insolvency petition seeking the liquidation of the plaintiff before the High Court. That in the premises, the directors of the plaintiff were stripped of the management of the company.
14. That the only similarity between the plaintiff and 2nd defendant was that the 2nd defendant bore the word "Beverage" which is an ordinary English word which the plaintiff cannot claim ownership over. The 1st and 2nd defendant denied the particulars of passing off as set out in the plaint and contended that there was no valid resolution authorising the commencement of the suit and therefore, the suit should be struck out in limine.



15. They further contended that that there was a mediation meeting between the directors/shareholders of the plaintiff held on 7/11/2017 whereby the substratum of the entire suit herein was compromised through an agreement evidenced by a letter dated 8/11/2017. That in the premises the suit had been overtaken by events and it ought to be dismissed with costs.
16. At the trial they relied on the 1st defendant's witness statement dated 3/6/2019 which was adopted as part of his evidence in chief. He told the Court that there was a mediation meeting whereby the parties came up with a settlement and there was payment to directors of a sum close to Ksh.1 million and all cases were to be withdrawn.
17. In cross examination, he testified that he was the only financier of the plaintiff which guaranteed him to be its managing director. That according to the Articles of Association of the plaintiff, a unanimous resolution could only be passed by a 95% decision which meant that the 3rd director had to have an input. That there was an agreement arrived at during mediation and negotiations were done in good faith and that he met his part of the bargain.
18. In re-examination, he stated that there was no restraint of trade and that the other directors of the plaintiff had other businesses other than the plaintiff.
19. The 3rd defendant filed a statement of defence dated 25/9/2019. He contended that the suit was filed in contravention of Part XI of the *Companies Act* 2015 and was therefore incompetent and ought to be struck out.
20. Without prejudice to the foregoing, the 3rd defendant contended that the suit as framed disclosed no cause of action directly or indirectly against him. He denied that the plaintiff's name and that of the 2nd defendant were strikingly similar as per the provisions of section 58 of the *Companies Act* as read together with Regulation 11 & 12 of The *Companies (General) Regulations* 2015.
21. The parties filed their respective submissions which I have considered. The issues for determination are as follows: -
 - (a) Whether the suit is competent.
 - (b) Whether there was an out of court mediation settlement that resolved the present dispute.
 - (c) Whether there is a valid claim for passing off against the 1st and 2nd defendant.
22. On the competency of the suit, the plaintiff submitted that the suit was properly instituted as the board of directors of the plaintiff was properly constituted when the resolution was passed by the two directors to commence the suit. The plaintiff further relied on the case of *Leo Investments Limited vs. Trident Insurance Company Limited* (2014) eKLR where it was held that the failure to file a corporation's resolution together with the plaint did not invalidate the suit.
23. On the other hand, the defendants submitted that there was no valid resolution authorising the commencement of the suit. That it is not enough for the plaintiff to state that the board of directors meeting was properly constituted and that a resolution was passed to commence the suit, there has to be evidence of such action.
24. The plaintiff's memorandum and articles of association are found in the plaintiff's bundle of documents dated 30/5/2017. Articles 100 to 109 provides how the proceedings of the board of directors are to be carried out. Article 101 put the quorum of the board at 2 directors being present either personally or by alternate.



25. Article 107 provides that: -

“A resolution in writing signed or approved by letter or telegram or telex by all the Directors or by all members of a committee of directors shall be valid and effectual as a resolution passed at a meeting of the Board...such resolution may be contained in one document or several documents each signed or more approved by one or more of the directors.”

26. From the foregoing, the directors are required to have a board resolution signed by the directors. The resolution is to be contained in a written document and that a meeting of 2 directors is quorate.

27. The plaintiff did not provide a valid written and signed resolution authorising the commencement of the suit. The question is whether the suit ought to be struck out due to the absence of a written resolution.

28. In *Kibingo Village (Waridi Gardens) Management One Limited v William Edward Pike & 7 others* [2020] eKLR, it was held: -

“The courts, in subsequent cases, have resiled from the above position and have held that there is no requirement for a company to present a resolution of a company indicating that it has authorised the filing of a suit or has authorised the swearing of an affidavit on its behalf (see *Bethany Vineyards Limited and Another v Equity Bank Ltd and 2 Others* HC COMM No. 518 of 2011 [2020] eKLR and *Fubeco China Fushun v Naiposha Company Limited & 11 Others H COMM No.222 of 2012* [2014] eKLR). This case is distinguishable as the Plaintiff has two shareholders; Ndungu and Gitahi who are now in dispute as to whether the Company was authorised to file this suit. In such circumstances, the authority for the Company to agitate these proceedings must be established.”

29. Courts no longer require a company to present a resolution authorising it to file a suit. However, when such authority is challenged, it is imperative that the existence of such a resolution be produced to Court. This is so in particular where the dispute touches on the shareholders and/or directors.

30. In the above authority case, the court made a distinction based on the unique circumstances before it whereby the company had two shareholders who were in dispute on whether the company had the authority to file the suit.

31. In the present case, the 1st defendant instituted an insolvency petition seeking to wind up the plaintiff claiming oppressive conduct by the other two directors. This included failure to call meetings in compliance with the articles of association and creating fictitious board resolutions.

32. As the authenticity of its board resolutions is in contention, it was necessary in this case for the plaintiff to furnish and produce a written and signed resolution in compliance with its articles of association. It is also surprising that even after was raised at the earliest in the defence, the plaintiff did not see it fit to file such a resolution in the course of the proceedings.

33. In the premises, I find that the suit was not legally instituted and is for striking out.

34. Accordingly, this suit is incurably defective and is struck out with cost to the defendants.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb



JUDGE

