



**Tinga Traders Limited v Kenya Commercial Bank Limited & 2 others (Commercial Case E288 of 2023) [2024] KEHC 8594 (KLR) (Commercial & Admiralty) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8594 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
COMMERCIAL CASE E288 OF 2023**

**MN MWANGI, J  
JULY 11, 2024**

**BETWEEN**

**TINGA TRADERS LIMITED ..... PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**NELSON OGETO NYAMENIA ..... 2<sup>ND</sup> DEFENDANT**

**JOSEPH ARANGA BOGONKO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff filed this suit vide a plaint dated June 20, 2023, which was accompanied by a Notice of Motion application under certificate of urgency. The Court gave directions on the application and directed that this suit be mentioned on July 31, 2023 for further direction. From the Case Tracking System (CTS), on July 19, 2023, the law firm of Mose Nyambega & Co. Advocates filed a Notice of Change of Advocates dated July 18, 2023 to come on record for the plaintiff in place of Joseph Angwenyi & Co. Advocates. The Notice of Change of Advocates was followed by a Notice of Withdrawal of Suit dated July 18, 2023. Annexed to the said Notice of Change of Advocates was the plaintiff company’s resolution authorizing the law firm of Mose Nyambega & Co. Advocates to take over the conduct of this suit, and file a Notice of Withdrawal of Suit.
2. When this matter came up for mention on July 31, 2023, Messrs Nyambega, and Angwenyi, learned Counsel appeared before this Court and stated that their law firms were on record for the plaintiff. After listening to arguments by the said Counsel, this Court directed that the issue of the plaintiff’s legal representation by addressed by way of affidavits. The law firm of Joseph Angwenyi and Co. Advocates filed a supplementary affidavit sworn on July 28, 2023 by Richard Omwenga Gichana, who averred that he is one of the plaintiff company’s Directors and a signatory to its bank account



No.1100109xxxx held at Kenya Commercial Bank, Salama branch. Mr. Gichana confirmed that they gave the law firm of Joseph Angwenyi & Co. Advocates instructions to file the suit herein.

3. On the other hand, Joseph Aranga Bogonko, Nelson Ogeto Nyamwenia, Harrison Morogoro Momanyi, Julius Nyerere Gichana, Daniel Obiero Onwong'a, Tom Nyakundi Nyamari and Evans Newton Ogeto, through the law firm of Mose Nyambega & Co. Advocates filed an affidavit sworn on September 20, 2023, in which the said deponents averred that they are the current Directors of the plaintiff company as can be seen from the company's CR-12 dated August 2, 2023 annexed to the said affidavit.
4. They further averred that Richard Omwenga Gichana, Benson Omwenga Mosoti, and Joshua Oindi Ogoso, who instructed the law firm of Joseph Angwenyi & Co. Advocates to file the instant suit had no capacity and/or authority to issue instructions for the filing of this suit. Annexed to the said affidavit was the plaintiff company's resolution passed in a meeting held on July 5, 2023 authorizing the law firm of Mose Nyambega & Co. Advocates to take over the conduct of this matter from the law firm of Joseph Angwenyi & Co. Advocates and file a Notice of Withdrawal of Suit.
5. The issue of the plaintiff's legal representation was canvassed by way of written submissions. The law firm of Joseph Angwenyi & Co. Advocates filed its submissions on February 9, 2024, whereas the law firm of Mose Nyambega & Company Advocates filed its submissions on February 16, 2024.
6. Mr. Angwenyi, learned Counsel submitted that the 2<sup>nd</sup> & 3<sup>rd</sup> defendants who are Mr. Nyambega's clients were illegally appointed as the plaintiff's Directors in place of its true Directors. That thereafter, they proceeded to illegally appoint their co-directors with a view of eventually changing the plaintiff's signing mandate at the bank and access the plaintiff company's funds. He further submitted that the issue of change of the plaintiff's Directorship is one marred with too many fraudulent activities and the same is pending determination before the High Court in Nairobi Judicial Review Miscellaneous No. E107 of 2023; *Tinga Traders Limited & 2 others v The Business Registration Services & 2 others*. He contended that the 2<sup>nd</sup> & 3<sup>rd</sup> defendants cannot purport to rely on impugned CR-12's to run the affairs of the plaintiff company.
7. Mr. Nyambega, submitted that an Advocate representing a corporate entity, such as a body corporate, a limited liability company, or an artificial person, must have written authorization from the company's Directors to act on its behalf. He stated that the authority to act must be in writing and based on a resolution or decision of the Directors. He relied on the case of *Philomena Ndanga Karanja & 2 others v Edward Kamau Maina* ELC No. 1411 of 2014 and the provisions of Order 4 Rule 1(4) of the *Civil Procedure Rules, 2010* and submitted that the law firm of Joseph Angwenyi & Co. Advocates had no instructions to file this suit, but the law firm of Mose Nyambega & Co. Advocates on the other hand is properly on record for the plaintiff, having been authorized by the plaintiff pursuant to a resolution that was passed by the plaintiff company's Directors, Aranga Bogonko and Nelson Ogeto on July 5, 2023.
8. As to what constitutes a valid Board resolution, Mr. Nyambega relied on Bharat's Resolutions Notices Meetings & Minutes, 8<sup>th</sup> Edition, by K. V. Shanbhogue at page 63. He argued that the Directors of the plaintiff company verified their Directorship through a CR-12 dated August 2, 2023 annexed to an affidavit sworn on September 20, 2023, and that the contents of the said affidavit and CR-12 have not been challenged by Mr. Angwenyi and/or his clients. Thus, the law firm of Joseph Angwenyi & Co. Advocates was never authorized to commence this suit or represent the plaintiff company.



## Analysis And Determination.

9. I have considered the depositions on the affidavits filed and the written submission by Counsel. The issue that arises for determination is which of the two law firms is properly on record for the plaintiff.
10. Order 4 Rule 1(4) of the *Civil Procedure Rules, 2010* provides as follows-

“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.”
11. In the case of *Bugerere Coffee Growers Limited v Sebaduka & another* [1970] EA 147 cited by the Court in the case of *Nextgen Mall Management Company Limited v Netcom Investments Limited & another* [2021] eKLR it was held thus on the issue of institution of proceedings by a corporate body-

“(i) 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; no such resolution had been passed authorizing these proceedings...”
12. Mr. Nyambega contended that the law firm of Joseph Angwenyi & Co. Advocates is not properly on record for the plaintiff since it was instructed by persons who have no capacity and/or authority to instruct the said law firm to institute this suit on behalf of the plaintiff. From the evidence adduced by way of affidavits Mr. Nyambega’s clients by way of affidavit evidence, his clients are the current Directors of the plaintiff company as shown on the plaintiff company’s CR-12 dated August 2, 2023 annexed to the affidavit sworn on September 20, 2023, that was filed by Mr. Nyambega & Co. Advocates.
13. In as much as Mr. Angwenyi’s clients aver that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who instructed the law firm of Mose Nyambega & Co. Advocates to come on record for the plaintiff were illegally appointed as the plaintiff’s Directors, and that there is a pending suit being Nairobi Judicial Review Miscellaneous No. E107 of 2023; *Tinga Traders Limited & 2 others v The Business Registration Services & 2 others*, challenging their Directorship, no order was exhibited to this Court that restrains the Directors listed in the plaintiff company’s CR-12 from running the affairs of the plaintiff company and/or carrying out the mandate and duties of Directors of the plaintiff company.
14. Mr. Nyambega’s clients exhibited a Board resolution by the plaintiff’s Directors which was passed in a meeting held on July 5, 2023, authorizing the law firm of Mose Nyambega & Co. Advocates to come on record for the plaintiff in place of the law firm of Joseph Angwenyi & Co. Advocates, and file a Notice of Withdrawal of Suit.
15. Mr. Angwenyi on the other hand exhibited an instruction note issued to his law firm by Richard Omwenga Gichana, Benson Omwenga Mosoti, and Joshua Oindi Ogoso, who in as much as they refer to themselves as Directors of the plaintiff company, they have not tendered any evidence to that effect. Further, the said instruction note was not accompanied by the plaintiff’s company’s Board resolution, and this Court was not informed by Mr. Angwenyi and/or his clients of the existence of such a resolution.
16. It is trite law that he who asserts must prove, as provided under Sections 107, 108 & 109 of the *Evidence Act*. Therefore, Mr. Angwenyi and his clients bore the burden of demonstrating to this Court that Richard Omwenga Gichana, Benson Omwenga Mosoti, and Joshua Oindi Ogoso are Directors of the plaintiff company, and that the plaintiff’s Board of Directors passed a resolution authorizing the law



firm of Joseph Angwenyi & Company Advocates to institute this suit on behalf of the plaintiff. From the record no such evidence has been tendered by Mr. Angwenyi & his clients, hence this Court finds that the burden of proof has not been discharged by Richard Omwenga Gichana, Benson Omwenga Mosoti, and Joshua Oindi Ogozo to demonstrate that they are Directors of the plaintiff company.

17. In the case of *Affordable Homes Africa Limited v Ian Henderson & 2 others* HCCC No. 524 of 2004 cited by the Court in *Directline Assurance Company Limited v Tomson Ondimu* [2019] eKLR the Court held the following-

“...that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company’s powers of management are, by articles, vested in the Board of Directors, the general meeting cannot interfere in the existence of those powers.... 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 be borne by the advocates of the Plaintiff.”

18. In the circumstances, this Court finds that the law firm of Joseph Angwenyi & Co. Advocates is not properly on record for the plaintiff. Consequently, the amended plaint dated April 29, 2024 is hereby struck out.
19. The plaintiff through the law firm of Mose Nyambega & Co. Advocates filed a Notice of Withdrawal of this Suit with no orders as to costs, dated July 18, 2023.
20. Ms. Aisha, learned Counsel for the 1<sup>st</sup> defendant on December 14, 2023 stated that the 1<sup>st</sup> defendant had no objection to withdrawal of this suit by the plaintiff.
21. In the result, the suit herein is hereby marked as withdrawn with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF JULY, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

Mr Angwenyi Advocate (formerly for the Plaintiff)

Ms Kwamboka for the Plaintiff

Ms B. Wokabi – Court Assistant.

