



Ueing & another v Barclays Bank of Kenya Limited & another (Commercial Case 195 of 2016) [2023] KEHC 3068 (KLR) (Commercial and Tax) (7 March 2023) (Judgment)

Neutral citation: [2023] KEHC 3068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 195 OF 2016**

GL NZIOKA, J

MARCH 7, 2023

BETWEEN

**DR UDO UEING 1ST PLAINTIFF
AGREA LIMITED 2ND PLAINTIFF**

AND

**BARCLAYS BANK OF KENYA LIMITED 1ST DEFENDANT
ESTHER NJUGUNA 2ND DEFENDANT**

JUDGMENT

1. By a plaint dated 19th May 2016, the plaintiffs are seeking for judgement against the defendant for:
 - a. A mandatory injunction compelling the defendants to release to the plaintiffs all information and correspondences exchanged with Ms. Schaar and Mr. Kempkes and any other third parties with respect to account number XXXXXXXXXXXX.
 - b. A permanent injunction restraining the defendants and their authorized agents from releasing any or further details of and concerning the second plaintiff's finances and financial information as contained in its bank account number XXXXXXXXXXXX held at the defendant's Eldoret Bank Branch, either to the said Ms. Schaar and Mr. Kempkes or any other third parties without proper authority from the plaintiffs.
 - c. Damages for negligence and breach of contract.
 - d. Costs of this suit.



- e. Any other relief that this court may deem fit and just to grant.
2. The plaintiffs' case is that, the 2nd plaintiff's company has two directors; the 1st plaintiff and Christopher Theodor Heinrich Kempkes. That the company holds and operates an account No. XXXXXXXXXXXX, with the 1st defendant at its Eldoret branch which account was opened by the 1st plaintiff in his capacity as the managing director of the company. Further, the account is operational under the business name of the company and the 1st plaintiff is the sole signatory thereto.
 3. That, on or about 2nd February 2016, the 2nd defendant who is an employee of the 1st defendant was consulted and engaged in telephone communication with one Caroline Schaar, from Germany with intent to create the possibility of online banking for the subject account. That, the 2nd defendant informed Mrs Schaar that such information could only be given by the 1st plaintiff or on his instruction in writing.
 4. Subsequently, on 15th February 2016, Ms. Schaar contacted the 2nd defendant again seeking for copies of the last 20 entries on the account's statement including details of deposits, withdrawals and transfers and details of the named recipients. That the 2nd defendant gave the information.
 5. The plaintiffs aver that, the disclosure of that information to Ms. Schaar was in breach of banker – customer relationship between the 2nd plaintiff and the 1st defendant, since Ms. Schaar is a stranger to the account and not authorized to access the information given to her. As such, the disclosure was in breach of plaintiffs' right to privacy and duty of care owed to the 2nd plaintiff.
 6. Further, immediately upon the disclosure, the 1st plaintiff wrote to the 1st defendant demanding to know the details of all the information and correspondence exchanged with Ms. Schaar and any other third party concerning the 2nd plaintiff's account. However, the 1st defendant in reply embarked on a cover up perpetrated with the aim of colluding with Mr. Christopher Theodor Heinrich Kempkes to indicate that Ms. Schaar had authority having been duly appointed as an agent by Mr Kempkes.
 7. However, the 1st defendant's internal investigations revealed that, the 2nd defendant had accessed the account on 15th February 2016 and disclosed its contents to Mrs. Schaar. That, Mr. Waweru, an employee of the 1st defendant informed the 1st plaintiff that, legal action was being taken against the 2nd defendant, and that the 2nd defendant had no authorization to access the account and/or disclose the information relating thereto to a third party.
 8. That, on 26th February 2016, the 1st defendant informed the 1st plaintiff that Mr. Kempkes had written to the 1st defendant saying that he had authority to access the account and had transferred the same to Ms. Schaar to “manage” the account, and that the 1st defendant accepted the instruction.
 9. However, the 1st plaintiff avers that, the said authority from Kempkes was written on a letterhead of a company known as AGRAVIS AG Germany which is not the 2nd plaintiff herein nor the account holder. That, although Kempkes is a shareholder in the 2nd plaintiff company and co-signatory to the opening of the 2nd plaintiff's company account, he had no legal rights whatsoever either acting or on behalf of and or as a member of the board of AGRAVIS AG to appoint an agent and communicate the same to the 1st defendant in writing.
 10. Further there was no board resolution to authorize the disclosure of the information or seeking for online banking or authorize Mr. Kempkes to appoint Ms. Schaar as an agent.
 11. Furthermore, at the time of opening the account, the 1st plaintiff was identified as the sole signatory thereto and had administrative control over it. That, Mr Kempkes had no right to access the account



- without authority of the sole signatory. Further the account was operated by the 1st plaintiff solely, therefore the 1st defendant should have been on notice upon the appearance of a third party.
12. That, the disclosure of the confidential information into the “wrong hands” enabled the recipient to use it adversely to block the company from successfully entering into business deals in Germany. Furthermore, the release of the information is anathema and blatant disregard of the right to protection of property. That, as a result of the breach the 1st plaintiff has been embarrassed and therefore, the 1st defendant is vicariously liable for the acts of its employees and authorized agents.
 13. That, despite demand and notice of intention to sue the defendants have refused and/or neglected to pay whereof the plaintiff prays that the orders sought for be granted.
 14. However, the plaintiff’s claim was opposed by the 1st defendant vide a statement of defence dated 27th June 2016. The 1st defendant averred that, it would raise a preliminary objection to the entire suit in limine on the grounds as here below reproduced: -
 - a. The plaintiff has no locus standi to file suit against the bank as Account Number XXXXXXXXXXXX is in the name of a limited liability company, the 2nd plaintiff herein. That the plaintiff has no legal capacity to seek any reliefs against the 1st defendant.
 - b. The suit was filed without due authority from Agrea Limited [hereinafter “the 2nd plaintiff”] Company and the bank will apply to strike it out.
 - c. There is no resolution or valid resolution on the 2nd plaintiff’s company approving the institution of this suit which was instituted on the face of it by a minority shareholder.
 - d. The affidavits are fatally defective and inadmissible. The 2nd plaintiff company did not authorize Dr. Udo Ueing to swear either the verifying affidavit or the supporting affidavit for the application dated; 19th May 2016.
 15. The 1st defendant avers that, contrary to the averments at paragraph 5 of the plaint, the account in issue was opened on 26th October 2015, by two directors of the 2nd plaintiff namely; Mr. Christopher Theodor Heinrich Kempkes and Dr. Udo Ueing.
 16. Subsequently the two directors accepted terms and conditions laid out in the Appointment of Bankers Mandate to bank for Public, Private and Partnership, as shown under paragraph 4 of the defence.
 17. That, in exercise of the powers under the Articles of Association, Mr Kempkes appointed Mrs Schaar to manage the 2nd plaintiff’s account on his behalf as such all the of information exchanged was done in accordance with that authority and Banking Prudential Guidelines.
 18. Further Mr Kempkes was authorized to access the account information by virtue of being a director of the 2nd plaintiff, and a representative of Agrarrohstoffe Beteiligungus GMBH (largest shareholder of Agrea Limited) with 600 shares out of 1,000 shares and a mandated signatory as provided for in the appointment of Banker’s Mandate.
 19. Further, contrary to the averments in the plaint no resolution is required for any act of a mandated signatory. That, the Articles of Association of the 2nd plaintiff authorized any director to appoint any person to act as an alternate director in his place during his absence in Kenya or inability to act.



20. Further by a letter dated, 26th February, 2016, the 1st defendant informed the 1st plaintiff that, it acted in good faith but unfortunately Mr Kempkes declined to consent to the disclosure email. That, it is indecorous for the plaintiffs to allege cover up after proper communication was effected.
21. That Mr Kempkes was authorized to; open, close and appoint authorised signatories to the account while the 1st plaintiff was only authorized to operate the account.
22. The 2nd defendant was served with the plaint through substituted service by means of advertisement in the daily newspaper but did not enter appearance and neither did she file any defence. As a result, by a letter dated; 29th January 2019, the plaintiffs sought for interlocutory judgment to be entered against her, and the same was entered by the Hon. Deputy Registrar on 7th May, 2019, who further ordered that the case against her proceeds to formal proof.
23. Be that as it may, the plaintiffs filed a reply dated; 29th January, 2019, in response to the 1st defendant's defence in which it is averred that, that the preliminary objection raised is ill informed and untimely as the 1st plaintiff not only had authority to act on behalf of the 2nd plaintiff but is also the sole director of the 2nd plaintiff.
24. That in any event the 1st plaintiff could seek for leave of the court either orally or by way of application, to continue the suit as a derivative suit.
25. The case proceeded to full hearing wherein the plaintiff's case was supported by the evidence of the 1st plaintiff who adopted and relied on his witness statement dated, 19th May 2016, which mirrors the averments in the plaint.
26. On its part, the 1st defendant relied on the evidence of Fredrick Ogada, a manager in its Forensic Investigation Department. He adopted and relied on his statement dated; 25th January 2019. Similarly, he reiterated the averments in the 1st defendant's defence save to state that, the 2nd plaintiff opened a current account number XXXXXXXXXXXX with the 1st defendant on 26th October 2015.
27. That the account opening form indicate that Mr. Christopher Kempkes and the 1st plaintiff are the director of the 2nd plaintiff. Further, the 2nd plaintiff provided certified copies of its Memorandum and Articles of Association which provided inter alia that:
 - a. The names of the directors shall be determined in writing by the subscribers of the Memorandum of Association or a majority of them and until such determination the signatories to Memorandum of Association shall be the first directors.
 - b. No share qualification of the directors shall be required.
 - c. Each director shall have power to nominate any person to act as alternate director in his place during his absence from Kenya or inability to act as such director – Clause 14 of the Articles of Association
 - d. The share capital of Agrea Limited is Kshs. 1,000,000. divided into 1,000 shares of Kshs. 1,000.
 - e. Agrarrohstoffe Beteiligungus Gmbh is the largest shareholder of Agrea Limited with 600 shares.
 - f. Rosendhal Farm Ltd has 400 shares.



- g. That Christopher Kempkes subscribed by signing on behalf of Agrarrohstoffe Beteiligungus Gmbh Plathnerstrasse 4a 30175 Hannover (Largest shareholder) 600 shares
 - h. Dr. Ugo Ueing subscribed by signing on behalf of Rosendhal Farm Ltd 400 shares.
- 28. Furthermore, the 2nd plaintiff executed an Appointment of Bankers and Mandate Bank Form for Public and Private Limited Companies and Partnerships and agreed to be governed by the terms and conditions therein which state inter alia;
 - a. That the signatories named in the mandate and in combination specified be authorized on behalf of the customer to operate account number XXXXXXXXXXXX in respect to all transactions and to give instructions to the 1st defendant and set up security procedure for giving instructions by telephone or otherwise, as acceptable by the 1st defendant;
 - b. The scope of the authorised signatories and the mandated signatories as set out in its mandate and banking law and regulations;
 - c. The combined authorized signatories authorised to give instructions on behalf of the 2nd plaintiff were Christopher Kempkes as a director and mandated signatory and the 1st plaintiff as a director and authorised signatory
- 29. That, by a letter dated 15th February 2016, Mr. Kempkes informed the bank that he had appointed Mrs. Carolin Schaar as his authorized agent and upon receipt of the letter, the 2nd defendant who was at the time an employee of the 1st defendant, being satisfied that she was dealing with a duly authorized agent, agreed to offer advice as long as it was consistent with the bank mandate.
- 30. That on 26th February 2016, the 1st plaintiff lodged a complaint with the bank and requested to be furnished with any and all information and correspondence with whoever called the bank in relation to account number XXXXXXXXXXXX. After conducting its investigations, the 1st defendant by a letter dated 26th February 2016, informed the 1st plaintiff that the 2nd defendant had acted on good faith as Mrs. Schaar had been appointed by Mr. Kempkes.
- 31. On 7th March 2015, the 1st plaintiff wrote to the 1st defendant again, accusing it of serious breach of banking procedure. In reply by a letter dated 10th March 2016, the 1st defendant reiterated that the disclosure was made to a duly appointed agent of Mr. Kempes, a mandatory signatory who is entitled to account information.
- 32. That it is standard procedure for banks to give account information to mandatory signatories and that they can be no order barring a mandated signatory from accessing information as they 2nd plaintiff had not provided any resolution changing the mandated and authorised signatories. Further, that it is standard practice for directors to appoint agents to represent them as signatories.
- 33. At the conclusion of the case, the plaintiff filed submissions dated 23rd June 2020 and identified two issues for determination as follows:
 - a. What is the operating mandate of the 2nd plaintiff's account?



- b. Whether, any information in respect of the account was provided to unauthorized 3rd party in breach of mandate.
34. As regards the first issue, the plaintiff submits that the bank mandate in respect to account number 20348455 is found at pages 8, 9, 12 and 13 of the 1st defendant's bundle of documents. That the provisions thereof are quite clear and therefore the defendants cannot be excused for breaching the same.
35. On the second issue, the plaintiff cited the case of; *Eastern Produce (K) Limited v Christopher Atiado Osiro* ELD HCCA No. 43 of 2001 [2006] eKLR where the court stated that, the onus of proof in negligence lies with the plaintiff.
36. The plaintiff further cited *Salmond and Heuston on; The Law of Torts* 19th Edition where negligence is defined as "the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do".
37. Further reliance was placed on the case of *Marfani & Co. Ltd vs Midland Bank Ltd* [1968] All ER 573 where the court stated that the facts that ought to be known by a banker depend on the current banking practice.
38. It was reiterated that the mandate provides that two or all of the mandated signatories are authorized to appoint agents, and therefore the sole appointment of Ms. Schaar by Mr. Kempkes did not conform to the mandate and in the absence of a valid authorization, Ms. Schaar is an unauthorized third party. As such the acceptance of her appointment and the disclosure of confidential information to her is a breach of the mandate.
39. That, confidentiality is a fundamental term in the bank-customer relationship and that the release of the 2nd plaintiff's banking information is a breach of this fundamental fiduciary duty. Reliance was placed on the case of; *Tournier vs National Provincial and Union Bank of England Ltd* [1923] All ER 550 where it was stated that, a customer's credit depended on strict observance of the confidential relationship between the banker and his customer.
40. It was further submitted that, while the legal duty arising out of contract is not an absolute duty, that no qualification or exemption exists in this case. That, in the case of *Selangor United Rubber Estates v Cradock (No. 3)* [1968] 1 WLR 1555 it was stated that, a bank has a duty of care to exercise reasonable care and skill in its contract with its customer.
41. That the standard of reasonable care and skill is objective and has to be decided in any particular light of all relevant factors that can vary.
42. Further, as the defendants were negligent, liability for negligence must be cured by an award for damages. That, in *Shalimar Flowers Self Help Group v Kenya Commercial Bank* [2016] eKLR the court found that the bank owed the plaintiff a duty of care and therefore the plaintiff was entitled to his reliefs.
43. The 1st defendant filed submissions dated; 3rd August 2019 and identified the following issues for determination:
- a. Whether the plaintiffs have locus to sue the 1st defendant



- b. Whether the 1st defendant breached the banker-customer confidentiality by disclosing information relating to the 2nd plaintiff's account to Mr. Kempkes authorized agent.
 - c. Whether the court should grant the plaintiffs the orders sought
 - d. Who should bear the costs of the suit.
44. It was submitted that the 1st plaintiff lacks locus to file a suit on behalf the 2nd plaintiff as he is a minority shareholder and further the privity of contract herein is between the 2nd plaintiff and the 1st defendant. Furthermore, there is no board of directors' resolution approving filing of the suit on behalf of the 2nd plaintiff as such the verifying affidavit is fatally defective as the 2nd plaintiff did not authorize the 1st plaintiff to swear the same.
45. The 1st defendant argued that the authority to act document produced by the 1st plaintiff does not constitute a resolution by the 2nd plaintiff to institute the suit. Thus in absence of the necessary resolution the suit should be dismissed. The 1st defendant relied on the case of; *Affordable homes Africa Ltd vs Henderson & 2 Others* [2004] eKLR where it was held that, in the absence of a board resolution to sanction the filing of the suit by the company meant that the company was not before the court.
46. Further reliance was placed on the case of *Kenya Commercial Bank Limited vs Stage Coach Management Ltd* [2014] eKLR where the court cited the case of Bugerere *Coffee Growers Ltd v Seraduka & Anor* (1970) EA 147 where it was stated that a company can only authorise the commencement of legal proceeding through a resolution passed at a company or board of directors meeting.
47. Similarly, that in total disregard of; section 239 of the *Companies Act*, No. 17 of 2015, that deals with derivative claim, the 1st plaintiff failed to seek leave to commence the suit. In that regard the case of; *Isaiab Waweru Ngumi & 2 Others v Muturi Ndungu* [2016] eKLR was cited where the court explained that the purpose of leave for derivative action under section 239 was to strike a balance between seeking accountability and remedies against faithless officers and directors as well as third parties who may have injured the corporation and to prevent diverting attention and energy of corporate officers and directors from their primary role of managing the business to deal with litigation.
48. In further submissions, it was argued that contractual duties of a bank toward a customer were fortified in the English Court of Appeal case of *Lipkin Gorman (A Firm) v Karpnale Ltd* [1986] [1992] 2 All ER 331 where the court established propositions inter alia that, the bank is to treat a customer mandate at face value save in extreme cases and that the bank is not obliged to question any transaction which is in accordance to its mandate; and neither should the bank act as an amateur detective.
49. That a mandate to a bank personifies an agreement authorizing the bank to act if given an instruction in accordance with its terms and that any bank that acts in accordance with the mandate is authorized. Reliance was placed on the case of *Barclays Bank of Kenya Limited vs John Peter Yagetari Simba (Liquidator of Lakestar Insurance Co. Staff Retirement Benefits Scheme) in Liquidation* [2013] eKLR where the court cited *Paget's Law of Banking* at page 403 that, a bank that acts in accordance with its mandate is duly authorized.
50. That in the present case, Mr. Kempkes being the largest shareholder, a director and a mandated signatory of the 2nd plaintiff was entitled to information on the account and was right in authorizing Mrs. Schaar to act as his agent.



51. Further, that the plaintiffs has failed to discharge the burden that, the 1st defendant acted unlawfully in disclosing account information to the authorized agent. Furthermore, the bank acted in good faith as it is a standard procedure for banks to give account information to mandatory signatories and for directors to appoint agents to represent them as signatories. Reliance was placed on the Court of Appeal decision in *Standard Chartered Bank Kenya Ltd vs Intercom Service Ltd & 4 Others* [2004] eKLR where the court found that, the bank did not breach its contractual duty of confidentiality and financial losses claimed were too remote and irrecoverable from the bank having not been cause by the alleged breach of contract but an independent intervening force.
52. The 1st defendant urged the court not to grant the orders sought, as prayer 1 and 2 were overtaken by events in that Mr. Kempkes has since relinquished his shares in the 2nd plaintiff and is not a mandated signatory nor director of the 2nd plaintiff. Further, that the 1st plaintiff is fully aware of the information shared with Mrs. Schaar.
53. That on the prayer for damages, the plaintiff did not provide any evidence during hearing that he had been unable to enter into business deals in Germany. Further, that it is settled law that damages are not awarded for breach of contract.
54. Finally, that costs follow the event and under section 27 of the *Civil Procedure Act*, the court has discretion to award costs to the successful party. That, as the plaintiffs dragged the 1st defendant into court, over misapprehension of contractual terms they were well aware that a mandated signatory has powers to appoint an agent, the plaintiffs should pay for costs. Furthermore, the plaintiffs' claims were without an iota of evidence that the 2nd plaintiff suffered loss. As such the suit be dismissed with costs.
55. At the close of the case, I have considered the evidence adduced before the court and I find that the key issues that have crystallized for determination are whether:
 - a. The plaintiffs have the locus standi to institute the suit.
 - b. The plaintiffs have adduced adequate evidence to prove their case.
 - c. Whether the orders sought should be granted.
 - d. Who should bear the costs of the suit.
56. As regards the 1st issue, I find that a company is a legal entity separate from its shareholders as well articulated in the case of; *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 where Lord Macnaghten affirmed the separation between the corporation and its members in the following words:

“The company is at law a different person altogether from its subscribers to the memorandum and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the Act.”
57. In deed upon incorporation, the company can sue and be sued in its own name. In that regard the 2nd plaintiff herein is recognized as a legal entity separate from the 1st plaintiff. It can sue and be sued in its own name.



58. However, the question is whether the suit herein is properly instituted by the plaintiffs. As a requirement of law, for a suit filed on behalf of the company to be properly before the court, a resolution must be passed by the company authorising its institution.
59. Similarly, the verifying affidavit must be sworn by an authorized person in compliance with the provisions of; Order 4 rule 1 (2), (4) and (6) of the [Civil Procedure Rules, 2010](#), which provides inter alia that:
- (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.
 - (4) 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.
 - (6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.

60. On that issue, the Court of Appeal in [Spire Bank Limited v Land Registrar & 2 others](#) [2019] eKLR thus stated:

“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.”

61. In the same vein, this court stated in the case of; [Yussuf Abdi Adan & another v Hussein Ahmed Farah & 3 others](#) [2017] eKLR on the same issue that: -

“21. ---The general principles of Company law are well established that, a Company is an association of persons formed for the purpose of some business or undertaking which has a legal personality separate from that of its members. That legal personality of a limited liability company is that it acquires its own property, rights and liabilities separate from its members upon incorporation. The centuries-old case of Salomon Vs. Salomon Company Limited [1895-99] All ER 33 laid that principle to rest. While Companies are owned by their members, the shareholders, they are managed by a Board of directors. The duties owed by the Board are fiduciary in nature and are owed to the Company rather than the shareholders. There is also no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to the Company is the company itself. That was established over 100 years ago in Foss vs. Harbottle (1843) 67 ER 189 (the Foss case), popularly referred to in company law as “the rule in Foss Vs. Harbottle”. The rule was restated by



Jenkins L. J. in the case of Edwards Vs. Halliwell (1950) All ER 1064 as follows:

“The rule in Foss-vs.-Harbottle, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie to the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

22. The Halsbury’s Laws of England/Fourth Edition at page 429 stipulates that;

“A company, not being a physical person, can only act either by resolution of its members in general meeting, or by its agents. It is not the agent of its member and a member as such is not the agent of the company, the company being a separate entity or legal person apart from its members, who are not even collectively, the company”.

62. It suffices to note that the principle in *Salomon vs Salomon & Co. Limited* is embodied in section 19 of the *Companies Act* No 17 of 2015 which provides that;

“From the date of incorporation mentioned in the Certificate of Incorporation, the subscribers to the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the company in the event of its being wound up as is mentioned in this Act”.

63. Similarly, section 18(4) of the *Companies Act* No 17 of 2015 Laws of Kenya states;

“ A Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with and that the association is a company authorized to be registered and duly registered under this Act”.

64. The question is this: did the 1st plaintiff have authority to institute this suit on behalf of the 2nd plaintiff? It is clear that there was no requisite resolution. The plaintiffs filed and produced a document entitled; “authority to act” signed by one director and one secretary of the company. It is noteworthy the document is signed in the year 2019, when the suit was filed in 2016. Even then the question is; can a company that has two directors pass a resolution by one director and one secretary. The answer is obviously in the negative.



65. Indeed, the plaintiffs were aware of the need to file a resolution when they argued that, “the preliminary objection is premature and ill-informed because the plaintiffs still have room to seek for permission to institute a suit” but later withdrew the application seeking for leave or permission to commence and prosecute the suit.
66. It is the finding of the court that, in the absence of a resolution of the board authorizing institution of the suit on behalf of the 2nd plaintiff Company, the 2nd plaintiff is not a party to this suit and the natural consequence is that 2nd plaintiff is struck out from the plaint. That similarly collapses the matter herein.
67. In that respect, the court in the case of; *Airways Ltd Vs Bowen & Another* (*supra*) stated that: -
- “There could not be a clearer case than the present, once it had been conceded that the action was and remained improperly constituted and brought without authority. In those circumstances the Judge should have granted this Application at once, with the effect that the action would necessarily have come to an end. Nothing else was open to him on the facts of this case”.
68. Be that as it were, even if the court were to venture into the matter on an academic exercise or on merit, the matter herein, involves a banker-customer contractual relationship. In that case the duties of the bank towards the customer were well articulated in the case of; *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110
69. The main duties applicable herein relate to inter alia, the duty to comply with the customer’s mandate. This mandate refers to the original mandate completed when the customer opened the account and other various documents interpreted as mandate for example, standing orders and direct debits.
70. The other most relevant duty herein is the duty to keep its customer’s dealings confidential as held in the celebrated case of *Tournier vs National Provincial Bank* (1924) and failure to do so will make the bank to compensate the customer for any damage or loss suffered. This duty is the cornerstone of the relationship as it is based on the trust between the parties.
71. However, the duty is not absolute, that is to say, there are times when the bank will disclose its customer’s confidential information. In that regard, there are four main exceptions to the rule in *Tournier* namely:
- a. With implied consent of the customer, for instance in the case of an inquiry from another bank and an opinion is given. By the customer giving the details of his account to the inquirer; a credit card company or a supplier, the customer has in fact intended that the inquirer write to the bank to obtain an indication of the credit worthiness of the customer; or a guarantor who makes an inquiry on his/her liability.
 - b. Compulsion of law: Usually under a statute for example, the *Evidence Act* and taxation legislation. However, the authorities seeking for the information must have a reason for the information. They cannot be on a “fishing expedition” as held in *R vs Nottingham Justices ex parte Lynn* (1984). However, the bank must be served with a court order.
 - c. Disclosure in the bank’s interest, for example where the bank is suing for recovery of a debt or protecting its reputation as held in the case of; *Sunderland vs Barclays Bank* (1938).



- d. Disclosure in the public interest and the classic example thereof is where the disclosure is to protect to large public interest in cases where the public is exposed to danger either the account is being used for terrorist activities, money laundering and/or any other vice that will endanger the public.

72. The question is; was there a breach of the duty of secrecy? Assuming there was a breach of confidentiality what remedies are available to the plaintiffs. For a remedy to be awarded the plaintiffs must prove loss. In the instant matter the plaintiffs allege that they lost business in Germany and the 1st plaintiff was embarrassed and/or character assassinated.
73. However, there was no thread of evidence adduced to prove the financial loss suffered. It is trite law he who alleges proves. Therefore, even if there was a valid case before the court, no damages would be awarded in the absence of proof of loss or harm suffered.
74. Finally, should the court grant the prayers sought. As rightfully observed the directorship of the company has changed and the impugned director has left the company and therefore the prayers 1 and 2 have been overtaken by events. Similarly, damages cannot be granted for want of a competent suit and/or proof of loss.
75. In conclusion the suit against both defendants is struck out for being incompetent and/or for lack of merit. The costs follow the event. The costs are awarded to the 1st defendant who defended the suit.
76. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 7TH DAY OF MARCH 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Ouma for the Plaintiff

Kidata for the 1st Defendant

No appearance for the 2nd Defendant

Ms Ogutu: Court Assistant

Page | 7

