



Business Partners International Kenya (II) Limited v Otundo & another (Commercial Case E034 of 2022) [2023] KEHC 18028 (KLR) (Commercial & Admiralty) (15 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE E034 OF 2022
DO CHEPKWONY, J
MAY 15, 2023**

BETWEEN

BUSINESS PARTNERS INTERNATIONAL KENYA (II) LIMITED ... PLAINTIFF

AND

BERNARD ONKUNDI OTUNDO 1ST DEFENDANT

LILIAN BONARERI ABUGA OTUNDO 2ND DEFENDANT

RULING

1. As per the directions issued on 30th March, 2022, the proceedings and ruling in this case (being HCCC No.E034 of 2022) to apply to HCCC No.E033 of 2022, where the cause of action and parties are similar as the ones in this case.
2. The ruling is in respect of a Notice of Preliminary Objection dated 18th February, 2023 which was filed by the Defendants in opposition to the Plaintiff's suit filed vide a Plaint dated 6th December, 2021 in which the prayers sought are:
 - a. Judgment be entered against the 1st and 2nd Defendants jointly and severally in the sum of Kshs.80,340,040.71.
 - b. Interest on (a) above at the rate of 13%per annum from 15th November, 2021 until payment in full.
 - c. Costs of the suit.
3. The said Notice of Preliminary Objection has raised the following grounds:-
 - a. That the Plaintiff's suit is fatally defective and bad in law as it offends the provisions of Order 4 rule 11(4) of the Civil Procedure Rules, 2010.



- b. That the Plaintiff's suit was filed without due authority from the Plaintiff's Company.
 - c. That there is no resolution or valid resolution of the Plaintiff Company approving the institution of this instant suit.
 - d. That there is no resolution or valid resolution of the Plaintiff Company appointing C. M. Advocates LLP to institute this suit for and on behalf of the Plaintiff Company.
 - e. That the filing of the instant suit by the aforesaid Firm of Advocates is invalid for want of authority.
 - f. That the Plaintiff Company did not authorize Michael Muthengi to swear the Verifying Affidavit.
 - g. That the entire suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process hence a good candidate and striking out with costs.
4. On 2nd June, 2021, the parties were directed to dispose of the Notice of Preliminary Objection dated 8th February, 2022 by way of written submissions. The Applicant's submissions are dated 5th June, 2022 while the Respondents' are dated 6th July, 2022.
 5. In its submissions, the Plaintiff has stated that the Verifying Affidavit accompanying the Plaint which was sworn by Michael Muthengi is incompetent and fatally defective as it has not adhered to the mandatory provisions of Order 4 Rule (1)(4) of the Civil Procedure Code by failing to attach a written authority or resolution to confirm that he was a duly authorized officer by the Company to depone to the facts herein under its seal. According to the Defendants/Applicants, although Sections 1A and 1B of the *Civil Procedure Act* and Article 159(2)(d) of the *Constitution* provide for the administration of justice without undue disregard to the procedural technicalities, litigants should not be encouraged to use these provisions as a panacea to all irregularities and procedural technicalities. The Defendant has relied on the provision of Order 4 Rule 1(4) and (6) of the *Civil Procedure Rules*, Order 2 Rule 9 of the same *Rules* and various authorities in support of its objection.
 6. In opposition, the Respondents who are the Plaintiffs herein submitted that the Notice of Preliminary Objection dated 18th February, 2023 is ill-conceived, unmerited and does not satisfy the required legal threshold set, but is an uncanny attempt at delaying the expeditious determination of the dispute herein. According to the Respondents/Plaintiffs, the grounds of objection as raised are questions of fact and cannot dispose of the suit contrary to the objective for a Preliminary Objection as set out in the case of *Mukisa Biscuits Manufacturing Company v West End Distributors Ltd* [1969]EA 696. It is the Plaintiffs'/Respondents argument that failure to file authority to act/sue at the time of filing a suit is not fatal as the same may be filed any time before the suit is set down for hearing.

Analysis and Determination

7. Having considered the arguments advanced by the parties herein with regard to the grounds raised in the Notice of Preliminary Objection to the Plaint filed herein, the court finds that the following issue arise for determination;-
 - a. Whether the Plaintiff's suit offends the provision of Order 4 Rule 1(4) of the *Civil Procedure Rules*, hence fatally defective and bad in law, hence should be dismissed?
8. It is trite that a Preliminary Objection should be raised on points of law which have been pleaded or which arise by clear implication out of the pleaded and which if argued as preliminary point may dispose of the suit. Order 2 Rule 15 of the *Civil Procedure Rules* provides:-



- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - a. it discloses no reasonable cause of action or defence in law; or
 - b. it is scandalous, frivolous or vexatious; or
 - c. it may prejudice, embarrass or delay the fair trial of the action; or
 - d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.
 - (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
 - (3) So far as applicable this rule shall apply to an Originating Summons and a Petition.
9. And indeed, Sir Charles Newbold in the erudite excerpt ratio decidendi in the case of *Mukisa Biscuits Manufacturing Company v West End Distributors Ltd* [1969] EA 696 noted thus:-
- “..... The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”
10. In this case, the Defendant seeks to have the Plaintiff dated 16th December, 2021 and filed by the Plaintiff struck out for being incompetent and fatally defective as it offends the mandatory provisions of Order 4 Rule 1(4) of the [Civil Procedure Rules](#) which provides 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”.
11. According to the Defendant, the person who purported to have sworn the Verifying Affidavit on behalf of the Plaintiff Company has not provided proof of their authority under the Company Seal, which is a procedural irregularity that cannot be cured by the provisions under section 1A and 1B of the [Civil Procedure Act](#) and Article 159(2)(b) of the [Constitution](#) on the need to administer justice without undue regard to procedural technicalities.
12. The Plaintiff on the other hand behoves that the Grounds of Objection raised by the Defendant are questions of facts in dispute and cannot dispose of the Plaintiff herein without a judicious determination of the issues in contestation. It is the Plaintiff's contention that the Preliminary Objection is ill-conceived and only meant to delay, obfuscate and detract the due trial of the suit herein as such authority may be filed at any time before the suit is set down for hearing and not necessarily at the time of instituting the suit.
13. The Plaintiff is a Company registered under the [Companies Act](#), hence falls within the ambit of Order 4 Rule 1 Sub-rule 4 which provides for corporations, which under Section 2 of the Companies Act, 2015 is defined as “a body corporate to include a firm that is a legal person under the law by which it is governed”.



14. Indeed, the Plaintiff is a Company registered under the Companies Act, hence governed by the provisions of Order 4 Rule 1 Sub-rule 4 which requires a Verifying Affidavit by it to be sworn by its officer duly authorized under the Company seal.

Order 4 Rule 1(6) of the *Civil Procedure Rules* provides:-

- (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.

Order 2 Rule 15 of the same *Act* provides:-

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- e. it discloses no reasonable cause of action or defence in law; or
 - f. it is scandalous, frivolous or vexatious; or
 - g. it may prejudice, embarrass or delay the fair trial of the action; or
 - h. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.

15. I have perused the Verifying Affidavit accompanying the Plaint and confirm that I was sworn by Mr. Michael Muthengi who deponed that he was a duly authorized officer of the Company but no written authority or resolution has been provided by the Plaintiff/Respondent to confirm this. However, in determining whether or not to strike out the Plaintiff's suit as per the provisions of Order 4 Rule 1(6), this Court has placed reliance on the case of *Spire Bank Limited v Land Registrar & 2 Others* [2019]eKLR, which it finds is not distinguishable from the instant matter. In this case, court elaborated on the said provisions 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”.

16. Hinging on this decision of the Court of Appeal, it is clear that the burden of proof to confirm that Michael Muthengi is not duly authorized to depone the Verifying Affidavit shifts to the Defendant/Applicant. It is worth-noting that while it has sought for the Plaint to be struck out, the Applicant has not provided evidence that the said Michael Muthengi was not a duly authorized officer of the Plaintiff Company.



17. Further, in the case of *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another* [2015]eKLR, the Court of Appeal had this to say:-

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it. It was therefore sufficient for the deponents to state that “they were duly authorised.” It was then upto the appellants to demonstrate by evidence that they were not so authorised.”

18. It is also worth of note that the matter herein is still at the pre-trial or case management stage hence the court would be acting on apprehension if it entertains the invitation to strike out the Plaintiff.

19. In view of the foregoing consideration of the law as appreciated by the Court of Appeal in the cited authorities, even though the Respondent has not provided any written authority or Company Resolution to confirm that Mr. Michael Muthengi is duly authorized by the Company as required by the law, the same does not go to the core of the suit to be extend of invalidating the same at this stage.

20. In conclusion, this Court finds that the Notice of Preliminary Objection dated 18th February, 2022 is unmerited and proceeds to dismiss the same on the following terms:-

- a. The suit herein is stayed pending its ratification through a written authority or Company Resolution.
- b. The Respondent to file and serve written authority or Company Resolution by the Plaintiff Company within 21 days from the date of this ruling.
- c. Each party to bear its own costs.
- d. Mention on 7th June, 2021 for parties to confirm compliance and take further directions before the Deputy Registrar of the Commercial Division.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIS 15TH DAY OF MAY , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Mwangi counsel for Plaintiff/Respondent

Court Assistant – Mwenda/Sakina

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