



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAKURU

ELC CASE NO. 147 OF 2019

RAYMARK LIMITED.....PLAINTIFF

VERSUS

JOHN LOKORIO.....DEFENDANT

R U L I N G

1. The Notice of Preliminary Objection dated 20th February 2021 and filed on 24th February 2021 was brought by the defendant on the following grounds:

1. That at the inception of this suit No resolution or any valid resolution of the plaintiffs board was filed contemporaneously with the filing of this case, sanctioning or authorizing the institution of this case, and or appointing the firm of Ashitiva Advocates LLP to file and prosecute this case and/or nominating and authorizing Joseph Njore Karanja to swear the verifying affidavit and any other depositions in support of the plaintiff's case for and behalf of the plaintiff company.

2. That the suit as filed is incompetent and a ripe candidate for the inevitable result of being struck out.

2. The preliminary objection was canvassed by way of written submissions. The defendant in his submissions dated 10th July 2021 submitted that the preliminary objection is based on the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules. He relied on the cases of *Ibacho Trading Company Limited v Samuel Aecha Ondora & 3 others [2017] eKLR*, *Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR* and *Directline Assurance Company Limited v Tomson Ondimu [2019] eKLR* and submitted that there was no company board resolution under the seal of the plaintiff company filed with the verifying affidavit authorizing the institution of the suit and hence the suit was fatally defective. He prayed that the preliminary objection dated 20th February 2021 be allowed.

3. The plaintiff in their response submissions argued that the resolution of the board of directors of a company may be filed at any time before the suit is fixed for hearing and it was not mandatory that the resolution be filed at the inception of the suit. The plaintiff further argued further that the present suit is yet to be fixed for hearing and given a chance, it will file the resolution if need be.

4. The plaintiff relied on the cases of *Fidelity Commercial Bank Limited v Simon Maina Gachie [2016] eKLR* and *Republic v Registrar General & 13 others [2015] eKLR* among other cases and submitted that the plaintiff was not bound to file the board resolution at the time of filing the suit and could do so at any time before the suit was heard.

5. The defendant's preliminary objection is founded on Order 4 Rule 1(4) of the Civil Procedure Rules and consequently is on a point of law and hence satisfies the threshold established in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696* as to what constitutes a preliminary objection. In the case *Sir Charles Newbold, P* stated as follows:-

“--- 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

6. The defendant is seeking that the suit to be struck out on the ground that the plaintiff did not comply with the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules 2010 to the extent that no resolution was filed appointing the firm of Ashitiva Advocats LLP to file the present suit and authorizing Joseph Njore Karanja to swear the verifying affidavit.

7. Order 4 rule 1(4) 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.’

8. The plaintiff describes itself as a limited liability company and therefore the deponent of the verifying affidavit ought to annex the authority as provided for under Order 4 Rule 1(4) of the Civil Procedure Rules.

9. In the case of **Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR** Odunga, J was in agreement with the decision of Kimaru J in the case of **Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** where the court stated:-

“...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.”

10. The Court of Appeal in the case of **Spire Bank Limited v Land Registrar & 2 others [2019] eKLR** also stated 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.”

11. In the present matter the plaintiff at the time of filing the plaint on 28th November 2019 also filed a letter of authority attached to the bundle of documents dated 18th November 2019 appointing and authorizing Joseph Njore Karanja to execute all documents including any verifying affidavit and/or supporting and replying affidavits and witness statements. This letter was under the letter head of the plaintiff company and was duly executed under seal in the presence of two directors of the plaintiff. In the premises there cannot be any doubt that Joseph Njore Karanja was authorized to plead on behalf of the plaintiff and that the verifying affidavit accompanying the plaint was properly signed by him.

12. Although the said letter of 18th November 2019 was strictly not in the form of a resolution of the Board of directors, it is clear evidence that the directors of the company had authorized the suit to be commenced and had appointed Joseph Njore Karanja, a director of the company to represent the company.

13. Having found that the company (plaintiff) had indeed authorized the filing of the suit, the mere fact there was no board resolution that was filed together with the plaint sanctioning the filing of the suit cannot render the suit fatally defective, See **Leo Investments Ltd -vs- Trident Insurance Co. Ltd** (supra) where Odunga, J held that failure to file a resolution authorizing filing of the suit does not invalidate the suit as the defect can be rectified by filing the resolution before the suit was heard. To hold otherwise would be to elevate procedural technicalities to a point where they would be an impediment to the administration of justice. Article 159 (2) (d) of the constitution which section 19(1) of the Environment and Land Court Act, 2011 echos, enjoins the court to administer justice expeditiously and without undue regard to technicalities of procedure.

14. In the present matter the plaintiff on 28th September 2021 filed the resolution of the plaintiff under seal authorizing the filing of the suit and appointing the Law firm of Ashitiva Advocates LL.P to represent them. Though the Resolution was filed after the preliminary objection had been taken, it had the effect of rectifying any defects in the suit for want of a resolution authorizing its filing. Various courts have held such a resolution can be filed at any time before the hearing of the case. The preliminary objection was intended to bar the plaintiff from making amends to any omissions that may have occurred in the institution of the case. I would opine that just as parties are permitted to amend their pleadings in the course of the proceedings, a party ought to also be permitted to correct a misstep in the procedure adopted in the institution of the suit when no prejudice and/or injustice is occasioned to the opposing party. The significance of a board resolution authorizing the filing of a suit by a corporate entity is to ensure that they do not have unauthorized persons instituting suits on behalf of companies in respect of which the companies may have no knowledge about yet when liabilities ensue they would be expected to shoulder the same.

15. The resolution by the plaintiff though filed after the preliminary objection was taken is properly on record as it was filed before the suit was set down for hearing. The preliminary objection is not sustainable and I dismiss the same with costs to the plaintiff.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF DECEMBER, 2021

J M MUTUNGI

JUDGE