



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 25 OF 2019

EYE COMPANY (K) LIMITED.....APPELLANT

VERSUS

ERASTUS ROTICH T/A VISION EXPRESS.....RESPONDENT

(Being an appeal from the judgment of Honourable F. MUNYI CM,

delivered on 25th January, 2019 in Nakuru CMCC No. 94 of 2015)

JUDGMENT

1. This appeal arises from a suit filed in respect to an agreement between the appellant and the respondent for supply of ophthalmic goods for use at respondent's business in Nakuru and Eldoret branches in consideration for payment on demand. The plaintiffs claim was for Kshs. 271, 452.50 which remained outstanding as at 31st January, 2014 to date.

2. After hearing, the trial court dismissed the suit with costs on ground that it was fatally defective for lack of resolution by the company to authorize institution of suit.

3. The plaintiff/appellant being dissatisfied by the said orders, filed this appeal seeking reversal of the judgment/decree and in its place a substitute a decree allowing the appellant's claim or review of the same upon terms that are just and in consonance with the evidence adduced before the trial court. Grounds of the appeal are as set out hereunder: -

i. ***THAT*** the learned trial magistrate erred in law and in fact in dismissing the appellant's suit solely on the ground that there was no resolution instructing the Appellant's advocates to commence legal proceedings against the Respondent for the recovery of monies due to the appellant when there was neither an issue in the case nor was it relevant.

ii. ***THAT*** the learned trial magistrate erred in law and in fact in holding that the appellant had not validly commenced proceedings against the Respondent which was not an issue pleaded nor canvassed in the proceedings.

iii. ***THAT*** the learned trial magistrate erred in law and misdirected herself fundamentally in dismissing the Appellant's claim by giving undue regard to procedural technicalities at the expense of substantive justice.

iv. ***THAT*** the learned trial magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence adduced.

4. This appeal proceeded by way of written submissions.

APPELLANT'S WRITTEN SUBMISSIONS

5. The appellant submitted that this court has unfettered jurisdiction to reanalyze both the facts and the law presented in the trial court being the first appellate court and cited the case of **John Teleyio Ole Sawoyo v David Maobe [2013] eKLR** and **Selle vs. Associated Motor Boat Co. [1968] EA 123** and the case of **Ephantus Mwangi & Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] IKAR 278**.

6. In submitting on grounds one and two of the appeal, the appellant submitted that all parties are bound by their pleadings and the issue of no resolution to institute the suit by it was never in question; the appellant submitted that the court ought not to have directed itself to what

was not pleaded nor evidenced and quoted the book titled **Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (the Common Law Library No. 5)** as quoted with approval by the Supreme Court of Malawi in **Malawi Railways Limited v Nyasulu [1998] MWSC 3**.

7. The appellant further submitted that Article 165 (6) and (7) **Constitution of Kenya 2010** give the High Court supervisory jurisdiction of the High Court over subordinate courts and further **sections 1A and B of the Civil Procedure Act** provides that striking out of the pleadings was the last resort and urged this court to look into the substance and merits of the case.

8. On ground three, the appellant submitted that the trial magistrate did not consider and/or look into the substance of the evidence on record when making a finding in the primary suit and the decision was based on mere technicality.

9. The appellant further submitted that **Article 159 (2) (d) of the Constitution** requires courts to administer justice without undue regard to procedural technicalities and cited the cases of **Kenya Ports Authority v Kenya Power & Lighting Co. Limited [2012] eKLR** and **James Murithi Ngotho & 4 others v Judicial Service Commission [2012] eKLR** where both decisions substantively held that procedural technicality is a lapse in form that does not go to the root of the suit.

10. The appellant further submitted further that **section 128 of the Companies Act** provides that a private company is required to have at least one director and the managing director being the owner of the appellant had capacity to institute the proceedings in the company's name and failure by the appellant to file a resolution did not wish away the substance of the case and justice and cited the case of **Leo Investments Ltd v Trident Insurance Company Ltd [2014] eKLR**.

11. Lastly, on ground 4 the appellant submitted that the trial court ought to have determined whether there existed a contractual relationship between it and the respondent, whether the appellant supplied the ophthalmic goods, whether it had proved its case on a balance of probability and whether it was entitled to the reliefs sought.

12. The appellant concluded by submitting that adduced evidence which was not challenged; that it produced documents in support of its claim and further testified that the goods were delivered to the respondents the same remained unpaid.

13. The appellant urged this court to evaluate evidence adduced before the trial court and set aside the judgment dated 25th January, 2019 and replace with a judgment in appellant's favor.

RESPONDENT'S WRITTEN SUBMISSIONS

14. On whether the lack of a resolution of the company allowing the institution of the suit was fatal, the respondent submitted that PW1 admitted that there was no resolution authorizing him to swear an affidavit on behalf of the company and submitted that a company is an artificial person and cannot therefore act by itself; that it is a separate entity which conducts its business through agents and cited the case of **Thome Farmers Company No. 4 Ltd v Farm of Faith Investors Limited [2019] eKLR**.

15. On whether the trial magistrate misdirected herself in regarding the technicality the respondent submitted that the procedures set by law that a company cannot transact without the resolutions having been made and without resolution, the court cannot proceed to entertain the suit as it cannot be demonstrated that the action would be binding on the company as it might disown the suit for no authorization.

16. The respondent submitted that **Article 159 of the Constitution** did not accord parties a lee way for parties to flaunt procedure and this court to dismiss the appeal with costs in its favor.

ANALYSIS AND DETERMINATION

17. This being the first appellate court, I am required to reevaluate evidence adduced before the trial court and make an independent determination. This I do with the knowledge that unlike the trial court, I did not get the benefit of taking evidence first hand and observe the demeanor of witness. For this reason, I will give due allowance. The principles guiding the first appellate court were set out in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

18. In view of the above, I have perused and considered evidence adduced before the trial court and submissions filed and consider the following as issues for determination: -

- i. Whether failure to file or obtain authority to file suit was fatal to plaintiff's/appellant's case
- ii. If answer to issue 1 is not in the affirmative, whether the appellant/plaintiff proved its case on a balance of probabilities.

i. Whether failure to file or obtain authority to file suit was fatal to plaintiff's/Appellants case

19. Order 4 rule 1(4) of the civil procedure Rules provide as follows: -

“1(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.”

20. It has not been disputed that at the time of filing suit in the lower court, resolution to institute suit was not filed. The question that follows is whether that failure is fatal to appellant's suit? In **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000** the court held as follows: -

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

21. There is no doubt a resolution is required which I believe as shown above, is intended to address situations where some persons drag the company to court and bind the company on issues litigated yet members of the company have not sanctioned their action. The requirement is therefore intended to protect the companies from unauthorized court processes. From the above, it is evident that the omission can be ratified after the suit has been filed. The authorization is to assure court that the company is properly in court and it is not an action of unauthorized members/individuals.

22. In the case of **Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR Odunga J.** found that the mere failure to file the resolution of the Corporation together with the Plaintiff did not invalidate the suit and the associated himself 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 held as follows:-

” ...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.”

23. In the case of **Spire Bank Limited v Land Registrar & 2 others [2019] eKLR** the Court of Appeal 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.”

24. In view of the above, it is clear that it was sufficient for the authorized person to depose that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority.

25. In the instant case, I note that the trial magistrate relied on failure to file authority in dismissing the suit. However, on perusal of the pleadings. I note that the issue of failure to file resolution on authority to file suit was not raised in defence dated 18th February 2015. The issue has been raised in submissions; if this issue had been raised in defence or if the defendant had filed preliminary objection, I believe the plaintiff would have addressed the court on it. In my view parties should be bound by their pleadings.

26. From the foregoing, it is my considered view that the trial magistrate misdirected himself in dismissing the suit on technicality not raised in parties' pleadings.

(ii) If answer to issue 1 is not in the affirmative, whether the appellant/plaintiff proved its case on a balance of probabilities.

27. The defendant denied existence of contract with the plaintiff. The plaintiff however produced documents to prove that goods were supplied to the defendant. Payments were done leaving a balance of Kshs. 271, 452.50 the amount claimed herein being balance owing as at 31st January, 2014.

28. The defendant never adduced any evidence to controvert evidence adduced by the plaintiff.

29. From the foregoing, on a balance of probabilities, the plaintiff proved existence of a contract with the defendant and further proved amount owing as shown by documents filed.

30. In view of the above, I find the appeal is merited and proceed to allow it with costs to the appellant.

31. FINAL ORDERS

- 1) **The appeal herein is hereby allowed.**
- 2) **Judgment is entered for the plaintiff against the defendant for Kshs. 271, 452.50**
- 3) **Interest on 2 above to be paid at courts rate from the time of filing this suit in the lower court.**
- 4) **Costs of trial court & appeal to be paid to the appellant/plaintiff.**

Judgment dated, signed and delivered via zoom at Nakuru

This 22nd day of **July**, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Mr. Muriithi holding brief for Kisila for Appellant

Mr. Oumo for Respondent