



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**HIGH COURT CIVIL APPEAL NO 46 OF 2020**

**APA INSURANCE CO. LIMITED.....APPELLANT**

**VERSUS**

**RANGI MBILI AUTOSPARES LIMITED.....RESPONDENT**

*(Being an appeal and Judgment of the Honourable Chief Magistrate Hon. Nathan Shiundu Lutta*

*delivered on 22<sup>nd</sup> July 2020 in Chief Magistrate's Court Civil suit No. 612 of 2016 at Kisii)*

**JUDGMENT**

1. The suit against the defendant (appellant) in the lower court was that on 12<sup>th</sup> March 2013 the defendant instructed the plaintiff (respondent) to repair motor vehicle registration mark KAV 211 Toyota Land cruiser insured with Telkom Kenya Limited under policy number xxxx. The respondent averred that in carrying out the repairs it incurred Kshs 544,562/-. The respondent claimed that it was a term of the contract that upon completion of the repairs the motor vehicle would be released to the appellant. The respondent issued the appellant with an invoice claiming for payment of its services but the appellant neglected to pay the sum due. The respondent's claim against the appellant in the lower court was for Kshs 544,562/-, costs of the suit, together with interest thereon.

2. In its statement of defence dated 18<sup>th</sup> November 2016, the appellant denied having a contract with the respondent. Although the appellant admitted that the plaintiff carried out the said repairs, it averred that the amount was mutually agreed as between the appellant and the respondent to offset against premiums for various covers issued to the respondent. The appellant therefore advanced that it did not owe the respondent any money.

3. In the lower court, the Hon Magistrate stated that there existed a contract between the parties and the appellant breached the terms of the said contract. The said Magistrate then went ahead to find that the respondent was entitled to damages in the sum of Kshs 544,562/-, costs and interest.

4. The appellant being dissatisfied by the decision of the trial Magistrate filed a memorandum of appeal on 18<sup>th</sup> August, 2020, raising the following grounds of appeal:

*1. That the learned trial magistrate erred in law when he failed to appreciate and/or hold the suit as mounted was fatally defective for want of the mandatory resolution by the Plaintiff/Respondent authorizing the commencement and/or filing of the suit, to both the directors ad Counsel, as prescribed under the mandatory provisions of Order 4 Rule 2 (4) of the Civil Procedure Rules and Order 9 Rule 2 (c) of the Civil Procedure Rules.*

*2. The Learned Trial Magistrate erred in law when the same failed to appreciate that Resolution to commence and/or prosecute the suit was the lifeline of the claim before him and was condition precedent whereupon the Respondent was bound to prove or establish sections 107, 108, 109 and 112 of the Evidence Act, Cap 80 Laws of Kenya.*

*3. The learned trial magistrate erred in law by entering judgment in favour of the Respondent whereas the suit was for dismissal insofar as the Respondent failed to discharge the burden placed upon its shoulder by as, which were substantive issue of law which could not be disregarded or overlooked.*

*4. The learned trial magistrate erred in law by excusing an illegality and sustaining he suit which was otherwise bad in law.*

5. The appellant's prayer is for the appeal to be allowed and for this court to set aside the Judgment delivered by the Hon. Magistrate N.S Lutta and this court to enter Judgment for the appellant.

6. This appeal was canvassed by way of written submissions. On 25<sup>th</sup> June, 2021, the law firm of O.M.Otieno & Co. Advocates filed written submissions on behalf of the appellant. The respondent's submissions were filed on 9<sup>th</sup> July 2021 by the law firm of Khan & Associates.

7. The appellant's Counsel submitted that their appeal raises the issue concerning the suitability or competence of the respondent's claim without the resolution of the plaintiff as provided by the mandatory provision of **Order 4 Rule 2 (4) of the Civil Procedure Rules**. The appellant relied on the decisions of **Steel Formers Limited v SGS (Kenya) Limited & another (2020) eKLR** and **Ibacho Trading Company Limited v Samuel Aencha Ondora & 3 Others [2017] eKLR** in support of its case.

8. The respondent's Counsel submitted that Order 4 Rule 1(4) and **Order 9 Rule 2 of the Civil Procedure Rules** was meant to protect corporate bodies from unauthorized persons who may bring suits in the name of the company to the detriment of the company or its shareholders. It was argued that the provisions do not state that the resolutions must be produced in court if in doubt of the authority of a director. The respondent cited the case of **Leo Investment Limited v Trident Insurance Company Limited [2014] eKLR** and **Private Development Co. Ltd v Rebecca Ngonyo & 2 Others [2018] eKLR**.

9. I have considered the appeal, submissions and authorities relied on. I have also considered the impugned judgment and read the trial court's record. As this is a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions in the matter. (*See Selle -vs- Associated Motor Boat Co. [1968] EA 123*)

10. The appeal raises only one issue for consideration, that is, what is the effect of the failure to adduce resolution by the respondent/Plaintiff company authorizing the commencement of civil proceedings. In regard to suits instituted by companies by way of plaint, **Order 4 rule 1(4)** provides 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."*

11. The appellant heavily relied on the case of **Ibacho Trading Company Limited v Samuel Aencha Ondora & 3 others (supra)** where the court considered that the failure to file the company resolutions authorizing the filing of a suit is fatal. In that case the court while considering whether the filing of the suit was under the authorization by the plaintiff company where no resolution of the company had been filed authorizing the filing of the suit found that such a failure dealt a fatal blow to say their case.

12. The court of Appeal in **Spire Bank Limited v Land Registrar & 2 others [2019] eKLR** while considering the effect of the failure to produce board resolution sanctioning the commencement an action by a company, held that:

*"Clarifying the position on the question of authorization in the case of Makupa Transit Shade Limited & Another vs Kenya Ports Authority & Another [2015] eKLR this Court stated thus;*

*"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 authorized by it. It was therefore sufficient for the deponents to state that "they were duly authorized." It was then up to the appellants to demonstrate by evidence that they were not so authorized."*

*So that it was sufficient for the authorized person to depone 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, the onus being on the party making the allegation to prove it. A bare statement that the plaintiff or applicant was not authorized would not be sufficient.*

*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."*

13. In the verifying affidavit the Akbar Kassam Khan deposed that he was the director of the plaintiff company and competent to swear the affidavit. The respondent's failure to file resolutions permitting Akbar Kassam Khan, a Director of the company, to institute and swear the verifying affidavit on its behalf cannot be used to invalidate the complaint.

14. On the issue as to who is an authorized officer of the company, the court of appeal **Spire Bank Limited v Land Registrar & 2 others (supra)** cited with approval the decision in the case of **The Presbyterian Foundation & Another vs East Africa Partnership Limited & Another [2012] eKLR** where Odunga J held thus;

*"The Civil Procedure Rules do not define what an authorized officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavits be sworn by either the directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word "authorize" which is defined by Oxford Dictionary as "sanction"; "give authority"; "commission". That being the position, whether or not the 2<sup>nd</sup> Plaintiff was given authority to swear the verifying affidavit is a matter of evidence and cannot certainly be the subject of a preliminary objection unless the said fact is admitted."*

15. In this case the Akbar Kassam Khan in his affidavit averred that he was the director and maintained the same at the hearing of the suit. The respondent also produced into evidence Pexh 8 showing that Akbar Kassam Khan was a director at the plaintiff company. The appellant has not led any evidence to demonstrate that Akbar Kassam Khan was an unauthorized officer.

16. In the end, I find the appeal to be unmeritorious and the same is dismissed with costs.

**Dated, Signed and Delivered at KISII this 6<sup>th</sup> day of October, 2021.**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Miss Opondo For the Appellant**

**Miss Kusa For the Respondent**

**Ms. Rael Court Assistant**