



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 74 OF 2019

SOLARIS ENERGY U.S INC.....PLAINTIFF

VERSUS

TAVEZ CONNECTION LIMITED.....1ST DEFENDANT

ABEL MAKAU.....2ND DEFENDANT

NATIONAL BANK OF KENYA.....3RD DEFENDANT

R U L I N G

1. The 1st and 2nd defendant have raised preliminary objections to the plaintiff's suit.
2. Before I set out the objections I will start by reminding myself what is a proper preliminary objection. Justice John M. Mativo in the case **J. N. & 5 others v Board of Management St G. School Nairobi & Another (2017) eKLR** considered what is a preliminary objection and stated:
 12. Also relevant is the decision by **Ojwang, J** (as he then was) where he expressed himself as follows:-[3][3]

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.... 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 opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion
3. Just to repeat the one raising the objection must raise it on a pure point of law and should argue it on the assumption that the facts pleaded are correct.
4. With above in mind I am unable to grasp the objection raised that the plaint is undated and unsigned. The one in the court file, which is the relevant one to refer to, is signed by an advocate and it is dated 15th February 2019. If the pleadings served on the 1st and 2nd defendant were not signed and dated I will request the plaintiff to serve the said defendants with pleading dated and signed. Nothing therefore turn on that objection.
5. The same thing applies to the verifying affidavit in the court file – it is dated and sworn before a commissioner of oaths.
6. The 1st and 2nd defendant also objected to the plaint, herein, on the basis that it was filed without authorisation through a resolution of the plaintiff company.
7. I am not persuaded by the authorities relied on in support of this objection. The court of appeal has in the case **Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR** pronounced itself on this topic and this is what the learned judges said:

44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; **Bugerere Coffee Growers Ltd v Sebaduka & Anor** (1970) 1 EA 147. The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

45. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the **Bugerere** case has since been overruled by the Uganda Supreme court. The authority is **Tatu Naiga & Emporium vs. Virjee Brothers Ltd** Civil Appeal No 8 of 2000.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the **Bugerere** case was no longer good law as it had been overturned in the case of **United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998**. The latter case restated the law as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in **Fubeco China Fushun v Naiposha Company Limited & 11 others** [2014] eKLR.

8. Similarly the court in the case **Spire Bank Limited v Land Registrar & 2 Others** [2019] eKLR stated:

“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.”

9. It is however to be appreciated that Order 4 Rule 4 of the Civil Procedure Rules does require the verifying affidavit **“be sworn by an officer of the company duly authorized under seal of the company to do so.”**

10. The verifying affidavit in the file is not so authorized under seal. What then should be done in the light of that clear provision of the Rules. I am persuaded by the decision of Justice Ringera, as he then was, in the case **Microsoft Corporation v Mitsumi Computer Garage Ltd & another** (2001) eKLR, where the judge stated:

“The result of my consideration of the preliminary objection is that both verifying affidavits by Marilyn Lesley Pearman and Louis Otieno are ordered struck out.

The next matter for consideration is whether I should consequently strike out the suit itself. Rules of procedure are the hand maids and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed no prejudice has been alleged.

Being of that persuasion, I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit while at the same time putting right the lapses in the offending affidavit.”

11. The only error with the verifying affidavit in this matter is that, unlike as required under Rule 4 of Order 4 of the Civil Procedure Rules the plaintiff’s verifying affidavit is not authorized under seal. I will order the plaintiff, in the interest of justice, to file another verifying affidavit that is authorized under seal.

12. The defendants also raised on objection that the advocate for the plaintiff has not filed an authorisation under seal to act for the plaintiff. There is no backing of law on such requirement and therefore I reject this objection. Whether or not an advocate is authorized to act for a

company must surely be an issue that concerns the company itself and not third parties. Certainly not the court.

13. In view of the above, other than the plaintiff's needs to serve the defendants with pleadings that are dated and signed and other than that the verifying affidavit requires authorization under seal the objections fail.

CONCLUSION

14. In the end and in respect to the preliminary objection dated 2nd October 2019, the objection in regard to the provisions of Order 4 Rule 4 of the Civil Procedure Rules is upheld, the other objections are dismissed with costs. The 1st and 2nd defendants are granted costs for the one objection relating to order 4 Rule 4 of the Civil Procedure Rules.

15. The plaintiff is ordered within 30 days from today's date to file a verifying affidavit that complies with Order 4 Rule 4 of the Civil Procedure Rules. The plaintiff shall also serve to the defendant's pleadings that are dated and signed.

16. At the reading of this Ruling parties will be given a date for case management and for full hearing of this case.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19 pandemic** and in light of the directions issued by **his Lordship, the Chief Justice on 15th March, 2020**, this decision has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

MARY KASANGO

JUDGE