



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 518 OF 2011

BETHANY VINEYARDS LIMITED.....1ST PLAINTIFF

JOSEPH MUTURI KAMAU.....2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT

EQUITY NOMINEES LIMITED.....2ND DEFENDANT

PETER K. MUNGA.....3RD DEFENDANT

RULING

1. The **Notice of Motion** dated **4th September 2019** is filed by the **3rd defendant, Peter K. Munga**. The application is brought under **Order 4 Rule 1(4)** and **Order 51** of the **Civil Procedure Rules**. By that application the **3rd defendant** prays for:

“THAT the Honourable court be pleased to strike out the plaintiff’s suit and entire claim as against the 3rd defendant for want of authority from the plaintiff company to institute the suit and verify such contents as alleged.

THAT the plaintiffs have failed to comply with the orders in paragraph 25 of the Ruling delivered on the 23th November, 2017 by the Honourable justice Fred A. Ochieng and the affidavit of Joseph Muturi Kamau sworn on 27th May 2019 be struck out for non-compliance of the aforementioned orders.”

2. What triggered the present application is the verifying affidavit in support of the plaint, sworn by Joseph Muturi Kamau, the **2nd plaintiff**. That verifying affidavit was in support of both the claims by the **1st plaintiff**, a limited liability company, and by the **2nd plaintiff**. The **3rd defendant** filed an application dated **24th February 2017** by which the **3rd defendant** argued that the **1st plaintiff** company did not pass a Resolution to authorize the filing of this claim and to authorize the then law firm for the plaintiffs, namely **Amingá Opiyo Masese & company** advocates, to act in this case. The plaintiffs, in response to the application, filed an affidavit confirming that all the directors of the **1st plaintiff** had authorized the filing of the suit. Justice Ochieng by his Ruling dated **13th November 2017**, at paragraph 25, ordered the plaintiffs to prove that such authority had been given by the **1st plaintiff** company. This what the learned judge stated:

“In the interest of justice, I decline the invitation to immediately strike out the plaint filed by the company. Instead, I will, reluctantly allow the company to demonstrate, within the next 7 days that the persons who signed the Board Resolution were legitimate Directors of the company.”

3. The plaintiffs in response to the order made by Justice Ochieng filed an affidavit, on **27th May 2019**, which the **3rd defendant** argues, by this present application, was filed out of the timeline set by Justice Ochieng. The **3rd defendant** also deposed as follows:

“THAT it is already established as in the plaintiffs (sic) Memorandum and Articles of Association of the 1st plaintiff that its directors are limited companies namely: Fatima Holding limited, Consolidated Securities Limited and Nimex Limited.

Therefore, it’s a statutory requirement that the three (3) individual companies provide separate and individual Board

Resolution duly giving authority to their respective companies to authorise the 1st plaintiff to file suit.”

4. The plaintiffs in response to the 3rd defendant’s application filed a replying affidavit and deposed that the application is without merit because Justice Ochieng found that there was no reason to strike out the suit.

ANALYSIS AND DETERMINATION

5. The 3rd defendant’s application requires this court to determine two issues: that is, does the 1st plaintiff’s suit fail for lack of authority of its board of directors and what is the effect of the failure, by the plaintiffs, to file within 7days, of Justice Ochieng’s Ruling, the affidavit explaining the directorship of 1st plaintiff.

6. On the first issue identified above I respond by stating that the plaintiffs’ suit does not fail. The plaint was supported by the verifying affidavit of 2nd defendant. He deposed in that affidavit that:

“THAT I am an adult male of sound mind sufficiently familiar with the facts herein and also a director of the 1st plaintiff company duly authorized by my co-directors to swear this affidavit on their behalf, hence competent to swear this affidavit.”

7. That deposition clearly shows that the 2nd plaintiff was authorized to swear the affidavit in support of the plaint. That authority cannot be questioned by the 3rd defendant, as he seeks to do by his application. It can only be questioned by the 1st plaintiff the giver of the authority. I believe that Justice Ochieng was of a similar view because by his Ruling the learned judge stated:

“Finally, I find no reason to warrant the striking out of the 2nd plaintiff’s (sic) suit. To that extent, the application fails.”

8. This finding has found support both in the High court and in the Court of Appeal. In the high Court Justice F. Gikonyo, in the case **Fubeco China Fushun v Naiposha Company limited & 11 others (2014) eKLR**, was confronted with the same issue: that is whether a suit fails if the deponent does not disclose whether he/she is authorized by a limited liability company to file a suit. This is what the learned judge had to say.

“Need for a resolution to file affidavit and instruct an advocate.

[17] These issues that the application before the court is improper by virtue of the fact that the affidavits of Caroline Wairimu Kimemia did not disclose that she had authority to act on behalf of the Company and the other directors; and further that there was no board resolution instructing the advocate on record to act on behalf of the Defendant; apply to both applications. Let me be emphatic on this issue that, I am aware of ample decisions of the court, and I can cite an example; the case of **BUGERE COFFEE GROWERS LTS v SEBADUKA & OTHERS (1970) EA 147** where the court held that a company authorizes the commencement of proceedings by resolution of the company or by way of minutes of its board of directors. However, I find a lot of persuasion in the thread of thinking in the Ugandan case of **UNITED ASSURANCE CO. LTD v ATTORNEY GENERAL: SCCA NO.1 of 1998** where the Supreme Court of Uganda held that 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. In the case before me, Caroline Wairimu Kimemia is a director of the Defendant Company and she duly authorized the Advocates on record to commence this Application. That fact is not denied and I am surprised the person laying the objection is the Plaintiff and not the Defendant Company. The Plaintiff has also not presented any material or affidavit from the other directors denying the authority of Caroline Wairimu Kimemia as a director in the Defendant Company. As such, I do not think the Court is in any position to dispute the authority of Caroline Wairimu Kimemia or the instructions to the advocate on record to defend the interest of the company. “

9. The Court of Appeal approved that decision of the High Court, that is Fubeco China (supra), in the case **Arthi Highway Developers Limited v West End Butchery Limited & 6 others (2015) eKLR** as follows:

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.”

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10. It does become apparent that there is no requirement for a company to present a resolution of a company indicating that a company has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf nor, for that matter, confirming it has authorized an advocate to represent it. It suffices for the deponent to state that he has authority to do such act.

11. The answer to the first issue therefore is to the effect that the plaintiffs’ suit does not fail because of lack of the Resolution of the 1st plaintiff.

12. On the second issue I do find that the plaintiff did not abide with the timelines set by Justice Ochieng in his Ruling of 13th November 2017. The plaintiffs were ordered by the learned judge, by that Ruling, to file an affidavit within 7 days of that Ruling confirming that the directors who authorized the filing of the suit were directors of the 1st plaintiff. The plaintiffs filed that affidavit on 27th May 2019. That affidavit was filed 6 months later. No explanation was given by the plaintiffs why they delayed in filing the affidavit. Notwithstanding that delay there is in my view no prejudice suffered by the 3rd defendant due to that delay. I will therefore deem that affidavit as though filed within time but will order the plaintiff to pay the costs to the 3rd defendant of the application under consideration as a penalty for the late filing.

13. In the end and bearing the above discussion I hereby dismiss the application dated 4th September 2019, but the 3rd defendant’s costs of that application will be borne by the plaintiffs. The affidavit of Joseph Muturi Kamau of 27th May 2019 is hereby deemed as though filed within the time limit set in the Ruling dated 13th November 2017. I order parties to attend to the case management conference in preparation of the hearing of this case. Case Management Conference is fixed on 29th July, 2020.

ORDERS ACCORDINGLY.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of MAY, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **6th** day of **May, 2020**.

MARY KASANGO

JUDGE