



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 34 OF 2018

DIRECTLINE ASSURANCE COMPANY LIMITED.....PLAINTIFF

-VERSUS-

TOMSON ONDIMU.....DEFENDANT

RULING

1. This ruling relates to the Notice of Preliminary Objection filed by the defendant herein on 27th March, 2018 wherein the aforesaid defendant states inter alia that the suit filed by the plaintiff offends Sections 5, 8 and 16 of the Insurance (Motor Vehicle Third Party Risks) Act; that there is no valid resolution approving the institution of the suit, neither is there a valid resolution appointing the firm of MOHAMED MADHANI & CO. ADVOCATES to act for the plaintiff herein; and that the suit offends Order 2, Rule 15 (1) (a) and (d) of the Civil Procedure Rules.

2. The Preliminary Objection was disposed of through written submissions. The plaintiff in its submissions dated 25th October, 2018 argued inter alia that the preliminary objection lacks in merit since it does not raise pure points of law; that the plaint as filed is in compliance with the relevant provisions under the Civil Procedure Rules and in any case, an authority or resolution can be filed at any time prior to the hearing of the suit. Reference was made to relevant judicial precedents in this respect. Through his submissions filed on 31st July, 2018 the defendant contended that being a company, the plaintiff ought to have not only given authority for the institution of any legal proceedings but also provided a resolution appointing an advocate or firm of advocates to institute legal proceedings on its behalf. The defendant further contended that the plaint inter alia does not disclose a reasonable cause of action, is premature and an abuse of the court process.

3. I have taken into consideration the arguments enunciated in the rival submissions and wish to begin by defining the term 'preliminary objection.' The celebrated case of *Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696* presents a rather precise definition 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

4. In light of the foregoing, what emanates clearly is that a Notice of Preliminary Objection is limited purely to points of law. It therefore goes without saying that issues requiring the ascertainment of facts by way of evidence cannot be raised under the purview of a preliminary objection.

5. In this instance, the defendant is by and large challenging the validity of the suit particularly in grounds 2), 3) and 4) of his preliminary objection. To my mind and contrary to the averments made by the plaintiff, the abovementioned grounds do raise valid issues of Law and are therefore properly before this court. In finding so, I am persuaded by the Honourable Justice Havelock's reasoning in *Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR* wherein relatively similar objections were raised and to which the learned judge had this to say:

“...I do not agree with the Plaintiff as regards its submission that the Preliminary Objection is based on facts not law and is therefore improperly before this Court. In my view, all 5 grounds of the Defendant's Preliminary Objection relate to matters of procedure and have nothing to do with the facts of the case.”

6. Having determined the above, I will now address the ground raised that the suit offends Sections 5, 8 and 16 of the Insurance (Motor Vehicle Third Party Risks) Act. I have taken the time to peruse the aforesaid sections and established that they relate to insurance policies whose applicability would require this court to consider the facts of the case coupled with the evidence of the respective parties. That being the case, ground 1) of the Preliminary Objection cannot stand.

7. I shall now address my mind to whether or not the plaintiff had given the necessary authority to institute the suit. In so doing, I deem it

necessary to mention that the plaintiff in its submissions leaned toward the argument that the verifying affidavit was sworn by an authorized officer of the plaintiff company. In response thereto, it is worth clarifying that the objections raised by the defendant do not concern the verifying affidavit; rather, they touch on the institution of the suit. In the circumstances, I find no relevance in the authorities cited by the plaintiff to this effect.

8. That said, I cite with approval the case of *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014] eKLR wherein the Honourable Lady Justice Mumbi Ngugi concurred with the reasoning held in *Affordable Homes Africa Limited v Ian Henderson & 2 Others HCCC No 524 of 2004* in this way:

“that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company’s powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers...The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff.”

9. The above position was restated by Justice Havelock in *Kenya Commercial Bank Limited* (supra). Drawing therefrom, what comes out clearly is the fact that in instances of a company, the institution of a suit can only be instigated by way of a resolution. This is in due appreciation that a company is a legal entity whose operations are driven by the relevant authorized officers. In the present instance, there is no indication that a company resolution was passed prompting the institution of the suit before me. Furthermore, the plaintiff has not offered guidance on whether such resolution is in existence to begin with. Under the circumstances, I am convinced that no authority was given for the filing of the suit. Ground 2) is sustained.

10. Having established so, I come to the same finding as concerns the appointment of the firm of advocates currently on record for the plaintiff. The circumstances as presented to me have led me to the conclusion that the firm of Mohamed Madhani & Co. Advocates had no basis or authority to come on record for the plaintiff in the absence of a company resolution. In fact, the court in *East African Portland Cement Ltd* (supra) did not shy away from holding that:

“...as an Advocate and an officer of the Court, the Counsel responsible for the filing of this petition was fully aware, or should have been aware, of the requirements of the law with regard to the filing of suits by companies, and had a duty to advise his client(s) not to file proceedings if there was no or no clear authority to do so...”

Grounds 3) and 4) are similarly sustained.

11. This leads me to the final issue for determination, touching on whether the suit offends Order 2, Rule 15 (a) and (d) of the Civil Procedure Rules. The referenced provisions concern the striking out or amendment of a suit where the same either raises no reasonable cause of action or is an abuse of the court process. That being the case, the proper procedure for a party wishing to raise these grounds is to file an application on the same. I am hesitant to address this issue on the basis of a preliminary objection. Consequently, ground 5) is untenable.

12. In view of the foregoing, I find that the Notice of Preliminary Objection dated 19th March, 2018 succeeds only in part. Grounds 2), 3) and 4) are allowed. Resultantly, the suit is hereby struck out with costs to the defendant.

Dated, signed and delivered at **NAIROBI** this **1st** day of **March, 2019**

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant