



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 345 OF 2004**

**CHINA JIANGSU INTERNATIONAL ECONOMIC TECHNICAL  
CO-OPERATION CORPORATION.....PLAINTIFF**

**VERSUS**

**FINTEL LIMITED.....1<sup>ST</sup> DEFENDANT**

**HILLARY MAINA THEGEYA.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is a ruling to a preliminary objection dated the 26<sup>th</sup> day of January, 2016. The objection has been raised by the defendants and it is premised on the grounds that

- a. The suit was filed without the authority of the Plaintiff
- b. There is no resolution or valid resolution of the Plaintiff approving the institution of the suit.
- c. There is no resolution or valid resolution of the Plaintiff appointing M/S Kibatia & Co. Advocates to institute the suit on behalf of the Plaintiff
- d. The filing of the suit by the said firm of Advocates is invalid for want of authority from the Plaintiff.
- e. The Plaintiff did not authorize David Liu or any other person to swear the verifying affidavit and any witness statements to the plaint on behalf of the Plaintiff.

The preliminary objection was canvassed by way of written submissions.

In their submissions the Defendants have averred that the minutes that the Plaintiff filed in court on the 20<sup>th</sup> July, 2018 of an alleged meeting held on 2<sup>nd</sup> November, 2015, notwithstanding the fact that the suit was filed in 2004, and the preliminary objection had been filed two years earlier, can't in any way authorize institution of a suit which was filed in the year 2004.

The Defendants also noted that the Plaintiff has not up to this day produced the resolution that authorized the institution of the suit arguing that the suit was unauthorized. They relied on Order 4 Rule 1 of the Civil Procedure Rules 2010 which, in mandatory terms requires a verifying affidavit in support of a suit initiated by a corporation to be sworn by an officer of the company duly authorized under the seal of the company.

The Defendants have further submitted that the minutes passed on 2<sup>nd</sup> November, 2015 are neither proper nor valid as they are minutes of a different company and not the Plaintiff herein and that the same have not been filed with the Registrar of Companies under the Companies Act. The case of *East Africa Portland Cement Limited Vs. Capital Markets Authority & 4 others, Petition No. 600 of 2013* and that of *Bugerere Growers Limited vs. Sebaduka & Another (1970) EA 147* were relied on.

On the part of the Plaintiff, it has been submitted that the Plaintiff authorized the firm of Kibatia & Co. Advocates in the year 2008 to institute the suit herein as confirmed by the minutes of the meeting of the Plaintiff's Directors held on the 2<sup>nd</sup> November, 2005 and the company resolution of even date. On whether the institution of the suit was ratified by a resolution, the plaintiff contended that by the said resolution, it had ratified the institution of the suit and confirmed that indeed it had authorized the firm of Kibatia & Co. Advocates to institute the suit and that it would continue representing it in the matter.

It further submitted that the passing of the resolution and filing it in court is a procedural issue which should be cured by Article 159(2) of the Constitution that enjoins the courts and tribunals to administer justice without undue regard to procedural technicalities. He relied on the case of ***Raila Odinga Vs. IEBC & Others (2013) eKLR***, where the Supreme Court held that courts should not pay undue attention to procedural technicalities at the expense of substantive justice.

The court has considered the purport of the preliminary objection and the submissions made by the learned counsels in support of and in opposition to the same. The essence of a preliminary objection was given by law JA ***old Sir Charles Newbold P***, in ***Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors (1969)EA 696 at page 700*** when the court stated;

***“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. Example 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 case to refer the dispute to arbitration.***

***Sir Charles Newbold P.*** added as follows on page 701

***“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 facts are to be ascertained or if what is sought is the exercise of judicial discretion.***

The preliminary objection herein is primarily based on the provision of Order 4 Rule 1(4) of the Civil Procedure Rules 2010, which provides;

***“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”.***

Basically, the preliminary objection is premised on the fact that the suit was filed without authority from the Plaintiff, there is no resolution or valid resolution approving institution of the suit and appointing the firm of Kibatia & Co. Advocates to institute the same and that the Plaintiff did not authorize David Liu or any other person to swear the verifying affidavit on its behalf.

From the onset, it is not in issue that the plaintiff did not file any authority and the resolutions complained of by the Defendants. However, in a replying affidavit sworn by Moses Maina Keruga in response to the notice to show cause why the suit should not be dismissed for want of prosecution, it is annexed a further list of documents filed on 20<sup>th</sup> June, 2013 which list consists of minutes of the meeting held on 2<sup>nd</sup> November, 2013, and Company Resolution dated the 2<sup>nd</sup> November, 2015.

The Plaintiff has submitted that it authorized the firm of Kibatia & Co. Advocates in 2005 to institute the suit and has relied on those minutes and the Resolution. It has contended that by this Resolution, it ratified not only the institution of the suit and the representation by the firm of Kibatia & Co. Advocates but also the continued representation by the said firm of Advocates.

The court has carefully perused the said minutes and the resolution dated the 16<sup>th</sup> May, 2018. The Defendants have submitted that the minutes are for a different company and not the Plaintiff in that the letterheads reads, China Jiangsu Economic Technical Cooperation Corporation East African Company. Whereas this court is in agreement that the minutes were done on a letterhead for a company different from the Plaintiff, it is clearly shown that they relate to a meeting of Directors of the Plaintiff and not that other Company.

Secondly, the only agenda of the meeting was to obtain an update of Hccc. number 345/2004 which case involves the parties in the case before the court and not any other party/company. In the same minutes, the company (Plaintiff herein) resolved to continue with the suit in court to its logical conclusion and that the appointed firm of Kibatia & Co. Advocates would continue acting for Plaintiff and was authorized to file the suit. The third resolution was that one MS Zhu Ling who is based in Kenya would sign all court documents, affidavits and witness statements hitherto signed by David Liu and give evidence in court on behalf of the company.

A cursory perusal of the said minutes and resolution reveals that the Plaintiff is aware of the pending suit and that the firm of Kibatia & Co. Advocates are on record for it. The same minutes also show that David Liu had hitherto signed court documents on behalf of the Plaintiff. These documents are specifically listed and they include affidavits and witness statements.

In my considered view, the Plaintiff did not have to use the word “ratified” to show that it had authorized the initiation of the suit and the legal representation albeit late after it had been filed. It is enough for it to simply acknowledge that it was aware of the suit and that it had authorized the firm of Kibatia & Co. Advocates to continue acting for it and that it had authorized it to file the suit. In its own words, also, the Plaintiff acknowledges that affidavits and court documents in respect of the suit had hitherto been signed by David Liu who is the deponent to the verifying affidavit.

In arriving at this conclusion, I would be content to cite and rely on the case of ***Mayuno Industries Limited & 2 others vs. Keroche Industries Limited, Hccc. No. 122 of 2011*** where the court held;

***“As properly submitted by the defendant, under Order 4 Rule 1(4) of the Civil Procedure Rules, 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. Nowhere is it stated that such authority or resolution must be filed”.***

The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the Plaintiff’s

bundle of documents, which commonsense dictates it should of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of Companies as the requirement is extended by the Defendant does not invalidate the suit.

The court in the case of Leo Investment limited vs. Trident Insurance Company Limited Hccc. 893 of 2010, quoted with approval the case of Assie Pharmaceuticals Vs. Nairobi Veterinary Centre Limited Nairobi (Miliman) Hccc. No. 391/2000 as follows;

***“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”.***

I wholly agree with this finding and consequently dismiss the preliminary objection but with no orders as to costs.

**Dated, Signed and Delivered at Nairobi this 2<sup>ND</sup> Day of OCTOBER, 2019.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... *For the Plaintiffs/Applicants*

..... *For the Defendant/Respondent*