



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 183 OF 2016

BRITIND INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

APA INSURANCE LIMITED.....DEFENDANT

RULING

1. This Ruling is on the Preliminary Objection raised by the defendant, in the following terms;

“TAKE NOTICE that the Defendant shall at the hearing of the suit herein raise a preliminary objection to the suit on the ground:-

a) The Resolution of the plaintiff’s Board of Directors authorizing Mr. Santosh Kumar Singh to swear the Verifying Affidavit and to file this suit has not been filed and/or otherwise provided as required by Order 4 rule 1 (4) of the Civil Procedure Rules 2010”.

2. After being served with the Preliminary Objection the plaintiff filed an application for enlargement of time for filing the Board Resolution and the Letter of Authority, which authorized the institution of this suit, and which also authorized Mr. Santosh Kumar Singh to swear the Verifying Affidavit.

3. That application also comes up for determination in this Ruling.

4. It is common ground that the plaintiff, **BRITIND LIMITED**, is a limited liability company.

5. The parties are also in agreement that limited liability companies ordinarily take decisions through Resolutions passed by their respective Boards of Directors.

6. In the case of **AFFORDABLE HOMES AFRICA LIMITED Vs IAN HENDERSON & 2 OTHERS, Hccc No. 524 of 2004**, Njagi J. found that the Board of Directors had not passed a resolution to authorize the institution of the suit. In the circumstances, the learned Judge said;

“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”.

7. In the case before me, the plaintiff had not lodged in court, the resolution authorizing the institution of

the suit. The plaintiff had also not exhibited the letter of authority, pursuant to which the Verifying Affidavit was sworn.

8. However, the plaintiff insisted that the company's Board of Directors had actually passed the requisite resolutions.

9. It is the submission of the defendant that the law requires the plaintiff to not only pass the appropriate resolutions, but to also file the same in court. In the opinion of the defendant, it is only by the filing of the appropriate resolutions, in the court case, that the plaintiff would have demonstrated that it had complied with the legal requirements.

10. In support of its position, the defendant cited the following words of Gacheru J. in **PHILOMENA NDANGA KARANJA & 2 OTHERS Vs EDWARD KAMAU MAINA, ELC No. 1411 of 2014;**

“I have considered the rival submissions, and it is obvious that the suit herein was filed without the resolution of the Board. The 1st plaintiff tried to justify that position. However, it is trite law that where a suit is instituted for and on behalf of a company, there should be a company resolution to that effect”.

11. As there was no resolution passed by the Board of Directors, authorizing the institution of proceedings in that case, the learned Judge struck out the suit.

12. In this case, there is a dispute between the plaintiff and the defendant, concerning the existence of the Board Resolution.

13. And, as the defendant had indicated earlier, the only way that it could be sure that the company has passed a resolution is if the plaintiff had made available the said resolution.

14. In the event that the plaintiff had not exhibited the requisite resolutions, the defendant could only guess. The defendant could not make an authoritative statement of fact, regarding the existence or otherwise of the requisite Board Resolution.

15. It means that the factual foundation for the Preliminary Objection herein is not firm.

16. Mr. Santosh Kumar Singh swore the Verifying Affidavit on 13th May 2016. At paragraph 1 of the said affidavit, he said that he had been authorized to swear the affidavit. Therefore, I find that the plaintiff's contention that Santosh Kumar Singh had been authorized to swear the Verifying Affidavit, is not an afterthought, as suggested by the defendant.

17. In any event, as was stated in the case of **MAVUNO INDUSTRIES LIMITED & 2 OTHERS Vs KEROCHE INDUSTRIES LIMITED Hccc No. 122 of 2011;**

“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 plaintiff or with the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit”.

18. I have quoted extensively from that authority, as it was cited by the defendant. Therefore, I hold the view that the defendant should, in relying upon the said decision, have been persuaded about its correctness.

19. Another authority which the defendant relied upon is that of **LEO INVESTMENTS LIMITED Vs TRIDENT INSURANCE COMPANY LIMITED, Hccc No. 893 of 2010**. In that case Odunga J. quoted with approval the following words of Hewett J. in **Assia Pharmaceuticals Vs. Nairobi Veterinary Centre Limited Nairobi (Milimani) Hccc No. 391 of 2000**;

“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”.

20. Based on that authority, I find that if the plaintiff’s Board of Directors had not passed a resolution to institute these proceedings, (*which is not the position here*), the proceedings could still have been ratified.

21. In conclusion, I find no merit in the Preliminary Objection. It is therefore overruled.

22. Meanwhile, I also find no reason in law, to warrant the grant of an extension of time for the filing of the Board resolution which authorized the institution of this case.

23. I so find because there is no time set within which the resolution had to be filed. It is only when the law or rules stipulates a time within which a step has to be taken that a party needs to apply for an extension of time, if the stipulated period had lapsed.

24. However, as the plaintiff had already filed its List of Documents, and because the said list does not include the Board Resolutions, I hold the view that the plaintiff had overlooked the requirement of demonstrating the existence of the resolutions.

25. Therefore, although the Preliminary Objection is lacking in merits, I also find that it is the defendant’s action which has prompted the plaintiff to place the requisite evidence before the court.

26. The plaintiff has 7 days from today to file and serve the appropriate resolutions, showing the authorization for the institution of the suit, and also showing that the plaintiff had authorized Santosh Kumar Singh to swear the Verifying Affidavit.

27. The costs of the Preliminary Objection shall be in the cause, whilst each party will bear its own costs in respect to the plaintiff’s application dated 13th February 2017.

DATED, SIGNED and DELIVERED at NAIROBI this 2nd day of May 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ogada for the Plaintiff

Karuhaga for Mrs. Makasila for the Defendant

Collins Odhiambo – Court clerk.