



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO 538 OF 2013

DAYLIGHT DRYCLEANERS LIMITED.....PLAINTIFF

VERSUS

SAMCHI TELECOMMUNICATIONS LIMITED.....1ST DEFENDANT

KILIMANJARO CONSTRUCTION LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The 2nd Defendant's Notice of Motion application dated and filed on 22nd September 2014 was brought under the provisions of Order 51 Rule 1, Order 2 Rule 15 (1) (b), (c) and 6(sic) of the Civil Procedure Rules, 2010, Section 1A & B of the Civil Procedure Act and under the Inherent powers of this court. It sought the following orders:-
 - a. **THAT the suit by the Plaintiff against the 2nd Defendant be struck out.**
 - b. **THAT costs of the suit and the application be granted to the 2nd Defendant.**

THE 2ND DEFENDANT'S CASE

2. The 2nd Defendant's application was supported by the Affidavit of James Gitau Singh that was sworn on 1st September 2014. Its Written Submissions were dated 27th January 2015 and filed on 2nd March 2015.
3. The 2nd Defendant's case was that the present suit as instituted by the Plaintiff was incurably defective as the same had been instituted without the mandate required by the law regarding limited liability companies.
4. It therefore sought to have the Plaintiff's suit against it struck out and that it be awarded costs of the suit and those of its present application.

THE 1ST DEFENDANT'S CASE

5. In response to the said application, Esther Wanjiru Muchemi, a director of the 1st Defendant Company swore a Replying Affidavit on 10th February 2015. The same was filed on 11th February 2015. The 1st Defendant's Written Submissions were dated 24th February 2015 and filed on 17th

March 2015.

6. It set out the circumstances of the matter in dispute and pointed out that the present application was intended to defeat its right to seek indemnity against the 2nd Defendant in the event it was held liable for any expense, loss or proceedings whatsoever to any property arising in the course or by reason of its carrying out of works on its property namely L.R. No 209/2466.
7. It stated that the 2nd Defendant's application was prejudicial to it and urged the court to dismiss the same with costs to it.

THE PLAINTIFF'S CASE

8. On 6th February 2015, Peter Waihumbu Muigai, a director of the Plaintiff's company swore a Replying Affidavit that was filed on even date. The Plaintiff's Written Submissions were dated and filed on 17th March 2015.
9. The Plaintiff contended that it had fully complied with the provisions of the law as far as instituting the suit and filing of the requisite documentation herein were concerned and the taking all the necessary steps towards preparing for trial, while the Defendants had not.
10. It averred that the filing of a Board Resolution together with the Plaint was not a requirement under the law and that in any event, there was no defect that could not be cured by way of filing additional documents or amendment.
11. It pointed out that striking out of pleadings is draconian and must be exercised sparingly and therefore urged the court to dismiss the 2nd Defendant's application with costs to it.

LEGAL ANALYSIS

12. Order 2 Rule 15 (I) of the Civil Procedure Rules that the 2nd Defendant relied upon provides that:-

1. **At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-**
 - a. **It discloses no reasonable cause of action or defence in law; or**
 - b. **It is scandalous, frivolous or vexatious; or**
 - c. **It may prejudice, embarrass or delay the fair trial of the action; or**
 - d. **It may be otherwise an abuse of the court process of the court,**

And may order the suit to be stayed or dismisses or judgment to be entered accordingly as the case may be.

2. **No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the ground on which it is made.**

13. It is evident that the 2nd Defendant only relied on the provisions of Order 2 Rule 15 (b) and (c) of the Civil Procedure Rules seeking to strike out the Plaintiff's suit. A provision of a "Rule 6" it placed reliance upon appeared misplaced. The court did not therefore consider the same in the Ruling herein as it was unable to decipher the application and relevance of the said Rule in the circumstances herein.

14. The 2nd Defendant was emphatic that the Board Resolution was not filed at the time of filing suit but was instead furnished after the filing of the present application as an annexure to the Plaintiff's Replying Affidavit. It referred the court to the provisions of Order 4 Rule 4(1) of the Civil Procedure Rules that stipulates as follows:-

"Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit may swear the affidavit on behalf of the others."

15. It relied on the cases of **Affordable Homes Africa Ltd vs Henderson & 2 Others [2004] eKLR, Suraya Property Group Ltd & Another vs K Estates Ltd & 2 Others [2012] eKLR,**

East African Portland Cement Ltd vs Capital Markets Authority & 4 Others [2014] eKLR and **Elite Earthmovers Ltd vs Krisha Behal & Sons [2004] eKLR** where the common thread was that a decision of a limited liability company could only be made through a Board Resolution. The effect of this was that the deponent of a verifying affidavit can only have capacity to swear the same if he has been given authority through a Board Resolution to do so, failing which the suit filed will be struck for being defective and incompetent.

16. The 1st Defendant submitted that a mere technicality that can be remedied should not defeat the ends of justice as Article 159 (2)(d) of the Constitution of Kenya, 2010 was clear that justice shall be administered without undue regard to technicalities. It placed reliance on the case of **James Mangeli Musoo vs Ezeotec Limited [2014] eKLR** in which Marete J stated as follows:-

“...the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and procedural in nature.”

17. On its part, the 2nd Defendant argued that Order 4 Rule 1 (4) of the Civil Procedure Rules does not suggest that authority of a Board of a company has to be filed at the time of filing suit but that the same merely provides that the officer who swears a verifying affidavit must be duly authorised under the seal of the company. It was its contention that it was only where there were several plaintiffs where such an authority had to be filed at the time of filing a verifying affidavit.

18. Order 4 Rule 1 (4) of the Civil Procedure Rules provides as follows:-

“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.”

19. As was rightly pointed out by the Plaintiff’s advocates, the provisions that are applicable in the circumstances of this case are those under Order 4 Rule 1 (4) of the Civil Procedure Rules and not Order 4 Rule 1 (3) of the Civil Procedure Rules as was contended by the 2nd Defendant. Indeed, the Plaintiff herein was a limited liability company. There were no other plaintiffs in the suit herein which would have required other plaintiffs to authorise one of them to swear a verifying affidavit.

20. The court, however, wholly concurred with the 2nd Defendant that where a verifying affidavit had not been sworn by an officer duly authorised by a corporation, it rendered the suit as incompetent and fatally defective and had to be struck out. Similarly, as was again correctly submitted by the Plaintiff, there was no requirement for the authority by an officer of a corporation to be filed together with a verifying affidavit and that this requirement only obtained where there were several plaintiffs in a suit.

21. In this regard, the court fully associated itself with the holding in the case of **Mavuno Industries Limited & 2 Others vs Keroche Industries Limited [2012] eKLR** where Odunga J stated as follows:-

“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...The mere failure to file the same with the plaint...die not invalidate the suit.”

22. The court perused the Resolution dated 6th September 2013 that was annexed to the Plaintiff’s Replying Affidavit and marked “PWM 1” and noted that the same was duly executed by the directors but the same was not under seal as is required under the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules.

23. The irregularity of the said Resolution definitely has an impact on the competence or otherwise of the filed verifying affidavit. Essentially, a plaintiff risks his verifying affidavit being rendered incompetent and defective if a duly sealed authority has not first been obtained.

24. Having said so, courts have moved from striking out suits where verifying affidavits do not conform to the mandatory provisions of the law. The primary objective of courts has been to seek to sustain rather than terminate suits by striking out irregular affidavits and instead exercising their

- wide and unfettered discretion to order that fresh verifying affidavits that comply with the law be filed within a given time. This is to ensure that they achieve the objectives of Section 1B of the Civil Procedure Act that seek to further the timely dispose of proceedings before them.
25. It does appear to the court that as the intention of the directors was manifestly clear from the said Resolution, failure to seal the same could be deemed to have been a procedural technicality within the meaning of Article 159(2)(d) of the Constitution that could be cured with a view to giving the Plaintiff a fair opportunity to present its case in court as contemplated by the provisions of Article 50 of the Constitution of Kenya.
26. Similar to the view that was taken by Mukunya J in the case of **Mulgold Limited vs Maimuna Abdullahi Mohamed & 5 Others [2014]eKLR**, this court found and held that it could exercise its wide and unfettered discretion to permit the Plaintiff to issue an authority under its seal to regularise the verifying affidavit that would be sworn on its behalf.
27. Accordingly, having considered the pleadings, the affidavit evidence, the written submissions and case law that was relied upon by the parties, the court took the firm view that this was not a suitable case in which it could strike out the suit.
28. As has been stated herein above, it is the duty of the court to sustain rather than terminate suits as was held in the case of **DT Dobie & Co (Kenya) Ltd vs Muchina [1982] KLR** that was relied upon by the Plaintiff. It should be a general rule, rather than the exception, that courts should at all times endeavour to consider the merits of a case rather than be too quick to strike out pleadings at an interlocutory stage.
29. It is worthy of note that the 2nd Defendant did not demonstrate, in its affidavit evidence or written submissions, that the suit herein should be struck out for being scandalous, frivolous or vexatious or that it could prejudice, embarrass or delay the fair trial of the action as was envisaged in the provisions of Order 2 Rule 15 (b) and (c) of the Civil Procedure Rules that it relied upon.

DISPOSITION

30. Accordingly, the upshot of this court's ruling was that the 2nd Defendant's Notice of Motion application dated 22nd September 2014 and filed on 1st October 2014, having been grounded on the provisions of Order 2 Rule 15 (1)(b) and (c) of the Civil Procedure Rules, was not merited and the same is hereby dismissed.
31. However, as the authorisation relied upon by the Plaintiff in filing the suit herein was not sealed under the Plaintiff's company's seal thus rendering the Verifying Affidavit of Peter Waihumbu Muigai that sworn on 9th December 2013 defective, it is hereby directed as follows:-
- a. **THAT the said Verifying Affidavit be and is hereby struck out.**
 - b. **THAT the deponent of the Verifying Affidavit to be filed within the next seven (7) days from the date of this Ruling shall first obtain authority under seal of the Plaintiff company before swearing and filing the said verifying affidavit.**
32. Costs of the application herein shall be in the cause.
33. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of July 2015

J. KAMAU

JUDGE