



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 600 OF 2013

EAST AFRICAN PORTLAND CEMENT LTDPETITIONER

VERSUS

THE CAPITAL MARKETS AUTHORITY.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL2ND RESPONDENT

THE NATIONAL SOCIAL SECURITY FUND3RD RESPONDENT

THE TRUSTEES OF THE BOARD OF THE

NATIONAL SOCIAL SECURITY FUND4TH RESPONDENT

NAIROBI SECURITIES EXCHANGE LTD5TH RESPONDENT

RULING NO. 2

Introduction

1. This ruling pertains to the Notice of Preliminary Objection filed by the 2nd respondent in this matter. The objection relates to the competence of this petition in that, among other reasons, it was lodged without the authority of the Company as required under the Articles of Association of East African Portland Cement Company Limited (Hereafter **‘the company’**).
2. The 2nd respondent contends that the petition is not properly before the Court as there is no resolution for its institution passed in accordance with the company’s Articles of association; that the Articles require that a resolution of the company should be signed by a majority of the directors present in Kenya; and that the affidavits in support of the suit are sworn by persons other than those authorised by the Article or by the resolution relied on.
3. The Preliminary Objection, which was argued before me on 12th February 2014, is couched in the following terms:
 1. **The application and petition are fatally defective and bad in law.**
 2. **The resolution allegedly passed on 23rd December 2013 purporting to authorize the institution of the suit herein and appoint Messrs Aduda & Company Advocates to act for the Petitioner is invalid, null and void for the following reasons:-**

- a. **Article 110 of the Articles of Association of the Company requires that a valid resolution be passed by a majority of directors present in Kenya.**
- b. **The resolution was sent to seven (7) directors of which only three approved the same. The said three approvals do not constitute a majority. (sic)**
3. **As such, there is no valid resolution authorizing the institution of these proceedings or the appointment of the firm of Aduda & Company Advocates to file proceedings on behalf of the Petitioner.**
4. **The affidavits sworn by John Maonga and Mark Ole Karbolo in these proceedings are fatally defective and ought to be struck out.**
5. **The entire proceedings are therefore null and void and ought to be struck out forthwith.**
6. **The Application and Petition are an abuse of the process of the Court.**

The Submissions

Submissions by the Respondents

4. The objections raised by the 2nd respondent and presented to the Court by Mr. Kamau Karori assisted by Ms. Odari are threefold. The 2nd respondent contends, first, that the filing of the petition and the appointment of Advocates was not sanctioned by the company in accordance with Article 110 of the company's Articles of Association; that the affidavits sworn by Mr John Maonga and Mr. Mark Ole Karbolo on 23rd December 2013 in support of the petition are also incompetent for not having been authorised by the company; and thirdly, that there is no constitutional issue raised in the petition before the Court.
5. With regard to the first issue, it was Counsel's contention that a resolution by the company must be signed by a majority of the directors in Kenya in accordance with the requirements of Article 110 of the company's Articles of Association. The 2nd respondent contends that the resolution annexed to the affidavit sworn in support of the petition and the application are signed by only three of the directors of the company. Since the total number of directors is seven, the resolution should have been signed by at least four. It was submitted therefore that there was no authority to present the petitions and the application; and that in the absence of a valid Board resolution sanctioning the petition, the company is not in Court at all. Reliance was placed in this regard on the case of **Affordable Homes Ltd -vs- Ian Henderson & 2 Others – HCCC No 524 of 2004**.
6. The 2nd respondent argued, secondly, that the documents filed in Court on behalf of the petitioners are signed by officers who were not authorised to sign them; and that the resolution alleged to have authorised the filing of the present petition authorised Mr. Kephah Tande to swear affidavits, and the seal of the company to be affixed in his presence. It was Counsel's contention that on the material before the Court, the only person who could swear an affidavit on behalf of the petitioner was Mr. Kephah Tande. Consequently, neither Mr. John Maonga nor Mr. Ole Karbolo who say they have authority to swear the affidavits in support of the petition had such authority. The 2nd respondent contended therefore that the two affidavits were incompetent and could not be said to support the petition.
7. Counsel discounted the argument contained in the supplementary affidavit of Mr. Ole Karbolo that the resolution authorising the filing of this petition was also signed by one other director, Mr Didier Tresarrieu. It was Counsel's contention that aside from the fact that the material allegedly evidencing Mr. Tresarrieu's approval of the resolution was introduced into Court improperly and therefore was not properly before the Court, the deponent has not indicated when the document was allegedly signed by Mr. Tresarrieu or where or why it was not attached to the affidavits when

the petition was filed. He submitted that there is also no confirmation of the resolution from Mr. Tresarrieu in the email attached to the affidavit of Mr. Ole Karbolo, even though Mr. Tresarrieu also received the resolution by email.

8. The 2nd respondent submitted further that in any event, the petitioner had filed this petition because the resolutions made at its AGM on 17th December 2013 had been suspended by the 1st respondent; that one of the suspended resolutions was the appointment of Mr Didier Tresarrieu; that his status as a director had thus been suspended on 18th December, 2013 while the suit was filed on 30th December 2013; and that he therefore had no capacity to execute the resolution authorising the filing of this petition. Counsel submitted therefore that there is no proper suit before the Court and the petition should be struck out, and, on the authority of **Bugerere Coffee Growers Ltd –vs- Sebaduka & Others (1970)EA 147**, the costs thereof awarded against the Counsel who instituted the suit and the directors who authorised the filing of the suit.
9. While associating himself with the submissions made on behalf of the 2nd respondent, Mr. Murugara for the 1st respondent submitted that unless the petitioner can satisfy the Court that there was valid authority to institute these proceedings, the petition was a nullity. Counsel also asked the Court to make an order for costs against both the Advocates and the directors. He relied on the decision in **Hood Sailmakers Ltd. -vs- Axford & Another (1996) All E.R.** to the effect that if a resolution is passed in any way other than as authorised by the articles of association of the company, it is void and can transact no business. It was also Murugara's submission that the objections by the respondent with regard to jurisdiction were based on the decision of the Court in **Owners of Motor Vessel "Lilian S" -vs- Caltex Oil (Kenya) Ltd (1989) KLR 1**.
10. Mr. Ogembo, Counsel for the 3rd and 4th respondents, also associated himself with the submissions made on behalf of the 2nd respondent and prayed that the petition be struck out.

Submissions by the Petitioner

11. In his submissions on behalf of the petitioner, Mr. Aduda argued that the petition is properly before the Court and should be allowed to stand so that the matters in issue can be heard and determined.
12. Counsel relied on the case of **Mukisa Biscuits Manufacturing Ltd vs Westend Distributors (1969) EA 696**, contending that a preliminary objection ought to raise a pure point of law, but that what was raised before the Court are issues of fact with regard to whether a director signed a resolution or where he signed such resolution.
13. Counsel contended that once issues of fact are raised as preliminary objections, that preliminary objection ought to be dismissed, placing reliance on **Mariam Mueni Musembi & Another –vs- Commissioner of Lands Malindi High Court Civil Case No 102 of 2008**. Counsel took the view that in considering a Preliminary Objection as presented, the Court will have to consider both law and fact; and that in such circumstances, the preliminary objection fails the **Mukisa Biscuits** case and should be dismissed.
14. To the question whether the affidavits in support of the petition were properly before the Court, it was Counsel's contention that the resolution annexed to the supporting affidavit only authorizes Mr. Kephara Tande to swear a verifying affidavit on behalf of the company; that it did not authorise him to swear a supporting affidavit; and that the affidavits sworn by Mr Ole Karbolo and Mr Maonga are properly on record and should be considered in determining the matter before the Court. Counsel argued, further, that his law firm was properly instructed to institute the present proceedings.
15. With regard to the resolution authorising the filing of the petition, Mr. Aduda argued that the draft resolution was circulated to all the directors by email; that the resolution was signed by 4 directors

out of 7, which constitutes a majority; that Mr Didier Tresarrieu was elected as a director on 17th December 2013 at the 81st Annual General Meeting of the company; that in accordance with section 201 of the Companies Act, his appointment was duly registered with the Registrar of Companies. He urged the Court not to strike out the petition but to disallow the preliminary objections with costs.

Preliminary Issues

Whether Preliminary Objection Proper

16. The respondents have challenged the competence of the present petition and urged the Court to strike it out, arguing that the Court has no jurisdiction to hear and determine it and on the authority of **Owners of Motor Vessel “Lilian S”, -vs- Caltex Oil (Kenya) Ltd (supra)** the Court should take no further step with regard to it.

17. On his part, Counsel for the petitioner has made two main arguments. The first is that the objections by the respondents do not fall within the rubric of the **Mukisa Biscuits** case. Secondly, that the Court should treat the issues raised in the preliminary objections as technicalities which the Constitution at Article 159 provides that the Court should not pay undue regard to.

18. On the first issue, I am guided by the words of Law, JA in the case of **Mukisa Biscuits** where he stated as follows:

‘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. Examples 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 suit to refer the dispute to arbitration.’

19. I take the view that the objections raised by the 2nd respondent in this matter and supported by the other respondents fall within the rubric of the **Mukisa Biscuits** case. The objections centre on the competence of the petition in that the company has not authorised the institution of the suit in accordance with the articles of association, and that the persons who have purported to swear documents in support of the petition have no authority to do so. These are, I believe, issues arising out of the pleadings which do not require a trial of the facts for the Court to determine. In keeping with the decision of the Court in the **Mukisa Biscuits** case with regard to points of law arising from the pleading, and also bearing in mind that in accordance with the decision of the Court of Appeal in the case of **Motor Vessel “Lilian S”**, the Court is permitted to consider the evidence presented before it to determine whether or not it has jurisdiction, I believe the preliminary objections are properly raised before this Court.

Legal Technicalities

20. With regard to the contention by Counsel for the petitioner that the issues raised by the respondents are mere technicalities which the Court should not take heed of in accordance with Article 159, I must respectfully disagree. Article 159(2)(d) makes reference to **“procedural technicalities”**. I agree with Counsel for the 2nd respondent that the issues before me go to the very root of the matter. This is a petition allegedly filed by the East African Portland Cement Company Limited, a limited liability company whose operations are regulated by its Articles of Association and the provisions of the Companies Act. For any action or proceedings to be taken in its name, such action or proceedings must be authorised in accordance with the Articles of Association. It is not a **“procedural technicality”** to require that a company authorises any proceedings brought in its name.

Determination

21. In determining the preliminary objection by the 2nd respondent, I do so against the two issues which arise with regard to the present petition. First, is it brought in accordance with the Articles of Association of the Company? Secondly, are the affidavits filed in support of the petition sworn by officers who are duly authorised to do so?

Whether Petition Filed in Accordance with the Company's Articles of Association

22. Article 110 of the company's Articles of Association states as follows:

“ A resolution in writing signed by a majority of the directors for the time being in Kenya, shall be as effective for all purposes as a resolution passed at a meeting of the Directors, duly convened, held and constituted, and may consist of several documents in, the like form, each signed by one or more of the directors.”(Emphasis added)

23. The Court notes from the documents annexed to the supporting affidavit of Mr. Mark Ole Karbolo sworn on 23rd December 2013 that a resolution marked as ‘MK1’ was circulated to the directors of the petitioner by email. The email responses indicate that three directors approved the resolution. It is only in the supplementary affidavit of Mark Ole Karbolo sworn on 3rd February 2014 that a document said to be the resolution signed by Mr. Didier Tresarrieu is annexed. The intention is to support the contention that the resolution to file the petition was supported by four directors and therefore by a majority of the Board of the petitioner, which comprised seven (7) directors.

24. Had this latter document been annexed to the initial affidavit sworn by Mr. Ole Karbolo in support of the petition on 23rd December 2013, then one would have had some basis for concluding that it had been duly signed in support of the resolution to file the petition. However, the fact that it was produced to the Court after the 2nd respondent raised the issue of the petition's competence raises serious doubts about its authenticity.

25. However, even assuming that it was authentic, a second question arises: was Mr. Tresarrieu a director of the company at the date of the resolution, 23rd December 2013, and therefore competent to approve the resolution authorising the filing of the petition?

26. The petition was filed in order to challenge the decision of the 1st respondent suspending the implementation of the resolution arrived at by shareholders at the 81st Annual General Meeting of the company. Mr. Tresarrieu was appointed as a director in that resolution, which was suspended by the 1st respondent as regulator on 18th December 2013. Could it therefore be said that the resolution had taken effect and vested Mr. Tresarrieu with the authority of a director to sign a resolution authorising the filing of a suit, or any other action by the company?

27. Counsel for the petitioner argues that the fact that the resolution was filed in the Company's Registry constitutes Mr. Tresarrieu a director with authority to sign the resolution. I must express some reservations with regard to this, given the circumstances of this case. It appears that Form 203A was filed at the Companies' Registry on the same day as the implementation of the resolution appointing Mr. Tresarrieu a director was suspended by the 1st respondent. Whether, therefore, he was properly a director and competent to sign the resolution authorising the filing of the suit is also in doubt.

Whether Affidavits Sworn by Duly Authorised Persons

28. There is, however, more concern about the authorisation of the present suit. The requirements of the Companies' Act and the petitioner's Memorandum and Articles of Association with regard to the execution of documents and filing of depositions authorising institution of suits are, I believe, intended to protect the petitioner's assets, to ensure among other things, that the petitioner is not

embroiled in lawsuits instigated by individuals within the company without the sanctions of the body authorised to involve the company in litigation. In the present case, any lawsuit or other proceedings entered into by the company required to be sanctioned by the Board of Directors, and only such officers as are authorised by the Board or under the Articles of Association could sign documents on its behalf.

29. The Board resolution authorising the filing of this petition, is in the following terms:

“RESOLUTION OF THE BOARD OF DIRECTORS PASSED ON 23 DECEMBER 2013 PURSUANT TO THE PROVISIONS OF ARTICLE 110 OF THE COMPANY’S ARTICLES OF ASSOCIATION

APPOINTMENT OF A LEGAL FIRM TO REPRESENT THE COMPANY NOTED that:-

- 1. The Capital Markets Authority (CMA) had by their letter dated 18 December 2013 instructed the Company Secretary of the petitioner not to implement the resolutions passed at its 81st Annual General Meeting held on 17 December 2013.*
- 2. The action by the CMA was as a result of the complaints lodged by Respondents No.1,2,3 and 4.*
- 3. In order to protect the shareholders’ interest, there was need for the Company to seek legal advice and take the appropriate action.*
- 4. There was need to appoint a competent legal firm to file a case on behalf of the Company.*

RESOLVED

- 1. To appoint Messrs Aduda & Company Advocates to advice and to institute a case in Court to protect the interest of the shareholders of the Company arising from the action of the CMA.*
- 2. That Mr Kephah Tande be and is hereby authorised to swear on behalf of the Company, a verifying Affidavit for the civil suit by the Company versus the Capital Markets Authority (CMA), the Attorney General, the Board of Trustees of the National Social Security Fund and the National Social Security Fund as the 1st, 2nd, 3rd and 4th Defendants respectively.*
- 3. To affix the Common Seal of the Company on any document required for this purpose in the presence of Mr Kephah Tande, the Managing Director and the Company Secretary.”*

30. The resolution is thus intended to authorise the appointment of a firm of Advocates, Messrs. Aduda & Co. Advocates, to advice and institute a case in Court to protect the interests of the shareholders of the company, with regard to the 1st respondent and for Mr. **Kephah Tande** to swear a verifying affidavit for a civil suit to be filed on behalf of the company. There is no authorisation for any other person to swear any documents on behalf of the company. So whether a civil suit was filed, as the reference to a ‘verifying affidavit for the civil suit’ suggests, or a petition as was ultimately done, the authorisation was for Mr. Tande, not anyone else, to swear documents on behalf of the company.

31. If, as Mr. Aduda contended, the resolution authorised Mr. Tande to swear a verifying affidavit and not a supporting affidavit, then there is no resolution from the company authorising the filing of the present petition or the affidavits filed in support. Certainly, there is no authorisation for Mr. Ole Karbolo or Mr. Maonga to swear any documents in support of any proceedings on behalf of the company, or authorising the filing of the present petition, and the affidavits sworn by Mr. Mark Ole Karbolo and Mr. John Maonga are incompetent as having been sworn without the authority of the company.

32. That being the case, what does the law provide with regard to suits filed without the authority of

the company?

33. In **Affordable Homes Africa Limited vs Ian Henderson & 2 Others HCCC No 524 of 2004**, Njagi J observed 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 (see the decision of the Court in **Automatic Self-Cleansing Filter Syndicate v. Cuninghame [1906] Ch.34, CA.**); that it was therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the company. The Court (Njagi J) observed that it was common ground that there was no authority from the Board Directors to institute the suit, and consequently, he held as follows:

“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.”

34. I believe a similar situation obtains in the present suit. Article 92 of the company's Memorandum and Articles of Association (annexure **KT3** annexed to the undated affidavit of Mr. John Maonga filed in Court on 24th December 2014) provides that the business of the company shall be managed by the Directors who may do on behalf of the company all such acts and exercise all such powers as may be exercised by the company. As already stated, Article 110 of the company's Articles provides for the passing of resolutions of directors in writing, such resolutions to be as effective as those passed at meetings of the Board of Directors. As has also been found, the resolution purportedly authorising the present petition was not passed in accordance with Article 110. Consequently, there was no resolution for the filing of this matter.

35. In **Bugerere Coffee Growers Ltd vs Sebaduka & Another (supra)**, it was held, in dismissing the suit, that when companies authorise 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 authorising the proceedings in the case. The Court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action.

36. In the present case, as I have already found, there is a resolution which does not accord with the provisions of the company's Memorandum and Articles of Association. The resolution annexed to the affidavit of Mark Ole Karbolo has not been approved by a minimum of the directors of the company as required under Article 110 of the company's Memorandum and Articles of Association; further, the persons who have sworn the affidavits in support of the petition do not have the authorisation to do so, either from the Articles of Association, or from a resolution of the Board. In the circumstances, the company is not present before the Court, and this petition is therefore a nullity. The 2nd respondent's grounds of preliminary objection succeed, and the petition is hereby struck out.

37. With regard to costs, on the authority of the decision in **Affordable Homes Africa Limited vs Ian Henderson & 2 Others** and **Bugerere Coffee Growers Ltd vs Sebaduka & Another (supra)**, I am satisfied that the Counsel responsible for filing the present petition as well as the director and secretary who swore the affidavits in support of the petition without the requisite authority from the company should bear the costs of this petition without recourse to the company's funds. I am so satisfied for several reasons.

38. First, 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. Secondly, he presented to the Court the resolution alleged to evidence the requisite authority when it clearly did not meet the requirements of the law, then attempted to cure it by presenting a document whose authenticity is in doubt.

39. Thirdly, even assuming that the resolution that he presented as evidence of authority for the filing of the suit was passed in accordance with Article 110 of the company, he lodged documents which were sworn by persons other than the person specifically authorised by the resolution to swear a 'verifying affidavit' for a civil suit against the respondents.

40. As for the two deponents, they were also fully aware, as senior officers of the company, that the authority of the company, granted in accordance with the company's Articles of Association, was required before they engaged the company in litigation. They, too, bear responsibility for the filing of the present matter.

41. Consequently, I direct that the costs hereof be borne by:

- i. **Mr. Mark Ole Karbolo** and **Mr. John Maonga**, the two persons who made depositions for the filing of the petition without the authority of the company;
- ii. **Messrs. Aduda & Co Advocates**, the firm of Advocates who filed this petition ostensibly on behalf of the company.

42. It is so ordered.

Dated, Signed and Delivered at Nairobi this 12th day of March 2014

MUMBI NGUGI

JUDGE

Mr. Aduda instructed by the firm of Aduda & Co. Advocates for the Petitioner

Mr. Gitonga Murugara instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for the 1st respondent

Mr. Kamau Karori instructed by the firm of Iseme, Kamau & Maema & Co. Advocates for the 2nd respondents

Mr. Ogembo instructed by the firm of Okoth & Kiplagat & Co. Advocates for 3rd and 4th respondent

Mr. Otabo instructed by the firm of Coulson Harney & Co. Advocates for the proposed interested party