



**Multiple Hauliers EA Limited v Yazad (Civil Case E023 of 2022)
[2025] KEMC 30 (KLR) (10 March 2025) (Ruling)**

Neutral citation: [2025] KEMC 30 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE E023 OF 2022
YA SHIKANDA, SPM
MARCH 10, 2025**

BETWEEN

MULTIPLE HAULIERS EA LIMITED PLAINTIFF

AND

AHMED MOHAMED YAZAD DEFENDANT

RULING

THE PRELIMINARY OBJECTION

1. This is a determination on a preliminary objection raised by the defendant herein. The notice of the preliminary objection is dated 4/7/2024 but was filed on 12/7/2024. The objection is premised on the following grounds:
 1. The suit is fatally defective pursuant to the provisions of Order 4 rule 1(4) of the civil procedure rules;
 2. The suit herein is incompetent and an abuse of this Court's process, and CANNOT be entertained by this Honourable Court.

Response by the Plaintiff

2. The Plaintiff filed a Replying affidavit to the notice of Preliminary objection and attached a copy of the resolution to rebut the Preliminary objection.

Main Issues for Determination

3. In my opinion, the main issues for determination are as follows:
 - i. Whether the preliminary objection was properly raised;
 - ii. Whether the preliminary objection should be upheld.



Submissions by the Defendant

4. The defendant submitted that the plaintiff filed this suit in the year 2022 but has never filed a resolution to institute the suit as provided for in Order 4 rule 1(4) of the Civil Procedure Rules. The defendant further submitted that the plaintiff had responded to the preliminary objection by way of replying affidavit and annexed minutes of some meeting by the alleged directors of the plaintiff. However, no CR 12 had been annexed to prove the nexus between the attendees and the minutes. The defendant argued that there was also no nexus between Mr. Felix Ngotho and the company contrary to the provisions of the said order which makes it mandatory for the verifying affidavit to be sworn by an officer of the company. That the minutes are yet to be filed as part of the plaintiff's bundle of documents yet this suit has already been fixed for hearing.
5. The defendant contended that lack of a resolution was not a mere procedural technicality as was stated by the plaintiff. The defendant argued that Article 159(2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. That it was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court. The defendant maintained that even at the time of filing their submissions, the plaintiff had not filed any resolution by way of list of documents. The defendant urged the court to uphold the preliminary objection and attached copies of the following authorities:
 - a. Directline Assurance Company Limited v Tomson Ondimu [2019] eKLR;
 - b. Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR.

Submissions by the Plaintiff

6. The plaintiff submitted that the preliminary objection was premised on a procedural technicality. That justice demands that parties approaching the court must be heard on merit and that it would amount to a miscarriage of justice for a court to shut out a party from the seat of justice on account of a technicality. The plaintiff relied on their replying affidavit and urged the court to dismiss the preliminary objection.

Analysis and Determination

7. I have carefully considered the preliminary objection. The question of what constitutes a preliminary objection was well answered in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd [1969] E.A. 696 where at page 700 D – E Law J.A. stated: -

So far as I am aware, Preliminary objection consists of a pure point of Law which has been pleaded, or which arises by clear implication out of the 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.”

8. At page 701 Sir Charles Newbold, P. said: -

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”. (Emphasis supplied)



9. It is trite law that a preliminary objection can be raised at any time when the proceedings are still active. The case of *Ng'ang'a Kahuha v Munyi Kahuha* [2008] eKLR is germane on this point. In the said case, the court held as follows:

Did the defendant/applicant raise the issue of jurisdiction too late? I also answer this question in the negative. Jurisdiction is everything and if it turns out to be an issue in court proceedings, it has to be addressed regardless of the stage of the proceedings. Nevertheless, jurisdiction ought to be raised at the earliest possible opportunity.....In the present case, the issue of jurisdiction has been pursued belatedly but I must consider it all the same. Note should be taken that even the court can raise the issue of jurisdiction suo motu”.

10. The nature of the objection is on the competence of the suit. I agree that competence of a suit is a point of law. Order 4 rule 1(4) of the Civil Procedure Rules provides that:

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”.

11. Sub-rule (6) thereof provides:

The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule”.

12. However, the argument concerning the incompetence of the suit is based on the alleged fact that there is no resolution sanctioning the institution of the suit and authorizing the deponent of the verifying affidavit to act for the plaintiff company. The authorities relied upon by the defendant indicate that the courts entertained such an objection as a preliminary objection on a point of law. For instance, in the case of *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014] KEHC 6532 (KLR), the court observed thus regarding involvement in a suit by a company:

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”.

13. In the above authority, the court struck out the suit on a preliminary objection on the ground that there was no resolution as required by law and the Articles of Association of the plaintiff company. Similar findings were made in the authorities of *Curly Klurly Ltd v Mtoi Mwero Mtoi & 3 others* [2019] KEELC 166 (KLR) and *Directline Assurance Company Limited v Tomson Ondimu* [2019] KEHC 8646 (KLR) as well as in the authorities relied upon by the defendant.

14. In the authority of *Faith & Hope Properties Kenya Ltd v James Muchiri Waweru & another* [2021] KEELC 4104 (KLR), the court (Angote J) held that:

The issue of whether it is mandatory to file alongside the Plaint a resolution of a Company under seal authorizing a particular Director to swear a Verifying Affidavit and appointing an advocate to file the suit on behalf of the Company has now been settled by the court. In the case of *Space Geo Enterprises Limited vs. Kenya National Highways Authority* [2019] eKLR, Muchemi J. held as follows:

Clearly from the foregoing provision, nowhere is it required that the authority given to the counsels instituting suit be filed. 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 does not invalidate the suit. In *Leo Investments Ltd vs. Trident Insurance Co. Ltd* (2014) eKLR and *Republic vs. Registrar General and 13 Others* (2015) eKLR, Odunga J. and Kimaru J. respectively rendered that the legal position is that a resolution of the Board of Directors of a company may be filed at any time before the suit is fixed for hearing. This is the same position by the Court of Appeal in *East Africa Safari Air Ltd vs. Antony Ambaka Kegodre & Another* (2011) eKLR__ where the Court reversed the decision of the High Court of striking out the suit instead of giving the appellant the opportunity to demonstrate that the appointment of its advocates, even if irregular at the beginning, had been regularized. It is therefore established by case law that proceedings can be ratified after filing a case in a meeting of the shareholders or by authority of the Board. This means that failure to file the authority together with the petition cannot lead to nullification of the proceedings.’

15. This court is in agreement with above pronouncements. The mere fact that the Plaintiff did not file its resolutions authorizing the swearing of the Verifying Affidavit by one of its Directors and the firm of S. J. Nyang and Company advocates to file the suit on its behalf cannot be a ground for invalidating the suit. The two resolutions by the Plaintiff can be filed and served at any time before trial. For those reasons, I find the Notice of Preliminary Objection dated 28th September, 2020 to be unmeritorious. The Notice of Preliminary Objection dated 28th September, 2020 is therefore dismissed with costs.”

16. A similar finding was made in the case of *Republic v National Land Commission & 2 others Exparte Flamingo Horticulture (K) Ltd; Ontulili Mt Kenya Forest Squatters (Intended Interested Parties/ Applicants)* [2020] KEHC 8665 (KLR) by Lucy Mbugua J. Whereas Angote and Mbugua JJ of the Environment and Land Court were of a different opinion as to whether a suit by a company filed without a resolution ought to be struck out in the first instance, they were not clear as to whether such an objection may properly be raised by way of a preliminary objection.

17. In the case of *The Presbyterian Foundation & Another vs East Africa Partnership Limited & Another* [2012] eKLR, Odunga J (as he then was) observed thus:

The Civil Procedure Rules do not define what an authorized officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavits be sworn by either the directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word "authorize" which is defined by Oxford Dictionary as "sanction"; "give authority"; "commission". That being the position, whether or not the 2nd Plaintiff was given authority to swear the verifying affidavit is a matter of evidence and cannot certainly be the subject of a preliminary objection unless the said fact is admitted." (Emphasis supplied)

18. The holding of Odunga J (as he then was) was affirmed by the Court of Appeal in the case of *Spire Bank Limited v Land Registrar & 2 others* [2019] KECA 530 (KLR), in which the court held:

It is clear from the provision, which is stated in mandatory terms, that for a company to file suit, there must be a verifying affidavit sworn by an officer of the company stipulating that he or she is duly authorized under the company’s seal to verify the affidavit in respect of the suit. Such person would of necessity require to be authorized by a resolution of the Board of Directors or the members under seal of the company, in order for the suit to be instituted.....So that it was sufficient for the authorized person to depone that he or she was duly authorized, but in the event of a complaint that such person was unauthorized,



it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority, the onus being on the party making the allegation to prove it. A bare statement that the plaintiff or applicant was not authorized would not be sufficient..... And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.....As such for a preliminary objection to be successful it must be based on a pure point of law, and further, it cannot be a requirement of its foundation that evidence be produced in its support. In other words the objection does not lie if the objector requires to demonstrate that a party is unauthorized or if in response a resolution or other document under seal requires to be produced as proof of its existence. This effectively defeats the principles behind a preliminary objection, in which case, it ought not to succeed.....Whether or not an officer is authorized to institute the proceedings is a matter of evidence, which requires to be canvassed before the court.”

19. Similarly, in *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* [2015] KECA 721 (KLR), the Court of Appeal was of the view that:

.....there is no legal agreement that authority to swear an affidavit on behalf of a corporate need to be filed in court.....In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it. It was therefore sufficient for the deponents to state that ‘they were duly authorised.’ It was then up to the appellants to demonstrate by evidence that they were not so authorised.”

20. In view of the position taken by the Court of Appeal, whose decisions bind the High Court and the courts below, such as this court, I find that the objection is not a pure point of law capable of being raised as a preliminary objection. For the court to determine whether or not the plaintiff company authorized the filing of the suit as well as the deponent of the verifying affidavit, evidence will have to be adduced. Where there is need for evidence to ascertain a point of law raised by a party, the issue cannot qualify as a preliminary objection. On that ground alone, the preliminary objection must of necessity fail. Even if the objection could be entertained as such, the Court of Appeal authorities indicate that failure to file a resolution in the first instance is a procedural technicality that can be cured by giving the party in default time to file the resolution. Instead of raising a preliminary objection, perhaps the defendant would have applied for the suit to be struck out and attached evidence to support the application.

Disposition

21. The upshot of the above considerations is that the preliminary objection is devoid of merit. I proceed to dismiss it with costs. The plaintiff is granted leave to regularize the record within 14 days by filing the relevant resolution(s).

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 10TH DAY OF MARCH, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

