

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1001 OF 2013

**KENYA BUILDERS & CONCRETE
COMPANY LIMITED**

PLAINTIFF

VERSUS

**NAMAN NDONJI MUKABANA
Suing as Administrator of the Estate of the Late
PETER KEYA WERE**

DEFENDANT

RULING

1. The Plaintiff commenced this suit vide a plaint dated 15th August 2013, seeking a declaration that it is the registered proprietor of **LR No. 7086 (Original No. 6825/1)**, and a permanent injunction restraining the Defendant from interfering with the parcel. In opposition, the Defendant filed a defence and counterclaim and in 2025, he filed the Notice of Preliminary Objection dated 29th September 2025 which is

for determination before this court. He seeks to have the suit struck out on grounds that:

a) That the suit was instituted without the Plaintiff's authority and or resolutions as required by the law.

b) That the suit is therefore fatally incurable, defective and bad in law and should be dismissed with costs.

2. The Preliminary Objection was canvassed by way of written submissions.

Submissions

3. The Plaintiff urges the Court to expunge the Defendant's Notice of Preliminary Objection for offending Order 9 Rule 7 of the Civil Procedure Rules, having been filed by Onyango Oyieko & Co. Advocates without first filing a Notice of Change of Advocates from the Defendant's previous advocates. In support of this position, reliance is placed on

the case of **Joshua Nyamache T Omasire v Charles Kinanga Maena [2008] eKLR.**

4. The Plaintiff further submits that even if the Court were to admit the Notice of Preliminary Objection, Order 4 Rule 1(4) of the Civil Procedure Rules does not impose a mandatory requirement that a resolution be filed contemporaneously with the suit. Rather, the provision only gives rise to a request for particulars, and the proper procedure in such circumstances is to stay the proceedings pending ratification, as opposed to striking out the suit.

5. To buttress his averments, the Plaintiff relied on the following decisions: **Leo Investment Limited v Trident Insurance company Limited [2014] eKLR** and **East African Safari Air Limited v Anthony Ambaka Kegode & another [2021] eKLR.**

6. On his part, the Defendant submits that the Preliminary Objection raises a pure point of law as the suit offends Order

4 Rule 1(4) of the Civil Procedure Rules since the Plaintiff's board of directors did not authorize Dharajlal Ramji Patel by way of a board resolution to swear the verifying affidavit that accompanied the Plaint on behalf of the Plaintiff company. To buttress his averments, the Defendant relied on the case of **Kenya Commercial Bank Ltd v Stage Coach Management Ltd [2014] eKLR.**

Analysis and Determination

7. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the following are the issues for determination:

- **Whether the Notice of Preliminary Objection should be expunged for failure to comply with Order 9 Rule 7 of the Civil Procedures.**
- **Whether the plaint dated 15th August 2013 is incurably defective and should be struck out.**
- **Whether the Defendant's preliminary Objection is merited.**

8. On the first issue, this Court is urged to strike out the Defendant's Notice of Preliminary Objection on the basis that it is filed by an advocate who did not file a Notice of Change of Advocate while taking over the matter from the previous advocates thus it offends the provisions of Order 9 Rule 7 of the Civil Procedure Rules which stipulates thus:

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

9. While considering whether to strike out pleadings in a similar situation, Mativo J (as he then was) stated as follows in **John Gitonga Gachuhi & 4 others v Commissioner of Lands & 5 others [2017] eKLR**;

“The Constitution is an effective document that is the basis of our laws. Considering the principles,

purposes and objectives of the constitution enumerated above, the right to legal representation, I find myself unable to uphold the objection by the Petitioners counsel that the Respondents counsel is not properly on record. Instead, in exercise of my discretion, I hereby grant an order regularizing his being on record and a further order that the notice of change of advocates and all the documents filed by the said advocate be deemed to be properly on record....”

10. Based on the facts before me while associating myself with the decision quoted as well as Article 159 (2) (d) of the Constitution, I find that this objection is based on procedural technicality which offends the aforementioned Constitutional provisions. I opine that even if the Counsel for the Defendant did not file a Notice of Change of Advocates as claimed, he can be allowed to regularize his appointment and will proceed to exercise my discretion and allow him to do so.

11. On the second and third issue, the Defendant’s Preliminary

Objection is raised on the basis that the Plaint as filed is
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incurably defective as it offends the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules which stipulates thus:

“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.”

12. On raising of a preliminary objection, it was held as follows in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696:**

“So far as I am aware, 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....”

13. The Plaintiff contends that Order 4 Rule 1(4) does not contemplate the filing of a company resolution alongside the plaint and that noncompliance is not inherently fatal.

14. In **Kivulini Cottages Limited v Sheelali & 3 others** (Environment and Land Petition E005 of 2023) [2025] KEELC 6160 (KLR) (24 September 2025) (Ruling), this Court held as follows in a persuasive decision:

“However, it is clear that from Order 4 rule 1 (4), there is no requirement that the authority given to the deponent of the verifying affidavit be filled. The failure to file the authorization, therefore, in my view, may be a ground for seeking particulars. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. However, the failure to file the same with the Petition does not invalidate the suit...”

15. The Court of Appeal has taken a stand on the import of Order 4 Rule 1 (4) of the Civil Procedure Rules where it stated as follows in **Spire Bank Limited v Land Registrar & 2 others** [2019] eKLR;

“It is essential to appreciate that the intention behind Order 4 Rule 1 (4) was to safeguard the

corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. ... 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.” Emphasis Mine

16. See also the case of **East African Safari Air Limited v Anthony Ambaka Kegode & Elizabeth Ann Kegode (Civil Appeal 42 of 2007) [2011] KECA 160 (KLR) (Civ) (27 July 2011) (Judgment).**

17. Based on the facts before me while associating myself with the decisions cited, even if Order 4 Rule 4 of the Civil Procedure Rules envisaged 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, it did not indicate that failure to do so would render the suit a nullity. I opine that if the Defendant wanted to confirm if the Deponent in the verifying affidavit was authorized by the Plaintiff, then he should have sought for particulars to confirm this position instead of seeking to have the Plaint struck off. To my mind this is seeking to rely on a technicality which Courts are urged to disregard by dint of Article 159 (2) (d) of the Constitution. In the circumstances, I decline to find that the suit as filed is fatally incurably, defective and bad in law and should hence be dismissed with costs.

18. In the foregoing, I find the instant Notice of Preliminary Objection unmerited and will disallow it.

19. Costs in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
18TH DAY OF FEBRUARY, 2026**

CHRISTINE OCHIENG

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JUDGE

In the presence of:

Makori and Onyango Oyieko for Respondent/Defendant

Onduso for Plaintiff/Respondent

Court Assistant: Joan

ORIGINAL