



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. E129 OF 2022**

**LOREIGN VENTURES LIMITED.....1<sup>st</sup> APPELLANT**

**OMA SERVICES LIMITED..... 2<sup>nd</sup> APPELLANT**

**-VERSUS-**

**PUBLIC TRANSPORT INVESTMENT CO. LTD.....RESPONDENT**

*(Being an appeal from the judgement delivered by the Hon. I. Khatambi Principal Magistrate on the 26<sup>th</sup> August 2022 in Nakuru CMCC No. 1428 of 2018, Agnes Wanjiku Muriuki, loreign ventures limited, OMA Services Limited and Lucas Mathenge -vs- Public Transport Investment Company Limited)*

**JUDGMENT**

**Background**

1. This is an Appeal against the dismissal in judgment by the trial court for failure to comply with **Order 4 rule 1(4)** of the Civil Procedure Rules that provides; 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.
2. The Appellants herein lodged the instant appeal vide a Memorandum of Appeal date 20<sup>th</sup> September 2023 being aggrieved by the Judgment entered by Hon. I. Khatambi Principal Magistrate on the 26<sup>th</sup> August 2022 in **Nakuru CMCC No. 1428 of 2018.**

3. In their memorandum of Appeal the Appellants fault the trial magistrate in their eleven (11) grounds as follows;

- i. That, the learned trial magistrate erred in law and in fact in dismissing the Appellants suit on the ground that there was no resolutions of the companies filed.**
- ii. That, the learned trial magistrate erred in law and in fact, in dismissing the Appellants suit on the ground that the verifying affidavit sworn by the 1<sup>st</sup> Plaintiff did not disclose authority by the Appellants.**
- iii. That, the learned trial magistrate erred in law and in fact, in interpreting the provisions of Order 4 Rule 1 (4) the Civil Procedure Rules to the detriment of the Appellants who had placed on record witness statements duly made by their directors in support of their claims.**
- iv. That, the learned trail magistrate erred in law and in fact, in failing to appreciate and give full effect to the mischief intended to be cured by the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules.**
- v. That, the learned trail magistrate erred in law and in fact, in making a finding that the Appellants suit was fatally defective and that the error was incapable of being ratified.**
- vi. That, the learned trial magistrate erred in law and misdirected himself, to make a determination on**

**whether the substantive claim by the Appellants had been specifically pleaded and proved.**

- vii. That, the learned trial magistrate erred in law and in fact in dismissing the Appellants suit on the basis of the Respondent's preliminary objection pleaded under Paragraph 17 of the Statement of Defence when the preliminary objection was not considered at the trial at pleaded.**
- viii. That, the learned trial magistrate erred in law and misdirected himself in dismissing the Appellants suit on the basis a procedural issue at the expense of substantive justice of the claim which had been specifically pleaded and proved.**
- ix. That, the learned trial magistrate erred in law and in fact in failing to make a determination on whether the substantive claim by the Appellants at pleaded had been proved.**
- x. That, the trial magistrate erred in law and in fact by misapprehending the Appellants submissions and judicial authorities and thereby distinguishing the decisions which were binding on the court and applicable to the facts of the case under trial.**
- xi. That, the trial magistrate erred in law and in fact by according undue consideration to the Respondent's submissions and judicial authorities and thereby**

**reached a decision that was against the spirit of the law and interests of justice of the case under trial.**

4. The Appeal is undefended despite multiple service effected upon Respondent's Advocates and the Appellants did not file written submissions as directed.

### **Analysis and Determination**

5. Being a first appeal this Court lays emphasis on the principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & others [1968] 1EA 123:**

***“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”***

6. The only solo issue for this court to consider is whether the dismissal of case made in judgment for want of company resolutions authorizing the institution of the suit warrants the disturbance by the court?

7. In this instance the Memorandum of Appeal was filed on the 20<sup>th</sup> September 2022, the Appellants served a Mention Notice dated 29<sup>th</sup> October 2024 on 8<sup>th</sup> November 2024, a Mention Notice dated 16<sup>th</sup> May 2025 on 19<sup>th</sup> May 2025, a Mention Notice dated 29<sup>th</sup> October 2024 on 8<sup>th</sup>

November 2024, a Mention Notice dated 29<sup>th</sup> July 2025 on 12<sup>th</sup> June 2025 and a Mention Notice dated 19<sup>th</sup> August 2025 on 19<sup>th</sup> August 2025.

8. On the 30<sup>th</sup> September 2025, the Appellant counsel **Mr. Karanja** appeared before court for a mention in the absence of the Respondent and indicated that the Appellant had complied by serving the Respondent the Record of Appeal and that, the court should admit the Appeal to be heard and disposed off by way of filed written submissions and the court dutifully admitted the Appeal for hearing and issued appropriate directions.
9. A scrutiny of the entire record reveals that the Appellant have never served the Respondent with either the memorandum of Appeal or the Record of Appeal contrary to **Order 42 Rule 13** of the Civil Procedure Rules
10. This court is equally alive to the fact that this is not a retrial and the court has the duty reconsider the record of appeal evaluate the evidence and basis of the dismissal of the primary suit.
11. It is apparent that Hon. I. Khatambi Principal Magistrate in his judgment dated 26<sup>th</sup> August 2025 dismissed the suit solely for want of compliance with **Order 4 Rule 1 (4)** the Civil Procedure Rules having failed to include the Company resolutions for the 1<sup>st</sup> and 2<sup>nd</sup> Appellant.
12. It should be noted that PW2 was **George Murithi Githinji** a chairman and director with the 1<sup>st</sup> Appellant as well as chair for the 2<sup>nd</sup> Appellant and he extensively testified on the dispute at hand.

13. The primary duty of the court is to do substantive justice and that duty cannot be fettered by procedural technicalities. The Constitution under **Article 159 (2) (d)** on judicial authority has urged Courts to do justice without undue regard to procedural technicalities.

14. In the Supreme Court decision in **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR** the Court observed that:-

***“(55) Be that as it may, the essence of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties...”***

15. The want of company resolutions to institute a suit is curable and in any case **Section 1A** of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and provides as follows:

***“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

***(2)The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***

***(3)A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to***

***participate in the processes of the Court and to comply with the directions and orders of the Court”.***

16. **Section 1B** of the Civil Procedure Act, on the other hand provides for the duty of court and states:

***“(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —***

- (a) the just determination of the proceedings;***
- (b) the efficient disposal of the business of the Court;***
- (c) the efficient use of the available judicial and administrative resources;***
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
- (e) the use of suitable technology.***

17. The right to be heard is fundamental right enshrined in the constitution of Kenya and in this instance it would have been prudent for the court to afford an opportunity to cure any shortcomings a determine the case on merits.

18. The Court is under a statutory duty to ensure that the overriding objective of the Act is attained. In so doing, there is a statutory duty imposed on the Court by section 1B aforesaid to ensure the just determination of the proceedings and the efficient disposal of the business of the Court.

19. I therefore find that in failing to strike a balance between the two positions, the trial court erred in dismissing the entire suit without attaching any weight to the evidence presented.

20. In the Court of Appeal case of **D T Dobie & Company Kenya Limited vs. Muchina [1982] KLR 1** the Court held as follows;

***“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross – examination in the ordinary way.....”***

***A Court of justice should aim at a sustaining a suit rather than terminating it by summary dismissal. Normally, a suit is for pursuing it.....”***

***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real***

***life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”***

21. This Court is thus persuaded that the Appeal is of merit and allows the same.
22. The Judgment entered by Hon. I. Khatambi Principal Magistrate on the 26<sup>th</sup> August 2022 in Nakuru CMCC No. 1428 of 2018 is hereby set-aside and the suit is accordingly reinstated.
23. The Appellants are granted leave to file the requisite company resolutions and authority to sue.
24. The Nakuru CMCC No. 1428 of 2018 shall be heard afresh before any other magistrate other than Hon. I. Khatambi Principal Magistrate.
25. The Court shall award to the Appellants costs of the Appeal assessed at kshs 30,000/-.

It is So Ordered

**Signed, Dated and Delivered at Nakuru  
on this 26<sup>th</sup> Day of March 2026.**

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**Mohochi S. M.  
JUDGE**