



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 752 OF 2015

AJIWA SHAMJI LIMITED.....PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY...1ST DEFENDANT

SINOPEC PETROLEUM CONSTRUCTION

SHENGLI CORPORATION.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Preliminary Objection dated 10th August 2015 raised by the 1st Defendant/Respondent as follows:

1. That this suit and the Application are incurably defective for want of authority from the Plaintiff/Applicant: and,
2. That the affidavit of Patrick Mulili Kaluva in support of the Application is defective and invalid for lack of authority and capacity.

Both the 1st Defendant and the Plaintiff filed their respective written submissions.

It was the submission of the 1st Defendant that this suit is incurably defective for want of authority from the company. Order 4 Rule 4 was highlighted which states as follows:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so.”

It was their submission that this rule makes it a mandatory requirement that a verifying affidavit accompanying a Plaintiff in a suit instituted by a company must be sworn by an officer of that company duly authorized under seal, failure to which the plaintiff is deemed incompetent and liable to be struck out. They submitted that in this suit, which was filed by way of a plaintiff, the plaintiff was accompanied by a verifying affidavit sworn by one Hussein Shamji in which he states that he is the director of the plaintiff but does not indicate any authority under the seal of the plaintiff company allowing him to swear verifying affidavit for the company. They submitted that in the absence of such authority by way of company seal, the verifying affidavit and the plaintiff accompanying it is incompetent. In their submissions, the plaintiff stated that in his verifying affidavit sworn on 31st July 2015, Hussein Shamji has categorically identified himself as a director of the plaintiff. Further that he deposed that he is duly authorized by the plaintiff to swear an affidavit for and on behalf of the plaintiff. In their submissions, they stated that that does not in their opinion require the plaintiff's authority under the seal of the plaintiff be filed contemporaneously with the verifying affidavit. Further, they stated that Order 11 of the Civil Procedure Rules 2010 states that such authority, being an evidentiary document to be relied on at the trial, ought to be filed before the hearing. They submitted that this case has not been certified as ready for hearing by which time the court would order that the plaintiff's authority be filed and adopted as part of the court record. They further proceeded to attach a copy of the plaintiff's resolution dated 30 July 2015 and requested the court to adopt it as part of the court's records in compliance with the rules.

On this issue of the requirement of the plaintiff's authority under seal is accepted by both parties. What they do not agree on is that time when such authority must be filed. The first defendant contends that such authority must be filed contemporaneously with the verifying affidavit into plaintiff of the plaintiff corporation. The plaintiff on the other hand, is of the view that such authority may be filed any time

before the suit is certified for hearing. To that end the next duly sealed authority to the submissions and sought that the court to adopt it. I have really looked at order for rule for and cannot find any timelines the failing of the authority under seal. The rule simply says that the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company. To that extent therefore, my finding on this issue is that the timelines are not indicated and it is therefore open for the plaintiff to file its authority under seal at any time prior to the certification of this suit is ready for hearing.

The second objection is that the affidavit of Patrick Mulili Kaluva is defective and invalid for want of authority and capacity. It is the submission of the 1st Defendant that Patrick, who indicates that he is a caretaker of the Plaintiff company, does not indicate that he has authority from the Plaintiff company to swear the affidavit and furthermore, there is no indication or exhibition of the company seal authorising him to depose, or any accompanying resolution by the board of directors allowing him to swear this affidavit for the Plaintiff. They further submitted that Patrick is neither a director nor a secretary nor a principal officer of the Plaintiff company. They submitted that he does not hold a position of authority or decision-making in the Plaintiff company such as to purport act for it. On that submission, I am inclined to agree with the position taken by the Plaintiff which quoted the decision of D.K. Maraga (Ag. Judge as he then was, now Chief Justice) in the case of **Mombasa HCCC No. 496 of 1995 Peter Onyango Onyiego vs. Kenya Ports Authority**, who stated as follows:

“from these definitions, it is clear that an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation. To suggest, therefore, that everybody who testifies for or on behalf of a corporation has to have authority from the corporation given under seal as required by order 3 rule 2(c) is in my view not correct. In the circumstances, I hold that other than verifying affidavits, which as I have stated must be sworn by the plaintiffs themselves or authorised agents, all other affidavits filed and used in courts are not among the acts covered by order 3 rules 1 to 5. All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and/or information that he depones on, that in the rules of evidence would be admissible. Mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity courts can under Order 18 rule 7 of the Civil Procedure Rules ignore.”

The equivalent of Order 3 Rules 1 to 5 referred to in the above quotation is the current Order 9 Rules 1 to 4 of the Civil Procedure Rules, 2010.

This being my finding on the two issues, this preliminary objection is hereby overruled. Costs shall abide the cause.

SIGNED AND DATED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 24TH DAY OF APRIL 2018

MARY M. GITUMBI

JUDGE

DELIVERED BY JUSTICE SAMSON O. OKONG'O AT NAIROBI THIS 3RD DAY OF MAY 2018.

SAMSON O. OKONG'O

PRESIDING JUDGE