



REPUBLIC OF KENYA



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**Smartshop Limited v Mutitu (Civil Appeal 76 of 2019)
[2023] KECA 737 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KECA 737 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 76 OF 2019
F SICHALE, FA OCHIENG & LA ACHODE, JJA
JUNE 16, 2023**

BETWEEN

SMARTSHOP LIMITED APPELLANT

AND

DANIEL KARANJA MUTITU RESPONDENT

(An Appeal from the Ruling of the Environment and Land Court at Nyabururu (Hon. M. Oundo, J.) dated and delivered on 17th January, 2018 in ELC No. 179 of 2011)

JUDGMENT

1. The appellant herein is dissatisfied with the ruling of the ELC in Nyahururu ELC No. 179 of 2018 which struck out its case against the respondent on a preliminary objection. The ELC in its ruling pointed out that there was no valid suit as there was no resolution by the appellant's directors for the institution of the suit. In the memorandum of appeal, the appellant is raising 5 grounds of appeal which we condense into two, to wit, that the learned Judge erred in finding that there was no valid suit as a consequence of lack of company's resolution; and that the learned Judge erred in upholding the respondent's preliminary objection thereby striking out the appellant's suit.
2. In a nutshell, the appellant had moved the ELC vide an originating summons against the respondent. On 14th May, 2013, parties consented to proceed with the matter by way of viva voce evidence. The matter did not take off until 18th June, 2015 when directions were issued for the respondent to file his defence and counter claim. On 24th September, 2018, the respondent filed a notice of preliminary objection seeking to have the appellant's suit dismissed with costs, on grounds that Smart Shop Ltd did not authorize the filing of the suit, as demonstrated by the lack of a resolution, on record, from the appellant company. The respondent's preliminary objection also pointed out that the advocates on record lacked the requisite authority to litigate this matter. The preliminary objection was heard



by way of written submissions and in its ruling, the learned Judge of the ELC upheld the preliminary objection founded upon the lack of a resolution to institute the proceedings.

3. This appeal came up before us for hearing on 6th March, 2023 with Mr. Maina Kairu appearing for the appellant and Ms. Wanjiru Miriithi appearing for the respondent. Both parties had filed their respective written submissions. For the appellant, counsel pointed out that they were relying on their submissions before the trial court. Counsel maintained that the failure to file a resolution by a company's board of directors authorizing institution of a suit was not fatal, and even if deemed mandatory, such a defect was still curable. Counsel submitted that the learned Judge relied heavily on the case of *Bugere Coffee Growers Ltd v Sebaduka & Another* (1970) 1 EA 147 which, counsel submitted, was no longer good law hence arriving at a wrong decision. To buttress his submissions, counsel placed reliance on the case of *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 Others* (2015) eKLR and urged the Court to find that the failure to file a resolution by the board of directors was not fatal to their case.
4. For the respondent, counsel pointed out that Order 4 Rule 1(4) of the *Civil Procedure Rules* required a corporate entity to have a duly authorized person to act and swear its affidavits. Counsel pointed out that it was only after the matter had been set down for hearing that they raised the preliminary objection. Counsel further pointed out that despite being prompted with the preliminary objection, counsel for the appellant did not take any steps to rectify the error. In his understanding, a party who was a corporate body does not necessarily have to file a resolution when lodging the plaint, but that the said resolution must be filed at least before the suit is fixed for hearing. In support of this submission, counsel relied on the cases of *Leo Investment Ltd v Trident Insurance Co. Ltd* (2014) eKLR as quoted in *Joseph Kipng'etich v Litein Tea Factory Ltd & Another* (2016) eKLR. Regarding the appellant's submissions, counsel argued that because the same were filed out of time, the trial court exercised its discretion correctly when it disregarded them. In the end, counsel urged us to dismiss this appeal with costs.
5. The proceedings giving rise to the appeal herein were commenced at Environment and Land Court by way of an Originating Summons dated 11th July 2011. After a long hiatus, the suit was confirmed to be ready for hearing.
6. After the matter was scheduled to come up for hearing, the defendant, Daniel Karanja Mutitu, filed a Notice of Preliminary Objection dated 24th September 2018. Through the said preliminary objection, the defendant sought the dismissal of the suit. The preliminary objection raised the following 6 grounds:
 - “ 1. That the plaintiff herein Smart Shop Limited did not authorise the filing of the suit.
 2. That the suit is incurably defective for lack of resolution by the plaintiff company to institute the present suit.
 3. That the firms of Kinoti & Kibe Co. Advocates and M/s Waichungo Martin & Co. Advocates have no authority to file, institute and/or appear in this suit for and on behalf of the plaintiff company.
 4. That this Court lacks jurisdiction to hear this suit.
 5. That Susan Gathoni Maina has no authority from the company to swear affidavits on behalf of plaintiff or appear.



6. That the suit should be dismissed with costs payable by the firm of Kinoti & Kibe Company Advocates, M/s Waichungo & Co. Advocates and the said Susan Gathoni Maina jointly and severally for acting without authority.”
7. On 3rd December 2018, the parties agreed to file written submissions on the preliminary objection. In compliance with the directions which the court issued, with the concurrence of the parties, the defendant filed and served submissions. Notwithstanding the service of the defendant’s submissions, the plaintiff totally failed to file submissions.
8. Having given due consideration to the said preliminary objection, the learned Judge held that;

“ ... In the absence of a board of directors’ resolution to commence a suit, a company, which is an artificial person, as in this case, cannot be capable of instituting a suit in court, and that such a suit should be struck out.

In the case before me, the plaintiff had not lodged in court, the resolution authorising the institution of the suit. The plaintiff had also not exhibited the letter of authority, pursuant to which the Supporting Affidavit was sworn. I therefore find that the proceedings, as they relate to the affairs of a limited liability company, were a nullity, having not been sanctioned by a valid resolution of the company.”
9. In the circumstances, the court upheld the preliminary objection, and struck out the Originating Summons, with costs being awarded to the defendant.
10. There are 2 aspects to the decision by the learned Judge. First, that the plaintiff had not lodged in court, the resolution authorising the institution of the suit. And, secondly, that the proceedings had not been sanctioned by a valid resolution of the company. In other words, the plaintiff did not just fail to file a resolution in court, but also that the company had never passed any resolution to institute the proceedings.
11. We note that the respondent now concedes, and rightly so, that;

“ We submit that though the law has developed to the effect that it is not a requirement that the resolutions be filed together with the plaint or at the point of filing suit, the same must be filed at least before the suit is fixed for hearing.”

Why do we say that the respondent was right to make that concession?

The answer is provided by the respondent, when he said;

“ We make these submissions well aware that there exists numerous authorities to the effect that action commenced without authority/resolution of a company can be ratified.”
12. It therefore follows that even if the proceedings had been instituted without the resolution of the directors, to commence the same, the institution of the proceedings can be ratified.
13. In the circumstances, therefore, the absence of a resolution in the court file would not, of itself, render the suit fatally defective.



14. Indeed, the respondent clearly appreciated that legal position as cited the following words from the case of *Leo Investment Ltd v Trident Insurance Co. Ltd* [2014] eKLR;

“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 plaintiff does not invalidate the suit. I associate myself with the decision of Kimaru J in *Republic v Registrar General & 3 Others*, Misc. Application No. 67 of 2005 [2005] eKLR, and hold that the position in law is that such resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing, as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore not fatal to the suit.”

15. If, as the respondent has acknowledged, the absence of a resolution at the time when the suit was instituted does not render the suit fatally defective, we have difficulty in appreciating why the respondent still opposed the appeal herein.

16. In any event, this Court has had this to say, in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others*, Civil Appeal No 76 of 2019;

“The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court, which has been followed and applied in this country for a long time: *Bugerere Coffee Growers Ltd v Sebaduka & Another* [1970] 1 EA 147. The court in that case held; -

“When companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at the company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorising the proceedings in this case.”

17. The court went on to note that the above-stated position was no longer the law.

This is what the court said;

“The Uganda Supreme Court endorsed the decision of the Court of Appeal, that the decision in the Bugerere case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General*, SCCA No. 1 of 1998. The latter case restated the law as follows:-

‘... It was now settled, as the law, that it does not require a Board of Directors, or even the general meeting of members, to sit and resolve to instruct counsel to file proceedings on behalf and in the name of the Company. Any director, who is authorised to act on behalf of the company, unless the contrary is shown, has powers of the board to act on behalf of that company.’

This decision has since been applied in Kenyan Courts, for example in *Fubeco China Fushun v Naiposha Company Limited & 11 Others* [2014] eKLR.”

18. In this case, Susan Gathoni Maina swore an affidavit in which she stated that she was a director of the appellant company. She deposed that she was duly authorised to make the affidavit in support of the Originating Summons. Furthermore, she made reference to the law firm of Messrs Kinoti & Kibe Advocates as being the advocates for the company. By necessary implication, the said firm had been instructed by the company.



19. We find that the respondent had not shown that the said depositions were contrary to the correct factual position.
20. In the circumstances, we find that the conclusion arrived at by the learned Judge was not in accord with the law, as it currently stands. Therefore, we allow the appeal, and set aside the orders for the striking out of the Originating Summons. In lieu thereof, we find that the Preliminary Objection dated 24th September 2018 lacks merit: it is therefore overruled.
21. The Originating Summons is reinstated.
22. Costs of this appeal, as well as the costs pertaining to the Preliminary Objection are awarded to the appellant.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF JUNE, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

