



Olkeju Ronkai Limited v County Government of Narok (Environment & Land Case E012 of 2022) [2024] KEELC 1255 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E012 OF 2022**

CG MBOGO, J

MARCH 7, 2024

BETWEEN

OLKEJU RONKAI LIMITED APPLICANT

AND

COUNTY GOVERNMENT OF NAROK RESPONDENT

RULING

1. The defendant filed the Notice of Preliminary Objection dated 16th November, 2023 challenging the hearing of the suit on the following grounds: -
 1. That the entire suit as filed by the plaintiff/respondent is fatally defective for lack of an authority to sue from the plaintiff company.
 2. That the entire suit as filed by the plaintiff/respondent is fatally defective for want of a resolution and/or valid resolution of the plaintiff company approving the institution of this suit.
 3. That the suit as filed by the plaintiff/respondent is fatally defective as the verifying affidavit offends the mandatory provision of Order 4 Rule 1 (4) of the Civil Procedure Rules, 2010.
 4. That in the circumstance therefore, the suit as filed in court against the defendant/applicant is fatally defective, incompetent and an abuse of the court process and this honourable court should dismiss and/or strike it out with costs to the defendant/applicant.
2. The notice of preliminary objection was canvassed by way of written submissions.
3. On the 19th December, 2023 the defendant filed its written submissions dated 13th December, 2023 where it raised two issues for determination as follows: -
 - a. Whether the defendant/applicant’s preliminary objection is merited.



- b. Who should bear the costs of the preliminary objection.
4. On the first issue, the defendant submitted that the preliminary objection has merit for the reason that it raises a pure point of law. The defendant submitted that the application as well as the plaint were filed in breach of statutory provisions. Further, that for any action or proceedings to be taken in the plaintiff/ respondent's name, such action or proceeding must be authorized in accordance with the Articles of Association and the provisions of the *Companies Act* and, it is not a procedural technicality to require that a company authorizes any proceedings brought in its name.
 5. The defendant submitted that since no resolution has been annexed to show that the company or the board of the plaintiff sanctioned the commencement of this action, then the company is not before this court at all. The defendant relied on the cases of Kenya Commercial Bank Limited versus Stage Coach Management Limited [2014] eKLR, Affordable Homes Africa Limited versus Ian Henderson & 2 Others HCCC No. 524 of 2004 and East African Portland Cement Limited versus Capital Markets Authority & 4 Others [2014] eKLR.
 6. The defendant, in conclusion, submitted that it is entitled to costs as provided under Section 27 of the *Civil Procedure Act*.
 7. By the time of writing this ruling the plaintiff/respondent had not file its written submissions. Be that as it may, I have considered the preliminary objection and the submissions filed by the defendant/applicant.
 8. I am of the considered opinion that the issue for determination is whether the notice of preliminary objection has merit.
 9. A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA 696 to mean: -

Per Law, JA

“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. 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”.

Further Sir Charles Nebbold, P stated that: -

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

10. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct.



11. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of Quick Enterprises Ltd versus Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

12. It is also this court’s opinion that in determining a preliminary objection, the court will take into consideration that the preliminary objection must stem from the pleadings and must raise pure point of law. See the case of Avtar Singh Bhamra & Another versus Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

13. As I embark on determining the merits of the preliminary objection, this court will consider whether what has been raised herein satisfies the ingredients of a preliminary objection. This court is persuaded by the findings in the case of Oraro versus Mbaja (2005) 1KLR 141, where the court held that: -

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

14. Based on the above cited authorities, and looking at the nature of the preliminary objection before this court, I am satisfied that it raises a pure point of law on the mandatory provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules.

15. The plaintiff filed a plaint dated 24th October, 2022 which was accompanied by a verifying affidavit which is sworn on even date by Tom Ole Kamwaro. In the verifying affidavit, Tom Ole Kamwaro depones: -

“That I am the Director of the Plaintiff/Applicant herein having authority to swear this affidavit hence competent to do so.”

16. 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.”

17. In the case of Livestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Aburili J observed as follows:

“31. It is clear that from the foregoing provision, there is no requirement that the authority given to the deponent of the verifying affidavit be filed. The failure to file the authorization, therefore, in my view, may be a ground for seeking particulars, assuming that the said authority does not form part of the plaintiff’s bundle of documents which commonsense dictates it should. 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 plaint does not invalidate the suit.

32. I associate myself with the decision of Kimaru, J in Republic v Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR that the position in law is that such a 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 he suit. Its absence, is therefore, not fatal to the suit.”

18. Bearing in mind that the objective of this court is to uphold substantive justice, and further taking note that the suit is yet to be set down for hearing, I find that there is still room for the plaintiff/respondent to put its house in order.

19. I am persuaded by the decision of the court in the case of Faith & Hope Properties Kenya Ltd v James Muchiri Waweru & another [2021] eKLR, where the court held that: -

“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.”

20. From the above, I find no merit in the notice of preliminary objection dated 16th November, 2023, the same is hereby dismissed. Costs to abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 7TH DAY OF MARCH, 2024.

HON. MBOGO C.G.

JUDGE

7/03/2024.

In the presence:

Mr. Meyoki – C.A

