IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KOOME, OKWENGU & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO.31 OF 2014

BETWEEN

SARAF LIMITED .... APPELLANT

AND

AUGUSTO ARDUIN .... RESPONDENT

(An appeal against the ruling of the High Court of Kenya Malindi (Meoli, J)

delivered on 14th October 2014

in

H.C.C.C. NO.30 OF 2014)

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JUDGMENT OF THE COURT

1. The appellant, **Saraf Limited**, has filed this interlocutory appeal against the decision dated 7th July 2014 made by the High Court (Meoli J) sitting in Malindi in Civil Case No.30 of 2014. The High Court decision was made in the notice of motion dated 7th November 2013 by the respondent seeking to strike out the appellant's defence and entry of judgment as prayed for in the plaint.

2. The background facts from the record of this appeal show that the respondent commenced by plaint dated 12th January 2012 High Court Civil Suit No.30 of 2014 (at Malindi) claiming from the appellant the sum of Shs.4.4 million as money had and received. After entering appearance, the appellant filed a statement of defence in which it denied the claim and sought dismissal of the suit. Besides denying the claim, the appellant also averred that one Daniele Barzecola had not authorized the respondent to institute the suit. The appellant pleaded in the alternative that the contract relating to the claim for shs.4.4 million was made not by the appellant but by the said Daniele Barzecola and that it was illegal and unenforceable because "*it was made for the purpose of defrauding Daniele Barzecola.*" The appellant did not in its statement of defence furnish particulars of the alleged fraud nor show how or why the alleged contract was made between the respondent and the appellant as alleged in the plaint rather than between the said Daniele Barzecola and the respondent.

3. After filing its defence, the respondent made an application by way of notice of motion dated 7th

November 2013 seeking to strike out the defence on the ground that *"no resolution of defendant company (i.e. the appellant) had been filed,"* that *"the appointment of counsel for the appellant was irregular and contravened the law in absence of a resolution to that effect; that the defence as filed was prejudicial, embarrassing and/or would cause delay of fair trial and that it was mandatory for a company as a legal entity to file its resolution whether prosecuting or defending a suit."*

4. An affidavit sworn by advocate Philip Muchira on behalf of the respondent was filed in support of the said notice of motion. The deponent averred that the pleadings in the suit were incompetent, misconceived, unmaintainable and lacked any basis in law.

5. The appellant as the defendant in the suit opposed the notice of motion and its counsel, Mr. Tukero ole Kina, swore a replying affidavit in which he averred that the respondent's suit was bad in law in that it was *"commenced by Ms Raffaella Pochintesta, a Director of the defendant appellant company without authority from the Board of Directors exemplified by a resolution conferring authority to her."*

6. In his submissions, the respondent/plaintiff contended that the appellant/defendant did not have a resolution of its Board of Directors authorizing it to defend the suit and accordingly urged the Court to strike out the defence and enter judgment.

7. The learned Judge (Meoli J) disposed of the notice of motion by her ruling dated 7th July 2014 in which she ordered that a suitable authority be filed within 14 days by the appellant/defendant alongside

> ***"properly intituled defence in compliance with Rule 2 (c) of Order 9 of the Civil Procedure Rules to reflect the true nature of pleading filed by the appellant/defendant, and ordered costs thereof to be in the cause."***
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> She delivered herself as follows –
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> ***6. "In the circumstances of this case, it would be unjust of the court to strike out the defence on record without giving a chance to the Defendant to satisfy the court that the defence filed is an action falling within Order 9 Rule 2 (c) of the Civil Procedure Rules on which they have placed reliance, now that a challenge has been raised by the Plaintiff and no affidavit has been sworn by the alleged director Rafaella Pochintesta.***
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> ***7. For these reasons I would order that a suitable authority be filed by the Defendant in compliance with Order 9 Rule 2 (c) within 14 days of today's date alongside a properly intituled defence to reflect the true nature of the pleading filed by the Defendant.***
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> ***Costs will be in the cause.***

8. It is not discernible why the respondent/plaintiff focused on the question of legal status and capacity of the appellant/defendant to defend the suit rather than the substance of the claim and whether the statement of defence disclosed a reasonable defence.

9. The appellant, aggrieved by the decision of the court (Meoli J), lodged notice of appeal on 18th July 2014 pursuant to Rule 75 of this Court's Rules and on 25th August 2014 lodged the record of appeal. In the memorandum of appeal, the appellant put forward the following four grounds of appeal –

> "(1) ***The Honourable Court erred in law when it found that in the circumstances of the case before it where the suit is instituted by a third party against the appellant, it was necessary for the appellant to file a resolution of its board of directors authorizing the defence of the suit.***
>
> ***(2) The Honourable Court erred in law when it failed to distinguish the decision in Bugerere Coffee Growere Ltd vs Sebaduka & Another [1970] EA 167 and instead held that the decision and the line of cases following it applied to the circumstances of this case.***

(3) The Honourable Court misconstrued the purport and import of Order 9 Rule 1 and 2 Civil Procedure Rules as read together with Section 38 of the Companies Act, Chapter 486 of the Laws of Kenya and Rule 80 Part I of the Regulations for Management of a Company Limited by Shares not being a Private Company and thereby came to an erroneous decision.

(4) The Honourable Court erred in law by failing to find that the inquiry into the authority of the company to defend the suit against it by a third party is an unnecessary intrusion into the internal affairs of the company and by denying the appellant the protection implicit in the decision in Royal British Bank v Turguand (1856) 6 E & B 327."

10. When the appeal came up for hearing before us on 29th January 2015, learned counsel for the appellant, **Mr. P. Ole Kina** submitted that a resolution of the Board of Directors of the respondent (plaintiff company) was necessary before the latter could institute the suit against a third party (as opposed to a suit against a member of the plaintiff company). He referred us to the decision of the High Court of Uganda in **Bugerere Coffee Growers Limited v. Sebaduka and Another** [1970] EA 147 in which the learned Judge (Youds J) held that –

"(c) **(i)** ***when companies authorize the commencement of legal proceedings a resolution have to be passed either at a company or Board of Directors meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings;***

ii. where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action (Danish Mercantile Co. Ltd v Beaument [1951] J Ch.680 adopted;

iii. the advocates should be ordered to pay the costs. Action dismissed. Costs to be paid by the advocates for the purported plaintiff."

11. It was Mr. Ole Kina's further submission that the defendant/appellant had not exhibited the requisite Board of Directors resolution and, according to counsel, it was not clear how the respondent's firm of advocates had entered appearance in the suit in absence of such resolution. Counsel's take was that the advocates acting for the appellant/defendant had no authority. He urged the Court to strike out the defence.

12. On his part, **Mr. Elijah Ogot**, the learned counsel for the appellant submitted that the appellant qua defendant did not in law have to demonstrate that it had authority to defend the suit. In his view, Order 9 Rule 2 of the Civil Procedure Rules does not place any obligation on a company defending or filing suit against third parties to pass a Board resolution before doing so. In his view, such requirement amounts to intrusion into the business and internal affairs of the company and further that the decision in **Royal British Bank v. Turquand** (1856) 6 E & B 327 seeks to protect the internal affairs of companies and that parties dealing with them are entitled to assume that internal company rules are complied with even if they are not.

13. We have perused the record of appeal and given due consideration to the rival submissions of counsel for the parties.

14. The respondent/defendant sought in its notice of motion dated 7th November 2013 an order that the defence of the appellant qua defendant in the suit be *"struck out and judgment be entered accordingly as prayed in the plaint on the grounds that (1) there was no resolution of the defendant company filed; (2) the appointment of counsel for the respondent was irregular and contravened the law in absence of a resolution to that effect; (3) the defence as filed will prejudice embarrass and/or delay the fair trial of the matter; (4) that its (sic) mandatory provision that a company being a legal entity must file its resolution whether prosecuting or defending the suit."*

15. In short, the respondent's case for striking out the appellant's defence was that the latter had not demonstrated that it had legal capacity to defend the suit. We know of no law that makes it a requirement

for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (see **Solomon & Solomon** [1897] AC 22 (H. L.)) Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law. It has always been the law that directors are the persons who have authority to act for the company but the majority of the members of the company are entitled to decide, even to overrule, the directors. In **Shaw and Sons (Salford) v. Shaw** [1935] 2 KB 113, Greer LJ reiterated that –

> ***"if powers of management are vested in the directors, they and they alone can exercise these powers...".***

He also observed what **Solomon v. Solomon** had much earlier held, namely, that –

> ***"a company is an entity distinct from its shareholders and directors."***

The law on the position where one is dealing with a limited liability company shows that one cannot probe into the internal affairs of a company. A party dealing with a limited liability company which has instituted a suit against him/her seeking relief or making a claim cannot go behind what ex facie appears to be legitimate and fail to answer the allegation on the claim and instead question legality of the action against him, that is to say, whether there was a resolution of the Board of Directors or a resolution of the general meeting. He must proceed on the footing that ex facie the action was commenced with the authority of the Board or the general meeting. The decision in **Royal British Bank v. Turquand** [1856] 6 E & B 327 is in support of this proposition. In that case a limited liability company was sued on a bond for £2,000 which two directors of the company had signed on behalf of the company. The deed of settlement registered under the Joint Stock Company Act 1847 allowed directors to borrow on bond to the extent authorized by general meeting of the company. In an action on the bond, the company pleaded that there had been no resolution authorizing the making of the bond. The English Court of Exchequer Chamber held that –

> ***"...a person, on reading the deed of settlement, would find, ... not a prohibition against borrowing, but a permission to borrow on certain conditions, and, learning that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done; and therefore, the company was*** **liable whether or not a resolution had been passed."**

16. This decision shows that the law treats a person dealing with a limited liability company as entitled to assume that internal company rules are complied with even if, unknown to him, they are not. At any rate, in the instant appeal, the substantive issue before the court was whether the appellant who is the defendant in the suit pending in the High Court is liable. The points raised by the appellant on procedure were a deviation and had the effect of derailing the suit. They did not impact on the jurisdiction of the court to hear the matter, much less prejudice the appellant. It was not a matter that could not be addressed at the full hearing. In our view, the learned trial judge was correct in her decision and we find no merit in this appeal which we dismiss with costs to be borne by the appellant in any event.

Dated and delivered at Malindi this 1st day of July, 2016.

M. K. KOOME

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR