



**Green Holiday Condos Ltd v Gregorio & another (Environment & Land
Case 49 of 2020) [2023] KEELC 545 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 545 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 49 OF 2020
MAO ODENY, J
JANUARY 30, 2023**

BETWEEN

GREEN HOLIDAY CONDOS LTD PLAINTIFF

AND

ANTONIO DE GREGORIO 1ST DEFENDANT

DISTRICT LAND REGISTRAR, MOMBASA 2ND DEFENDANT

RULING

1. The 1st defendant filed a Notice of Preliminary Objection dated September 3, 2020 seeking dismissal of this suit on the ground that the same does not comply with Order 4 Rule 1(4) of the [Civil Procedure Rules](#).
2. The Preliminary Objection was canvassed by way of written submissions which were duly filed by both parties.
3. Counsel for the 1st defendant submitted that the plaintiff Company did not give authority to the director, Peter Kahihu to execute the supporting and verifying affidavits accompanying the Notice of Motion and Plaint respectively and urged the court to uphold the Preliminary Objection and strike out the suit.
4. Counsel for the plaintiff also filed submissions and submitted that Order 4 rule 1 (4) does not specify when the company resolution should be filed and that failure to file the resolution could be cured at any time before the suit is set for hearing.
5. Counsel relied on the cases of [Leo Investments Limited v Trident Insurance Co Limited](#) [2014] eKLR; [Republic v Registrar General and 13 others](#) [2015] eKLR; and by the Court of Appeal in [East Africa Safari Air Ltd v Antony Ambaka Kegodre & another](#) [2011] eKLR and urged the court to dismiss the Preliminary Objection.



Analysis and Determination

6. The issue for determination is whether the Preliminary Objection meets the threshold as was enunciated in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696.
7. The Preliminary Objection by the 1st defendant is that the plaintiff has no locus standi to institute the suit since there is no board resolution under seal authorizing commencement of this suit in the name of the Plaintiff Company. The 1st defendant further argues that the suit offends the provisions of Order 4 Rule 1 (4) of the [Civil Procedure Rules](#) which provides as follows: -

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.

8. The issue of whether it is mandatory to file alongside the Plaint a resolution of a Company under seal authorizing a particular Director to swear a verifying affidavit on behalf of the Company has now been settled by the court. That failure to file the resolution alongside the Plaint is not on its own a ground for invalidating a suit since the resolution can be filed at any point before trial.
9. In the case of [Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited](#) [2016] eKLR the court held that:

“I associate myself with the viewpoint taken by Kimaru, J in *Republic v Registrar General and 13 others* Misc Application No 67 of 2005 [2005] eKLR that such a resolution by the Board of Directors of a company may be filed at 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. Accordingly, it is my finding that there is indeed on record credible evidence that the deponent, Pramit Verma, was duly authorized by the Plaintiffs to swear affidavits on their behalf.”

10. Similarly, in the case of [Private Development Co. Ltd v Rebecca Ngonyo & 2 others](#) [2018] eKLR, the court held that: -

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“9. I associate myself with the sentiments of Odunga J, in the case of *Leo Investments Limited v Trident Insurance Company Limited* (2014) eKLR, cited by counsel for the plaintiff, where the learned judge stated as follows on the provisions of Order 4 Rule 1 (4) :-

“...nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, 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 common sense dictates that it should. Of course, 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 plaint does not invalidate the suit. 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, and hold the position in law is that such a resolution by the Board of Directors of a company may be filed anytime 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."

In my own view, unless there is serious contention by an insider of the company, that the company could not have issued a resolution to institute the suit, then the court ought to be slow to infer that the company which has commenced the suit, had no authority to do so, especially where a director or directors have sworn affidavits affirming that they have indeed authorized commencement of the case."

11. Counsel for the 1st defendant has raised many issues which are factual regarding the ownership of the suit land which are disputed. It is trite that Preliminary Objection should only raise points of law and not facts that need to be proved during a full trial since if argued has the effect of disposing the suit.
12. A party can file and serve the Board resolutions any time before trial as was held in the case of *Faith & Hope Properties Kenya Ltd v James Muchiri Waweru & another* [2021] eKLR.
13. The upshot is that the Preliminary Objection is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JANUARY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

