



REPUBLIC OF KENYA



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**Ochanda v EON Energy Limited (Civil Appeal E178 of 2024)
[2025] KEHC 7964 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 7964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E178 OF 2024
AB MWAMUYE, J
APRIL 30, 2025**

BETWEEN

DANIEL OTIENO OCHANDA APPELLANT

AND

EON ENERGY LIMITED RESPONDENT

(Being an Appeal from the whole of the Judgment and Decree of the Small Claims Court at Kisumu delivered by Hon. Getrude Chepngetich Serem (Senior Resident Magistrate/ Adjudicator) on 13th August 2024 in SCCCOMM No. E163 of 2024)

JUDGMENT

1. The Appellant herein has approached this court aggrieved by the Judgment of the Trial Court delivered on 13th August, 2024 in Kisumu SCCCOMM No. E163 of 2024. The Memorandum of Appeal dated 10th September, 2024 has six (6) Grounds of Appeal namely:
 - i. The learned Trial Magistrate erred in law and in fact in considering and determining the lack of Authority from the Board of Directors to file the case was not fatal to the case.
 - ii. The learned Trial Magistrate erred in law and fact in admitting new evidence from the Respondent when the same had not been tendered during hearing as it pertains the issues of necessity of Authority from Directors before filing the suit.
 - iii. The learned Trial Magistrate erred in law and fact when she found that the Appellant was liable to pay the Respondent a sum of Kshs. 259,859/- for Special Damages when no evidence was tendered in proof thereof.
 - iv. The learned Trial Magistrate erred in law and fact when she awarded the Respondent interest at court rate from the date of filing till full payment which was inappropriate and inapplicable to the facts of the case.



- v. The learned Trial Magistrate erred in law and fact when she awarded the Respondent cost of the suit.
 - vi. The learned Trial Magistrate erred in law in disregarding the Appellants submissions.
2. The Respondent on the other hand filed a Memorandum of cross-appeal dated 27th November 2024 based on the ground that the learned trial magistrate erred in law and fact when she failed to award the Respondent debt collection fees of Kes. 50,000.00 despite the same being provided for in the agreement between parties.
 3. Despite the Appellant not filing a Record of Appeal, both parties canvassed the Appeal and cross - appeal by way of written submissions.
 4. The Appellant through its counsel, filed written submissions dated 18th January 2025 where he dealt with two issues for determination namely; whether the Claimant had capacity to institute a claim against the Respondent without authority from the Directors and whether the appeal has merit.
 5. On the first issue, the Appellant submitted that it is settled law that any incorporated company that institutes a suit must have a company's resolution, and anyone who swears an affidavit on behalf of the company must be duly authorized to do so. The Appellant further submitted that the verifying affidavit attached does not show that the deponent had authority to swear the same nor does it show that he had authority from the company to swear the affidavit on its behalf. Reliance was placed on the case of Kenya Commercial Bank Limited vs Coach Management Limited [2004] eKLR.
 6. On the second issue, the Appellant submitted that the Respondent sued the Appellant for recovery of Kes.309,854.79 but on the other hand the Appellant raised a Counter-claim against the Appellant for Kes. 2,000,000.00 thus since the Appellant raised a claim which wasn't within the jurisdiction of the small claims court, the matter ought to have been transferred to a court of competent jurisdiction. In support of this, they relied on the case of Daikyo Japan Motors Limited & 2 others v Yasin & Fairuz Feisal Yasin & Another [2020] eKLR.
 7. The Respondent on the other hand filed written submissions through its counsel dated 22nd January, 2025. The Respondent outlined four issues for determination namely; whether the lack of a written authority to sue from the Board of Directors was fatal to the case, whether the award of special damages of Kes. 259,859.00 together with interest was proper and justified, whether the Respondent is entitled to recover debt collection fees from the Appellant and finally whether the costs and interests awarded to the Respondent were proper and lawful.
 8. On the first issue, the Respondent submitted that the Respondent authorized Mr. Dwalo Ariaro, who is the CEO and a Director at the company to institute the suit and that in challenging the authority, the Appellant did not produce any proof that there was no authority from the Board of Directors. The Respondent further submitted that the lack of written authority is not fatal to the suit and furthermore, the question of authority was not raised in the Appellant's Statement of Response nor did he move the court to have the suit struck out. In support of this, they cited the case of Bethany Vineyards Limited & Another v Equity Bank Limited & 2 Others [2020] eKLR.
 9. On the second issue, the Respondent submitted that it is trite law that special damages must not only be specifically pleaded but proven as outlined in the case of Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 (as quoted in the case of Swalleh C. Kariuki & another v Violet Owiso Okuyu [2021] eKLR. The Respondent submitted that they submitted duly executed account opening forms, invoices and detailed statement of accounts in support of their claim for special damages.



10. On the third issue, the Respondent submitted that the contract between the parties provided for payment of debt collection fees in the event the customer defaulted thus they are entitled to debt collection fees of Kes. 50,000.00
11. On the fourth issue, the Respondent submitted that costs are discretionary as provided for under Section 27 of the *Civil Procedure Act* and further costs follow the event. Reliance was placed on the Court of Appeal case of Punchlines Limited v Joseph Mugo Kibaria & 10 others [2018] eKLR and the case of Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others [2014] eKLR.

Analysis and Determination

12. This being an Appeal from the Small Claims Court, the duty of this court is circumscribed under Section 38 of the *Small Claims Court Act* which provides as follows:

“ 38.

- (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High court on matters of law.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.”

13. The duty of the Court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of Mbogo and another v Shah [1968] EA 93, the Court of Appeal stated as doth:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

14. However, an Appeal of this nature is purely based on points of law. What constitutes points of law, has been settled by the Court of Appeal in the case of Peter Gichuki King'ara Vs IEBC & 2 Others, Nyeri Civil Appeal No. 31 of 2013 where the court stated as follows:

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law of evidence with the caveat that the appeal court did not see the witness demeanor- is an issue of law.”

15. It is evident that the question of whether the trial court properly considered and/ or evaluated the evidence on record and arrived at a correct determination is a question of law not fact. This means that the court can only intervene if the evidence on record does not reasonably support the conclusions made by the trial court.



16. I have observed that judgment by the trial court was delivered on 13th August 2024 and on 2nd December, 2024 when the matter appeared before court for mention to confirm compliance by parties, the Appellant was yet to file his Record of Appeal to which he was granted leave of 30 days to file and serve the same. No record of appeal has been filed since then.
17. I am alive to the fact that there is no prescribed time limit as to when a record of appeal should be filed. Section 79G of the *Civil Procedure Act* applies to filing of the Memorandum of Appeal. The record of appeal can always be filed later after the memorandum of appeal has been served on the Respondent and before the appeal is listed for directions under Order 42 Rule 13 of the Civil Procedure Rules.
18. However, that rule leaves no doubt that ideally, the record of appeal should be filed soon after service of the memorandum of appeal to pave way for fixing of a mention date for the purpose of giving directions on hearing of the Appeal.
19. Be it as it may however, I have considered the key issue for determination brought about in the Appellant's Submissions which is whether the Claimant had the capacity to institute a claim for the Respondents without authority from the Directors.
20. It is trite law that a company can sue in its own name with the sanction of its Board of Directors or by a resolution in a general or special meeting. It is during such meetings that authority is given to institute or defend a case on its behalf. It is therefore needless to say that an incorporated body has of necessity to act through agents who are usually members of its Board of Directors.
21. Order 9, Rule 1 of the Civil Procedure Rules provides that any Application to or appearance or act in any court required or authorized by the law to be made or done by a party in such a court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf
22. Order 9 Rule 2 (c) of the Civil Procedure Rules outlines that the recognized agents of parties by whom such appearances, applications and acts may be made or done are in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.
23. My view is that when a party is of the opinion that a suit is incompetent because of want of authority, such party needs to plead that issue, or even if it is not pleaded, such party needs to file an application before this suit is heard, so that the issue is sorted out earlier in the proceedings.
24. The essence of this is to reply to the Respondent to respond to the application. The Respondent can in response to such application, demonstrate that it has given authority to defend the suit and authority to the person who swore the affidavit.
25. It has not been demonstrated to me that the director of the Respondent is not the person who would ordinarily have the authority to sign documents on behalf of the Respondent.
26. The Articles of Association could authorize a suit to be commenced by an officer of the company independently, or require a resolution of the Board of Directors or even a resolution of the General Meeting or any other way that the Company wishes. The Articles of Association of the Respondents have not been displayed to court by the Appellant so as to demonstrate that there was a breach in the Articles of Association in the manner in which this suit was instituted.
27. It is not for this court to speculate whether or not the requisite authority has been obtained from the Respondent herein. The assumption should be that the claim has been duly authorized by the Respondent and the court can be put into inquiry if the Respondent or an authorized agent puts material before the court that the Verifying Affidavit has not been duly authorized. This is because



- authority to institute or defend the suit is an internal matter of the company emanating from its Articles of Association.
28. The appropriate officer authorized to swear an affidavit on behalf of a company is known internally to the Company under its Articles of Association. To state that an affidavit by a corporation is not properly sworn by a person who is not authorized by the Articles of Association of the company is a matter that touches on a violation of the Articles of Association.
 29. In any event, the Affidavit sworn has been sworn by a director of the Respondent's company. Pursuant to the principles of company law, a director is a known agent of the company. It is within the ostensible authority of the directors to sign documents on behalf of a company including affidavits unless evidence is given that the Respondent acted outside the scope of his actual authority. I cannot hold that he was unauthorized to swear the affidavit on behalf of the Respondent.
 30. I am inclined to agree with the position of the decision of D.K.Maraga J (as he then was) 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 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 authorized 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 y 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 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.”
 31. The equivalent of Order 3 Rules 1 to 5 referred to above is the current Order 9 Rules 1 to 4 of the Civil Procedure Rules, 2010.
 32. Similarly in the case of Britind Industries Limited vs APA Insurance Limited [2017] eKLR borrowed from the authority of Mavuno Industries Limited & 2 Others vs Keroche Industries Limited HCCC No. 122 of 2011 where the court held that failure to file the requisite authority together with the plaint does not invalidate the suit.
 33. I associate myself with the above position and find that the alleged Affidavits sworn by the director of the Respondent's Company are not incompetent in the absence of the Board Authority. My finding therefore is that this case was properly instituted and determined by the trial court.
 34. In my view, this appeal is frivolous, vexatious, an abuse of the court process and a tactic to delay justice. I do not find merit to it and therefore dismiss it.
 35. On the memorandum of cross- appeal dated 27th November 2024 by the Respondent, I note that the ground raised is to the effect that the trial court failed to award the Respondent debt collection fees of Kes. 50,000.00 despite the same being provided for in the agreement.
 36. This appeal is solely anchored on issues of evidence. Section 32 of the Small Claims Act expressly provides that the Small Claims Court shall not be bound wholly by rules of evidence.



37. I have not seen a single issue of law being raised by the Respondent in the cross- appeal. The trial court cannot be faulted that it reached a decision on no evidence. I have evaluated the same and noted that the Trial Court exercised its discretion correctly.
38. It is my finding that the adjudicator at the trial court properly considered and evaluated the evidence and arrived at a correct determination that is supported by law of evidence. I therefore find no legal issue raised by the Respondent in the circumstances, I hereby dismiss the cross – appeal.
39. In the circumstances, it is fair, proper, and just that each party bears its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL 2025.

BAHATI MWAMUYE

JUDGE

