



Mtangi & 431 others (The names of the other 427 Plaintiffs above-stated are stated in the authority to file suit and list exhibited on the Affidavit in support of the Application herein) v Zumzum Investments Limited (Environment & Land Case 139 of 2020) [2023] KEELC 15692 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 139 OF 2020
NA MATHEKA, J
FEBRUARY 21, 2023**

BETWEEN

**FONDO KARISA MTANGI 1ST PLAINTIFF
MANYESO CHARO JEFWA 2ND PLAINTIFF
KENGA NGARI KOMBO 3RD PLAINTIFF
HALIMA ABDALLAH OMAR 4TH PLAINTIFF
GITARI J. KENNEDY MICHENI & 427 OTHERS 5TH PLAINTIFF
THE NAMES OF THE OTHER 427 PLAINTIFFS ABOVE-STATED ARE
STATED IN THE AUTHORITY TO FILE SUIT AND LIST EXHIBITED ON THE
AFFIDAVIT IN SUPPORT OF THE APPLICATION HEREIN**

AND

ZUMZUM INVESTMENTS LIMITED DEFENDANT

RULING

1. The Plaintiffs raised a preliminary objection on the legal representation of the Defendant's advocates on record and seek for them to be struck off the record and to have their pleadings including the memorandum of appearance dated 16th November, 2020, statement of defence dated 10th December, 2020, Notice of Preliminary Objection dated 16th November, 2020 struck out from the proceedings and the defence proceedings commenced by the said pleadings be dismissed in limine on the following grounds that;

1. The Defendant lacks the requisite resolution and authority from its Board of Directors to defend this suit. There is no resolution of the company filed in this suit.



2. The Defendant's advocates are not properly on record as there is no resolution of the Defendant company filed authorising them to appear in this suit and file pleadings for or on behalf of the Defendant.
 3. The Defendant's pleadings filed herein are fatally defective for lack of authorization by the Defendant's company.
2. The Plaintiffs submitted that in the case of [East African Safari Air Ltd v Anthony Kegode & Anor](#) in which Emukule J. had detailed:

“When an Advocate is however instructed to file a suit, particularly against current or sitting directors or immediate former directors of the company, special care is required on the part of the Advocate or his firm that necessary authorizations by way of clear resolutions of the Board had been taken to institute the suit.”

3. That it was common ground that there was no authority from the board of Directors to file defence or defend the suit, and consequently, considerations is that in the absence of a board resolution sanctioning the commencement of any action by the company, the company is not before the court at all. For that reason, the preliminary objection ought to succeed and the pleadings by the Defendant must be struck out with costs, such costs to be borne by the advocates for the Defendant. That in this case, there has been no such ratification even after the Defendant, became aware of the Preliminary Objection filed sometimes on the 15th February 2021 over a year ago now. There are a litany of court decisions that state that, it would therefore not be in the interests of justice to dismiss this suit on the ground merely that there was no authority filed to institute the suit. That is a defect that does not, in my view, go to the jurisdiction of this court, and is an omission is curable. They submit that whereas the board resolution need not be filed at the time of filing pleadings and whereas the same can be filed at any moment before the suit commences and further that the actions can be ratified at a later stage. That would be n impossibility given the circumstances of this case for reasons that there exists wrangles between the directors herein. They refer to paragraph 5 of the Defence where one director has sued the other director.
4. Further one of the directors Abdulkarim Saleh Muhsin has already been adjudged bankrupt by the Court under the provisions of the [Insolvency Act](#) 2015 via Mombasa Insolvency Cause No 1 of 2019. According to search at the company registry Saleh Muhsin is a majority shareholder. The Order adjudging Abdulkarim Saleh Muhsin bankrupt was issued on the 1st July 2019 before the commencement of this suit. They submit that for want of Board Resolutions, all pleadings filed by the Defendant are defective. There is further no possibility of ratification of the actions taken by the Defendant since some of the directors are not only bankrupt and thus cannot legal transact any business, they are also engaged in legal wrangles amongst themselves. To date no Board Resolution has be filed and served, this further confirms that it cannot be secured due to the current prevailing circumstances. The preliminary objection herein is meritorious and should thus be allowed.
5. The Defendant submitted that there is no pure point of law raised in the preliminary objection and the same is a matter of evidence. That the same does not cite any law that it is purportedly based or grounded upon. That there is no law cited by the Plaintiff that requires a Defendant in a matter to produce a resolution on appointment of advocates. That there is no law cited requiring the filing of a resolution on appointment of an Advocate. That the said preliminary objection is an abuse of the court process and should be dismissed with costs.



6. Having perused the Plaintiffs' preliminary objection dated 11th February 2021, its submissions dated 26th January 2023 and the Defendants submission dated 30th January 2023, I find the issue for determination is whether the notice of preliminary objection by the Plaintiff is merited. It is not in dispute that the Defendant herein is a corporate body and there is need for it to file its resolution of board of directors in order to file pleadings in Court. From perusal of documents filed herein no relation of such nature has been filed by the Defence. However therein numerous authorities the Courts have opined that absence of filing such a resolution is not fatal to the suit.
7. In *Leo Investments Ltd v Trident Insurance Company Ltd* (2014) eKLR Odunga, J was in agreement with the decision of Kimaru J in the case of *Republic v Registrar General and 13 Others* Misc. Application No. 67 of 2005 (2005) eKLR where the court stated;

“... 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.”
8. The Court of Appeal in the case of *Spire Bank Limited v Land Registrar & 2 others* (2019) eKLR also stated as follows: -

“... It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”
9. From the foregoing, it is my position that since the matter has not reached the hearing stage the Defendant is given 30 days to file the resolution and I therefore find the application unmerited and it is overruled. The costs will be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2023.

N.A. MATHEKA

JUDGE

