



Safaricom Limited v Load Runners Limited & another (Civil Appeal E399 of 2021) [2024] KEHC 1667 (KLR) (Civ) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E399 OF 2021**

AN ONGERI, J

FEBRUARY 23, 2024

BETWEEN

SAFARICOM LIMITED APPELLANT

AND

LOAD RUNNERS LIMITED 1ST RESPONDENT

BONIFACE MWANZIA KIVINDYO 2ND RESPONDENT

*(Being an appeal from the ruling of Hon. D. M. Kivuti (PM)
in Milimani CMCC No. 2489 of 2015 delivered on 18/6/2021)*

JUDGMENT

1. On 18/6/2021, the trial court delivered the impugned ruling in Milimani CMCC No. 2489 of 2015 striking out the plaint dated 28/4/2015 with costs to the respondent on the basis that it was constituted contrary to Order 4 Rule 1(4) of the Civil Procedure Rules.
2. The ruling was pursuant to a preliminary objection dated 24/3/2021 raised by the respondent.
3. The appellant has appealed against the ruling of the trial court on the following grounds;
 - i. That it was not in the interest of justice for the trial court to strike out the case on a procedural technicality, on the basis that the authority under seal from the plaintiff was not filed together with the plaint notwithstanding the deponent of the verifying affidavit had deponed as having been authorized to swear the affidavit.
 - ii. That the learned magistrate erred in law and fact by finding that failure to exhibit an authority under seal should result in the striking out of a plaint in the first instance. The court erred in



failing to find that the omission was curable under Article 159(2) (d) of *the Constitution* of Kenya 2010 that requires justice to be done without undue regard to technicalities.

- iii. That the honourable magistrate misdirected himself in striking out the plaint noting that the omission to file the authority under seal neither went to the jurisdiction of the court nor prejudiced the defendants in any fundamental respect, indeed no prejudice was alleged by the defendants.
 - iv. That the learned magistrate erred in failing to appreciate the position in law that the requisite resolution and authority may be filed any time before the hearing as there is no requirement that the same be filed at the same time as the suit is absent, therefore, was not fatal to the suit at the time of filing the same.
 - v. That the learned magistrate was not cognizant that an action commenced without authority is capable of being ratified and it would not be in the interest of justice to dismiss the suit on the ground that there was no authority filed to institute the suit.
 - vi. That failure to file the authority together with the board resolution in the first instance does not result in the nullification of the proceedings.
4. The parties filed written submissions which I have considered. The appellant submitted that order 4 rule 1 (4) does not state that the authority given to the deponent of the said affidavit has to be filed together with the same or at all.
5. In support the appellant cited *Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR* where Odunga J when faced with a similar issue observed that:-

“60. On the issue whether or not the suit is defective, it was contended that there was no authority given by the plaintiff company authorizing the institution of these proceedings contrary to the provisions of the *Civil Procedure Act*. Order 4 rule 1(4) of the Civil Procedure Rules provides: 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.

61. Clearly from the foregoing provision, 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 commonsense dictates 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.”

6. It was the appellant’s submission that the trial court misconstrued the matter and upheld the Preliminary Objection on a false premise. The actions taken by Daniel Ndaba towards the institution of the suit was proper in any event, since he is the Principal In-house Litigation of the appellant.
7. Further, that Order 9 Rule 2(c) of the Civil Procedure Rules (2010), the recognized agent of parties by whom such appearances, applications and acts may be made or done are, in respect of a corporation is an officer of the corporation duly authorized under the corporate seal.
8. That the deponent of the Verifying Affidavit was duly authorized to act in the interest of the Company unless the contrary is shown and in the instant case, that the Respondents have not tendered any



evidence before the court to show that the said Daniel Ndaba did not have the authority to act in any way on behalf of and in the interest of their company, the Appellant herein.

9. The appellant argued further that the primary duty of the court is to do justice and that duty cannot be fettered by procedural technicalities. *The Constitution* under Article 159 (2) (d) on judicial authority has urged Courts to do justice without undue regard to procedural technicalities.
10. In that regard, the appellant cited the Supreme Court decision in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR where the Court observed that:-
 - “(55) Be that as it may, the essence of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties...”
11. The respondent alternatively submitted that the plaint was filed without a verifying affidavit under the seal of the company and any resolution of the board of directors of the appellant. There is nothing on record to show that the appellant, a limited liability company authorized one Daniel Ndaba to swear the verifying affidavit that accompanied the plaint.
12. The verifying affidavit rendered the suit incompetent since the provision of order 4 Rule 1 (4) of the Civil Procedure Rules 2010 is couched on mandatory terms. Further, it is necessary for a company which is filing a suit to have an authorizing resolution so to do either from the Board of directors of the company or by members of the company in General Meeting.
13. That the said position was confirmed in *Kariuki Njoroge & Others v. Stephen Mugo Mutothori & Others* Hccc No. 609 of 2004 (Nrb) in which case Hon. Lady Justice M. G. Mugo stated as follows;
 - “The issue of authority and capacity to sue goes to jurisdiction. The applicants have submitted, and properly so, that a company can only sue in its own name with the sanction of its Board of Directors or under a resolution in general or special meeting. The Respondents have not shown this Court that they have been authorized to take out these proceedings in the name of the 5th Defendant or at alt. It matters not whether or not they have certain legal rights that they would wish to enforce as beneficiaries under the relevant Trust deed. They must come to Court properly and with authority.”
14. The respondent argued that they stand to suffer prejudice since they will have no remedy against the Appellant in case final orders in the main suit were to be issued against the Plaintiff and in favour of the defendants and respondents in the appeal.
15. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to come up with its own conclusion whether to support the findings of the trial court.
16. The issues for determination in this appeal are as follows;
 - i. Whether the trial court was right in striking out the plaint in Milimani CMCC no 2489 of 2015.
 - ii. Whether the appeal should be allowed.
17. On the issue as to whether the trial court was right in striking out the plaint dated 28/4/2015, I find that Section 1A of the *Civil Procedure Act* provides for the overriding objective of the *Civil Procedure Act* and the rules made thereunder and provides as follows:



- 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
18. Section 1B of the same Act, on the other hand provides for the duty of court and states:
- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —
- (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.
19. I also find that the right to be heard is fundamental right enshrined in *the constitution* of Kenya.
20. The Court is under a statutory duty to ensure that the overriding objective of the Act is attained. In so doing, there is a statutory duty imposed on the Court by section 1B aforesaid to ensure the just determination of the proceedings and the efficient disposal of the business of the Court.
21. I find that in failing to strike a balance between the two positions, the trial court was not right in striking out the plaint.
22. In the case of *D T Dobie & Company Kenya Limited vs. Muchina* [1982] KLR 1 the Court of Appeal ruled as follows;
- “The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross – examination in the ordinary way.....
- A Court of justice should aim at a sustaining a suit rather than terminating it by summary dismissal. Normally, a suit is for pursuing it.....
- No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”



- 23. I agree with the Court of Appeal position in D T Dobie vs. Muchina Case (ibid) that if a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.
- 24. No party should be driven away from the seat of judgment unheard. I find that it is not in the interest of justice to strike out pleadings no matter how hopeless.
- 25. On the issue as to whether the appeal should be allowed, I find that the answer is in the affirmative.
- 26. The appeal is allowed and the plaint is reinstated for hearing with leave to the Appellant to file the requisite resolution and authority.
- 27. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

.....
A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent