Diesel Inject Services v Shajand Holdings Ltd (Civil Appeal 53 of 2020) [2024] KEHC 4902 (KLR) (28 March 2024) (Judgment)

Neutral citation: [2024] KEHC 4902 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 53 OF 2020

RE ABURILI, J

MARCH 28, 2024

BETWEEN

DIESEL INJECT SERVICES ..... APPELLANT

AND

SHAJAND HOLDINGS LTD ..... RESPONDENT

(An appeal arising out of the Judgment and decree of the Honourable M. Agutu in the Chief Magistrates' Court at Kisumu delivered on the 23rd August 2018 in Kisumu CMCC No. 485 of 2013)

JUDGMENT

Introduction

1. The Appellant herein Diesel Inject Services was the plaintiff in the suit before the trial court against the Respondent Shajand Holdings Limited. Vide a plaint dated 5.11.2013, the appellant prayed for judgment against the Respondent for Kshs. 78,434.15 together with costs of the suit and interest being the cost for servicing and repairing two injector pumps belonging to the Respondent.

2. The respondent filed a defence contending that the appellant failed to release the pumps to it and further that the appellant failed to avail its technician even after being informed that the two pumps were faulty.

3. The trial court in its judgement addressed itself to only one of the issues raised in the respondent's submissions, specifically, that the deponent to the verifying affidavit filed by the appellant lacked the locus standi to institute the suit as it was instituted without a resolution of the Directors of the Plaintiff Company and secondly, that there was no resolution authorising the advocate representing the plaintiff company to institute suit on behalf of the plaintiff company. The trial magistrate found that the plaintiff/appellant's suit was thus incompetent and proceeded to strike it out.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 20th June 2022 raising the following grounds of appeal:

    a. That the learned magistrate erred in law in striking out the plaintiff's suit.

    b. That the learned magistrate erred in law and in that in finding that failure to file a company resolution before filing suit was fatal.

    c. That the learned magistrate erred in law and in fact in relying on an issue that was neither raised in pleadings or proceedings before court.

    d. That the learned magistrate erred in law and fact in relying on extraneous matters in striking out the plaintiff.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant through its counsel submitted that the deponent who signed the verifying affidavit being a director of the appellant then it was evident that the appellant had properly executed the said verifying affidavit.

7. The appellant further submitted that the provisions of Order 4 rule 1 (6) of the Civil Procedure Rules which gives the court the discretion to strike out any plaint or counterclaim was not couched in mandatory terms and as such, the court has the alternative remedy rather than the drastic one of striking out pleadings as was held by the High Court in the case of HCCC No. 153 of 2002 M'Impwi M'Ikiugu v Joseph Kithinji & Anor.

8. It was further submitted that the trial court ought to have paid attention to the substance of the case rather than the procedural technicalities as espoused by the provisions of Sections 1A and 1B of the *Civil Procedure Act* as well as jurisprudence set by courts that have maintained that striking out pleadings ought to be the last resort such as was the case in the Court of Appeal case of Trust Bank Ltd v Amalo Co. Ltd (2009) KLR 63.

9. The appellant further relied on the case of Raila Odinga v IEBC & Others [2013] eKLR where the court held that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice.

The Respondent's Submissions

10. On the part of the Respondent, it was submitted, relying on the submissions which were filed before the lower court and skeletal submissions filed which mirror the submissions filed in the lower court, urging this court to uphold the decision of the trial magistrate.

11. According to the respondent, whereas the "amended Verifying Affidavit" sworn by Sadrudin H. Bhanji indicated at paragraph 2 thereof that "I know of my own knowledge that the Plaintiff instructed M/s Rajni K. Somaia Advocate to file this suit," nonetheless, there was no written authority filed as required under Order 4 Rule 1 (4) of the Civil Procedure Rules.

12. It was submitted that the lack of written authority came up during the cross-examination of PW1 which was not controverted by the Appellant's witness in re-examination and accordingly, stood unchallenged.

13. It was submitted that even the person who swore the verifying affidavit and filed a witness statement, Mr. Sadrudin H. Bhanji did not testify and that neither did PW1 Joseph Kizito Okal have any written authority although it was alleged by his counsel that he had authority as an Accountant of the Appellant company, evidence which was not founded on pleaded facts.

14. It was submitted that the Appellant could have authorized the filing of the suit through other legally recognizable forms, in this case, by donating a power of attorney to PW1 who prosecuted the case through the firm of Otieno, Yogo & Ojuro Advocates.

15. It was therefore submitted that a private company, like the Appellant, under the *Companies Act*, a director and manager of that company can lawfully give instructions to a lawyer to institute court action on behalf of the company. Reliance was placed on section Section 35 (1) of the *Companies Act*, 2015 which provides that: "A contract may be made-

    a. By a company, in writing under its common seal; or

    b. On behalf of a company, by a person acting under its authority, express or implied."

16. It was submitted that the firm of Otieno, Yogo & Ojuro Advocates did not have the authority or instructions of the Appellant to represent it or continue with the proceedings in the lower court in its name or on its behalf.

17. on the combine grounds of appeal that the learned Magistrate erred in law and in fact in relying on an issue that was neither raised in the pleadings or proceedings before the Court and that the learned Magistrate erred in law and in fact in relying on extraneous matters in striking out the Plaintiff's suit, it was submitted that the learned Trial Magistrate did not err at all in dealing with the question of lack of authority which came up during cross-examination of PW1.

18. Further, that Order 15 Rule 2 Civil Procedure Rules requires issues of both law and fact arising in the same suit, if the court is of the opinion that the case or any part of it may be disposed of on the issues of the law only and try those issues first, and that for that purpose may if it thinks fit, postpone the settlement of the issues of fact until the issues of law have been determined.

19. It was therefore submitted that in the instant case, neither party moved the trial court to frame and resolve the issues of law as had arisen during cross-examination nor did the court on its own motion require the parties to the suit to address the court on the issues of law arising.

20. Counsel for the respondent submitted that the Court had the discretion to dispose of a preliminary objection immediately it was raised or could defer its ruling until after hearing the whole case, which deferment may be made where it is necessary to hear some or the entire evidence to enable the Court to decide whether the objection is dispositive of the suit or not.

21. Counsel for the respondent maintained that the Respondent raised the question on capacity to institute the suit in its submissions in a case where pleadings had been filed and exchanged between the parties to the suit, and the case had proceeded to trial, and that any points of law raised by the Respondent were to be taken by the Court alongside the evidence and the decision thereon was to be made after hearing the whole case, as part of the judgment.

22. It was submitted that the Learned Trial Magistrate rendered a lucid Judgment that ought to be upheld by this Honourable Court.

Analysis and Determination

23. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and reach its own conclusions. This is what section 78 of the *Civil Procedure Act* espouses. This court must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

24. In addition, an appellate court will only interfere with the judgment of the lower court if the said decision is founded on wrong legal principles. That was the holding by the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

25. I have considered the pleadings herein as well as the submissions filed by the appellant. The question this court is faced with is whether the trial court erred by striking out the appellant's suit on account that the same was filed without authority as there was no resolution of the plaintiff/appellant company to authorize the filing of such suit.

26. The appellant has argued that by virtue of Sections 1A and 1B of the *Civil Procedure Act*, the trial court ought to have considered striking out of the suit as a last resort. On the part of the respondent, it is submitted in contention that failure to file the resolution authorizing the filing of the suit was fatal to the suit and in addition, that the person who swore the verifying affidavit had no such authority and neither did he testify, while the person who testified as a witness for the appellant had no authority to do so.

27. I must first dispose of the question of whether a witness must produce authority to testify as a witness and my answer is a clear no. There is no legal basis at all for demanding that a witness for a company must produce authority to testify.

28. On whether failure to file a resolution passed by the directors of the plaintiff company was fatal to the suit, there are two schools of though. the first school is the purely legalistic one where, in the absence of such resolution or authority, the courts will not hesitate to strike out the suit. the other school of thought is that such suit is curable and that absence of such authority or resolution is a procedural lapse which does not go to the substance of the suit hence courts must be slow in striking out such suits and instead allow the party to rectify the anomaly.

29. Adopting the second school of thought as it is geared towards promoting substantive justice, I will review a few decisions who's reasoning though persuasive, is good law.

30. In Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited [2016] eKLR, Sewe J was equally confronted with similar questions as those in this appeal and this is what the learned Judge had to say:

> "I have carefully considered the Affidavits on record, the submissions of Counsel and the authorities relied on. There is one issue to be determined with regard to this application, namely: whether the verifying affidavit should be struck out for want of form. That affidavit was attacked from various fronts. The first front was that there was no authority given by the Plaintiff companies authorizing the institution of these proceedings contrary to the provisions of the *Civil Procedure Act*. Indeed Order 4 rule 1(4) of the Civil Procedure Rules provides:
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> "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."
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> It is however manifest, from the above stated provision, that there is no requirement that the authority given to the deponent of the verifying affidavit be filed. I have looked at the Replying Affidavit of Pramit Verma sworn on 29th September, 2015, and noted that it has annexed to it, two board resolutions dated 13th April, 2015 and 12th April, 2015, by the 1st and 2nd Plaintiffs, respectively, authorizing the deponent, Pramit Verma, the General Manager to represent and swear affidavits on behalf of the two companies in respect to these proceedings. I however note that the same did not form part of the Plaintiffs' bundle of documents. Of course, this only means that the same had not been filed alongside the Plaint. However, in my view, the mere failure to file the same with the Plaint does not necessarily invalidate the suit.
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> I associate myself with the viewpoint taken by Kimaru, J in Republic vs. 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.
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> The next issue is that there was no company resolution to institute the instant suit. It is trite that an incorporated person is but just a legal person in the eyes of the law. 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. As was held by Hewett, J in Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000:
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> "It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

Looking at the court records, it is apparent that no such company resolution was filed. However, going by the Assia Pharmaceutical Case (supra), an action commenced without authority is capable of being ratified. It would therefore not be in the interest 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. In the Microsoft Corporation Case ,Ringera, J (as he was then) expressed the same viewpoint as follows:

"...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record."

In the premises, I take the view that even if I were to find that the verifying affidavit in question is defective in form, which is not the case herein as pointed out herein above, such a defect cannot and should not warrant the striking out of the suit as sought in the present application. Accordingly, it is my finding that the Defendant's application dated 3rd June, 2015 is without merit and would dismiss the same with costs to the Plaintiffs.

31. In Eye Company (K) Limited v Erastus Rotich t/a Vision Express [2021] eKLR Rachael Ng'etich J was faced with a similar question of whether failure to file or obtain authority to file suit was fatal to plaintiff's/Appellants and had this to say:

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" 19. Order 4 rule 1(4) of the civil procedure Rules provide as follows: -
"1(4) 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."

20. It has not been disputed that at the time of filing suit in the lower court, resolution to institute suit was not filed. The question that follow is whether that failure is fatal to appellant's suit? In Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000 the court held as follows: -

"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

21. There is no doubt a resolution is required which I believe as shown above, is intended to address situations where some persons drag the company to court and bind the company on issues litigated yet members of the company have not sanctioned their action. The requirement is therefore intended to protect the companies from unauthorized court processes. From the above, it is evident that the omission can be ratified after the suit has been filed. The authorization is to assure court that the company is properly in court and it is not an action of unauthorized members/individuals.

22. In the case of Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR Odunga J. found that the mere failure to file the resolution of the Corporation together with the Plaint did not invalidate the suit and the associated himself with the decision of Kimaru J. in the case of Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR where the court held as follows:-

" ...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."

23. In the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR the Court of Appeal 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."

24. In view of the above, it is clear that it was sufficient for the authorized person to depose that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority.

25. In the instant case, I note that the trial magistrate relied on failure to file authority in dismissing the suit. However, on perusal of the pleadings. I note that the issue of failure to file resolution on authority to file suit was not raised in defence dated 18th February 2015. The issue has been raised in submissions; if this issue had been raised in defence or if the defendant had filed preliminary objection, I believe the plaintiff would have addressed the court on it. In my view parties should be bound by their pleadings.

26. From the foregoing, it is my considered view that the trial magistrate misdirected himself in dismissing the suit on technicality not raised in parties' pleadings.

32. Most recently, Mabeya J in Nairobi High Court Commercial, Admiralty and Tax Division Petition No. E002 of 2023 [UR]] Between Autoports, Nairobi Freight Terminal Limited And Compact Freight System Limited -Versus- Cabinet Secretary, Ministry of Roads&Transport Cabinet Secretary,

Ministry Of Industrialization, Trade And Enterprise Development, The Attorney General, Kenya Ports Authority & Siginon Freight stated as follows regarding failure to file authority or company resolution when filing suit:

> " 42. Mr. Buti submitted that, to the extent that those plaints were not accompanied with resolutions authorizing their filing or the deponents of the verifying affidavits to do so, they were bad in law and liable to be struck out. However, Mr. Gathu, Ms Nzamsa and Mr Karina, Learned Counsels for the plaintiffs in those suits and the 6th respondent submitted that the suits were proper. That it was not necessary to have resolutions accompany the plaints and that in any event, such resolutions have since been filed in Court. They relied on the cases of Interactive Advertising Ltd and Anor vs Equity Bank Ltd [2014] eKLR and Spire Bank Ltd vs the Land Registrar [2019] eKLR in support of those submissions.
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> 43. I do agree with Mr. Gathu and his colleagues that those plaints are not bad in law. The view I take is that, the provisions in the Civil Procedure Rules that require the filing of a company's resolution to institute a suit was not meant to curtail Corporations' right to access to justice. It was meant to bar persons purporting to act on behalf of such Corporations, and who did not have authority to bind the Corporations, from instituting unauthorized suits. It sought to safeguard companies from being dragged into unnecessary suits which resulted in heavy expenses by way of costs that are appurtenant to litigation.
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> 44. Those provisions did not intend to regulate the internal affairs of companies. They sought to bar abuse of process by either a section of directors or shareholders of companies in lodging unnecessary and unauthorized law suits. In this regard, I find and hold that the only competent person to rely on the provision for filing of resolutions authorizing filing of suits should be a member or director of the company and not 3rd parties. (see Interactive Advertising Ltd & Anor vs Equity Bank Ltd (supra).
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> 45. Further, even where the challenge is by a member or director of a company, such resolution can be lodged with the Court at any time before the hearing of the suit or at the hearing of such challenge. In the present case, Mr Buti's clients were neither members or directors of the plaintiffs in E058 and E059 of 2023.
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> 46. Accordingly, I hold that the plaints in HCOM E058 and E059 of 2023 are not bad in law as contended."

33. I have no reason to differ from the above reasoning. In this case, the respondent did not plead in its defence that the suit was filed without a resolution or authority. This was raised in cross examination and the submissions.

34. As was stated by Ngetich J in the above case of Eye Company (K) Limited v Erastus Rotich t/a Vision Express, parties are bound by their pleadings. In addition, in as much as parties can ask any questions in cross examination, such answers in cross examination do not constitute a defence or built up a defence case. There was no preliminary objection raised to the competency of the suit on account of a resolution or authority. There is also no evidence that the suit was filed by a busy body as none of

the directors raised any issue with the suit being filed without authority. It follows that, as stated by Mabeya J in the above case of Autoports, Nairobi Freight Terminal Limited And Compact Freight System Limited -Versus- Cabinet Secretary, Ministry of Roads&Transport Cabinet Secretary, Ministry Of Industrialization, Trade And Enterprise Development & others that:

> "....., the provisions in the Civil Procedure Rules that require the filing of a company's resolution to institute a suit was not meant to curtail Corporations' right to access to justice. It was meant to bar persons purporting to act on behalf of such Corporations, and who did not have authority to bind the Corporations, from instituting unauthorized suits. It sought to safeguard companies from being dragged into unnecessary suits which resulted in heavy expenses by way of costs that are appurtenant to litigation.
>
> 44. Those provisions did not intend to regulate the internal affairs of companies. They sought to bar abuse of process by either a section of directors or shareholders of companies in lodging unnecessary and unauthorized law suits. In this regard, I find and hold that the only competent person to rely on the provision for filing of resolutions authorizing filing of suits should be a member or director of the company and not 3rd parties.

35. I hasten to add that the decision relied on by the trial court is an old decision of Bugerere Coffee Growers Ltd v SSebaduka & Another (1970) EA 147 which has been overtaken by lapse of time in view of Article 48 as read with Article 159 (2) (d) of *the Constitution* of Kenya, 2010.

36. Thus, authority to institute suit on behalf of the company can be express or implied and in this case, as supported by the many decisions cited by the learned Judges as quoted above, Iam satisfied that this appeal is merited. I allow it and set aside the order striking out the appellant's suits and substitute it with an order reinstating the appellant's suit for hearing on merit. In addition, I direct the appellant to file and serve upon the respondent the company resolution and authority within 21 days of receipt of this judgment.

37. I order that each party bear their own costs of this appeal.

38. This file is closed.

39. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH, 2024

R.E. ABURILI

JUDGE