



**First Community Bank Limited v Michael Osundwa Sakwa t/  
a Osundwa & Company Advocates (Commercial Case E985 of 2021)  
[2024] KEHC 3499 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3499 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E985 OF 2021  
DO CHEPKWONY, J  
MARCH 18, 2024**

**BETWEEN**

**FIRST COMMUNITY BANK LIMITED ..... PLAINTIFF**

**AND**

**MICHAEL OSUNDWA SAKWA T/A OSUNDWA & COMPANY  
ADVOCATES ..... DEFENDANT**

**RULING**

1. By way of background, the Plaintiff granted the Defendant a credit facility for the sum of Kshs.48,000,000/= to finance the purchase of a property known as LR. No.3734/27 Lavington, which he agreed to repay with a profit of the rate of 13% as per the terms/condition of an Agreement between them. It is stated that the Defendant defaulted and the Plaintiff moved the court vide Plaint dated 15<sup>th</sup> November, 2021 seeking Judgment for the sum of Kshs. 63, 617,215/= as arrears together with profit 13% on the amount per annum with effect from 5<sup>th</sup> November, 2021 until payment in full, default damages at 30% p.a on prayers (a) and (b) together with costs and interest of the suit.
2. The Defendant filed Memorandum of Appearance dated 22<sup>nd</sup> February, 2022 but failed to file its Defence, a result of which the Plaintiff filed a Request for Judgment dated 22<sup>nd</sup> March, 2022. The Plaintiff also filed Supplementary Bundle of Documents dated 10<sup>th</sup> March, 2022.
3. The Defendant has now moved the court vide a Notice of Motion Application dated 26<sup>th</sup> April, 2022, which is the subject of this Ruling seeking the following orders:
  - a. Spent;
  - b. The Plaint dated 15<sup>th</sup> November, 2021 be struck out in its entirety;



- c. In the alternative to prayer b above, the Honourable court be pleased to strike out the Plaintiff's Supplementary List of Documents dated 14<sup>th</sup> February, 2022 and the Plaintiff's Request for Judgment dated 22<sup>nd</sup> March, 2022 for being incompetent;
  - d. The costs of this application be borne by the Plaintiff;
  - e. Such other orders and directions as may appear to this Honourable Court just and convenient to grant under the circumstances.
4. The Application is based on the grounds set out on its face and in the Supporting Affidavit of Michael Osundwa Sakwa sworn on 26<sup>th</sup> April, 2021.
  5. According to the Applicant, the contents of the Plaint were verified by one Claris Ajwang Ogombo in a deposition sworn on 15<sup>th</sup> November, 2021 as the Legal Manager of the Plaintiff Company but she did not attach any board resolution or authority to act under the Seal of the Company which is contrary to Order 4 (1) (4) and Order 9 (2) (c) of the Civil Procedure Rules 2010 that a suit be accompanied by evidence under oath that a person is authorised through whom a corporation acts and or appears to commence a suit. That for this reason, the suit is incompetent and fatally defective as it violates the law and the Plaint should be struck out for the defect goes to the jurisdiction of the court.
  6. The Applicant also argues that the during the pendency of the suit, the Plaintiff filed a Supplementary list of Documents dated 14<sup>th</sup> February, 2022 and a Request for Judgment dated 22<sup>nd</sup> March, 2022, which pleadings the Applicant contends were filed under the name and style of Kemunto Ntenga & Associates Advocate who as per the records Nteng'a Verah Kemunto was listed as inactive under the Law Society of Kenya, hence certified to practice law and was therefore in breach of Section 9 as read with Section 34 of the Advocates Act and is guilty of an offence. It is the Applicant's contention that the said pleadings should be struck out with costs as they are bad in law and based on incurable illegalities which cannot be remedied.
  7. Further, the Applicant has urged the court not to allow a fatally defective suit to proceed as it will be prejudicial to him since he will suffer loss for a colossal sum of Kshs 63,767,215/=. He therefore urged the court to allow his application.
  8. In response, the application is opposed vide a Replying Affidavit sworn by Verah Kemunto Ntenyah, the Respondent's Counsel on 1<sup>st</sup> June, 2022 wherein she has stated that the application is misconceived devoid of merit bad in law and an abuse of the court process as the Defendant has not set out or demonstrated any reasonable grounds to warrant grant of the orders sought. She stated that when the suit was filed on 29<sup>th</sup> December, 2021, her practising Certificate for the year 2021 was still in subgated and attached copy marked as VKN-1. She has stated that she paid and took out her practising certificate for the year 2022 on 2<sup>nd</sup> February, 2022 and forwarded the documents to the Law Society of Kenya for processing of the Practising Certificate and she attached a copy of the mpesa statement marked as VKN-2 to show the payment and was subsequently issued with a receipt acknowledging payment attached and marked as VKN-3.
  9. According to the Respondent's Counsel, the LSK website showed her status as inactive but the same was later regularised to active and was yet to obtain the actual certificate due to the system backlog at the LSK which she attached the email from the LSK on the response given. She again annexed a copy of Website to confirm the averment as VKN – 4. She also attached an email from the Law Society to confirm her follow up on the issuance of the said certificate marked as VKN-5.



10. The Respondent's Counsel contends that a Board Resolution had been issued by the Bank the Plaintiff herein on 4<sup>th</sup> March, 2021 authorizing her firm to institute legal proceedings against the Defendant and there was also Board Resolution authorising Ms Claris Ogombo, the Legal Manager to swear Affidavit on behalf of the bank. She has attached the said copies of the Board resolution marked as VKN-6 AND VKN-7
11. The Respondent's Counsel holds that the failure to attach the two Board Resolutions was a mistake on her part and the same should not be visited upon the client the Plaintiff herein. She however argues that the failure to attach the same is not fatal to the suit and no injustice or prejudice has been suffered by the Applicant due to the mistake and that the court should not strike out the suit on that ground.
12. It is the Respondent's Counsel's contention that if the suit is struck out, it will thwart the Plaintiff's efforts to recover its monies and it will suffer loss of over Kshs 70,000/= for filing the suit, Kshs. 50,000/= tracing the Defendant for service. She has urged the court to dismiss the application with costs.
13. On 24<sup>th</sup> May, 2022, the parties were directed to canvass the Application by way of written submissions which the Applicant filed his dated 25<sup>th</sup> September, 2022 and the Respondent filed its own determination of the application.
14. Upon considering the prayers sought in line with the grounds upon which they are premised and the response in opposition thereof together with the submissions filed by either party, the issues that arise for determination are:-
  - a. Whether the failure to attach the Board Resolution is fatal to the suit.
  - b. Whether the Respondent's Counsel was competent to file the subsequent pleadings in court.
15. With regard to the issue of whether the failure to attach the Board Resolution is fatal to the suit, the law under 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.”
16. It is trite that the authorization or a resolution can be filed at any time before the suit is fixed for hearing so that it is not fatal to a suit if the same is not filed at the time of filing it. This was the position held in the case of Republic v Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] Eklr, where the Court stated 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.”
17. It is therefore this court's finding that the Plaintiff has attached the Board's Resolution authorizing the said Claris Ogombo the Legal Manager of the Plaintiff to swear the Affidavits and the Plaintiff's Counsel firm to represent it in the suit the same is sufficient as they have been filed before the hearing of the suit as VKN – B – 7, which has not been rebutted by the Defendant/ Applicant. It is therefore not fatal that they were not filed at the time of filing of the suit and it is sufficient that the same can be filed before the hearing of the suit.
18. On the issue of whether the Respondent's Counsel was competent to file the subsequent pleadings in court, it was also not contested by the Defendant that at the time of filing of the suit in 2021, the Respondent's Counsel had taken out her practicing certificate for the year 2021 as the said Practicing



certificate has been attached as VKN-1. The pleadings in question are those which were filed in 2022. According to the Respondent's Counsel she paid for her Practicing Certificate on 2<sup>nd</sup> February, 2022 and she attached the Mpesa message (VKN-2) Reference No. QCE6NGANNG to show the payment of Kshs 21,360/=. The Respondent's Counsel has also attached the official receipt from Law Society of Kenya dated 14<sup>th</sup> March, 2022 confirming the same payment with the same reference which duly confirmed the payment.( see annexures marked VKN-3)

19. It is worth noting that the Defendant did not file a Supplementary affidavit to contest the Respondent's counsel's averments which in the court's view confirm that the Plaintiff's Counsel had already paid for the practicing certificate and it was now upon the Law Society to issue the practicing certificate and update its system to show that the Counsel has paid. Also, the court takes judicial notice that the Practicing certificates, a few years ago would take time to be processed and issued so that evidence of payment and the receipt issued is sufficient.
20. Further, it is the court's finding that the failure to have the actual practicing certificate cannot render the documents or pleadings filed in court irregular and litigants should not be punished for the non-compliance of their advocates. This was the court's decision in the case of *Kyalo Komu v Felix Maliti Mulingata* [2021] Eklr, where it was held that:-

“In the light of the above decisions, and the dictates of the Article 159 2(d) of *the Constitution* of Kenya, it is the position of this court that non-compliance of an advocate in taking out his practicing certificate, is a separate issue to be dealt with against the concerned advocate which may include and not be limited to disciplinary action against that advocate. But the same does not go into the root or substance of proceedings filed by such advocates. The non-compliance in my view, is a technicality and an innocent party or litigant should not be punished or impeded from accessing justice through a fault which is not of his/her making.”

21. In view of the above findings, it therefore follows that the Notice of Motion dated 26<sup>th</sup> April, 2022 lacks merit and is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF MARCH, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MARCH, 2024.**

**ALFRED MABEYA**

**JUDGE**

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