

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**H.C.C.S659 OF 1995**

**NILE SAFARIS LTD:.....PLAINTIFF/RESPONDENT**

**VERSUS**

**WADE ADAMS CONSTRUCTION LTD:.....DEFENDANT/APPLICANT**

**BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA**

**R U L I N G:-**

When the application to set aside the exparte order for attachment before judgment came for hearing pursuant to 36 rule 1 and order 9 r 24 of the CPR and section 101 CPA Mr. Muhwezi the learned counsel appearing for the respondent/plaintiff raised a preliminary objection. After referring to the affidavit by one Edward Bamwite the learned counsel submitted that the application and affidavit lacked legal capacity to commence legal proceedings and as such the application was a nullity. Article 80 to Table A of the Companies Act Laws of Uganda vests the power of the company in the Board of Directors which normally gives power to litigate by way of the company boards regulation.

The applicant is a limited liability company. He had made research with company registry and found no board company's resolution to proceed with those proceedings and unless the said resolution was filed just recently within two days the evidence which should be placed before the court then the application would have been made without authority the result of which would nullify the application together with the affidavit.

The learned counsel further submitted that the deponent of the affidavit in support of the application Anand Prasad is a financial controller of the company which is purely an administrative post as admitted in the affidavit. He is neither a managing director nor company

secretary. His affidavit therefore could not give any legal capacity in absence of the company's resolution. The application was incompetent and should be struck out.

Mr. Matovu the learned counsel representing the applicant submitted that his learned friend wanted to delay the disposal of the application. At the end he will seek for an order that the respondent files security for frivolous applications. Before a court could decide on a preliminary point of law it looks on the face of the pleadings. The application for preliminary objection is premature and misconceived. I was referred to Article 80 Table A of the Company's Acts. He had not looked at it but was citing the old rule in Mawagole's case decided by the then C.J. Kiwanuka. That unless there is aboard resolution the company cannot bring proceeding in court but the law has since changed. There is a line of cases in the Supreme Court. I was referred to **United Assurance case EACA Civil Appl. No. 1 of 1986.** That is no longer good law and if it was the case it is trite law that the points of law are decided on the face of the proceedings. His learned friend was talking about Table A of Article 80. The counsel must show a copy of the memorandum and copies of the applicant company. The court cannot make a decision on this. The company must have adopted article 80 and it is assumed his learned friend was supplied with articles and memorandum Article 80 talks about uniting litigation. The article says if one is sued one can take steps to defend. There is a distinction between uniting proceedings and defence. This was a simple application and wondered why the learned counsel could not allow them to proceed. The affidavit by Anand Prasad is affirming the application to set aside the order. He must know the facts he is swearing the affidavit in support. The applicant is ready to deposit money in court and have the vehicle released. He submitted further that they had a cheque in court and prayed that the preliminary objection be overruled with costs.

In reply Mr. Muhwezi submitted that the applicant lacked legal capacity to make legal proceedings. That was raised in paragraph 4 of the affidavit in reply. The articles talk of commencing legal proceedings and the application by notice of motion is a suit under section 2 of the civil procedure Act (cap). If the applicant is depositing money which is the claim in the plaint plus costs of the suit as security for the decree and that money is eventually passed then he would concede that the vehicle be released. He put the costs to be deposited at 2.5 Millions shillings being costs of the main suit.

On the question of depositing money in court that was never pleaded though he had seen a cheque in the names of the Chief Registrar. That was not money for the plaintiff/respondent and even if it were the procedure of getting it after the case is very lengthy because it has to be put on deposit account in the Ministry of Finance and the procedure of getting that money may take more than four months. The money is insufficient. His main argument is that the application is incompetent and therefore could be of no legal effect. This suit was under order 33 of the summary procedure. The applicant was served with court process and they applied for leave to appear and defend. He prayed that on the basis of order 33 rule 3, CPR this court enters judgment or decree because he admitted leaving the order for costs.

Article 80 of Table A of the company's Act Cap 85, deals with powers and duties of director. It provides:-

*The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and registering the company and may exercise all such powers of the company as are not by the Act or by these regulations required to be exercised by the company in general meeting subject nevertheless to any of the regulations being not inconsistent with the aforesaid regulation or provisions as may be prescribed by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if the regulations had not been made.*

Under section 2 of the civil procedure Act Cap 65 a suit means all proceedings commenced in any manner described in that the notice of motion before this court is a suit and therefore is properly before this court plus the accompanying affidavit I an therefore agreeable with the submissions of Mr. Muhwezi over this point.

However Article 80 of Table A of the Company's Act cap 85 as explained above deals with powers and duties of the director. The affidavit in support of the instant application was sworn by Anand Prasad a financial controller of the applicant company. It has been submitted that he had no legal capacity to bring the legal proceeding against the respondent. In **Bugerere Coffee Growers Limited vs. Sebaduka and another 1970 EA 147 Younds J** as he then was held that

for a company to authorize the commencement of proceedings must do so either by resolution of the company or by that of its board of directors. But in United Assurance Company Limited .vs. Attorney General Civil Appeal No. 1/86 court of Appeal Mengo Wambuzi C.J. doubted the correctness of that statement when he observed.

*“Every case must be decided on its own facts looking at the various authorities and the law I would say that one way of providing a decision of Board of Directors is by its resolution in that behalf. But I would not go so far as to say as is suggested in **Bugerere Coffee Growers Ltd .vs. Sebaduka supra**, unless of course the law specifically requires a resolution as appears to be the case in the instances specifically provided in the company’s Act, and authority to bring an action in the names of the company is not one of those instances here a resolution is required.”*

A similar View was arrived at in the case of **Emo plastics International Ltd .Vs. Free borne 1971 EA 432**. See also the decision in the recent case **of Ravichand Kakubhai Radio .Vs. Kakubhai Kilidas and Co. SCU Civil Appeal No.10/94**. From the authorities cited above I would agree with the submissions of the learned counsel appearing for the respondent the-b the applicant could initiate proceedings against the respondent by resolution of the board of directors on behalf of the applicant company but according to the decision in the United Assurance Company Ltd vs. Attorney General that is only one of the ways of initiating proceeding by the applicant but there could be other ways of doing so depending on the constitution of the company. It could not therefore be said that the financial controller of the applicant company had no legal capacity to initiate the proceeding. It was premature to decide on the question of lack of authority to institute the proceeding. The issue could be decided after hearing evidence See Ravichand Kakubhai Radia supra.

On the question of money to be paid in court pending the disposal of the application the offer was rightly rejected by the respondent because the same was never pleaded and because of the various reasons he gave.

As for the prayer/request by Mr. Muhwezi that judgment be entered in favour of the respondent this was not the right forum to make such an application. He would be advised to make a formal application as provided for under order 33 summary procedure rules.

In the end result the preliminary point of law is overruled with costs to the applicant.

**I. MUKANZA**

**JUDGE**

**30.8.1995**