IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL CASE NO. 12 OF 2021

ABRASHID COMPANY LIMITED ..... PLAINTIFF

Versus

MWANGA DISTRICT COUNCIL.....1st DEFENDANT

THE ATTORNEY GENERAL.....2nd DEFENDANT

RULING

28/4/2022 & 28/06/2022

SIMFUKWE, J.

The plaintiff Abrashid Company Limited filed a suit against the Defendants herein claiming a total of Tshs 76,674,000/= as outstanding commission and compensation for breach of contract and financial loss.

In their Written Statement of Defense, the Defendants raised a preliminary objection on point of law that:

1. *That, this suit is instituted premature (sic) before the Court contrary to the requirement of the law.*
2. *That, the plaintiff has no capacity to sue as it does not exist.*

The preliminary objection was argued orally. The plaintiff was represented by Ms Lilian Mushemba – learned Advocate while the Defendants were represented by Mr. Edwin Lusa learned State Attorney.

Submitting in respect of the 1st ground of Objection, Mr. Lusa argued that the suit has been instituted prematurely contrary to the law. He stated that before the institution of this suit there was a contract between the plaintiff and the defendant namely: 'Mkataba No. LGA 148/2018/2019 NC/16 titled *UKUSANYAJI WA USHURU WA MCHANGA VIJIJINI KIFARU KIVISINI NA KWANYANGE'* which is part of the Written Statement of Defence (Annexure 1). That, Clause 27 of the said contract requires the parties before referring the dispute to court to refer the same to the Arbitrator. Under the said clause, parties have quoted the **Arbitration Act, Cap 15 R.E 2019.** The learned State Attorney was of the view that since the parties quoted the clause of referring the matter for Arbitration, then instituting this suit without first referring it to the Arbitrator is contrary to Clause 27 of the Contract and the requirement of **section 14 (1) of the Arbitration Act.** (supra)

He submitted further that, it has been held by the court in several cases that once parties agree in the contract to refer the matter to the Arbitrator before instituting the suit, they have to refer the matter to the Arbitrator. He cemented his argument by citing the case of **Sajima Enterprises Co. Ltd vs Dodoma Municipal Council, Civil Application No. 29 of 2016,** HC. Basing on this case and the Arbitration Act, the learned State Attorney concluded that the suit was filed prematurely.

Also, Mr. Lusa referred to **section 190 (1) of the Local Government (District Authorities) Act, Cap 287 R.E 2002** as amended by

Written Laws (Miscellaneous Amendment) Act No. 1 of 2020 which requires the plaintiff before instituting a suit to serve 90 days' notice to the intended defendant. He condemned the plaintiff for lack of proof if the same was complied with. Mr. Lusa concluded that since the plaintiff instituted the suit without serving 90 days' notice showing an intention to sue, so, the application was instituted prematurely.

The second ground of objection is that the plaintiff has no capacity to sue as it does not exist. It was Mr. Lusa's argument that the plaintiff did not attach the Certificate of Incorporation to satisfy the court and the defendant that the company exists though the plaintiff attached the Certificate of Incorporation when he replied to the Written statement of Defence. However, upon search in the BRELA website which was done by the defendant, the defendant counsel argued that he did not find it. He argued that Certificate of Incorporation is not only the proof that the company exist, also it proves that the company is operating that is, it convenes its meetings.

The learned State Attorney also faulted the plaintiff for failure to attach the Company's Resolution which allow or authorize institution of Civil Case No. 12 of 2021 between the plaintiff and the defendant. He supported this argument by **section 147(1) of the Company Act, Cap 212 R.E 2002**. He continued to state that anything done by the company shall be done by the Company's resolution. He supported his point by the case of **Kati General Enterprises Limited vs Equity Bank Tanzania Limited and Ipyana Bernard Mwalusaka, Civil Case No.22 of 2018** (HC) which set the precedent in interpreting **section 147(1) of the Company Act** to the effect that it is mandatory for the company before instituting the suit to attach a Company Resolution authorizing the

institution of the suit and appointment of advocate to prosecute the suit. He continued to quote page 14 of the cited case where it was held that:

> *"In view of the above deliberation I find the first ground of objection has merit and therefore uphold it as the plaintiff ought to have complied with the requirement of* ***section 147 (1) (a) and (b) of the Companies Act, No. 12 [Cap 212 R.E 2002*** *by annexing to the plaint Company board of directors' resolution authorizing institution of the suit and appointment of the advocate to prosecute the suit, but she failed to do so."*

It was further argued that failure to attach the Company Resolution to the plaint renders the plaint incompetent and the same should be struck out. That, failure to attach the Company Resolution means that the company does not exist that why it does not convene meetings.

Finally, the learned State Attorney was of the view that the suit is incompetent and prayed the same to be stuck out with costs.

In reply, Ms. Lilian pointed out that the raised Objections do not qualify to be preliminary Objection since the same are not purely point of law. He referred to the case of **Mukisa Biscuit Manufacturing Company vs West end Distributors [1968] EA 696** which held that a preliminary Objection must be purely on point of law which is self-proof and does not require further investigation into evidence or document.

In the instant objections, Ms. Lilian argued that the same take them to annexures, documents and pleadings which automatically requires the court to investigate into the said annexures which defeats the whole meaning of preliminary Objection. He opined that the said objection ought

to have been brought before this court by way of Miscellaneous Application for stay of proceedings.

Ms. Lilian also challenged the manner in which the said Objections were raised. That, the same are vague in the sense that they did not disclose the law against which plaintiff has contravened.

Apart from that, the plaintiff's advocate submitted that the raised objections intended to catch defendants by surprise. That, they should have disclosed how the suit was premature and relevant laws as well as the grounds of the incapacity of the plaintiff and their specific sections so as to enable the plaintiff to be aware of what he is going to reply. She opined that such omission has occasioned miscarriage of justice on part of the plaintiff.

On the aspect of arbitration, Ms Lilian stated that the arbitration was preferred by the plaintiff and it was actually conducted by the head of Lutheran Parish Church as Arbitrator. She argued that the counsel was not properly informed in this aspect.

Concerning the aspect of notice of intention to sue, Ms. Lilian contended that the said notice was filed as required by the law and it was addressed to the defendants and they received the same by signing.

In respect of the search which was alleged to be conducted in the BRELA website, Ms. Lilian submitted that the search on BRELA website is not an official search. That, the website is very recent such that the companies registered prior to such use do not come up in searching website. She argued that an official search ought to be conducted at the BRELA offices where special form are supplied, pay the search fee and wait for feedback from the Registrar.

Concerning the aspect of the absence of the resolution, the learned counsel for the plaintiff conceded that no such resolution was annexed to the plaint. She prayed for leave to amend the plaint so that they may comply to such requirement.

Basing on the case of **Mukisa Biscuit** (supra) Ms. Lilian concluded that the rest of Preliminary Objection be dismissed with costs.

In rejoinder, Mr. Lusa denied the fact that their Preliminary Objections were not purely based on law. He said that in their submission for each preliminary objection they cited the law to support their preliminary objection. Mr. Lusa asserted that on the first preliminary objection they had referred to the contract entered between the parties which made reference to **Arbitration Act.** That also, they had referred to **section 190 of the Local Government Act** (supra) and the provisions of the **Companies Act** and its interpretations.

Concerning the allegation that the plaintiff was taken by surprise, Mr. Lusa argued that the same is not true since the plaintiff has engaged an advocate who is conversant with the law and knowledgeable on what is required to be done before institution of the suit since they even attached the certificate of Incorporation of the Company.

Regarding Ms. Lilian's reply that the matter was referred to the Arbitrator who is the head of Lutheran Church, Mr. Lusa argued that the head of Lutheran Church is not among the Arbitrators recognized by the law.

In respect of notice, the learned State Attorney said that if the same was served to the defendants, then the plaintiff was duty bound to attach the same to her plaint. They insisted that the same was not served and that

their objections are based on pure point of law. He implored the court to strike out the suit with costs.

Concerning the prayer of leave to amend the plaint so as to attach the resolution of the company, Mr. Lusa was of the view that the same was supposed to be prayed before the preliminary Objection were raised. Otherwise, the same will pre- empty their preliminary Objections.

Having heard the submissions for and against the preliminary objections, I wish to begin by first restating the law that governs Preliminary Objections. It is trite principle of law that a preliminary point of objection must be purely point of law. The one who raised Preliminary Objection ought to tell the court his/her problem based on the point of law which must be decided. Where the objection is a mixture of law and fact, then it lacks the criteria of being preliminary Objection. In the case of **Shose Sinare vs Stanbic Bank Tanzania Ltd & Another, Civil Appeal No. 89 of 2020 CAT** at Dar es Salaam at page 12 it was held that:

> ""*A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure to entertain application for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed point of facts or evidence. The objector should not condescend to the affidavits or other documents*

accompanying the pleadings to support the objection such as exhibits."

I hasten to conclude that I fully subscribe to the above decision. In the instant matter the learned State Attorney for the defendants has raised two grounds of Preliminary Objections.

In respect of the 1st ground of objection that the suit has been instituted prematurely; under this ground, the learned State Attorney raised two concerns, ***first,*** that the plaintiff did not refer the matter to the Arbitrator, ***second,*** that the plaintiff did not serve a 90 days' notice to the defendants.

Starting with the issue of failure to refer the matter to the Arbitrator, with due respect this is a mixture of law and fact. The plaintiff's advocate has stated that the matter has been referred to the Arbitrator who is the head of Lutheran Paris Church. In rejoinder Mr. Lusa argued that the said head of Paris Church is not an Arbitrator. As you can see this assertion is subjected to evidence. As stated by the Court of Appeal in the case of **Shose Sinare** (supra), once the objection is a mixture of law and facts, then it lacks the criteria of being a Preliminary Objection.

The same applies to the issue of Notice, it has been stated that the plaintiff did not serve notice as per **section 190 of the Local Government Act** (supra). The plaintiff to the contrary, argued that notice was served to the 1st and 2nd defendants and they signed. This also is a mixture of law and fact. Thus, the same has to be ascertained through evidence.

Coming to the second point of objection that the plaintiff has no capacity to sue as it does not exist; Mr. Lusa raised two concerns, the first one

was that, search on BRELA website, revealed that the said company does not exist. Opposing the same, Ms. Lilian argued that the said search was not official search and that the use of BRELA website was introduced recently thus for the company registered prior to the introduction of the website do not come up in the website search. Again, this is not pure point of law. The issue on whether the plaintiff company exist or not it requires evidence to prove. In the case of **Ibrahim Abdallah (the Administrator of the Estate of the late Hamisi Mwalimu vs Selemani Hamisi (The Administrator of the Estate of the late Hamisi Abdallah), Civil Appeal No.314 of 2020** at page 9, the Court of Appeal stated that: -

> *"It is settled law that a pure point of law does not arise if there are* ***contentions on facts yet to be ascertained by evidence.*** *"* [Emphasis added]

In respect of the cited case and the established findings, I am of considered view that this ground of objection lacks criteria of being a Preliminary Objection.

Lastly, concerning the issue that the plaintiff did not attach the Company's resolution to the plaint authorizing institution of the suit. The plaintiff's advocate conceded to this fact that they did not attach the Company's Resolution. However, the learned counsel prayed for leave to amend the plaint so as to comply with such requirement. The defendants' counsel was of the view that the prayer to amend the plaint so as to attach the Company's Resolution was supposed to be prayed before the preliminary Objections were raised.

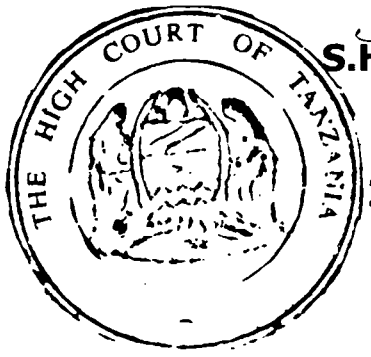
The plaintiff's prayer suggests that the Company's Resolution is there. Thus, striking out this suit basing on failure to attach the Company's Resolution will be contrary to the good purpose of the Overriding Objective which requires the court to have regard to substantive justice. The learned State Attorney did not state before the court how this prayer will prejudice the defendants if the court will grant the prayer of amending the plaint.

Mr. Lusa referred the court to the case of **Kati General Enterprises Limited** (supra) which struck out the case for failure by the plaintiff to attach Company's Resolution. With due respect, the cited case though relevant to the instant matter it is only persuasive. However, I am not persuaded by the cited case given the different circumstances in a cited case. In that case the plaintiff's advocate denied the fact that the Company Resolution ought to be attached. In the present case, the learned counsel for the plaintiff has conceded to such legal requirement and prayed to amend the plaint. Considering the circumstances that granting the prayer of amending the plaint so as to attach the Company Resolution will not prejudice the defendants, I find it prudent to invoke the principle of Overriding Objective to grant the prayer of amending the plaint so as to attach the Company Resolution. I thus grant 14 days to the plaintiff to amend the plaint and attach the Company resolution.

Having said so, I am of a firm view that the raised grounds of Preliminary Objections have no legs to stand and I hereby dismiss all the grounds of objections save for the conceded ground of objection. The suit should proceed on merit. The plaintiff is granted 14 days to amend the Plaint on the reason stated herein above. Considering the circumstances of this matter, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 28th day of June, 2022.



S.H. SIMFUKWE

JUDGE

28/6/2022