IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI SUB REGISTRY)

AT MOSHI

CIVIL CASE NO. 04 OF 2022

MAKOA FARM LIMITED
ELIZABETH STEGMAIER ..... **PLAINTIFF**
DR. LASZLO GEZA PAIZS

VERSUS

UDURU MAKOA AGRICULTURAL
AND MARKETING COOPERATIVE ..... **DEFENDANTS**
CO-OPERATIVE SOCIETY LIMITED
(UDURU MAKOA AMCOS)

RULING

Last Order: 7th March,2023
Date of Ruling: 27th April, 2023

MASABO, J.:-

This ruling is in respect of a two limbed preliminary objection raised by the defendant vide which he had questioned the competence of the suit and the jurisdiction of this court. Briefly, the kernel of the suit is a lease agreement between the 1st plaintiff and the defendant executed way back in 1999 and renewed in 2014 for a period of 25 years. By this contract, plaint, the defendant leased its farm to the 1st plaintiff. The defendant now intends to terminate the lease agreement and has done several acts manifesting her intention. The plaintiffs have come to this court seeking to restrain the defendant from forcefully evicting them; payment of a compensation at a tune of Tsh.4,026,749,628.00, general and exemplary

damages and costs of the suit. Upon being served the defendant filed a written statement of defence accompanied by a two limbed preliminary objection contending that:

1. This court has no jurisdiction to entertain the matter at hand; and
2. The suit at hand is incompetent for lack of board resolution

Hearing of the preliminary objection proceeded *viva voce*. Both parties had representation. The plaintiffs enjoyed the services of Mr. Qamara Valerian and Mr. Emmanuel Chengula while the defendant was represented by Mr. Engelberth Boniface, all learned counsels.

Submitting in support of the first limb of the preliminary objection, Mr. Boniface argued that the defendant is a cooperative society hence governed by the Cooperative Societies Act, 2013 and the Cooperative Societies Regulations GN. 272 of 2015 which regulate the formation, constitution, registration and operation of the Cooperative societies. He proceeded that, Section 141(2)(i) of the Act clothes the Minister with mandate to pass regulations on dispute resolution mechanisms and the minister has done so through Regulation 83(1) of the Cooperative Societies Regulations which provides mechanisms for resolution of disputes concerning the business between members of the society and persons claiming through them and between one cooperative society and another. Among other things, Regulation 83 require that such dispute be first resolved by mediation and can then be referred to the Registrar of the Cooperative Societies who may either settle or arbitrate the parties. A party aggrieved by the Registrar's decision may appeal to the responsible minister whose decision is designated as final (see Regulation 83(3)).

Based on the above provisions, Mr. Boniphace argued that this suit has been wrongly filed in this court as it lacks jurisdiction to entertain matters concerning cooperative societies. Thus, it should be struck out so that the parties can exhaust the remedies set out under the regulations. To fortify this argument, he cited the case of **Daud Gerald Kilinda vs Chama cha Msingi Kalemela** Civil Appeal No. 5 of 2019 (HC Tabora (unreported) where the court held that it is in the interest of sustenance of cooperative societies that disputes be resolved by machinery provided under the Act and the Regulations as opposed to ordinary courts. He argued that remedies under Regulation 83 ought to have been exhausted first. Fortifying his submission further, Mr. Boniphace cited **Nazir Ahmad vs Kings Emperor** 1936 PC at 253 ALL ER [1936] where it was held that, if a statute requires a thing to be done in a particular manner, then it should be done in that manner alone or not at all. Therefore, since the Cooperative Societies Act and the Regulations have provided specific ways of resolving disputes, the parties cannot agree on terms contrary to the specific statute governing them.

Further, Mr. Boniface referred to Clause 23(4) of the lease agreement of 2014 and argued that the present suit has been prematurely instituted in this court as it ought to have been first referred to arbitration as per the arbitration clause contained in the above clause by which the parties agreed to first refer their dispute to arbitration. Thus, the suit has been prematurely filed in this court prior to being referred to arbitration. In the foregoing, he submitted that the suit be dismissed for want of jurisdiction.

On the second limb of the preliminary objection, Mr. Boniface submitted that the suit is incompetent for lack of a board resolution. He cited Section 141 of the Company Act [Cap 212 RE 2002] and paragraphs 71 and 80 of Table A Part I of the Schedule to the Company Act and submitted that, it is a trite law that a company is a legal person independent from its members, shareholders and subscribers. Its business and affairs are transacted by directors who act on behalf of shareholders and they do so through board resolution. Thus, every act of the company must be blessed by directors through the board of directors and if not so, the activity so held will be considered a nullity. Supporting this point, he cited the case of **KATI General Enterprise vs Equity Bank (T) Ltd and Another** Civil Case No. 22 of 2018 HC DSM (unreported) Pg. 9 and Section 141(2) of the Companies Act which provides that a board resolution is mandatory.

In further fortification, Mr. Boniface cited paragraphs 71 and 80 for management of Public Company (table A) as stipulated in Part I of the Schedule to the Companies Act under which it is underlined that, business of a company should commence with a board resolution and the same should be in the minute book of the company and the same ought to have been appended to the plaint. The absence of resolution will render any order passed by the court inexecutable. Hence, this suit is incompetent for want of a board resolution.

In his reply to the first limb of the preliminary objection, Mr. Valerian did not dispute the existence of amicable dispute resolutions under the Cooperative Societies Act and Regulation 83 of the Cooperative Societies

Regulations but he argued that, the amicable dispute resolution mechanisms stipulated in these laws apply to disputes between one society and another and a society and its member, not otherwise. A dispute of the nature similar to the one in the present case does not fall within the scope of the dispute settlement mechanisms above as it originates from a lease agreement which governs the relationship between the parties hence this court has jurisdiction. In fortification he cited the decision of this court in **Asha Iddi vs Babati SACCOS Ltd**, Civil Appeal No. 30 of 2019, HC at Arusha at p 6 in which, it was stated that the provision of Regulation 83 only deals with members of society and those claiming under them or two or more societies and not otherwise. The case of **Babati SACCOS (T) Ltd and another vs Reginald Sauka** Land Appeal No. 67 of 2019 HC at Arusha at pages 5 and 6 and **Sylvester Gerald Jackson vs Kigoma Pastors SACCOS and others** Misc. Civil Application No. 07 of 2022, HC Kigoma at were also cited in support. Regarding the cases cited by Mr. Boniphace, Mr. Valerian argued that they are distinguishable as the parties herein have no other relationship apart from contractual relationship. Concluding this point, he cited the case of **Ms. Marangu East Cooperative Society Ltd vs Authorized Officer for KBM SONs and Company Ltd** Misc. Land Application No. 10 of 2004 whereby it was held that if the dispute is not between a society and its member, then the court has jurisdiction to entertain it.

As to the arbitration clause, Mr. Valerian argued that it was properly included in the agreement given that the plaintiffs are not members of the society. He further maintained that this court has jurisdiction to

entertain the matter as the defendant has submitted herself to the jurisdiction of this court by filing a written statement of defence. In support, he cited the decision of the Court of Appeal in **Trade Union Congress of Tanzania (TUCTA) Vs Engineering Systems Consultants Ltd and Others,** Civil Appeal No. 51 of 2016 CAT at pp 20 and 21, where it was stated that filing of written statement of defence signifies the readiness of the defendant to submit to the jurisdiction of ordinary court.

On the second limb of the objection, Mr. Chengula argued that it is not a pure point of law as it requires evidence to support it. To fortify his argument, he averred that the objection does not meet the requirements under **Mukisa Biscuit Manufacturing Co. ltd vs West End Distributors Ltd [1960] EA 701** which required that a preliminary objection should be on a point of law. He stated the right approach is the objection to be overruled as it is without merit as was the case in **CRDB Bank PLC vs Ardhi Plan Ltd and 4 others** Commercial Case No. 9 of 2020, HC commercial Division at pages 10 and 11. In further fortification of this argument, Mr. Chengula cited the case of **Ally Mchekanae and Another vs Hassady Noor Kajuna and Another** Civil Case No. 03 of 2022, HC, Songea at Page 72 where it was stated that the objection is incompetent as the plaintiff has room to file additional documents, the board resolution inclusive. Concluding this point, the counsel cited the case of the **Registered Trustees of St. Anita's Greenland Schools(T) Ltd and 6 others vs Azania Banka Ltd**, Civil Appeal No. 225 of 2019, CAT where it was stated that such a point was just a matter of fact and not properly raised as a preliminary objection. He thus prayed

that this point be ignored and the respective limb of the preliminary objection be overruled with costs.

In rejoinder, Mr. Boniface reiterated his submissions in chief and rejoined that Regulation 83(1) covers matters concerning the business of cooperative society and persons claiming through them. He argued that the plaintiffs herein are claiming through the defendant with whom they are related through the lease agreement. As to the cases cited, he argued that, **Asha Iddi's** case is distinguishable as it was based on defamation and not business of the cooperative society; the case of **Babati SACCOS** is also distinguishable in the same category. Similarly, the case of **Sylvester Gerald** is distinguishable. Mr. Boniface argued further that, the case of **TUCTA** (supra) is inapplicable to the present case as unlike the present case, there was no specific law stipulating the dispute mechanisms. On the issue of arbitration, he rejoined that the statute has overriding powers over agreements by parties and that the arbitration clause cannot override the Cooperative Societies Act. Thus, it was wrong to0 have the arbitrations clause.

On the 2nd limb, Mr. Boniface it was rejoined that the case of **Mchekanae and others (supra)** and **Mukisa Biscuit (supra**) are distinguishable because of **Ally Shaban's case (supra**) which states that annexures are not evidence but part of pleadings. The **Registered Trustees of St. Anita** is also distinguishable as the Court of appeal did not set the principle. He averred that the counsel did not dispute provision of Section 141 of the Company Act and this signifies that he has conceded to the

objection. He prayed the court to sustain the preliminary objections and the suit be dismissed with costs.

I have thoroughly read the submissions by both parties and the pleadings from which the preliminary objection emanates. Thus, I am now ready to determine the two limbs of the preliminary objection starting with the first one. As I embark on this limb, let me state at the outset that it is now trite that, where a specific law establishes a special dispute resolution mechanism(s), all disputes arising from that law or emanating from relationships regulated by the said law, should not be entertained by ordinary courts unless the parties have exhausted the specific mechanism stipulated under the said law. Reference to such mechanisms is mandatory irrespective of the use of such words as "may" which in ordinary cases implies optional (see **Salim O. Kabora v TANESCO & 2 Others**, Civil Appeal No. 55 of 2014, CAT at Dar es Salaam (unreported); **Azam Media Limited & 2 Others vs TCRA & Another**, Misc. Civil Cause No. 56 of 2017, HC, Dar es Salaam (unreported); **Smart Global Ltd v TCRA & Another**, Commercial Case No. 77 of 2009 (unreported); and **Mohsin Somji v Commissioner for customs and Exercise and Commissioner for Tax Investigations** [2004] TLR 66. A suit filed in an ordinary court prior to exhaustion of the specific dispute resolution mechanism consequently bears the risk of being struck out for want of jurisdiction.

It is in this context, the defendant's counsel has passionately argued and submitted that the suit be found incompetent for want of jurisdiction as the plaintiff did not exhaust the specific remedy set out under regulation

83 of the Cooperative Societies Regulations. On his party, the defendant has contended that the dispute does not fall within the scope of Regulation 83(1) as it is neither between members of a cooperative societies nor between two cooperative societies. Hence, the plaintiffs cannot be penalized for failure to exhaust the remedy stipulated under the Regulations. To appreciate these contending arguments, I will reproduce the provision of Regulation 83 (1). It states thus:

> "Any dispute concerning the business of a cooperative society between members of the society or persons claiming through them or between a member or persons so claiming and the Board or any officer, or between one cooperative society and another shall be settled amicably through negotiation or reconciliation."

The wording of this provision is too obvious such that, it is incapable of any interpretation other than that, a dispute falling under the purview of section 83(1) must not only concern the business of a cooperative but should be between members of the society or persons claiming through them, between a member and the board or any officer of the society or between two or more societies. Thus, as held by my brother, Massara, J in **Babati SACCOS (T) Ltd and another vs Reginald Sauka** (supra);

> "From the wording of Regulation 83(1), a dispute has to first concern the business of the Cooperative society to qualify thereof..... If the person is not a member of the society, he may also qualify where such person claims on behalf of a member or the board of the cooperative societies or when business transactions are undertaken between two cooperative societies. In those circumstances, a dispute thereof will be referred to reconciliation or negotiation. It is the opinion of this court that the Regulation excludes all other incidents, which, invariably,

have to be dealt with in a normal suit." Also see **Asha Iddi vs. Babati SACCOS Ltd and Another**, Civil Appeal No. 30 of 2019 (unreported).

In the present case, there is no contention that the plaintiffs are not cooperative societies nor is there any indication that they are members of the defendant or any cooperative society. According to the plaint, the 1st plaintiff is a cooperate body incorporated as a limited liability company and the 2nd and 3rd plaintiffs are its directors whereas the defendant is a cooperative society. Mr. Boniphace has invited this court to hold that the dispute falls under the purview of Regulation 83(1) as the plaintiffs claim through a cooperative society an argument which I have failed to comprehend because the plaint vividly shows that the plaintiffs claim on their own right not as representatives or agents of a member or a body of any cooperative society which would have subjected them to the provision above. In the foregoing, I am fully convinced and entirely agree with Mr. Valerian that the argument by Mr. Boniphace is terribly misconceived as the plaintiffs' claims against the defendants are contractual emanating from the lease agreement executed by the 1st plaintiff and defendant and not from membership or any other relationship falling under the purview of Regulation 83(1) of the Cooperative Societies Regulations.

The second part of this limb of the preliminary objection to which I now turn, concern the arbitration agreement contained in clause 23 of the English version of the Lease Agreement by which the parties covenanted thus:

23.0 DISPUTE RESOLUTION AND ARBIRTATION

23.1 In case of any Dispute arising out of this agreement either party may give notice to each other with intention to settle the matter amicably and if the dispute continues for not more than 60 days, then reference will be made to the parties advocates under this agreement and or the cooperative officer who shall sit together and examine the possibilities of setting the matter amicably within 30 days from the date of reference and make joint report to the parties.

23.2 If a resolution is not reached within 60 days from the date of reference to the advocates or cooperative officer to resolve any dispute arising out of this agreement, the matter shall be referred to the registrar of Cooperative Societies who will make a decision on the matter.

23.3 if any of the parties is not satisfied with the decision of the registrar of cooperative societies, then the matter shall further be referred to the minister responsible with cooperative societies.

23.4 If either of the party is not satisfied by the decision of the minister, then that party shall have the option of taking the matter to court in accordance with the laws of Tanzania.

23.5 Either party thereto may initiate arbitration proceedings in order to resolve any dispute which arises under or in connection with this agreement. Such arbitration proceedings shall be made pursuant to the provisions of the Arbitration Act [Cap 15 RE 2002] of the laws of Tanzania or any amendment thereto.

23.6 Any Hearing of a dispute under or relating to this agreement shall take place on Moshi, Tanzania."

Mr. Boniphace's submission in this limb is twofold. In the first part, he has argued that, the suit has been prematurely instituted in this court prior to reference to arbitration hence offensive of the arbitration agreement and the law governing arbitration. In his second argument, he has challenged

the competence of the arbitration agreement, arguing that it ought not to have been included in the lease agreement as there were already an amicable settlement mechanism provided under Cooperative Societies Act and its Regulations, the details and scope of which have been sufficiently canvased when resolving the first limb of the preliminary objection.

While considering these two points, I have found it rather strange as they are contradictory. On the one hand, Mr. Boniphace is convincing the court to find the arbitration agreement incompetent but on the other, he is inviting it to hold the suit incompetence for offending the same 'incompetent arbitration agreement'. This reminds me of a popular English idiomatic proverb that says; "you can't have your cake and eat it". Mr. Boniphace's submission suggests that he wants to eat his cake and to simultaneously retain its possession.

This notwithstanding, I will address the two issues he has raised starting with the last one on the competence of the arbitration agreement in which has argued that the parties herein ought not to have entered into an arbitration agreement as there already existed a special dispute resolution mechanism under the Regulation to which they were all bound to subscribe to. In view of the finding in the first limb of this preliminary objection it is obvious that the argument fronted by the learned counsel is lucidly misconceived. In any case, even if the parties were all subject to the provision of Regulation 83(1), this point would still fail as there is no single provision in this law or any other law that I am aware of, which restricts the parties to conclude an arbitration agreement if they so wish. Such a restriction, if any, would amount to an encroachment on the party's

autonomy in formation of contracts and the principle of sanctity of contract to which the law attaches a greater value.

It is a trite principle of law in our jurisdiction and other jurisdictions under the common law that, unless there is credible proof of coercion, fraud or undue influence in the formation of contract or where there is evidence that a certain clause is inconsistent with the main purpose of the contract, or with the intentions of the parties objectively ascertained from the whole of the contract in its relevant contextual setting, courts should refrain from nullifying the terms of an agreement as in so doing, they will rewriting the contract for the parties which is not the duty of court. **In Wallis v. Smith**, Jessel, Master of the Rolls, stated, thus:-

> "I have always thought, and still think, that it is of the utmost importance as regards contracts between adults – persons not under disability, and at arm's length – that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character."

Echoing this position in **Fina Bank Ltd v Spares and Industries Ltd** [2000] 1 EA 52, the court had this to say:

> "It is clear beyond peradventure that save those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain"

In the foregoing and since no coercion, fraud or undue influence have been pleaded, it would be inconsistent with the law and policy for this court to overrule the arbitration agreement as in so doing, it would be rewriting the contract for the parties in abrogation of well settled legal principles.

Reverting to the argument that this court lacks mandate to entertain this suit as it was prematurely filed in court prior to reference to arbitration hence offensive of the arbitration agreement, I observed and read the cases cited in support and I indeed agree with Mr. Boniphace that, where the parties consider arbitration as a suitable mode for resolution of their dispute and conclude an agreement to that effect, they are duty bound to submit to arbitration and come to court after exhausting the remedy available through arbitration. This alone, does not however totally waive the jurisdiction of ordinary courts to entertain the matter so filed. Section 15 of the Arbitration Act, No. 2 of 2020, stipulates the appropriate remedy. It states that:

> 15.-(1) A party to an arbitration agreement against whom legal proceedings are brought, whether by way of claim or counterclaim in respect of a matter which under the agreement is to be referred to arbitration may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
> (2) An application under subsection (1) may be made notwithstanding that the matter is to be referred to arbitration after the exhaustion of other dispute resolution procedures.
> (3) A person shall not make an application under this section unless he has taken appropriate procedural step to acknowledge the legal proceedings against him or he has

taken any step in those proceedings to answer the substantive claim.

(4) The court shall, except where it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, grant a stay on any application brought before it.

From the foregoing, it is crystal clear that, a preliminary objection such as the one raised by the defendant herein is not a remedy available to a party offended by a breach of the arbitration agreement. The legal remedy available to such party, is to lodge an application for stay of proceedings subsequent to his written statement of defence or any other step acknowledging the present legal proceedings. As the defendant herein had not filed the application subsequent to his WDS, it is deemed that he has waived his right to have the suit stayed pending reference to arbitration and has submitted herself to the jurisdiction of this court.

Let me add here that, in the past, the filing of WSD sufficed as a bar for the defendant to move the court for stay of proceedings which is the position in **Trade Union of Tanzania (TUCTA) vs Engineering Systems Consultants Ltd and 2 Others** (supra) and a string of other decisions from this court and the Court of Appeal. With the enactment of a new Arbitration Act, No. 2 of 2020 which repealed and replaced the former Arbitration Act, the position has slightly changed. The current position as vividly demonstrated in the provisions above is that, an application for stay of proceedings can only be lodged after the defendant has acknowledged the proceeding by, among other things, answering the substantive claim, a step which is ordinarily done by filing a written statement of defence. Therefore, under the prevailing law, the filing of

WSD which in the past used to be a bar for an application for stay of proceedings, is no longer a bar to such application. This part of the preliminary objection is thus devoid of merit.

In a sum of what I have demonstrated above, the first limb of the preliminary objection fails in entirety and is accordingly overruled.

Moving to the second limb, it is indeed trite that, a company being a cooperate body does not transact in its own. It transacts through the directors in whom the powers to transact on behalf of the company vest and they execute such powers through board resolutions. Therefore, and as correctly argued by Mr. Boniphace, crucial decisions of any company are made through board resolutions and this includes a decision to institute a suit in which case, the respective board resolution is normally enclosed to the plaint.

As to the effect of non-enclosure of the board resolution to the plaint which is the subject of this limb of the preliminary objection, there are two schools of thought. The first is reflected in the submission by Mr. Boniphace and holds that such omission is fatal and vitiates the proceedings whereas the second school, as reflected in the submissions by the plaintiffs' counsels, holds that, the omission is minor anomaly and a factual one which can neither be resolved through preliminary objection nor vitiate the proceedings. It is not my intention to dwell on the details of each of these two schools as the same have been exhaustively discussed in a string of cases, the most recent one being the decision of

this court in **Ally Mchekanae & Another v Hassady Noor Kajuna & Another** (supra).

It thus suffices to state that, I fully subscribe to the view that hold that, much as the importance of board resolution cannot be underrated, enclosure of the same to a plaint is not a mandatory legal requirement nor it is a pure point of law which can be resolved through preliminary objection. Further to the authorities cited by the defendant's counsel to which I subscribe, I will briefly comment that, Order XXVIII Rule 1 of the Civil Procedure Code Cap 33 RE 2019 which regulates the institution of suits by body cooperates just states thus;

> "In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case

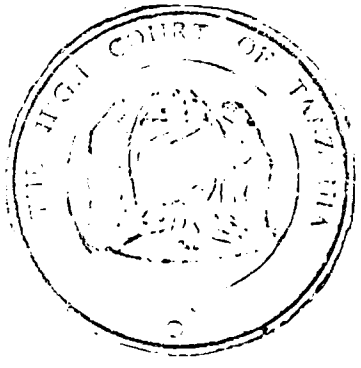
And, in view of this provision, it is now a settled position of law that, a suit by a cooperate will be deemed incompetent if it is neither signed nor verified by a director of the said company or its principal officer. The rationale for this requirement is as expounded by the Court of Appeal in **Bansons Enterprises Ltd vs Mire Artan** (Civil Appeal 26 of 2020) [2023] TZCA 90 [Tanzlii] stated;

> "In conclusion, it should be emphasised that a plaint by a company cannot be duly presented to the court and a suit duly instituted unless it is duly signed and verified by persons listed under Order XXVIII rule 1 of the Code. Where a plaint is not duly signed and verified in accordance with the law, there is no suit which the court can legally try."

In the present case the plaint has been verified and signed by the 2nd and 3rd defendant, not only on their individual capacity but as principal officers of the 1st defendant, hence it is fully compliant with the mandatory requirement of the law. Had the law intended to make the enclosure of the resolution a mandatory requirement it would have stated so. Since it does not, it can be safely assumed as it been done in a string of cases, that such an enclosure is not mandatory and the effect of its omission from the plaint cannot therefore be resolved as preliminary objection as it does not exhibit a pure point of law. That said, the 2nd limb of the preliminary objection is found incompetent and without merit.

In the upshot, the two limbs of the preliminary objection fail and they are consequently overruled with costs.

DATED and DELIVERED at Moshi this 27th day of April 2023.



J.L. MASABO

JUDGE

27th April 2023