IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 38 OF 2022

BETWEEN

ECOBANK TANZANIA LIMITED.....PLAINTIFF

VERSUS

EAST AFRICAN FOSSILS CO. LTD .....1ST DEFENDANT

VEDASTUS MATHAYO MANYINY.....2ND DEFENDANT

STEPHEN MARWA MATHAYO.....3RD DEFENDANT

MATHAYO SONS ENTERPRISES LIMITED .....4TH DEFENDANT

RULING

Date of last order: 20/04/2023
Date of ruling: 12/05/2023

AGATHO, J.:

This ruling was prompted by preliminary objection (PO) raised by the defendant's counsel when the suit was at the hearing stage. The PO was that the suit is incompetent for lacking board resolution sanctioning its institution. The ruling is therefore in that respect.

The Plaintiff was represented by Joseph Nuwamanya, Advocate

The Defendants were under legal representation of Seni Malimi, Advocate.

The hearing of the PO was done orally on 20/04/2023.

Mr Seni Malimi, Advocate for the Defendant began his submission in support of the PO by submitting that on 06/12/2022 the defendants raised a PO that the suit is incompetent for failure to plead and attach board resolution authorising institution of the suit before you. It is on this account that the plaintiff prays the suit to be struct out with costs.

Mr Malimi went on submitting that it is not in dispute that the plaintiff in her suit has neither pleaded nor attached the board resolution which authorised the institution of this suit. There is none, in the plaint where the board resolution has been pleaded or attached.

He submitted that the plaintiff is a corporate entity which is managed through it board of directors. And it is trite law that the board of corporation such as the plaintiff acts through board resolution. Anything done by a company must be authorised and sanctioned by the board through a resolution. This is pursuant to Section 147(i) of the Companies Act, Cap 212.

The learned counsel was of the view that since the plaintiff has not pleaded or attached the board resolution authorising institution of the suit, the question will now be what are the legal consequences to this suit. It is the defendant's submission that the suit is liable to be struck out for failure

to plead and attach the board resolution. This flows from the fact that the institution of the suit is an act by the company and since the company function through the board of directors which acts through resolutions, it is our humble submission that the suit before you was not authorised by the plaintiff's board of directors. We are saying so because the board of directors action to authorise such institution of the suit will only be through board resolution. The counsel said that the failure to do that not only offends Section 147 of the Companies Act, but also offends plethora of authorities of this Court, which state that failure to plead and attach board resolution renders the suit incompetent. On the authorities Mr Malimi submitted that there is a string of authorities decided by this Court and the Court of Appeal. One of them is **Katt General Enterprises Limited v Equity Bank Tanzania Limited and Another, Civil case No. 22 of 2018, HCT at Dar es salaam District Registry** at pages 9-12. It cements that failure to plead or attach board resolution renders the suit liable to be struck out. The board resolution is the one which renders the authority to file the suit. Another case he referred to is that of **Exim Bank Tanzania Limited v Jandu Construction and Plumbers Limited & 5 others, Commercial Case No. 135 of 2020, HCCD at DSM** this court

dealt with the issue of board resolution at pages 13-17. Especially, on pages 15-16 the court held that failure to plead and attach board resolution is fatal and consequently it struck out the suit. The defendant's counsel also cited the Another case referred to extensively. That is the case of **New Life Hardware and another v Shandong Locheng Export Co. Limited and 2 others, Commercial Case No. 86 of 2022** and **Misc. Commercial Application No. 135 of 2022, HCCD at DSM** where the issue was again failure to plead and attach board resolution. The court at pages 11-12 referred to section 147(1) of the Companies Act on resolutions, and on pages 14-15 the court concluded that failure to attach board resolution renders the suit liable to be struck out. To impress the court Mr Malimi went on citing the case of **Tanzania American International Development Cooperation 2000 Limited (TANZAM) and another v First World Investment Auctioneers Court Brokers, Civil Case No. 15 of 2017 HCT, Arusha District Registry** at page 7 the court held that corporate entity must have a board resolution before instituting a suit. The reason is that companies are formed by more than one person. Therefore, the resolution will show that the authority has been given to institute the case. The learned defence counsel did not end up

there. He cited the case of **ISA Limited and another v Bulyanhulu Gold Mine Limited and 2 others, Consolidated Commercial Case No. 114 and 115 of 2019, HCCD at DSM** at pages 3-4 the court held that failure to plead and attach board resolution renders the suit incompetent and liable to be struck out.

Having cited the High Court (HCT) decisions on the issue of board resolution, Mr Malimi turned to CAT authorities. He cited the two Court of Appeal decisions, that have been referred in the HCT decisions. The first one is **URSINO Palm Estate Limited v Kyela Valley Foods Ltd and two others, Civil Application No, 28 of 2014, CAT at DSM** at pages 3-4 it held that when the company commences legal proceedings a resolution have to be passed at a company or board of directors. That case also cited the two cases, first, **Bugerere Coffee Growers Ltd v Sebaduka and another [1970] 1EA 147** which was cited by the CAT in case of **Pita Kempap Ltd v Mohamed I.A Abdulhussein, Civil Application No. 128 of 2004 cf No. 69 of 2005, CAT**, where it was held that when the company authorises commencement of legal proceedings resolution or resolutions have to be passed either at a

company or board of directors' meeting. The case of **Pita Kempap** holding on necessity of board resolution in instituting a case is found on pages 2-3.

Mr Malimi submitted that the two decisions of the CAT are binding upon this court. Your lordship we are aware of the holding of this court to the contrary. The ruling of the case of **Sharaf Shipping Limited v Barclays Bank Tanzania Limited and another, Commercial Case No. 115 of 2014 at HCCD at DSM** pages 4-8. Your Lordship, that decision held that board resolution is not required in institution of the suit and that Section 147 of the Companies Act does not make such requirement.

The learned counsel for the defendant added another case though not in line with **Sharaf shipping case** but share the same holding that much as board resolution is required its absence is not fatal. It can be brought later. This is the case of **Ally Ally Mchekanae and Another v Hassady Noor Kajuna and another, Civil Case No. 03 of 2022, HCT Songea Sub-registry**. Mr Malimi submitted that in **Ally Mchekanae' s case** the HCT surveyed many authorities, and the relevant holding is on pages 59-65. There is a long discussion and school of thoughts therein. The ruling is to the effect that the board resolution is a must but need not

to be there at the institution of the suit. It can come later before the hearing.

In Mr Malimi's perspective the ruling of **the Sharaf Limited** viewed in the CAT decisions it was arrived per incurium. He submitted that the CAT decisions are binding upon this Court and the **Sharaf Shipping** ought to note that. The learned counsel opined that it can be observed that the emphasis in **Sharaf Shipping's case** was put on interpretation of Section 147 of the Companies Act. But the CAT decisions were emanating from the principle developed in **Bugerere's case.**

The defence counsel admitted that there are a number of HCT decisions that have cited Section 147(1) of the Companies Act. But he was quick to point out that is not seem in the CAT decisions. The CAT decisions are based on principle developed in **Bugerere's case**. Mr Malimi was of the view that the divergent opinions by the judges of the HCT loses sight of the holding of the two decisions of the CAT which cited the **Bugerere case** principle on board resolution.

He added that on **Sharaf Shipping's case** coming from this division of the HCT is a lone voice among more than four cases of this court. And looking at **Sharaf Shipping case** in the perspective of other HCT decision

it is clear that it is silent on whether the CAT decisions are binding upon it. While other three rulings of the HCCD (**ISA Limited, New Life and Exim Bank Limited**) they are clear that this Court is bound by the decisions of the CAT. Mr Malimi submitted that it is understandable that judges of the same Court can differ and there are authorities to the effect that in case of conflicting decision among the judges of same rank then it should be absolutely necessary and sufficient reasons must be given. That was held in **JAS Mtungi v University of Dar es salaam and others [2001] TLR 261 (CA)**. He submitted that **Sharaf Shipping Limited** put its departure by distinguishing itself from the CAT decisions in that the CAT interpreted the CAT Rules regarding representation in that Court. It was the defendant counsel's submission that this departure falls short of the fact that the two decisions were echoing **Bugerere's case** on the principle of board resolution. And objections which were premised in that were overruled in the CAT cases where the respondents were resisting actions against them. The principle of **Bugerere** could not apply. Mr Malimi repeatedly stressed that the ruling in **Sharaf Shipping** viewed in the perspective of the CAT decision was arrived in per incurium. And finally, not following the **Ursino** and **Pita Kempap cases** in his view will be tantamount to violating the

doctrine of precedents which is the foundation of judicial authority of this honourable court. He concluded his submission in chief by praying that the objection be sustained, and the suit be struck out with costs.

On his side Mr Joseph **Nuwamanya, Advocate for the Plaintiff protested the preliminary objection raised. He** replied that the PO raised does not amount to the PO based on the standard set out in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. The reason being that in that case the PO should raise a pure point of law based on assumption that all facts pleased by the other party are correct. It cannot be raised if facts are to be ascertained. And the submission by the defendants' counsel seeks to examine facts and ascertain them and in particular if there was board meeting and a resolution passed. Mr Nuwamanya submitted that the second issue is that he is of considered opinion that this court should be guided by the statutory laws of this country. He lamented that the defence counsel has not cited any statutory laws in particular Order VII Rule 1 of the CPC that specifies or outlines what should be contained in a plaint. And none of those suggest that a board resolution or such authorisation must be impleaded and attached. The Plaintiff's counsel further submitted that

Order XXVIII Rule 1 (1) of the CPC provides guidance on how suits instituted by and against corporation should be handled. It provides that pleadings should be signed by a secretary, director or other principal officer of the company. It was the counsel's submission that if a board resolution is to be a mandatory requirement then the same must have been specifically mentioned in the statute especially in the circumstances where non attachment thereof has dire effect such as the one prayed for by the counsel for the defendant.

Thereafter, the learned counsel Nuwamanya directed his submission on the decision of this court in **Sharaf Shipping case, which the defendant's counsel labelled** it as a lone voice. The plaintiff 's counsel refuted it by submitting that this court (HCCD) has in other instances maintained the position in **Sharaf Shipping case.** One of those cases is the case of **CRDB Bank PLC v Ardhi Plan Limited and 4 Others, Commercial Case No. 90 of 2020 HCCD** where the court when faced with similar objection addressed most of if not all the cases addressed by the counsel for the defendants who raised the PO including the CAT decisions (**Ursino Palm** and **Pita Kempap**) mentioned. In line with what was discussed in the **Bugerere's case** the HCCD proceeded to dismiss the

PO. And in the **CRDB's case** at pages 7 and 8 the court took cognisance of the existence divergent schools of thought on this matter and proceeded to distinguish itself from the other school of thought and dismissed the preliminary objection.

Mr Nuwamanya, counsel for the plaintiff submitted that the other case is that of **New Safari Hotel (1967) Ltd v Newton Air Limited and Other, Commercial Case No. 06 of 2022, HCCD at DSM** in this case Mkeha J departed from his earlier position in **ISA limited case** (supra). Under page 3 of **New Safari Hotel case** the court held that there is no law to the effect that the board resolution has to be attached to the plaint. The counsel submitted that the plaintiffs fully associated themselves with **the CRDB's case, Sharaf Shipping Agency's case** as well as the **New Safari Hotel's case** as well as the reasoning and arguments therein.

Mr Nuwamanya added in his submissions that, 1st the import and rationale of Section 147 (1) of the Companies Act. Your Lordship it is our submission that the import of that section provides for a procedure that can be followed in making a resolution. It does not under any circumstances imply that all company decisions and in particular institution

of the suit has to be supported by a resolution. He continued to submit that Section 147(1)(a) and (b) of the Companies Act talk about a company in a general meeting or a class of members. By members we understand shareholders. It was Mr Nuwamanya's humble submission that the output or resolution that comes from members' meeting is a resolution but not a board resolution. These are called special resolutions. The board resolutions on the other had are those decisions that are reached after a board meeting. Therefore, a demand for board resolution while mentioning section 147 of the Companies Act is misguided. And for that reason, the plaintiff's counsel encouraged the court to maintain the decision in **Sharaf Shipping case**.

As for the cases of **Katt General, Jandu Construction**, and **New Life Hardware** as cited by the counsel for the defendants Mr Nuwamanaya was of the view that they were all based on section 147 of the Companies Act. He submitted that they were decided per incurium.

The counsel for the plaintiff's second remark was on the submission of the counsel for the defendants on the doctrine of precedent especially with respect to the CAT decisions cited, that is **Ursino palm estate** and **Pita Kempap cases**. Mr Nuwamanya submitted that both CAT decisions

address themselves to the rule 30(3) of the CAT Rules 2019 as amended which addresses the issues of appearance of the corporations before the CAT. The counsel was of the view that the mention of a resolution in that sub rule only infers to the appearance of a manager or company secretary to appear with the resolution to be able to represent the corporation. He was of the firm view that the CAT rules do not apply to this Court. And even if they did this rule does not require that such resolution to be attached to the plaint.

The third remark by Mr Nuwamanya, the plaintiff's counsel wasm on matters of corporate governance. He was of the view that under the auspices of **Salomon v Salomon & Co Limited (1879) AC 22**, the corporation is a legal entity. And there are several rules as to why such corporations can and may deal with other persons and institutions. For Tanzania and especially financial institutions the regulator the Bank of Tanzania (BoT) has set in place such guidelines. These include the BoT Guidelines for Board of Directors for Banks and Financial Institutions, 2008. These are guidelines set in place bank management structures. There are also Banking and Financial Institutions (Corporate Governance Regulations) of 2021 GN 767 of 2021, which guide banks on how to run, and manage

their board and in particular Regulation No. 35(1) requires the board to meet at least every quarter. The practical aspect of this is that where the bank institutes or defend the suits every now and then it would not be practical to have board resolution as it has been interpreted. This aspect critically discussed in the case of **Ally Ally Mchekanae's case** at pages 68-69. It could not be practical to have board resolutions or even special resolutions which are the import of section 147(1) of the Companies Act especially in companies such as CRDB banks which has over 2800 shareholders. The plaintiff herein although has 3 corporate shareholders two of them are listed outside Tanzania it would be impractical comply with section 147 of the Companies Act.

The plaintiff's counsel continued to impress that if one takes the position that every company decision has to be supported by written resolution what will be the limit in the running of the day-to-day business of the corporation in today's world. Even purchase of groceries would require resolution. We submit that the court should not touch that door. The counsel submitted that the answer to that is provided for under Section 37 of the Companies Act, which in essence stated that a party to a transaction with a company is not bound to inquire as to whether the

company is permitted by companies MEMART or as to any limitation on power of the board of directors to bind the company or authorised others to do so. The import of this is that when a party deals with a company it has not business in questioning as to whether the company has power to transact and just like in this matter when a defendant dealt with the plaintiff during the borrowing did not inquire and a documentation provided including the facility letters and mortgage deeds provided such remedies of recovery in event of default including the institution of this suit should be taken that the defendant recognized the powers and authority including the institution of the suit. For the above reasons Mr Nuwamanya, the plaintiff's counsel prayed for the dismissal of the PO with costs.

Mr Nuwamanya, Advocate for the plaintiff submitted that it was his understanding that the court directed the counsel of both parties to submit on circumstances as to when the lower court can depart from the decision(s) of the court of appeal under the doctrine of precedent. He informed the court that he had taken time to study the matter and he did not find such a direct authority. Although during the process, he came across findings on this matter, the matter before this court.

The plaintiff's counsel submitted regarding the position and implication of the two court of appeal decisions on the need for board resolutions, and these are the cases of **Pita Kempap** as well as **Ursino Palm Estate**. To begin with **Pita Kempap**, Mr Nuwamanya submitted that Justice Ramadhan (JA as he then was in 2005) did not lay out the law or principles making it mandatory for a company to make a resolution before institution of a suit. It was his humble submission that what happened in those proceedings was that the Court simply agreed with submission of counsel Maira (the late) that the facts in the **Bugerere's case** was not applicable to **Pita Kempap's case**. The court did not adopt the position in **Bugerere's case** as most courts have come to believe. The learned counsel went on submitting that if the court has intended to adopt the position in **Bugerere's case**, it should have deliberated about the process such as identifying the lacuna in the laws of Tanzania and thereafter proceed to specifically and categorically state the law and principles applicable in Tanzania. The court in that instance was invited by counsel Rwebangira to discuss the Companies Ordinance, but the court did not discuss the mandatory requirement of such resolution to be attached to the plaint and neither did it discuss repercussion of not so doing. Mr

Nuwamanya posed as to who came up with those standards that the board resolution has to be annexed to the plaint and the repercussion of not annexing thereto. He was of the view that these were not laid down in **Bugerere Coffee case**. If at all it is to be assumed that the court in **Pita Kempap** did adopt **Bugerere case** as it was then everyone adopting this position should go beyond and read the fill content of **Bugerere case** because the Court of Appeal in **Pita Kempap** case only picked a three-line quotation. If one read the full paragraph of **Bugerere's case** which was quoted then one would find out that the discussion of bringing that issue was the authority of a law firm to commence legal proceedings. The issue is not whether the company authorised itself to commence legal proceedings. And this is what the current preliminary objection and other preliminary objections are about.

Mr Nuwamanya, in concluding his reply, he briefly reiterated that the **Ursino Palm estate case** was also dealing with the issue of authority of an advocate to institute a case and in particular it was discussing the authority of the counsel to enter appearance pursuant to rule 30(3) of the Court of Appeal Rules 2019.

In his rejoinder, which was a lengthy one, Mr Malimi started with the last point of the Plaintiff's counsel regarding the Court of Appeal cases. He was of the view that Mr Nuwamanya submitted at length to show that the **Bugerere Coffee's case** has been misapplied or misinterpreted by the High Court in the manner it was cited in **Pita Kempap's case**. It was Mr Malimi's humble submission that reading the **Pita Kempap's case** particularly at page 3 of that ruling the quotation taken by the Court of Appeal is basis of this preliminary objection. He added that the CAT in its conclusion after citing that quotation overruled the objection because the respondent in that application was defending an action against it in that Court and in the Hight Court. Thus, the objection of not having board resolution failed on that account because the company was defending itself.

Mr Malimi re-joined further against the Plaintiff's counsel assertion that mere quotation of **Bugerere's case** in the Court of Appeal did mean that it adopted the principle in the **Bugerere's case** decision because if it did so it ought to identify the lacuna in Tanzanian laws. In contrast, Malimi submitted that what the counsel of the plaintiff is disputing is only a style which in his view the Court of Appeal ought to do. He submitted that since

the style of CAT using the **Bugerere's case** was in fact the adoption of that principle because the preliminary objection was dismissed on that account. He opined that the CAT effectively adopted the **Bugerere** decision. The defendant's counsel contested the submission that the CAT did not go further discussing the mandatory requirement of attaching board resolution to the plaint or repercussion thereof. He was of the view that the fact that the objection failed in **Pita Kempap** on that account the CAT held that the absence of board resolution in launching an action or instituting a suit will be fatal. Mr Malimi submitted that the quotation in **Pita Kempap** cited by some judges in the High Court is correct.

The defendant's counsel clarified as to what exactly was the import of the **Bugerere's case**. He submitted that the ratio decidendi the key principle was what exactly cited in **Pita Kempap**. Mr Malimi submitted that much as the **Bugerere case** could have different facts and principles one can only pick what the CAT took from that decision as demonstrated in **Pita Kempap**.

Regarding the **Ursino Palm case**, the defendant's counsel was of the view that that case followed the ruling of **Pita Kempap**. He admitted though that the **Ursino case** dealt with Rule 30(3) of the CAT Rules. But

he was quick to add that the **Ursino case** quoted in full the CAT ruling in **Pita Kempap** position drawn from **Bugerere case.** And that has been cited by many High Court rulings.

Mr Malimi also submitted on the situation where the High Court is not bound by the CAT decision. He opined that the Hight Court is not bound by CAT decision where the decision is per incurium. He proceeded to submit that the decisions of the CAT in **Pita Kempap** and **Ursino Palm** were not per incurium. To cement his supposition Mr Malimi referred the Court to the case of **JUWATA v KIUTA [1988] TLR 146.** In that case the meaning per incurium was stated to mean ignorance or forgetfulness of some inconsistencies of statutory or authorities binding on the court that the decision was demonstratively wrong. The defendant's counsel opined that a mere difference in interpretation of the law does not make the decision per incurium. He insisted that this court must follow *stare decisis*. Malimi submitted that **Pita Kempap** and **Ursino Palm Estate** are good law and represent a requirement of attaching board resolution to the plaint.

As to the allegation by the plaintiff's counsel on the appropriateness of the PO, the defendant's counsel submitted that the PO fits in **Mukisa**

Biscuit case. He went on submitting that the issue of board resolution is now a legal point. He then pointed out that he is aware that there are some cases initially that took the view that it was not a pure point of law. Looking at the decision of this court and the CAT this point is not a pure point of law. Much as it relates to law and facts fitting into one. Mr Malimi submitted that this is not a question of fact alone. It is like the objection on law of limitation that the action or suit is time barred. There must be ascertainment as to when cause of action accrued.

At this point I should remark that despite his eloquent submission Mr Malimi has not told the court where should the facts be drawn from. In my view, the law allows extraction of facts from pleadings. But what the **Mukisa Biscuits case** disallows is to go beyond the pleadings searching for evidence. In the case at hand minutes of the board meeting and the resolution will be required. These are not in the pleadings.

Mr Malimi extended his rejoinder to the point that the plaintiff raised in submission in reply that the court should be guided by statutory law and that the defendant did not cite any provision of the statute. The reference was provision Order VII Rule 1 of the CPC which provides for content of the plaint. The defendant's counsel re-joined by submitting that the

statutory law is not exhaustive. The court of law uses the statutory law along with judge made. It is his humble submission that the requirement of board resolution in instituting the case is largely a product of judge made law. And this being coming from the CAT, it is a requirement which cannot be ignored. Malimi went on submitting that the statutory law does not provide each and everything which require the interpretation of the court. The practical aspect of statutory law is tested in court, where applicable development is made such as this issue of board resolution.

Regarding the cases referred to you in particular the **CRDB case** and **Sharaf Shipping case**, Mr Malimi, the defendant's counsel started with the **CRDB case** where he submitted that the court was alive with the fact that there are different schools of thought on the issue of board resolution. And the judge decided to follow the school which subscribe to the fact that the board resolution is not mandatory. On page 8 of that ruling she made that clear. And on page 9 court she distinguished the **Ursino Palm's case**, that the CAT case applied to CAT rules as opposed to what was before the HCCD. Mr Malimi was of the view that the **CRDB case** side stepped the **Pita Kempap's case** where the CAT imported the principle in **Bugerere case**. The **CRDB case** did not cite **Pita Kempap**. He

submitted that had the HCCD took deliberation of the two CAT cases together then the requirement of the board resolution would have come to the fore. As for **Sharaf Shipping's case** he said that he has submitted a lot on that, and he reiterates what he submitted in the submission in chief.

Turning to **New Safari Hotel (1967) Ltd case** on which the plaintiff counsel submitted that Judge Mkeha made the U-turn, Mr Malimi disagreed and submitted that he did not do U-turn. Rather the board resolution was pleaded. He went on arguing that what was missing though and which the court supported was not attaching the board resolution. It was the court's position on page 3 of that ruling that the attachment of the board resolution was not a requirement of the law. Thus, this case followed the **Pita Kempap** decision. He viewed the case as supporting the defendant's than the plaintiff.

With regard to section 147(1) of the Companies Act, Mr Malimi reiterated his submission in chief. Moreover, he pointed that the section talks about any action of the company should be done via board resolution. He admitted that the practice of board meeting is diverse nowadays. The set up of section 147 is that the meeting could be done through meeting or circular resolution. He added that nowadays meetings are now done online.

There is no hardship in doing meetings as the technology has resolved that problem.

I concur with the counsel for the plaintiff in distinguished the cases the defendant's counsel cited despite his standing with what he submitted on the said cases in the submission in chief.

As to corporate governance, the defendant's counsel submitted that there is a need for board resolution. That does not interfere with the internal affairs of the company. Mr Malimi submitted that the board resolution requirement came from case law. It is not an absurd practice. He submitted further that even in meetings, representatives of companies are asked to show their power of attorney. He stressed that asking a company to have board resolution before institution of a case which is a serious business came from case law. He was of the view that the insistence of board resolution is not in conflict with corporate governance which consider litigation as a serious business.

Mr Malimi also re-joined on the Bank of Tanzania (BoT) regulations. He submitted that they support those regulations. However, the defendant's concern is on board resolution which is a requirement of the law. It is the stage which is there. That the plaintiff ought to have done is

to have a board resolution. He opined that this is a compliance issue. he suggested that the court will not be alone in penalizing the plaintiff for non-compliance. The penalty for not having board resolution to sanction institution of the suit is that it will be struck out. The BoT regulations have no bearing to this matter.

The defendant reacted to cited to the plaintiff's citing of section 37 of the Companies Act that a third party transacting with the company need not to inquire as to whether the company has been mandated by the board resolution or its MEMART has allowed it to do the transaction. Mr Malimi for the defendant submitted that they are not questioning the powers of the company to transact. They are concerned with failure to comply with the procedures in instituting the suit by companies. Therefore, that section is inapplicable in this case. This sounds convincing but I am of the view that the Civil Procedure Code [Cap 33 R.E. 2019]regulating institution of suits by companies has not made it mandatory to attach or plead board resolution.

Mr Malimi was also not convinced with the defendant's submission that when she was dealing with the plaintiff there were a lot of documentations which include facility letter and mortgages, all these

include the remedies such as institution of the suit, and the defendant were taken to be cognizance of that authority. He re-joined by stating that, that was the framework of their engagement. It was like a decision to perform something. When it comes to actual performance then decision has to be made at the board level. The defendant's counsel went on submitting that disbursement of mortgage has to go through the authority. In that case therefore board resolution is needed for the plaintiff to file her suit. He winded his submission by praying that the objection be sustained, and the plaint be struck out. Court: this point is without substance.

In my analysis, I should foremost acknowledge the industrious work done by the learned counsel representing the parties. The quality of their submission attest to their research skills. Perhaps leaving that aside and back to the PO at hand that the suit is incompetent for failure to plead and attach board resolution sanctioning its institution. I feel obliged to state that the suit at hand was at the commencement of the trial when the defendant's counsel raised the PO. There is no harm in doing so. But time is of the essence in dispensation of justice.

The counsel representing the parties are at loggerhead on whether board resolution is mandatorily required or not in instituting a suit. The

Position of this Court on this is known by the parties as reflected in **Sharaf Shipping case**. It was ruled in that case that the board resolution is not a requirement of the law for a company to institute a suit in its own name. But since the parties have made extensive research and made several points for and against the PO, I will traverse those points and thereafter draw conclusion. I will not discuss in detail the existing schools of thought one in support and the other against pleading and attaching board resolution in instituting a suit. That has been done in **Ally Ally Mchekanae's case**, and **CRDB's case** (supra). Moreover, I will not focus on issues of corporate governance, the import of section 37 of the Companies Act that a third-party transacting with the company need not to inquire as to whether the company has been mandated by the board resolution or its MEMART to do the transaction, and the BoT regulations, for a simple reason that these points are superfluous. Much as they may seem to be relevant, to discuss them will be an academic work.

In my view, there are several issues that are worth to be examined as they are central to the PO at hand. **One**, whether the PO is compatible with the parameters set in **Mukisa Biscuits' case**? **Two**, whether Section 147 of the Companies Act makes it mandatory to plead and attach board

resolution? **Three**, whether rule 30(3) of Court of Appeal (CAT) Rules requires board resolution in instituting a suit? **Four**, what is the principle in **Bugerere's case** regarding board resolution? **Five**, what is the Court of Appeal holding in **Pita Kempap** and **Ursino Palm Estate's cases**? **Six**, whether **Sharaf Shipping's case** was decided per in curium? **Seven**, whether requirement of board resolution establishes locus standi of the company? **Eight**, whether the PO should be sustained or overruled?

To begin with, **One**, whether the PO is compatible with the parameters set in **Mukisa Biscuits' case**? I concur with the defendant's counsel that the PO is based on pure point of law which does not mean that one cannot examine the pleadings. To appreciate the validity of the PO one may look at the pleadings. That is in line with the principle stated in **Mukisa Biscuits' case**. The PO in the present case came from the case law (**Pita Kempap** and **Ursino Palm Estate cases**) as rightly pointed out by Mr Malimi. I thus disagree with the plaintiff's counsel submission that the PO contravenes the principle in **Mukisa Biscuits' case**. It may however be true that evidence may be required to confirm that there was board resolution. But that may be substantiated by looking at the

pleadings. Once we go beyond the pleadings then the principle in **Mukisa Biscuits' case** is breached.

Two, whether Section 147 of the Companies Act makes it mandatory to plead and attach board resolution? I do not have to belabour on this point. The court has treated it extensively in **Sharaf Shipping's case**. It is apparent that that Section does not make it a requirement that for a company to institute a case there must be a board resolution. This position is appreciated by both parties to the case at hand.

Three, whether rule 30(3) of CAT Rules requires board resolution in instituting a suit? Looking at the CAT decision in **Ursino Palm Estate's case** that rule deals with locus standi and legal representation. That the advocate lacks locus to prosecute a case at the CAT without board resolution sanctioning it. The PO in this case differs from the **Ursino Palm Estate's case**. The ruling in the latter case is thus distinguished.

Four, what is the principle in **Bugerere's case** regarding board resolution? Both plaintiff and defendants agree that the **Bugerere's case** made it a requirement that *whenever a company authorise commencement of legal proceedings a board resolution or resolutions sanctioning it must be in place*. It is interesting to note that the **Bugerere's case** dealt with a

feud in the company itself where an action in the name of the company was brought challenging the appointment of new directors. The court in **Bugerer's case** further held that *where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action.* This holding has been cited by CAT in the cases of **Ursino Palm Estate** and **Pita Kempap** (supra). In **Sharaf Shipping's case** this court held that the context will determine the necessity of board resolution. When one reads the **Bugerere's case** and considering its context, it was indeed necessary for the board resolution because it was the company and its members themselves who had legal tussle. It was an internal matter of the company that is the removal and appointing of company's new directors.

It is pity to note that the learned counsel in this case did not tell the court that the **Bugerere's case** is no longer a good law in Uganda where it was pronounced particularly on the principle that *whenever a company authorise commencement of legal proceedings a board resolution or resolutions sanctioning it must be in place.* For details see **Sharaf Shipping's case** and **Ally Ally Mchekanae's case.**

I concur with the defendants' counsel view that this Court is bound by the CAT decisions. Once the CAT has established a principle all lower courts including this court are bound to follow. But in my humble view reading the cases of **Ursino Palm** and **Pita Kempap**, the CAT's adoption of the principle in **Bugerere's case** is not as crystal as we tend to assume. The CAT was certainly inspired by the **Bugerere's case.** But seemingly it applied the principle differently. That will unfold herein below.

Five, what is the CAT holding in **Pita Kempap** and **Ursino Palm Estate's cases**? With the latter case, that of **Ursino Palm Estate** (supra) the CAT dealt with CAT rule 30(3) of CAT rules as to whether the advocate can institute and prosecute a company's suit without board resolution sanctioning it. This is what was decided in **Bugerere's case**. I am of the view that the case (Ursino Palm's case) dealt with a question of locus standi and legal representation at the CAT. As for **Pita Kempap's case** its reading shows that the CAT overruled the objection on requirement of board resolution which was raised by the respondent (defendant at the trial court) because that respondent was defending the suit.

Six, whether **Sharaf Shipping's case** was decided per in curium? Since that ruling was handed down by this very court, it is not for me to

say. That should be determined by the CAT. In as far as **Sharaf Shipping's case** is concerned this court is functus officio. To invite it to comment on such ruling is to create confusion which I am not prepared to do. And it will not augur well with the doctrine of precedent. In the end board resolution requirement depends on the context as the **Ursino Palm Estate's case** show. Regarding **Pita Kempap's case** particularly at page 3 of that ruling the CAT overruled the preliminary objection because the respondent in that application was defending an action against it in that Court and in the Hight Court. Thus, the objection of not having board resolution failed on that account because the company was defending itself. This does not by extension mean that the CAT ruled that had the respondent sued or instituted the suit in the trial court then the board resolution would have been necessary in every case. That will amount to putting words to the CAT which it never articulated. In the case at hand, it is the company itself that instituted the case against the defendants and there is neither plaintiff's member nor director who came forth complaining that there was no board resolution sanctioning the suit. That is in line with the principle in Bugerere's case because there was conflict in the company. In the case at hand there is no such conflict. In the circumstance of the

present case, this reasoning does not contradict **Pita Kempap's** ruling. It is rather compatible with **CRDB's case** (supra) as well as **BETAM Communications Tanzania Limited v China International Telecommunication Limited and Others, Civil Case No. 220 of 2012 HCT at Dar salaam** (unreported). In the latter the court held that, *board resolution is not mandatory for a company to institute a suit. It is internal affairs of the company in which Defendants as third parties, it is none of their business*. Thus, it is not for the defendant to say that there was no board resolution. That is why the PO raised in that case was overruled. Furthermore, I find the ruling in **CRDB's case** justifiably appealing.

Seven, whether board resolution establishes locus standi of the company? I do not need to define what is locus standi as that has been done in **Lujuna Shubi Balonzi (senior) v Registered Trustees of Chama cha Mapinduzi [1996] TLR 203**. It will be a grave error to entertain a PO of this nature as it has a potential of eroding the very corporate fiction facade of legal personality. Putting the company's right to sue at jeopardy. It is trite law that once a company is incorporated it becomes a legal person capable of inter alia suing and being sued in its

own name. That is the principle enunciated in **Salomon v Salomon & Co. Ltd. (1897) A.C.22**. I am afraid the sentiment extended to requirement of board resolution does not sync with the legal personality of a company. I am of settled view that a company cannot be deprived its locus standi to sue merely because there was no board resolution save for limited circumstances like the one stated in **Bugerere's case**, and **Ursino Palm Estate's case** where an advocate could not initiate a suit or prosecute it on behalf of the company without board resolution. For details see **Sharaf Shipping's case**. Lastly, whether the PO should be sustained or overruled? For the reasons stated herein above, it is my considered view that the PO lacks merit. I proceed to overrule it. The Plaintiff shall have her costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 12th Day of May 2023.

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

U. J. AGATHO
JUDGE
12/05/2023

Date: 12/05/2023

Coram: Hon. U. J. Agatho, J.

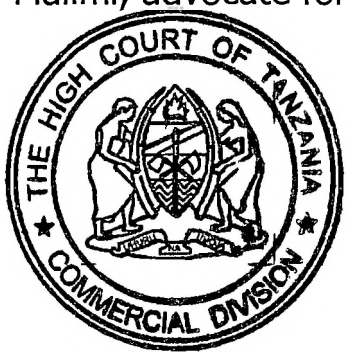
For Plaintiff: Zuriel Kazungu, Advocate

For Defendants: Zuriel Kazungu, Advocate holding brief of Advocate Seni Malimi.

JLA: Opportuna

C/Clerk: Sania

Court: Ruling delivered today, this 12th May, 2023 in the presence of Zuriel Kazungu, learned counsel for the plaintiff, and also holding brief of Mr. Seni Malimi, advocate for the defendants.



U. J. AGATHO
JUDGE

12/05/2023