

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 351 OF 2023

PONEKA PATRICK MIHAYO Alias

PATRICK LUTANDULA MIHAYO 1ST PLAINTIFF

SAYUNI CONTRACTORS LIMITED 2ND PLAINTIFF

VERSUS

CRDB BANK PLC DEFENDANT

Date of last order: 11/12/2023

Date of ruling: 20/12/2023

RULING

I. ARUFANI, J.

This ruling is for preliminary objection raised by the counsel for the defendant that *the suit is incompetent for failure to plead and annex the company resolution sanctioning the same*. The counsel for the parties prayed and allowed to argue the stated preliminary objection by way of written submissions. While the submission in support of the preliminary objection was drawn and filed in the court by Ms. Haika A. Mrango, learned advocate the reply submission was drawn and filed in the court by Mr. Erick Simon, learned advocate.

The counsel for the defendant stated in her submission in chief that, a company is a legal entity registered under Companies Act, No. 2 of 2002 and once registered it acquires a legal personality which its all affairs are

entrusted in the hands of board of directors who performed all the activities of the company on behalf of the shareholders. She stated it is a requirement of the law as provided under section 147 (1) of the Companies Act that anything done by the company is required to be done by under the resolution of the company in a general meeting or any class of members of the company.

She stated that, failure to comply with the requirement provided in the above cited provision of the law renders the act so done to have no legal effect and unenforceable. To support her argument, she referred the court to the case of **Giant Machine and Equipment V. Gilbert R. Mlaki & another**, Civil Case No. 5 of 2019, HC at Mbeya (unreported). She went on arguing that, the second plaintiff in the present suit is a company registered in Tanzania and it is bound by the provision of the law cited hereinabove. She submitted that the second plaintiff has neither pleaded nor attached company resolution that sanctioning institution of the present suit in the court.

She argued that, the stated omission caused the case to lack legs to stand on as it was not authorized by the company but by one person whose name appears in the plaint. She referred the court to the cases of **Unction Trading Company V. KCB Bank & Another**, Land Case No. 222 of 2023, HC Land Division at DSM, **Boimanda Modern**

Construction Co. Ltd V. Tenende Mwakagile & Six Others, Land Case No. 8 of 2022, HC at Iringa, **Bugerere Coffee Growers Ltd**, cited in the case of **Ursino Palms Estate Limited V. Kyela Valley Foods Limited & Others**, Civil Application No. 28 of 2014, CAT at DSM where it was stated that, before institution of a company's suit in court there must be a board's resolution sanctioning institution of the same.

She submitted that, as the second plaintiff has failed to comply with the requirements of the law stated in the above cited law and cases to plead and annex company resolution sanctioning institution of the suit in the court to the plaint, it renders the suit incompetent thus it should be struck out with costs. She based on the above submission to pray the court to struck out the suit with costs.

In his reply the counsel for the plaintiffs stated he is acknowledging being aware of the previous conflicting decisions of the High Court in respect of the requirement of a board resolution before a company or corporation commence a law suit in a court of law. He stated there are those who states it is mandatory to have the board resolution before filing a company's suit in court and those who states a board resolution is not mandatory for institution of a company or corporation's suit in court. He argued that, due to the development of the law there has been changes and the issue of requirement of a board resolution from the company

before commencing a suit has now been settled by the Court of Appeal in the case of **Simba Papers Converters Limited V. Packaging and Stationary Manufacturers Limited & Another**, Civil Appeal No. 280 of 2017, CAT at DSM (unreported).

He stated the Court of Appeal appreciated the position of the law stated in the cases of **Bugerere Coffee Growers Ltd V. Sebaduka** (1970) EA 147 and the case of **St. Bernard's Hospital Company Ltd V. Dr. Linus Maemba Mlula Chuwa**, Commercial Case No. 57 of 2004, HC Commercial Division (unreported) whose dispute was on internal management of the company between the directors and shareholders of the company. He argued that, the Court of Appeal refused to extend the rule laid in the above cases to other cases not involving internal affairs or conflict of a company.

He argued that, the Court of Appeal arrived to the stated finding after taking into consideration the general powers of the company to institute, defend and compromise legal proceedings stated in the **Pennington's Company Law**, 15th Edition. He submitted the position of the law stated hereinabove shows the present suit does not involve the internal dispute within the second plaintiff's company. He stated that, the case at hand concerns the plaintiffs and the defendant who is an outsider

and that being the case the rule requiring board resolution cannot be extended to apply in the present case.

He invited the court to subscribe to the position of the law stated in the case of **Simba Papers Converters Limited** (supra) on aspect that dispute which do not involve internal directors or shareholders should not necessarily require attachment of the board resolution to the suit. He referred the court to the cases of **BEB Company Ltd V. Geita Gold Mining Limited**, Civil Case No. 142 of 2022, HC at DSM (unreported) and **The Moshi Hotel 2010 Limited V. Salim Juma Mushi t/a Dexter Attorneys**, Civil Reference Application No. 3 of HC at Moshi (unreported) which relied on the above case to hold board resolution is not mandatory where the suit is not involving internal dispute of a company.

He argued in alternative that, although the board resolution was not necessary as per their submission but the same is available and was pleaded and annexed to the plaintiffs' reply to the written statement of defence as annexure SCL. He stated if the same is necessary it will be produced at the first hearing of the suit as stated in their reply to the written statement of defence. He argued that, when the resolution is available the same cannot be treated like when it is not available. He cited in his submission Order VI Rule 1 and Order VIII Rule 13 of the Civil

Procedure Code, Cap 33 R.E 2019 and the case of **Banson Enterprises Ltd V. Mire Artan**, Civil Appeal No. 26 of 2020 (unreported) and stated the term pleading is defined therein.

He went on arguing that, the suit before the court is not the suit of the second plaintiff alone but it is a suit filed in the court by two plaintiffs on their own legal capacity to sue. He argued the first plaintiff is a natural person who is claiming to be the owner of the house in dispute and he has filed the suit in the court to rescue his property as a mortgagor. He submitted that, the legal right of the first defendant does not depend on the borrower who is the second plaintiff. He submitted further that, if it will be assumed that the board resolution was necessary in the case, still the entire suit would not be defeated to the extent of striking it out.

He stated the suit would proceed by the first plaintiff who is a mortgagor as a suit can be institute by or against or mortgagor. He supported his argument with the case of **I & M Bank (T) Limited V. Mustafa's (2005) Limited & Two Others**, Commercial case No. 15 of 2022 (unreported). He went on submitting that, all the three cases cited by the counsel for the defendant have already been overtaken by event in view of the decision made in the case of **Simba paper Converters Ltd** (supra). In conclusion he based on the above submission to pray the

court to dismiss the preliminary objection raised by the counsel for the defendant and the costs be ordered to follow the events.

It is stated in the rejoinder drawn and filed in the court by Ms. Miriam Moses Mwinzya, learned advocate for the defendant that, as it is not disputed that the second plaintiff is a company dully registered and authorized to do business in Tanzania and section 147 (1) of the Companies Act makes it mandatory that anything done by a company has to be authorized by the board resolution, then board resolution is of paramount in everything that a company intends to do. She stated there is no exception on it and the law provides for the ways of reaching a board resolution and institution of legal proceedings is not an exception in complying with the stated requirement.

She stated the case of **Simba Papers Converters Ltd** (supra) did not cover each circumstance as the Court of Appeal stated that, as the conflict in the stated case was involving internal affairs of a company it could have not go beyond what was before it. She referred the court to the case of **Junior Construction Co. Ltd V. AMC Tanzania Limited & Another**, Civil Case No. 72 of 2020 HC at DSM (unreported) where after interpreting the rule laid in the case of **Simba Papers Converters Ltd** (supra) it stated the principle laid in the cited case did not cover every circumstance in respect of institution of a company's case in a court of

law. She stated the court held in the above cited case that, a company has to authorize commencement of legal proceedings by its director or shareholders.

She stated that, the counsel for the plaintiff has submitted there is a board resolution dated 10th October, 2023 annexed in the reply to the written statement of defence and the preliminary objection was raised prematurely. She submitted that, annexing the board resolution in the reply to the written statement of defence is an afterthought and such act amount to pre-empting the preliminary objection they have raised in the matter. She referred the court to case of the **Commissioner General TRA V. Pan Africa Energy (T) Ltd**, Civil Application No. 206 of 2016, CAT at DSM (unreported) where it was stated that, the court will not tolerate the practice of an advocate trying to pre-empt a preliminary objection or trying to rectify the error complained thereof.

She went on arguing that, the submission by the counsel for the plaintiff that the preliminary objection was raised prematurely is not true and it is unfounded. She stated it is the requirement of the law as provided under Order VIII Rule 2 of the Civil Procedure Code that defendant must raise by his pleading all matters which shows the suit is not maintainable or the transaction is either void or voidable on point of law. She argued it cannot be said the preliminary objection was raised prematurely.

To support his argument, he referred the court to the case of **A/S NOREMCO Construction (NOREMCO) V. Dar es Salaam Water and Sewerage Authority (DAWASA)**, Commercial Case No. 47 of 2009, HC Commercial Div. at DSM (unreported) where the mode of how preliminary objection can be raised was stated. It was stated in the foregoing cited case that, preliminary objection can be raised either in the written statement of defence or separately by a notice or even suo moto by the court itself. Finally, she prayed the preliminary objection be sustained and the suit be dismissed with costs.

I have carefully weighed the submissions from both counsel for the parties on the preliminary objection raised by the counsel for the defendant that the suit is incompetent for failure to plead and annex the company resolution sanctioning institution of the same. The court has found it is not in dispute that the second plaintiff is a company incorporated in the law of Tanzania and licensed to carry on its business in the country. It is also not in dispute that it is neither pleaded nor annexed in the plaint a resolution from the second plaintiff's board of directors or company's general meetings sanctioning the second plaintiff to institute the instant suit in the court. The issue is whether failure to plead or annex the board resolution authorizing the second plaintiff to

institute the suit in the court to the plaintiff renders the present suit incompetent.

The court has found as rightly argued by the counsel for the plaintiff there has been diverging views in various cases decided by this court about whether it is mandatory for resolution from the board of directors of shareholder of a company to be obtained before instituting a law suit in the court or it is not mandatory. The court has found there are those who says it is mandatory to have a resolution sanctioning institution of a suit by a company and those who says it is not mandatory to all cases instituted in court by a company.

The court has found the counsel for the plaintiff stated the stated diverging views in relation to the requirement of having a board resolution before a company has instituted a suit in court was settled in the case of **Simba Papers Converters Ltd** (supra). The Court of Appeal considered the position of the law stated in the cases of **Bugerere Coffee Growers Ltd** (supra) and **St. Benard's Hospital Company Ltd** (supra) and stated that, a resolution is necessary where the suit involves a dispute between a company and one of its shareholders or directors. The Court of Appeal stated that, it was hesitating to extend the rule any further after taken into consideration the legal position relating to the power of the company to be sued in its own name.

The decision made by the Court of Appeal in the case of **Simba Papers Converters Ltd** (supra) has attracted different interpretation from the High Court. The High Court stated in the case of **Junior Construction Co. Ltd** (supra) that, the principle set out by the Court of Appeal in the case of **Simba Papers Converters Ltd** (supra) did not cover every circumstance and facts where the company is involved in a litigation. The court considered in the case of **Junior Construction Co. Ltd** (supra) the requirement of the law provided under section 147 (1) of the Companies Act which requires anything to be done by the company to be authorized by resolution of the company in the general meeting or meeting of any class of members of the company.

The court found it was a mandatory requirement for a company to have a company resolution before instituting a suit in the court. After finding the board resolution was required in the stated case it proceeded to strike out the suit which its dispute was not involving internal affairs of the company because of being instituted in the court without having a board resolution. The view taken by the High Court in the case of **Junior Construction Co. Ltd** (supra) is different from the view taken by the High Court in the cases of **The Moshi Hotel 2010 Limited** (supra) and in the case of **BEB Company Limited** (supra) which applied the principle laid in the case of **Simba Papers Converters Ltd** (supra) that as the

disputes were not involving internal affairs of the companies, the board resolutions were not required and the objection raised in respect of failure to plead and annex the board resolution sanctioning institution of the two suits in the courts were overruled.

After considering the position of the law stated in the above cited cases together with the other decisions cited in the submissions of the counsel for the parties the court has found the position of the law as stated in the case of **Simba Papers Converters Ltd** (supra) is that, a resolution of a company sanctioning institution of a suit is necessary where the suit involves a dispute between a company and one of its shareholders or directors. When the Court of Appeal was considering the position of the law stated in the case of **Bugerere Coffee Growers Ltd** (supra) in the foregoing cited case it stated as follows: -

"A resolution would be necessary where the suit involves a dispute between a company and one of its shareholders or directors."

The court has found the Court of Appeal stated further in the case of **Simba Papers Converters Ltd** (supra) that, it was hesitating to extend the rule of requiring board resolution any further than the suit involving a dispute between a company and one of its shareholders or directors. The court has found the Court of Appeal did not say anything in relation to the

cases which are not between a company and one of its shareholders or directors. It also did not say anything in relation to the circumstance where it is the company which is instituting a suit in court against a third party because it considered only the power of the company to be sued without considering the power of the company to sue.

To the view of this court that is the reason caused the court to considered the position of the law provided under section 147 (1) of the Companies Act and stated in the case of **Junior Construction Co. Ltd** (supra) that, the Court of Appeal did not cover every circumstance and facts where the company is involved in a litigation. The above stated view caused the court to subscribe to the position of the law stated in the case of **Junior Construction Co. Ltd** (supra) that, where there is a need for a company to commence a suit in court of law against anybody there has to be a board resolution sanctioning commencement of the suit in court. The reason for coming to the stated finding is based on the facts as stated in various cases including that of **Junior Construction Co. Ltd** (supra) where my learned sister Ebrahim, J stated that: -

"I am taking this route in cognizance of the policy of the company, financial implications, costs associated with legal proceedings in the event the matter is decided against the company and protection of corporate bodies from its overzealous

directors and shareholders. Again, the assurance that the board has authorized institution of proceedings is paramount to the defendant to know the legitimacy of the proceedings instituted against him or her and whether or not he will be able to recover his or her costs should the matter end in his or her favour instead of endless objection proceedings and litigations."

Coming to the case at hand the court has found that, although the dispute does not involve the company and one of the shareholders or directors but as stated in the case of **Junior Construction Co. Ltd** (supra) board resolution to authorize the second plaintiff to institute the suit in the court was mandatory. Having found it was mandatory for the second plaintiff to have a board resolution sanctioning the same to institute the present suit in the court, the question is whether the present suit is incompetent for being instituted without being pleaded in the plaint that the second plaintiff was authorized by a board resolution to institute the suit in the court.

The court has found that, although the court has found it was mandatory for the second plaintiff to plead and annex a board resolution authorizing institution of the present suit in the court to the plaint but as rightly argued by the counsel for the plaintiffs the resolution to authorize the second plaintiff to institute the suit in the court is annexed in the reply

to the written statement of defence. The court has found the counsel for the defendant argued in his submission that, annexing board resolution in the reply to the written statement of defence is an afterthought as it was supposed to be pleaded and annexed in the plaint.

The court has found that, although Order VIII Rule 2 of the Civil Procedure Code requires the defendant to raise in his pleading all matters which shows the suit is not maintainable or the transaction is either void or voidable in point of law and the pleading which a defendant is required to file in a case is a written statement of defence, but proviso to Rule 13 of Order VIII allows plaintiff to file a reply to the written statement of defence in a case. To the view of this court the role of a reply to the written statement of defence is to respond to new matters that has been pleaded in the written statement of defence including point of law like the one raised by the defendant in their written statement of defence.

That being the position of the matter the court has found that, as the resolution of the company authorizing the second plaintiff to institute the present suit in the court is annexed in the reply to the written statement of defence which was filed in the court within seven days as provided under Order VIII Rule 13 of the Civil Procedure Code it forms part and parcel of the pleadings of this matter. In the premises and as rightly argued by the counsel for the plaintiff the suit cannot be treated like the

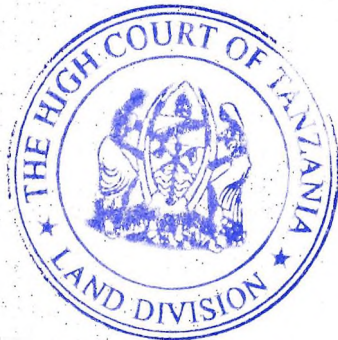
one which has no resolution of the company at all authorizing the second plaintiff to institute the suit in the court and strike out the same on the ground of lacking board resolution to institute the same as prayed by the counsel for the defendant.

The court has also found that, even if it will be said as the resolution of the company to authorize institution of the present suit in the court was neither pleaded or annexed in the plaint it renders the suit of the second plaintiff incompetent but the court has found that, as rightly argued by the counsel for the plaintiffs the suit at hand has two plaintiffs. There is the first plaintiff who is suing as a mortgagor of the suit property which the defendant has advertised to auction the same who do not require a board resolution to institute the suit in the court to challenge the intention of auctioning his mortgaged property.

That being the position of the matter the court has found that, even if the preliminary objection raised by the counsel for the defendant would be sustained it would not dispose of the matter as the first plaintiff will be left to continue with the suit. In the premises the court has found it is not appropriate for the preliminary objection raised by the counsel for the defendant to be sustain as it cannot dispose of the matter pending before the court. That makes the court to find the suit is not incompetent as argued by the counsel for the defendant. Consequently, the preliminary

objection raised by the counsel for the defendant is hereby not sustained and it is overruled and the costs to be within the suit. It is so ordered.

Dated at Dar es Salaam this 20th day of December, 2023.

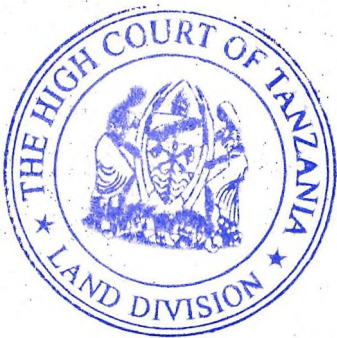


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I. Arufani
JUDGE
20/12/2023

Court:

Ruling delivered today 20th day of December, 2023 in the presence of Mr. Erick Simon, learned advocate for the plaintiffs and in the presence of Ms. Miriam Moses, learned advocate for the defendant. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani
JUDGE
20/12/2023