IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 280 OF 2017

SIMBA PAPERS CONVERTES LIMITED..... APPELLANT

VERSUS

PACKAGING AND STATIONERY MANUFACTURERS LIMITED.....1ST RESPONDENT
DR. STEVE K. MWORIA.....2ND RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Nyangarika, J.)

dated 3rd day of December, 2013

in

Commercial Case No. 52 of 2010

.....

JUDGMENT OF THE COURT

3rd & 23rd May, 2023

MUGASHA, J.A.:

This appeal arises from the decision of the High Court in Commercial Case No. 52 of 2010. In the said case, **PACKAGING AND STATIONERY MANUFACTURERS LIMITED,** the 1st respondent sued **SIMBA PAPERS CONVERTES LIMITED**, the appellant and Dr. Steve Mworia, the 2nd respondent who was the 2nd defendant at the trial. The claim was in respect of a machine known as Biolematic, P 590 (the machine) alleged to have been sold to the appellant by 2nd respondent in the name 1st respondent for USD 92,000 which was below the agreed

price of USD 315,000 without involving any other Director of the respondent. It was also alleged that while the proceeds of sale of the machine were not deposited in the respondent's account, subsequently the 2nd respondent allowed the appellant to access the respondent's premises, dismantled the machine and took it away. Thus, the 1st respondent prayed for judgment and decree against the appellant and 2nd respondent on the following orders; **One**, annulment of the purported sale of the machine; **Two**, an order that the appellant return the machine to the respondent's premises on Plot No. 28 and 29 Block JJJ Industrial Area, Bonite Road Moshi and re-assemble it in the manner it was before; **Three,** general damages, costs and other reliefs which the court may deem fit to grant.

The 1st respondent's claim was disputed by the appellant and the 2nd respondent who both contended that, the machine was sold at the agreed price of USD 315,000 and that the 1st respondent was duly notified. Having heard the case, the learned trial judge entered a judgment in favour of the 1st respondent herein. The appellant and the 2nd respondent were ordered to deposit the proceeds of sale of the machine into the respondent's account, and in case of default, to pay a compound interest at a rate of 2% per day till full and final payment.

Aggrieved, the appellant and 2nd respondent each, filed a separate notices of appeal expressing desire to fault the judgment of the High Court. Whereas the respondent did not proceed to pursue any appeal, the appellant filed an appeal contained in the Memorandum of Appeal comprising nine grounds of complaint as hereunder paraphrased:

1. *That the high court misdirected itself to frame the issue as to whether the Bielomatic P-Machine was sold to the 2nd defendant (the appellant) at the agreed price in the wake of the plaintiff's admission on its sale at (USD) 315,000, and the 1st defendant's confirmation on receipt of the sum on behalf of the respondent from the appellant.*
2. *The High Court erred in law and not holding that there was completely no cause of action by the respondent against the appellant because the Director had notified the respondent on the receipt of the purchase price and had requested that a general meeting be convened to determine how the proceeds of sale of the machine would be shared among the shareholders of the respondent, whose outcome was not disclosed at the trial.*
3. *The High Court erred in law and fact for ordering appellant to pay what is called the balance of USD 315,000 to the respondent in the absence evidence to dispute that the appellant had paid the purchase price to the respondent through the 1st defendant.*
4. *The High Court erred in law and fact in holding that, Dr. Steve Mworia's alleged involvement in fraudulent transactions warranted*

the suit on behalf of the company to be filed without general meeting or even a board of director's resolution whereas shareholding and directorship in the respondent (plaintiff) company shows that the respondent had 5 directors and 6 shareholders.

5. *That the High Court erred in law and fact for holding that Commercial Case No. 52 of 2010 as a case whose decision is being challenged in the present appeal was a case of minority shareholders.*

6. *That the High Court erred both in law and fact by holding that the agreement for the consideration of USD 92,000.00(PE2) for which no stamp duty had been paid was a lawful, recognizable, and enforceable document for action in court and any lawful excuse in the present case excluding it from the requirement of being stamped.*

7. *That the High Court erred in law and in fact for awarding the respondent a compound interest at the rate of 2% every day for which the judgment debt would remain unsatisfied.*

When the appeal was called for hearing previously, having gathered that although 2nd respondent was not pleaded in the appeal, was mentioned severally in the Memorandum of Appeal, the Court invoked Rule 97(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and ordered that he be served with a copy of the record of appeal so as to apply to be joined in the appeal or to have the appeal

consolidated so that he is not condemned unheard. Upon being served with the record of appeal, the 2nd respondent filed a notice of cross appeal dated 24/12/2021 seeking to have the impugned Judgment and Decree of the High Court set aside. We have not reproduced the grounds in question on account of what will become apparent in due course.

The notice of cross appeal was confronted with a preliminary objection challenging its competence on ground that; **One**, it was filed in contravention of Rule 94 of the Rules, which avails such right to a respondent in an appeal which is not the case for 2nd respondent as no appeal has been preferred against him; **Two**, the notice of cross appeal was filed in contravention of the Court order which had directed that the 2nd respondent may apply to be joined or for consolidation of the appeals. As is the practice, we had to determine first the preliminary objection before proceeding to determine the substantive appeal.

In amplifying the grounds of the preliminary objection, advocate Ezra Mwaluko for the respondent, submitted that since no appeal has been preferred against the 2nd respondent, he does not qualify to file a notice of cross appeal and instead, he ought to have complied with the Court order directing that he apply to be joined or have his appeal

consolidated. In the premises, Mr. Mwaluko contended that on account of the ground of incompetence, the notice of cross appeal is not competent and deserves to be struck out with costs.

On the other hand, advocate Philemon Mutakyamirwa for 2nd respondent opposed the preliminary objection and sought the indulgence of the Court to dismiss it with costs. On this, he argued that as the 2nd respondent had filed a separate notice of appeal on 12/12/2013, he deserves to be treated as a respondent in terms of Rule 88 (1) of the Rules, and as such, he qualified to lodge a notice of cross appeal. To support his proposition, Mr. Mutakyamirwa cited to us the case of **JOHN SIRINGO AND TWENTY OTHERS VS. TANZANIA NATIONAL ROAD AGENCY AND ANOTHER**, Civil Appeal No. 171 of 2021 (unreported).

On the part of Mr. Audax Kahendaguza for the appellant, besides supporting the course taken by Mr. Mutakyamirwa, he added that the 2nd respondent's notice deserves to be treated as notice of address of service in terms of Rule 88 (1) of the Rules which, entitles him to file a notice of cross appeal in order to challenge the decision of the High Court being a judgment debtor. Ultimately, he urged us to find the preliminary objection misconceived and proceed to strike it out.

In a brief rejoinder, it was Mr. Mwaluko's argument that, since the notices of appeal were filed on the same day, the 2nd respondent's notice of appeal cannot be treated as a subsequent notice of appeal so as to be taken as notice of address for service. He thus, reiterated his earlier submission that, as the intending appellant, it was incumbent on 2nd respondent to comply with the Court order and apply to be joined in the appeal or seek to have the appeals consolidated instead of lodging a notice of cross appeal.

Having heard the contending submissions, in disposing of the preliminary objection, the issue for our determination is the propriety or otherwise of the notice of cross appeal. It is not in dispute that; **one,** the impugned judgment was entered against both the appellant and the 2nd respondent who are judgment debtors and each had filed a separate notice of appeal on the same day; **two,** the appellant herein did not implead the 2nd respondent who had also filed a separate notice of appeal and **three**, it is the Court which ordered that, the 2nd respondent be served with the record of appeal having gathered that, he was likely to be affected by the outcome of the appeal. The contentious issue on which parties locked horns is whether the 2nd respondent's notice of

appeal deserves to be treated as a subsequent notice in terms of Rule 88 (1) which stipulates as follows:

> *"Where two or more parties have given notice of appeal from the same decision, the second and all subsequent notices to be lodged* ***shall be deemed*** *to be notices for address of service within the meaning of rule 86 and the party or parties giving those notices shall be respondent".*

[Emphasis supplied]

The catch word here is "deemed" which in law has been aptly described as a legal fiction. Commenting on the notion, Justice G.P Singh in his Book titled Principles of Statutory Interpretation, page 301, 8th Edition, 2001 has this to say:

> *"The legislature is quite competent to create a legal fiction, in other words to create a deeming provision for the purpose of assuming existence of a fact which does not really exist provided the declaration of non-existing facts as existing does not offend the constitution".*

The learned Author further observes at page 302 that, legal fictions may also be created by delegated legislation, as is the case here and in interpreting a legal fiction, the Court is to ascertain for what

purpose the fiction is created and subsequently to assume the facts and consequences which are incidental or inevitable to the giving effect to the fiction without extending the purpose for which it was intended. See: **EMIR WILSON DAUD AND ANOTHER VS TANZANIA POSTAL BANK** [2009] TLR. 144.

The Court had the occasion of discussing the fate of the notice of appeal filed subsequent to the other both arising from the same decision in the case of **JOHN SIRINGO AND TWENTY OTHERS VS. TANZANIA NATIONAL ROAD AGENCY AND ANOTHER** (supra). The Court observed as follows:

> *"When the appeals were placed before us for hearing, we reflected on rule 88 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules), which provides that where two or more parties have given notices of appeal from the same decision,* ***the second and all subsequent notices to be lodged shall be deemed to be notices of address for service within the meaning of Rule 86 of the Rules and the party or parties giving those notices shall be respondents in the appeal. The said rule in our view, is intended to avert the possibility of multiplicity of***

appeals being lodged by different parties arising from the same decision. All aggrieved parties who, having lodged the subsequent notices become respondents by dint of rule 88 (1) of the Rules, could still seek redress by lodging a notice of cross appeal within thirty days in terms of rule 94 (1) and (2) of the Rules after being served with the memorandum and record of appeal lodged by the party who lodged the first notice of appeal".

[Emphasis supplied]

In the present matter, the separate notices of appeal were both filed on the same day, there is no evidence as to which one was filed first; it cannot be safely vouched as to which notice of the two notices was filed subsequently. At this juncture, it is upon the Court to ascertain for what purpose the deeming provision under rule 88 was created and subsequently to assume the facts and consequences which are incidental or inevitable to the giving effect to the deeming provision without extending the purpose for which it was intended. In this regard, we are satisfied that indeed, what was envisaged under rule 88 was the existence of two notices of appeal or more filed separately all intending to appeal against the same decision and the manner in the subsequent

notice should be treated. Since no appeal was preferred by the 2nd respondent even after the current appeal was filed, the scenario is indeed incidental to what was envisaged under rule 88 (1) of the Rules on the existence of two separate notices of appeal from the same decision. In the circumstances, the 2nd respondent's notice of appeal is as well, deemed to have been a notice of address of service in terms of Rule 88 (1) of the Rules and as such, he became the respondent which entitled him a remedy to lodge a notice of cross appeal in terms of Rule 94 (1) of the Rules. Therefore, the cross appeal is properly before the Court as it enables the 2nd respondent and one of the judgment debtors to be heard in this appeal against the impugned decision. In the premises, we find the preliminary objection not merited and we proceed to dismiss it.

We now proceed to deal with the main appeal beginning with the 4th and 5th grounds complaint as earlier paraphrased. The High Court is faulted in entertaining the suit filed on behalf the respondent company without its authority by way of the Board of Director's resolution and holding that the involvement in fraudulent transactions by 2nd respondent warranted the suit to be filed without a Board of Director's resolution. Mr. Kahendaguza submitted this to be irregular adding that,

as the respective plaint was neither signed nor verified by the respondent, is an indication that the company did not give authority to institute on its behalf any case against the appellant. In this regard, he argued that besides the suit not being competent for lack of authority of the respondent company, it was not in order for the learned trial Judge to treat the respondent as a minority shareholder entitled to institute a case without the resolution of the Board of Directors merely because of the alleged fraudulent transactions which were not pleaded at all.

On the other hand, it was submitted by Mr. Mwaluko that, in terms of sections 182 of the Companies Act [CAP 212 R.E.2002], a company being an artificial persona operates through its the Directors who must act honestly and in good faith to conduct and transact business in the manner which is in its best interests. This, he argued, was not the case in the present matter because besides the absence of proof that the machine was sold at USD 315,000, the purchase price was not paid in full and yet, the proceeds of the purported sale were not deposited in the company's account. Thus, Mr. Mwaluko urged the Court to lift the corporate veil so as to proceed personally against the respective directors. Upon being probed by the Court, he conceded that the trial

Judge's finding on the existence of fraudulent transaction is not founded on the pleadings and as such, it is not in order.

After a careful consideration of the complaint, the contending submissions and the record before us, the issue for our determination is the propriety or otherwise of the suit before the High Court which was filed without authority of the company. Prior to that, it is crucial to understand the nature of the dispute between the parties before the High Court. This can be discerned in the amended plaint at page 59 of the record of appeal which among other things show:

1. *That the Plaintiff's claim against the Respondents jointly and severally is for permanent injunction restraining the 2nd Defendant from trespassing into the Plaintiff's factory and general damages for trespass into the Plaintiff's factory.*
2. *That the Plaintiff is owning, among other properties, exercise books manufacturing machine known as Bielomatic P-590 installed at the Plaintiff's factory located on Plot No. 28 and 29 Block "JJJ" Industrial Area Bonite Road Moshi.*
3. *That on 10th June, 2010 the Plaintiff convened an extra ordinary general meeting and among the agendas was the sale of Bielomatic P-590 machine.*
4. *It was agreed that the machine would be sold at a price of United States Dollars Three Hundred Fifteen Thousand only (USD 315,000,00).*

A copy of minutes of the meeting marked "A" is attached hereto to form part of this affidavit.

5. *That contrary to what was resolved in the meeting referred to in paragraph 6 hereinabove, the 1st Defendant without any mandate from the Plaintiff, on 21st June, 2010 sold the Bielomatic P-590 machine to the 2nd Defendant at a price for below the agreed price.*

   A copy of the sale agreement marked "B" is attached hereto to form part of this affidavit.

6. *That after selling the machine without mandate and at a price that was not agreed in the meeting, the 1st Defendant wrote to the Chairman of the Plaintiff purportedly informing him that he (the 1st Defendant) had already sold the Bielomatic-590 machine at the resolved price of United States Dollars Three Hundred Fifteen Thousand only (USD 315,000.00).*

   A letter dated 21st June, 2010 marked "C" is attached hereto to form part of this affidavit.

7. *That apart from the 1st Defendant there was no any other director of the Plaintiff who was involved in any way in the purported sale of the machine to the 2nd Defendant.*

8. *That there is no any amount of money deposited in the Plaintiff's account as proceeds of sale of the machine.*

9. *That in the letter referred in paragraph 8 hereinabove, the 1st Defendant proposed that the 2nd Defendant be allowed to dismantle the Bielomatic-590 machine and take it with them.*

10. *That Plaintiff did not allow the 2nd Defendant to inter into the factory hence on 23rd June, 2010 the 2nd Defendant broke in the Plaintiff's factory and started to dismantle the machine.*

11. *That the Plaintiff Reported the matter to police but police advised that this being the matter of either existence or none existence of the sale agreement of the Bielomatic-590 machine is a civil matter and therefore the same should be taken to court as civil case.*

12. *That later on it was learned that the 2nd Defendant had already dismantled the machine and shifted it to Dar es Salaam.*

The reliefs claimed are as hereunder:

***"WHEREFORE** the Plaintiff prays for judgment and decree against the 1st Defendant for the following orders:*

An order that the purported sale of Bielomatic P-590 machine by the 1st Respondent to the 2nd Respondent is null and void.

(i) An order that the 2nd Defendant shall return the Bielomatic P-590 machine to the Plaintiff's factory located on Plot No. 28 and 29 Block "JJJ" Industrial Area Bonite Road, Moshi.

(ii) An order that the 2nd Defendant shall re-assemble and fix the machine in the Plaintiff's factory the way it was before they started dismantling it.

(iii) General damages of TSH. 30,000,000/= for tress pass.

(iv) Costs of this suit.

(v) Any other and further relief(s) that this Honorable Court may deem *fit and just to grant".*

In a nutshell, the plaint contains serious allegations against one of respondent's directors that he sold the company's property which was entrusted to him below the agreed price; omitted to deposit the proceeds realized in the purported sale and forcefully entered into the company's premises so as to dismantle and take away the machine. While the claimant is the respondent's Company, it is indeed glaring that the row or rather the dispute was between the directors of the 1st respondent whereby the 2nd respondent who is one of the directors, was accused of not having acted in good faith in disposing of the asset of the company contrary to what was resolved by its directors. Therefore, could the company which according to the record before us had 5 directors, commence a suit without the authority of the company? We do not think so. On this, we borrow a leaf from the case of **BUGERERE COFFEE GROWERS LTD VS. SEBADUKA** [1970] 1 EA 147 (HCU) which dealt with an akin situation. In that case, an advocate instituted a suit in the name of the company challenging the appointment of new directors following the removal of old directors. As the Court found that there was no evidence adduced to prove authority of the company to institute the suit, it held the suit defective. In particular, it states:

> *"When companies authorize the commencement of legal proceedings a resolution have to be passed either at a company Board of Directors' meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings".*

This position was followed by Kalegeya, J, as he then was but it was narrowed down to befit a particular situation on the dispute between the company and its Directors and/or shareholders in the case of **ST. BENARD'S HOSPITAL COMPANY LIMITED VS DR. LINUS MAEMBA MLULA CHUWA,** Commercial Case No. 57 of 2004 (unreported). In that case, the dispute was between the company and one of its shareholder and Director. The suit was a result of internal conflict between the Company and its Director General and in the claim, the company made reference to a Board of Director's resolution to relieve the Director General from its duties. Relying on the case of **BUGERERE COFFEE GROWERS LTD VS. SEBADDUKA** (supra), the court observed that, a reading of that decision reveals that what is required is not a specific resolution but a general permission. Secondly, a resolution would be necessary where the suit involves a dispute between a company and one of its shareholders or directors. Thus, Kalegeya, J, as he then was held:

> *"Having carefully considered the matter, I have reached a settled conclusion that, indeed the pleadings (plaint) should expressly reflect that there is a resolution authorizing the filing of an action. A company which does not do so in its pleadings, risks itself to the dangers of being faced by any insurmountable preliminary objection as is the one at hand. I should hurriedly add however that in my view the resolution should be of a general nature, that is, it is not necessary that a particular firm or person be specifically to do the task. It suffices if the resolution empowers the company management to take the necessary action. I am making this insistence because from the wording in Bugerere case one may be led to believe that the resolution should point out a particular person or firm.*

We subscribe to the said position to the extent that it relates to the institution of a suit by one or more directors in the name of the company whereas in the present matter, it revolves on the internal conflict within the company. In any other case we will be hesitant to extend the rule any further mindful of the legal position relating to the power of the company to be sued in its own name. This position is well

summed up by Pennington's Company Law, 15th edition, London, Butterworths by Robert Pennington thus:

> *"The intention of the legislature was undoubtedly that the Court should assist the Company to achieve its expressed objects by implying all powers necessary for it to do so... On the whole the Courts have been liberal in implying powers. Thus powers have been implied to do acts obviously appropriate to the carrying out on of any business such as appointing agents and engaging employees; and instituting, defending and compromising legal proceedings..."*

The above reflects a correct legal position to which we fully subscribe.

As correctly submitted by Mr. Mwaluko which is a requirement under the Companies Act, in transacting the business of a company, the directors of the company should be honest and transact the business with due regard to the better interests of the company. What transpired in the cases of **BUGERERE COFFEE GROWERS LTD VS. SEBADDUKA** and **ST. BENARD'S HOSPITAL COMPANY LIMITED VS. DR. LINUS MAEMBA MLULA CHUWA**, is similar to the present case whereby the dispute was between the company who is the 1st

respondent and one of the directors who is alleged to have conducted himself in the manner not compatible with the better interests of the company. In the premises, since the claimant was a company, it was not proper institute a suit on behalf of the company without its formai authority. This required the express authority by way of resolution of the Board of Directors to institute the case in the absence of which, the suit in the name of the company was defective and it ought to have been struck out. In a similar vein, we do not agree with the learned trial judge who treated the respondent company as minority shareholder on the ground that there were elements of fraud. The allegations of fraud are not founded on the pleadings and as such, was in error as it offended the settled rule against departure from the pleadings set out under Order VI rule 7 of the Civil Procedure Code [CAP 33 R.E. 2019]. Thus, the learned Judge's finding is not proper because besides the parties, the court is as well bound by what is pleaded by the parties in order to avert consideration of extraneous matters.

In view of what we have demonstrated above, since the suit at the trial court which was at the instance of the 1st respondent was instituted without its mandate through the board of directors, it was incompetent and the respective judgment and proceedings are void. We thus quash

and set aside the entire pleadings, proceedings and judgment. Thus, we find the 4th and 5th grounds of appeal as paraphrased are merited, sufficing to dispose of the appeal and as such, we shall not determine the remaining grounds of appeal. Having nullified the proceedings and judgment on which the cross appeal is based, it is uncalled for to determine it and we accordingly strike it out. Whoever wishes to institute a similar suit on behalf of the company is at liberty to do so subject to obtaining the authority of the company. Considering the circumstances surrounding the matter we make no order as to costs.

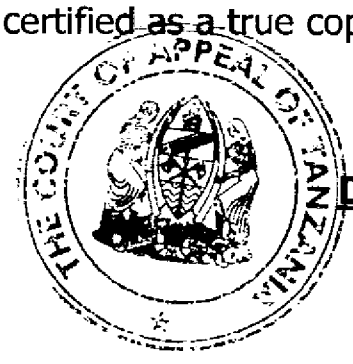
DATED at **DAR ES SALAAM** this 19th day of May, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 23rd day of May, 2022 in the presence of Mr. Philemon Mutakyamirwa, learned counsel for the 2nd Respondent also holding brief for Mr. Audax Kahendaguza, learned counsel for the Appellant and Mr. Ezra Mwaluko, learned counsel for the Respondent, is hereby certified as a true copy of original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL