**IN THE HIGH COURT OF TANZANIA**
**(DAR ES SALAAM DISTRICT REGISTRY)**
**AT DAR ES SALAAM**

**CIVIL CASE NO. 60 OF 2014**

**INDEPENDENT POWER TANZANIA LIMITED ..... 1ST PLAINTIFF**
**PAN AFRICA POWER SOLUTIONS LIMITED ..... 2ND PLAINTIFF**

**Versus**

**STANDARD CHARTERED BANK**
**(HONG KONG) LTD. ..... 1ST DEFENDANT**
**MARTHA KAVENI RENJU ..... 2ND DEFENDANT**
**TANZANIA ELECTRIC SUPPLY CO. LTD. ..... 3RD DEFENDANT**

*Date of last submissions: 25/05/2015*
*Date of Ruling: 06/07/2015*

**R U L I N G**

**F. Twaib, J:**

The plaintiffs in this suit are seeking a multitude of reliefs against the defendants. In their written statement of defence, the 1st and 2nd defendants have raised five points of preliminary objection against the whole suit and certain aspects of the suit. Both parties have made extensive

submissions on the various points of preliminary objection raised. This ruling constitutes the court's determination of those points.

It would however point out that, in their written submissions in support of the preliminary objections, counsel for the 1st and 2nd defendants have mixed up the numbers: they refer to the third objection as "the fourth objection" while the fourth objection is termed "fifth objection". In doing so, and perhaps because of that, they also mixed up their submissions in support of the third point of preliminary objection with the fourth. Hence, to avoid this mix-up, I propose to determine the objections in the order that appears in the notice of preliminary objections as contained in the 1st and 2nd defendants' written statement of defence.

In the first point of preliminary objection, it is the 1st and 2nd defendants' position that, based on various decided cases, the law in Tanzania is that a suit commenced without the necessary corporate authority by way of a valid resolution of the board of directors is incompetent. They relied on the case of *St. Bernard's Hospital Co. Ltd. v Dr. Linus Maemba Mlula Chuwa*, Commercial Case No. 57 of 2004 (unreported), *Toico Ltd. v B.F. Financial Services & General Supply Ltd.*, Land Case No. 41 of 2007 (unreported). Also cited is the English case of *Mitchell & Hobbs (UK) Ltd. v Mill* (1996) 2 BCLC 102.

However, defendants' counsel have been professional enough to also cite cases that have taken the opposite view, namely, *Addax Geneva Branch v Kigamboni Oil Co. Ltd.*, HCT (Commercial Div., Dar es Salaam) Comm. Case No. 72 of 2008 and *Kilombero North Safaris Ltd. v Registered Trustees of Mbomipa Authorised Association*, HCT (Commercial Div., Dar es Salaam) Comm. Case No. 63 of 2013 (unreported). Counsel, however, urged this court not to follow the decisions in the latter category, on the ground that they are erroneous and thus not good law.

On the other hand, counsel for the plaintiffs advocated for the position taken in these same cases, to the effect that a board resolution need not accompany the plaint at the point of filing, and that the issue is a point of fact that cannot constitute the basis of a preliminary objection. Counsel cited the case of *Tanzania Cigarette Co. Ltd. v Burundi Tobacco Co. Ltd. & Anor*, Misc. Civ. Cause No. 7 of 2004, HCT (Commercial Div.).

This issue does not have to detain us. As demonstrated by the number of decisions cited by both counsel, there is indeed a dichotomy of views as to the position on this issue. Suffice it to say, with respect, that I belong to the group amongst us, Judges of this court, who hold the view that the issue is a question of fact. We opine that where it is disputed as to whether there is a Board resolution authorizing the institution of a suit, it is not a matter for determination as a preliminary point, and the absence of a copy of the resolution annexed to the plaint does not mean that the suit is incompetent and liable to be struck out: see my decision in *Dhow Mechantile East Africa Ltd. & 2 Ors v Yusuph N. Mulla*, Misc. Civil Cause No. 16 of 2012 and my full court opinion in *Tanganyika Law Society v Attorney General*, Misc. Civil Cause No. 31 of 2014 (both unreported). I would therefore overrule this point of objection.

Arguing the second point of preliminary objection, sub-numbered (a), (b) and (c), counsel for the 1st and 2nd defendants combined sub-points (a) and (c), and argued sub-point (b) separately. I will follow the same pattern.

Points (a) and (c) essentially raise the issue of time limitation. It has been argued on behalf of the 1st and 2nd defendants that the plaintiffs have delayed too long in bringing this action and are thus time-barred.

Before we move to discuss the particulars of this ground of objection, it is pertinent, given the nature of the suit, that the cause of action is clearly

ascertained. The issue requires the court to determine two crucial questions:

1. What is the cause of action? and
2. When did it arise?

Both parties hold the view that this case is based on tort, because it is founded on an allegation of fraud and misrepresentation. With respect, the issue is not as straightforward as counsel for both sides appear to think. It seems to me that the manner in which the reasons to sue arose discloses two causes of action, but both of them are torts, even though the second one is somewhat connected to two agreements, to which it is closely intertwined. That makes it look like contractual, but it is not in fact contractual. I will explain.

While on the one hand the plaintiffs complain about misrepresentation amounting to fraud, on the other, and closely interlinked with the first, is a claim which traces its origin to a Power Purchase Agreement between the 1st plaintiff and the 3rd defendant and a Loan Facility Agreement with a consortium of Malaysian Banks under which the Banks agreed to advance the 1st plaintiff a loan of US$ 105m. It is on the basis of these two contracts that the 1st defendant alleges to be a creditor of the 1st plaintiff, an allegation the latter denies and seeks for various declarations herein to refute the said claim. The existence or absence of rights and/or obligations under those contracts, which is the basis for the plaintiff's other claims in this suit, while on the surface appear to be based on contract, are essentially tortious, since they are founded on the allegation that the 1st and 2nd defendants are claiming rights in a contract to which they are not parties.

Furthermore, the alleged interference by the 1st and 2nd defendants also emanates from a different set of facts, even though, as we shall see, an arbitral award rendered in February 2014 by the International Centre for the Settlement of Investment Disputes (ICSID) is linked to that set of facts as well. Hence, we have here a situation that is akin to a joinder of causes of action, though it is a joinder that is closely inter-linked. And even where there is a joinder of causes of action, its effect is not fatal. Under Order II rule 6 of the Civil Procedure Code, Cap. 33 ("the CPC"), the court has power to order separate trials where it appears that any causes of action joined in one suit cannot be conveniently tried or disposed of together. However, given the close interweaving between the two in this case, I think it is much more convenient that the two of them be tried in the same suit.

In any case, however, since the plaintiffs' claims are not based on contract, their claim is basically in tort, and for the purposes of limitation, they should be treated as such. Under item 21 of the Schedule to the Law of Limitation Act (Cap 89, R.E. 2002), the time limit for such cases is three years from the date the cause of action arose. The crucial question is: When did the causes of action arise?

It has been contended on behalf of the 1st and 2nd defendants that it arose when the 1st defendant first held itself out as a creditor of the 1st plaintiff. That was 17th August, 2005. It has further been contended that the plaintiffs had reason to sue, at the latest, by 13th October 2005, when the 1st defendant wrote to the 1st plaintiff giving it notice that it had purchased the loan, and that:

> *…[G]oing forward, all rights and obligations relating to the IPTL loan will be with [the 1st defendant] and all repayments of principal or interest need to be made to [the 1st defendant].*

Obviously, this contention cannot apply to both plaintiffs, as the 2nd plaintiff was not a party to the alleged contract, and the letter was not written or even copied to it. Learned counsel for the 1st and 2nd defendants insist on this position because, they argue, the plaintiffs themselves so state in paragraphs 26, 27, 28, 29, 30, 31, 32, 33, 35, 36 and 37 of the plaint, and there would thus be no need for further evidence. They cite an example from paragraph 37 of the plaint, where the plaintiffs state: "*That since 2005 to date, the 1st defendant has been masquerading as a creditor of the 1st plaintiff.*"

The plaintiffs' counsel, on the other hand, maintain that their cause of action arose, *inter alia*, from the ICSID arbitral award between the 1st respondent and the second respondents. The award is titled "Decision on Jurisdiction and Liability" issued in ICSID Case No. ARB/10. The dispute thus arose, according to the plaintiffs, only after the award was rendered and dispatched to the parties on 12th February 2014, i.e., two months before the suit was instituted. Counsel's use of the phrase "*inter alia*" means that there is at least one other cause of action. But they say nothing about what that other cause is, and whether they are not therein time-barred.

Unfortunately, and with due respect, the plaintiff's counsel's response to this ground was very casual, to say the least. They did not say what the other cause of action was, or when it arose. Nonetheless, since this is a point of law, and the court has the duty to determine it, the court cannot simply do so after another slipshod effort. The court had to conduct its own perusal of the plaint in order to determine the matter. On such perusal, it was found, as already stated, that the other cause of action is also based on tort, though it involves some elements of contract and can thus be so confused, an error in which counsel for the defendants appear to have fallen. Its confusion arises from two agreements that were entered into by the 1st plaintiffs with third parties, but on the basis of which the 1st

defendant claims the 1st plaintiff to be indebted to it, and the plaintiff denies.

Counsel for the plaintiffs submitted that their clients have filed this suit, among other things, to set aside the ICSID award handed down in February 2014. The Plaintiffs were not parties to the proceedings that culminated in the ICSID decision. The award is being assailed because, according to the plaintiffs, it was "punctuated with misrepresentation and was fraudulently obtained". This suit was filed in April 2014. That was two months after that award. It has thus been argued on behalf of the plaintiffs that it is not true that they waited too long to file the suit and hence, the suit is not time-barred.

That may clearly suffice as a response to the cause of action in respect of all the claims that are based on the ICSID decision and the part of the suit which expressly seeks to assail that decision. However, it does little to explain the defendant's argument that the plaintiffs have always known that the 1st and 2nd defendants have been "masquerading as the 1st plaintiffs creditor" as so forcefully submitted by counsel for the 1st and 2nd defendants.

The 1st and 2nd defendants insist that by alleging that they had begun their "masquerading" as creditors in August 2005, the 1st plaintiff, at least, had a cause of action against them. Going through the plaint, however, one sees a clear connection between the prayers that expressly base on the ICSID decision and those that do not. That connection is in the allegation, contained in paras 57 and 58 of the plaint, in which the plaintiffs aver that in administrative petitions filed at the Commercial Division of this court (Miscellaneous Commercial Causes Nos. 123 and 124 of 2013), which were later consolidated, the 1st defendant, together with another party (Standard

Chartered Bank of Malaysia), sued the 1st plaintiff on the 1st defendant's alleged status as the latter's creditor.

However, on 31st October 2013, the 1st defendants as well as Standard Chartered Bank of Malaysia, withdrew both suits, without leave to refile. In terms of Order XXIII rule 1 (3) of the CPC, a plaintiff who withdraws a suit without leave to refile is precluded from refiling it based on the same cause of action. That comes out clearly from the plaint by necessary implication when one considers the plaintiffs' averments in paragraphs 62 and 63 of the plaint.

The same situation exists in respect of a withdrawal order that was entered in another case, Misc. Civil Cause No. 112 of 2009 (Utamwa J) in respect of paragraph 61 of the plaint. This is obviously a defence available to the defendant in that case (1st plaintiff herein) against any suit subsequently filed by the plaintiff therein (1st defendant herein). It is however not so clear when it comes to whether the plaintiff herein can use it (as he has done) as a response to the charge of time limitation raised by the 1st defendant.

However, those orders are the links by which the plaint connects the issue on creditor status with the ICSID award. Hence, even those prayers that are not directly based on the ICSID decision, are still alleged to emanate from that decision because, as consistently averred in the plaint, they were made on the basis of the 1st plaintiff's alleged creditor status. That claim, according to the plaint, had already been the subject of litigation and there are court withdrawal orders that preclude the 1st and 2nd defendants from re-asserting them.

So, what the plaintiffs are affirming herein is a cause of action against the 1st defendant (and therefore its agent, the 2nd defendant) that arose after

the withdrawal of Misc. Civil Cause No. 112 of 2009 and Consolidated Commercial Cases Nos. 123 and 124 of 2013. The said orders were given by Utamwa J and Makaramba J on 5th September 2013 and 31st October, 2013 respectively. Both of them were given less than a year before the institution of this suit, therefore within the statutory period of limitation for tort cases.

Whether the plaintiffs' averment that the ICSID decision amounts to a decision on appeal or revision against decisions of Tanzanian courts, a point of dispute among the parties in this case, is a question that must await the full trial. It is not a matter of law for preliminary determination.

Furthermore, it appears to me that the 1st plaintiff's masquerading as a creditor is a continuing tort, which falls within the ambit of section 7 of the Law of Limitation Act, Cap 89 (R.E. 2002). The section states:

> *Where there is a continuing breach of contract or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues.*

This principle has been applied in several cases in East Africa of a nature where the wrong is deemed to have continued every time it is repeated: See *Variety Timber Ltd v Musa* [1971] 1 EA 398; *Siya v Attorney-General* [1972] ULR part 1 at 71 and *Difasi v Attorney-General* [1972] EA 335.

Hence, going by the plaint, there was no delay on the plaintiffs' part in instituting this case, since the cause of action in respect of the 1st defendant's creditor status was "renewed" after 31st October 2013, by way of the ICSID decision to be precise, hence within the time limit provided for by law—whether one considers it as having been based on tort or contract.

As for the alleged fraud and misrepresentation, resulting in the ICSID decision, both parties agree that the same is not time-barred, since the time starts to run from February 2014, when the award was rendered.

Considered from this perspective, the claim of acquiescence, which forms objection 2 (b) of the points of preliminary objection, likewise cannot stand. It is based on the contention that the plaintiffs had acquiesced to the assignment of the facility agreement entered into by the 1st plaintiff on 28th June 1997 and the security in support of the said facility. Counsel has relied on the case of *De Bussche v Alt* (1878) 8 Ch D 286, 314. Their submissions in support of this ground include the following:

> ***As explained in the 1st and 2nd defendants' joint statement of defence****, between 1997 and 1999 the 1st plaintiff utilized the loan pursuant to the terms of a loan agreement it entered into on 28th June 1997*. [emphasis mine]

Plainly, this statement shows that the issue is contested. A preliminary objection of this nature cannot be resolved by reference to the defence. It has to be based purely on what is stated in the plaint. Once one brings in the defendant's stand to contradict the plaintiff's averments in the plaint, one would have broken down the most cardinal principle upon which all preliminary objections must lie: As a factual point of dispute between the parties in the case, it cannot pass the test laid down in the Ugandan case of *Mukisa Biscuits v West End Distributors* [1969] EA 696, which has now established its authoritative position in our own jurisdiction through a series of approving decisions, both in this court and the Court of Appeal. The principle recognises a preliminary point as:

> *[a] point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit*.

See, for example, *Citibank Tanzania Ltd. v TTCL & 4 Ors*., Civ. Appl. No. 112 of 2003, CAT, DSM (unreported). Hence, as counsel for the plaintiffs rightly submitted, the acquiescence claim, which is based on the defendant's own allegation that the plaintiffs have "*on numerous occasions*" recognized the 1st defendant's creditor status, cannot be a pure point of law, but of fact.

With these conclusions*,* I find the second point of preliminary objection without merit and I overrule it.

In the third point of preliminary objection, the 1st and 2nd defendants aver that the 2nd plaintiff has no *locus standi* for its claims and thus has no cause of action against the 1st and 2nd defendants. The 1st and 2nd defendants have argued that the 2nd plaintiff, being a stranger to the agreement that is the subject of the purported claims, has no *locus standi* and cause of action to sue the defendants. The question is, counsel contends, whether the 1st defendant is a creditor of the 1st plaintiff can only be argued by the 1st defendant against the 1st plaintiff (citing *Lujuna Shubi Ballonzi v Registered Trustees of Chama cha Mapinduzi* [1996] TLR 204). Counsel also relied on the famous English case of *Salomon v Salomon* [1897] AC 22 for the proposition that the company is distinct from its individual shareholders.

The plaintiff's counsel have responded with the contention that the 1st and 2nd defendants are, by basing on their argument on contract, "blowing hot and cold", in that while acknowledging that the suit is based on tort in its third point of preliminary objection they at the same time expect the 2nd plaintiff to have been privy to a contract upon which to sue. Counsel for

the plaintiffs submitted that this is a contradiction. But the mix-up betrays the intertwining nature of the causes of action in this case as discussed earlier, which is, nonetheless, immaterial in determining the question at hand.

The 1st and 2nd defendants' counsel has argued that this is a misunderstanding on the part of the plaintiffs' counsel. They explain that the only basis upon which the 2nd plaintiff could have suffered any loss by reason of the alleged causes of action set out in the plaint is as a shareholder of the 1st plaintiff. Invoking the famous principle in the old English case of *Foss v Harbottle* (1843) 67 ER 189, counsel submitted that the proper claimant in such a case is the company itself. This principle has been followed in more recent cases, such as *Prudential Assurance v Newman* [1982]1 Ch 204, 210, where it was held:

> *A shareholder cannot recover damages merely because the company in which he is interested has suffered damage…The shareholder does not suffer any personal loss. His only loss is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding.*

A similar holding was made in *Johnson v Gore Wood* [2002]2 AC 1, where Lord Bingham held (at p. 35F):

> *A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss.*

As these cases were cited by way of rejoinder submissions, the plaintiffs did not have an opportunity to respond to them. However, the point was earlier made in submissions in chief, and counsel for the 1st and 2nd defendants cited three English cases to support it: *Short v Treasury Commissioners* [1948]1 KB 116, 122 and *Tate Access Floors Inc. v Boswell* [1991] Ch 512, as well as *Salomon v Salomon* (*supra*).

However, it is not the case here that the 2nd plaintiff has joined as a plaintiff simply because it is a shareholder in the 1st plaintiff. It is true that in many paragraphs, both plaintiffs assert their claims jointly. However, in some of the paragraphs, the 2nd plaintiff asserts its own rights. It complains that the defendants have been, as part of their claims, asserting rights over the management of the affairs of the 1st plaintiff, a position that the 2nd plaintiff currently enjoys pursuant to the orders of Utamwa J of 5th September 2013. For instance, in paragraphs 52, 54 and 55, the 2nd plaintiff avers that pursuant to Utamwa J's orders, the administration, management and control of the 1st plaintiff were handed over to the 2nd plaintiff. This right is asserted and complaints against its interference by the 1st and 2nd defendants are made in paragraphs 58 and 83 of the plaint, among others. In paragraph 83, the plaintiffs aver:

> *That in a manner contemptuous to the High Court (Utamwa J) Order…the 2nd defendant has been maliciously obstructing the 2nd plaintiff from exercising his rights over the 1st plaintiff, by instituting claims purporting to be the creditor and* ***threatening to have the control over all assets and management of the affairs of the 1st plaintiff company****…"* [emphasis mine]

These facts support some of the reliefs sought in the plaint, notably prayer (t), which seeks a perpetual injunction prohibiting the 1st and 2nd defendants from:

> *…trespassing upon or in any other manner whatsoever interfering with the quiet and peaceful…possession,* ***management and administration*** *of the plaintiffs' power plant and/or any other movable or immovable assets of the plaintiffs.* [emphasis mine].

Hence, contrary to what the 1st and 2nd defendants aver, the 2nd plaintiff has certain claims that do not arise out of its position as a shareholder of the 1st plaintiff, but of its own right as manager and caretaker of the 1st plaintiff—a separate and distinct legal capacity altogether—that was bestowed upon it by Utamwa J's order.

For these reasons, the third point of preliminary objection is likewise without merit, and it is overruled.

The fourth point of preliminary objection is that the plaintiffs are engaged in litigation in England with the 1st defendant over substantially similar facts and matters alleged in this case. The English proceedings were commenced on 23rd December 2013. The defendants have pointed out that in that case, the 1st defendant and Standard Chartered Bank (Malaysia) have sued the plaintiffs herein on a loan agreement that is the subject matter of these proceedings as well. This renders the commencement of fresh proceedings in Tanzania an abuse of the process of the court, insist defence counsel.

The plaintiffs' counsel's answer to this contention, though short, was very powerful: they relied on the explanation to section 8 of the Civil Procedure Code. The explanation categorically stipulates:

> *The pendency of a suit in a foreign country does not preclude the courts in Tanzania from trying a suit founded on the same course of action*.

This principle is an exception to the rule as to *res sub-judice*. With it alone, the fourt point of preliminary objection is decisively destroyed.

The ifth ground of preliminary objection is that this Court is an incorrect forum for the resolution of the disputes the 1st plaintiff has raised in this suit. "The contractual nexus", they say, to which the 1st plaintiff and the 1st defendant are both parties "requires that claims be resolved in either the courts of England, Malaysia and/or arbitration".

It has further been contended on behalf of the 1st and 2nd defendants, presumably in support of the fifth ground of preliminary objection, though without saying so, that the English proceedings are in the proper forum, since England was the contractually agreed seat, and that the plaintiffs' act of suing herein could only be justified if they could establish that there is some personal or juridical advantage that would only be available to them in Tanzanian courts and which is of such importance that it would cause injustice to deprive them of it (citing *The Abidin Daver* [1984] AC 398). The 1st and 2nd defendants conclude that the plaintiffs herein "have shown no such evidence". Again, with respect, if evidence is required to be shown on the point, it ceases to be a preliminary point.

However, it would appear, from the above reasoning on the third and fourth grounds (*locus standi* and *res subjudice*), that this argument is answered against them as well. There are two reasons operating in favour of taking that position:

1. As their advocates have intimated, this ground can neither cover claims raised by the 2nd plaintiff, nor claims against the 2nd defendant. Counsel agree that these three were not parties to the contract from which the alleged "contractual nexus" emanates. A suit involving

them, therefore, cannot be brought pursuant to contractual provisions to which they were not privy;

2. This action is essentially one of tort (a common stand taken by both parties). Hence:

    a. The plaintiffs are entitled to bring this action in Tanzania, where the tortious cause of action has arisen; and

    b. The argument that there is a contractual nexus requiring litigation to be instituted in England, Malaysia or by way of arbitration, is unfounded.

It is thus this court's overall finding that all the points of preliminary objection raised by the 1st and 2nd defendants are without merit, and they are accordingly overruled. Costs to follow events in the main cause.

DATED and DELIVERED at Dar es Salaam this 6th day of July 2015.

**F.A. Twaib**

**Judge**