IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CIVIL CASE NO.19 OF 2012

BOUNDARY HILL LODGE LTD ..... PLAINTIFF

VERSUS

1. **THE INTERNATIONAL FINANCE CORPORATION**
2. **GLOBAL ENVIRONMENTAL FACILITY (GEF)** } **..... DEFENDANTS**
3. **MARTHA KAVENI RENJU (RECEIVER/MANAGER)**

RULING

S.M. MAGHIMBI, J

The plaintiff herein through the services D'Souza and Company Advocates, filed an original Civil Case No. 19/2012 against the three defendants herein praying for judgment and decree against the defendants jointly and severally for the following reliefs inter alia;

1. A declaratory order that the 1st and 2nd defendants are in breach of the Loan Agreement and declare that the appointment of the 3rd defendant as receiver Manager of the plaintiff company null and void *abinitio*
2. An order that the defendants pay Plaintiff Company general damages to be assessed by the court.
3. An order that the defendants pay plaintiff company exemplary damages to be assessed by the court.

While filing their written Statement of Defence, the defendants duly represented by Mr. Onesmo Kyauke, learned advocate, raised two preliminary points of objection that one; the suit is bad in law and thus not maintainable for lack of Board resolution that authorizes the institution of a suit and two; the suit is res judicata. The defendants prayed that the suit be dismissed with costs. On the day that the matter was fixed for hearing on special clearance session, Mr. Kyauke prayed to drop the second point of objection and further prayed that the first point of objection be disposed by way of written submissions. Having no objection from Mr. D'Souza, learned counsel for the plaintiff, the court ordered that the matter be disposed by written submissions. Both parties adhered to the schedule of submissions hence this Ruling.

In his submissions in chief, Mr. Kyauke submitted that the suit, subject of preliminary point of objection was filed by Boundary Hill Lodge Limited, a limited liability company duly incorporated under the laws of Tanzania. That Section 15(2) of the Companies Act (Cap.212 R.E.2002) provides that:-

> *"From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time become members, shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company...."*

Mr. Kyauke further cited Section 21(1) of the Companies Act Cap.212 R.E.2002 which provides that once a Memorandum and Articles of Association of a company are registered, they become binding to the company as well as to the members. He argued that from the cited provisions of law, when a company is duly registered, it becomes a body corporate and can sue and be sued on its own corporate name. To support his argument Mr. Kyauke cited the case of **Solomon Vs. Solomon and Company [1879] AC 22**, where it was held that;-

> *"A Company in the eyes of the law is a person distinct from its members or shareholders, a metaphysical entity or a fiction of law, a different person altogether from a subscriber to the memorandum of association".*

He argued further that once registered a company acquires a legal personality and its affairs are entrusted in the hands of Boards of Directors who performs all activities of the company on the behalf of all shareholders. That Section 67 of the Cap.212 provides that the business of the company shall be managed by the Directors and they are therefore the proper person to perform any act in the name of the company.

Mr. Kyauke submitted further that it is tritate law that an action brought in the name of a company must be authorized both by the company itself in a meeting of shareholders convened for that purpose, or by the Board of Directors and if it is not so authorized, the action must be struck out. That the defendants took trouble to peruse pleadings and annexure, and found no authority from the meeting of shareholders or Body of directors that

conferred authority to any person to commence a civil case on behalf of the company against the Defendants.

To support his submissions, he cited the Case of **Masumin Printway And Stationers Limited Vs. M/S TAC Associates (Commercial Case No.7 of 2006)** (unreported) where his Lordship MASSATI, J, (As he then was) was referred to several other case including the case of **Bugerere Coffee Growers Limited Vs. Sebadduka and Another (1970) E.A.147,** where a firm of Advocates instituted a suit on behalf of the Plaintiff's company without the authority of the Board of Directors, and the court held that;-

> *"When companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of directors meeting and recorded in the minutes".*

He argued further that in the case of Masumini Printways and Stationeries Limited (supra) his Lordship at last paragraph of page 10/11 had this to say:

> *"So, on the authorities, it is true that there is a long unbroken chain of case law that a company must authorize by a resolution, the commencement of legal proceedings in its name. And the rationale is twofold. First is to show that the company still exists. Secondly to show that the decision has been reached in accordance with its constitution or articles of association and therefore legally binding on it. And the rule is intended to secure the interests of the*

defendants and also save the court's time. It may also avoid unnecessary sufferings by shareholders who are unknowingly dragged to court and commanded to pay huge costs'.

Mr. Kyauke submitted that in that case, the preliminary objection was upheld. He further cited the case of **Tusker Safari Limited Vs (1) Fedha Fundi Limited (2) Investment Overseas Finance Limited (3) Dr. Hawa Sinare Civil Case No.111 of 2002,** (Unreported) where the Plaintiff filed the suit without the authority of the company and the Defendants raised a preliminary objection to the effect that the suit was bad in law for having been file without the authority and therefore ultra vires. The court was referred to two cases, the case of **La Campagnie de Mayville v. Whitely (1896) 1 Ch 788** where it was held that:-

"if authority is wanted to use the name of the company, must be authority from the proper quarter either from the Directors or from the shareholders meeting convened for the purpose".

and the case of **Joseph Abasoro Limited v. Western Nigerian Finance Cooperation (1974) ALR 266** where it was held that:

"An action in the name of the company must be authorized either by the company itself in a meeting of shareholders convened for the purpose, or by the directors of the company; and if it is not so authorized, the action must be dismissed".

Mr. Kyauke argued that her ladyship Kimaro, J, (As she then was) upheld the preliminary objection by the Defendant and dismissed the suit accordingly for want of Board of directors resolution that authorized the commencement of a suit.

Mr. Kyauke submitted that the case filed without authority is ultra vires, which as per (Black's law dictionary) means an act done without any authority to do that act. He argued therefore that since the suit was filed without the resolution of the general meeting or Board of Directors to authorize institution of these proceedings, the suit is equally ultra vires.

In his reply, Mr. D'Souza submitted that the objection on the 'lack of a board resolution' raised is an afterthought for one; not being contained in the Defendants Joint Written Statement of Defense, in other words at no point in time in the pleadings of the Defendants that they questioned the authority of the Directors and competency of the suit as a factual matter. Further that even if one is to assume if the Defendants did, the Plaintiffs still had the right to file a Reply to the Written Statement of Defense. Two, that the Defendants themselves admitted at Paragraph 12 of the Joint Written Statement of Defense that the court has jurisdiction to hear and determine the suit for what was pleaded in Paragraph 26 of the Plaint. The Defendants note and admit (by not specifically denying as required by Order VIII Rule 5 of the Civil Procedure Code, Cap 33) to the effect that the case/suit is proper before this Honorable Court and it requires no further proof and the Defendants are *ipso facto* bound by their pleadings.

On the Preliminary Objection raised, Mr. D'souza submitted that it is purely factual matter that the objection does not go to the root of this Court's jurisdiction. To support this line of argument Mr. D'souza cited the principles enunciated in the case of **Mukisa Biscuit Co. Ltd Vs West End Distributors (1969) E.A** which was also stressed in the case of **National Oil (Tanzania) Ltd & Another Vs Standard Chartered Bank (T) Ltd, Commercial Case No 97/2005,** that a foundation to all preliminary objections is a test whether the point raised falls within the category of a preliminary objection enough to struck out the suit. The principles are that:

(i) There must be point of law either pleaded or must arise as a clear implication from the pleadings.

(ii) They must be pure points of law which do not require close examination or scrutiny of the documents.

(iii) Determination of points of law in issue must not depend on the discretion of the court.

Mr. D'Souza argued that the objection that there lacks a Board Resolution fails the three. To support his argument, Mr. D'Souza cited the case of **Cool Care Service Ltd Vs Electrics International Company Ltd & Another, Commercial Case 60/2009,** (unreported).Where his Lordship Makaramba J

> *"In order to establish whether there is a Board Resolution, it would in my view, require evidence to be adduced, thus defeating the whole object of Preliminary objection which is to raise a pure point of law, if argued disposes the suit."*

Further that, in the case of **National Oil (Tanzania) Ltd & Another Vs Standard Chartered Bank (T) Ltd, Commercial Case No 97/2005**, at Page 7 Kimaro J stressed on the same specific question/objection whether lack of Board Resolution amounts to a point of objection had these to say,

> *"regarding to the third objection on a resolution of the Board authorizing the institution of the suit, I will out rightly say that this point does not fall into the category of Preliminary Objections." ...There are matters which can be determined without having evidence. Any matter which has to be determined after the receipt of evidence falls outside matters to be argued as Preliminary Objections"*

Mr. D'Souza submitted further that it is now settled law in Tanzania that it is no longer necessary to plead and attach a Board Resolution. That by virtue of Order VI Rule 3 of the Civil Procedure Code, Cap 33 the Plaint should be confined to facts that are material and relate to the cause of action. Whether a board of directors was constituted or not or if a resolution is annexed is immaterial. He argued further that the plaint is also inconformity to Order VII Rule 1 of Cap 33.

Mr. D'Souza submitted further that the arguments by Mr. Kyauke that there are two schools of thought is not virgin in our jurisdiction and had already been ruled and is settled law as per the decision In **Cool Care Service Case** (Supra), **National Oil (Tanzania) Ltd case** (Supra)and further in **Addax Bv Geneva Branch Vs Kigamboni Oil Co. Ltd Commercial Case No 72 of 2008** (unreported), both schools of thought were

considered and the bottom line is that similar objections was deemed premature for requiring evidence.

Mr. D'Souza further cited the case of **Masumin Printways and Stationers Limited Vs M/S Tac Associates Commercial Case No 7 of 2006** (unreported), the Judge, citing **Buike Estate Coffee Ltd and Two Others Vs. Lutabi & another [1962] E. A 358** at pages 7 and 8**,** where the court had these to say on whether absence of Board Resolution amounts to a preliminary Objection,

> *The question whether the Plaintiff's Advocate had been duly authorized to sue would depend upon the Courts' finding who were the lawful Directors, this could only be determined after the evidence had been heard, at this stage of the suit want of authority to sue did not plainly appear and therefore the suit would not be struck out"*

Mr. D'Souza argued that it is a cardinal principle in law that the High Court of Tanzania cannot be bound by a singular dissenting decision and authority given in England, where under the hierarchy as the Court of Appeal of East Africa in the Mukisa Biscuit case cited above was the supreme Appellate Court for East Africa. That the Courts in Tanzania cannot in principle adopt foreign authorities where there is sufficient domestic authority. He argued that the cases cited by the defendant are bad law/precedents as similar objections were deemed premature for requiring evidence as held in the decisions of Cool Care Service Ltd (Supra), National Oil (Tanzania) Ltd (Supra) and Addax Bv Geneva Branch (Supra) cases.

Mr. D'Souza argued further that assuming, if this case was a case to question the authority of a handful of permanent directors (to the exclusion of other directors) who sanctioned commencement of the suit, attracting the court to venture in to the mere existence of a Board Resolution, the mandate of the directors and authority of the Articles of Association is purely a matter that requires evidence. The effect of entertaining the objection is that the court is prematurely blocking the Plaintiffs from being heard on the merits of the case or attempting to create a *voire dire* situation, a case within a case, to question the authority of the directors by adversely prejudicing the real reason why the plaintiff is in court in the very first place. Mr. D'souza further argued that the cases cited by the defendants are distinguishable in the present scenario, as they emanated from an internal conflict within the companies over ownership and control of the Company, which is not the case presently as the case at hand relates to an order declaring the appointment of the Reviver Manager in breach of the loan agreements, in other words in protecting the Plaintiffs from outsiders- the Defendants. He cited the provisions of Order XXVIII Rule 1 of the Civil Procedure Code Cap 33 that:

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

Further that the court has the discretion to personally require the appearance of the secretary, or any director or principal officer to answer

any material question relating to the suit and that the issue here is why the Defendants Counsel wants to interfere with the courts discretion and powers under Order XXVIII Rule 3 of the Civil Procedure Code Cap 33. He argued that all these arguments boil down to the fact that the preliminary objection so raised is premature. He argued that Section 67 of Cap 212 cited by the defendant is irrelevant as it relates to Members (not directors). According to Mr. D'Souza, Section 181 of Cap 212 clearly provides that a director is an authorized officer of the company clearly stating "have all the powers". Further that the Defendants have failed to establish in the slightest degree how not attaching a board resolution has occasioned them any slightest injustice on the contrary it would occasion the plaintiff's injustice if they are blocked to bring and justify their evidence. Mr. D'Souza further relied on the provisions of Order VII, Rule 14(2), of Cap. 33 that:

> *"Where the Plaintiff relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the Plaint".*

Mr. D'Souza argued that the plaintiff still has a room to produce the board resolution. Further that the issue of authority or *ultra vires* as submitted by learned counsel for the Defendants, is purely a matter of fact and evidence. He hence prayed that the preliminary objection raised be dismissed with costs.

Having gone through the preliminary objection raised, the records of the case and the parties submissions herein, I have noted that the parties based their arguments in two folds. On his part Mr. Kyauke based his

argument on the fact that a board resolution authorizing institution of a suit is a pre-requisite before any action is instituted by a Company. On his part, Mr. D'Souza though not substantively denying the fact that there is indeed required a board resolution that the company has authorised institution of proceedings, his arguments are mainly based on the fact that the issue of board resolution cannot be raised and argued as a preliminary point of objection as it requires evidence to prove. Owing to the counsels approach, I think it is prudent that I first address the point raised by Mr. D'Souza as to whether the objection raised does or does not qualify to be a preliminary point of objection as principled in the celebrated case of Mukisa Biscuits (Supra).

Throughout his submissions, Mr. D'Souza main line of argument conferred to the decisions of the High Court in the **Cool Care Service Case** (Supra), **National Oil (Tanzania) Ltd case** (Supra) and further in **Addax Bv Geneva Branch Vs Kigamboni Oil Co. Ltd Commercial Case No 72 of 2008** (unreported), where in all the cited decisions the bottom line is that similar objections was deemed premature for requiring evidence.

With due respect to the cited decisions, in my opinion, as a legal entity/legal person, a company has (subject to the Companies Act and to such limitations as are inherent in its corporate nature) the capacity, rights, powers and privileges as that of any individual person. This entails that a company can amongst other, things sue and be sued. However, since a Company, unlike a human being, is not a natural person, it can only act through an agent, namely, a Board of Directors (or otherwise through a majority voted decision in shareholder's meeting) via a vocal termed a

"board resolution". Therefore the fact that a company has authorised institution of proceedings in my opinion should be known to the other party at the very initial stages of proceedings as a condition precedent through a decision made prior to institution of any proceedings by the company. The rationale for this will be discussed while addressing the arguments advanced by Mr. Kyauke.

For the purpose of addressing the argument raised by Mr. D'Souza, the board resolution authorizing institution of proceedings has to be clearly availed to the defendant/respondent that the suit/matter that is actually before the court has been instituted by the company. In the absence of such proof, it will be difficult for the defendant/respondent, as the case may be, to know the legitimacy of the proceedings instituted against him and whether or not he will be able to recover his costs should the matter end in his favour. Therefore in my view, the fact that there is a board resolution authorizing institution of proceedings should be reflected as one of the clauses of the plaint with the proof attached as an annexure to the plaint. Hence the issue of board resolution does not require arguments basing on evidence to be adduced during trial, instead it should be availed clearly on the plaint that the company has authorised institution of certain proceedings.

The plaintiff is hence duty bound to show at the initial stage of the proceedings that a company has authorised the institution of the proceedings and in the absence of such proof on record, the defendant need take any risks an proceed to incur any costs to have to answer the claim against him. Therefore an absence of body resolution in the plaint

need not be taken cognizance by adducing any evidence but rather form part of the initial pleadings. Now answering Mr. D'Souza contention that he still had a chance to file a resolution while filing a rejoinder, it is pertinent to note that this suit had already reached the stage of hearing on a special session after pleadings being completed, and until that time, no board resolution had been filed. Furthermore, the case itself was lodged in 2013 which is three years ago. Therefore Mr. D'Souza's argument that the plaintiffs still had a room to file the resolution is not maintainable. By the time the case is scheduled for hearing, no board resolution has been attached hence the plaintiff has failed to show as to which authority or who exactly in the company authorised that there shall be instituted a suit against the defendants.

The rationale to the findings that a board resolution authorizing bringing of an action to a court should be a condition precedent in filing a suit will now be discussed with respect to the argument advanced by Mr. Kyauke. He based his arguments on the provisions of Section 15(2) and Section 21(1) of the Companies Act (Supra) emphasizing that once incorporated a company acquires a legal personality and its affairs are entrusted in the hands of Boards of Directors who performs all activities of the company on the behalf of all shareholders. Further that as per Section 67 of the Act, the business of the company shall be managed by the Directors. He argued that an action brought in the name of a company must be authorized both by the company itself in a meeting of shareholders convened for that purpose, or by the Board of Directors and in the case at hand no such proof has been pleaded or attached in support of the plaint. To support his

arguments he cited the cases of **Masumin Printway And Stationers Limited V. M/S TAC Associates (Commercial Case No.7 of 2006)**and the case of **Tusker Safari Limited Vs (1) Fedha Fundi Limited & 2 Others, Civil Case No.111 of 2002**, (Unreported).

In his reply, Mr. D'Souza surprisingly based his argument on a hypothetical situation by convincing the court to make an assumption that if the matter was the question of the authority of a handful of permanent directors (to the exclusion of other directors) who sanctioned commencement of the suit then attracting the court to venture in to the mere existence of a Board Resolution, the mandate of the directors and authority of the Articles of Association is purely a matter that requires evidence. He argued that under the circumstances, the effect of entertaining the objection is that the court is prematurely blocking the Plaintiffs from being heard on the merits of the case or attempting to create a *voire dire* situation, a case within a case, to question the authority of the directors by adversely prejudicing the real reason why the plaintiff is in court in the very first place. With due respect to Mr. D'Souza, since the current substantive case is on breach of loan agreement and nullification of appointment of a receiver and not a question of authority of directors, his argument is only hypothetical and not the basis of Mr. Kyauke's argument. Furthermore, this is a Ruling of a Court of law and not an academic paper; therefore the Court's time will not be consumed to reply on the hypothetical argument raised by the plaintiff.

In the current case I am in total agreement with the argument advanced by Mr. Kyauke that the board resolution is a condition precedent to prove that an action has been brought on behalf of a company. The rationale

behind this is that **first;** it is more convenient for the company to sue instead of having any number of suits instigated and subsequently discontinued by individual shareholders as it eliminates wasteful litigation at the expense of a company by individual shreholder. **Second;** suing by an authority of a resolution eliminates vexatious actions initiated by troublesome minority shareholders trying to harass the company or have greed gain from the proceeds of a litigation which if it doesnt work in their favour, the action will incur loss to the comapny at the expense of unaware shareholders/directors.**Third;** if a wrong is done to a company, it is the company alone which can decide to sue and that decision shall be made by the majority via the vocal termed earlier as board resolution. It cannot be left open to individual members to assume to themselves the right of suing in the name of the company. That being the case, all the above rationale can be achieved and proved by a presence of a board resolution or an authorityto the effect that bringing an action to court was a decision of the company as a corporate body and not a decision by an individual director/shareholder/member. Hence unless the exception is to the extent inter alia that the litigations are against the internal affairs of a corporation and not against a third party, a board resolution authorising institution of litigation is part and parcel of the pleadings initiated by a corporate body and has to be a condition precedent to filing of any action.

I am in further agreement with the decision of the Court in the **Masumin Printways case** that the fact that there is a board resolution authorising the institution of proceedings will also secure the interests of the defendants and also save the court's time.

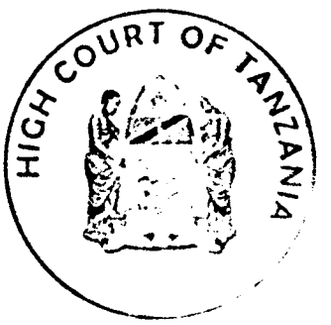
Having said that, the preliminary point of objection raised by the defendants is hereby sustained, this suit is incompetent before this Court for want of a board resolution. However, the defendants prayer that the suit be dismissed is not granted, instead the suit is hereby struck out. Given the time that this matter has been pending before this Court and the fact that the defendant raised the objection three years after the suit was filed, the plaintiff is hereby granted leave to refile the matter should he be interested to so do.

Suit Struck Out

Dated at Arusha this 21st day of August, 2015

SGD
S.M MAGHIMBI
JUDGE

I hereby certify this to be a true copy of the original.



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4/11/15