

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

CIVIL CASE No. 36 OF 2019

A ONE PRODUCTS AND BOTTLERS LIMITED.....PLAINTIFF

Versus

BOGE KOMPRESSOREN OTTO BOGE GMBH

& CO KG.....DEFENDANT

RULING

30th April, 2020 - 4th June, 2020

J. A. DE - MELLO J;

This Ruling is on three **Preliminary Objection** raised by the Defendant on a Points of Law that;

- i. That, this Honourable Court has no 'Jurisdiction' to try the suit;**
- ii. That, the Plaintiff's claims in the suit are 'Time Barred' and**
- iii. That, the Plaintiff's suit is defective due to 'Lack of Authority' allowing for its filling.**

On **24th March, 2020** this Court directed Parties to dispose the same by way of ~~Written~~ Submissions and, both parties have dully filled their submissions.

Submitting on the 1st limb of objection, with regard to jurisdiction and citing the case of **Director of Public Prosecution vs. Farid Ahmed & 9 Others, Criminal Appeal No. 96 of 2013, Court of Appeal of Tanzania at Dar Es Salaam** and terms of section **7 (1)** of the **Civil Procedure Code, Cap. 33** that;

'Subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.'

Counsel is of a firm view that, the authority in which this Court has to decide matters that are litigated before it, has to take cognizance of matters presented in the suit for its decision, based on the fact that, Parties relationship is governed by the terms and, conditions as stipulated under **page 17** of the order of conformation of **4th February, 2011 (annexture B1 of the WSD)** and, **page 2** of the general terms and conditions of business (**annexture B2 of the WSD**) in which parties chose as observed, the place of jurisdiction to be at **Bielefeld, Germany**. On **Time Barred** is, founded on claims for **breach** of an **implied condition** as to fitness of goods as evidenced from **paragraph 3** of the **Plaint**, as well as the Relief clause, **section 16 (a)** and, **(b)** of the **Sales of Goods Act, Cap 214** creates rights of implied condition as to quality and, fitness in a contract of sale. **Item 1** of **Part I** of the **Schedule** of the **Law of Limitation Act, Cap. 89**, clearly provide for the all suit for compensation for doing or omitting to do an act alleged to be in pursuance of any written law, the period of limitation is one year. Since the cause of action arosed in **February, 2014 (paragraph 6** of the **Plaint)** and, the filing of the suit on

20th February, 2019, it is evidently far from the prescribed time. With regard to **lack of authority** allowing for its filing and, it being a corporate body, there must be unanimous express authority to sue, he further contends. Sadly, there is none in as far as the Plaintiff is concerned for sanctioned by the body of Directors. It is hence the Defendant's prayer for **Dismissal** or **Strike Out** the suit with costs.

On his part, the Plaintiff strongly objects the Objections commencing with **Jurisdiction**, claiming that, much as order of conformation dated the 4th **February 2011 (annexture B1)** is in place, however, **clause 13** at **page 16** of the Order of Conformation provides that, the agreement comes on force by signing of both Parties as below. The Plaintiff is not suing by an agreement but, rather on the pro-forma invoice as pleaded (annexture P1 of the Plaintiff) the reason behind the extension of time to file Written Statement of Defence, in which Misc. **Application No. 627** of **2019** arosed and which, had it been granted, it would be clear from the pleadings that, order of conformation and, not supplied to the Plaintiff did not constitute a contract between the Parties. Cited the case of **Sunshine Furniture Co. Ltd vs. Maersk (China) Shipping Co. Ltd** and, **Another, Civil Appeal No. 98 of 2016**, the case which was determined the issue of choice of forum not to ouster of the jurisdiction of the Court.

Section 7 (1) of the **Civil Procedure Code, Cap 33** provides that;

"Subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

Under **section 3** of the **Code**, the word "**Court**" has been defined as **High Court** of the **United Republic of Tanzania**, a **Court of Resident Magistrate**, or a **District Court** presided by a **District Magistrate**, thus, the Civil procedure Code does not envisage a **foreign Court** to be applicable in as far as jurisdiction is concerned. It is the Plaintiffs further observations that, the claim is covered by **Item 1 Part I** of the **Law of Limitation Act Cap. 89**, for an alleged **breach** of an **implied Contract** for **warranty of sale** of **goods**, whose period is **six (6)** years. According to **paragraph 6** of the **Plaint**, the **Cause of Action** occurred on the commissioning of the compressor in **February 2014**, to expire **on 18th February 2020**, the subject matter of the suit, upon which the defects where discovered and, reported to the Defendant, a year before it was to become **Time Barred**. Lastly, and as a matter of practice, once a preliminary objection is taken, one can take any step aimed at pre - emptying the objection like making a reply that, would produce the Resolution, different from if, it was raised in the main body of the **Written Statement of Defence**, which could afford the in which a Plaintiff to exercise his option to file a reply to the **Written Statement of Defence**. He is thus of a firm view that, since it was raised as matter of law and, not of fact, he cannot make a reply, it being misconceived. The objections have no merits, he believes, as he implores the Court to dismiss them all, paving room for substantive suit to proceed. Briefly the Defendant rejoins by restating that, in as far as **paragraphs 3, 6** and, **17** the Plaintiff is suing on the **breach of conditions** as to **quality** and **fitness of goods** as well as **loss of business**, as opposed to contract. It is perusal from **Order of Confirmation**, dated the of **4th February, 2011**

(annexture B1 of the WSD) and, the General terms and conditions of business **(annexture B2 of the WSD)** at **page 2** which as alleged by the Defendant defines expressly the jurisdiction to be at **Bielefeld**. While this is vivid, the same has not been endorsed by any of the Parties.

This being the case and as read from order of Conformation under **clause 13** at **page 16** it clearly stipulates that;

“The agreement comes in force by signing of both parties as below”

What this therefore translates to and, in absence of signing by Parties, the agreement is **void** in terms of **7 (1)** of the **Civil Procedure Code, Cap. 33** provides that;

“Subject to this Act the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.”

Expressly or impliedly and, not signed, **Bielefeld** is in the hanging, subjecting the parties to the jurisdiction of this Court, he observes. Regarding the second ground, and, based on the fact that, suit is founded on claims for breach of an implied condition as to fitness and quality of goods, as seen in **(paragraph 3 of the Plaintiff as well as prayers clause), section 16 (a) and, (b) of the Sales of Goods Act, Cap. 214** creates rights of implied condition, out of a contract of supplying air compressor allegedly defective. So, notwithstanding the performance by the Defendants, the Plaintiffs claims the that, the goods were not in good condition, renders both section **16 (a) and, (b) of the Sales of Goods Act, Cap 214 & Item 7 Part I of the Law of Limitation Act Cap. 89**, be fitting

the **six years (6) limitation** period of institution a case, appropriate. In as far as '**Authority**' is concerned, I am live of several authorities making this, a matter of **evidence** as opposed to pure point of law. In the case of **Plasco Ltd vs. Efaham Ltd & Another, Commercial Case No. 60 of 2012, Commercial Division, at Dar es Salaam** held that;

"...the existence or non-existence of a board resolution for instituting a suit constitutes a point of fact, which is disputed, and has to be investigated, and as such it cannot constitute a fit candidate for a preliminary objection on a point of law."

Similarly and, drawn from different schools of thoughts, was the case of **Resolute Tanzania Limited vs. LTA Construction (Tanzania) Limited & 3 Others, Commercial Case No. 39 of 2012** that;

"I am aware that so far there are two schools of thought regarding this point. One school of thought is of the view that it is mandatory for the company to produce (probably on filing the Plaintiff), evidence that the company authorized a suit to be instituted. [see St. Bernard's Hospital Co Ltd vs. Dr. Linus Mlula Chuwa Commercial Case No. 57 of 2004 (Unreported) and Bugerere Coffee Growers Ltd vs. Sebaduka and Another [1970] EA 1471. I do not belong to that school. The second school of thought [which I fully associate myself with], is of the view that requiring proof of authority from the company before instituting a suit does not qualify to be a preliminary objection because a preliminary objection must be on the pure point of law. It should not be raised if any fact

18 has to be proved or ascertained [see Mukisa Biscuits case (supra) Whether there is a board meeting which passed a resolution to institute a suit or not is a fact that needs to be ascertained by calling in evidence for instance that: (i) That there were a Board meeting properly constituted (ii) That institution of a suit was an agenda end. (iii) That a resolution to that effect was passed. " This was Mruma J;

In the Plasco's Ltd case (Supra) Makaramba J; (Rtd) emphasized that, "the legal requirement for a company to produce, when filing the plaint, evidence that the company authorized the suit to be instituted Aside from my holding in the present matter that the existence or non existence of a board resolution requires evidence to establish and therefore cannot be determined as a preliminary matter, the requirement for authorization by a company for instituting a suit is not expressly stated in the Civil Procedure Code, Cap. 33 R.E.2002 or any other written laws dealing with institution of actions in this country. Order XXVII Rule 1 of the Civil Procedure Code simply requires in a suit by or against a corporation, for the pleadings to be signed or verified on behalf of the corporation by the secretary or by director or other principal officer of the corporation" who is able to depone to the facts of the case. "In my considered view if parliament intended that a board resolution was a requirement for instituting a suit by corporation it would have stated so expressly. It seems to me therefore that the requirement for a company board resolution authorizing institution of a suit by

a corporation is largely judge-made law, traceable to the Bugerere Coffee Growers Ltd vs. Sebaduka and Another [1970] EA 1471, which has been religiously followed by courts in this country”.

Also in the case of **Investment House Limited vs. Webb Technologies (T)Limited and 2 Others, Commercial case No. 97 of 2015, High Court of Tanzania, Commercial Division, at Dar es Salaam**, where **Mansoor J**; referred to his decided case and stated;

“...in the case of Messina (T) Limited vs. Quality Business Consultants (T) Limited, Commercial Case No. 13 of 2015 (unreported), in which, I said, that this kind of preliminary objection cannot be qualified to be treated as preliminary objections as they do not fit in the categories of preliminary objections set or established in the famous case of Mukisa Biscuits Co. vs West End Distributors Limited (1969) E.A 696, that, preliminary objection should be on points of law or which arises by clear implication out of pleadings, which if argued may dispose of the suit. ”

While fully in one with all the above, let me reiterate that, it has its origins from the case of **Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors Ltd. (1969) E.A. 698 page 70** stating; **“...A preliminary Objection... raises a pure point of law which is argued on the assumption that all facts pleaded by the other side is correct. It cannot be raised if any fact is to be ascertained or if sought is the exercise of judicial discretion”.**

This is the line of argument which I too fully subscribe, as I find the objections all of them misconceived. Them all to be un merited, I therefore order for hearing of the substantive suit in its merits.

Costs in due course.

It is so ordered.


J. A. DE- MELLO
JUDGE
4th June, 2020

