

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA
CIVIL CASE NO. 05 OF 2019**

GIANT MACHINE AND EQUIPMENT LTD.....PLAINTIFF

VERSUS

GILBERT R. Mlaki.....1ST DEFENDANT

CAPCON LTD.....2ND DEFENDANT

RULING

Date of Last Order: 08/07/2020
Date of Ruling : 20/08/2020

MONGELLA, J.

This is a ruling on a legal issue raised by the court on the competence of the suit for lack of board resolution by the plaintiff company to institute legal proceedings against the defendant. Both parties were represented whereby the plaintiff was represented by Mr. Sospeter Tyeah and the defendants were represented by Mr. Philip Mwakilima, both learned counsels. The learned counsels orally addressed the court.

Mr. Tyeah started to address the court. He contended that from the research he did he found that there are two schools of thought, whereby the first is that there must be a board resolution for a company to sue, and the second, that there is no need of having a board resolution for the company to sue. He submitted that his stance lies with the second school


Daniel M. C.

of thought. In support of his position, he argued that once a company is incorporated it bears the ability to sue and to be sued in accordance with section 15 (2) of the Companies Act. He argued that there is no statutory provision that provides for the presence of a board resolution. He further referred to Order XXVIII Rule 1 of the Civil Procedure Code, Cap 33 R.E. 2019 and argued that this provision provides how incorporated companies can institute claims in court whereby it only provides for persons who can sign the pleadings, but does not provide for the requirement of a board resolution.

He further referred to several cases from this Court being: **PLASCO Ltd. v. EFAM Ltd & Fatma M. Rweyemamu**, Commercial Case No. 60 of 2012 (HC at DSM, unreported); **Resolute Tanzania Limited v. LTA Construction (TZ) Ltd. & 3 Others**, Commercial Case No. 39 of 2012; and that of **Mwanachi Insurance Co. Ltd. v. Elias Masija Nyong'olo & Two Others**, Commercial Case No. 135 of 2015 (HC at DSM (unreported)). He argued that in all these cases the court was of the view that the requirement to have a board resolution is not statutory, but was created through case law. He added that the same is also based on facts. On these bases he prayed for this court to uphold this school of thought and allow the matter to proceed to hearing. On his part, Mr. Mwakilima did not make any submissions, but stated that he shares the same position as Mr. Tyeah.

I have considered the arguments by the parties, particularly by Mr. Tyeah. I am in fact aware that there are two positions by the learned judges in this Court on this requirement. See for example: **Ndiyo United Company Limited v. Irene Simon Kahemele**, Civil Case No. 14 of 2018 (HC at Mbeya,

unreported); **Evarist Steven Swai & Another v. The Registered Trustees of Chama cha Mapinduzi & 2 Others**, Land Case No. 147 of 2018 (HC at DSM, Land Div., unreported); and **Masumin Printway and Stationers Limited v. M/S TAC Associates**, Commercial case No. 7 of 2006 (unreported) in which the court was of the view that a board resolution is a mandatory requirement for a company to file a suit in court.

Finding strength on the cases he cited, Mr. Tyeah argued that the requirement to have a board resolution is not a creature of statute but case law and thus this court should not apply it. With all due respect, I would like to remind him that under common law legal system to which the legal system of this country is built on, case law is one of the major sources of law. Thus once the position has been settled by the higher court in the hierarchy, the courts subordinate to it are bound by it. The requirement to have a board resolution for a company to sue has been underscored by the Court of Appeal of this land and thus I am going to base my deliberation in line with the position set by the Court of Appeal which in accordance with rules of precedent, like I pointed out earlier, is binding upon this Court.

The requirement for a company to have a board resolution before instituting legal proceedings traces its roots from the Ugandan case of **Bugerere Coffee Growers Limited v. Sebaduka and Another** [1970] EA 147, in which it was held:

"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."

The above position was reiterated by the Court of Appeal in the case of **Pita Kempap Ltd. v. Mohamed L. A. Abdulhussein**, Civil Appeal No. 128 of 2004 & 69 of 2005 (CAT, unreported). The CAT also in **Ursino Palms Estate Limited v. Kyela Valley Foods Ltd. & 2 Others**, Civil Application No. 28 of 2014 (CAT at DSM, reported at Tanzlii) reverted to this position by adding that even the advocate representing the company must be appointed by a resolution. Though in this case the Court was faced by a preliminary objection involving the defendant company and it ruled that the defendant company did not need a board resolution because it is defending itself after being sued or affected by a court order, it took cognizance of the position settled in **Bugerere Coffee Growers** (supra) and **Pita Kempap** (supra). However, reading between the lines, I am of the settled position that the decision of the CAT in this case connotes that a company does not need a board resolution when it is being sued, but it certainly needs the resolution if it is the one instituting the suit as a plaintiff.

The CAT in the above decisions also acknowledged that this requirement is one of the legal requirements in our law as of now. I therefore do not subscribe to Mr. Tyeah's argument that the requirement is purely based on facts and cannot be entertained as a legal issue. In my considered view, the same need not be proved by the plaintiff at this stage of determining the legal issue by providing the copy of the board resolution. However, the fact that a board resolution was passed to authorise the plaintiff company to institute legal proceedings in court has to be pleaded in the



plaint. The plaintiff's plaint as it stands does not bear this fact in any of its paragraphs.

I do not as well subscribe to Mr. Tyeah's argument that the board resolution is not required as the plaintiff sued in its own name, having acquired the capacity upon being incorporated. In my view, as much as the company after being registered acquires legal personality whereby it can sue and be sued, the decisions of the company are done by the board of directors or members through resolutions and therefore it becomes imperative to have the resolution in place upon instituting a suit in court.

Having said all, it is my finding that the plaintiff's suit is incompetent and consequently, I struck it out. Since the issue was raised by the court, I make no orders as to costs.

Dated at Mbeya on this 14th day of August 2020




L. M. MONGELLA
JUDGE

Date: 20/08/2020

Coram: N. Mwakatobe – DR

For the Plaintiff: Thea - Advocate


1st Defendant: |

2nd Defendant: | Present

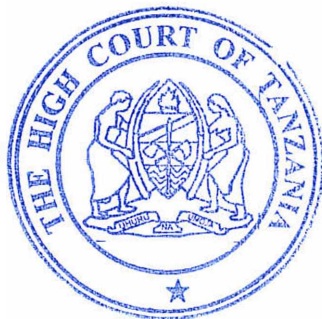
For the Defendant: Mwakilima – Advocate


B/C: Mapunda

Court: Ruling is delivered this 20th day of August, 2020 in the presence of both parties and their Advocates.


N. Mwakatobe – DR
20/08/2020

Court: Right to appeal is hereby explained.




N. Mwakatobe – DR
20/08/2020