

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA
CIVIL CASE NO. 16 OF 2018

NAMBURI AGRICULTURAL CO. LTD.....PLAINTIFF

VERSUS

KIBELO AGROVET SUPPLIER.....DEFENDANT

RULING

Date of Last Order: 02/07/2020
Date of Ruling : 12/08/2020

MONGELLA, J.

The plaintiff herein is suing the defendant for breach of an oral contract. The two entered into the contract for supply of maize seeds in 2016 in which the plaintiff was the supplier. On 24th November 2016, the plaintiff supplied 15,000 Kgs. of the seeds worth T.shs. 60,000,000/- on the agreement that the defendant shall pay the amount by November 2017. Until November 2018, the plaintiff had only recovered 4050 Kgs. worth T.shs. 16,200,000/-. The defendant also delivered to the plaintiff various agricultural inputs valued at T.shs. 3,340,000/- between 2017 and 2018 and promised to pay the remaining amount of T.shs. 40,460,000/- by 15th July 2018. He however defaulted in paying the outstanding amount. In his plaint, the plaintiff is claiming for the following reliefs:

1. Specific damages to the tune of T.shs. 40,460,000/- .



2. General damages to the tune of T.shs. 50,000,000/- for loss of money, business and disturbance.
3. Interest of 20% at bank rate per annum on the total principle sum of general damages from the date of cause of action to the date of judgment.
4. Interest at 12% per annum of the decretal sum from the date of judgment to the date of payment in full.
5. Costs of the suit.

Both parties were represented whereby the plaintiff was represented by Mr. Isack Chingilile and the defendant was represented by Mr. Simon Mwakolo, both learned advocates. Before the matter could proceed to hearing, the court raised a legal issue as to the competence of the suit in the absence of a board resolution passed to authorise the plaintiff to institute legal proceedings against the defendant. Thus both parties were ordered to address the court on the same.

Mr. Chingilile argued that the requirement to have a board resolution annexed in a plaint factual whereby it has to be proved in evidence. He said that the plaintiff was authorised by the board to institute legal proceedings and since documentary evidence shall be needed to prove the said fact, the same can be tendered during hearing. He contended that the law allows for additional documentary evidence not annexed in a plaint to be filled by filing a notice to produce document under Order XIII Rule 1 of the Civil Procedure Code, Cap 33 R.R. 2019. To buttress his point he cited the case of **East African Cables Limited v. Spenco Services**



Limited, Commercial Case No. 42 of 2016 (HC at DSM, unreported). In this case it was held:

"Regarding the objection that the plaintiff did not append Board Resolution authorizing institution of the suit, firstly I would agree with the plaintiff's counsel view that existence or non-existence of board's resolution is a matter of fact which requires evidence to be established, secondly, it is my considered view that there are internal matters (or affairs) of the suing company and cannot be...(sic) by the defendant or third party."

He argued further that the plaintiff in this matter sued in its own name and in that regard it was not necessary to annex Board Resolution appointing its directors to sue because the plaintiff has the capacity to sue or be sued. He referred to the case of **Mwanachi Insurance Co. Ltd. v. Elias Masija Nyong'olo & Two Others**, Commercial Case No. 135 of 2015 (HC at DSM (unreported) in which it was held:

"To the contrary in the present matter the suit is brought in the name of the said company. In terms of the company laws currently in place, a company being a body corporate can sue and be sued in its own name, and as such no requirement for leave of this court to do so."

He as well referred to the case of **PLASCO Ltd. v. EFAM Ltd & Fatma M. Rweyemamu**, Commercial Case No. 60 of 2012 (HC at DSM, unreported) in which this court also ruled that the requirement to have a board resolution is based on facts and there is no express provision under statutory law providing for such requirement. In the alternative, Mr. Chingilile argued that if the recent position of the law necessitates the



requirement to have a board resolution, the same should not act retrospective in this matter. He contended that this matter was filed in this Court on 28th October 2018 when the law was silent whereby neither the statutory laws nor case laws provided for this requirement. He further argued that this requirement is still on debate, but if the requirement is insisted by the court it may cause miscarriage of justice to the parties, especially when the company is being sued and there is no time for directors to make a board resolution to receive summons, appear and defend the company.

In reply, Mr. Mwakolo challenged Mr. Chingilile's arguments and the cases he cited. He argued that it is a requirement of the law that before a company institutes a matter in court there must be a board resolution to do so. He referred this Court to the case of **Bugerere Coffee Growers Ltd. Sebaduka and Another** (1970) E.A. 1471 which set out this principle and of which was cited in approval 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). He said that, in the former case it was held:

"Given that there is no resolution in the present case to authorize the commencement of the present suit, I find that the first preliminary objection has merit. Accordingly this suit is improperly before the court. It is incompetent. It is struck out."

On the strength of the above decision, Mr. Mwakolo argued that the two cases are from the superior courts thus their position is binding to this court compared to the High Court decisions cited by Mr. Chingilile. He concluded that the a board resolution is now a prerequisite in filing of a

Dr. P. K.

suit by a company thus the suit at hand is incompetent for lack of the board resolution.

I have given the submissions of both counsels due consideration. Considering the authorities cited by Mr. Chingilile, it appears that there are conflicting decisions at the High Court. See: **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 these three cases the court was of the view that a board resolution is a mandatory requirement for a company to file suit in court. However, this issue 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 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** (supra) 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 as argued by Mr. Mwakolo was reiterated by the Court of Appeal in the case of **Pita Kempap Ltd** (supra). 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 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). Therefore, the decision of the Court 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.


Mr. Chingilile argued that the requirement to have a board resolution is based on fact. However, the Court of Appeal in the above decisions acknowledged that this requirement is one of the legal requirements in our law as of now. In my considered view, the same need not be proved by the plaintiff at this stage however, the said fact 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. Chingilile's argument that the board resolution is not required as the plaintiff sued in its own name. 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 thus it becomes imperative to have the resolution in place upon instituting the suit in court.



Mr. Chingilile further submitted that since this matter was filed on 28th October 2018, the requirement to have a board resolution should be applied retrospectively in this case because at that time the said position was not settled under the law. I have gone through the court record and found that this matter was filed on 28th December 2018 and not 28th October 2018 as claimed by Mr. Chingilile. On the other hand, the decision in **Ursino Palms Estate Limited** (supra) was issued on 20th June 2018 and it made reference to the case of **Pita Kempap** (supra) and that of **Bugerere Coffee Growers** (supra) which were decided earlier on. Considering these facts, the argument by Mr. Chingilile lacks merit as the CAT decisions were issued prior to the institution of the plaintiff's suit in this Court.


Having observed as above, I find the plaintiff's suit incompetent and thus struck it out. Since the issue was raised by the court, I make no orders as to costs.

Dated at Mbeya on this 12th day of August 2020


L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 12th day of August 2020 in absentia of both parties.




L. M. MONGELLA
JUDGE