

**IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 215 OF 2019**

**Bashasha Merchandise Dealers Limited.....1<sup>st</sup> PLAINTIFF**

**Global Agency Limited .....2<sup>nd</sup> Plaintiff**

**VERSUS**

**Equity Bank Tanzania Limited .....1<sup>ST</sup> DEFENDANT**

**NISK Capital Limited .....2<sup>ND</sup> DEFENDANT**

**RULING**

*Date of last Order: 18.06.2020*

*Date of Ruling: 09.10.2020*

The Plaintiffs herein have instituted the instant suit against the defendants claiming that the 1<sup>st</sup> Defendant is in breach of contract for her neglect to disburse to the Plaintiffs the agreed loan amount of USD 22,820,000/-. The Plaintiffs are also suing the Defendants for professional negligence which caused the Plaintiffs substantial financial loss following the Defendants promise to advance loan to the Plaintiffs worth USD 28,000,000/- whilst knowing that the 1<sup>st</sup> Defendant had no financial capacity to advance such amount. The

Plaintiffs further sue the Defendants for tort of breach of duty of secrecy and tort of misfeasance for breach of statutory duty of compliance with the laws of the land.

Upon being served with the copies of the plaint, both Defendants issued notices of preliminary objections. The 1<sup>st</sup> Defendant raised 5 points of objection that:

1. The Plaintiffs' plaint has not been properly verified as required by law; or in the alternative the verification is legally defective.
2. The Plaintiffs' plaint does not disclose any justiciable cause of action by the second Plaintiff against the 1<sup>st</sup> Defendant nor any of the Defendants
3. The plaint is defective for misjoinder of the causes of action- breach of contract, tort of misfeasance, professional negligence and breach of duty.
4. The plaint does not disclose particulars of the causes of action contrary to the law.
5. The amount of the Plaintiffs' claim made in paragraph 4 of the plaint differ and contradicts with the Plaintiffs' reliefs claimed in prayer items (a) to (g) contained in the foot of the plaint.

As for the 2<sup>nd</sup> Defendant, she raised three points of preliminary objection that:

1. The 2<sup>nd</sup> Plaintiff has no cause of action against the 2<sup>nd</sup> Defendant
2. The plaint is bad in law for misjoinder of the causes of actions.
3. The plaint is bad in law for containing a defective verification clause.

The points of preliminary objection were argued by way of written submission. Both Plaintiffs were represented by Mr. Obadia Kajungu and Ismail Bulembo, learned advocates. The 1<sup>st</sup> Defendant was represented by advocate Emmanuel Daniel Saghan; and the 2<sup>nd</sup> Defendant was represented by advocate Sabas Shayo.

The second defendant apart from raising points of objection, did not file submission in support of the same. I shall therefore only consider the rival submissions between the 1<sup>st</sup> Defendant and the Plaintiffs. I shall further not recapitulate the submissions by the rival parties as they are well in the record; rather I shall consider and refer to them in the course of addressing substantive issues.

In making submission in support of the preliminary objection, Counsel for the 1<sup>st</sup> Defendant introduced another point of preliminary objection that the Plaint is incurably defective for want of Board of Directors Resolution. He advanced the justification that the Plaintiffs will not be prejudiced as they shall have opportunity to address the court in their reply submission.

Counsel for the Plaintiff vigorously challenged the addition of another point of preliminary objection and argued that the added point of preliminary objection has taken them by surprise and denied them right to be heard for not being afforded sufficient time to make legal research to defend their case. Thus, severely prejudiced as it is the position of this court in numerous decisions that the preliminary objections must be raised on notice. In cementing his argument Counsel for the Plaintiffs cited the High Court case of **Maheshkumar Raojibhai Patel V Karim Shamshuddin Suleman**, Commercial Case No. 80 of 2005 at DSM on the holding that preliminary objections must be raised in time and on reasonable time.

Rejoining on the point, Counsel for the 1<sup>st</sup> Defendant contended that the objection on the manner the objection was raised is a

misconception considering that Counsel for the Plaintiff does not object that the point raised qualifies to be amongst the points of preliminary objection. He rejoined further that the Plaintiffs had opportunity to file their reply and submitted extensively in their reply submission on the added point of objection. Therefore, the Plaintiffs cannot contend that they have been deprived their right to be heard.

Beginning with the issue as to whether the Plaintiffs have been taken by surprise by the additional point of objection raised by the Counsel for the Defendant on the absence of Board of Directors' Resolution; I hurriedly find that the argument by the Counsel for the Plaintiffs that they have been denied right to be heard is farfetched. The point of law raised by the Counsel for the 1<sup>st</sup> Defendant was raised at a time when he was making his submission in chief. Certainly, Counsel for the Plaintiffs became aware of the additional point of objection after being served with the submission by the 1<sup>st</sup> Defendant and managed to respond to the same. Thus, I would not term the timing of the preliminary objection caught the Plaintiffs' counsel by surprise to be denied fair hearing. Indeed, the timing is reasonable

enough as per the spirit of the cited case of **Maheshkumar Raojibhai Patel (supra)** which eventually enabled extensive reply on the same in a bid to accelerate pursuit of justice. I therefore find that no miscarriage of justice was occasioned to the Plaintiffs and had they needed more time; Counsel for the Plaintiffs is well aware that he could ask the court to avail the same.

Now coming to the point of objection that there is no Resolution of the Board of Directors allowing one Fidelis Bashasha to sign the plaint on behalf of the 1<sup>st</sup> Plaintiff. Counsel for the 1<sup>st</sup> Defendant argued before the court that the person instituting a case or signing the plaint on behalf of the Company must specifically state in the clause of the plaint that he is authorized to do that by the Resolution of the Board of Directors of the Company. He cited the High Court case of **Evarist Steven Swai and Other Vs The Registered Trustees of Chama Cha Mapinduzi and Others**, Land Case No. 147 of 2018 (unreported) which held that the issue of Board Resolution does not require arguments based on evidence to be adduced during trial but should be stated clearly in the plaint that the Company has authorized the institution of the said suit.

Responding to the question as to whether Mr. Fidelis Bashasha has authority to sign the pleadings, Counsel for the Plaintiffs referred to the High Court case of **Investment House Limited Vs Webb Technologies and Others**, Commercial Case No. 97 of 2015 where it was held that the absence of company resolution does not qualify to be preliminary objection as per the standards set out in **Mukisa Biscuit Company Limited [1969] EA**.

In rejoinder, Counsel for the 1<sup>st</sup> Defendant insisted that authorization from the Board of Directors for a company to commence legal action for, or against the company is an essential step and it is the procedure that has to be adhered to.

Needless to say, a Company as a legal entity/juristic person (**subject to the Companies Act and to such limitations inherent to its corporate nature**); has capacity to sue or be sued. However, unlike a natural person, much as it enjoys the same privileges, all those privileges have to be acted upon through another body which is a Board of Directors or through a majority voted decision in shareholder's meeting via a vocal termed as a "**board resolution**". Indeed, in exercising particular powers or activities of the company,

those powers are derived by the company general meeting or Board of Directors vested in them by the memorandum and articles of association.

I am abreast to two positions propounded by this Court as to whether the authority of the Board of Directors of the company qualifies to be raised as point of preliminary objection.

In **International Mining and Prospecting (T) Ltd V Cornelius Pinely and 2 Others**, Civil Case No. 35 of 2001; **E.R. Investment Ltd V Tanzania Development Finance Co. Limited & Another**, Civil Case No. 66/1999; **St. Bernard's Hospital Company Limited Vs Dr. Linus Maemba Mlula Chuwa**, Commercial Case No. 57 of 2004; **Bugerere Coffee Growers Ltd Vs Sedduka & Another** [1970] E.A. 147; and the cited case of **Evarist Steven Swai and Other** (supra); this court held that a company has to authorize the commencement of legal proceedings by passing a resolution either at a Company or Board of Directors' meeting. In **St. Bernard's case** as well as **Evarist Steven Swai's case**, this court made a conclusion that a plaint should expressly reflect that there is a resolution authorizing the filing of an



action to avoid the risk of **insurmountable** *preliminary objections*. I share this view and I shall explain in the due course.

As intimated earlier, while I highly respect the position that **the issue of requiring a proof of board resolution** to institute a proceeding is a matter of evidence; I am of the firm view that a minimal requirement has to be met to ensure **that authority to sue has been obtained**. Since the principle in **Mukisa Biscuits** is on the presumption that facts are not in dispute, then it is my holding that the minimal requirement is that **the plaintiff must specifically plead the authority to sue using the name of the company or authority to sign the plaintiff on behalf of the company** as per the position in **Bugerere's and St. Bernard's cases**. Thus, a person instituting the suit or signing a plaintiff on behalf of the company must specifically aver so in the plaintiff that he has been duly authorized to act or sign on behalf of the company. Otherwise such person would have no such authority to perform such function. More so much as a party can bring a document to prove a fact at a later stage as it can be added to the list of additional documents to be added or annexed to the plaintiff in terms of **Order VII Rule 14 (2) of Cap 33** or by giving notice of additional documents as per the set

procedures; however, he cannot bring an additional document to prove a fact that has not been pleaded in the plaint. To do so would be pleading new facts to the surprise of the other party; the act which is sanctioned by law.

I am taking this route in cognizance of the policy of the company, financial implications, costs associated with the legal proceedings in the event the matter is decided against the company and protection of corporate bodies from its own overzealous directors and shareholders. Again, the assurance that the board has authorized institution of proceedings is paramount to the defendant to know the legitimacy of the proceedings instituted against him/her and whether or not he will be able to recover his/her costs should the matter end in his/her favour. Therefore, since there is no averment in the plaint to show that Fidelis Bashasha has been authorized to sign and institute the case on behalf of the Plaintiffs, I hasten to agree with the Counsel for the 1<sup>st</sup> Defendant that Mr. Bashasha signed the plaint without being duly authorized by the board of directors contrary to the spirit of the law under **section 181 of the Companies Act**, No. 12 of 2002 Cap 212 RE 2019 which reads:

*“Subject to any modifications, exceptions, or limitations contained in this Act or in the company's articles, **the directors of a company have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of a company**”.* (emphasis is mine).

Accordingly, I sustain this point of objection.

This point of objection alone suffices to dispose of the matter.

Nevertheless, before I pen off and give my final order, I wish to address the issue of cause of action and defectiveness of the verification clause albeit in brief.

On the issue of cause of action, in a simple translation cause of action is a fact or facts that enable a person to bring an action against another. **Order 7 Rule 1(e) of the Civil Procedure Code, Cap 33 RE 2019**, requires a plaintiff to disclose facts that constitute cause of action. It follows therefore that in determining as to whether there is a cause of action; court should look into the pleadings. This position has been illustrated by the Court of Appeal in the case of **M. Byombarilwa V Agency Maritime International** [1983] TLR 1 (CA); and in the case of **Stanbic Finance Tanzania Ltd V Giuseppe Trupiaa and Chiara Malavasi** [2002] TLR 217. Again, the case of **Joraj Sharif & Sons Vs Chotai Fancy Stores** (1960) E.A 375 expounded further that:

*"The question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone, together with anything attached so as to form part of it and upon the assumption that any express or implied allegations in it are true ...".*

I have dispassionately read the contents of the plaint in its context and the annexures annexed to the plaint. It is not difficult to gather that the Plaintiffs are basically suing the Defendants for their failure to advance the loan highly depended in operation of their business despite their promises at different dates and occasions. The Plaintiffs are complaining further that the Defendants convinced them to leave other banks with a promise of lucrative loans and incentives in betterment of their business whilst knowing that they had no such liquidity to maintain them hence causing them financial loss. The Plaintiffs are also suing the Defendants jointly and severally for their professional negligence among others for failure to disclose that they had no enough liquidity to support Plaintiffs' business and exposing their affairs to a 3<sup>rd</sup> party whose legal status is questionable.

Undoubtedly, since the cause of action is a fact that enables a party to bring an action against another, I could think of no other kind of facts that would suffice to establish a claim by the Plaintiffs that failure by the Defendant to advance them loans as promised and at agreed periods for the operation of their businesses, has caused them financial loss. Therefore, I would have no difficulty in being convinced that the plaint contains facts that disclose cause of action.

As for the verification clause, **Order 4 Rule 2 of the CPC, Cap 33, RE 2019**, requires a plaint to comply with rules contained in **Order VI and VIII of the code**. Accordingly, **Order 6, Rule 15 (1) and (2)** makes it mandatory for the pleadings to be verified specifying by reference to the numbered paragraphs of the pleading or by some other person proved to be acquainted with the facts of the case.


The Plaintiffs plead at para 29 of the Plaint that the 1<sup>st</sup> Defendant being unable to issue loan in lumpsum; the Plaintiffs continuously implored the 1<sup>st</sup> Defendant to disburse the loan by instalment so as to rescue the Plaintiffs' business but the 1<sup>st</sup> Defendant has been

avoiding the Plaintiffs. Again, at para 31 the Plaintiffs aver that the 1<sup>st</sup> Defendant despite her failure to honor the agreement and being in breach of contract, she has remained malignant while rejecting the loan application a year after approval.

Certainly, those two paragraphs speak ill of the conduct of the 1<sup>st</sup> Defendant in breaching the alleged agreement and goes to the basis and subject matter of the claim to be determined by this court. However, those paragraphs i.e para 29 and 31 have not been verified. In fact, it makes difficult for a court to rely on a fact advancing strong allegations of wrong doing and the ill conduct of the Defendant without verifying the same. As such it would be calling a court to act on unverified facts in adjudicating on the rights and obligations of parties. Verily, this court cannot determine a fact pleaded but not verified or owned as required by law. That being the position, I subscribe to the position taken by my sister judge hon. Mashaka, J in the cited case of **Nolasco Kalongola V Promasidor (T) PTY Ltd**, Revision No. 17 of 2017 when she declared an application incompetent for containing a defective verification clause of which the essential paragraphs have not been verified as per the law.

All said and done I find that the instant suit is incompetent for being instituted without the authority of the Board of Directors; and that the plaint is fatally unmaintainable for containing a defective verification clause. I therefore struck out the plaint with costs.

Accordingly ordered.



**R. A. Ebrahim**  
**JUDGE**

**Dar Es Salaam**  
**09.10.2020**