

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

AT DAR ES SALAAM

CIVIL CASE NO. 22 OF 2018

KATI GENERAL ENTERPRISES LIMITED.....APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED.....DEFENDANT

IPYANA BERNARD MWALUKASA.....THIRD PARTY

RULING

28th July 2021 & 13th August, 2021.

E. E. KAKOLAKI J

In this matter the Court is moved by the 3rd party to dismiss with costs the whole suit for being incompetent basing on the three points of preliminary objection raised by him going thus:

- (a) The suit is unmaintainable for being filed without appending the Company's Board Resolution to the plaint as required under section 147(1)(a) and (b) of the Companies Act, No. 12, [Cap. 212 R.E 2002].
- (b) The whole suit is bad in law for contravening the provisions of Order VI Rule 15(3) of the Civil Procedure Code, [Cap. 33 R.E 2019], for being improperly verified by a stranger (non Director) to the

Plaintiff's company names Eden Samwel Katininda which is contrary to an extract annexed as Annexure MBA-A to the plaint.

- (c) That the Plaintiff's Company was fraudulently registered by the Registrar of Companies on 13th day of December, 2002 without disclosing that one among the first Director of the Plaintiff's Company namely Felician Eden Katininda was a Minor being born on 03rd date of January, 1997.

Briefly the plaintiff in this case a Limited Liability Company duly incorporated under the Companies Act, [Cap. 202 R.E 2002] is suing the Defendant also a registered Company running financial business as a Bank for unlawful diversion of her funds which were expected to be credited into Plaintiff's account from Pyrethrum Processing Company of Kenya by unlawfully opening account No. 300211237025 in plaintiff's name at Kariakoo Branch, crediting the said money and allowing its withdrawal without the plaintiff's authority. The plaintiff is thus claiming a total amount of Kenya Shillings 8,982,184/= (equivalent to Tshs. 198,481,533.65) and Tanzanian Shillings 100,000,000/= allegedly deposited in the said account plus interest of the claimed amount at the rate of 26% as well as damages arising from embarrassment, loss of Goodwill to their bankers and disruption of their account system and budget resulted from defendant's act and the costs of the suit. When served with the plaint the defendant denied any liability thus filed a third party notice joining the third party as the person responsible for opening the account and withdrawal of the alleged monies. In his written statement of defence the third party squarely resisted the claims against him while raising a Notice of Preliminary points of objection advancing the three above cited grounds.

As a practice of this court when objections are taken the same are to be disposed of first. On the date of hearing parties who were represented agreed to dispose of the objections raised by way of written submissions. The plaintiff chose representation of Mr. James Mwenda learned advocate whereas the defendant and 3rd party enjoyed the services of Mr. Stephen Axwesso and Mr. Simon Mwakolo learned advocates respectively. Submitting in support of the first ground of objection Mr. Mwakolo argued as per section 147(1) of the Companies Act, anything done by the company has to so be done by resolution of the Company's general meeting or of any class of members of the company. He said it is a requirement of the law through case law that any suit instituted in court must be accompanied with a copy of company's resolution which is also appointing the advocate to take conduct of the said suit otherwise the suit will be rendered untenable before the court. In this case he argued, the minutes of company resolution are missing something which renders the suit incompetent before this court. To fortify his stance he referred the court to the cases of **Bugere Coffee Growers Ltd Vs. Sebaduka and Another** (1970) EA 147 which was cited in the cases of **Pita Kempap Ltd Vs. Mohamed I.A. Abdulhussein**, Civil Application No. 128 of 2004 c/F No. 69 of 2005 (CAT-unreported) and **Namburi Agricultural Co. Ltd Vs. Kibelo Agrovvet Supplier**, Civil Case No. 16 of 2018 (HC-Unreported) where it was held:

“ When companies authorise 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...”

As regard to the second ground of objection Mr. Mwakolo intimated, the suit was in contravention of the provisions of Order VI Rule 15(3) of the CPC as the verification clause was verified by a stranger (non Director) to the plaintiff's company as the name of *Eden Samwel Katininda* does not appear in the extract containing names of Directors of the Company as annexed to the plaint. To him the principle of authorization as discussed above through company resolution applies here as the said *Eden Samwel Katininda* was never authorised by the company to verify on behalf of the directors of the company. And on the third ground it was his contention that the plaintiff's company was fraudulently registered by the Registrar of Companies on 13/12/2002 as it was not disclosed to him that the plaintiff's first director one **Felician Eden Katininda** was a minor by then as per the Primary school living certificate indicating he was born on 03/01/1997 which was annexed to the submissions. With all those submissions, facts and law the learned senior counsel for the third party submitted the suit is incompetent as deserves to be dismissed and so prayed the court to do.

Mr. Axwesso for the defendant in his submission almost supported in whole the submissions by the 3rd party. On the first ground he said it is a sacrosanct principle in company law that as the company has a distinct legal personality it has to act through the requisite authority of a resolution sanctioned by the company's board of directors. The authority must be expressly provided and not merely perceived. As in this case the plaintiff pleaded nowhere in the plaint to have the authority of the company's directors to institute or file this suit then the suit is incompetent before the court. He relied on the cases of Bugere Coffee Growers (supra), **Ursino Palms Estates Limited Vs. Kyela Valley Foods Ltd & 2 Others**, Civil Application No. 28 of 2014 (CAT-

unreported), **Tanzania American International Development Corporation 2000 Limited (TANZAM) & Another Vs. First World Investment Auctioneers, Court Brokers**, Civil Case No. 15 of 2017 and **Evarist Steven Swai & Another Vs. The Registered Trustees of Chama Cha Mapinduzi & 2 Others**, Land Case No. 147 of 2018 (HC-unreported).

On the second ground it was his submission that the suit was verified by the person who is not a director, secretary or authorised officer of the company something which is contrary to section 44 of the Company's Act which provides that a document or proceeding requiring authentication by a company may be signed by director, secretary or authorised officer of the company. The said provision he submitted bears the same requirement to that of Order VI Rule 15(3) of the CPC. Since the said **Eden Samwel Katihinda** is not one of the persons registered as directors of the company and since there is no evidence that he was authorised by the board of directors then the provisions of Order VI Rule 15(3) of the CPC was infringed. And with regard to the third ground of objection Mr. Axwesso supported the 3rd party's submission arguing that under section 194 of the Company Act the minimum age for the person to be appointed director of the company is twenty one (21) years only. He invited this court to take inspirational of the decision of the Supreme Court of India in the case of **Oriental Metal Pressing Working Ltd Vs. Bhaskar Kashinath Thakoor Vs. Another** (1961 AIR 573 where the Court said:

"... a director is an office of trust and there should be somebody available on whom responsibility could be fixed. Fixing that

responsibility might be difficult if the director is a minor, therefore a minor cannot be appointed as a director of the company.”

In this case **Felician Eden Kahinda** who was born on 13/01/1997 was five years when the company was registered on 13/09/2002, therefore was not eligible to be appointed and hold the post of director of the plaintiff's company as indicated in Annexure BMA-A item 3 of the plaint. On the strength of the above submission, law and case laws Mr. Axwesso implored this court to dismiss the suit with costs.

In riposte Mr. Mwenda for the plaintiff hastened to submit the submission by the 3rd party is devoid of merits. Responding to the first ground of objection on the requirement of board resolution before institution of the suit he said, the pertinent question to be answered by the court is whether Board resolution is mandatory requirement in which he argued is not. Justifying his answer he submitted, it is not the Company Act that governs the procedure for institution of the suit but rather the CPC. To reinforce his stance he cited the case of **A One Products & Bottlers Ltd Vs. Boge Kompressoren Otto Boge GMBH & Co KG**, Civil Case No. 36 of 2019 (HC- unreported) where this court held the requirement of board authorization for institution of the suit is not expressly stated in the CPC as the requirement under Order XXVIII Rule 1 of the CPC is that in a suit by or against a corporation, the pleading must be signed or verified on behalf of the corporation by secretary or by the director or other principal officer of the corporation. The court further held the requirement for authorization of institution of the suit through a company board resolution by corporation is by large judge made

law traceable to the case of **Bugere Coffee Growers Ltd Vs. Sebaduka and Another** (1970) EA 147. That aside Mr. Mwenda argued the raised preliminary objection was against the principle enunciated in the case **Mukisa Bisacuits Manufacturing Co. Ltd Vs. West End Distributors Ltd** (1969) EA 696 that objection must be on pure point of law, as in this case it would require calling evidence to prove whether there was board meeting properly constituted, the agenda and the resolution passed so as to prove the said preliminary point of objection. To cement his position he cited the cases of **A One Products** (supra) and **Plasco Ltd Vs. Efam Ltd & Fatma M. Rweyemamu**, Commercial Case No. 60 of 2012 (HC-unreported). In **Plasco Ltd** (supra) this Court said:

“The legal requirement for a company to produce, when filing the plaint evidence that the company authorising the suit to be instituted, aside from my holding in the present matter that the existence or non-existence of board resolution requires evidence to establish and therefore cannot be determined as preliminary matter.”

As regard to the second ground of objection on the requirement of Order VI Rule 15(3) of the CPC for verification of the plaint by the director of the company and not the stranger to the suit it was Mr. Mwenda’s response that, the counsel for the third party failed to interpret the provision. To him the issue is whether the principal officer to the company is allowed to sign the pleadings on behalf of the company. He said under the provision the pleadings are signed by the person making it. In this case as the person is the company then the plaint has to be signed through its officers and the

provision governing that procedure is Order XXVIII Rule 1 of the CPC that provides a suit by the company or corporation can be signed or verified on behalf by the secretary or director or principal officer of the company in which in this case the plaint was signed by the principal officer. On the proof whether the officer who signed had authorisation of the board of directors that fact requires evidence hence disqualification of the point of objection from being objection on point of law as per **Mukisa Biscuits** case, Mr. Mwenda tressed.

As to the last ground he submitted the proof whether fraud existed or not during registration of the company is something that requires evidence such as production of leaving certificate to prove the alleged fraud on age of the director, thus this ground does not qualify to be a preliminary objection on point of law. It was Mr. Mwenda's argument that with advent of the principal of overriding objective this point of objection must fail. In view of the above submission he implored the court to dismiss the preliminary points of objection raised and allow the case to proceed on merit with costs. In his rejoinder submission Mr. Mwakolo said the case of **One Product** (supra) relied on by the plaintiff to counter the first ground of objection does not bind this court unlike the cases cited by the 3rd party. On the citation of the case of **Mukisa Biscuits** to imply that the requirement of Board resolution minutes before institution of the suit does not qualify to be points of law for want of proof by evidence he argued that point of law is made through case laws. He said, since judges make law then the case of **Bugere Coffee Growers Ltd** (supra) cited by the 3rd party is relevant and binds this court. As to the case of **Plasco Ltd** (supra) relied on by the plaintiff he submitted it is of no assistance to her as it goes against the decision of the superior

courts' decisions on the same issue as cited by the 3rd party. Otherwise he reiterated his earlier submission and prayers thereto.

I have taken time to visit and consider both parties fighting submission as well as the pleadings. To start with the first ground of objection, it is the law that a company is a legal person independent from its members or shareholders as well as its subscribers. See the case of **Solomon Vs. Solomon and Company** (1879) AC 22. Being a legal person its affairs are entrusted in the hands of directors who always perform all company's activities on behalf of all shareholders. In other words directors are directly responsible for daily running of the company, thus whichever takes place or performed on behalf of the company has to be blessed by the directors through directors meeting.

In this case it not disputed by both parties that when filing this suit the plaintiff did not attach the minutes of the board of directors to exhibit its resolution that the company through its directors or any special class of members authorised the institution of the suit as well as the advocate taking the conduct of this suit to represent it in court. That being the position the only issue with which this court is called to determine is whether it was mandatory for the Plaintiff's company Board of directors' resolution to be attached to the plaint before institution of this suit. While Mr. Mwenda is saying it is not mandatory relying on the cases of **A One Products** (supra) and **Plasco Ltd** (supra) and further that being issue of fact it requires evidence to prove whether the board meeting was conducted and resolution passed, thus disqualification of the ground from being the objection on point of law, Mr. Mwakolo and Mr. Axwesso submit it is mandatory on the strength

of the decisions in the cases of **Bugere Coffee Growers Ltd** (supra), **Ursino Palms Estates Limited** (supra), **Tanzania American International Development Corporation 2000 Limited (TANZAM) & Another** (supra) and **Evarist Steven Swai & Another** (supra). I am at one with Mr. Mwakolo and Mr. Axwesso that it was mandatory to plead and attach to the plaint minutes of board of directors resolution at the time of filing this suit. I so find as anything done by the company has to be so done by resolution of the company general meeting or meeting of any class of members of the company as provided under section 147(1) of the Company's Act, [Cap. 202 R.E 2002]. The section reads:

*147.-(1) Anything which in the case of a company may be done -
(a) by resolution of the company in general meeting, or
(b) by resolution of a meeting of any class of members of the company, may be done, without a meeting and without any previous notice being required, by resolution in writing signed by or on behalf of all the members of the company who at the date of the resolution would be entitled to attend and vote at such meeting:*

The Court of Appeal in the case of **Ursino Palms Estate Limited** (supra) when deliberating on the provisions of Rule 30(3) of the Court of Appeal Rules on whether a corporation must appear by an advocate or directors or managers duly appointed by resolution of the Company cited with approval the case of **Bugere Coffee Growers Ltd** (supra) and said:

*"The provision derives its objective from the principle that, institution of legal proceedings by a company must be authorized either by a company or Board of Directors' meeting. In the case of **Bugerere Coffee Growers Ltd Vs. Sebaduka and Another** (1970) EA 147*

which was cited in the cases of **Pita Kempap Ltd Vs. Mohamed I.A. Abdulhusein**, Civil Application No. 128 of 2004 c/F No. 69 of 2005 (CAT-unreported), the High Court of Uganda held that:

“when companies authorize the commencement of legal proceedings a resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes...”

The Court of Appeal went further to qualify application of the said requirement to the advocate when stated:

“In order to qualify to represent a company therefore, and advocate has to be appointed by a resolution. It was for this reason that in that case, after having found the firm of advocates, Messrs Parkhiji & Co. had acted without having been appointed by a resolution of the company, the suit was dismissed.” (Emphasis supplied)

On the objects for this mandatory requirement of obtaining first sanction of the board of directors before institution of any company’s suit this court had deliberation in a number of cases. In the case of **Masumin Printway and Stationers Limited Vs. M/S TAC Associates**, Commercial Case No. 7 of 2006 (HC-unreported) after referring several cases including the case of **Bugere Coffee Growers Ltd** (supra), the court said:

*“So, on the authorities, it is true that there is a long unbroken chain of case law that a company must authorise by a resolution, the commencement of legal proceedings in its name and the rationale is two folds. **First**, is to show that the company still exist. **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 interest 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."

I subscribe to the above cited cases and I would add sanction of the board of directors before institution of the suit is mandatory as it gives assurance to the defendant that the company will be able to pay his costs should the case be decided in his favour. I have chosen to take the position in the above case as I am bound by the Court of Appeal decision in the case of **Ursino Palms Estate Limited** (supra). The case of **A One Products** (supra) relied upon by Mr. Mwenda to support his stance that it is not mandatory to obtain the board of directors' consent before institution of the suit made reference to the decision of this Court in the case of **Plasco Ltd** (supra). In my opinion both cases supports my finding as they appreciated the fact that the requirement of obtaining the company's authorization before institution of the suit is a judge made law traceable from the case of **Bugere Coffee Growers Ltd** (supra) meaning is the mandatory requirement of the law as it has been religiously followed by courts of this land though not expressly stated under the CPC. This was the position in the case of **Plasco Ltd** (supra), where the Court had this to say:

*"... the requirement for authorizing by the company for instituting a suit 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...**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 147, which has been religiously followed by courts of this country.”
(*Emphasis is mine*)

As regard to the point raised by Mwenda that the first ground does not qualify to be objection on point of law for requiring evidence to prove that the meeting was held by the board, the agenda under discussion and the resolutions reached, I do not find merit on it. As stated above consent of the directors is mandatory before institution of the suit, equally importantly it is the requirement of the law that, minutes of board of directors' resolutions must be pleaded and annexed to the plaint so as to establish to the court's satisfaction at the earliest possible time as well as the defendant that, consent of the board of directors was obtained before institution of the suit. In that regard it does not require evidence to prove whether the board of directors authorised institution of the suit or not as that fact can be established by perusing the plaint and not otherwise. My views find support in the position taken by my sister Maghimbi J, in the case of **Evarist Steven Swai and Another** (supra) when faced with similar situation where she had this say:

“From the foregoing, throughout their pleadings, the plaintiff have not indicated anywhere that the said Board Resolution was passed to authorise institution of the suit. 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...” (Emphasis supplied)

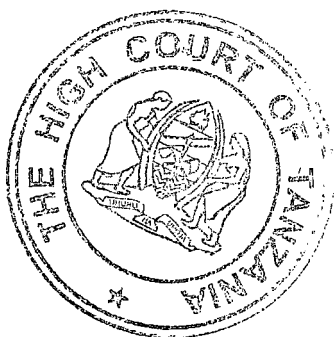
In view of the above deliberation I find the first ground objection has merit and therefore uphold it as the plaintiff ought to have complied with the requirement section 147(1)(a) and (b) of the Companies Act, No. 12, [Cap. 212 R.E 2002] by annexing to the plaint company board of directors' resolution authorizing institution of the suit and appointment of the advocate to prosecute the suit, but she failed to so do. As this ground has the effect of disposing of the matter I see no pressing issue to move me to the next ground.

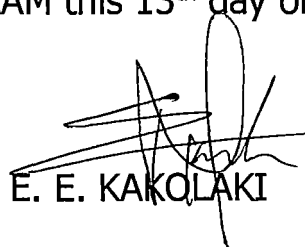
In the premises and for the fore stated reasons, cited law and authorities, I do hereby hold this suit is incompetent and the same is struck out.

Given the nature of the suit, each party has to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 13th day of August, 2021.




E. E. KAKOLAKI


JUDGE

13/08/2021

Delivered at Dar es Salaam in chambers this 13th day of August, 2021 in the presence of Mr. Thomas Mathias advocate for the Plaintiff, Mr. Method Nestory advocate for the Defendant who is also holding brief for Mr. Simon Mwakolo advocate for the 3rd Party and Ms. Asha Livanga, court clerk.

Right of appeal explained.




E. E. KAKOLAKI

JUDGE

13/08/2021