

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CIVIL CASE NO. 5 OF 2019

GSM TANZANIA LTD.....PLAINTIFF

VERSUS

UMOJA WA VIJANA KARAGWE

SAVINGS AND CREDIT CO-OPERATIVE LTD } ... DEFENDANT

(UVIKASA LTD.

RULING

12/08/2021 & 27/08/2021

NGIGWANA, J.

This ruling emanates from the two preliminary objections on point of law raised by the defendant through Mr. Aaron Kabunga, learned Advocate when filing the Written Statement of Defence. The Plaintiff GSM Tanzania Ltd, a Company established and incorporated under the laws of the United Republic of Tanzania sues the defendant UMOJA WA VIJANA KARAGWE SAVINGS AND CREDIT CO-OPERATIVE LTD (UVIKASA LTD), a company incorporated in Tanzania and validly licensed to carry on business, for payment of **TZS 390, 000,000/=** (Tanzania Shillings Three Hundred Ninety Million only) being special damages arising from an alleged contractual business relationship.

The Plaintiff also claims costs of the suit and any other relief as the court may deem fit and just to grant.

The two points of preliminary objection are as follows: -

- (i) *That the suit is bad in law for being preferred against the defendant without any scintilla cause of action known at law.*
- (ii) *That the suit is incompetent and unmaintainable for having been filed without prior approval and written consent of the Board of directors of the Plaintiff directing the institution and commencement of these legal proceedings.*

The parties agreed to argue the preliminary objection by way of written submissions. The defendant had the services of Mr. Aaron Kabunga, learned advocate while the Plaintiff had the services of Ms. Beauttah Camara, learned advocate.

Addressing the court in support of the first limb of preliminary objection Mr. Aaron Kabunga maintained that the suit is bad in law for failure to disclose the cause of action against the defendant. He referred the court to Order VII rule (1) (e) of the Civil Procedure Code Cap. 33 R:E 2019 to emphasize that the issue of cause of action is creature of statute, therefore a party suing must disclose the cause of action and when it arose. He further submitted that a party suing must demonstrate that he has a cause of action and *locus standi* to sue the defendant and that he is defending his right or interest. The learned counsel made reference to the case of **Lujuna Shubi Balonzi Versus The Registered Trustees of Chama cha Mapinduzi (1996) TLR 203**. He further submitted that in this case, the Plaintiff is GSM TANZANIA LTD suing the defendant and the contract which is alleged to have been entered by the parties up on which

the suit hinges and of which constitute the cause of action was entered between GATCO and not GSM Tanzania Ltd.

Mr. Kabunga further submitted that GATCO LTD is a Limited Liability Company established and incorporated under the Companies Act Cap. 212 R:E 2002 hence has legal powers to sue and to be sued in its own name; and in that vain the Plaintiff has no cause of action against the defendant who is not a party to that contract, and no right or interest which has been breached to entitle the Plaintiff bring an action in court against the defendant.

Mr. Kabunga ended his submission that the contract attached to the plaint speaks itself that the defendant had a binding contract with GATCO but for reasons not disclosed, GSM TANZANIA LTD a third party who was not privy to that contract is suing, and that is not acceptable since the two are distinct creatures in law.

Opposing the first limb of objection, Ms. Beuttah for the plaintiff, submitted that the demand note which was annexed to the plaint as Annexure X-2 shows that the plaintiff was formally known as GATCO LIMITED hence the plaintiff and the supposed GATCO LIMITED are one and the same entities. She further submitted that, the defendant is aware of this fact as he received the said Annexure on 28/12/2018. The learned counsel quoted section 31 (4) of the Companies Act, Cap 212 R: E 2019 to emphasize that a change of a name by a company shall not affect any rights or obligations of the Company or render defective any proceeding by or against the company. She added that the plaintiff sued on its own proper name and is

the proper party to enforce its rights against the defendant who owes it. She ended her submission urging the court to overrule the objection.

To start with the 1st limb of objection, I would like to state that, it is a cardinal principle stipulated under Order VII rule 1(e) of the Civil Procedure Code Cap. 33 R: E 2019 as correctly stated by Mr. Kabunga that a plaintiff must disclose a cause of action against the defendant.

Now the question is what amounts to "cause of action". Courts in various decisions including a decision in **Stanbic Finance Tanzania Ltd versus Giuseppe Trupia and Chiara Malavasi [2002]** TLR 221 have defined "a cause of action" as facts which give a person a right to judicial redress, or relief against another as found on the Plaintiff and its annexures. Mulla in the Code of Civil Procedure (12th edn) Vol. 1, 120 defined "a cause of action as a set of facts sufficient to justify a right to sue someone, and upon proof attract remedies. It is a settled proposition of the law that a plaintiff discloses a cause of action if it shows that the plaintiff enjoyed a right; that the right was violated, and the violation is by the defendant.

In determining whether a plaintiff discloses a cause of action, the court must look at the plaintiff, and annexures thereto with an assumption that all facts as pleaded are true. See **Norattam Bhatia & Hemantini Bhatia versus Boutique Shazim Ltd** SCCA No.16 of 2009

In our case, I have revisited the Plaintiff and annexures thereto and found that at paragraphs 3, 4 and 5 of the Plaintiff it is pleaded that the suit is based on breach of contract.

A contract is a voluntary, deliberate and legal binding agreement between two or more competent parties. Parties to the contract are bound only by

its terms or contents of the contract. Performance that falls short of what has been agreed in the terms of the contract constitute a breach of contract, and the injured party has the right to take action against the party who has failed his ~~part of contract.~~

In our case, the question is who were the parties to the contract? As correctly submitted by Mr. Kabunga, in this case there was a business contractual relationship, between **GATCO LTD**, a Company established and incorporated under the Laws of the United Republic of Tanzania and the defendant UMOJA WA VIJANA KARAGWE SAVINGS AND CREDIT CO-OPERATIVE (UVIKASA LTD), it was entered on 26/07/2016.

It is Mr. Kabunga's submission that, the GSM TANZANIA was a third party who has no privity to the contract hence has no right to institute a suit against the defendant. On her side Ms. Beauttah Camara, relied on the demand note which annexed to the plaint as Annexure X-2 to stress that GATCO LIMITED has changed its name to GSM TANZANIA LIMITED, and that the same was duly served to the defendant.

Reading the said demand letter, it is not difficult to note that it was not specifically meant to inform the defendant that the Company has changed its name from GATCO LIMITED to GSM TANZANIA LIMITED, but it was aimed to demand the payment of TZS 411,232,000/= from the defendant. No certificate of change of name was annexed to the plaint on that effect. No specific paragraph was set in the plaint stating that the plaintiff was formally known as GATCO LIMITED. Notwithstanding my observation, the Demand note being part of the annexures which must be considered

together with the plaint has shown that plaintiff was formally known as GATCO LIMITED. Part of it read;

"We, GSM TANZANIA LIMITED formally known as GATCO LIMITED are issuing this demanding letter to you in pursuant to our contract which was entered between your Company **Umoja wa Vijana Karagwe Savings & Credit Co-operative** and our Company **GATCO LIMITED** on the sale of GSM Motorcycles which were landed to your Company". The demand letter was received by the defendant on 28/12/2018.

In that premise, this court is in agreement with the learned counsel for the plaintiff that a plaint discloses a cause of action because it shows that the plaintiff enjoyed a right arising from contractual relationship; that the right was violated, and the violation is by the defendant. It is obvious that the plaintiff has locus **standi** to sue the defendant according to law.

As regards the second limb of objection, Kabunga submitted that looking at the Plaint and annexures attached to the plaint, there is no where it is indicated even impliedly that the Board of Directors consented to the commencement of these proceedings. He added that had it been that the Board of Directors were consulted they would not have sanctioned such a frivolous, vexatious and unfounded claims. The learned counsel went on submitting that according to the Companies Act Cap. 212, the company resolution for instituting suits in court is mandatory. He also made reference to the case of **Pita Kempak Ltd versus Mohamed I.A. Abdul Hussein, Civil Application No. 128 of 2004** where the Court of appeal quoting with approval the case of **Bunyere Coffee Growers Ltd versus Sebaduka and Another (1970) EA 47** held that a company must make

resolution regarding commencement of legal proceedings and that would help to avoid filing of cases without any cause of action.

On her side, the learned counsel for the plaintiff submitted that such a requirement is not mandatory taking into account that the plaintiff is a legal entity able to sue and be sued. It is also the contention of the plaintiff that on ascertaining whether the plaintiff had authority to sue or not is a matter of evidence and fact which cannot be ascertained at the stage of preliminary hearing objection; thus, the objection ceases to be on point of law rather on a point of fact. Furthermore, the plaintiff maintained that the court has a duty to administer justice without undue regard to technicalities, and asked the court to apply the principle of Overriding Objectives

In my considered view, the 2nd limb of the preliminary objection relates to matters of procedure and has nothing to do with the facts of the case. It should be noted that the Principle of Overriding Objective was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. In other words, it was not meant to be used by litigants as a panacea to the mandatory procedures.

I do agree with Mr. Kabunga that this suit was filed without prior approval or written consent of the Board of Directors. I subscribe with the decision of my learned brother R. A. Ebrahim, Judge in the case of **Bashasha Merchandise Dealers Ltd and Another versus, Equity Bank of Tanzania Ltd and Another, Civil Case No. 215 of 2019** HC DSM (unreported) that a company through Board of Directors or members has to authorize the commencement of legal proceedings by passing a

resolution and that the plaint should expressly reflect that there was a resolution authorizing the filing an action to avoid insurmountable preliminary objections. I am also guided by section 181 of the Companies Act No. 12 of 2002, Cap. 212 R: E 2019 which reads;

"Subject to any modifications, exceptions, or limitations contained in this Act as in the company's articles, the directors of a company have all the powers necessary for managing and for direction of and supervising the management of, the business and affairs of the company".

Now taking into consideration the policy of the company, financial implications and costs associated with the legal proceedings when the matter is decided against the company, it appears imperative for the Directors/Board of Directors of the Company vested with powers to manage, direct and supervise the business and affairs of the company to pass a resolution authorizing the institution of an action to avoid the company being taken by surprise and fall into legal crisis which could have been avoided or lessened.

However, a company does not need authorization or Board of resolution when it is being sued, but it certainly needs the resolution if it is the one instituting/commencing the suit as Plaintiff. See **Ursino Palms Estate Limited versus Kyela Valley Foods Ltd and 2 Others**, Civil Application No.128 2014 CAT (Both unreported). In our case, GSM TANZANIA LIMITED is suing as a plaintiff therefore authorization/resolution was mandatory.

Again, in this case, one of the conditions of the contract attached to the plaint is to the effect that, in case of any dispute, the same has to be

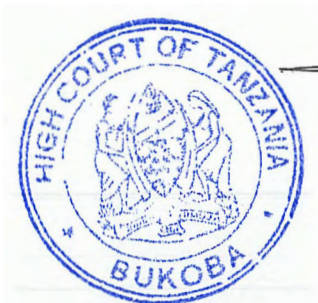
settled amicably, and that parties will go to court as a last resort. Item 6(2) of the said contract read:

"Mgogoro wowote utakao tokea utatatuliwa kwa njia ya mapatano na iwapo njia ya mapatano ikishindikana basi mgogoro utawasilishwa mahakamani kwa mujibu wa sheria za Tanzania".

It is not shown in the plaint that the parties complied with this condition before coming to court and that shows that the suit was prematurely filed. Under the circumstances of this case, I find the 2nd limb of preliminary objection meritorious and I sustain it. The suit is therefore incompetent, consequently, it is struck out with costs.

It is so ordered.

Dated at Bukoba this 27th day of August, 2021




E.L. NGIGWANA

JUDGE

27/08/2021

Ruling delivered this 27th day of August, 2021 in the presence of Mr. Frank Karoli John, learned counsel for the defendant, also holding brief for Ms. Beauttah Camara, learned advocate for the plaintiff, and in the presence of Mr. E. M. Kamaleki, Judges' Law Assistant.




E. L. NGIGWANA

JUDGE

27/08/2021