

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

**IN THE SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**CIVIL CASE NO. 24 OF 2021**

**YOBAMA AND SONS COMPANY LTD.....PLAINTIFF**

**VERSUS**

**RAHA OIL LTD.....DEFENDANT**

**RULING**

13<sup>th</sup> July & 4<sup>th</sup> August, 2022

**DYANSOBERA, J.:**

The parties in this suit did, on 21<sup>st</sup> day of July, 2021 enter into a lease agreement whereby the defendant leased to the plaintiff his factory industry located at Nyakato Industrial Area, Mwanza City for production of edible cotton oil. The term of the agreement was three months commencing from the date of entering in to the lease agreement to 30.9.2021 at a monthly rental fee of Tshs. 45,000,000/=.

The plaintiff then failed to make production in time as agreed. The production was there by stopped. It is the plaintiff's complaint that the defendant unlawfully seized the defendant's raw materials and goods worth Tshs. 48,453,000/= in the factory and closed the factory preventing him from accessing to the factory.

He is claiming, therefore, Tshs. 1.5m/- being expenses the plaintiff incurred in repairing and replacing machinery in the leased factory, Tshs. 48,453,000/= being compensation for the defendant's seized raw materials and goods, Tshs. 390,000,000/ being loss of anticipated revenue as well as Tshs. 60m/- as loss of anticipated revenue and Tshs. 5,200,000/= for legal services. The plaintiff is also claiming general damages costs of the suit interest any other remedies.

On his part, the defendant has not only resisted the claims but also has filed a counter claim claiming Tshs. 90m/- being outstanding rental arrears that the plaintiff has failed to pay as per lease agreement dated 1<sup>st</sup> day of July, 2021 arguing that the plaintiff managed to pay the defendant Tshs. 45, 000,000/= as rental fees for the month of July and remained to be indebted the rent arrears of two months, which is August and September, 2021 totaling Tshs. 90,000,000/=.

It is further averred in the counter claim that up to date, the plaintiff has vacated the defendant's factory after the expiry of the lease agreement without paying rental arrears which he was indebted by the defendant despite of several oral reminders from the defendant. In the written statement of defence to the counter claim

the plaintiff has also raised two preliminary objections on the grounds that:-

- (a) The counter claim is incompetent before the court for want of jurisdiction.
- (b) That the counter claim has been prematurely filed.

In disposing of the preliminary objection in writing, Mr. Anthony Nasimire, learned Advocate, represented the plaintiff and submitted in support of the preliminary objection while Mr. Geoffrey Reuben Kishosha of Katemi & Associates Advocates, learned Counsel, stood for the defendant and argued in opposition to the preliminary objections.

Arguing in support of the preliminary objection, Counsel for the plaintiff had the following to submit. With respect to the first preliminary point, he submitted that the pecuniary jurisdiction of the High Court for recovery of rent is provided for under section 37 (1) (a) and (b) of the Land Disputes Courts Act [Cap. 216 R.E.2019] to be that which exceeds 300,000,000/= for recovery of possession of land or immovable property and in other proceedings where the subject matter may be estimated at a monetary value Tshs 200,000,000/=. It is the argument of the learned Counsel for the plaintiff that the

defendant's claim of Tshs. 90,000,000/= in the counter claim does not exceed Tshs 200,000,000/=.

Further that under section 13 of the Civil Procedure Code, the defendant was enjoined to institute the suit in the court of the lowest grade competent to try it which is the District Land and Housing Tribunal and not before the High Court as she did.

Regarding the second preliminary point on the failure to comply with section 13 (4) of the Land Disputes Courts Act as amended by section 45 (c) of the Written Laws (Misc. Amendments) (No. 3) Act, 2021, Mr. Nasimire argued that having seen that jurisdiction wise the counter claim needs to be accommodated at the District Land and Housing Tribunal, the defendant is required to approach the Land courts with a certificate from a Ward Tribunal that certifies the failure to solve the matter amicably. He argued the court to find the claim to be premature for lack of such certificate.

On the absence of the resolution of the board to sanction the institution of the counter claim, it was submitted on part of the plaintiff that the counter claim is a suit in itself and there it was necessary to be commenced. To buttress this argument, Counsel for the plaintiff cited the cases of **Bunyerere Coffee Growers Ltd v. Sebaduka and Another** [1970] EA 147 and **Pita Kempap Ltd v. Mohamed**

**I.A. Abdul Hussein**, Civil Application No. 128 of 2004 Cf No. 69 of 2005 (unreported). He clarified that the defendant being a limited company going by the name Raha Oil Limited had to institute the suit after it had passed the appropriate resolution to that effect. Mr. Nasimire concluded that since this case was instituted in contravention of the law, it is not proper before this court.

Responding to the submission of learned Counsel for the plaintiff, Mr. Geoffrey Reuben Kishosha of Katemi & Associates Advocates, put forward that the preliminary objections have no legal justification. He argued that the claim in the counter claim arises from the Lease Agreement contract, the matter in issue filed by the plaintiff where the defendant is also claiming breach of the contract. He is of the view that the counter claim is connected with the plaintiff's claim and the two suits should be conveniently tried together as they are intertwined. In support of this argument, Counsel for the defendant relied on the case of **Nobert Mbowe t/a Gasoil Consulting Group v. Issasck Mwamasika and 2 others**, Civil Case No. 204 of 2019.

With respect to the second point of preliminary objection, Counsel for the defendant contended that the preliminary objection is misconceived in that the law does not compel a party whose case or suit or is intending to be filed before the High Court to be accompanied

or must be attached with the certificate form of disputed resolution from the Ward Tribunal showing that mediation has been conducted and marked unresolved, it only applies where the suit is to be filed in the District Land and Housing Tribunal.13 (4) of the Land Disputes Courts Act as amended by the Written Laws (Misc. Amendments) (No. 3) Act No. 5 of 2021 does not apply in case the matter is triable by the High Court, Counsel for the defendant insisted. He was also emphatic that this counter claim cannot be tried separately from the case of the plaintiff because the subject matter of the counter claim is the same as that of the main suit.

As to the issue of a company resolution, Counsel for the defendant maintained that the preliminary objection is misconceived because the defendant is in the process of defending the claim raised by the plaintiff, raising a counter claim in the written statement of defence does not require a board resolution, else, the raising of this issue is premature at this stage as the defendant still has a room to file a list of documents to be relied upon.

Finally, Counsel for the defendant was of the view that even if it was necessary for the party raising a counter claim to have a company resolution to sue, the said preliminary objection does not qualify to be a pure point of law.

In his rejoinder, Counsel for the plaintiff re-iterated what he had submitted in chief insisting that since the counter claim has been instituted in contravention of the law and hence not properly before the court, the same is prematurely filed and misconceived.

Having considered the preliminary objections and the rival arguments of learned Advocates, my finding is as follows. A counter claim is the claim raised by the defendant opposing the plaintiff's claim which seeks some relief from the plaintiff. There is no doubt that the counter claim is governed by the rules that regulate the claims made by the plaintiff in his suit with the exception that it is a part of the answer the defendant advances in response to the plaintiff's complaint.

It is trite that the facts to prove the counter claim may refer to an entirely different claim that the defendant has against the plaintiff or they may refer to the same event that gave rise to the plaintiff's cause of action. It is the contention of learned Counsel for the defendant that the facts to prove her counter claim refer to the same event that gave rise to the plaintiff's cause of action. With respect, I agree. According to the pleadings and the submissions, the counter claim arises from the of lease agreement contract which is same transaction or occurrence on which the plaintiff is suing. This is termed

as a compulsory counter claim and for that reason cannot be made later or in a separate suit. The aim is to turn a table on the plaintiff by bringing up more issues in the suit and demand redress.

For the reasons I have attempted to give, I find that the court has jurisdiction to entertain the counter claim and the same has been properly filed. I hold that the first preliminary objection of the plaintiff is misconceived and devoid of any merit

As far as the second preliminary objection is concerned, I agree to the submission of Counsel for the defendant that it is devoid of merit. The amendment to section 13 (4) of the Land Disputes Courts Act brought about by section 45 (c) of the Written Laws (Misc. Amendments) (No. 3) Act, 2021 cannot apply in the present matter. This is partly because, the case is before the High Court and not before the District Land and Housing Tribunal and Counsel for the plaintiff has no quarrel with this obvious fact and partly because, the counter claim on which the said preliminary objection is pegged arises from the same transaction or occurrence on which the plaintiff is suing and as indicated above, it is a compulsory counter claim.

On the argument that in the absence of a board resolution of the defendant's company authorizing her to institute the counter claim, the claims by the defendant in the counter claim are both



premature and misconceived, my observation is as follows. There is a strong and unbroken chain of authorities that a company must authorise, by a resolution, the commencement of legal proceedings in its name. In that respect, there is no dispute that a resolution of a company or Board of Directors authorising a party to the case to sue is mandatory. For instance, Section 181 of the Companies Act No. 12 of 2002, clearly states that:-

“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”.

The rationale for this principle is not far to find. First, it is to show that the company exists. Second, to show that the decision has been reached in accordance with its Constitution and Articles of Association and, therefore, legally binding. As rightly pointed out by Counsel for the plaintiff, such authorization by way of a resolution is mandatory. This was clearly expressed in the cases of **Bugerere Coffee Growers Ltd v. Sebaduka and Another** [1970] EA 147 and **Pita Kempap Ltd v. Mohamed I.A. Abdul Hussein**, Civil Application No. 128 of 2004 Cf No. 69 of 2005 (unreported) cited by Mr. Nasimire.

For that matter, the concept of resolution of Board of Directors as far as the company is concerned is a question of law.

However, as rightly argued by learned Counsel for the defendant, the existence or non-existence of a resolution of a Board is a question of fact. In other words, to establish whether the resolution exists or not is a question of fact to be proved in evidence owing to the fact that the question whether the defendant's Board of Directors has authorized the institution of this suit by way of counter claim is the defendant's internal affairs and none of the business of the plaintiff. To that extent, such question of fact has to be raised in a substantive action so that the parties address the court on not only whether there is an authorization to the defendant to file the counter claim this suit but also whether the plaintiff has such authorization to file this suit. This is a fact the court has to investigate.

This court, in the case of **Mwananchi Insurance Company Ltd v. Commissioner for Insurance**, Misc. Commercial Cause No. 2 of 2016 in which the case of the **Soitsambu Village Council v. Tanzania Breweries and another**, Civil Appeal No. 105 of 2011, a decision of the Court of Appeal was quoted, observed at pages 4-5 thus:

“Where the court is to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law...It treats as a preliminary objection only those points that are purely law, unstained by facts or evidence”.

With respect, I subscribe to that legal exposition. With that observation, I am satisfied and hereby find that the preliminary objection that there is no resolution of the board of Directors of the defendant authorising the institution of the defendant’s suit by way of counter claim is, at this stage, misconceived and I, accordingly, overrule it.

All in all, I dismiss the two preliminary objections raised by the plaintiff and make an order that the suit and counter claim proceed as per law prescribes.

Costs to be in the main cause.



  
**W.P. Dyansobera**  
**Judge**  
**4.8.2022**

This ruling is delivered under my hand and the seal of this Court on this 4<sup>th</sup> day of August, 2022 in the presence of Advocate Joseph Madukwa holding brief for Mr. Kishosha, learned Counsel.

  
**W.P. Dyansobera**  
**Judge**