THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CIVIL APPEAL NO. 12 OF 2022

(Originating from the Court of Resident Magistrate of Mbeya in Civil Case No. 20 of 2021)

MASALENI LINNER COMPAMY LIMITED .....APPELLANT

VERSUS

ELIBARIKI MCHAKI .....1ST RESPONDENT

OBO INVESTIMENT LIMITED .....2ND RESPONDENT

JUDGMENT

Date of last order: 20th October, 2022

Date of judgment: 5th December, 2022

NGUNYALE, J.

The appellant instituted Civil Case No. 20 of 2021 in the Court of Resident Magistrate of Mbeya at Mbeya claiming payment of Tanzania shillings 184,200,000/= for wrongful conversion of the motor vehicle with registration No. T956CPL made Mistubishi Fuso, payment of general and punitive damages to be assessed by the court and other reliefs as was pleaded. In their defence the defendants now respondents denied the claim, in addition they filed a notice of preliminary objection consisting

two points of law **one;** that the suit is incompetent and bad in law in that it was not preceded by a board resolution to sue (that it has not been pleaded and no board resolution is annexed to the plaint, **two;** that the suit is bad for misjoinder of cause of action and parties.

The parties submitted for and against the first objection. In its ruling the Magistrate after considering arguments sustained the first objection and the suit was struck out with costs. This decision aggrieved the appellant and has filed memorandum of appeal consisting two grounds;

1. *That the trial magistrate erred in law in ordering the appellant's suit to be struck out for want of board resolution to sue*
2. *The trial magistrate erred in law and fact for not considering the authorities cited during hearing of the preliminary objection.*

When the appeal came on for hearing Ms. Secilia Luhanga, learned advocate appeared for the respondents whereas Mr. Austach Mushi, the director entered appearance for the appellant. Disposal of the appeal was in form of written submission, dutifully parties complied with the scheduling order of the court.

In the submission the appellant is faulting the trial Magistrate to struck the suit based on preliminary objection on ground that there was no board resolution without considering that there are two schools of thought on

issue, the first school advocating for attaching board resolution authorising institution of the suit and the second school considers attaching board resolution as a matter of evidence which cannot be resolved as a preliminary objection.

On his part he submitted he supports the second school of thought. He outlined for points for his argument, **one** that it is a matter of evidence which cannot be disposed as a preliminary objection. He cited the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors** [1969] EA 696 and **One Products and Bottles Limited vs Boge Kompressoren Otto Boge GMBH &CO KG**, Civil Case No. 3 of 2019 HCT at Dar es Salaam in support of the argument.

Two; not the requirement of the law, referring to order XXVIII of the Civil Procedure Code [Cap 33 R: E 2019 now R: E 2022] (the CPC) which only requires pleadings to be signed by authorised officer. He cited the case of **Plasco Ltd vs Efaham Ltd & Another**, Commercial Case No. 60 of 2012. **Three**; indoor management principles, he cited the English case of **Roya British Bank vs Turquard** [1856]6 E&B 327 and the Tanzanian case of **East African Cable Limited vs Spencon Service Ltd**, Commercial Case No. 42 of 2016 HCT at Dar es salaam. **Four**; overriding objective principles enshrine under the CPC which required the court to

strive achieving substantive rights than technicalities. He prayed the appeal to be allowed with costs and the file to be remitted back for continuing from the stage it ended.

In reply Ms. Secilia submitted that the requirement of there being board resolution authorising institution of the suit is embodied under section 35(2) of the Companies Act cap 212. She added that directors are not required to commence suit without consent of board resolution by citing the cases of **Milo Construction Company Ltd vs Mar Florence Mtetemele & Others**, Misc. Commercial Case No. 16 of 2009 and **Grant Machine and Equipment Ltd vs Gilbert R. Mlaki,** Civil Case No. 5 of 2019, HCT at Mbeya.

On the second ground she submitted that the trial Magistrate considered all the authorities which was cited to him which was distinguishable with their case and came to conclusion he did. In the end she prayed the appeal to be dismissed with costs.

In rejoinder the appellant has the similar submission except that he came with new authorities to support grounds of appeal and not as reply to submission of the respondents which I have found not necessary to recite here as it goes against the rules of filing rejoinder.

Having considered the submission of both parties for and against the grounds of appeal, the only issue calling for my determination is whether the appeal is meritorious.

I wish to start with a note that there are two schools of thought on the issue under contest, the first school holds the view that it is not mandatory requirement to attach board resolution at the institution of the suit, and the second school advocates that failure to attach a board resolution at the time of institution of the suit makes it unmaintainable. This has been acknowledged in the number of cases to wit **CRDB Bank PLC vs Ardhi Plan Limited & Others,** Commercial Case No.90 of 2020, HCT, Commercial Division at Dar Es Salaam, **Plasco Ltd vs Efam Ltd & Another**, Commercial case No. 60 of 2012, **Resolute Tanzania Ltd vs LTA Construction Ltd & Other**, Commercial Case No. 39 of 2012 (all unreported). All these cases have been decided at the High Court level, as now I have not come across with the authority of the Court of Appeal on the issue. But for suits in the Court of Appeal the situation is different as rule 30(2) of the Tanzania Court of Appeal Rules, 2009 as amended by G.N. No. 344 of 2019 clearly stipulates that there have to be a board resolution authorising commencement of legal proceedings. The Court of Appeal Rules unfortunately is not applicable in courts below it.

In this appeal the appellant is faulting the trial Magistrate for his failure to follow the first school of thought based on the authorities he cited to him, the respondent holds a different view by favouring the trial magistrate who was in favour of the second school of thought. From the contending arguments I start with general preposition that our legal system is one based on the application of the doctrine of precedent that the lower courts are bound by judgments and decision of the high court or court of appeal.

In this appeal the trial Magistrate was faced with a point which at the High Court the matter has not been settled, that is judges are divided as to whether or not institution of the suit by the company requires to be sanctioned by board resolution. The appellant counsel is in favour of the first school, all the argument he made in this appeal are those which was placed before the Magistrate. I have gone through the ruling of the trial court and found that the Magistrate considered the case of **East African Cable Limited** (supra) which was cited to him by the appellant and came to the conclusion that circumstances deferred. In particular he found that in the former facts as to board resolution was pleaded and the same attached except that not all directors signed the plaint while in the later nothing has been pleaded and no board resolution was attached.

The appellant in the trial court and this court, relied on the decision of this court to support his stance which is not binding on me. I expected the appellant to come with a decision of the Court of Appeal which binds all courts below it and, on that situation, it could confidently be argued that the Magistrate felt into error or the case did not come to his attention for this court to arrive at a different conclusion. Given that there are two schools of thought in the matter, the Magistrate cannot be faulted for being in favour of either school of thought.

The appellant counsel feel that the trial Magistrate ought to have invoked overriding principles, in the passing based on what have been taking place it was in the discretion of the Magistrate to follow either school of thought because whatever decision he reached was based on sound principles of the law. The matter has been prolonged by the appellant herself because after the suit being struck out, she had time to procure the board resolution and commence a fresh suit. Based on the nature of order test. the doors were not closed to her to file the suit in the same court. See the cases of **Jitesh Jayantilal Ladwa & Another Limited vs Dhirajlal Walji Ladwa & 2 others,** Civil Appeal No. 435 of 2020, CAT at Dar es Salaam, **Prime Catch (Exports) Limited vs Diamond Trust Bank**

Tanzania Limited, Civil Application No. 296/16 of 2017, CAT at Dar es Salaam (both unreported) in which the court held that;

> *'Does the judgment or order as made, finally dispose of the rights of the parties? If it does then... it ought to be treated as a final order, but if it does not it is then interlocutory. From the above, it is our view that an order or decision is final only when it finally disposes of the rights of the parties. That means that the same order or decision must be such that it could not bring back the matter to the same court.'*

The same is embodied under section 74 (2) of the Civil Procedure Code [cap 33 R: E 2022] which bars appeal against or made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other tribunal, unless such decision or order has effect of finally determining the suit.

Based on what has been said and done, the trial court decision cannot be faulted and I find no reason to do so because the Magistrate acted in accordance with the principles of the law in reaching the decision he pronounced. To that end the appeal is dismissed with costs. It is so ordered.

DATED at MBEYA this 5th day of December, 2022

D.P. Ngunyale
Judge