

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO.206 OF 2022

EMITAC MOBILE SOLUTIONS LLC.....PLAINTIFF

VERSUS

ZANZIBAR TELECOM LIMITED.....DEFENDANT

RULING

15/02/2023 & 21/04/2023

POMO; J

The plaintiff, EMITAC MOBILE SOLUTIONS LLC, filed this suit against the defendant claiming, among others, for payment of the United States Dollars to the tune of 174,047.15. The claim arises out of the allegedly breach of contract they entered into on 21/10/2008 for supplying products and performing services. The said contract was amended on 15th August, 2012 to include Blackberry Complete Service and Blackberry Social Service. That, it was the terms of contract that when the plaintiff issues an invoice the defendant had to effect payment within thirty-five days of the invoice.

That, on 24th November, 2016, without making good the outstanding invoiced balance, the defendant terminated the contract. It is that facts which moved the plaintiff to file the herein suit

The suit has strenuously encountered three objections on point of law the notice of which being embodied into the defendant's written statement of defence filed on 19th December, 2022. The objections read as follows: -

- 1. To the extent that the plaintiff claims for unpaid invoices as from 5th August 2021 to 1st October, 2016, the total of USD 167,787.09 cannot be claimed in terms of Item 7 of Part I to the Schedule of the Law of Limitation Act, [Cap 89 R.E.2019], the claim is time barred*
- 2. In terms of section 40(2)(b) of the Magistrate' Courts Act, [Cap 11 R.E.2019], this court does not have pecuniary jurisdiction to entertain the claim of USD 6,260.06*
- 3. That, the suit is incompetent for want of Board Resolution to authorize the Plaintiff to institute legal proceedings against the Defendant*

On 15th March, 2023 I ordered hearing of the defendant's above mentioned objections be argued by way of written submission, the order which is complied with by the parties

Arguing in support of the 3rd objections on point of law, Ms. Caster Lufungulo, learned counsel for the Defendant submitted that the suit is incompetent for want of Board Resolution to authorize the plaintiff to institute legal proceedings against the Defendant. That, a company has distinct legal personality in that it can not act on itself or on its own rather it has to act through requisite authority of a resolution sanctioned by the company's board of directors which must be expressly provided and not merely perceived.

That, in this suit nowhere is pleaded in the plaint that there is board resolution of the board of directors authorizing and /or sanctioning the institution of the suit against the defendant. In support of the argument on that requirement the learned counsel cited to this court the following decisions. **Bugere Coffee Growers Limited Vs Sebaduka and Another** [1970] EA 147, **Ursino Palms Estate Limited Vs Kyela Valley Ltd & 2 Others**, Civil Application No.28 of 2014 CAT at Dar es Salaam (Unreported); **Tanzania American International Development Cooperation 2000 Limited (TANZAM) & Another Vs First World Investment Auctioneers, Court brokers**, Civil Case No.15 of 2017 HC at Arusha (Unreported); **Evarist Teven Swai & Another Vs The Registered**

Trustees of Chama Cha Mapinduzi & 2 Others Land Case No.147 of 2018 HC (Land Division) at Dar es Salaam (unreported). That, all these cases insist that the suit by the company to be filed basing on the board resolution of the board of directors and reasons for that stance is explained in those authorities.

That, since this suit is filed in violation of the above requirement having not been supported by the company's board resolution then it is not maintainable and it be dismissed with costs.

Responding to the 3rd Preliminary Objection on point of law, Mr. Eric Magige, for the Plaintiff is of the contention that institution of the civil suit is governed by the provisions of the Civil Procedure Code [Cap 33 R.E.2019] (the CPC) and not the Companies Act. That, the provisions clearly so state under Order XXVIII of the CPC when it comes to institution of a civil suit by a corporation, arguing that the precedents cited by the Defendant in support of the third preliminary objection that the Board Resolution is a mandatory requirement for the Company to Commence a legal proceeding cannot warrant the striking out of the suit.

It is Mr. Maige's further argument that the issues of Board Resolution is a matter of fact and not pure point of law, and in the instance at hand, if it has to be considered as a mandatory requirement then the Court of law will need to satisfy itself, in the course of hearing and not at preliminary stages, with the evidence as to:-

- (i) Whether there were properly Boards meeting.
- (ii) That the issue in the Suit was within the agenda to be discussed in the Meeting.
- (iii) That the resolution to that effect was passed

To support the above contention Mr. Maige has cited the decision of this court in **Resolute Tanzania Limited vs. LTA Construction (Tanzania) Limited & 3 others, Commercial Case No. 39 of 2012** High Court (Unreported) where Hon. A. Mruma, J emphasized that:

"I am aware that so far there are two schools of thought regarding this point. One school of thought is of the view that it is mandatory for the company to produce (probably on filing the Complaint), evidence that the company authorized a suit to be instituted, [see St. Bernard's Hospital Co Ltd vs. Dr. Linus Mlula Chuwa Commercial Case No. 57 of 2004 (unreported) and Bugerere Coffee Growers Ltd vs Sebanduka

and Another [1970] EA 1471. I do not belong to that school. The second school of thought [which I fully associate myself with], is of the view that requiring proof of authority from the company before instituting a suit does not qualify to be a preliminary objection because a preliminary objection must be on the pure point of law”.

Mr. Magige further argued that in the **Plasco’s Ltd case (Supra)** it was emphasized that the requirement for authorization for a company in instituting a suit is not expressly stated in the CPC or any other written laws dealing with institution of actions in this country. That, Order XXVII Rule 1 of the CPC simply requires in a suit by or against a corporation, pleadings to be signed or verified on behalf of the corporation by the secretary or by director or other principal officer of the corporation who is able to depone to the facts of the case. That, if the parliament intended that a board resolution be a requirement for instituting a suit by corporation it would have expressly so stated. Therefore, such requirement for a company’s board resolution authorizing institution of a suit by a corporation is largely judge’s made law, traceable from the **Bugerere Coffee Growers Ltd vs. Sebaduka and Another [1970] EA 1471**, which has been religiously followed by courts in this country. He cited the case of **A ONE PRODUCTS AND BOTTLERS**

LIMITED Versus BOGE KOMPRESSOREN OTTO BOGE GMBH & CO KG. Civil Case No. 36 of 2019 HC at DSM (Unreported) and informed this court that all the cases he cited are referred therefrom and the view in them is that the requirement of Boards Resolution is not a legal requirement

Regarding the cited case of ***Ursino Palms Estate Limited versus Kyela valley Foods LTD and another, Civil Application No. 28 of 2014***, a decision of single Justice of Appeal, Mr. Maige contends that the issues observed in it were distinguishable in the matter at hand in that it addressed the issue as to whether a person making an application for revision of the High Court Decision against a dismissal order to the Court of Appeal, can appear and represent the Company in the Court of Appeal without the Resolution authorizing him to the same effect. That, it is on the above reason the Justice of Appeal reproduced the rationale that some Courts have been requiring the Board resolution. Yet, in the findings there is nowhere it was decided that the issue of board resolution is a mandatory requirement for the Company to annex or plead in the Complaint when instituting a suit in a Court of law.

Advancing his argument further, Mr Maige submitted that the decision by the Court of Appeal in **Ursino Palms** case (**supra**) from which the defendant is seeks reliance was decided *per-incurium* despite of dealing with different fact from the one at hand. According to him it was because the Justice of Appeal expressed opinion in relation to the case of **PITA KEMPAMP LTD Vs MOHAMEDI ABDULHUSSEIN CIVIL APPLICATION NO 128 OF 2004 C/S No. 69 of 2005**, CAT AT DSM, in which the Court of Appeal of Tanzania cited with approval the decision in **BUGERERE COFFEE GROWERS LTD Vs SEBADUKA AND ANOTHER (1970) EA147**. That, the position in **Bugerere's** case was overruled by the Court of Appeal of Uganda in **UNITED ASSURANCE CO. LTD VS. ATTORNEY GENERAL, CIVIL APPEAL NO. 1 OF 1986** as it can be appreciated at page 6 of the judgment of the Supreme Court of Uganda in the Case of **NAVICHANDRA KAKUBHAI RADIA VS KAKUBHAI KALIDAS AND CO LTD CIVIL APPEAL NO. 10 OF 1994** whereby it held that:

"Every case must be decided on its own fact, looking at various authorities and the law, I would say that one way of providing a decision of Boards of Directors is by its resolution in that behalf. But I would not go so far as to say as it is suggested in Bugere Coffee Growers Limited versus Sebaduka. Unless of course the law

specifically requires a resolution as appears to be the case in instances where resolution is required."

Mr Maige contends that, the requisite compliance that validates the commencement of the proceedings by the plaintiff in the Court of law is that the plaint must be signed by an officer of the Company, director or secretary dully authorized to that effect. That, it is without dispute the plaint was signed by an officer of the Company authorized for such purpose as it is witnessed in the verification clause. That, the objection raised is not meritorious to warrant this claim to be struck out as it was so empathized by the Court of Appeal decision delivered on **08th March 2023 in the case of Banson Enterprises Limited Versus Mire Artan, Civil Appeal No. 26 of 2020 CAT (Unreported)** where at page 9 it had this to say: -

"As for suits by or against Corporation or Companies, A dully instituted suit must be by presentation to the Court of plaint signed and verified by the Company secretary or by its directors or other principal officer of the company who is able to depose to the facts of the case".

Arguing further, it was Mr. Maige's contention that a Preliminary objection must raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. That, it cannot be raised

if any fact is to be ascertained or involve the exercise of judicial discretion. The issue of whether a board resolution is a mandatory requirement or not is a judicial discretion which does not fit or fall within the ambit of preliminary objection. In the end, he submitted that the third limb of objection be dismissed with the costs.

Dispassionately, I have given due considerations the plaint and the rivalry submissions in support and opposing the 3rd point of preliminary objection raised by the defendant. From their respective submissions, it is common ground that in the plaint neither is it annexed the company's board resolution authorizing institution of this suit nor is it pleaded. That, while the defendant is of the argument that the board resolution is mandatorily required to be annexed and pleaded, the plaintiff is of the view that it is not a legal requirement. Each side has given a well-researched submission in defending the stance taken. Now, the issue for determine is whether it is a legal requirement for a company to plead and/or annex the company's board resolution in the plaint when instituting a suit before a court of law?

I will start with what was decided in **Ursino Palms Estate Limited vs Kyela Valley Foods Ltd, Civil Application No.28 of 2014 CAT at**

Dar es Salaam (Unreported) at p. 4 -5 where the Court of Appeal had this to state: -

*"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] 1 EA 147** which was cited with approval by this Court in the Case of **Pita Kempap v. Mohamed I.A bdulhussein, Civil Application No.128 of 2004 c/f No.69 of 2005 (unreported)**, the High Court of Uganda held that:*

*"When companies authorize 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...**"*

My understanding of the excerpt in **Ursino Palms Estate** case (**supra**) is that the decision in **Bugerere Coffee Growers Ltd** (**supra**) on the requirement to have "Board of Directors'" resolution when a company institutes civil proceedings before a court of law was approved by the Court of Appeal to be good law in our legal system in **Pita Kempap v. Mohamed**

I.A bdulhussein, Civil Application No.128 of 2004 c/f No.69 of 2005 (unreported). And so far, there isn't any Court of Appeal decision which have overturned that position obtaining in **Pita Kempap** case (supra) to be a bad law then the counsel for the plaintiff can not be heard that the decision in **Ursino Palms Estate Ltd** (Supra) was decided *per incurium* by the Court of Appeal of Tanzania basing on the current position obtaining in Uganda on **Bugerere Coffee Growers Ltd** (supra) that it is no longer a good law having overturned by the Supreme Court of Uganda in the Case of **NAVICHANDRA KAKUBHAI RADIA VS KAKUBHAI KALIDAS AND CO LTD CIVIL APPEAL NO. 10 OF 1994.** Being declared to be bad law by the Supreme court of Uganda, at any rate, does not mean that position applies in our country.

Power to declare *per incurium* a decision of the Court of Appeal vests in the Court of Appeal itself and not the High Court. More importantly, this court, being the High Court subordinate to the Court of Appeal, is bound to apply the court of appeal decision. In **Jumuiya ya Wafanyakazi Tanzania Vs Kiwanda cha Uchapishaji cha Taifa [1988] TLR 146** the Court of Appeal sitting as Full Bench had this to state: -

*"That under the common law doctrine of precedent, which is one of the pillars of the law of this land, **all courts and tribunals below this court, are bound by decisions of the court, regardless of their correctness.** We have no doubt that this is a sound position which is necessary for the Rule of Law".*

Having so expounded, now I can safely say that the law is settled that a company can not file a suit before a court of law in absence of company resolution or Board of Directors' resolution authorizing it to institute a suit in a court of law. Such resolution has to be pleaded in a plaint and annexed.

Since the suit by the plaintiff is not accompanied with board resolution sanctioning filing the same, then in the manner it was held by this court in **Tanzania American International Cooperation 2000 Limited and Another Vs First World Investment Auctioneers, Court Brokers, Civil Case No. 15 of 2017 High Court at Arusha (unreported)** at p. 7 – 8 the suit herein is incompetent before the court.

All the authorities cited by the plaintiff, none of them distinguishes the position obtaining in ***Pita Kempap v. Mohamed I.A bdulhussein, Civil Application No.128 of 2004 c/f No.69 of 2005 (unreported)*** approving on

Bugerere Coffee Growers Ltd (supra) as good law, the case law which set as a condition filing a suit by the company to be accompanied by board resolution of the board of directors authorizing the institution of the suit. Therefore, the authorities cited by the defendant, in my view, cannot override the court of appeal position as it stand on the requirement of board resolution.

Guided by the above settled law, I uphold the Defendant's 3rd Preliminary Objection raised on point of law. And, since the same is enough to dispose of the suit, I find no need to labour on the rest of the raised preliminary objections.

In the upshot, I hereby the suit to be incompetent before the court and therefore struck it out with costs.

It is so ordered.

Right of Appeal explained.

Dated at **DAR ES SALAAM** this 21st day of April, 2023.



MUSA K. POMO

JUDGE

21/04/2023

