

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR-ES-SALAAM DISTRICT REGISTRY)**

AT DAR-ES-SALAAM

CIVIL CASE NO. 6 OF 2023

AQUA POWER TANZANIA LIMITED T/A

TURBINE TECH LIMITED PLAINTIFF

VERSUS

I & M BANK (T) LIMITED 1st DEFENDANT

ADRONICUS KEMBUGA BYAMUNGU (Receiver and Manager of Aqua

Power Tanzania Ltd t/a Turbine Tech Limited in Receivership) 2nd DEFENDANT

RULING

Date: 28/03 & 15/05/2023

NKWABI, J.:

The plaintiff is suing the defendants in this Court for judgment, decree and orders jointly and severally as follows:

1. An order that the defendants fundamentally breached the terms and conditions of the credit facility agreement (the agreement) and subsequently understandings, promises and undertaking as agreed by both parties for repayment of outstanding credit facility.
2. A declaration that the Notice of default and notice of appointment of the 2nd Defendant as receiver manager issued by the 1st defendant were unlawful.
3. An order restraining the defendants jointly and severally from disposing the power generation plant consisting of three gas fired

turbine generators of the capacity of 15 megawatts each making a total capacity of 45 megawatts collectively with complete balance of plant including motor control, switch gear, black start generator, spare parts and electric cabinets constructed on a 15,807 square meters piece of land on plot No. 1 Block A Hiyari area, Mtwara District.

4. General damages as may be assessed by this honourable Court.
5. Interest at Court rate on the decretal sum from the date of judgment to full satisfaction of the decree.
6. Costs of this suit and any other order(s) or relief(s) the Court may deem fit to grant.

The defendants in their joint written statements of defence raised three grounds of preliminary objection. They are as follows:

- a. That the suit is bad for offending the provisions of section 411 of the Companies Act, 2002 for not disclosing that the plaintiff is under receivership.
- b. That the plaintiff has no locus standi to institute this suit.
- c. That the suit is an abuse of the court process owing to the pending Civil Case No. 240 of 2022 which deal with the same subject matter and or litigating under the same title.

I directed that the preliminary objection be argued by way of written submissions. Mr. Tazan Keneth Mwaiteleke, learned counsel for the defendant, argued in favour of the preliminary objection. Mr. Braysoni Shayo, learned counsel, represented the plaintiff and resisted the preliminary objection. I am grateful to both counsel for their powerful submissions.

I will start considering the 3rd leg of the preliminary objection which is that the suit is an abuse of the court process owing to the pending Civil Case No. 240 of 2022 which deals with the same subject matter and or litigating under the same title.

It was argued for the defendants that the plaintiff has previously instituted in this Court civil case no. 240 of 2022 which is pending fixed for mention on 5th April 2023 which the parties are the same and the issues to be determined are the same as in this suit. He claimed the plaintiff is abusing the court process citing **Managing Director, ABSA Bank (T) Ltd (Formerly known as Barclays Bank (T) Ltd v Felician Muhandiki**, Civil Application No. 37/01 of 2021 CAT (unreported) where it was stated that:

"By keeping both applications alive, the applicant was indeed riding two horses; the practice abhorred by the courts and,

aside from being unprocedural, was also an abuse of the Court process.

He urged me to strike out the suit with costs.

The counsel for the plaintiff apart from denying that the matter is res-judice, stated that the court is already informed that the plaintiff intended to withdraw civil case No. 240 of 2022.

I agree with the counsel for the plaintiff. Civil case No. 240 of 2022 was withdrawn on 5th May 2023 as per the JSDS so, the matter as it stands now, cannot be said to be res-judice. The third limb of preliminary objection is overruled.

I now revert to consider the 1st limb of the preliminary objection which is that the suit is bad for offending the provisions of section 411 of the Companies Act, 2002 for not disclosing that the plaintiff is under receivership.

The counsel for the plaintiff contended that the plaintiff's name appearing on the plaint makes it clearer that Aqua power Tanzania Limited and Turbine Tech Limited are names of one and same company. I think that argument is

misleading as there is nothing in the pleading to suggest, currently the plaintiff has two names, but what appears is that the plaintiff changed her name from Turbine Tech Limited to Aqua Power Tanzania Limited. So, I reject the contention of the plaintiff.

I also endorse the complaint of the defendants that the plaintiff as cited in this suit is very awkward. How could a company trade in another limited liability company. That is inconceivable and is very unacceptable. The plaintiff's counsel submissions are gravely geared up at misleading this Court on this point, that the name is not confusing while it is indeed confusing. The counsel for the plaintiff is also introducing evidence (the change of name certificate from BRELA) in the written submissions which is not allowed in law, in his attempt to save his ever-sinking boat. I need not cite authority on that position of the law.

I accede that the description (citation) of the plaintiff on the plaint is unacceptable on two folds. Firstly, she is not indicated as being under receivership while, that is a fact. She cannot resist something that is not. She paints a picture that she is not under receivership while challenging the receivership but she is indicating the 2nd defendant as receiver of the plaintiff.

This, may lead to a disastrous unwarranted confusion and ultimately miscarriage of justice. Secondly, she is portraying herself as trading as Turbine Tech Limited while indeed that is not the case, her pleadings disclose it all that Aqua Power Tanzania Limited formerly used to be known as Turbine Tech Limited. In my view, the plaintiff ought to have been cited as Aqua Power Tanzania Limited (formerly known as Turbine Tech Limited) like the citation in **Managing Director, ABSA Bank (T) Ltd (Formerly known as Barclays Bank (T) Ltd v Felician Muhandiki**, Civil Application No. 37/01 of 2021 CAT (unreported). Yet, in my view, that could be easily captured in the paragraphs in the pleadings without mentioning it in the citation of the plaintiff. The plaintiff, as currently cited is confusing and cannot be permitted in the manner the plaintiff wants or otherwise. The 1st branch of the preliminary objection is sustained.

Now, I turn to consider the 2nd leg of the preliminary objection which is that the plaintiff has no locus standi to institute this suit. Mr. Mwaiteleke contended that the plaintiff being under receivership has no locus standi to institute the suit. It was explained that upon the appointment of a receiver, powers of directors to constitute and make the board resolutions are put on abeyance or suspended. It was added that a company under receivership

will only sue through the receiver and manager who has the locus to sue. The receiver upon appointment became an agent of the company. He referred me to the case of **Magnum (Zambia) Ltd v. Basit Quadri (Receivers/manager) & Grindlyays Bank International Zambia Ltd** [1981] Z.R 141 where it was held that:

"A company under receivership has no locus standi independent of its receiver. As long as a company continues to be subjected to receivership, it is the receiver alone who can sue or defend in the name of the company."

That is not all, the counsel for the defendants also fortified his position by making reference to the case of **Marangu Sisal Estate Limited v. George Nicholas Efstatchiou & 2 Others** [2003] TLR 21 where it was stated obiter that:

"... It is trite law that a receiver and manager appointed under a valid instrument supplants the board of directors but the company's powers and the directors' authority are only in abeyance in respect of assets within the scope of the charge. There must be a valid receivership to supersede the company's internal structures through which it conducts its business. The internal structures are not destroyed. In the

case of Newthart Developments Ltd v. Cooperative Commercial Bank Ltd (2) it was held that the appointment of receiver does not divest the directors of their power to institute proceedings in the company's name provided they do not interfere with the Receivers work of realizing the charged assets, though of course, directors may take proceedings to challenge the validity of the Receiver's appointment ..."

It was added that once the company is put under receivership, the powers of the directors of the company cease to function except for a limited role in challenging the receivership or taking action that does not interfere with the receivership. It was further stated that in this case the directors of the plaintiff are not challenging the receivership but interfering with the receivership as they are complaining about the sale of the plant and machinery. It was opined by the counsel for the defendants that the board resolution authorizing filing of this suit is invalid. He asked I be inspired by submissions before the Court of Appeal of Tanzania in **Sanyou Service Station Ltd v. Bank of Baroda Tanzania Ltd & 2 Others**, Civil Application No. 232/16 of 2019. He urged I strike out the suit.

In reply submission, it was contended that the plaintiff is not in any lawful hands of receiver manager and therefore the plaintiff still maintains its legal capacity to sue and to be sued until this Court determines the issues of the appointment of 2nd defendant as receiver manager of the plaintiff. It was noted by the counsel for the plaintiff that the cases that were referred to by the counsel for the defendants to support his argument on this point are distinguishable. He prayed that I find the leg of the preliminary objection destitute of merit and it be overruled.

I have duly considered the submissions of both parties. I am of the view that this preliminary point of objection is merited. The plaintiff is already in receivership, whether that receivership is legal or not, is not to be determined in the stage of preliminary objection. The plaintiff pointed out that she is claiming that the appointment of the 2nd defendant as receiver manager issued by the 1st defendant were unlawful. To me I get the impression that the plaintiff is very much fondle of or embraces confusing the other party. She mixed two distinct prayers into one which are for notice of default and notice of appointment. I take that in the 2nd prayer, what was intended was declaration that the notice of default is unlawful, the other mixed prayer is disregarded to discourage that practice hence, there is no

such prayer. Once the prayer for declaration that the appointment of the 2nd defendant is disregarded in order to remove confusion or mix-up, then the remaining prayers cannot be sought by the plaintiff who is under receivership in terms of **Newthart Developments Ltd v. Cooperative Commercial Bank Ltd** cited in **Marangu Sisal Estate Limited** (supra).

The suggestion by the counsel for the plaintiff that the defendant ought to have sought confirmation of the receivership and the confirmation be sought before the plaintiff instituted this suit is misleading, without support of any authority and I wonder if the plaintiff is backed by **General Tyre East Africa Ltd v. HSBC Bank** [2006] T.L.R. at Pages 60 where it was stated that:

- (i) *The right to appoint a receiver is overdue as the right accrued to the respondent as a debenture holder immediately upon default being made by the appellant in repayment of the principal and interest, to say otherwise would be to defeat the very purpose for which a debenture is issued as a security,*

The above suggestion by the plaintiff is rejected at this stage for it tries to drag this Court to embark on the merits of the case while the case is yet to reach to that stage. Thus, the 2nd limb of the preliminary objection is sustained.

Consequently, the preliminary objection is sustained on the 1st and 2nd limbs.

The suit is, thus, struck out with costs.

It is so ordered.

DATED at DAR-ES-SALAAM this 15th day of May, 2023.



A handwritten signature in blue ink, appearing to read 'J. F. Nkwabi'.

J. F. NKWABI

JUDGE