

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 72 OF 2020

JUNIOR CONSTRUCTION CO. LTD **PLAINTIFF**

VERSUS

AMC TANZANIA LIMITED **1st DEFENDANT**

DESTENI COMPANY LIMITED **2nd DEFENDANT**

RULING

Date of order: 25.05.2023

Date of ruling: 26.05.2023

Ebrahim, J:

The plaintiff lodged the instant suit against the defendants claiming that the 1st defendant breached terms and conditions of 2 sale agreements they executed on 3rd October 2019 and 13th November 2019 respectively. The respective agreements were for the sale of Nissan Patrol Y62LE-1 and 4 units of Brand New Nissan Hardy Body NP300, AR006 white colored all to the tune of USD 192,000/-. The particulars of the breach are averred at para 8 of the Plaintiff's plaint where she claims that on 17th March 2020, the defendant repossessed

and refused to release vehicle described as Nissan Patrol Y62LE-1. The Plaintiff further registered her surprise to be availed with a demand notices from the 2nd defendant following the instruction given by the 1st defendant stating that the Plaintiff has outstanding amount of USD 49,140/- for Nissan Patrol Y62LE-1 and USD 88,250/- for the other 4 units making a total of USD 137,390/-. The Plaintiff therefore prays for the judgement and decree against the first defendant for the court to declare that she has breached terms and conditions of two sale agreements; an order for an immediate release of Nissan Patrol Y62LE-1; permanent injunction and general damages.

The 1st Defendant apart from filing Written Statement of Defence, raised a counter claim against the plaintiff claiming Tshs. 292,294,200/- being the outstanding balance for five units of motor vehicle which she supplied to the Plaintiff (defendant in the counter claim).

When the case was called for hearing, the Plaintiff was represented by advocate Halima Semanda and the Defendants preferred the services of advocate Antipas Lakam.

Before the matter could proceed further, the court asked counsels for both parties to address the issue of institution of the present case without board resolution since the Plaintiff is a company.

Submitting on the issue advocate Semanda briefly told the court that the issue of board resolution is established under **section 147(1) of the Companies Act, Cap 212** which does not make it mandatory as the condition provided there in do not bind the company to pass oral resolution if there was prior notice. Therefore, for a 3rd party, it would require evidence to establish that the said meeting was never conducted or held. She stated further that the absence of board resolution does not make the suit to be incompetent because it is not against the law for the company to institute a suit to protect its interest. She referred this court to a persuasive case of **Sharaf Shipping Agency Vs Barclays Bank (T) Ltd and Another**, Commercial Case No. 115 of 2015 page 6.

On their part counsel for the Defendants joined hands with the counsel for the Plaintiff and argued on the recognition of a company as a legal entity as stated in the case of **Solomon Vs Solomon** [1897] AC 22 and **section 16 of Cap 212**. He commented on the two positions of the High

Court concerning the requirement of board resolution and was of the views that matters of board resolution are internal matters and cannot bind the outsider. To substantiate his assertion, he made reference to the persuasive case of **Foss vs Herbottle** [1975] All ER 849.

He stated that once the company institute a suit on its own name the suit becomes valid as stated in the case of **Simba Papers Converters Ltd Vs Packaging and Stationery Manufacturing Ltd and Another**, Civil Appeal No. 280/2017 decided on 23rd May 2023. He further relied to the persuasive cases of **Sharaf Shipping Agency (supra)** and **Ally Ally Mchekanae and Another Vs Hassady Noor Kajuna and Another**, Civil Case No 03/2022 and argued that Companies should have right to sue in the absence of a board resolution.

Indeed, I agree with advocate Lakam that a Company as a legal entity/juristic person **(subject to the Companies Act and to such limitations inherent to its corporate nature)**; has capacity to sue or be sued. However, unlike natural person, much as they enjoy the same privileges, all those privileges have to be acted through another body which is a Board of Directors or through a majority voted decision in shareholder's meeting via a voice termed as a **“board resolution”**.

Therefore, a body corporate like the Plaintiff is managed through its Board of Directors which acts through a board resolution and in exercising particular powers or activities of the company, those powers are derived by the company general meeting or Board of Directors vested in them by the memorandum and articles of association. Thus, anything done by the company must be authorized and sanctioned by the Board through a resolution.

Counsel for the Defendants has referred this court to the decision of the Court Appeal in the cited case of **Simba Papers Converters Ltd Vs Packaging and Stationery Manufacturing Ltd and Another (supra)** which mainly necessitated the presence of board resolution in a case where the Company institute a suit against its own shareholder or a Director. Nevertheless, the Court while confirming its position that a board resolution is mandatory in a suit which involves internal conflict within a company, subscribed to the position in the case of **ST. BENARD'S HOSPITAL COMPANY LIMITED VS DR. LINUS MAEMBA MLULA CHUWA**, Commercial Case No. 57 of 2004 (unreported) to the extent that it relates to the institution of a suit by one or more directors in the name of the company. In our instant case,

the plaint is signed by one of Managing Director of the Company named Suleiman Masoud Suleiman. Moreover, in the cited case of the Court of Appeal which cited with approval the excerpt from **Pennington's Company Law, 15th Edition, London Butterworth by Robert Pennington** on the powers of the Company to among other things to institute, defend and compromise legal proceedings which is not disputed, which in my opinion it is subject to the adherence to any other written laws and set procedures. The Court was hesitant to extend the rule stated in **ST. Bernard Hospital's case (supra)** any further and only recognized the power of company **to be sued** in its own name. The Court did expressly confirm that the board resolution shall be needed in case of internal conflict. Neither, did the Court interpret the intention of the provisions of **section 147 (1) of the Companies Act, Cap 212**. Therefore, I am of the firm belief that the principle set by the Court of Appeal did not cover every circumstance and facts where the company is so far as its involvement in litigation is concerned. Otherwise, it would have expressly stated so.

Further, my stance is amplified by the written law of this country i.e., the provisions of **section 147(1) of the Companies Act, 2002, Cap 212 (R.E 2002)** which provides as follows;

“147(1) anything which in case of a company may be done-

(a) By resolution of the company in general meeting, or

(b) By resolution of a meeting of any class of members of the company”

My take of the purpose of the word “**may**” in the above provision is that the word “**may**” is disjunctive to subsection (a) and (b) in a sense that it only explains the discretion powers of the company in any activity purporting to do and the mode in which a company can make its decision (that complying with the set procedure provided by the written law in the course of exercising its powers) i.e., by either invoking **section 147(1)(a) or (b)**; but Company has no discretion to either or not invoke the provisions of **section 147(1)(a) and (b)**. Rather it has to use one of the above options in making any such decision. Therefore, I do not agree with the counsel for the Plaintiff that the invoking of **section 147(1)(a) and (b) of the Companies Act** in making the decision of the activity of the company like in our instant case to decide to file a suit

is not mandatory. The discretion is on what they purport to do thereafter the action is mandated to be done by either through a resolution of the company in a general meeting or resolution of a meeting of any class of members of the company. All in all, a resolution has to be passed for a company to perform the act. As to whether the same has been reached orally, that is for their internal arrangements but in a case where a third party's right is involved, it has to be either expressed or shown that the act is sanctioned by the company to avoid insurmountable litigations.

I am abreast to two positions propounded by this Court as to whether the authority of the Board of Directors of the company is mandatory or not. That notwithstanding, while **the Sharaf case(supra)** was decided to serve its purpose from its own facts and circumstance; in- fact at the end the holding in **Ally Ally Mchekanae's case** suggest that a board resolution is mandatory even in the institution of the counter claim.

That being said, it is my holding that a company has to authorize the commencement of legal proceedings which would generally authorize any director or shareholder to institute/sign the same by

passing a resolution either at a company or Board of Directors meeting, hence the requirement of a board resolution.

I am inspired by the wisdom of this court in the case of **Tanzania American International Development Cooperation 2000 Limited (TANZAM) Vs. First World Investment Auctioneers, Court Broker**, Civil Case No. 15 of 2017 (HC-Arusha) where it was observed that;

"I fully subscribe to the spirit and position of the High Court which are to the effect that the plaintiff being a corporate entity must have a board resolution of an entity before instituting a civil suit. I take the above position basing on the fact that, a company is formed by more than one person and those persons have interest in the company. Thus, since the suit touches that interest, it is prudent to have a board resolution prior to the filing of a suit, the board resolution will show that people whose interest will be affected have consented to the institution of a suit..."

The above same position was also held by the Court of Appeal of Tanzania in the case of **Pita Kempap Ltd. v. Mohamed L A. Abdulhussein**, Civil Appeal No. 128 of 2004 & 69 of 2005 (unreported).

Borrowing a leaf from other jurisdictions, I am again inspired by a persuasive decision in the case of **La Campagnie de Mayville v.**

Whitely (1896) 1 Ch 788 where it was held that:-

“if authority is wanted to use the name of the company, must be authority from the proper quarter either from the Directors or from the shareholders meeting convened for the purpose”.

I am taking this route in cognizance of the policy of the company, financial implications, costs associated with the legal proceedings in the event the matter is decided against the company and protection of corporate bodies from its own overzealous directors and shareholders. Again, the assurance that the board has authorized institution of proceedings is paramount to the defendant to know the legitimacy of the proceedings instituted against him/her and whether or not he will be able to recover his/her costs should the matter end in his/her favour instead of endless objection proceedings and litigations.

Having said that, I struck out this case with costs for being incompetently filed before the court without a board resolution.

As for the counter claim, the same is predicated on the written statement of defence of the main case as reflected in para 12 of the amended counter claim. In that case in the absence of the written statement of defence, the filed counter claim does not stand on its own feet. Equally it is struck out with costs to be labored by the Plaintiff in the main case i.e., plaintiff in the plaint. If the defendant in the main case wishes to pursue the matter, she should institute a fresh case.

Accordingly ordered.



**R.A. Ebrahim
Judge**



Dar Es Salaam

26.05.2023.