

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

**MOSHI DISTRICT REGISTRY OF MOSHI**

**AT MOSHI**

**CIVIL REFERENCE APPLICATION NO. 3 OF 2022**

*(Arising from proceedings and orders in Misc. Civil Application No. 3 of 2022 before Hon. O. H. Kingwele, DR)*

**THE MOSHI HOTEL 2010 LIMITED ..... APPLICANT**

***VERSUS***

**SALIM JUMA MUSHI T/A DEXTER ATTORNEYS..... RESPONDENT**

**RULING**

23<sup>rd</sup> March & 6<sup>th</sup> June, 2023.

**A.P.KILIMI, J.:**

The applicant filed this application praying for extension of time reference after being aggrieved by the decision of Deputy Registrar dated 14<sup>th</sup> February 2022. In the course of hearing this application, Mr. Ngereka Miraji representing the respondent lodged a notice of preliminary objection on point of law that;

*"The Application is incompetent for failure to attach Board Resolution authorizing the Applicant to file and prosecute the present application/suit."*

In disposing this objection, Mr. Melchizedeck Paul Hekima appeared for the applicant, while Mr. Miraji stood for respondent. Both counsels acceded for written submissions, with the leave of this court, the schedule of filing the same was made and I thank them for the timely research and compliance of the schedule issued, however their submissions will be referred in due course of this ruling whenever necessary.

In supporting the objection Mr. Miraji contended that, this application lacks a board resolution and attendant minutes authorized its commencement, he urged this is contrary to the requirement of section 147 (1) (a) of the Companies Act, Cap. 212 [R.E 2019], the counsel further referred the case of **Bugerere Coffee Growers Ltd v. Sebaduka & another** [1970] EA 147 **Pita Kempap vs. Mohamed Abdul Hussein**, Civil Application No. 138 of 2004/2005 Court of Appeal of Tanzania (unreported) and recently in **Ursino Palms Estate Ltd v. Kyela Valley Foods Ltd & Others** (Misc. Civil Application 28 of 2014) [2018] TZCA 48 (14 June 2018).

Mr. Miraji insisting the above referred the case of High Court Land Division of **SOGECOA Tanzania limited v. Syrvia Simoyo Saidi Namoyo (Administratrix of the Estate of Saidi Namoyo)** (land Case

32 of 2022) [2022] TZHC LAND 294 pg. 10-11. Which struck out the suit for being filed by the company without annexing the minutes or board resolution authorizing its commencement. Thus, the suit was deemed incompetent.

Back to the matter at hand, Mr. Miraji submitted that Moshi Hotel 2010 Limited, is a corporate body taking into account section 34 of the Companies Act, since the Application filed before this Court was neither accompanied by a board resolution nor minutes from the board of directors of the Company authorizing commencement of the present application, it is irredeemably incompetent. Also, there is no statement in the application reflecting that the authorization to commence the suit was given by the Board of Directors of the Applicant. This is the reason as to why even the present application was deponed and signed by the person who is neither the director nor the principal officer of the Company/ Applicant. He prayed the application be struck out.

The counsel for respondent further referred the High Court of Tanzania case of **Ally Ally Mchekanae, Issa Ally Mchekanae v. Hassan Noor Kajuna and Mbuyula Coal Mine Limited**. Civil Case No. 03 of 2022. Which also supported his view.



Mr. Miraji finally contended that on applicant affidavit apparent there is an internal conflict between the purported directors of the Applicant. That while one Viv Mrema is said to be a director who appointed one Advocate Hellen Mahuna to take conduct of the matter on the other hand one Joan Auye Mrema is refusing to be aware of the said stated facts and she totally disown the said Viv Mrema to be Director of the Applicant. With that conflict in mind together with what has been deponed by the said Joan Auye Mrema, i.e. she is the only surviving director and shareholder, therefore, this matter could have only been instituted after obtaining leave of this Court in terms of the provision of section. 234(1) of the Companies Act, Cap 212 R.E. 2019.

Responding to the above, Mr. Hekima submitted that, it well settled principle that when a company defends itself in any suit filed against it there is no need of any resolution. To buttress this view the counsel referred the case of **Pita Kempap vs. Mohamed Abdul Hussein** (supra) and **Ursino Palms Estate Ltd** (supra). In view of the above, Mr. Hekima said in this case it was not the Applicant who commenced the proceeding but respondent via Misc. Civil application number 2 of 2022 in this Court and Applicant herein (the Moshi Hotel Company) is defending the case through civil reference no. 3 of 2022 according to Rule 7(1) of the Advocate

Remuneration Order, GN no 263 of 2015. Therefore, the applicant herein is still defending itself after been affected by the decision of Deputy Registrar in Misc. Civil application no 2 of 2022 which was held ex-parte.

Submitting further, Mr. Hekima contended that, for this objection to stand should completely consist of pure point of law which has been pleaded or which arises from the facts and not that has to be ascertained by facts. To support his view, he has referred the case of **Karata Ernest and Others v. Attorney General**, Civil Revision No 10 Of 2010 CAT, **Mukisa Biscuits Manufacturing Co. vs. West End Distributors Limited** [1969] EA 696 and **Legal and Human Right Centre and Tanganyika Law Society vs. Hon. Mizengo Pinda and Attorney General**. Misc. Cause No 24 of 2013 (unreported).

In his brief rejoinder, Mr. Miraji contended that, the application before the Court was filed by the Applicant which is the body corporate and the gist of the preliminary objection is to the effect that there is not board resolution which was attached or even a statement which shows that at some Point the board of directors authorized the institution of this Application as stated in his submissions in chief.

In respect to whether the objection has point of law, Mr. Miraji contended that, Authorities cited are distinguishable, since the preliminary objection raised is a pure, point of law and the specific law which require that a board resolution is of essence is attached. He further insisted the Applicant is the one who filed the application as a matter of procedure was supposed to attach board resolution authorizing the commencement of this Application. The argument that it is the Applicant who defends herself against the respondent that reason is unfounded. He therefore invited this court uphold the preliminary objection and strike out this Application for being incompetent.

I have considered the rival submissions above; in my view the point of contest is whether this objection raised has merit.

First and foremost, I do agree with the contention by Mr. Hekima that the applicant in this matter did not commence the proceeding before the Deputy Registrar, the applicant stepped in to defend his rights alleged to be affected by the decision of the Deputy Registrar, thus in my view is not initiator of the case.



Furthermore, I am mindful that it is not proper to institute a suit on behalf of the said company without its formal authority. What is required is the express authority by way of resolution of the Board of Directors to institute the case in the absence of which, the suit in the name of the company is defective and it ought to be struck out. I also subscribe to the position that any suit by the Company instituted without its mandate through the board of directors is incompetent.

Be as it may, the institution of suits by body cooperates is regulated by civil procedure law, Order XXVIII Rule 1 of the Civil Procedure Code Cap 33 RE 2019 states that;

*"In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the **secretary or by any director or other principal officer** of the corporation who is able to depose to the facts of the case"*

[ Emphasizes added]

In my interpretation of the above law, I am of the view, failure to annex/ attach the said board resolution to a plaint in law cannot hinder institution

of suits. Thus, is not a pure point of law as per **Mukisa Biscuits Manufacturing Co.** (supra)

It is now a trite law that, a suit by a cooperate will be deemed incompetent if it is neither signed nor verified by a director of the said company or its principal officer. This observation is not mine, but of the recent decision of the highest court in this land which we are obliged to subscribe by the doctrine of stare decis, stated in the case of **Bansons Enterprises Ltd v. Mire Artan** (Civil Appeal 26 of 2020) [2023] TZCA 90 [Tanzlii] stated;

*"In conclusion, it should be emphasized that a **plaint by a company** cannot be duly presented to the court and a suit duly instituted **unless it is duly signed and verified by persons listed under Order XXVIII rule 1 of the Code.** Where a plaint is not duly signed and verified in accordance with the law, there is no suit which the court can legally try."*

[Emphasizes added]

In the present application the chamber summons pointed out to be supported by duly sworn affidavit of one JOAN AUYE MREMA, in the said affidavit at para two avers that is the sole surviving directors and shareholder



of the applicant. It is therefore my considered opinion the law above was complied with. Thus, the application was proper filed before this court.

However, it is true the issue of a need for resolution was discussed in the case of **Bugerere Coffee Growers Ltd v. Sebadduka** (supra), but the facts of that case are distinguishable to this case at hand. In that case, an advocate instituted a suit in the name of the company challenging the appointment of new directors following the removal of old directors. As the Court found that there was no evidence adduced to prove authority of the company to institute the suit, thus the court observed that, a reading of that decision reveals that what is required is not a specific resolution but a general permission. Secondly, a resolution would be necessary where the suit involves a dispute between a company and one of its shareholders or directors.

The position above has been subscribed by the court of appeal in the case of **Simba Papers Converters Limited vs. Packaging & Stationery Manufacturers Limited & Another (Civil Appeal Case 280 of 2017) [2023] TZCA 17273 (Tanzlii)** at page 18 the court had this to say;

*"We subscribe to the said position to the extent that it relates to the institution of a suit by one or more directors in the name of the company whereas in the present matter, **it revolves on the internal conflict within the company, In any other case we will be hesitant to extend the rule any further mindful of the legal position relating to the power of the company to be sued in its own name***

[ Emphasizes added]

As observed in this case at hand, this is not a dispute of the above circumstances, whereas the company is suing to resolve the internal conflict, herein the respondent is a stranger to the company, therefore no requirement of having resolution stated above.

In respect, to conflict stated by Mr. Miraji that the applicant affidavit shows internal conflict between purported directors of the applicant. With respect, those need to be ascertained by evidence, thus cannot be point of law. It is the position of the law that, the purpose of preliminary objection is to enable the court to decide on the point of law based on ascertained facts that give rise to a pure point of law, which can be disposed of without need of further evidence. (See the case of **Legal and Human Right Centre and**

**Tanganyika Law Society v. Hon. Mizengo Pinda and Attorney General.** (Supra)

On the other hand, I am also persuaded to consider the position in the case of **Makoa Farm Limited, Elizabeth Stegmaier and Dr. Laszlo Geza Paizs vs. Uduru Makoa Agricultural and Marketing Cooperative Co-Operative Society Limited (Uduru Makoa Amcos)** Civil Case No. 04 Of 2022 HC at Moshi Registry. Wherein my learned sister Masabo J. at page 18, observed that;

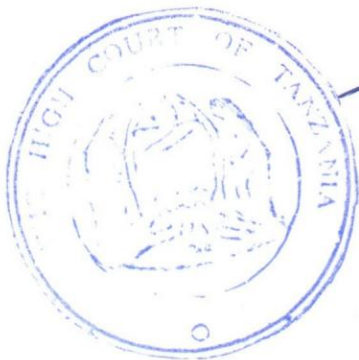
*"Had the law intended to make the enclosure of the resolution a mandatory requirement it would have stated so. Since it does not, it can be safely assumed as it been done in a string of cases that such an enclosure is not mandatory and the effect of its omission from the plaint cannot therefore be resolved as preliminary objection as it does not exhibit a pure point of law."*

In the event and for the reasons herein above stated, I am of considered opinion the objection raised has no merit. I accordingly proceed to dismiss in its entirety with costs.

It is so ordered.



**DATED** at **MOSHI** this 6<sup>th</sup> day of June, 2023.



*A.P.K.*  
**A. P. KILIMI**  
**JUDGE**  
**6/6/2023**