

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 55 OF 2022

(Arising from Judgment and Decree of the Resident Magistrate Court of Dar es Salaam
at Kisutu Dated 14th March, 2022 before Hon F. Mhina - PRM in Civil Case No. 212 of
2017)

CRDB BANK PLC..... APPELLANT

VERSUS

DELTA AFRICA LIMITED..... 1st RESPONDENT

VODACOM TANZANIA PLC.....2nd RESPONDENT

JUDGMENT

Date of last Order: 31/07/2023.

Date of judgment: 04/08/2023.

E.E. KAKOLAKI, J.

This appeal originates from the Civil Case No. 212 of 2017 before the Resident Magistrate Court of Dar es Salaam at Kisutu, in which the 1st respondent sued the appellant and 2nd respondent claiming for the payment of sum of Tshs. 45,000,000/= being refund money arising out of wrong posting of float recharge from the 1st respondent's mobile money transfer business account (M-PESSA) operated by the 2nd respondent to the appellant's account, general damages, interest at the bank rate of 22% per

annum from the date of filling the suit until judgment, Interest on the decretal sum at court rate of 7 % per annum from the date of judgment until full payment and costs of the suit.

The brief background of this matter as can be discerned from the record is that, the 1st respondent had an agreement with the 2nd respondent on operating mobile money transfer business as MPESA super dealer by using MPESA till number 23320 with short code number 440403 and was running her business at Mlimani City Mall. The 1st respondent used appellant's bank which is one of the 2nd respondent's super dealers in disbursing MPESA floats in their daily MPESA sales. It appeared on 11th April 2017 the 1st respondent committed wrong float posting worth Tsh. 45,000,000/= vide transaction ID 4DB5KE PPVP 632002 to the appellant's account. Upon noticing such error she immediately reported the incident to the 2nd respondent so as the later could intervene immediately by blocking the transaction and after investigation, reverse it in favour of the 1st respondent. According to the 1st respondent that was the usual business operation security protective procedure, but unfortunately the 2nd respondent did not act on the report as the appellant informed her that the money was correctly sent to them. As a result the 1st respondent communicated the appellant vide a letter dated 19th

April, 2017 requesting for return back of the said fund amounting Tsh. 45,000,000, but the appellant through a letter dated 28th April, 2017 maintained that the transaction was a reversal of two transactions sent to the same till 233326, with short code 4440403 amounting Tsh.30,000,000/= (say thirty million and Tsh. 15,000,000/= (say Fifteen Million) , hence correctly sent to her. It is on account of those circumstances the 1st respondent instituted Civil Case No. 212 of 2017 against the appellant and the 2nd respondent for the prayers described above.

After full trial, the court entered judgment in favour of the 1st respondent, in which the appellant was ordered to pay the respondent Tsh. 45,000,000 as a refund of her money, Tsh. 30,000,000/= as general damages, interest at bank rate of 22% per annum from the date of filling the suit to the date of judgment, Interest at decretal amount at the court rate of 7% per annum from the date of Judgment until full payment and costs of the suit. The second defendant/2nd respondent was exonerated from liability.

It is the said decision that triggered the appellant to file this appeal fronting six grounds of appeal, which for the reasons to be apparent soon, I shall not reproduce them. Hearing of the appeal took the form of written submission, as both parties were represented and filed their respective submissions.

It appeared when preparing to compose the judgment, this Court noted and suo motu raised an issue as to whether the suit was competently filed and tried before the trial court for want of company board resolution and if none was secured, what are the consequences. Parties were therefore, summoned and on 31/07/2023 appeared to address the Court on the raised issue. Mr. Matia Samwel appeared for the appellant, Mr. Daniel Ngudungi and Bernadetha Fabian represented the 1st respondent, while the 2nd respondent enjoyed the legal services of Ms. Fatuma Mgunya, all learned advocates.

It was Mr. Matia who took the floor first and enlightened the court that, the 1st respondent when filing her plaint before the Resident Magistrates Court of Dar es salaam at Kisutu did not have board resolution. To him, the issue of board resolution being the issue of fact and not of law could not have been raised at earliest stage of the suit hence need to be investigated first. He informed the court that, the 1st respondent's plaint was signed by Mohamed Araz who never appeared in court to testify on the existence of the board resolution and that, even the person who appeared as 1st respondent's witness failed to show where he came from as he did not have the identity card. While relying on section 147 (a) and (b) of the Company's Act, Mr. Martia explained to the Court of the importance of securing company

board resolution before a company institutes the case. He supported his stance by citing the case of **Ally Ally Mchekanae & Another vs Hassady Noor Kajuna**, Civil Case No 03 of 2022, (HC- Unreported) and took the position that, the proceedings before the Resident Magistrates Court at Kisumu were incompetent and so is the judgment thereof hence should be quashed and set aside.

On the contrary Mr. Ngudungi for the 1st respondent, attacked the submission by Mr. Matia on the application of the provision of section 147 of company's Act. He said, the wording of the said section is not coached in mandatory terms as the word used is "may". Concerning the case relied by Mr. Martia, he alleged the same is not binding to this court and added that, he is aware of the position of this Court in the case of **Kati General Enterprises Ltd Vs. Equity Bank Tanzania Limited & Another**, Civil Case No. 22 of 2018, HC-unreported in which the Court decided that the board resolution is mandatory. He held the view that annexing company's board resolution to the plaint is two ways traffic depending on the nature of dispute before the court. To him, where a company is instituting a case against the other company the board resolution is not mandatory save for the situation where there is internal conflict between shareholders against

directors of the company where the board resolution is mandatory. Mr. Ngudungi placed reliance in the cases of **Bugeregere Coffee Growers Ltd Vs. Sebaduka** (1970) 1 EA 147 (HCU) and **Simba Papers Converters Ltd Vs. Packaging and Stationery Manufacturer Limited & two Others**, Civil Appeal No. 280 of 2017 (CAT -unreported). He added that, in **Kati General's case** the issue revolved around the internal affairs of the company, same as in **Bugeregere's case** and that's why there was a need for board resolution.

Concerning the case of **Simba Papers**, it was his submission that, the director therein was accused to defraud the company thus the issue of board resolution was questioned before the suit could be preferred. Mr. Ngudungi was insistent that, since in this case the company was suing the other company, there was no need for company's resolution as stated in **Simba Papers case**.

On the contrary, Ms. Mgunya, differed with Mr. Ngundugi's submission particularly on the contention that board resolution is required only where there is internal conflict within the company. In her view, reading the case of **Simba Papers** (supra) the same does not waive the requirement of having board resolution where the company has the case against the other,

apart from dealing and applying the rule in a situation where there is internal conflicts in the company, the dispute which was before the Court. He relied on the decision of this Court in case of **Stanbic Bank Tanzania Limited Vs. Sumry Bus Services and Company Ltd**, Civil Case No 125 of 2018, decided after the case of **Simba Papers** (supra), which insisted and embraced the principle that a company has to be authorized by the board resolution to commence a legal action as in **Simba Papers** case the Court of Appeal was dealing with a conflict involving internal affairs of a company only. Ms. Mgunya maintained the position that, the absence of board resolution made the suit before the trial court incompetent.

In a short rejoinder, Mr. Matia attacked the submission by Mr. Ngudungi countering that, he did not cite any case which stated that the board resolution is not mandatory when the company sues another company. He had the view that, the board resolution gives assurance of the genuineness of the suit before the court as the decision to institute the suit should be reached in accordance with the constitution of the company and not otherwise. He stressed that, the 1st respondents claim was supposed to be sanctioned by board resolution which was not presented before the trial court, hence the suit was incompetently tried before it.

I have keenly considered the fighting submission advanced by the learned counsels for the parties concerning the raised issue and the lower courts records which I inquisitively perused. The main issue for determination here is whether the suit was incompetent before the trial court for want of board resolution by the 1st respondent.

I wish to state from the outset that, I do not subscribe to Mr. Matia's proposition that, the issue of board resolution is a matter of fact. The law is very clear under section 147 (1) (a) and (b) of the Companies Act No 12 of 2002, that anything which is in the business of a company may be done by resolution of the company in general meeting or by resolution of a meeting of any class of members of the company. The section was discussed and given interpretation by this Court in the cases of **Kati General Enterprises Limited** (supra), **Oxley Limited Vs. Nyarugus Mine Company Limited and Another**, Commercial Case No. 14 of 2022, HC-Commercial Division at DSM and **Boimanda Modern Construction Co. Ltd Vs. Tenende Mwakagile and 6 Others**, Land Case No. 8 of 2022 to mention few. Therefore, since issues of incompetence of the suit affects the jurisdiction of the court, the same cannot be taken to be matters of fact.

Now back to the issue at hand, the sub issues to be addressed as deduced from the main issue are whether board resolution is mandatory before institution of the case and whether in this case the same was secured before institution of the case.

On the first sub issue I subscribe to Mr. Ngudungi's submission that, section 147 (1)(a) and (b) is not coached in mandatory terms rather it uses the word may. Nevertheless, I differ with stance taken by him in that, board resolution is only required in the circumstances where there is internal conflicts within the company and not when the company sues another company. As the law stands, when the company institutes the suit, proof of formal authority sanctioning its decision to sue duly issued by board of directors must be disclosed by way of pleading that fact and annexed the minutes of board resolution. The object of so disclosing is so obvious as it was observed by this Court in the cases of **Oxley Limited vs Nyarusu Mining Company Limited and Another**, Commercial Case No. 14 of 2022 and **Aloyce Elias Kitambi (Administrator of the estate of the late Joseph Elias Kitambi) and Another Vs. CRDB Bank PLC and 3 Others**, Land Case No. 40 of 2018 (both HC-unreported), which is to protect interest of shareholders and/or other directors in the company from

unilateral decisions or act of an individual person. In the case of **Oxley Limited** (supra) on interpretation of the provisions of section 147 of the Companies Act, had this to say:

*"It has been held by this court that the gist of the above provision is to ensure that the company's affairs are run and managed by board of directors to avoid unilateral decisions or acts of an individual person which might be detrimental to the company and other shareholders. As such, **the requirement for board resolution before institution of the case is intended to safeguard the interests of shareholders who may be bound by the decision of the court of which they were not aware. See New Life Hardware Company Limited and another vs Shandong Locheng Export Co. Limited and 2 others, Commercial Case No. 86 of 2022 and Misc. Commercial Application No. 135 of 2022, HC (Commercial Division) at Dar es Salaam.**"*(Emphasis supplied)

Thus, it is pre-requisite for a company to pass board resolution to sue before institution of a suit. See also the cases of **Bugerere Coffee Growers Ltd Vs. Sebaduka and Another** (supra), **Ursino Palms Estate Limited Vs. Kyela Valley Foods Ltd and Others**, Civil Application No. 28 of 2014, **Lwempisi General Company Limited and Another Vs. Richard**

Kweyamba Joseph Rugarabamu, Commercial Case No 6 of 2022 (all HC-unreported) and **Boimanda Modern Construction Co. Ltd** (supra).

As to whether board resolution is mandatory requirement only where there is internal conflict within the company as claimed by Mr. Ngudungi while placing reliance on the case of **Simba Papers** (supra) and **Bugerere** (supra), I am inclined to embrace Ms. Mgunya's proposition that it also covers the circumstances where two companies sue each other or a company sues an individual due to the following reasons;

Firstly, as rightly submitted Mr. Matia, Mr. Ngudungi cited no law or case law stating that, board resolution is not a mandatory requirement when a company is suing the other company. *Secondly*, this court has already pronounced itself in the case of **Stanbic Bank Tanzania Ltd Vs. Sumry Bus Services and Company Ltd** (supra) when speaking through my brother Mahimbali J. the position that I subscribe to, where after having considered the positions in the cases of **Simba Papers** (supra), **Bugeregere** (supra) and **Ursino** (supra), held the view that in the case of **Simba papers** (supra) the Court of Appeal applied the said principle or requirement basing on the dispute before it on the conflict between the company and its directors on decision making, but the rule was not intended

to be restricted to such situation only as it extends to other circumstances.

In so doing this Court at page 9 had this to say:

"...the rule is not only restricted between a company and its members but also extends between that corporate body and an individual or against another corporate body."

Further to that at page 11 the Court went on to observe:

*"Therefore, the fact the court of appeal in this case was dealing with a conflict involving internal affairs of a company, however it embraced the same principle of a company's resolution authorizing the commencement of any legal action. **This is equally my position and understanding of the law as far as suit by a company is concerned that being the correct position of the law, I have no privilege to close my eyes in disrespect of it.** (Emphasis supplied)*

In view of the above position of the law and the fact that the object of having in place the board resolution before commencement of any legal action by the company is to protect interest of shareholders and/or other directors in the company from unilateral decisions or act of an individual person, it is the finding of this Court that the same is a mandatory requirement on both internal conflicts and when the company is suing another company or individual.

The above notwithstanding is also worth noting that, a board resolution when passed must be pleaded in the plaint as stated in the case of **Boimanda Modern Construction Co. Ltd** (supra). Similar stance was outlined in the case of **St. Benard's Hospital Company Limited vs Dr. Linus Maemba Mlula Chuwa**, Commercial Case No 57 of 2004 (Unreported) where this Court had this to say;

*"Having carefully considered the matter, I have reached a settled conclusion that, **indeed the pleadings (plaint) should expressly reflect that there is resolution authorizing the filing of an action.** A company which does not do so in its pleadings, risks itself to the dangers of being faced by any insurmountable preliminary objection as is the one at hand..."* (Emphasis supplied)

Now as to matter at hand, I had time to peruse the 1st respondent's plaint filed in the trial Court and satisfied myself that, there is no single paragraph which pleaded facts showing that there was board resolution passed before instituting the suit nor was it annexed in the plaint or tendered in Court during the trial.

In view of the above I am of the finding that, since the suit at the trial court was instituted by the 1st respondent without pleading whether there was board resolution it was incompetently filed and tried, and the respective

proceeding and judgment rendered void. Consequently, I proceed to quash and set aside the proceedings and judgment in Civil Case No. 212 of 2017 and subsequent orders therefrom for being a nullity. This appeal therefore is incompetent for originating from null proceedings and judgment, hence struck out.

As the issue disposing of the appeal was raised by the Court I order each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 4th August, 2023.



E. E. KAKOLAKI

JUDGE

04/08/2023.

The Ruling has been delivered at Dar es Salaam today 04th day of August, 2023 in the presence of Mr. Matia Samwel, advocate for the appellant, Ms. Benadetha Fabian, advocate for the 1st respondent, Ms. Fatuma Mgunya, advocate for the 2nd respondent and Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
04/08/2023.

