

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

**AT DAR ES SALAAM**

**CIVIL CASE NO. 142 OF 2022**

**BEB COMPANY LIMITED..... PLAINTIFF**

**VERSUS**

**GEITA GOLD MINING LIMITED..... DEFENDANT**

**RULING**

*21<sup>st</sup> July, & 28<sup>th</sup> August, 2023*

***BWEGOGGE, J.***

The plaintiff herein commenced civil proceedings against the defendant claiming for payment of TZS 270,000,000/=, being the value of the low bed trailer that the plaintiff delivered to the defendant in discharging her contractual obligation; and payment of TZS 150,000,000/=, being special damages for breach of contract, among others. In tandem with filing

defence, the defendant herein advanced notice of preliminary objection on point of law as thus:

- 1. This court is not seized with jurisdiction to entertain this suit since the same was instituted without a Board Resolution; hence, in contravention of the mandatory provisions of section 147 (1)(a) and (b) of the Companies Act, No. 12 of 2002.*

The plaintiff was represented by Ms. Grace Ndera, learned advocate whereas the defendant was represented by Mr. Ally Hamza, learned advocate. The counsel above mentioned argued the preliminary objection above mentioned orally. The submissions made by both counsel are revisited hereunder, albeit briefly.

In substance, Mr Hamza argued that the current suit has not been accompanied by a Board resolution contrary to the law. That section 147 (1) of the Companies Act (Act No. 12 of 2002) makes it mandatory that the civil proceedings by the company can only be commenced in Court with Board resolution. The counsel cited the case of **Bugerere Coffee Growers Ltd vs Sebaduka and Another** (1970) EA 147.

The counsel expounded that the reason why the Board resolution is a condition precedent for the commencement of civil proceedings is well explained in the case of **Newlife Hardware Company Ltd and**

**Another vs. Shandong Locheng Export Co. Ltd and 2 Others**, Commercial Case No. 80 of 2022 and Misc. Commercial Application No. 135 of 2022 cited in **Oxley Ltd vs Nyarugusu Mine Company Ltd**, Commercial Case No. 14 of 2022 HC at page 6.

Further, the counsel asserted that recently, the Apex Court of this land, in the case of **Simba Papers Converts Ltd vs Packaging and Stationery Manufactures Ltd and Another** (Civil Appeal 280 of 2017) [2023] TZCA 17273 reiterated the importance of the companies having authorization before commencing legal proceedings. Likewise, the counsel directed the mind of this court in the recent decision of this court in the case of **Wellness Co. Ltd vs Mgen Tanzania Insurance Co. Ltd**, Civil Case No. 201 of 2021 HC whereas the decision of the Apex Court [**Simba Papers Converts Ltd vs Packaging and Stationery Manufactures Ltd and Another** (supra)] was followed in resolving an issue of like nature.

In light of the above-mentioned legal principles, the counsel prayed the preliminary objection advanced herein to be sustained and the suit instituted herein be struck out with costs.

Ms. Ndera, Counsel for the respondent, opened up her submission in reply by reminding this court that the company as per the landmark case of

**Solomon vs Solomon** has a private legal personality with the capacity to sue or be sued. That it is in this principle that this case was filed. The counsel enlightened this court that the case herein is between a company and a third-party company. That the dispute between the parties herein is not related to an internal matter of the company. And, the counsel informed this court that no shareholder or principal directors of the company objected to the commencement of civil proceedings herein.

Further, the counsel asserted that each case should be determined based on its material facts. That the cited case of **Simba Papers Converts Ltd vs. Packaging and Stationery Manufactures Ltd and Another** (supra) is quite distinguishable from this case, as the principle enunciated therein applies in disputes concerning the internal affairs of the company not in disputes between a company and a 3<sup>rd</sup> party company. Thus, the strict adherence to the decision of the Apex Court mentioned above in resolving the issue before this court would be a misconception, as the principle thereof is not a general rule applicable to all cases.

In resting her contention, the counsel opined that this court should not blindly apply the decision of the superior Court without interpreting the principle(s) enunciated and determining whether a given decision is binding or not. The counsel referred to the case of **Jinglang Li vs**

**National Housing Corporation and Another** (Civil Revision 01 of 2013) [2023] TZCA 335 to bring her point home.

On the above premises, the counsel for the defendant prayed that the preliminary objection raised herein be dismissed for want of merit with costs.

In rejoinder, the plaintiff's counsel reiterated his stance in that the Board resolution is *a sine quo non* for commencing civil proceedings by the company.

The issue for determination is whether the plaintiff herein was required to obtain a Board resolution to commence the proceedings herein against the defendant.

Unarguably, the principle pertaining to the requirement to obtain the Board resolution for the company may be traced from the decision of the defunct Eastern Court of Appeal in **Bugerere Coffee Growers Ltd vs Sebaduka** [1970] 1 EA 147 whereas it was held:

*"When companies authorise the commencement of legal proceedings, a resolution has to be passed either at a Company or Board of Directors meeting and recorded in the minutes; no such resolution had been passed authorising these proceedings."*

The above-mentioned principle features in numerous decisions of this court in the cases, among others, **Wakulima Tea Company Limited vs. Joseph Lupungu & 9 Others** (Land Case 17 of 2021) [2022] TZHC 9825, **Newlife Hardware Company Ltd & Another vs. Shandong Locheng Export Co. Ltd and 2 Others** (Commercial Case 80 of 2022 and Misc. Commercial Application 135 of 2022) [2022] TZHC ComD 287; **Oxley Ltd vs. Nyarugusu Mine Company Ltd** (Commercial Case 14 of 2022) TZHC 19 and **Wellness Co. Ltd vs. Mgen Tanzania Insurance Co. Ltd** (Civil Case 201 of 2021) TZHC 17966, among others.

The counsel for the plaintiff, in bolstering his position that Board resolution is a condition precedent for instituting legal proceedings by the company, asserted that recently, the Apex Court of this land, in the **Simba Papers Converts Ltd case** (supra) reiterated the importance of the companies having authorization before commencing legal proceedings.

The counsel for the respondent has an opposing view in that the company, as per the principle in the case of **Solomon vs Solomon**, has a private legal personality with the capacity to sue or be sued. That the cited case of **Simba Papers Converts Ltd vs. Packaging and Stationery Manufactures Ltd and Another** (supra) is quite distinguishable from this case as the principle enunciated therein applies in disputes concerning

internal affairs of the company not in disputes between a company and a 3<sup>rd</sup> party company. As aforesaid, the counsel cautioned this court not to blindly apply the decision of the Apex Court without interpreting the principle(s) enunciated and determining whether a given decision is binding or not.

Admittedly, the submission made by the plaintiff's counsel has exercised my mind. Principally, this court is obliged to interpret the decision of the superior Court and determine whether the principle(s) enunciated therein renders any binding rule on the matter before it. See the case of **Jinglang Li vs National Housing Corporation and Another** (supra). The question arising herein is whether the recent decision of the Apex Court in the **Simba Papers Converts Ltd case** (supra) expressly restated the principle making it mandatory that the company should obtain Board resolution prior to instituting legal proceedings in court, as asserted by the counsel for the defendant. To answer this pertinent question, I revert to the holding of the superior Court in the **Simba Papers Converts Ltd Case** (supra). In this case, the Court observed that the claimant is the respondent's company which involves the dispute between the directors of the 1<sup>st</sup> respondent whereas the 2<sup>nd</sup> respondent is one of the directors who was accused of acting dishonestly in disposing of the asset of the

company contrary to the resolution made by the directors of the company.

The question before the court was whether the company which had 5 directors could commence a suit without the authority of the company. In answering the query, the court borrowed a leaf from the case of **Bugerere Coffee Growers Ltd** (supra) which resolved the question of like nature and stated:

*"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, it held the suit defective."*

Further, the Court observed:

*This position was followed by Kalegeya, J, as he then was but it was narrowed down to befit a particular situation on the dispute between the company and its Directors and/or shareholders in the case of **ST. BENARD'S HOSPITAL COMPANY LIMITED VS DR. LINUS MAEMBA MLULA CHUWA**, Commercial Case No. 57 of 2004 (unreported). In that case, the dispute was between the company and one of its shareholder and the Director. The suit was a result of internal conflict between the Company and its Director General and in the claim, the company made reference to a Board of Director's resolution to relieve the Director General from its duties. Relying on the case of **BUGERERE COFFEE GROWERS LTD VS. SEBADDUKA** (supra), 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.*

And, the Court expounded:

*"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 around 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.***

[Emphasis mine].

Conclusively, the Court affirmatively stated that a correct legal position to which they fully subscribe is well summed up by *Pennington's Company Law, 15th edition, London, Butterworths* by Robert Pennington quoted thus:

*"The intention of the legislature was undoubtedly that **the Court should assist the Company to achieve its expressed objects by implying all powers necessary for it to do so...** On the whole, the Courts have been liberal in implying powers. Thus powers have been implied to do acts obviously appropriate to the carrying out on of any business such as appointing agents and engaging employees; **instituting, defending and compromising legal proceedings...**"*

[Emphasis mine].

Having read between the lines in the Apex Court decision above, I am constrained to agree that the opposing views of the plaintiff's counsel are legally sound. It is patently glaring that the assertion of the defendant's counsel in that the above decision of the Court made it mandatory that

the company should obtain Board resolution before instituting legal proceedings is misconceived, if not misleading. It is obvious that the decision revisited doesn't enunciate a principle that Board resolution is a condition *sine quo non* for instituting any legal proceedings in court. Therefore, I purchase wholesale the argument by the plaintiff's counsel in that the principle thereof is not a general rule applicable to all cases but specifically to cases pertaining to the institution of a suit by one or more directors in the name of the company and, or on the internal conflict within the company. The Court expressly made it clear that; "*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.*" Unarguably, the legal personality of the company with power to sue or be sued without fetters by the courts of law embodied in our law has been appositely restated.

In the case at hand, it has not been brought to the attention of this court that the suit herein has been commenced following the internal dispute or otherwise taken privately by a director in the name of the company. It has been eloquently averred that the plaintiff herein, a limited company, entered a contract with the defendant whereas the defendant without justifiable ground has refrained from discharging her contractual

obligation to the financial detriment of the plaintiff. And, in its legal capacity, the same commenced the suit herein for damages suffered. I am of the settled view that the circumstances of this case don't render it fit to apply the cases cited by the plaintiff to arrive at the conclusion that the suit is incompetent for want of Board resolution.

Before I pen down, I find it pertinent to address one of the assertions made by the defendant's counsel in his bid to substantiate the preliminary objection raised herein. The same asserted that; I beg to quote:

*".... section 147 (1) of the Companies Act (Act No. 12 of 2002) makes it mandatory that the civil proceedings by the company can only be commenced in Court with Board resolution."*

For clarity, I find it fit to reproduce the relevant provision in *extenso*:

*147.-(1) Anything which in the case of a company may be done:-  
(a) by resolution of the company in a general meeting, or  
(b) by resolution of a meeting of any class of members of the company, may be done, without a meeting and without any previous notice being required, by resolution in writing signed by or on behalf of all the members of the company who at the date of the resolution would be entitled to attend and vote at such meeting.."*

Having scrutinized the above-reproduced provision, I am unable to find the veracity of the assertion made by the plaintiff's counsel that the civil

proceedings by the company can only be commenced in Court with Board resolution. The law doesn't expressly provide to that extent. Be that as it may, assuming the institution of legal proceedings is one of those matters which are sanctioned by resolution, yet the word employed is "*may*" which denotes that there is discretion and, or flexibility in adhering to the laid procedure depending on the prevailing circumstances.

Based on the foregoing premises, I find the preliminary objection advanced by the defendant herein bereft of substance. Consequently, I hereby overrule the same with costs.

I so order.

**DATED** at **DAR ES SALAAM** this 28<sup>th</sup> August, 2023.



A handwritten signature in blue ink, appearing to read "O. F. Bwego", is written over the judge's name.

O. F. BWEGOGGE

**JUDGE**