IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO 752 OF 2021

NYUMBA YA SANAA & CULTURE LIMITED .... PLAINTIFF.

VERSUS

UPANGA JOINT VENTURE COMPANY LTD ....1ST RESPONDENT

NMB BANK PLC...2ND RESPONDENT

RULING

MKWIZU, J:

The petitioner, a Limited Liability Company duly incorporated under the Companies Act, [Cap. 202 R.E 2002] and a minority shareholder in the 1st respondent company. Petitioner feels that the affairs of the 1st respondent's company are being conducted in a manner that is prejudicial to her interest hence this petition under section 233(1) and (3) of the Companies Act seeking an order for the purchase of its shares by either the respondent or any person willingly to purchase the shares. When the matter came for the final pre-trial conference on 7/8/2023, parties were asked to address the court on the maintainability of the petition in the absence of the Petitioner Board Resolution mandating the filing of the petition in court.

On 14/8/2023 Mr. Mafuru Mafuru learned advocate was in court representing the petitioner while the respondents enjoyed the services of

Mr. Antipas Lakamu also a learned advocate. Addressing the court on the raised issue, Mr. Mafuru's advocate said that the Companies Act 2002, as amended, does not require the Board Resolution for a company to institute a suit. The decision of the Court of Appeal in Civil Appeal No 208 of 2017**, Simba Papers Converters Limited V Packaging and Stationary Manufacturing Limited and Another** did not judge that a board Resolution is a mandatory prerequisite for a company to institute a suit. The judgment did not judge expressly that a board resolution is a requirement before a company institutes a suit. He contended that the Court of Appeal was confronted on whether the High Court was at fault in entertaining the suit filed by the respondents' company without the Board resolution where the dispute involved one director among other five Directors and borrowing a leaf from the decisions of **Saint Bernard Hospital Company** the Court ruled that there was no need for specific resolution. He argued that the petitioner is a legal entity independent of its own. The petition has been brought against two shareholders under the operations of the law, section 233(1) and 3 (d) of the Companies Act based on fair prejudice claims listed in paragraphs 8- 27 of the petition, which are not conflicts between the shareholders. He invited this court to assist the company in carrying out its objectives as decided by the Court of Appeal by entertaining the matter brought before it under section 233(1) of the Companies Act.

Seemingly in the alternative, Mr. Mafuru said, should the court find that Board resolution is necessary, it should resort to Order 23 Rule (1) (1) and (2) (b)of the CPC, and allow the petitioner to file a fresh petition with no order as to costs.

Mr. Antipoas Lakamu's advocate submission in reply was that the institution of the suit in this court by the company requires a Board Resolution. He said section 147 (1) of the Companies Act requires that every decision of the company be sanctioned by the Board resolution, and to him, the filing of the suit in a court of law is one of the decisions that require board resolution**.** He cited the decisions in **Junior Construction Co Limited V AMc Tanzania Ltd and Another,** Civil Case No. 72 of 2020 **pages 9 to 11** to bolster his submissions.

Submitting the decision of the Court of Appeal in **Simba Papers Converters** (Supra), Mr. Antipas said, the Court of Appeal was of the firm opinion that a dispute between the company and shareholders must be sanctioned by a board resolution. The current suit being filed by one of the shareholders of Upanga Joint Venture Co Limited, needed a board resolution because the petitioner is a Limited Liability Company, she was quite bound by the provisions of section 147 (1) of the Companies Act to prove that the filing of the suit was sanctioned by the Directors of the petitioner. He lastly urged the court to find the petition incompetent.

Rejoining, Mr. Mafuru was of the view that section 147 of the company's act has been read out of context. To him, the provisions deal only with the daily management of the company.

I have carefully considered the submissions. The issue is whether the board resolution of the company is a mandatory legal requirement in instituting legal proceedings by a Company. Principally, it is settled that the institution of legal proceedings in a court of law by a company is required to be sanctioned by the company itself. This position draws its genesis from the principle that an incorporated company is a separate

legal entity distinct from its members with perpetual succession having the ability to sue and be sued in its name as enunciated in the English case of **Salomon Vs. Salomon & Co. Ltd. [1897] A.C. 22** and section 147 of the Companies Act regulate the performance of the company's activities. The section reads:

> *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 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*" (emphasis added)

The kernel of the above section is that being a juristic person, a company's authority to act can only be obtained through a resolution of a company's general meeting or any class of members of the company. The above section is not restricted to the daily management of the company with the exclusion of decisions to file suit in a court of law as suggested by Mr. Mafuru. I thus agree with Mr. Antipas that, to protect the Company from unauthorized court proceedings filed on behalf of corporations and obtaining unwarranted orders from the court, the institution of the legal proceedings must be authorized by the company. The company's seal that is affixed under the hand of the Board of Directors ensures that they are aware of and have authorized such proceedings. Fortunately, this is not a new phenomenon. In **Masumin Printway and Stationers Limited**

Vs. M/S TAC Associates, Commercial Case No. 7 of 2006 (High court unreported) this court said:

> *"So, on the authorities, it is true that there is a long unbroken chain of case law that a company must authorize by a resolution, the commencement of legal proceedings in its name, and the rationale is twofold. The **first** is to show that the company still exists. **Secondly**, to show that the decision has been reached by its constitution or articles of association and it is therefore legally binding on it. The rule is intended to secure the interest of the defendants and also save the court's time. It may also avoid unnecessary sufferings by shareholders who are unknowingly dragged to court and commanded to pay huge costs."*

The above position was also pronounced by the Court of Appeal **Ursino Palms Estate Limited versus Kyela Valley Foods Ltd and two others;** Civil Application No. 28 of 2014 (DSM) (CA) (unreported), where citing with approval the decisions in **Bugerere Coffee Growers Limited v. Sebadduka and Another** (1970) E. A 147 the Court observed: -

> *"When companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes..."*

This position was maintained by the Court of Appeal in **Simba Paper Converters Limited (Supra)** where it was concluded that:

"*Since the claimant was a company, it was not proper to institute a suit on behalf of the company without its formal authority. This required 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 was defective and it ought to have been struck out."*

The parties agree that no resolution of the petitioner's board of directors was filed contemporaneously with the filing of this petition sanctioning the institution of this case contrary to section 147 (1) of the Companies Act. The petition is thus incompetent before the court.

Mr. Mafuru advocate for the petitioner has invited the court to resort to Order 23 Rule (1) (1) and (2) (b)of the CPC. I have read the order. Sadly, the order provides for the withdrawal and adjustment of the suit, which presupposes a competent suit before the court, which is not the case here. Having found that the petition is improperly before the court, the only available remedy is to have it struck out.

Consequently, I hold the petition to be incompetent and proceed to strike it out. Since the matter was raised by the court *suo-moto*, each party is ordered to bear its costs. It is so ordered.

DATED at **DAR ES SALAAM** this **1st** day of **September 2023**.

E. Y Mkwizu
Judge
1/9/2023