THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MBEYA SUB- REGISTRY)

AT MBEYA

MISC. CIVIL APPLICATION NO. 15 OF 2022

(Arising from the decision of the High Court of Tanzania at Mbeya in Civil Revision No. 4 of 2021)

KBC-COMMUNITY INITIATIVE SERVICE.....APPLICANT

VERSUS

GEORGE A. MWAKALINGA..... RESPONDENT

RULING

Date of last order:*10/08/2023*
Date of Ruling: *12/10/2023*

NDUNGURU, J.

The applicant herein has preferred an application for leave to appeal to the Court of Appeal against the decision of this Court by Hon. D.P. Ngunyale, J delivered on 13th day of May 2022, in Civil Revision No. 4 of 2021. The application is premised under Section 5 (1) (c) of the Appellate Jurisdiction Act (Cap 141 R.E. 2019), through chamber summons supported by the affidavit deposed by one, Abbas Ambwene Mwakalinga, the

applicant's principal officer. Upon being duly served with the application, the respondent filed counter affidavit and also raised the points of preliminary objection the subject matter of this ruling. The points of preliminary objection are couched thus:

1. That, the application is improperly before this Honourable Court for the applicant is organization acting under Tanzania laws and this application has been brought without any organization's resolutions contrary to the law.
2. That, the application by the applicant is improperly and incompetent before this Honourable Court for being supported with a defective affidavit sworn by a person that lacks locus standi, the same is not a principal member of the applicant.

As it is usually the practice of this Court where a notice of preliminary objection is lodged, the parties required to argue first on the preliminary objection before going into the merit of the application.

When the application was placed before me for hearing of the preliminary objections, the applicant was represented by Mr. Ignas Ng'umbi, learned advocate whereas the respondent enjoyed the services of

Mr. Joyce Kasebwa, learned advocate. Upon the request of the parties, this Court allowed the preliminary objection to be disposed of by way of written submissions. The counsel for the respondent complied with the filing schedule save for the counsel for the applicant who opted not to lodge the reply submission.

In arguing the first limb of objection, Ms. Kasebwa submitted that, it is mandatory requirement of the law that prior to institution of any suit or application, the company must be sanctioned to proceed with a suit, signifying that, a board resolution from directors must be secured to confer an authority to any person who need to initiate legal action to a Court of law on behalf of the Company. To buttress her submissions, she referred the Court to the various cases law including the case of **Simba Papers Convertes Limited v Packaging and Stationery Manufacturers Limited & another**, Civil Appeal No. 280 of 2017, CAT at DSM (unreported), which discussed the circumstance where the board resolution would be necessary in institution of legal action in the name of the company.

In relation the second limb of objection, Ms. Kasebwa argued that, the present application is incompetent on the ground that the same is supported by the defective affidavit. She added that, an affidavit in support of the application is defective because it is sworn by one, Abbas Ambwene Mwakalinga who is not the applicant's principal officer. To support her arguments, she cited Order XXVIII rule 1 of the Civil Procedure Code (Cap 33 R.E. 2019) and the case of **Banson Enterprises Limited v Mire Artan**, Civil Appeal No. 26 of 2020, CAT at DSM (unreported) to the effect that, in any suit by or against a corporation, any pleadings may be signed and verified on behalf of the corporation by the secretary or by any director or by other principal officer of the corporation. In conclusion, she prayed the Court that the application be struck out with costs for being incompetent before this Court.

Having considering the written submissions filed by the counsel for the respondent, I think in order for me to remain within a safe zone, I should begin by determining whether the points raised in the notice of the preliminary objection qualify to be points of preliminary objection. In the first place, I wish to invoke the principle in the case of **Mukisa Biscuit**

Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 700 which, in my view, not only defines what a preliminary objection is, but also prescribes when, it can be raised and when it should not be raised.

In the case of **Biscuit Manufacturing Co. Ltd** (supra) the Court inter alia stated that;

> *"A preliminary objection is in the nature of what used to be a* ***demurrer****. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion". (The bold is mine)."*

From the above statement a preliminary objection is like a demurrer. The latter word comes from the word "demur" which is defined in Black's Law Dictionary, 8th Edition at page 465, as;

> *"3. To object to the legal sufficiency of a claim alleged in a pleading <u>while admitting the truth of the facts stated</u>". (The underlining is mine)."*

It is therefore expected that, a matter raised as a point of preliminary objection should conform to and have qualities of what used to be a demurrer. In my view, point of preliminary objection raised by the counsel for the respondent meets the qualities sets in the case of **Biscuit Manufacturing Co. Ltd (supra),** I hold so because it does not require arguments basing on evidence to be adduced but it can be established by perusing the affidavit in support of the application.

The next question here is whether the points of preliminary objection raised by the counsel for the respondent have merit or not.

Starting with the first limb of object, it is settled principle of law that the board resolution would be necessary where the suit involves a dispute between a company and one of its shareholders or directors. In other words, a resolution would be necessary where there is the internal conflict within the company. See the case of **Simba Papers Convertes Limited** (supra) as well cited by the counsel for the respondent when submitting. What transpired in the case of **Bugerere Coffee Growers Ltd v Sibaduka & another** (1970) 1 EA 147, is similar to the present

application where the dispute was between the company and one of its shareholder and director.

In the instant application, throughout her pleadings, the applicant has not indicated anywhere if there is a board resolution was passed to authorize institution of the present application. It is my view, anything done by the company has to be so done by resolution of the company general meeting or meeting of any class of members of the company as per section 147 (1) of the Companies Act, No.12 (Cap 21 R.E. 2002). The purpose of the board of directors' resolution before institution of the suit is that, the potential shareholders must be aware via meeting executed internally for the sake of avoiding subjecting them into a surprise or any financial implication that might arise as consequence of engaging into pursuing a suit. Also, it is mandatory as it gives assurance to the defendant/respondent that the company will be able to pay his costs should the case be decided in his favour. In the regard, this required the express authority by way of resolution of the board of directors to institute the case or application in absence of which, the suit in the name of the

company is defective and it ought to have been struck out. See **Simba Papers Convertes Limited** (supra).

Again, this Court find that, it does not require to prove whether the board of directors' resolution authorized institution of the said application or not as that fact can be established by perusing the affidavit in support of the application and not otherwise. Indeed, as stated earlier, the record does not show if the resolution had been passed authorizing these proceedings. In that regard, I agree with Ms. Kasebwa that, since the applicant is a company, it was not proper institute the present application on behalf of the company without its formal authority.

More so, I am aware with the principle of the overriding objective but the said principle cannot be invoked blindly in disregard of the rules of procedure couched mandatory term. This position is well stipulated in the case of **Sgs Societe General De Surveillance SA & another Versus VIP Engineering & Marketing Limited and another,** Civil Appeal No. 124 of 2017, CAT at DSM (unreported) where the Court stated that:

> *"We also find that the overriding objective principle does not and cannot apply in the circumstances of this case since its*

introduction in the Written Laws (Miscellaneous Amendments) (No.3) Act, 2017 (Act No. 8 of 2017) was not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case."

In the premise, I find the first limb of objection has merit and therefore upheld it as the applicant ought to have complied with the requirement of section 147 (1) (a) and (b) of the Companies Act (supra) by pleading and annexing to the affidavit in support of the application company board of directors' resolution authorizing institution of the present application. I therefore find needless to belaboring to the rest of the point of objection since the first limb of objection is capable to dispose of the present application.

In the upshot, I hereby hold that this application is incompetent and the same is struck with no order as to costs.

It is so ordered.

D.B. NDUNGURU
JUDGE
12/10/2023