IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL CASE NO. 5 OF 2023

SHARED INTEREST SOCIETY LTD..... PLAINTIFF

VERSUS

KILIMANJARO NATIVE CO-OPERATIVE

UNION (1984) LTD.....DEFENDANT

RULING

18/09/2023 & 18/10/2023

SIMFUKWE, J.

The plaintiff herein instituted a case against the defendant claiming for payment of a sum of USD 399,175/= being amount due and payable arising from credit facility (loan advanced to the defendant) plus interest accrued thereon.

In their Written Statement of Defence, the defendant raised the following preliminary objections:

1. *The court lacks jurisdiction*
2. *The suit is time barred*
3. *The plaintiff lacks locus standi before this honourable court*

During the hearing of the raised objections, the defendant was represented by Mr. Elikunda Kipoko and Ms. Lilian P. Mushi, learned

advocates, while the plaintiff enjoyed the service of Mr. Raymond Laurent, learned advocate.

Submitting on the third ground of objection that the plaintiff lacks *locus standi*, Mr. Kipoko argued that since the matter was instituted by **Shared Interest Society Ltd** the assumption is that the plaintiff is a limited company. Thus, for this company to have locus before this court, should annex two documents: Certificate of Incorporation and Board Resolution. He challenged the annexed Board Resolution (Annexure P6) for two reasons; that ***first,*** the document is from Shared Interest Society and not Shared Interest Society Limited. He opined that the said annexure P6 has nothing to do with the plaintiff and the difference on names goes to the root of the matter.

The second reason for challenging the annexed Board Resolution is that it does not meet the requirement set by the law which governs execution of documents by companies. Mr. Kipoko explained that **section 39(1) and (2) of the Companies Act** requires a document of this nature on its face to be signed by either two directors or a director and a company secretary. That, according to annexure P6 the alleged Board Resolution is signed by one person a company secretary. He urged this court to find that annexure P6 does not meet the legal requirement set for Board Resolution under the laws of this country. He was of the view that the suit was filed without Board Resolution and it is incompetent before this court. Reference was made to the case of **Bugerere Coffee Growers vs Sebaduka and Another [1970] Vol. 1 EA 147.**

Mr. Kipoko went on to submit that another document which was supposed to accompany the plaint in this case is the Certificate of Incorporation on the reason that the plaintiff is the foreign Company. He asserted that Certificate of Incorporation should have put prima facie evidence that the plaintiff is a legal entity. He prayed the court to find that the suit before this court is incompetent for the stated reasons and strike it out.

Submitting on the second preliminary Objection that the suit is time barred, Ms. Lilian said that **item 7 Part 1 to the Schedule of the Law of Limitation Act Cap 89 R.E 2029** provides that the time limit for suits founded on contract is six years. That, taking a leaf from the plaintiff's plaint particularly paragraph 6, the plaintiff's claim against the defendant is breach of agreement or contract. The plaintiff alleged that the contract was breached on 27/06/2016 while the suit was filed on 4/4/2023 after the elapse of six years contrary to the **Law of Limitation Act**. The learned counsel prayed the court to dismiss this suit according to **section 3(1) of the Law of Limitation Act** (supra) which provides the remedy of the suit filed out of time.

In countering the 3rd point of objection that the plaintiff lacks *locus standi*, it was the opinion of Mr. Raymond that the raised objection does not qualify to be a preliminary objection before this court. He notified this court that the said objection was drafted in a way that the plaintiff could not understand it. He said it is the requirement of the law, in particular precedents, that a notice of preliminary objection must contain necessary particulars to enable the court and the other side to grasp the nature of the objection raised. He bolstered his argument with the case of **James**

Burchard Rugemalila vs The Republic and Another, Criminal Application No. 59/19 of 2017 which at page 9 stated that:

> *"It should be remembered that a notice of objection is always intended to let the adversary party know a point of law raised so that when it comes up for hearing he should be aware in advance what the nature of the point of objection raised is all about and this will enable him to prepare himself for a reply thereof, if any."*

Mr. Raymond continued to state that paragraph (c) of the raised objection is in the form of a riddle as it should have been made clear. That, the reasons/rationale behind this is to do away with unnecessary surprises to the court and the parties. Thus, promoting a fair hearing which at the end will make the end of justice.

Be as it may, replying on the argument that the plaintiff did not attach Certificate of Incorporation, it was Mr. Raymond's submission that the learned advocate has not cited any provision of the law. That, there is no provision in the **Companies Act** which requires a plaintiff to attach a Certificate of Incorporation to the plaint. He contended that, it would be like requiring a natural person to attach to his plaint a baptism certificate or birth certificate. He was of the opinion that since the same was not backed up with the provision of the law, it does not qualify to be a preliminary objection.

Concerning the argument that the attached Board Resolution does not meet the standards stipulated under **section 39(1) and (2) of the**

Companies Act, Mr. Raymond submitted that the same goes to the merits of the suit and it requires evidence. That, the submitted Resolution which will also be tendered as exhibit shows that the same was signed by one person as a company Secretary and Director of the Company. Thus, the raised issue was not supposed to be raised at this stage of Preliminary Objection. Mr. Raymond went on to submit that the attachment of Board Resolution to the suit is not a legal requirement. Thus, the raised preliminary objection has no merit.

In addition, Mr. Raymond submitted that the attached resolution came from the plaintiff herself. If one examines the said Resolution, he will discover that it's the plaintiff who is recognised in the said Resolution. If there is any difference, the same cannot defeat this suit as the difference will require evidence. Concerning the cited of **Bugerere Coffee Growers** (supra), Mr. Raymond replied that in their case they have the resolution. Thus, the cited authority serves no purpose at all.

On the issue that the suit is time barred, Mr. Raymond conceded to the provision quoted by Ms. Lilian. However, he was of the view that the cited provision is not appliable in this matter as the plaintiff's plaint should be read in its entirety. That, paragraph 4 and 7 of the Plaint show the origin of the plaint. That, there was a loan which the defendant defaulted to pay in 2019. The question is when the cause of action accrues. The answer is that, time commenced to run when the defendant stopped to pay the loan to the plaintiff. That is in 2019 as per paragraph 7 of the plaint. He prayed the court to seek wisdom from **section 27(3) of the Law of Limitation Act** (supra). Mr. Raymond believed that they are still within time and urged his fellow counsels to believe so. He insisted that the question of

time limitation cannot be used to curtail the rights of the other side as the remedy of the loan is to pay it. He made reference to the case of **CRDB Bank PLC vs Symbion Power Tanzania Limited, Civil Appeal No. 371 of 2022,** at page 25, CAT at Dsm, in which the issue was that the debt was claimed out of time and the court held that:

> *"In our conclusion the only time the respondent would be discharged from liability to pay is upon full payment of the debt as promised by it."*

In the instant case, the Defendant was paying his debt until 2019 when she defaulted. The learned counsel prayed the objection to be overruled. In respect of costs, Mr. Raymond was of the opinion that since the defendants have not prayed for the costs, they also refrained from praying for the same. However, he left it to the discretion of the court to decide.

In his rejoinder, Mr. Kipoko disputed the allegation that the plaintiff has been taken by surprise as there is notice in the Written Statement of Defence, particularly paragraph (c) which is specific without any ambiguity.

Commenting on the cited case of **James Burchard Rugemalira** (supra) on the requirement of notice, Mr. Kipoko explained that at page 10 of the cited case the Court of Appeal cited **Rule 107(1) of the Court of Appeal Rules** which stipulates the procedures of raising preliminary objection before the Court of Appeal. He stated that before the High Court, **Order VIII rule 2 of the CPC** prescribes procedures for raising preliminary objection which are quite different to the prescribed procedures before

the Court of Appeal which are strict. Nevertheless, Mr. Kipoko averred that they have met the requirement of specifying the legal principle that is the *locus standi*.

Regarding the status of annexure P6, it was alleged that they have cited the provision of the law which requires the Board Resolution to be signed by two individuals not one individual in two capacities. He insisted that the last defect in the said Board Resolution is apparent on its face. That, the plaintiff is Shared Interest Society Ltd while annexure P6 the company is called Shared Interest Society which are two different entities. He stressed that such defect of names is fatal. Thus, there is no Board Resolution.

Concerning attachment of Certificate of Incorporation, Mr. Kipoko reiterated his submission in chief.

In her rejoinder, Ms. Lilian distinguished the cited authorities by stating that, referring to the contents of the plaint particularly paragraph 4, 5, 6 and 10 which clearly state that the relationship between the plaintiff and the defendant is based on contractual agreement. According to the alleged agreement, the defendant was required to discharge her contractual obligation within three years from the date of signing the contact as indicated under the contents of paragraph 5 of the plaint. According to paragraph 6, it is alleged that the defendant failed to honour her contractual obligations on 27/06/2016. Ms. Lilian argued that with that, it is clear that the cause of action arose in 2016 as alleged by the plaintiff in the plaint.

She continued to re-join that the contents of paragraph 10 clearly indicate that following the breach of contractual terms and commitments made by the defendant, the plaintiff passed their purported Board Resolution on 01/11/2022. Assuming but not accepting that the purported Board Resolution is genuine, the plaintiff admits under paragraph 3 that the breach by the defendant was in 2015. She insisted that, it is their position that the suit by the plaintiff is based on contractual agreement and the same was required to be filed before this court within six years from the date of breach of contract. The same was not done. Hence, this suit is time barred.

Responding to the allegation that there was part or instalment payment by the defendant to the plaintiff, Ms Lilian argued that the same is submission from the bar as it is not indicated in any paragraph of the plaint. She concluded by praying this court to uphold their preliminary objections and dismiss this suit.

Having heard the submissions for and against the preliminary objections, the issue for determination is ***whether the raised preliminary points of objection have merit***.

Starting with the concern of Mr. Raymond that the third point of objection was drafted in a way that the plaintiff could not understand it; this concern was strongly disputed by Mr. Kipoko who argued that there was sufficient notice in their Written Statement of Defence which is without ambiguity.

I agree with Mr. Kipoko that there is no ambiguity in respect of the third point of objection which concerns *locus standi*. Besides that, Mr. Kipoko

explained in details as to why he believed that the plaintiff has no locus standi and the plaintiff's advocate was able to respond to it. Therefore, the argument by Mr. Raymond that he was taken by surprise is unfounded.

Having established and found as such, I now discuss the merit or otherwise of the third ground of objection. Mr. Kipoko was of the opinion that the plaintiff lacks locus standi for two reasons: first, that the plaint lacks Certificate of Incorporation and the Board Resolution. As far as the Board Resolution (Annexure P6) is concerned, Mr. Kipoko was of the view that the same is from Shared Interest Society while the plaintiff is Shared Interest Society Ltd. Also, it does not meet with the requirement set under **section 39(1) and (2) of the Companies Act** by being signed by either two directors or a director and a Company Secretary.

On the other hand, the plaintiff's counsel argued that the argument that there is no Certificate of Incorporation is not backed up with the law. On the issue of the Board Resolution, Mr. Raymond was of the view that such matter goes to the merit of the case and it requires evidence.

Starting with the first limb of objection that there was no certificate of Incorporation, with due respect to Mr. Kipoko as rightly submitted by Mr. Raymond, there is no law and Mr. Kipoko failed to cite any, which requires the plaint instituted by the Company to be accompanied with the Certificate of Incorporation. In other words, since the preliminary objection is in respect of the matters of the law and there is no law referred to this court, it goes without saying that the first limb of the 3rd objection is without merit.

Turning to the second limb of the 3rd objection that the Board Resolution was not signed by the director/s and the company Secretary, with all due respect to Mr. Kipoko, in the impugned Plaint the Board Resolution was attached as **Annexure P6.** The same was signed by **T.D Morgan** as the Finance Director and Company Secretary. Thus, it is not correct to say that there was no Board Resolution attached to the plaint.

Concerning the issue of its authenticity, I agree with Mr. Raymond that the argument requires explanations and evidence. The question why it was signed by the said person alone in two capacities is the issue which requires evidence/explanations. Thus, making the objection to lack the criteria of being determined at the preliminary stage.

Also, Mr. Kipoko submitted that the annexed Board Resolution has nothing to do with the plaintiff since the plaintiff in this case is Shared Interest Society Limited, while the Board Resolution is in respect of "Shared Interest Society." He argued that, difference on names goes to the root of the matter. Mr Raymond, was of the view that the said objection requires evidence, thus, cannot be determined at this preliminary stage. I think the learned counsel for the plaintiff has misdirected himself on this issue. The issue of names, particularly company names does not require evidence. It can be ascertained from pleadings of the parties and the law.

In the case of **Christina Mrimi v. Coca Cola Kwanza Bottlers Limited, Civil Appeal No. 112 of 2008**, at page 4, 5 and 6 the Court of Appeal observed that:

"Companies, like human beings, have to have names. They are known and differentiated by their registered names. In the instant case, it is apparent that the names "Coca Cola Kwanza Bottles", "Coca Cola Kwanza Bottlers Ltd" or Coca Cola Bottlers Ltd" have been used inter changeably. Although the Appellant wants this court to hold that they mean one and the same Company, strictly, this view cannot be accepted without same risk of in exactitude. We are mindful of the provisions of Article 107A of the Constitution of the United Republic of Tanzania, an article which requires Courts of law to give purposive interpretation of laws as they are and not impeding them with mere technicalities or procedural irregularities. However, as has been held by this Court in some of its recent decisions, not all procedural or technical irregularities can be ignored. Some technical irregularities cannot be ignored as they touch on the very fundamentals of the issue at hand….

It is our considered opinion that in the instant appeal, the REGISTERED NAME is fundamental to the whole case. There could be either different companies or simply a confusion in the use and application of the correct name of a company which bottles "Sprite" soft drink….

In the result, this appeal, incompetent for failure to identify the appropriate party, is struck out."

Guided by the cited case law, I totally agree with Mr. Kipoko that difference on names goes to the root of the matter. Shared Interest Society Limited

and Shared Interest Society are two different names. That anomaly renders this suit incompetent.

Regarding the allegation that the suit is time barred, Ms. Lilian believed that since the plaintiff alleges that the contract was breached on 27/06/2026 while the suit was filed on 04/04/2023, it apparent that the suit was filed out of six years as required under **item 7 part I to the Schedule of the Law of Limitation Act** (supra).

Contesting Ms. Lilian's argument, Mr. Raymond submitted that the suit was filed within time since the plaint should be read in its entirety. That, according to paragraph 7 of the plaint, the defendant defaulted to pay the loan in 2019.

I have read the Plaint in its entirety as suggested by Mr. Raymond, I have noted that according to paragraph 4, the defendant was issued with loan on 18/12/2013 which was to be paid within three years. That, the defendant did not honour the agreement until when the plaintiff issued a Default listing and Debt Collection Notification to the defendant on 14/06/2016. The same was replied whereby the defendant apologized for the delay to repay. According to paragraph 7 of the Plaint, on 28/10/2019 the defendant paid some of the amount. Thereafter, on 04/4/2023 the plaintiff decided to institute the present suit.

Basing on the above narration, the issue is when time accrued. Without wasting much time, I do agree with Mr. Raymond that time started to accrue when the defendant acknowledged the debt and paid part of the

debt in 2019. This argument is supported by the provision of **section 27(3) of the Law of Limitation Act** (supra) which reads as follows:

> *"27 (3) Where a right of action has accrued to recover a debt or other pecuniary claim, or to recover any other movable property whatsoever, or to recover any sum of money or other property under a decree or order of a court and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right of action in respect of such debt, pecuniary claim or movable property, or as the case may be, the right of action in respect of an application for the execution of the decree or the enforcement of the order, shall be deemed to have accrued on and not before the date of the acknowledgement or, as the case may be, the date of the last payment:…"*

In the present matter, since paragraph 7 of the Plaint states that the defendant paid part of the debt, guided by the above provision of the law, time started to run in 2019 and not otherwise. Thus, the suit was filed within the prescribed time.

On the first ground of objection that this court has no jurisdiction, Mr. Kipoko did not tell this court why he thinks this court has no jurisdiction.

In the final analysis, based on the issue of difference on names of the plaintiff in the plaint and attached board resolution, I hereby uphold the

third preliminary objection and find this suit incompetent before the court. The suit is struck out with no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 18th day of October 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

18/10/2023