

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CIVIL CASE NO.120 OF 2023**

**MAZONGERA BUILDING CONTRACTORS LIMITED.....PLAINTIFF**

**VERSUS**

**JIN HAO MINING COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**ZHENG ZHIHAO.....2<sup>ND</sup> DEFENDANT**

**FANG JINYE.....3<sup>RD</sup> DEFENDANT**

**RULING**

*Date of last Order:5-10-2023*

*Date of ruling:30-11-2023*

**B.K. PHILLIP, J**

Through the legal services of TJM Law offices, the plaintiff instituted this case against the defendants herein alleging breach of the shareholding agreement entered between them. The plaintiff claims against the defendant jointly and severally for the payment of USD 200,000/= being consideration for the commitment in the shareholding agreement, USD 300,000/= being damages arising out of breach of contract, interests, and costs.

Upon being served with the plant, the defendants through the legal services of Winstlaw Attorneys filed their written statement of defence together with two points of preliminary objections, to wit;

- i) That this court has no jurisdiction to entertain this case.*
- ii) That the case violates the provisions of the Companies Act 2002.*

This ruling is in respect to the above-mentioned points of preliminary objections which were disposed of by way of written submissions. The learned Advocates Thomas Massawe of TMJ Law offices and Bernard Stephen Advocates of Winstlaw Attorneys appeared for the plaintiff and defendants respectively.

Submitting for the 1<sup>st</sup> point of preliminary objection, Mr. Stephen argued that the cause of action in this case as per the facts pleaded in the plaint is a breach of the shareholding agreement entered between the plaintiff and a Company known as Qingdao Keshou New Material Technology Company Limited, the name which was later changed by being substituted with 1<sup>st</sup> defendant. He went on to submit that the shareholding agreement provides for the mode of dealing with disputes arising out of the implementation of the said shareholding agreement. He pointed out that paragraph "C" of the shareholding agreement stipulates that disputes arising out of the implementation of the shareholding agreement have to be solved by way of consultation between the parties and the party who has a claim against the other party has to deliver a written request to the other party for consultation. After such consultations, both sides shall resolve the dispute amicably within 30 days failure of which, the parties have to abide by the requirement stipulated in paragraph "D" of the shareholding agreement which provides that if parties fail to resolve the dispute amicably, the same shall be resolved in accordance to the Tanzanian laws. Mr. Stephen contended that this case had been filed in

court prematurely because the plaintiff did not exhaust the procedures for dispute settlement stipulated in the shareholding agreement paragraph "C". He insisted that the sanctity of the contract is of paramount importance and the plaintiff is duty bound to honor what was agreed in the shareholding agreement. Expounding on this point, Mr. Stephen contended further that nowhere in the plaint indicates that the plaintiff exhausted the procedures for dispute settlement stipulated in the shareholding agreement before filing this suit. He was emphatic that parties are bound by their pleadings. To cement his argument he cited the case of **Simon Kichele Chacha Vs Aveline. M.Kilawe, Civil Appeal No.160 of 2018,** ( unreported) and **James Finke Gwagilo Vs Attorney General ( 2004) T.L.R 161.** He implored this court to dismiss this case in its entirety.

Concerning the second point of preliminary objection, Mr. Stephen submitted that this suit has been filed in court in contravention of sections 233 and 234 of the Companies Act, Cap 212. Expounding on this point, Mr. Stephen contended that section 233 of the Companies Act provides for remedy for the directors or members of the Company who have been prejudiced by either other directors or majority shareholders, to wit; to file a petition against the defendants in this court on the ground that the affairs of the company are being conducted in an unfairly prejudicial to certain members of the company.

Moreover, Mr. Stephen submitted that what is pleaded in the plaint indicates that the parties in this case are shareholders in the Company known as EA Graphite Resources Limited and the source of this case is the shareholding agreement in which EA Graphite Resources Limited is a

shareholder. He was of the view that this case was supposed to be instituted by the aforementioned Company since the parties in this case are shareholders of the Company. He contended all the annexures to the plaint show that if the amount of money claimed by the plaintiff, in this case, has to be paid, then payment of the same has to be made by EA Graphite Resources Limited, not the plaintiff. In conclusion, Mr. Stephen implored this court to dismiss this case in its entirety.

In rebuttal, starting with the 1<sup>st</sup> point of preliminary objection, Mr. Masawe contended that the jurisdiction of the court is ousted either due to pecuniary jurisdiction or a specific provision in the agreement that bars the court from entertaining the matter. Also, he contended that the points of the preliminary objection raised by the defendant are not pure points of law, thus contravening the principles laid down in the case of **Mukisa Biscuits Manufacturing Co Ltd Vs East End Distributors Limited ( 1969) EA 696**. He went on to submit that the 1<sup>st</sup> point of preliminary objection had been raised due to Mr. Stephen's failure to properly construe the contents of paragraph 6 of the plaint. He contended that it appears Mr. Stephen did not read the plaint in its entirety. Expounding on this point, Mr. Masawe argued that if Mr. Stephen had read paragraphs 12,13, and 14 of the plaint, in which the plaintiff states clearly that following parties' endeavor to settle their disputes amicably, commitments were made by the parties and cheques to that effect were issued but the same was stopped from being cashed. He contended that this case was filed in court after exhausting the process for amicable settlement of the disputes but the same were not successful. He submitted that the case of **Simon Kichele**

**Chacha** (supra) is distinguishable from the facts of this case because the dispute in this case is over the payment of USD 200,000/= which was agreed in the shareholding agreement being commitment fees. Similarly, he distinguished the case of **James Funke** (supra) on the ground that the principles derived from that case that parties are bound by their pleadings is irrelevant in this case since there is no dispute on what is pleaded in the plaint as the pleadings are clear.

About the 2<sup>nd</sup> point of preliminary objection, Mr. Masawe pointed out that the provisions of section 233 (1) of the Companies Act, provide for remedies in the case where the affairs of the company are conducted in a manner that is unfair and prejudicial to other members, whereas section 234 provides for derivative actions. He was of the view that Mr. Stephen misconstrued the law and quoted the aforementioned provisions of the law out of context since in the case at hand, the dispute between the parties is the failure of payment of commitment fees agreed in the shareholding agreement and there is neither a claim concerning with unfair conduct of the matters of the Company nor any action against the company. He was emphatic that the provisions of sections 233 and 234 of the Companies Act are not applicable in the circumstances of this case.

In rejoinder, Mr. Stephen reiterated his submission in chief. He insisted that the cases of **Simon Kichele Chacha** (supra) and **James Funke** (Supra) are relevant in this case.

Having dispassionately analyzed the rival submissions made by the learned Advocates, let me embark on the determination of the points of preliminary

objection. I wish to start with the legal concern raised by Mr. Masawe that the 1<sup>st</sup> point of preliminary objection is not a pure point of law. It is a well-known position of the law that a point of preliminary objection has to be a pure point of law. It should not need evidence to ascertain some of the alleged facts. In the famous case of **Mukisa Biscuits** (Supra), the court had this to say on the qualities of a point of preliminary objection worthy of the name;

*".....A preliminary objection is in the nature of what used to be demurre. It raises a pure point of law which is 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....."*

( Emphasis is added).

In this case, Mr. Stephen contended that the procedures for dispute settlement stipulated in the shareholding agreement require the plaintiff to have a consultation with the defendant on the dispute between them before instituting a case in the court of law, but did not abide by the same. Furthermore, Mr. Stephen contended that the plaint does not disclose that the plaintiff complied with the aforesaid procedure. To determine whether or not the plaintiff complied with the afore-stated procedure, I need evidence to ascertain whether or not the plaintiff consulted with the defendants on the dispute in this case before instituting this case. The pleadings are not enough to show whether that procedure was complied with or not since the same narrates in a brief the way the steps taken by the plaintiff in solving the dispute between them before instituting this case. Thus, I agree with Mr.Masawe that the 1<sup>st</sup> point of

preliminary objection is not a pure point of law. Thus, contravenes the principles laid down in the case of **Mukisa Biscuits** (supra).

Without prejudice to my observation herein above, I have perused the plaint and noted that in paragraphs 12 and 13 the plaintiff alleges that upon the defendant's failure to pay the agreed commitment fees of USD 200,000/= the 2<sup>nd</sup> defendant issued the 1<sup>st</sup> commitment letter accompanied by a cheque worth USD 200,000/= which was dishonored upon encashment. In paragraph 15 of the plaint, the plaintiff alleges that despite several reminders and meetings between the plaintiff and the defendants on the payment of the said commitment fees but in vain. What can be gathered from the plant is that before the institution of this case, the parties attempted to dissolve their dispute amicably by way of consultation as proved in the shareholding agreement but it was not successful. Thus, I find Mr. Stephen's arguments that the plaintiff did not indicate in the plaint that he attempted to settle their dispute amicably through discussion/consultation is misconceived.

Concerning the 2<sup>nd</sup> point of preliminary objection, I am inclined to agree with Mr. Masawe that the provisions of sections 233 and 234 of the Companies Act are not applicable in this case since this case does not involve complaints on unsatisfactory conduct of the affairs of the company.

Moreover, Mr. Stephen's argument that the plaintiff was supposed to sue EA Graphite Resources Limited is misconceived and raised out of context. It is the plaintiff who instituted this case and knows who owes him the

amount of money he is claiming in this case. EA Graphite Resources Limited is not a party to this case. There is no way this court can issue orders in respect of a person or a legal entity not a party to the case.

In the upshot, the 2<sup>nd</sup> point of preliminary objection lacks merit too. Thus, I hereby dismiss all points of preliminary objection. Costs will be in course. It is so ordered.

Dated this 30<sup>th</sup> day of November 2023.



  
**B.K. PHILLIP**

**JUDGE**