

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

**AT DAR ES SALAAM**

**CIVIL CASE NO. 171 OF 2023**

**ATLAS PLUMBERS & BUILDERS LTD..... PLAINTIFF**

**VERSUS**

**M. A. KHARAFI & SONS ..... DEFENDANT**

**RULING**

*Date of Last Order: 09/11/2023.*

*Date of Ruling: 08/12/2023.*

**E.E. KAKOLAKI, J.**

The plaintiff herein preferred this case against the defendant claiming for payment of United States dollars four hundred fifty-six thousand six hundred and eight cents ninety-seven (456,608.97) being outstanding principal amount of the supplied and transported pipes, compensation for cancellation of the contractual relationship and the accrued interest.

After being served with the plaint in her written statement of defence the defendant raised three points of preliminary objection on the grounds that:

1. This honourable court does not have the pecuniary jurisdiction to entertain the present matter.

2. The suit is incompetent and bad in law for lack of a board resolution authorizing the institution of the present suit; and
3. That the suit is misconceived as there is no legal entity with the name of the defendant.

In view of the above raised points of objection this Court is invited by the defendant to dismiss the suit with costs.

As it is always the practice of the Court to dispose of the preliminary objections when raised, with leave of the Court parties were heard in written form and filed their respective submissions in accordance with the scheduled court orders. The plaintiff was represented by Mr. Juvenalis Motete, while the defendant hired the services of Mr. Fraterine Munale, both learned advocates.

In his submission in-chief Mr. Munale regarding the first point of objection on pecuniary jurisdiction of this Court he submitted that, pecuniary jurisdiction of the court is determined from substantive claims and not general damages and in that principle he referred the Court to the case of **Tanzania- China Friendship Textile Co. Ltd Vs. Our Lady of the Usambara Sister [2006] TLR 70**. He said, in establishing pecuniary jurisdiction the court will have to look at the whole plaint and its annexures

as it was held in the case of **Ali Shabani and 48 Others Vs. Tanzania National Roads Agency and Another**, Civil Appeal No. 261 of 2020 (CAT-unreported). He averred that, in this case the plaintiff claims of USD 456,608.97 include USD 193,811.17 as per paragraph 6 of the plaint which is a claim for loss of profit, USD 150,000 as compensation for cancellation of contract as per paragraph 8 and USD 112,797 as interest accrued as per paragraph 11 of the plaint. In his view, the plaintiff has not pleaded any special damages since such claims in the plaint and its annexures are falling under general damages out of alleged specific action performed and for that matter, it is wrong to derive pecuniary jurisdiction out of general damages or compensation for loss of profit. To fortify his stance, he cited to Court the case of **Mwananchi Communication Limited and 2 Others Vs. Joshua K. Kajula and 2 others**, Civil Appeal No. 126/01 of 2016 (CAT-unreported).

In regard to the 2<sup>nd</sup> point of objection that, the suit is incompetent and bad in law for want of board resolution authorising its institution it was Mr. Munale's submission that, section 147(1) of the Companies Act, 2002 requires in the case of the Company anything done to be done by the resolution of the company since when done without its sanction is not so done by or on behalf of the company. In the matter at hand he averred, the

plaintiff neither pleaded nor attached the board resolution of the board of directors sanctioning institution of the current suit, hence violation of the law which is fatal and renders the plaint incurably defective for going into the root of competency of the suit, thus the same should suffer the consequence of being struck out with costs. He invited the Court to be persuaded with its decision in **CRDB Bank PLC Vs. Delta Africa Limited and Another**, Civil Appeal No. 55 of 2022 when referred to the decision of the Court of Appeal in case of **Simba Papers Converters Limited Vs. Packaging and Stationery Manufacturers Limited and Another**, Civil Appeal No. 280 of 2017 (CAT-unreported) and held the appeal to be incompetent for originating from the suit by the company preferred without sanction of board of directors.

And regarding to the last point of objection it was submitted that, the suit is misconceived as there is no existing legal entity with the defendant's name. Relying on the case of **Change Tanzania Limited Vs. Registrar Business Registration and Licencing Agency**, Civil Appeal No. 03 of 2021 (CAT-unreported), Mr. Munale impressed upon the Court that, a suit instituted in the name of a non-existent party is void and must be struck out. In the present matter he submitted, the plaint named the defendant as M.

A. KHARAFFI & SONS on the first page of the plaint whereas in its second paragraph it is pleaded that, the defendant is a limited liability company thus failure to properly cite the name of the defendant as per the dictates of section 32 (1) of the companies Act, which requires use of the word "**limited**" at the end of citation unless licence from the Registrar to dispense with the said word limited is sought. He thus implored the Court to struck out the suit for being incompetent.

In rebuttal Mr. Motete submitted that, the three points of objection raised by the defendant are not pure points of law as they substantially raise factual matters which can be discerned when dealing with the case on merit. He urged the court to dismiss them with costs and allow the case to proceed on merit.

Submitting in regard to the 1<sup>st</sup> raised point of objection on competence of this Court to entertain the suit for want of pecuniary he argued that, the plaintiff's claim is USD 456,608.97 and there is nowhere plaintiff has claimed general damages from the defendant. While subscribing to the view that jurisdiction is determined by looking at the plaint and its annexures as held in the case of **Ally Shaban** (supra) Mr. Motete contended that, if the court scans the plaint and its annexures in this case will definitely arrive at the

conclusion that it has pecuniary jurisdiction to determine the matter. He distinguished the case of **Mwananchi communication limited** (supra) relied on by the defendant in his submission in chief submitting that, the prayers therein were (i) general damages, (ii) interest (a) above current bank rate from the day of filing the suit to the date of judgment (iii) interest on decretal sum (iv) costs of the suit and (v) any other or further reliefs the court may deem fit, while in the present matter the plaintiff is seeking for (a) an order for payment of USD 456,608.97 (b) an order for payment of interest on the principal amount claimed under paragraph (a) above at commercial lending rate 10% (c) an order for payment of interest on decretal amount at the rate of 12% (d) an order that costs arising from and incidental to the suit be borne by the defendant (e) an order for payment of interest on cost at the rate of 7% and (f) any other relief the court may deem fit to grant, hence the pecuniary jurisdiction is not premised on general damages as claimed by Mr. Munale. He thus invited the Court to find the objection is meritless and proceed to reject it.

Regarding the 2<sup>nd</sup> point of objection on incompetence of the suit for want of board resolution he submitted that, the requirement for attaching board resolution is not a pure point of law as it is factual based, hence can be dealt

with in the course of parties adducing evidence. In the alternative he argued, the law does not impose such requirement of attaching a board resolution as a pre- condition for instituting a case since the provision of section 147 (1) of the Companies Act is not worded in mandatory terms as its compliance is mandatory only in cases where there are internal disputes amongst members of the management in the company. His stance also relied on the decision in **Simba Paper Converters limited** (supra). As there is no internal dispute in the current suit to warrant the filling of a board resolution as a precondition for instituting a suit, Mr. Motete prayed for dismissal of the preliminary objection with costs.

As for the last point of objection on the argument that, the suit is misconceived for suing the none existing legal entity not in the name of the defendant, Mr. Motete countered that, the objection is misplaced as even the annexures in the defendant's own defence indicate defendant's name as **M. A. Khalafi & sons** and does not state it otherwise. To him therefore, the defendant is not known by any other name than **M. A. Khalafi & sons**. He added that, even when it is found the name is cited incorrectly, still the error is not fatal as it may be remedied by amendment and implored the

court to invoke the overriding objective principle to fit in the said amendment.

In his rejoinder Mr. Munale averred that, the plaintiff misunderstood the gist of raised objections as all are pure points of law which do not require to be ascertained by evidence since a point of objection cannot be determined from abstract as must be established by making reference to the facts in the plaint and its annexures. Regarding the first ground of objection he reiterated his submission in chief maintaining that, what is viewed out of the whole plaint and its annexures as indicated under paragraph 6 the claim is general damages and that, the reliefs sought are composed out of colourful language to hide the contents of paragraph 6 of the plaint. In regard to the 2<sup>nd</sup> objection he said that, it has been a precedent that interpretation of section 147(1) of the Companies Act, relating to company's business and institution of suit before the court makes a board resolution a mandatory requirement and urged the court to so find and proceed to strike out the suit with costs for want of board resolution.

Appreciating the rival submissions from both parties, it is now opportune for this Court to determine the points of objections raised after closely scanning the plaint and its annexures. To start with, it is imperative that this Court



determines first the point raised by Mr. Motete in his submission that all points of objection raised are not pure points of law for want of ascertainment of facts through evidence in the course of trial. The issue to be answered then is whether the raised preliminary objections suffice to constitute points of law. It is settled legal stance that, a preliminary objection is raised on assumption that all facts pleaded are correct as cannot be premised on facts requiring ascertainment or based on the discretion of the court. The above principle was stated in the landmark case of **Mukisa Biscuit Manufacturing Company Ltd vs. West Distributors Ltd** (1969) EA 696, when the Court observed thus:

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

While appreciating the principle that, a preliminary objection must be premised on pure point of law and not one that needs ascertainment of fact or evidence or based on discretion of the court that does not necessary mean that, the Court is restricted from referring itself to the pleadings or records if any as objection cannot be raised from abstract. I am therefore persuaded

that, some facts in the pleadings or record must be looked into without further going into details of evidence or facts pleaded therein as it was held in the case of **Ali Shabani (Supra)** where the Court of Appeal observed that:

*"...at any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence."*

Similar stance to the above was also taken by the Court of Appeal in case of **Gideon Wasonga and 3 others Vs. Attorney General and 2 others**, Civil Appeal No. 37 of 2018 (unreported) where it was observed that:

*"As to where the point of preliminary objection can be found, we do not have qualms that the court needs to ascertain it into the **plaints and its annexures without any further evidence** in determining the issue of time limitation. ...the preliminary objection would always be in the record of appeal."*  
(Emphasis is supplied)

Guided by the principles in the above cited cases and having revisited the plaint and its annexures versus the three raised points of objection, I find them all qualifying to be pure points of law and therefore disassociate myself with Mr. Motete's proposition that they require ascertainment by way of

evidence. For example, the issue of pecuniary jurisdiction of this Court though calling for consultation of pleadings it is a matter of law which needs no evidence to prove it as the facts from the pleadings are sufficient to prove or disprove it. The same applies to the issue of board resolution as well as the issue of wrong citation or naming of the party to the case.

Now, moving forward to the objections raised by Mr. Munale, for the reasons to be apparent soon I have chosen to start with the 2<sup>nd</sup> objection on the competence of the suit by the plaintiff for want of board resolution. After weighing the contending submissions, I do not subscribe to Mr. Motete's proposition that, the requirement of attaching board resolution is not a pure point of law rather factual one and for that matter that it ought be dealt with in the course of parties adducing evidence. The law is very clear under section 147 (1) (a) and (b) of the Companies Act No 12 of 2002, that anything done by the company may be so done by its resolution in the general meeting or resolution of members of any class of the company. Section 147(1)(a) and (b) of the Act provides that:

*147.-(1) Anything which in the case of a company may be done  
(a) by resolution of the company in 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.*

I agree with Mr. Motete that the wording in section 147 of the Companies Act is not coached in mandatory terms. However, that does not mean that the company has discretion at all time to choose either to secure sanction of its board or not especially when execution decisions that would require involvement or have effect to members of the company. This Court in the case of **Oxley Limited Vs. Nyarugusu Mining Company Limited and Another**, Commercial Case No. 14 of 2022 (HC-unreported) had an opportunity of discussing the rationale behind the requirement of companies' actions such as institution of case to be sanctioned by the companies' board resolution dully signed by or on behalf of members of the company, and observed that it is for prevention or avoidance of unilateral decisions or acts of an individual person which might impact or be detrimental to the company and other shareholders and safeguarding of interest of shareholders who might be affected with decision of the court without being aware of the institution of the case. In so doing the Court stated thus:

*"It has been held by this court that the gist of the above provision is to ensure that the company's affairs are run and managed by board of directors **to avoid unilateral decisions or acts of an individual person which might be detrimental to the company and other shareholders.** As such, the requirement for board resolution before institution of the case **is intended to safeguard the interests of shareholders who may be bound by the decision of the court of which they were not aware.**" (Emphasis supplied)*

Though the provision of section 147(1) of the Companies Act is not couched in mandatory terms as contended by Mr. Motete, its rationale as discerned from the above cited provision in my profound view renders compliance of the provision compulsory and I so find.

Again, I don't approve Mr. Motete's assertion that sanction of company board by way of board resolution is mandatory before institution of suit only when there is internal disputes within the management of board of directors of the company in particular when relied on the case of **Simba Papers Converts Ltd** (supra) in which its decision based on facts referring to internal conflicts of parties within the company. This Court in case of **Stanbic Bank Tanzania Limited Vs. Sumry Bus Services and Company Ltd**, Civil Case No. 125 of 2018 (HC-unreported) had the opportunity of discussing the

position in **Simba Papers Converts Ltd** (supra) and concluded that, requirement of sanctioning institution of suit by board resolution is not restricted to dispute arising from internal conflicts in the company only rather extends to cover those involving a corporate body against an individual or another corporate body. The Court echoed at page 9 thus:

*"...the rule is not only restricted between a company and its members but also extends between that of corporate body and an individual or against another corporate body."*

Further to that at page 11 the Court went on to observe that:

*"Therefore, the fact that the Court of Appeal in this case was dealing with a conflict involving internal affairs of a company, **it however embraced the same principle of a company's resolution authorizing the commencement of any legal action.** This is equally my position and understanding of the law as far as suit by a company is concerned that being the correct position of the law, I have no privilege to close my eyes in disrespect of it. (Emphasis supplied)*

The above notwithstanding it is trite law that, whenever a suit is preferred by the company, board resolution in a minutes form must be pleaded or/and annexed to the plaint, failure of which renders the suit incompetent. See the cases of **Oxley Limited** (supra), **Lwempisi General Company Limited**

**and Another Vs. Richard Kweyamba Joseph Rugarabamu,**  
Commercial Case No. 6 of 2022 and **Boimanda Modern Construction Co.**  
**Ltd Vs. Tenende Mwakagile and 6 Others,** Land Case No. 8 of 2022 (all  
HC-unreported).

In view of the above position of the law and given the fact that Mr. Motete is not disputing to have either pleaded and or annexed the said company's board resolution and I am in agreement with Mr. Munale that, its absence renders the plaint incompetent the consequences of which is to have it struck out as held the cases cited above. The 2<sup>nd</sup> point of objection therefore disposes of this matter and I see no pressing agenda to consider the 1<sup>st</sup> and 3<sup>rd</sup> points as that will be an academic exercise which I am not prepared to indulge on now.

In the premises I uphold the raised preliminary objection and proceed to strike out the plaint with costs for want of competence.

It is so ordered.

Dated at Dar es Salaam this 08<sup>th</sup> December, 2023.



E. E. KAKOLAKI  
**JUDGE**

08/12/2023.

The Ruling has been delivered at Dar es salaam today 08<sup>th</sup> day of December, 2023 in the presence of Mr. Juvenalis Motete, advocate for the plaintiff, Mr. Fraterine Monale, for the defendant and Ms. Elieth Lugahanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUGDE**

08/12/2023.

