IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

CIVIL CASE NO. 11 OF 2023

MATALE CONSTRUCTION COMPANY LIMITED .....PLAINTIFF

VERSUS

RURAL WATER SUPPLY AND SANITATION AGENCY..... 1ST DEFENDANT (RUWASA)
KILINDI DISTRICT COUNCIL..... 2ND DEFENDANT
THE ATTORNEY GENERAL ..... 3RD DEFENDANT

RULING

14th December, 2023.

HASSAN, J.:

The plaintiff herein is a body corporate with its registered office at the address stated in the plaint. In her claims, she is protesting against the 1st and 2nd defendants jointly and severally sued. The plaintiff is seeking for the declaration that, she is entitled to the payment of Tanzanian shillings 137, 000,000.00, being the outstanding amount of contractual price, arising from contract number **LGA/127/2013/2014-Lot 07** which was executed between the plaintiff and the 2nd defendant.

Story leading to the suit is that, in March 2014, the plaintiff applied for, and she was then awarded the tender for construction of small dam pumped water supply scheme (pump house treatment plant, pipe network water tank, water points and chamber) for Bangala and Jungu villages both located at Kilindi District, Tanga region by 2nd defendant's tender board. The contractual price was in the tune of Tshs. 2,593, 835, 153, 80. It is further alleged that, the plaintiff completed the project within the time frame of the contract, and upon completion, she handed over the same.

Thereafter, despite the completion of the contract, her contractual obligations and handing over the project, the 1st and 2nd defendants refused to effect payment of the remaining outstanding amount of the contractual price thus, coming this suit.

Now, upon the proper service of the plaint, the defendants filed the written statement of defence (WSD) accompanied by a notice of preliminary objection on the point of law. The points of preliminary objection are contesting for the propriety of the suit. Thus, the points of sought yield the following grievances:

1. *That, the plaintiff has no locus standi to institute this suit.*

2. That, this court has no jurisdiction pursuant to section 18 (a) (b) and (c) of the Civil Procedure Code, [cap. 33 R.E 2029].

On the day the matter was called for hearing, the plaintiff was represented by the learned counsel Mr. Omary Msemo. Whereas, on the other side, the learned State Attorney Ms. Kumbukeni Kondo appeared for all defendants and in assistance of the learned State Attorney Ms. Agness Makuba. Therefore, the matter proceeded orally.

To take the floor, the learned State Attorney started to submit the 2nd point of objection that, this court has no jurisdiction to entertain the suit pursuant to section 18 (a) (b) and (c) of the Civil Procedure Code, [Cap. 33 R.E 2029]. On that issue, she argued that the plaint shows that, the contract between the parties was concluded at Kilindi Tanga and the 1st and 2nd defendants who are directly responsible with this matter are residing at Kilindi Tanga. Thus, she referred section 18 (a) (b) and (c) of the CPC which provides that suit has to be instituted at the place of the local limit of whose jurisdiction arose.

As to where defendants live, Ms. Kondo submitted that the defendants are living and working at Tanga. She cemented her argument by citing section 53 (2) of the Interpretation of Laws Act [Cap 1 R. E 2019] which provide that, when the term "shall" is used in the provision, the

same should be referred with mandatory application. With that stand, she prayed the court to struck out the suit for lack of jurisdiction.

Moving on the 1st point of preliminary objection, the learned State Attorney protested that, the plaintiff has no *locus standi* to institute this suit. To support her stand, she referred to the plaint where she contended that, the plaintiff is a company and therefore, in order to be allowed to institute a suit, a company has to authorise a person who wishes to institute a suit on its behalf. To strengthen her point, she referred the case of **Simba Papers Convertes Limited v. Packaging Manufacturer Limited & Another, Civil Appeal No. 280 of 2017 CAT (unreported)**, where at page 20 it was held that:

> *"In the premises, since the claimant was a company, it was not proper to institute a suit on behalf of a company without its formal authority. This is required by the way of 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 out to have been struck out."*

Moving forward with the argument, Ms. Kondo raised the issue that, at paragraph 21 of the plaint at hand that, it shows that the board

of directors has resolved to file a suit as per annexure TAL-5. However, in her view, the said annexure TAL-5 does not show if those people who were present in the board meeting, were actual the directors of the company. On the same point, she went on to analyse annexure TAL-5 that, it only comprises of the signature of chairman and secretary at the bottom part of the document. She added that there is no stamp of the company in that purported board resolution. With that shortfalls, she argued that, it is unsafe to rely upon annexure TAL-5 by accepting that, the advocate who filed the suit was properly authorised by the company.

To that note, Ms. Kondo maintained the position that, this suit was filed without authorisation of the company, and henceforth, she prayed to struck out the same with costs.

On the other side, learned counsel Msemo readily responded to the preliminary objection, and on his endeavour, he resisted the prayer fronted by the learned State Attorneys. Thus, he started to attack the 1st point of objection. On that, he submitted that, it is not true that they did not attach the board resolution in the suit. He stressed that, they have attached the board resolution, and the same was pleaded under paragraph 21 of the plaint which shows the date, object and resolution reached by the board. In furtherance to what he has submitted, he indicated what was authorised in the resolution as thus, to institute a civil

suit and parties were identified. Therefore, what has been resolved by the board was signed by responsible persons. For that note, he concluded that in his view, the board resolution was competent and fit for the intended purpose.

On the issue of competence of the said board resolution, as to whether those who signed the resolution are actual the directors, and also as to whether those who have been mentioned on the top of the document are the directors or not, in his opinion is a matter of evidence.

Arguing further on that issue, he countered the decision in **Simba Paper (Supra)** by submitting that, in fact there is nowhere the Court of Appeal has said that, there must be a board resolution before company has instituted a suit. Thus, in his contentious view, what was said by the Court of Appeal is that, board resolution is mandatory only when a company's director will have an internal conflict with a company which will amount to the need to open a suit upon such misunderstanding.

Adding to that, he submitted that, in the case at hand, the dispute is between the company and the 3rd party who is not a member. To cement his argument, he referred the case of **Beb Company Limited v. Geita Gold Mining Limited, Civil Case No. 142 of 2022 H/C (unreported)**, where the need to have board resolution to institute a civil suit was addressed.

To that end, Mr. Msemo pressed further that, even if the court finds out that, the attached board resolution is not fit for purpose, yet, there is no mandatory requirement needful for a company to have board resolution before it has instituted a civil case. Further to that, he supplemented his point more that, if at all, there is such requisite, to ascertain the status of people (s) who signed the board resolution, then, that will be matter of evidence which need to be proved. Consequentially, if that will be the case, he highlighted that, the preliminary objection should only base on the point of law which does not need proof of evidence. To fortify his point, he cited the case of **Mantrac Tanzania Limited v. Goodwill Ceramics Tanzania Limited, Civil Appeal No. 269 of 2020 CAT (unreported)**, where at page 10 the court provides that:

> *"Matters which need to be ascertained by evidence should not be made as preliminary objection."*

At the end, Mr. Msemo prayed to overrule the 1st point of preliminary objection.

Moving on to the 2nd point of objection which addressed the issue of jurisdiction, Mr. Msemo submitted that, cause of action as to where it has raised is not the only prerequisite to determine jurisdiction of the court. He averred that looking at section 18 of the CPC, it provides for

three aspects of which suit can be filed. Therefore, it is clear that the question as to where cause of action raised is only one of the aspects which could be used to file a suit. Adding to that, he mentioned that, one of those aspects is also a place where the defendant lives. And on that, he pinpointed paragraph 20 of the plaint which shows that, the defendants are living in Dodoma. However, Mr. Msemo also indicated that, looking at paragraph 10 of the written statement of defence (WSD), it shows that the defendants are living at Kilindi Tanga and thus, in the circumstance, this issue as to where defendants live have raised a factual issue which cannot be determined through preliminary objection. Hence, once again to cement his argument, he referred the decision in **Mantrac Tanzania Limited v. Goodwill Ceramics Tanzania Limited (supra)**. He also referred the case of **Sarapia M. Veruli v. Multichoice Tanzania Limited, Civil Case No. 6 Of 2021 H/C (unreported)** where at page 9, this matter was extensively addressed by the court. With that submission, once again, he prayed the preliminary objections raised be overruled.

In alternative to what he has submitted on the issue of jurisdiction, learned counsel Msemo succumbed that, if the court finds out that, it does not have jurisdiction, then the remedy available in the such circumstance is to return the plaint where it was supposed to be instituted. That said,

he concluded with prayer that, the preliminary objection be overruled and the case to proceed with hearing on merit.

In rejoinder, Ms Kondo started to counter the point of *locus standi* as it was presented by the rival counsel that, it is not mandatory to have authority of board resolution in order to institute a case on behalf of a company as it was decided in **Beb Company Limited v. Geita Gold Mining Limited (supra).** To that effect, learned State Attorney reiterated that they had cited the decision of the court of appeal in **Simba Papers Convertes Limited v. Packaging Manufacturer Limited & Another (supra)** which supersedes the decision of high court that the plaintiff's counsel has referred. Hence, she insisted that, to file a civil suit on behalf of a company, it is mandatory to have board resolution which authorises such step, and that is not optional. Adding to that, Ms Kondo submitted further that, the board resolution is a mandatory requisite and that is why, the plaintiff has included it in the pleadings as under paragraph 21 of the plaint.

On the other issue, that the existing preliminary objection contains factual issues, and therefore it needs evidence to be proved thus, they are not subject to preliminary objection. On this point, she countered that preliminary objection does not come from heaven, it comes from the pleadings and its annexures. She thus referred the case of **Mukisa**

Bistcuits Manufacturing Company v. West End Distributors Ltd (1969) E.A. 696 which was cited with approval in the case of **Mantrac Tanzania Limited v. Goodwill Ceramics Tanzania Limited** at page 10 to cement her point that, the preliminary objection raised is of the point of law.

On the issue of jurisdiction, the learned state Attorney reiterated her earlier submission that under section 18 (a)(b) and (c) of the CPC, that the court lacks jurisdiction and she added that, the contract entered by the 1st and 2nd defendants with the plaintiff shows that, it was concluded at Kilindi Tanga and the work was performed at Kilindi Tanga. Similarly, she submitted that, looking at paragraph 3 of the plaint, it shows that the 2nd defendant is at Kilindi Tanga. Therefore, she stressed that, this matter ought to have been filed at Kilindi Tanga since the 2nd defendant is living there and the cause of action arose there. And with respect to the 1st defendant, she added that, she has her branch at Tanga and head quarter herein Dodoma. Hence, the branch which worked with the plaintiff is that of Kilindi Tanga. Thus, as per section 18 (b) of the CPC, the matter ought to be instituted at Tanga Kilindi and not in Dodoma.

Coming to the issue as to whether or not the court should strike out the suit or return it to the proper jurisdiction. Learned State Attorney contended that, in her view, to return it could have been sufficient if

plaintiff had conceded on the preliminary objections, but at this juncture, since the plaintiff opposed the same, he could not have prayed to be returned, hence, to do so will pre-empt the spirit of the preliminary objection.

Having gone through the rival's submissions, I am certain that, the crucial question to be answered is whether or not the preliminary objections have merit. To navigate through the matter in dispute, I will start with the first point of preliminary objection thus, this court has no jurisdiction pursuant to section 18 (a) (b) and (c) of the Civil Procedure Code, [cap. 33 R.E 2029].

To that effect, to build her case, Ms. Kondo submitted that, this court has no jurisdiction to entertain the suit pursuant to section 18 (a) (b) and (c) of the Civil Procedure Code, [Cap. 33 R.E 2029]. Going forward, she argued that the plaintiff's plaint shows that, the contract between the parties was concluded at Kilindi Tanga and the 1st and 2nd defendants who are directly responsible with this matter are residing at Kilindi Tanga. Thus, she referred section 18 (a) (b) and (c) of the CPC which provides that suit has to be instituted at the place of the local limit of whose jurisdiction arose.

As to where defendants live, Ms. Kondo submitted that the defendants are living and working at Tanga. And she further cemented

her argument by citing section 53 (2) of the Interpretation of Laws Act [Cap 1 R. E 2019] which provides that, when the term "shall" used in the provision, it should be referred with mandatory application. With that stand, she prayed to struck out the suit for lack of jurisdiction.

In hostility to the issue of jurisdiction, learned counsel Mr. Msemo contended that, cause of action as to where it raised is not the only prerequisite to determine jurisdiction of the court. Thus, he averred that looking at section 18 of the CPC, it provides for three aspects of which suit can be filed. Therefore, it is clear that, the question as to where cause of action arose is only one of the aspects which could be used to file a suit.

Adding to that, he mentioned that, one of those aspects is also a place where the defendants live. And on that, he pinpointed paragraph 20 of the plaint which shows that, the defendants are living in Dodoma. However, Mr. Msemo also indicated that, looking at paragraph 10 of the written statement of defence (WSD), it shows that the defendants are living at Kilindi Tanga. And thus, in the circumstance, this issue as to where defendants live have raised a factual issue which cannot be determined through preliminary objection. To cement his argument in this point, he referred the decision in **Mantrac Tanzania Limited v. Goodwill Ceramics Tanzania Limited (supra)**. He also referred the

case of **Sarapia M. Veruli v. Multichoice Tanzania Limited, Civil Case No. 6 Of 2021 H/C (unreported)** where at page 9, this matter was extensively addressed by the court. With that submission, he prayed the preliminary objections raised to be overruled.

In alternative to what he has submitted on the issue of jurisdiction, learned counsel Msemo succumbed that, if the court finds out that, this court does not have jurisdiction, then the remedy available in the such circumstance is to return the plaint where it was supposed to be instituted. That said, he concluded with prayer that, the preliminary objection be overruled and the case to proceed with hearing on merit.

All said and done, I have given due consideration to the submissions given by the rival parties. To me, what is disputed here is whether this court has jurisdiction to entertain the matter at hand. To say the least, if it is correctly pinned, issue of jurisdiction fits squarely to the bucket of issues which are subject of preliminary objection. See **Tanzania Post Corporation V. Salehe Komba and another, Civil Appeal No. 128 of 2020 CAT** (unreported) it provides:

> *"A question of jurisdiction can be belatedly raised and canvassed even on appeal by the parties or the court Suo motu, as it goes to the root of the trial."*

Now, in this matter, what was protested by learned State Attorney is the violation of section 18 (a) (b) and (c) of the CPC of which, for clarity I will reproduce it here-under.

> *"S. 18- Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—*
>
> *(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain;*
>
> *(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or*

(c) the cause of action, wholly or part, arises.

[Explanation I: Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect any cause of action arising at the place where he has such temporary residence.]

[Explanation II: A corporation shall be deemed to carry on business at its sole or principal office in Tanzania, or, in respect of any cause of action arising at any place where it is, has also a subordinate office, at such place.]"

Thus, apart from section 18 (a) (b) and (c) of the CPC on which the defendants relied upon in her preliminary objection as I have reproduced herein-above, it is also vital to consider provision of section 17 of the CPC which provides as follow:

"Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides, or carries on business,

or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts."

At this far, taking into consideration the submissions from both parties and looking on these two provisions, it is clear in my mind that suit can be instituted at either place indicated in section 17 and 18 of the CPC. However, as it has been well said by defendants' counsel, to stand alive, even a point of law depends on factual descriptions to show its existence. To borrow her actual words, is that, it does not come from the heaven.

Therefore, looking on the circumstance at hand, to determine jurisdiction, one should resort back to the original contract to ascertain where it was made and where the addresses of the defendants were dispatched. To put things clearer, I will reproduce the introductory part of the contract to reveal its contents as thus:

"CONTRACT AGREEMENT

This agreement, made the ..... day of ....., 20.....

between ***KILINDI DISTRICT COUNCIL OF P.O***

BOX 18 – SONGE – KILINDI *(hereinafter called "the employer") the one part and* ***MATALE CONSTRUCTION CO. LTD OF P.O BOX 1851 – MOSHI*** *(hereinafter called "contractor") on the other part."*

From the way it appears, the contract was concluded at Kilindi - Tanga and the residence of the 2nd defendant is also at kilindi -Tanga as per contract, which also attain support from the plaint in paragraph 3. Thus, there is no dispute with respect to the 2nd defendant's residence that her residence is at Kilindi - Tanga.

Coming to the 1st defendant, looking on the 90 days' notice of intention to sue the government, the plaintiff served a copy of the plaint to the 1st defendant pursuant to section 6 (3) the government proceedings Act, [Cap. R.E. 2019] on the address as hereunder:

> ***The Manager,***
> ***Rural Water Supply and Sanitation Agency (Ruwasa),***
> ***Kilindi – Tanga.***

That's being the case, it is clear in my mind that, the 1st defendant residence is at Kilindi – Tanga, the place their contract was concluded. And therefore, in my view, the mere assertion made by the plaintiff at

paragraph 2 of the plaint, that the 1st defendant's address is P. O Box. 412, Dodoma is unfounded.

Turning to the 3rd defendant, the Attorney General, as it appears in the 90 days' notice of intention to sue the government, as well as at paragraph 4 of the plaint, the address of service used for the Attorney General is at P.O Box. 630, Dodoma. Therefore, since the counsel for the defendants admits in her submission that the 3rd defendant had her branch at Tanga and head quarter herein Dodoma, thus, under section 18 (a) of the CPC, the 3rd defendant is presumed to reside within both jurisdictions. Section 18 (a) under of the CPC provides that:

> *"S. 18- Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—*
>
> *(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain;*
>
> *[Explanation I: Where a person has a permanent dwelling at one place and also a temporary residence*

at another place, he shall be deemed to reside at both places in respect any cause of action arising at the place where he has such temporary residence.]"

That being the case, it is obvious that, the 3rd defendant is residing at both Dodoma and Tanga. And to that note, the suit was correctly instituted in Dodoma. And therefore, the 1st point of preliminary objection that preferred by the defendants is hereby overruled for lack of merit.

Dealing with the 1st point of preliminary objection that, the plaintiff has no *locus standi* to institute this suit. In her submission Ms. Kondo submitted that the plaintiff has no *locus standi* to institute this suit. She contended that, the plaintiff is a company and therefore, in order to be allowed to institute a suit, a company has to authorise a person who wishes to institute a suit on its behalf.

To strengthen her point, she referred the case of **Simba Papers Convertes Limited v. Packaging Manufacturer Limited & Another, Civil Appeal No. 280 of 2017 - CAT (unreported)**, where at page 20 it was held that:

"In the premises, since the claimant was a company, it was not proper to institute a suit on behalf of a company without its formal authority. This is required

by the way of 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 out to have been struck out."

Moving forward with argument, Ms. Kondo raised the issue that, at paragraph 21 of the plaint, it shows that the board of directors has resolved to file a suit as per annexure TAL-5. However, in her view, the said annexure TAL-5 does not show if those people who were present in the board meeting were actual the directors of the company. On the same point, she went on to analyse annexure TAL-5 that, it only comprises of the signature of chairman and secretary at the bottom part of the document. She added that, there is no stamp of the company in the purported board resolution. Thus, with that shortfalls, she argued that, it is unsafe to rely upon annexure TAL-5 by accepting that, the advocate who had filed the suit was properly authorised by the company. For that note, she maintained the position that, this suit was filed without authorisation of the company, and henceforth, she prayed to be struck out the with costs.

On the other side, learned counsel Msemo readily queried the preliminary objection, and on his endeavour, he resisted the prayer

fronted by the learned State Attorneys. Thus, he submitted that, it is not true that the plaintiff did not attach a board resolution in the plaint. He pressed that, they have attached the board resolution, and the same was pleaded under paragraph 21 of the plaint which shows the date, object and resolution reached by the board of directors.

In furtherance to what he has submitted, he indicated what was authorised in the resolution as thus, to institute a civil suit and parties were identified. Therefore, what has been resolved by the board was signed by responsible persons. For that note, he concluded that in his view, the board resolution was competent and fit for the intended purpose.

On the issue of competence of the said board resolution, as to whether those who signed the resolution are actual the directors, and also as to whether those who have been mentioned on the top of the document are the directors or not. In his opinion, the learned counsel pointed out that, this is a matter of evidence. And arguing further on that issue, he countered the decision in **Simba Paper (Supra)** by submitting that, in fact, there is nowhere the Court of Appeal has said that, there must be a board resolution before company has instituted a suit. Thus, in his contentious view, he submitted that what was decided by the Court of Appeal is that, board resolution is mandatory only when a company's

director will have an internal conflict with a company which will amount to the need to open a suit upon such misunderstanding.

Adding to that, he submitted that, in the case at hand, the dispute is between the company and the 3rd party who is not a member. To cement his argument, he referred the case of **Beb Company Limited v. Geita Gold Mining Limited, Civil Case No. 142 of 2022 H/C (unreported)**, where the need to have board resolution to institute a civil suit was addressed.

To that end, Mr. Msemo pressed further that, even if the court will find out that, the attached board resolution is not fit for purpose, yet, there is no mandatory requirement needful for a company to have board resolution before it has instituted a civil case. Further to that, he supplemented his point more that if at all, there is such requisite, to ascertain the status of people (s) who signed the board resolution, then, that will be matter of evidence which need to be proved. Consequentially, if that will be the case, he highlighted that, the preliminary objection should only base on the point of law which does not need proof of evidence. To fortify his point, he cited the case of **Mantrac Tanzania Limited v. Goodwill Ceramics Tanzania Limited, Civil Appeal No. 269 of 2020 CAT (unreported)**, where at page 10 the court provides that:

"Matters which need to be ascertained by evidence should not be made as preliminary objection."

At the end, Mr. Msemo prayed to overrule the 1st point of preliminary objection.

In view of what parties have demonstrated, the questions which require court determination are; one, whether, owing to the circumstance of this case, there is a need to have board resolution allowing for institution of the suit? And two, whether annexure TAL-5 is actually a board resolution?

Thus, to begin with, I subscribe to the position given in the East Africa case of **Bugerere Coffee Growers Ltd v. Sebaduka (1970)1 EA 147 (HCU)** which was encountered with the relatively similar situation to the one at hand. In this case, an advocate had instituted a suit in the name of a company without its authority. Thus, the court held that:

"When company authorise the commencement of legal proceedings a resolution has to be passed either at a company board of director's meeting and recorded in the minute; no such resolution had been passed authorizing these proceedings"

The above position, in my view reflect tl
aimed temperament of incorporation set
Salomon v. A. Salomon and Co Lt
incorporated, a company enjoys a separa
its members and, or directors. The result
a company with its separate corporate li
the legal right of a company belongs to
person and not to its members or directc
or any other person acting in the capacit
to enforce the company rights through le
See for instance, a persuasive decision
Assurance Co. Ltd v. Newman Indus
204 at page 210 where the court of app

> *"Elementary principle that **A** ca*
> *bring an action against **B** to rec*
> *other relief on behalf of **C** for a*
> ***C** is the proper plaintiff becaus*
> *and, therefore, the person in w*
> *is vested. This is sometime re*
> ***Foss v. Harbottle (1843) 2 I***

to corporation, but it has a wider scope and is fundamental to any rational jurisprudence."

Simply, what I am trying to show here is what is famously known as "*a proper claimant principle*" which provides, as it was maintained in **Breckland Group Holding Ltd v. London and Suffolk Property Ltd (1989) BCCLC 100**, that:

"Whether or not a company sue to enforce its legal rights must be decided by the person who, under the company constitution [or article of association], have authority to institute legal proceedings in the company's name. This will normally be the director."

In the light of the above settled position of the law, given the decision in **Bugerere Coffee Growers Ltd v. Sebaduka (supra)** and other persuasive decisions as herein above cited, I am of the firm view that, to enforce a company right through civil proceedings, it requires an authority from the company. Practically accepted, a board resolution authorising any person whom so ever appointed by the board or management to undertake legal proceedings by using company name.

In my firm judgment, as the case may be, to let any person representing a company in a suit without a conferred authority through dully executed resolution, is not only to endanger infringement of

corporate personality status, but also to dishonour the strict rule of separate corporate personality enshrined in the case of **Salomon v. A. Salomon and Co. Ltd** (supra) where an incorporated company is enjoined with full mandate to enforce its legal rights like any other natural person.

That being the case, coming back into the case at hand, I have been moved by Ms. Kondo's submission that in order to institute the legal proceedings by the name of a company, like the one at hand, the advocate must have a well-executed board resolution authorising him to undertake the sought legal action.

To that end, I am in agreement with Mr. Msemo's submission in so far as, when he refuted the defendant's submission on the principled decision in **Simba Paper's case** (Supra) that, there is nowhere the Court of Appeal had said that, there must be a board resolution before company institutes a suit. However, looking at page 18 of the judgment, indeed the Court of Appeal had subscribed to the position upheld in the case of **St. Benard's Hospital Company Limited v. Dr. Linus Maemba Mlula Chuwa, Commercial Case No. 57 of 2004** (unreported) which was dealing with the dispute between the company and one of its shareholder or directors, whereas, in **Simba Paper's case** (Supra), the matter in contention revolves on the internal conflict within the company.

Nevertheless, even in such situation, the court of appeal had decided that, an authority to institute a suit in the form of resolution was mandatory.

As to the case of **Bob Company Limited V. Geita Gold Mining Limited** (Supra) which counsel Msemo seeks refuge at, my short analysis is that, in my view, in that case, the learned Judge was addressing the application of section 174 (1) (a), (b) of the Companies Act No. 12 of 2002. To me, that section deals with resolution initiated in the general meeting or meeting of any class of members of the company and not decision of the Directors who has exclusive management powers or in other words the board of Directors. Thus, this authority is distinguishable to the matter at hand.

That said, cementing on my earlier position, I am of the considered view that, so long as the company is in a position to institute a legal proceeding, an authority to do so become a matter of compulsion in order to distinguish between an individual action and action of a company. That means, a mere citation of company's name as complainant in the suit without valid authority will be obnoxious.

Now, moving on the other question as to whether the document attached as TAL-5 is competent to be a board resolution. In this point, after careful consideration of the parties' submissions, I am of the firm

view that, in essence, a well-executed and authentic board resolution should at least comprise of the following features:

1. Name and address of a company
2. Names of director (s) in attendance.
3. Agenda
4. Resolution arrived
5. Signs of the chairman and the secretary (if any).
6. Seal of a company.
7. Date.

Thus, by looking on the matter at hand, the plaintiff attached annexure TAL-5 which is a board resolution. On it, all the aforementioned requirements are met except seal of a company. However, according to section 39 (1) (2) of the companies Act, the requirement to put seal of the company when all board member agreed to the resolution is relieved. Section 39 (1) (2) of the companies Act, provides:

> *"39 (1)- A document is executed by a company by the affixing of its common seal. A company need not have a common seal. However, and the following subsections apply whether it does or not.*
>
> *(2) A document signed by a director and the secretary of a company, or by two directors of a company, and*

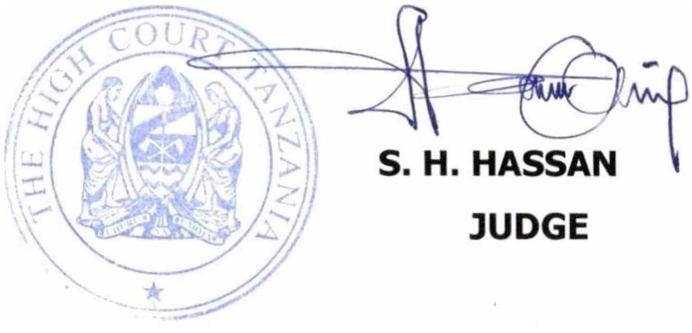
expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company."

To that end, based on the authority herein-above, it is my considered view that the impugned resolution was well executed by the board of director since it bears the signature of the chairman who is also a director and the secretary.

At the end, centred on the above demonstration, I hereby hold the preliminary objections raised by the defendants lack merit and I proceed to overrule them altogether. The matter will proceed with hearing on merit. Costs will follow the events.

It is ordered.

DATED at **DODOMA** this 14th day of December, 2023.



S. H. HASSAN

JUDGE