

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB-REGISTRY
AT SHINYANGA
CIVIL CASE NO. 02 OF 2023.**

KISHEGENA TRANSPORT LTD.....PLAINTIFF

VERSUS

AZANIA BANK LIMITED.....1st DEFENDANT

MABUNDA AUCTIONEERS MART CO LTD.....2nd DEFENDANT

MEK ONE INDUSTRIES LIMITED.....3rd DEFENDANT

ATTORNEY GENERAL.....4th DEFENDANT

RULING

18th January & 12th February 2024.

F.H. MAHIMBALI, J

This ruling, is on a preliminary objection raised by the 1st and 4th Defendants after the plaintiff had filed his plaint to this court against the Defendants praying this court to order a declaration that;

- 1) The sale of Fuel Station allocated in Plots No 41 & 42 Block "D" Nyasubi, three Trucks and one Trailer with registration No T 531 CLV Scania 124, T 193 BHG Scania 124, T 235 CXB Howo and T 477 CNC Trailer done by the 1st and 2nd Defendants to the 3rd Defendant was unlawful hence null and *void ab initio*.
- 2) The court to nullify the sale of Fuel Station allocated in plots No 41&42 Block "D" at Nyasubi, three trucks and one Trailer with

registration No T 531 CLV Scania 124, T 193 BHG Scania 124, T 235 CXB Howo and T 477 CNC Trailer done by the 1st and 2nd Defendants to the 3rd Defendant due to procedural irregularity, the costs of the suit and any other reliefs.

Their preliminary objection is to the effect that, **the plaintiff contravenes dispute clause of the letter of offer dated 09th June 2015**, on the other hand the 3rd defendant had preliminary objection to the effect that **the suit is not undergirded by the Board Resolution of the Plaintiff's company contrary to the requirement of the law and the recent precedents of this court and the Court of Appeal.**

The preliminary objections were argued by way of written submission whereas Mr. Evodius Rwangobe learned counsel represented the plaintiff, Mr. George Kalenda, learned state attorney represented the 1st and 4th Defendants, Dr Rugemeleza Nshala represented the 3rd Defendant and as for the 2nd defendant the matter was heard exparte.

In his submission Mr Kalenda stated that, the plaintiff did not adhere to the terms of their contract to wit the letter of offer and that the plaintiff ought to submit to the commercial Division of the High court of Tanzania for adjudication and not in the High Court hence breach of contract which they freely entered into.

He referred this court to numerous cases including the case of **George Peter Wanna Vs Africa Microfinance Limited**, Civil Appeal No 240 of 2020, High Court of Tanzania, Dar es salaam, (Unreported) at page 9 that:

"..... parties are bound by the agreement they freely entered into. It is a fact that, parties do not dispute that they entered into the loan agreement"

He continued citing the case of **Simon Kichele Chacha Vs Aveline M. Kiwale**, Civil Appeal No 160 of 2018, Cort of Appeal of Tanzania (Unreported), **Kassim Engineering Company Limited Vs David Saliva Komba**, Reference No 10 of 2023, High Court of Tanzania, Dar es salaam, (Unreported) at page 16 paragraph 1 where the High Court made reference to the case of **Mariam E. Maro Vs Bank of Tanzania**, (Civil Appeal- No 22 of 2017) [2020] TZCA 1989 (30th September 2020) whereas all these cases insisted on the sanctity of the contract that parties are bound by the agreement they freely entered into.

Mr Kalenda further pointed out the jurisdiction of the High Court (Commercial Division) and matters to be entertained by this court according to the law as was highlighted in **The National Bank of Commerce Limited Vs National Chicks Corporation Limited**

&Others, Civil Appeal No. 129 of 2015, Court of Appeal of Tanzania at Dar es salaam (Unreported) the court at page 16, 17 & 18 and at page 32 para 2 where the court insisted that where the cause of action arose from a commercial contract, that claim falls squarely in the purview of the area of specialization of the High Court (Commercial Division) as stipulated in item (iii) of Rule 2 of the High Court (Commercial Division Procedure) Rules, 2012.

He added that the plaintiff admitted in his plaint that parties entered into agreement to secure loan by mortgaging the disputed premises and failure to pay loan by reason of economic hardship, he insisted that by this assertion the plaintiff was aware of the contract entered into and the consequences therefore on being settlement of dispute which is to the High Court (Commercial Division).

He lastly submitted that in this case the cause of action accrued from mortgage transaction or a commercial contract and therefore it must be dealt with by Commercial Division of the High Court as was in their Dispute clause of the letter of offer as was in **Britania Biscuits Limited Vs National Bank of Commerce Limited and 3 Others**, Land Case No 4 of 2011 [HC](Unreported).

On his part, Mr Rwangobe submitted that the High court and its mandate are creature of the Constitution of the United Republic of Tanzania, 1977 as per Article 108(1) and that according to Section 5 of the Judicature and Application of Laws Act, Cap 358 R.E 2002 (JALA) the judge may exercise all of the High Court powers or any power and authorities conferred on the High court and that the High Court derives its jurisdiction from either Constitution or any other law with unlimited jurisdiction on the contrary the High Court (Commercial Division) was established by the Rules.

He agreed with Mr Kayanda that their contract had dispute clause that in case of any dispute arising out of interpretation, performance, or non-performance of the terms and conditions contained herein, the borrower and the Bank hereto irrevocably submit themselves to the Commercial Division of the High Court of Tanzania for adjudication, but filing this suit in normal court is not fatal as the letter of offer cannot override powers vested to the court by the Constitution and other laws.

He contended that the cause of action of this suit has elements of land matters and the letter of offer was not detailed with to what should be filed in commercial court and not should be filed there. He cited the

case of **A1 Outdoor (T) LTD Vs EURO Consultancy Limited**, Commercial Case No 2 of 2022, at page 9.

He also cited the case of **National Bank of Commerce Limited Vs National Chicks Corporation Limited and Others**, (SUPRA) insisting that the High Court (Commercial Division) is not designated to hear cases of a commercial nature only.

On his rejoinder Mr. Kalenda insisted that, the base of his preliminary objection is that the plaintiff contravenes Dispute Clause of the Letter of Offer by instituting this suit in the normal High Court instead of Commercial Division of the High Court of Tanzania for adjudication as they agreed.

He added that, any litigation whose cause of action accrued from mortgage transaction or commercial contract, it is a result of commercial transaction and it has to be dealt with by Commercial Division of the High Court as it was stipulated in their dispute clause.

Distinguishing the case cited by the plaintiff **A1 Outdoor (T) LTD Vs EURO Consultancy Limited** (SUPRA) he argued that this case is of the High court case which does not bind the same High Court and that the said Order IV Rule 4 does not exist in the Civil Procedure Code [CAP 33 R.E 2019].

He referred this court to the case of **Unilever Tanzania Ltd Vs Benedict Mkasa t/a Bema Enterprises**, Civil Appeal No 41 of 2009, Court of Appeal of Tanzania at Dar es salaam (Unreported) at page 16.

He insisted that the plaintiff and the 1st defendant entered into loan agreement freely and they are not allowed to go outside of it as explained in Unilever Case above.

Similarly, the 3rd defendant raised point of preliminary objection that; the suit is not undergirded by the Board Resolution of the Plaintiff's company contrary to the requirement of the law and the recent precedents of this court and the Court of Appeal.

Dr Nshala submitted that, the plaintiff's plaint does not show that the plaintiffs Board of Directors met on a particular date and authorized the filing of this suit against the Defendants, and since parties are bound by their pleadings and there is no paragraph in the paint stipulating that a board resolution will be produced latter as a document to be relied. He cited the case of **Hood Sports Company Vs East African Development Bank**, Civil Appeal No 262 of 2019 at Dar es Salaam (Unreported).

He argued that, the Court of Appeal have stressed about the importance of Board Resolution in cases involving companies registered

under the Companies Act, where as in **Simba Papers Convertes Limited Vs Packaging Stationery Manufacturers Limited & Dr Steve K. Mworio**, Civil Appeal No 280 of 2017, Dar es Salaam (Unreported) where it was held:

"In the premises, since the claimant was a company, it was not proper (sic) institute a suit on behalf of the company without its formal authority. This required the 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 ought to have bee struck out"

He also cited the case of **Bensons Enterprises Limited vs Mire Artan**, Civil appeal No 26 of 2020, Court of Appeal of Tanzania, at Dar es salaam, **New Life Hardware Company td & Manwaly Investment Limited vs Shandong Locheng Export Co Ltd & 2 Others**, Commercial Case No 86 of 2022, High Court of Tanzania, (Commercial Division) (Unreported), and the case of **Boimanda Modern Construction Co Ltd Vs Tenende Mwakagile & 6 Others**, Civil case No 8 of 2022 HC at Iringa (Unreported) where by all these cases insisted on the importance of the board resolution for a case to be instituted.

He concluded that, since the plaintiff's plaint does not contain any statement that the board of directors approved the institution of this suit which is a mandatory requirement of the law, then the whole suit is incompetent and ought to be struck out with costs.

On his reply, the counsel for the plaintiff submitted that, the position was clearly stated in **Bugere Cofee Growers Ltd Vs SEBADDUKA [1970] 1EA 147 (HCU)** as cited in **Simba Papers Convertes Limited Vs Packaging Stationery Manufacturers Limited & Dr Steve K. Mworio**, (SUPRA) at page 16 that

"when companies authorize the commencement of legal proceedings a resolution have to be passed either at a company Board of Director's meeting and recorded in the minutes, no such resolution had been passed authorizing these proceedings"

He also referred the case of **St Benard's Hospital Company Limited Vs DR. Linus Mlula Chuwa**, commercial case No 57 of 2004 (Unreported) cited in **Simba Papers Convertes Limited Vs Packaging Stationery Manufacturers Limited & Dr Steve K. Mworio**, (SUPRA), whereas the court used this position but narrowed down to benefit a particular situation as in this particular case the conflict was between the Company and one of its shareholder and its Director General, and the

court was in the view that what was required was not specific resolution but a general permission.

He argued that this position was emphasized in the case of **Sharaf Shipping Agency (T) Limited Vs Backlays Bank Tanzania Limited & Habib African Bank Limited**, Commercial Case No 115 of 2014 where it was decided at page 9.

He summed up that a board resolution for a company to institute a suit is not mandatory unless it involves internal affairs of the company.

I have followed the rival submissions in all of the two preliminary objections and to begin with the first preliminary there is no dispute that the plaintiff and the 1st defendant had Dispute Clause in the letter of offer which stipulated;

"In case of any dispute arising out of interpretation, performance or non-performance of the terms and conditions contained herein, the borrower and the bank hereto irrevocably submit themselves to the commercial Division of the High Court of Tanzania for adjudication"

Also, there is no dispute that the plaintiff defaulted to pay the outstanding amount of loan and as a result the 1st defendant and the 2nd defendant sold the plaintiff's properties. The issue for determination is as

to whether this court has jurisdiction to entertain this suit contrary to the party's agreement on the dispute clause?

There is no doubt that the plaintiff and the 1st defendant had an agreement in case of any dispute arising out of interpretation, performance or non-performance of the terms and conditions contained in their contract to submit themselves to the High Court of Tanzania Commercial Division, and therefore the plaintiff ought to adhere to their agreement since parties are bound by the agreement they entered into freely as was stated in **Simon Kichele Chacha Vs Aveline M. Kiwale**, Civil Appeal No. 160 of 2018, Court of Appeal of Tanzania (Unreported) See also a decision in **Abualy Alibhai Azizi vs. Bhatia Brothers Ltd [2000] T.L.R 288** and **East African Breweries Ltd Vs. GMM Company Ltd (2002) TLR 12**.

The dispute between counsels is, whether it is fatal as claimed by the 1st and 4th defendants for filing this suit in normal High Court?

First of all, as submitted by the plaintiff's counsel, the High Court of Tanzania is a creature of the Constitution of the United Republic of Tanzania, 1977 as amended with unlimited jurisdiction and that judges of the High Court of Tanzania are mandated to exercise all or any of the powers conferred on the High court. On the contrary, The High Court

(Commercial Division) was established by the High Court Registries (Amendment) Rules, 1999 and later in terms of Rule 5A of the High Court Registries (Amendment) Rules 1999 (G.N. No. 141 of 18/6/1999). Rule 2 of the latter Rules provided for the nature of cases that court would hear and determine, and according to the High Court (Commercial Division) Procedure Rule, 2012 G.N No 250 of 13/07/2012 the establishment of Commercial Court is made under Rule 5(1) which states that;

"There shall be a Commercial Division of the High Court of Tanzania vested with both original and appellate jurisdictions over commercial cases"

Whereas its jurisdiction is provided under sub-rule (2) which states that;

"(2) The Court shall have and exercise original jurisdiction in a commercial case in which the value of the claim shall be at least one hundred million shillings in case of proceedings for recovery of possession of immovable property and at least seventy million shillings in proceedings where subject matter is capable of being estimated at a money value"

Cases in this division are being entertained by the same judges who sit in the normal High Courts as was explained in **National Bank of Commerce Ltd vs National Chicks Corporation Ltd & Others** (Civil

Appeal 129 of 2015) [2019] TZCA referring section 5 of the Judicature and Application of Laws Act, Cap. 358 R. E. 2019 (The JALA) that provides that: -

"Subject to any written law to the contrary, a judge of the High Court may exercise all or any part of the jurisdiction of and all or any powers and authorities conferred on the High Court"

I will reach agreement with the plaintiff's counsel that judges of the High Court have mandate to exercise their powers conferred on the High Court under the Constitution of Tanzania therefore they can hear and determine all kind of cases regardless of their nature but subject to any written law, refer the case of **National Bank of Commerce Ltd vs National Chicks Corporation Ltd & Others** (SUPRA) where the court was of the view that:

"We find nothing express or implied in the above Rule to the effect that the High Court (Commercial Division) is a distinct and independent court from the High Court. That, in our view, means that it is equally part of the High Court. It enjoys and exercises the jurisdiction and mandate as stipulated by the Constitution and the Judges presiding over cases thereat, like any other Judges of the High Court, exercise the powers as stipulated in the JALA. However, as

that court is designated to hear cases of a commercial nature only"

Also, in **Tanzania Electric Supply Company (TANESCO) vs. Independent Power Tanzania Limited (IPTL)** [2000] TLR 324 that;

"It is a trite principle of law that parties cannot by agreement or otherwise confer jurisdiction upon the court"

Therefore, it is my considered view that the issue of jurisdiction is a creature of Constitution or law, in this case the normal High Court of Tanzania is vested with unlimited jurisdiction and the plaintiff instituting this case in this court has not infringed any law irrespective of their agreement as was observed by the state attorney.

What can be said of a person or parties referring disputes to Commercial Division of the High Court is not because they are barred by statutes to do so in the normal High Court, but just opted for speed disposal of the cases. Thus, those going to Commercial Division of the High Court, are like persons who have opted for SGR service or more luxurious bus service but not that they are barred so to use other normal railway or ordinary road service. Otherwise, in my considered view, the Commercial Division of the High Court of Tanzania, unlike Labour, Land or Economic Division of the High Court of Tanzania, being not a creature

of statute cannot legally be speaking to override the general jurisdiction of the High Court of Tanzania in handling civil cases until when the Parliament decides so by an enactment. As it stands by now, I think it just offers premium services of civil cases in Tanzania for commercial litigants (corporate clients) in Dar es Salaam, Arusha and Mwanza and at an option. Thus, at any time a party is not legally precluded from opting otherwise.

Regarding the 3rd defendant's preliminary objection that **the suit is not undergirded by the Board Resolution of the Plaintiff's company contrary to the requirement of the law and the recent precedents of this court and the Court of Appeal.**

From the submission of the counsel for the 3rd defendant, has cited numerous cases including the cases of **Simba Papers Convertes Limited Vs Packaging Stationery Manufacturers Limited & Dr Steve K. Mworio**, Civil Appeal No 280 of 2017, Dar es Salaam (Unreported) and **Bugerere Cofee Growers Ltd Vs SEBADDUKA [1970] 1EA 147 (HCU** which the Court held that there must be a Resolution sanctioning or authorising the commencement of legal proceedings by Companies.

I am mindful that there are several conflicting decisions that have come up with two school of thoughts whether it is mandatory to have a board resolution. Others are saying it is not mandatory as suggested by the plaintiff's counsel while citing the case of **Simba Papers Convertes Limited vs Packaging and Stationary Manufacturers Limited and Another, Civil Appeal No. 280 of 2017** at pages 18 – 21, that it is where there is internal conflict that is when there is a requirement of board resolution.

In my view it is the principal of law that, the law requires the company to make Board resolution before the commencement of the suit. It is also the position of the law that, a company is a legal person (with corporate personality) independent from its members or shareholders as well as its subscribers. The position was tinted in **Solomon Vs. Solomon and Company (1879) AC 22**. This means that, being a legal person, the company affairs are entrusted to its directors who perform all company's activities on behalf of all shareholders. In other words, the company being a legal person acts only through a resolution and the powers of the company can be given only by the company resolving to sue through a board resolution.

The legal issue to be determined, is if its mandatory for the company to get an authority from the board of directors through board resolution before filling a suit?

As submitted by the counsel for the 3rd defendant Section 147 of the Company Act Cap 212 R.E 2019 that;

(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

This provision suggests that failure to comply with it renders the act so done by the Company to have no legal effect, hence, unenforceable. The reasons for, it's because the company is a legal person being operated and managed by the natural persons who for the interests of the company operates by way of the meetings and resolutions and therefore in case of any matter regarding the interest of the company including institution of cases the Board's Resolution may come into agreement through minutes.

In **Ursino Palms Estate Limited v. Kyela Valley Foods Limited & Others, Civil Application No. 28 of 2014**, CAT at Dar es Salaam, (unreported) where the Court observed that when companies authorize

the commencement of legal proceedings a board's resolution or resolutions have to be passed.

Also, In the **BUGERERE COFFEE GROWERS** (SUPRA) the court stated that;

"When companies authorize the commencement of legal proceedings a resolution have to be passed either at a company Board o f Directors' meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings"

It went further highlighting the reasons for the importance of the resolution among others to show the company still exists and decision has been reached with its constitution or articles of association and therefore legally binding to shareholders who may without their knowledge be subjected to pay huge costs.

The counsel for the plaintiff in his reply cited the case of **St Benard's Hospital Company Limited Vs DR. Linus Mlula Chuwa**, commercial case No 57 of 2004 (Unreported) while cited in **Simba Papers Convertes Limited Vs Packaging Stationery Manufacturers Limited & Dr Steve K. Mworio**, (SUPRA) contending that in this particular case, the court revealed that where there is internal

conflict within a company what is required is not a specific resolution but rather a general permission, I will quote the wording of Kalegeya J that:

*"Having carefully considered the matter, I have reached a settled conclusion that, indeed the pleadings (plaint) should expressly reflect that there is a resolution authorizing the filing of an action. A company which does not do so in its pleadings, risks itself to the dangers of being faced by any insurmountable preliminary objection as is the one at hand. I should hurriedly add however that **in my view the resolution should be of a general nature, (Empasis is mine)** that is, it is not necessary that a particular firm or person be specifically to do the task. It suffices if the resolution empowers the company management to take the necessary action. I am making this insistence because from the wording in Bugerere case one may be led to believe that the resolution should point out a particular person or firm."*

With the above reflects, the pleadings should show that there was a meeting with the Board of Directors authorizing the filing of the suit on behalf of the company not necessarily a particular parson is appointed to take the needed action but general permission which shows that this

matter has been discussed by the management to file since a person cannot decide for the Company.

I have thoroughly viewed the Plaintiff's plaint there is no single paragraph that suggests that there is a Board resolution to be tendered as document to be relied upon nor a meeting giving that general permission as pointed out by the Plaintiff's counsel.

Basing on the above observations, principally a Company is a legal person. with its management filling a suit without its authority is incompetent, therefore I agree entirely with the counsel for the 3rd defendant that a Company's Board Resolution is a must. None compliance to it, renders the suit filed incompetent and thus liable for being struck out as I hereby do for want of the plaintiff's board of directors' authorization to sue.

Costs to follow the event.

DATED at SHINYANGA this 12th day of February, 2024.

It is so ordered.

DATED at Shinyanga this 12th day of February, 2024.



F.H. Mahimbali
Judge