

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB - REGISTRY)

AT DAR ES SALAAM

CIVIL CASE No.98 OF 2023

HUMPREY CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

NMB BANK PLC.....DEFENDANT

RULING

POMO, J

This is a ruling on objections raised by the Defendant against the suit questioning its competence before the court to the effect that: -

- 1. This suit is incompetent for being filed in a non – existing Registry of the High Court*
- 2. That, the suit is incompetent for misjoinder of the Statutory Manager appointed by the Bank of Tanzania (BOT) Ms. Neema Koka who was managing the affairs of China Commercial Bank before the defendant took over*
- 3. That, the Plaint disclose no cause of action against the defendant*

*4. The suit is incompetent for want of authorization to sue
namely Board Resolution as required by the law*

The plaintiff's claims against the defendant, as stated under paragraphs 3 of her plaint, is for the following orders: **Firstly**, Declaration that by its refusal to grant the advance payment guarantee of TZS 290,188,727.00 and performance bond guarantee of TZS 290,188.727.00 which it took over from China Commercial Bank Limited, following the takeover of the said bank by the Bank of Tanzania and later liquidation, is breach of contract and thus entitles the plaintiff to compensation and damages for consequential loss suffered as a refusal thereof. **Secondly**, the defendant be ordered to return all the three Plaintiff's collaterals which she is holding and to pay the Plaintiff the sum of TZS 1,800,000,000.00 as special damages due to termination of the contract for construction of Pangani District Council office, and **thirdly**, for an order that the Defendant to pay interest, general damages as assessed by the Honourable Court and costs of this suit.

This court ordered the defendant's objections against the suit be disposed by way of written submissions. Whereas the plaintiff had a legal service of Mr. Nuhu Mkumbukwa, learned advocate from Nex Law Advocates,

the defendant enjoyed the service of Mr. Walter Josia Shaya, learned advocate from Raw Attorneys. Both sides filed their respective contending submissions. I am grateful to the learned minds for their well-researched submissions.

Submitting on the first objection, Mr. Mkumbukwa argued that Dar es Salaam **District Registry** of the High Court of Tanzania to which the plaint refers is a non-existing registry following the amendment of the High Court Registries Rules, 1971, GN No. 164 of 1971 vide the Government Notice No. 638 of 2021 which amended Rule 5 thus: -

*"Rule 5. – In additional to the Main Registry at Dar es Salaam, **there shall be High Court Sub-Registry** at such places and for such areas as are set out in the Schedule to these Rules".*

On that basis therefore, Mr. Mkumbukwa argued that the plaint contravened the law thus prayed the same be struck out with costs

Responding, Mr. Shayo, argued that using the word **District** Registry instead of **Sub-registry** required under the High Court Registries Rules, G.N. No. 164 of 1971 as amended in 2019 is not fatal and has not prejudiced the Defendant. On that footing, Mr. Shayo invited this court to cure the

anomaly by invoking the overriding objective principle enshrined under section 3A and B of the Civil Procedure Code, [Cap.33 R.E. 2022]. Also, Mr. Shayo referred this court to the case of **Njake Enterprises Limited versus Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 CAT at Arusha (unreported) in his quest to apply the overriding objective principle.

In rejoinder, while reiterating his submission in chief Mr. Mkumbukwa argued that the overriding objectives principle cannot be applied blindly to circumvent the anomaly in the plaint citing the case of **Njake Enterprises Limited versus Tanzania sewing Machine Co. Ltd**, Civil Application No. 118/17 of 2017 CAT at Arusha (unreported) and pressed the suit be struck out.

On my part, having heard both sides submissions I will resolve the objection guided by the High Court Registry Rules. The Rules establishing the High Court Registries is The High Court Registries Rules G.N. No. 164 of 1971. The Rules has undergone several amendments including the one cited by the Defendant. That is to say, **The High Court Registries (Amendment) Rules, 2019** GN No. 111 of 2019; **The High Court (Amendment) Rules, 2012** GN No. 638 of 2021 and **The High Court Registries (Amendment) Rules, 2022** G.N No. 611 of 2022.

Of all the amendments, rule 1 thereof imperatively requires the same to be read as one with the High Court Registries Rules, 1971 hereinafter referred to as the "Principal Rules". The High Court Registries (amendment) Rules, 2019 amended the Principal Rules by deleting rule 5 and substituting for it thus: -

*"5.- In addition to the Registry at Dar es Salaam, there shall be a High Court **Zone** at such places and for such areas as are set in the schedule to these Rules or as may hereafter be set out under the provisions of rule 6".*

Likewise, The High Court Registries (Amendment) Rules, 2021 amended the Principal Rules by deleting rule 5 and substituting thereof the following: -

*"5.- In addition to the Main Registry at Dar es Salaam, there shall be a High Court **sub-registry** at such places and for such areas as are set out in the schedule to these Rules".*

Before amending rule 5 of the Principal Rules, it read thus: -

*"5.- In addition to the Registry at Dar es Salaam, there shall be a **District Registry** at such places and for such areas*

*as are set in the Schedule to these Rules or as may hereafter
be set out under the provisions of rule 6”.*

From the above, the words used are “**District** Registry”; “**Zone**” and “**sub-registry**”. Now, how is the title of the court, according to the High Court Registry Rules, need be drafted in court pleadings? Do we refer to rule 5 of the Principal Rules? In my view, the answer is given under Rule 7(1) and 8 (2) of the Principal Rules. These rules have never been amended by any amendments including the ones cited by the defendant. The provisions read thus: -

*“8(2) – **Where any cause or matter**, whether original or
appellate, has been entered in a District Registry, it shall be
entitled-*

*“IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA IN THE **DISTRICT REGISTRY** AT.....*

*Criminal/Civil Appeal/**Civil Case** No.....as the case may
be”.*

And Rule 7(1) provides thus: -

*"7(1) – Original proceedings in the Court may be instituted either in the Registry at Dar es Salaam or **in the District Registry** (if any) for the area in which the cause of action arose or where the defendant resides".*

In Rule 3 of the interpretation rule of the Principal Rules, the words **District** Registry or **sub-registry** are not defined save for "**Registry**". "**Registry**" is defined to include a **District** Registry. This means, the definition of "Registry" doesn't recognize "**sub-registry**" but the "**District Registry**". Therefore, in my considered view, until the Principal Rules is to be amended to specifically define "registry" to accommodate "sub-registry" as well amending Rule 8(2) which provides for titling the suit filed in the High Court, the words **sub-registry** and **District registry** in my view mean the same thing and are to be used interchangeably.

Following the exposition above, I find no merit in the defendant's first objection raised against the suit. It is therefore overruled

As regards the 2nd objection that the suit is incompetent for misjoinder of the Statutory Manager appointed by the Bank of Tanzania (BOT) one Ms.

Neema Koka who was managing the affairs of China Commercial Bank Limited (the CCBL) before the defendant took over.

On this, Mr. Mkumbukwa argued that the same is based on what is pleaded in the Written Statement of Defence (the WSD) specifically under paragraphs 6(c); 10; 10(a) and (c) and 13. That, the complained cancellation of the Advance Payment Guarantee and the Performance Bond were cancelled by Ms. Neema Koka the Statutory Manager even before the defendant took over, hence failure by the plaintiff to join her is fatal. On the effect of misjoinder of parties, he cited the case of **Juliana Francis Mkwabi versus Lawrent Chimwaga**, Civil Appeal No. 531 of 2020 CAT at Dodoma, **Tang Gas Distributors Limited versus Mohamed Salim Said and 2 Others**, Civil Application for Revision No. 68 of 2011 CAT, **Oilcom Tanzania Limited versus Christopher Letson Mgalla and 5 Others**, Land Case No. 29 of 2015 (All unreported).

In reply, Mr. Shayo argued that to on their side, they need don't joining the said Ms. Neema Koka as they have no claim against her rather the Defendant. That, the duties and obligations of the said statutory manager were extinguished when the said assets and liabilities of CCBL were transferred to the defendant. Resting his submissions, Mr. Shayo, is of the

argument that the cited authorities are distinguishable and inapplicable to the circumstances of this case. That, the plaintiff's complaint against the defendant is for her persistent negligence to act on the two facilities which were transferred by the Bank of Tanzania since 11th March, 2021 via its letter attached as Annexure HCL 6 under paragraph 9 of the plaint. That, the duties and obligations of the statutory manager were extinguished when the assets and liabilities were transferred to the Defendant. Also, Mr. Shayo, asked this court, if joining the statutory manager is necessary then, under Order I Rule IX of the Civil Procedure Code, [Cap.33 R.E.2022] order to that effect be given to join her.

In rejoinder, Mr. Mkumbukwa reiterated his stance on the non-joinder of the statutory manager and said allowing amendment of plaint to join her will amount to pre-empting the objection. In bolstering the stance, he cited the case **Standard Chartered Bank and Another versus VIP Engineering & Marketing Limited**, Civil Application No. 222 of 2016 CAT at Dar es Salaam (unreported)

Having heard rivalry submissions by both sides regarding the 2nd objection, the issue to determine is whether the same is worthy upholding or not.

It is common ground that this objection is raised basing on what was pleaded in the defendant's WSD that the statutory manager one Ms. Neema Koka is supposed to be joined in this suit. The plaintiff's argument is, Neema Koka was not joined because their claims are against the defendant who accepted assets and liabilities of the then CCBL and the Bank of Tanzania having directed assets and liabilities of it to the Defendant vide a letter dated since 11th March, 2021, this is Annexure HCL 6 to paragraph 9 of the plaint.

My take, in my considered view, the defendant cannot choose for the plaintiff who to sue in a suit. The instant objection therefore should not detain me. Reading the plaint, particularly paragraphs 3; 9 and 10 -17 are self-explanatory about the cause of action against the defendant. the same is on claim for failure to issue the advance payment guarantee of TZS 290,188,727.00 and performance bond guarantee of TZS 290,188.727.00, which claims touch no one else rather the defendant. Therefore, it is the plaintiff's duty to prove her case against the defendant. This objection is misconceived and thus is hereby overruled.

As to the third objection which is to the effect that the plaint discloses no cause of action; Mr. Mkumbukwa submitted that the herein plaintiff's claim arises out of cancellation of the Advance Payment Guarantee and

Performance Guarantee asserting that the one who cancelled them is Ms. Neema Koka the statutory manager and not NMB Bank the defendant herein. Therefore, to him, this claim has landed on a wrong party NMB Bank PLC (the defendant herein) whose liabilities accrued on 4th March, 2021 when the cancellation of the guarantees and bond had already occurred. Mr. Mkubumbwa referred this court to paragraph 12 and 12(a) of the defendant's WSD. Concluding on this objection, he submitted that the plaint does not state when the cause of action arose thus contravened Order VII Rule 1(e) of the Civil Procedure Code [Cap. 33 R.E.2022] and cited the case of **John Mwombeki Byombalirwa versus Agency Maritime International (T) Ltd** [1983] TLR 1 in which it was held that:

"The expression cause of action is not defined under the Civil Procedure Code but may be taken to mean essential facts which it is necessary for plaintiff to prove before he can succeed in the suit".

Basing on the above, Mr. Mkumbukwa submitted that since it is not the defendant who cancelled the performance guarantee and bond which are subject of this suit's claim, also the one who cancelled them being not joined, then this suit is not maintainable. As to consequences on suits disclosing no cause of action, Mr. Mkumbukwa cited the **Peter Keasi versus**

The Editor, Mawio Newspaper and Another, Civil Case No. 145 of 2014
High Court at Dar es Salaam (unreported) holding that the remedy is to strike out the suit and asked it be done to the instant suit for such failure to disclose the cause of action.

Replying the 3rd objection, Mr. Shayo argued that it is clear under paragraphs 3; 5; 9; 10; 11; 12; 14; 15 and 16 of the plaint read together with the prayers in the plaint, the cause of action stand disclosed. Therefore, according to him, the plaintiff has established the cause of action throughout the plaint.

In rejoinder, Mr. Mkumbukwa, while reiterating submission in chief, submitted that since the party who cancelled the two guarantees has not been made a party and as per the WSD the two guarantees never passed to the Defendant, thus the plaintiff does not have cause of action against the defendant.

I have given due scrutiny the parties' contesting submissions. Does the plaint disclose the cause of action? That is what I am called to determine

As was the findings of this court in the above second objection on non-joinder of a party, clearly, it is stated under paragraphs 3; 6; 9 and 10 -17

on when the cause of action arose against the defendant, what are the plaintiff's claim and a reason for so claiming. For instance, according to paragraph 9 of the plaint and annexure HCL6 thereto, the plaintiff stated thus: -

***"Para.9** - That, on 11th March, 2021 the Governor of the Bank of Tanzania issued a notice to all banks and financial institutions and the public at large, following the takeover of the China Commercial Bank Limited on 19th October, 2020, all its assets and liabilities, including the two facilities granted by China Commercial Bank Limited to the Plaintiff, were transferred to the Defendant bank. A copy of this notice dated 11th March, 2021 is attached as annexure **HCL.6**".*

Therefore, with due respect to the learned counsel, Mr. Mkumbukwa the instant plaint discloses cause of action against the defendant. It is settled law that cause of action has to be looked from the plaint and not the defendant's WSD. See: **Jeraj Sharif and Co. versus Chotal Fancy Store** [1960] E.A 375; **John Byombalirwa versus Agency Maritime Internationale (Tanzania) Limited** T.L.R.1; **Babito Limited versus Freight Africa NV – Belgium and 2 Others**, Civil Appeal No. 355 of 2020 CAT at Moshi (unreported).

Therefore, this objection, in my considered view, is also unmerited and I hereby overrule it

Lastly is the defendant's objection to the effect that the suit is incompetent for want of authorization to sue namely Board Resolution as required by the law.

Amplifying the objection, Mr. Mkumbukwa has submitted that the pleading, the plaint for that matter, is not attached with the board resolution. The resolution authorizes the filing of a suit by a company. That, such failure to attach the resolution implies the suit has been initiated without the authority of the company hence incompetent. In support of his stance, Mr. Mkumbukwa cited section 147(1)&(2) of the Companies Act, [Cap 212 R.E. 2002]; **Bugerere Coffee Growers Ltd versus Sebaduka** [1970] EA 147 (HCU); **Simba Papers Convertes Limited versus Packing and Stationary Manufacturing Limited and Another**, Civil Appeal No. 280 of 2017 CAT at Dar es Salaam (unreported); **Wellnest Company Limited versus Mgen Insurance Tanzania Limited**, Civil Case No. 201 of 2021 High Court at Dar es Salaam; **Oxley Limited versus Nyarugusu Mine Company Limited and Another**, Commercial Case No. 14 of 2022 High Court (Commercial Division) at Dar es Salaam.

That, despites of being pleaded under paragraph 17 of the plaint, nevertheless it is not annexed therefore it is as good as the same does not exist, arguing that his assertion is based on a simple reasoning that parties are bound by their pleadings as was held in **Masaka Musa versus Rogers Andrew Lumenyela and 2 Others**, Civil Appeal No. 497 of 2021 CAT at Kigoma (unreported). Winding up, Mr. Mkumbukwa prayed, on this infraction of failure to append company's board resolution, the suit be declared incompetent and henceforth struck out with costs

Replying the objection, Mr. Shayo argued that the objection is out of context because the resolution was passed on 3rd May, 2023 authorizing the filing of the instant suit as pleaded under paragraph 17 of the plaint. That, as long it is pleaded under paragraph 17 and mentioned as annexure HCL-17 then the objection on this aspect is quite inappropriate.

In his further response, Mr. Shayo argued that, after all it is not a legal requirement for a company to have board resolution authorizing the filing of the suit following the decision of the Court of Appeal in **Simba Papers Convertes Limited** (supra) cited by the defendant. Mr. Shayo rested his submission urging this court to overrule the objections raised against the suit.

In a rejoinder, keeping his earlier submission in chief, Mr. Mkumbukwa argued that the company resolution attached to the submission was never annexed to the pleading. Therefore, being part of the submission is not the evidence. Fortifying his position, he referred this court to the following cases.

The Registered Trustees of the Archdiocese of Dar es Salaam versus Chairman Bunju Village Government and 11 Others, Civil Appeal No. 147 of 2006 CAT at Dar es Salaam; **Rosemary Stella Chambejairo versus Kitundu Jairo**, Civil Reference No. 6 of 2016 CAT at Dar es Salaam and lastly, **Tina & Co. Limited and 2 Others versus Eurafrican Bank (T) Ltd**, Civil Application No. 86 of 2015 CAT at Dar es Salaam (All unreported). The findings in these cases is that submissions from the bar are not evidence which can be acted upon by the court

Having considered both sides' submissions on the instant defendant's fourth objection, that the suit is incompetent for want of board resolution authorizing the filing of it, the to determine is whether it is merited.

In defending their stance, both sides of the case have given reliance to the recent Court of Appeal decision in **Simba Papers Convertes Limited versus Packing and Stationary Manufacturing Limited and Another**, Civil Appeal No. 280 of 2017 CAT at Dar es Salaam (unreported).

Here what is at stake between them is on what is the correct interpretation of the decision regarding the requirement of company resolution when a company institute a suit before the court of law. This is what was said at page 18 of the decision, that:

*"We subscribe to the said position to the extent that it relates to the institution of a suit by one or more directors in the name of the company whereas in the present matter, it **revolves on the internal conflict within the company**. In any other case we will be **hesitant to extend the rule any further mindful of the legal position relating to the power of the company to be sued in its own name**".*

The above position on which the Court of Appeal subscribed, as obtaining in **Bugegere Coffee Growers Ltd versus Sebadduka**, [1970] 1 EA 147 (HCU) was reproduced at page 18 of the said **Simba Papers** case and reads thus: -

*"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, 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".* End of quote

As it can be observed above, the Court of appeal refrained from making it mandatory that a company filing a suit is mandated to first obtain board resolution authorizing the filing of a suit save where the suit involves internal conflict of the company, that is to say, against directors or shareholders rather than on the third party.

The instant suit, is not such a suit involving internal conflict between directors or shareholders but a third part, the defendant herein. therefore, in my considered view, the board resolution, as held in **Simba Papers** case (**supra**), is not a requirement for a company to institute a suit against a third party like the one at hand. In fine, I find no merit in this objection and a list of case laws cited regarding submissions from the bar in respect of the annexed board resolution in the plaintiff's submission are of no useful purpose for being redundant following the interpretation above stated.

Following the above findings on the four objections raised against the suit, of which are found unmerited, therefore, all the objections are hereby overruled in their entirety with costs.

It is so ordered

Dated at Dar es Salaam this 28th of February, 2024



MUSA K. POMO

JUDGE

28/02/2024



Court: Ruling delivered this 28/02/2024 in presence of Mr. Daniel Yona, learned advocate holding brief of Mr. Walter Shayo, learned advocate for the Plaintiff and Mr. Ali Hamza, learned advocate for the Defendant only

Sgd: S. B. Fimbo

Deputy Registrar

28/02/2024