

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 25 OF 2007

UNILEVER TANZANIA LIMITED..... PLAINTIFF
VERSUS
BENEDICT MKASA t/a
BEMA ENTERPRISES..... DEFENDANT

R U L I N G

Date of final submission July 27, 2007.

Date for ruling September 7, 2007.

MJASIRI, J.

In this case the Plaintiff is claiming from the defendant the sum of Tshs 122,316,459 being the amount outstanding for goods supplied and delivered to the Defendant by the Plaintiff on various dates, at the Defendant's request together with interest and costs.

The Defendant denied the Plaintiff's claim. The Defendant has raised a preliminary point of law that

the suit was instituted by the Plaintiff without the sanction of the Board i.e. without a Board Resolution.

Hearing of the preliminary point of law proceeded by way of written submissions.

The Plaintiff was represented by Mr. Kalolo Advocate and the Defendant was represented by Mr. Mlelwa Advocate.

Mr. Mlelwa Advocate for the Defendant submitted that there is no evidence in the pleadings that there exists a resolution of the Board. No Board Resolution has been attached to the Plaint. According to the Counsel for the Defendant the Board Resolution is mandatory, and the absence of the said resolution renders the entire suit incompetent. Counsel for the Plaintiff made reference to the case of **Bugere Coffee Growers Limited V Sebaduka** [1970] EA 147. According to Counsel for the Defendant a resolution has to be passed either at a company or Board of directors Meeting when a company authorises commencement of legal proceedings. Counsel for the Defendant submitted that the decision of **Bugere**

Coffee Growers Limited V Sebaduka was followed in the case of **St. Bernard Hospital Company Limited Dr. Linus Mlula Maemba Chuwa**, Commercial Case No.57 of 2004 (unreported).

Counsel for the Plaintiff submitted that the preliminary objection raised by the Defendant has no basis and the Counsel for the Defendant is turning the court into an academy of law citing Abraham CJ (as he then was) in **Anthony Edward Cuning V Queen's Hotel** (1935) EACA 25.

Counsel for the Plaintiff also cited **National Bank of Commerce V Jackson Seinzobakwila** (1978) LRT No.39.

According to counsel for the Plaintiff the preliminary objection does not meet the test of what a preliminary objection is. Counsel cited the case of **Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Limited** [1969] EA 696. According to Counsel for the Defendant this decision has been followed consistently by the Commercial Division of

the High Court. Counsel cited the following unreported cases:

1. *CRDB Bank V Noorally K.J.Dhanani & Another*,
Commercial Case No.1 of 2001.
2. *National Bureau de Change V the NBC Limited*,
commercial Case No.167 of 2001.
3. *Sycamore Investments Limited V Juma Mgassa*,
Commercial Case No.257 of 2002.

Counsel also cited **National Oil (T) Ltd V Standard Chartered Bank** (Commercial Case No.97 of 2005) where a similar objection was rejected as the Defendant failed to produce evidence to support the allegation that there was no authority to institute the suit. Counsel for the Plaintiff requested this court to follow a similar position.

Counsel also cited Pennington's Company Law, 15th Edition at page 28 where it is stated as under:

“The intention of the legislature was undoubtedly that the court should assist the Company to achieve its expressed objects by implying all powers necessary for it to do so. On the whole the courts have been liberal in implying powers. Thus, powers have been implied to do acts obviously appropriate to the carrying on of any business such as appointing agents and engaging employees and instituting, defending and compromising legal proceedings.”

According to Counsel for the Plaintiff a company has implied powers to institute legal proceedings without the need of the board resolution.

Counsel for the Plaintiff also cited Gower's Company Law 2nd Edition at page 528 where it was stated that the court would simply stay the proceedings until a resolution is passed. Counsel also brought to the notice of the court the case of **Danish Mercantile Co. Ltd versus Beaumont** Ch 680 cited in Gower's Principles of Company Law which established that the court will not dismiss or strike out the suit, because a Board Resolution is not available. Counsel

for the Plaintiff also brought to the attention of the court. The case of **D.T.Dobie (K) and Company Limited V Muchina & another [1981] KLR 9 (CAK)** where Madan J.A stated as follows:

“A court of justice should aim at sustaining a suit rather than terminating it by a summary dismissal. Normally a law suit is for pursuing of it.”

After carefully reviewing the submissions made by both counsels and the relevant authorities and taking into consideration the decision in **Mukisa Biscuits Co. Limited V West End Distributors Limited** (1969) EA 696 as to what constitutes a preliminary objection I am of the view that the objection on a resolution of the Board does not fall in the category of preliminary objections as clearly outlined in the **Mukisa Biscuits** case.

According to **Mukisa Biscuits** –

“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 the assumption that all the

facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of judicial discretion.”

The preliminary objection raised requires an inquiry to establish whether the Plaintiff had authority to institute the suit. This means evidence would be required. Therefore the Board Resolution question cannot be regarded as a preliminary objection.

In relation to the case of **Bugerere Coffee Growers Association V Sebaduka** 1970 EA 147, I would like to state that the circumstances of the **Sebaduka** case are different from this case. There was a dispute between members of the company and the Board of Directors and new directors were appointed by members.

Given the fact that the requirement of the Board Resolution is a matter of evidence I am in full agreement with the finding of my sister Kimaro J as she then was in the case of **National Oil (Tanzania) Limited and another versus Standard Chartered**

Bank (T) Limited Commercial Case No.97 of 2005 (unreported) where she stated that the preliminary point did not fall under a category of preliminary objections.

In the light of what has been stated hereinabove the preliminary objection is hereby dismissed with costs.

Sauda Mjasiri

Judge

September 6, 2007

1,803 words.

Jd.

I Certify that this is a true and correct
of the original ~~order~~ Judgement Rulling
Sign [Signature]
Registrar Commercial Court, Dsm.
Date 11/10/07