IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 97 OF 2015

INVESTMENT HOUSE LIMITED.....PLAINTIFF

VERSUS

WEBB TECHNOLOGIES (T) LIMITED.....1ST DEFENDANT

UNITED BANK OF AFRICA (T) LIMITED.....2ND DEFENDANT

BANK OF TANZANIA.....3RD DEFENDANT

RULING

Mansoor, J:

Date of RULING- 26TH FEBRUARY 2016

Against the suit, the 1st defendant took an objection that the suit is incompetent for want of Board Resolution, the suit is

premature, and that the amended Plaint contravenes the Order of the Court dated 22nd September 2015 by Mansoor J, which ordered to join the 2nd Defendant and not otherwise;

The 2nd defendant also raised objections to the effect that the suit is bad in law in that there is no Board Resolution authorising the plaintiff or his advocate or any other representative thereof to institute the matter before the Court, and that the Amended Plaint is hopelessly bad in law for contravening order VII (1) (f) of the Civil Procedure Code, Cap 33 R: E 2002.

With the leave of the Court, the preliminary objections were argued by written submissions.

On the requirement of filing the Board Resolution, the Counsel for the 1st Defendant has argued that there is no Board Resolution by the plaintiff's company authorising the plaintiff to sue the defendant or authorising Advocate Seni S Malimi to commence legal proceedings. The Counsel said that it is

important to have the Board Resolution on record so as to show that the company still exists, to show that the decision has been reached in accordance with its constitution or articles of association and therefore legally binding on it, to secure the interest of the defendants and also to save the Court's time and avoid unnecessary suffering by the shareholders who are unknowingly dragged to Court and condemned to pay huge costs. The Counsel referred to the case of **Msikimwe Investment Co. Limited vs Temeke District Football Association (TEFA) and another** (Civil Case No 2009 of 2012) HC, (unreported), the case of **Uvinza Heifer Farm Limited & 3 others vs Wengert Windrose Safaris (T) Limited & 2 others** (Civil Case 2 of 2005) HC, (unreported), the case of **Bugerere Coffee Growers Limited vs Sebaduka and Another** (1970) 1 EA 147 (HCU).

The 2nd Defendant withdrew this point of objection.

In answering this point, the Counsel for the plaintiff had referred to the case of **Mukisa Biscuits Manufacturing Limited**

vs Eastern Distributors Limited (1969) E.A 696, saying that this objection is not on pure points of law, and is based on disputed facts on which evidence will have to be led to establish them. In order to determine this point, the Counsel argued that, the Court will have to invite parties to prove by leading the evidence to establish whether or not the Board Resolution exists, and this would disqualify this point to be treated as the point of preliminary objection. Thus he prayed for the preliminary objection to be dismissed.

I observed that, the Counsel for the 1st Defendant cited several cases including the case of **Bugerere Coffee Growers Limited vs Sebadduka & another (1970) EA 147**, which case was referred in the case of **Tanzania Glue Lam Industries Limited vs Bjorn Schau & others** reported in Vol II of Commercial Court Manual Report, in which the Court held that there must be a Resolution sanctioning or authorising the commencement of legal proceedings by Companies.

On this point of objection I take the view of Hon Nchimbi J, in the case of **Kilombero North Safaris and Registered Trustees of Mbomipa**, and Hon. Makaramba J in the case of **Addax BV Geneva Branch vs Kigamboni Oil Co. Limited Commercial Cause No. 72 of 2008**, and also my own findings in the case of **Messina (T) Limited vs Quality Business Consultants (T) Limited, Commercial Case No. 13 of 2015** (unreported), in which , I said, that this kind of preliminary objection cannot be qualified to be treated as preliminary objections as they do not fit in the categories of preliminary objections set or established in the famous case of **Mukisa Biscuits Co. vs West End Distributors Limited (1969) E.A 696**, that *" preliminary objection should be on points of law or which arises by clear implication out of pleadings, which if argued may dispose of the suit."*

I also stated in that case that, "it is well settled that under the Companies Act except where express provision is made, the powers of a company in respect of a particular matter are to be exercised by the company in general meeting, or by the Board

of directors if the powers are vested in them by the memorandum and articles."

I continued saying in the case of Messina that "The question of authority to institute a suit on behalf of a company is not a technical matter. It has far-reaching effects. It often affects the policy and finances of the company. Thus, unless a power to institute a suit is specifically conferred on a particular director, or a manager, he has no authority to institute a suit on behalf of the company. Needless to say such a power can be conferred by the Board of Directors only by passing a Resolution."

There is no dispute about the fact that the person, who has instituted the suit, has not disclosed in the pleadings whether or not there has been filed a Resolution to that effect before the Registrar of Companies or in this Court.

I agreed in the case of Messina and I also agree here that under the principles of the Companies Act, the plaintiff ought to have filed the Resolution at the time of institution of the suit. Under normal circumstances, the suit should not have been admitted

without demanding a copy of the Resolution. If a demand had been raised at the time of filing the suit, by the Registry Officer, the plaintiff would have had an opportunity to file the document, and rectify the problem. In any case, the plaintiff has a chance to file it now as additional document. There is such a room under the CPC.

It can be said in the course of trial that the suit was instituted by an incompetent person, not authorized in this regard. If no such Resolution had been passed, as claimed by the defendant, then the very institution of the suit is bad and unauthorized. Therefore, the answer to the question raised by the 1st defendant lies in finding out, as a matter of fact, whether there was any Resolution actually passed for institution of this suit authorising Arthur Cyrus Dallas Seme, the principal officer of the plaintiff to sign and verify the pleadings or Advocate Seni S Malimi to file a suit.

I said in the Messina case, and I repeat it here that "Even if there was a Resolution filed, this would have been only a prima facie evidence of their contents. The plaintiff would be required

to prove that the Resolution was actually passed by a competent body, and the quorum for passing such a Resolution was present and that if it is a special Resolution, the Resolution was filed with the Registrar of Companies. It is always open to the defendants, to challenge the evidence presented by the plaintiff regarding the Board or Special Resolution. But the opportunity to do so will arise only at the time of trial. In other words, the question as to whether Mr. Arthur Cyrus Dallas Seme, the Principal Officer of the Plaintiff Company, and Advocate Seni Malimi were authorized by the Company to institute the suit and whether the suit was properly instituted or not, are all questions of fact, which can be decided only at the time of trial especially when the plaintiff has produced a document to show this authority. The jurisdiction to reject a plaint either under Order VII Rule 11, C.P.C. or to dismiss the suit on any technical ground, cannot be exercised, if the objection raised is on a question of fact, which can be established only by evidence.

I find in this case that a question of fact has arisen about the status of a person, who has filed a suit on behalf of the

Company and also about his authority to institute the suit. This disputed question is a fact and cannot be decided at this stage. The objection is therefore overruled and dismissed with costs.

On the objection on whether or not the suit by the plaintiff was filed prematurely, the Counsel for the 1st defendant submitted that clause 11 of the Agreement attached to the plaint, which is said to have ben breached is a precondition that before commencing any legal action, the plaintiff was required to issue notice of default to the other party, and if the default is not rectified within seven days from the date of the notice , then a party to that agreement could commence an action in Court. He said, such a requirement was not complied with.

Again, this preliminary objection cannot be qualified to be treated as a preliminary objection as it do not fit in the categories of preliminary objections set or established in the famous case of **Mukisa Biscuits Co. vs West End Distributors Limited (1969) E.A 696**, that "preliminary objection should be

on points of law or which arises by clear implication out of pleadings, which if argued may dispose of the suit."

In any case the 1st defendant has admitted receiving the demand notice, and the question of whether or not the demand notice fits squarely as with the notice under Section 11 of the Agreement requires evidence, and thus it is not a pure point of law, which if argued may dispose of the suit. This objection is misconceived, and it is hereby dismissed with costs.

The third objection by the 1st defendant is that the plaintiff did not comply with order of this Court when he was ordered to amend the plaint to include the 2nd defendant. He said, the plaint imposed new obligations on to the 1st defendant in the amended plaint, and also has added prayers as against the 1st defendant in the amended plaint. He said, in the original plaint, prayers (c) to (e) did not specifically mention that they should be directed to the 1st defendant but in the amended plaint he asked these prayers as against the 1st defendant. He submitted that the fact that the order of this Court was not complied with,

and since the plaintiff filed a new plaint introducing new reliefs, he prays for the plaint to be struck out with costs.

To this objection, the Counsel for the plaintiff submitted that in the original plaint there were 17 paragraphs pleading fraud, the particulars of fraud were missing in the original plaint but added in the amended plaint. He said the prayers in the original plaint are the same with the amended plaint, and since the 2nd defendant was added in the amended plaint, it was important to specify as to who is responsible for each claim. The contents of the plaint did not change, he said, and that the amended plaint did not introduce any new cause of action. He referred me to the case of **PG Associates Limited vs Georgina Mtikila Land Case No. 166 of 2005**, in which the claims relating to defamation were struck out leaving claims on land matters, similarly if the particulars of fraud in the amended plaint are seem to be offensive of the order of the Court, he prayed for the particulars could be struck out, leaving the other paragraphs of the amended plaint intact.

On this I agree with the submissions of the Counsel for the Plaintiff and the cases cited in particular the case of **Olga Robson Kimaro, Chiku Hamisi vs Shari Mwita, S.A said & Co. Limited, Civil Case No. 194 of 2005** (unreported) HC, that, even if it is found that the adding of the particulars of fraud is an omission, that omission is curable under Order VIII Rule 11 of the CPC, *"under this provision the Courts' discretion in allowing amendments is unlimited, it can allow amendment of the plaint where it appears that it does not disclose a cause of action or where it appears to be barred by any law provided that it is satisfied that the plaint can be cured by the amendment."*

I also agree with the finding of the case of **Nickson Zabuloni (the Administrator of the Estates of the Late Alweli Minuka Zabloni) vs Menrad Mwaliweuli Msigala, NBC Limited, Land Case No. 6 of 2012,** in that where there is a defect in the plaint, Order VI Rule 17 of the Civil Procedure Code, Cap 33 R: E 2002 giver powers to the Court to allow amendments.

It is on record that the Plaintiff was allowed by the Court to amend the Plaint to include the 2nd defendant and the claims against the 2nd defendant, and the 1st Defendant did not object the inclusive of the 2nd Defendant into the suit. In the amended plaint the Plaintiff pleaded facts that impleaded the 2nd defendant, and since in the new plaint we now have two defendants and the necessary party, it is not offensive of the order of this Court to specify in the reliefs as to which relief relates to which party. As submitted by the Counsel for the plaintiff that that there is no new cause of action that has been introduced in the amended plaint.

I take guidance from the text book of Sarkar Code of Civil Procedure, and the Book of Mullah, the code of civil Procedure, 16th Edition, Vol. 11 at page 1848, which states:

"It must be observed at the outset that a plaintiff must in general be limited to the case which he puts forward in his plaint. There are, however, cases in which by some mistake or misapprehension the plaintiff has failed to state his case

correctly and properly in the plaint. In such cases, the Court may allow the plaint to be amended; for if the amendment is refused the plaintiff may have to bring another suit, and the object of the rule allowing amendment of the plaints is to avoid multiplicity of suits. Where a plaint through mistake or inadvertence has not brought out in the plaint the real state of affairs and wants to amend the plaint, it is not as if he is stating new facts."

I agree that in the amended plaint the plaintiff did not introduce a new case rather he gave particulars of facts already pleaded in the original plaint.

It should be noted that the principal defendant in this case is the 1st defendant who did not object to amendment, and that it is the 1st defendant who shall be affected by the prayers made in the amended plaint and that there is no injustice complained of by the defendants arising out of the amendment of the plaint. The test for allowing the amendment is to find whether the proposed amendment will cause any serious injustice to the

other side, and quoted Mullah, the Code of Civil Procedure page 1849 that:

"Broadly stating, there is no injustice in granting the amendment if the opposite side can be compensated in costs. It is a tried proposition of law, culled from various pronouncements, that bonafide amendments, vital for adjudication of the real question in controversy between parties, should be allowed however negligent the first omission and howsoever delayed the proposed amendment, if the opposite party can be compensated with costs and the terms to be imposed in the order."

I shall refer also to the case of **The British India General Insurance Co. Limited vs G.M. Parmar & Co. LTD (1966) EA 172**, the East African Court of Appeal said:

"The amendment sought to add a new ground for denying liability which could have been pleaded in the beginning as an alternative ground of defense and as the judge was satisfied that the application was bona fide and could not cause injustice to the

respondents there was no good reason to refuse the respondents leave to amend their defense.

Also in the case of **Steward vs the Northern Metropolitan Tramways Co. 54 L.T.R 35,** the above principle was repeated that "*the rule of the conduct of the Court in such a case as this that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.*"

I agree that the amendment made to the paint is necessary to adjudicate the real issues in controversy and I observed that the order of the Court allowing amendment of the plaint was not violated as the order granted was an order to amend the plaint to include the 2nd defendant and the claims against the 2nd defendant had to be pleaded.

I overrule and dismiss this objection since the amendments are within the confines of the order of the Court made on 22 September 2015.

The 2nd defendant raised an objection that the Amended Plaint contravenes the provisions of Order VII Rule 1 (f) of the Civil Procedure Code, Cap 33 R: E 2002. That the plaint did not contain facts showing that the Court has jurisdiction. The Counsel for the 2nd defendant had argued that paragraph 23 of the Amended Plaint, the plaintiff stated that the Facilitation Agreement was concluded in Dar es Salaam and since the 1st defendant resides at Dar es Salaam, then it is correct to say that the Court has territorial jurisdiction. The Counsel for the 2nd defendant also admits that the Court has pecuniary jurisdiction to entertain the suit since the claim is USD 146,000. The Counsel for the 2nd defendant argues that the plaint should have contained a statement specifically pleading that the dispute is of commercial nature showing that it is a fit case to be instituted in the Commercial Division of the High Court. He took reference to the case decided by Hon Judge Mwambegele,

the High Court Judge, in the case of **China Pesticides Limited vs Safari Radio Limited Commercial Case No. 170 of 2014**, in which Hon Judge Mwambegele had this to say:

> *"I must say, for a suit to be filed in the Commercial Division of the High Court of Tanzania, it (the suit) must, inter alia specify the nature of the claim, the subject matter and the territorial jurisdiction as well as facts showing that the suit is of commercial significance..... the Commercial Division of the High Court is vested with jurisdiction to try only cases with commercial significance and this must be specified in the paragraph for jurisdiction in the plaint."*

The learned Counsel for the 2nd defendant also cited the case of **Lucas Malya vs Mukwano Industries Limited, Commercial Case No. 60 of 2004,** where Hon Judge Massati J had this to say:

"This is a commercial Court. It is pertinent that the facts show that the transaction is commercial in nature within the

jurisdiction of this Court. In my view therefore the rule is vital and goes to the root of the Court's jurisdiction and it cannot be broken. The omission is therefore fatal and renders the plaint incurably defective. In the event, I find, hold and order that the plaint is incurably defective, it is hereby struck out with costs."

The Counsel said that the omission is fatal as per the decisions of the cases of my learned brothers cited above, and that it is the requirement of Order VII Rule 1 (f) of the CPC that a plaint filed in the Commercial Division of the High Court must contain a paragraph in respect of the jurisdiction that states inter alia that the suit arises out of commercial transactions and that the case is of a commercial nature.

On this point I agree with the submissions by the Counsel for the plaintiff that Order VII Rule 1 (f) of the CPC requires that there should be a clause which shows the jurisdiction of the Court. I agree that clause 23 of the Amended plaint shows that there is in existence the Facilitation Agreement, and that the Facilitation Agreement was concluded at Dar es Salaam, and

that the Defendant resides at Dar es Salaam, and the amount involved. The Facilitation Agreement was pleaded and attached as an Annexure to the Plaint. Clause 10 of the Agreement it is clearly shown that parties have submitted to the jurisdiction of the High Court Commercial Division in case of a dispute. Order VII Rule 1 (f) states that a plaint shall contain facts showing that the Court has jurisdiction. This section of the law talks of the entire plaint, and not a particular specific clause, and when reading a plaint one has to read the annexures attached to the plaint as well. I am convinced that the plaint contains particulars and facts showing that the Court has jurisdiction, and the clauses in the Facilitation Agreement have expressly stated that any dispute regarding the Facilitation Agreement, the parties have to submit the claims at the High Court Commercial Division, since the transactions falling under the Agreement are of Commercial Significance. The requirements of Order VII Rule1 (f), the Plaint should not be read in isolation of other documents and that the Court should not be easily induced to deviate from the substantive contents of the plaint or from its inherent jurisdiction of dispensation of justice, and

that there is no failure by the plaintiff to plead facts showing jurisdiction in the amended plaint, however even if there was such failure to include a statement in the plaint that the Court has jurisdiction is a flimsy technicality and the Court cannot strike out the Plaint for such mistakes.

The plaint can only be stricken out under Order VI Rule 16, which reads:

> "The Court may at any stage of the proceedings, order to be struck out or amend any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit"

I agree that the provision of Order VII Rule 1 (f) requires that the Plaint must have a clause which shows that the Court has jurisdiction, however I agree also with the submission by the Plaintiff that in determining of whether or not the Court has

jurisdiction in the subject matter the Court does not only look at a clause pleaded by the Plaintiff in the Plaint which shows that the Court has jurisdiction, the Court looks at all the statements of facts pleaded in the plaint and its annexures.

Consequently, based on the above arguments, I overrule this objection as well. Thus, all the preliminary objections raised by the 1st and the 2nd defendants are overruled and dismissed with costs.

DATED at DAR ES SALAAM this 26TH day of FEBRUARY, 2016

MANSOOR

JUDGE

26TH FEBRUARY 2016