IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 2 OF 2016

(Arising from Commercial Case No. 240 of 2014)

MWANANCHI INSURANCE COMPANY LTD ..... APPLICANT

VERSUS

THE COMMISSIONER FOR INSURANCE ..... RESPONDENT

25th May & 27th June, 2016

RULING

MWAMBEGELE, J.:

This is a ruling on a preliminary objection raised against the application for extension of time within which to file a Bill of Costs in respect of Commercial Case No. 240 of 2014. The application which is made under sections 14 (1) of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 and 30 of the Civil Procedure Code Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC") is supported by an affidavit sworn by Hussein Kitta Mlinga, from whence the objection emanates. Along with its counter affidavit, the respondent, through the services of its legal representative Ellen Rwijage, State Attorney, raised a preliminary point of objection that:

"The Affidavit in support of the Application is defective for being sworn by an unauthorized deponent"

The preliminary objection (hereinafter "the PO") was argued before me on 25.05.2016 during which the applicant and respondent had the representation of Mr. Hussein Kitta Mlinga, learned counsel and Mr. Gabriel Malata, learned Principal State Attorney assisted by Mr. Paul Ngwembe, learned counsel, respectively. Both parties had filed their skeleton written arguments ahead of the oral hearing as dictated by rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter "the Rules").

Adopting his skeleton arguments and arguing in support of the objection, Mr. Malata, learned principal state Attorney, premises his contention on the cases of ***St. Bernard's Hospital Company Limited Vs Dr. Linus Maemba Mlula Chuwa***, Commercial Case No. 57 of 2004 (unreported) and ***Sudhir Lakhanpal Vs Delphis Bank (T) LTD and 2 Others,*** Civil Appeal No. 72 of 2004 (CAT unreported) as well as Order XXVIII Rule 1 of the CPC. His primary argument is that authority to commence suits on behalf of corporate persons like the applicant should be express and not merely perceived and therefore that Hussein Kitta Mlinga who affirmed the affidavit in support of the application is an unauthorized person to depone on behalf of the applicant, because he (Hussein Kitta Mlinga) is neither a secretary, director nor principal officer of the applicant company. The learned principal state attorney maintains that, having been not duly authorized to depone the affidavit supporting the application and having been not duly authorized to file

this application on behalf of the applicant company, this court should be pleased to dismiss the application with costs.

In response, Mr. Mlinga, learned counsel for the applicant, adopting his skeleton arguments too, grounds his argument on three authorities namely ***Mukisa Biscuits Vs West End Distributors*** [1969] EA 696, the decision by my Brother at the Bench Makaramba, J. in ***PLASCO Ltd Vs EFAM Ltd Vs Fatma M. Rweyemamu,*** Commercial Case No. 60 of 2012 (unreported) and Order XIX Rule 3 of the CPC, primarily maintains that the point raised does not amount to a preliminary point of objection because the question as to whether the deponent is or is not authorized by the applicant company is a question of fact, that taxation proceedings are extension of the proceedings that gave rise to the Bill of Costs and therefore there is no need of special resolution, that the facts deponed in the affidavit are within the knowledge of the deponent because he was the one who conducted the hearing of the matter from which taxation arises and therefore the preliminary point of objections should be dismissed with costs.

In a short rejoinder Mr. Malata, learned Principal State Attorney, sticks to his guns stating that on the basis of the said authorities, there is a requirement of a company resolution to authorize Mr. Mlinga to affirm the affidavit in support of the application as well as file the application for extension of time to file the Bill of Costs. He added that the learned counsel for the applicant should have appended the said resolution to the skeleton submissions after receiving their concern or should have filed a supplementary affidavit to prove that there is a company resolution to that effect. Failure to do that, stressed the Principal State Attorney, would suggest that there is no such authority

from the applicant company. He finally reiterated the prayer that the application should be dismissed with costs.

I have heard the learned contending views by counsel for both parties with keen interest and I must say outrightly that this kind of preliminary is no longer in the list of hard issues neither a topical one to deserve consumption of the court's precious time. As such, I will not be detained much by it.

With regard to there being no authority to depone and sign an affidavit by the applicant's counsel, I unflinchingly agree with the learned counsel for the applicant that the same is a factual matter deserving an inquiry and as such not a preliminary objection in the light of the oft-cited ***Mukisa Biscuits*** case. The case has religiously been followed by courts in this jurisdiction. One such case, among many others, is ***the Soitsambu Village Council Vs Tanzania Breweries Limited & Another,*** Civil Appeal No. 105 of 2011 (CAT unreported). In ***the Soitsambu Village***, the Court of Appeal observed:

> "Where a court is to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law ... It will treat as a preliminary objections only those points that are pure law, unstained by facts or evidence ..."

The learned Principal State Attorney bases his arguments in favour of the preliminary point of objection on the absence of the company a resolution to institute the application and as such that the deponent who is the learned counsel for the applicant is not authorized and not fit to depone and file this application for extension of time to file the Bill of Costs. To me, all these are matters that may be proved by facts; requiring evidence to establish and

therefore disqualifying this point as a preliminary point of law in the light of the principle set out in the oft-cited ***Mukisa Biscuits*** which has, as already alluded to above, been religiously followed by courts in this jurisdiction. The *ratio decidendi* of that landmark decision is that a preliminary objection has to be a pure point of law and is argued on assumption that all facts are correct. It is not a preliminary objection if there is need for evidence to ascertain a fact. Thus, on this point, I am at one with my brothers at the bench Makaramba, J. in the ***PLASCO*** case (supra) and Mruma, J. in ***Resolute Tanzania Limited Vs LTA Construction (Tanzania) Limited and 3 Others,*** Commercial Case No. 39 of 2012 (unreported) that this is none of the issue that can be raised as point of law since it needs investigation by evidence to be established.

Before I pen off, I wish to remind the learned Principal State Attorney that the position in ***St. Bernard's Hospital*** has long been departed by this court. If, anything, it has never or, rather, hardly been followed.

In ***Arcopar (O.M.) S.A Vs Harbert Marwa and Family & 3 Others***, Civil Application No. 94 of 2013 (unreported), the Court of Appeal, in its fairly recent ruling handed down on 12.12.2014, adopted as good practice the principles laid down in the Canadian case of ***Fisken Et Al Vs Meehan*** (1876) 40, U C Q.B. 146) to the effect that where there are conflicting decisions of equal weight, the court should follow the more recent decision and ***Campbell Vs Campbell*** (1880) 5 App. Case 787 to the effect that where two cases cannot be reconciled, the more recent and the more consistent with general principles ought to prevail. On the strength of the ***Arcopar*** case which is binding upon me, I am confident to find and hold that the ***St. Bernard's Hospital*** case, on the question whether or not failure to seek and obtain the

sanction of a company to institute a suit or application, as the case may be, is no longer good law. The position on the point in this jurisdiction is now fairly settled.

For the reasons stated above, I deem there to be no cogent reasons to proceed further with the rest of the arguments by the learned counsel for the parties. This PO is overruled with costs to the applicant.

Order accordingly.

DATED at DAR ES SALAAM this 27^{h} day of June, 2016.

J. C. M. MWAMBEGELE

JUDGE