IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 135 OF 2015

MWANANCHI INSURANCE CO. LTD ..... PLAINTIFF

VERSUS

ELIAS MASIJA NYONG'ORO
EDNA ELIAS NYANG'ORO } **..... DEFENDANTS**
RODRICK ELIAS NYANG'ORO

8th & 30th June, 2016

RULING

MWAMBEGELE, J.:

The current suit was filed by the plaintiff against the defendants claiming against them jointly and severally for the payment of some varied amounts of money which were, allegedly, fraudulently transferred, unjustifiably paid, negligently settled, willfully misappropriated, as well as commercial interest rate at 27%, court interest rate at 11%, punitive and general damages as well as costs of the suit and any other relief this court may deem fit to grant. From the statements as contained in the plaint, it is evident that the claims emanates from or revolves around the plaintiff company maladministration and/or failure to dispense the duties of the directors by the first and second defendants who are said to be directors of

the plaintiff and employees honestly and in the interest of the plaintiff company.

Against the claim, a defence was jointly entered by the three defendants. It was prefaced with a preliminary objection. The preliminary objection (henceforth "the PO") is premised on three main grounds; that is:

(a) There is no resolution of the Board of directors of the plaintiff authorizing institution of the current suit;

(b) The suit is grossly incompetent for contravening the provisions of section 234 (1) and (2) of the Companies Act, Cap. 212 R.E 2002; and

(c) The Current suit is an abuse of the Court Process.

The plaintiff and defendants are, respectively, represented by Mr. Hussein Kitta Mlinga assisted by Ms. Jacqueline Simbakalia and Mr. Mr. Imam Daffa, learned advocates. The learned counsel for the parties had filed their skeleton written arguments as dictated by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 which they both sought to, and adopted during their oral submissions on 30.05.2016. I have had an advantage of going through the same before their oral submissions. I do not intend to reproduce in *extenso* their arguments, lest this ruling would be unnecessarily long.

Suffice here to note that the arguments by the learned counsel for the defendants, having decided to drop the first point of objection, are mainly that the plaintiff has instituted the suit contrary to section 234 (1) and (2) of the Companies Act, Cap. 212 of the Revised Edition, 2002 which in

essence directs that for a person to institute or defend an action in the name of the company he or she must obtain leave of the court and further that such person must have issued reasonable notice to the directors of the Company as well, that that person must be acting in good faith and in the interest of the particular Company. To buttress his point, he cited the case of ***John O. Nyarronga Vs.Captain Ferdinando Ponti, Anil Patel and C.T.I Transport Ltd,*** Commercial Case No. 62 of 2009 (unreported) and ***Arcado Ntagazwa Vs Buyogera Bunyambo*** [1997] TLR 242. He insisted that since the suit has been brought without the said leave of the plaintiff company, then the same should be struck out.

On the second point, it is argued by the learned counsel that Mr. Ephraim Christopher Manase Mrema had instituted Commercial Case No. 20 of 2013 seeking the court to declare acts of the defendants prejudicial to the interests of the Company and authorize him to commence civil proceedings on behalf of the plaintiff. He maintains that the prayers having been refused, this current suit is incompetent and amounts to abuse of court process.

On the other hand, Mr. Mlinga, learned counsel for the plaintiff contended that the objection is based on a misconception because the plaintiff has sued in its own name and therefore properly before the Court. He contends that the provision of the law said to have been contravened relates to circumstances where a person wishes to institute a suit on behalf of the Company which is not the case in the present suit. As for the said Commercial Case No. 20 of 2013, he stated that it was instituted by the said Mr. Ephraim Christopher Manase Mrema seeking to have the acts of the defendants declared prejudicial to the interests of the Company and

that a competent inspector be appointed to investigate into the allegations. He maintains that it was on the basis of the said investigators report that the current suit was instituted, and further that the cited case of ***Arcado Ntagazwa*** is irrelevant to the current suit as the same was in respect of the Notice of Appeal.

For the second point of objection, his argument is that the same requires evidence for it to be determined and as such it is not a preliminary objection in line with ***Mukisa Biscuits*** case. Arguing in the alternative, he maintains that this court in its ruling in Commercial Case No. 20 of 2013 declared the acts of the defendants prejudicial to the plaintiff company and therefore this suit would not be an abuse of the court process.

In a short rejoinder, Mr. Daffa for the defendants submitted that the notice of appeal appended to the joint written statement of defence is in respect of the said Commercial Case No. 20 of 2013 which is said to be the basis of this suit and further that the suit is on the basis of the audit report dated 11.08.2015. He maintains that since the said report was presented to this court under the said Commercial Case No. 20 of 2013, after the filing of the said notice of appeal, this court was not supposed to proceed with this case and accept the said audit report which is the basis of this suit.

I having heard the rival submissions and accorded the same ample reflection on the basis of the law, I think, the question to be determined here is whether this suit is or is not competent before this court. I think this will not detain me much. At the outset, and based on the rival submissions and statements in respect of the basis of this suit; that is, the

basis of a suit is, and has always been, the cause of action and not the annextures to the pleadings or evidence thereof for that matter. In that line of view, the said audit report as being related or emanating from Commercial Case No. 20 of 2013 and as such being the basis of this suit thus warranting its impeachment does not hold water.

Coming to the objection, the major basis of attack of its competency are launched on the basis of the provisions of the said section 234 (1) and (2) of the Companies Act, as well as abuse of Court process. The said section reads as follows

> "(1) Subject to subsection (2), a person (the "applicant") may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the court for leave to bring an action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party.
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> (2) No action may be brought, and no intervention in an action may be made under subsection (1) unless the court is satisfied that -
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> (a) the applicant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (1) if the directors of the company or

its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action;

(b) the applicant is acting in good faith; and

(c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued."

Apparently, as rightly submitted by the counsel for the plaintiff, the provision above relates to a situation where a person, not the plaintiff company, wishes to institute or defend an action against the company. To the contrary, in the present matter, the suit is brought in the name of the said company. In terms of the company laws currently in place, a company, being a body corporate can sue and be sued in its own name, and as such, no requirement for leave of this court to do so. If at all the learned counsel for the defendant meant to submit that the said Mrema was the one suing and not the company, as appearing in the plaint, then the same requires evidence to be established, which renders the point not fit for preliminary determination as a point of law on the principles in the oft-cited ***Mukisa Biscuits***.

That apart, as I have intimated earlier, an argument that this suit is based on the audit report which is connected or emanates from Commercial Case No. 20 of 2013 so as to make the present suit an abuse of court process does not stand. I have scanned through the pleadings. I do not see how the current suit is premised on the previous suit, and as such, an appeal

against the ruling in Commercial Case No. 20 of 2013 has any connection to the present suit whatsoever.

It is on the above grounds that I find the preliminary objections raised to be devoid of any merit and, consequently, proceed to overrule the same with costs.

Order accordingly.

DATED at DAR ES SALAAM this 30th day of June, 2016.

J. C. M. MWAMBEGELE

JUDGE

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION