

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 90 OF 2020

CRDB BANK PLC PLAINTIFF

VERSUS

ARDHI PLAN LIMITED1ST DEFENDANT

GOMBO SMANDITO GOMBO.....2ND DEFENDANT

PRIMI TELESPHORIA MANYANGA.....3RD DEFENDANT

EMTIYAZ AHMED RAJWAN.....4TH DEFENDANT

KARIM AHMED MANJI.....5TH DEFENDANT

RULING

B.K. PHILLIP, J

This ruling is in respect of the points of preliminary objection raised by the learned advocate Dr Chacha Bhoke Murungu, the advocate for the 1st, 2nd and 3rd defendants, to wit;

- i) The suit is bad in law for lack of pleadings and annexing in the plaint, board of Directors' or members' resolution by the Plaintiff bank, which is a company, authorizing and sanctioning the plaintiff bank to institute this suit against the 1st and 2nd defendants in violation of the law.*

- ii) The suit is bad in law for lack of pleadings and annexing in the plaint, board resolution or members' resolution appointing the advocate for the plaintiff under the seal of the Bank to institute the suit and appear in this suit for the plaintiff bank.*
- iii) The suit is bad in law for improper verification in that the person who verified the plaint is not a principal officer of the plaintiff bank within the meaning of the law and therefore she was also not authorized by the bank to verify and sign the plaint on behalf of the plaintiff bank.*

The plaintiff is represented by the learned Advocate Claudio Msando whereas the 4th and 5th defendants are represented by the learned Advocate Ruwaida Manji.

In this case the plaintiff claims against the defendants jointly and severally for payment of Tshs 6,770,475,683.80 being an outstanding loan arising from the loan facility granted to the 1st defendant in December, 2015. The 2nd, 3rd, 4th, and 5th defendants are guarantors to the said loan facility. Besides being guarantors, 4th and 5th defendants, mortgaged their farm with CT No. 8311, Kisarawe area, in Kisarawe District, to secure the aforesaid loan facility granted to the 1st defendant. Upon being served with the plaint the advocate for the 1st, 2nd and 3rd defendants raised the above mentioned points of preliminary objection, which I ordered to be disposed of by way of the written submissions.

Submitting for the first point of preliminary objection, Dr Chacha submitted that this suit is bad in law for lack of pleading and annexing to the plaint, a Board of Directors' or members' resolution by the plaintiff's

Company (the Bank), sanctioning the plaintiff to institute this case. He contended that without any express Board resolution the company lacks capacity to sue thus, this suit is not maintainable. To cement his arguments he cited the following cases; **Bugerere Coffee Growers Limited Vs Sebadduka and another (1970) EA 147** , **Evarist Steven Swai and Ms Msafiri Enterprises Company Limited Vs The Registered Trustees of Chama cha Mapinduzi, the Commissioner for Lands and Attorney General, Land Case No. 147 of 2018** (unreported), **Urisino Palms Estate Vs. Kyela Valley Foods Ltd, The Registrar of Titles and the Attorney General ,Civil Application No. 28 of 2014** (unreported), **Pita Kempap Ltd Vs Mohamed I.A Abdulhussein, Civil application No. 128 of 2004 c/f No. 69 of 2005** (unreported) and **Giant Mashine and equipment Ltd Vs Gilbert R. Mlaki and Capcon Ltd, Civil Case No. 05 of 2019** (unreported). Dr. Chacha maintained that, according to the holding of the Court of Appeal in the case of **Ursino Palms** (Supra) and **Pita Kempap** (Supra), it is now a settled law in our Jurisdiction that commencement of legal proceedings by Companies have to be sanctioned by resolution(s) passed by the company / Board of Directors and recorded in minutes, short of that, the case is not maintainable before the court.

As regards the second point of preliminary objection, Dr. Chacha submitted that this suit is bad in law for lack of pleading and annexing in the plaint Board resolution or members' resolution appointing the advocate for the plaintiff under the seal of the Bank to institute the suit and appear in Court for the plaintiff .To cement his arguments, he referred

this Court to the case of **Ursino Palms** (supra) and **Pita Kempap** (Supra).

Dr Chacha contended that the requirement that an advocate should be appointed by a board resolution of a Company is in line with the requirements of the law in Order XXVIII Rule 1 of the Civil Procedure Code Cap 33, R.E 2019 (Henceforth "the CPC").

With regard to the last point of preliminary objection Dr. Chacha , submitted that the one who verified the pleadings in this case is the plaintiff's credit officer who is not qualified to verify the pleadings as she is neither a secretary nor a director or manager as required under the provisions of Order XXVIII Rule 1 of the CPC. At the end of his submission, he invited this court to dismiss this case for being incompetent basing on the points of preliminary objection he has raised.

In rebuttal, Mr. Msando submitted as follows; that the points of preliminary objection raised by Dr. Chacha as well as his submissions in support of the same are misconceived. He contended that there is no any express requirement in the CPC for the Company to plead in the plaint about the existence of a Board resolution authorizing the Company to institute a suit in Court or attaching a copy of the same for a case to be maintainable in court of law. Likewise, no Board resolution is required to appoint an advocate for representing a Company in court. Moreover, Mr Msando submitted that the case of **Ursino Palms Estate Limited** (supra) is distinguishable from the case in hand as the holding in that case was based on the Court of Appeal Rules which are not applicable in this court.

Mr. Msando referred this court to the case of **Mwananchi Insurance Company Limited Vs. Commissioner of Insurance, Misc. Commercial Cause No. 2 of 2016** (unreported), in which this court held that it is not mandatory for a company to annex to the pleadings the Board resolution authorizing the company to institute legal proceedings.

As regards the third point of preliminary objection, Mr. Msando submitted that Order XXVIII Rule 1 of the CPC provides that pleadings for suits involving corporations can be verified/signed by a secretary, director or other principal officer of the Corporation who is able to depose to the facts of the case. Furthermore, he submitted that a principal officer is defined in the CPC as any person connected with the management or administration of the company. The plaint in this case has been signed by the credit officer of the plaintiff's Bank. This is one of the principal officers of the plaintiff, contended Mr. Msando.

Furthermore, Mr. Msando submitted that all points of preliminary objection raised by the Dr. Chacha require this court to inquire or investigate on the allegations embodied therein, thus, they lack the quality of being pure points of law and violate the principle laid down in the case of **Mukisa Biscuits Manufacturing Company Ltd Vs. West End Distributors Ltd (1969) EA 696** which stipulates that a point of preliminary objection has to be a pure point of law and should not need evidence to be established. To bolster his arguments he relied on the decision of this court in the case of **Mwananchi Insurance Company**

Ltd (supra) . He implored this court to dismiss all points of preliminary objection for lack of merits.

In rejoinder, Dr. Chacha reiterated his submission in chief and insisted that, the most recent decision concerning the legal position on whether or not failure to plead on the existence of the Board resolution or attach a copy of the same renders a case filed by a Company incompetent is the case of **Giant Machine and Equipment Ltd (Supra)** ,thus this court is supposed to follow it.

I have carefully analyzed the arguments raised by the learned advocates as well as read all the cases referred to me. First of all, I wish to point out that the CPC neither provides for any requirement for attachment of a board resolution to the plaint for a case instituted by a Company nor requires the Company to plead on the existence of a Board resolution. As regards the 1st point of preliminary objection, Dr Chacha relied upon the case of **Evarist Steven Swai and Ms Msafiri Enterprises Company Limited**, (supra) to move this court to uphold this point of preliminary objection. However, in my considered view that case is distinguishable from the case in hand as according to the facts of that case, the same was filed by the 1st plaintiff, Mr. Evarist Steven Swai, who was the managing Director and majority shareholder of the 2nd plaintiff , which was a family Company. Therefore, the case was filed under the decision of a single member of the Company. The facts of the case of **Evarist Steven Swai** (Supra) are different from the facts of the case in hand as , this one has not been filed by a single shareholder or Director. The fact that this case has not been instituted by a single shareholder/Director removes

any risks that a single shareholder/Director might have decided to drag the Company in Court without involving other shareholders/ members. Not only that, going by the findings of this court in the case **Mwananchi Insurance Company Ltd** (Supra) and **Giant Machine and Equipment Ltd** (supra), in which this court held that the issue on existence of a Board of Directors' resolution authorizing the Company to institute a case cannot be entertained as a point of preliminary objection as it needs evidence to be proved, it goes without saying that the 1st point of preliminary objection raised by Dr Chacha is not maintainable .

However, I have noted that in the case of **Mwananchi Insurance Company Ltd** (Supra), the court despite holding that the point of preliminary objection was not a pure point of law as I have explained herein above, made a finding that the fact that a board resolution was passed to authorize the company to institute the case need to be pleaded.

At this juncture, I think it is worthy pointing out that , as well stated by this court in the case of **Giant Machine and Equipment Ltd** (Supra), **Plasco Ltd Vs Efam Ltd and another , Commercial Case No. 60 of 2012**, (unreported) and **Resolute Tanzania Limited Vs LTA Construction (Tanzania) Limited and three others, Commercial Case No.39 of 2012**, (unreported) there are two schools of thought on this issue, the first one is that , it is not a mandatory requirement to attach to the plaint a copy of a Board Resolution authorizing institution of a case by a Company or plead its existence. The second one is the opposite of the first one, that is, failure to attach to the plaint a copy of a Board resolution authorizing the institution of a case by a Company and plead

the existence of the same renders the case unmaintainable. Let me make it clear that I belong to first school of thought, that is, in cases involving a Company/ Corporation it is not mandatory to attach to a plaint a Board resolution authorizing the institution of the case or plead its existence. I entirely associate myself with the observation made by His Lordship Makaramba, J as he then was, in the case of **Plasco Ltd** (Supra) in which he said the following;

"Let me albeit briefly, make some observations on the legal requirement for a company to produce, when filing the plaint, evidence that the company authorized the suit to be instituted. Aside from my holding in the present matter that the existence or non existence of a board resolution requires evidence to establish and therefore cannot be determined as a preliminary matter, the requirement for authorization by a company for instituting a suit is not expressly stated in the Civil Procedure Code, Cap. 33 R.E. 2002 or any other written laws dealing with institution of actions in this country. Order XXVII Rule 1 of the Civil Procedure Code simply requires in a suit by or against a corporation, for the pleadings to be signed or verified on behalf of the corporation, by the secretary or by director or other principal officer of the corporation "who is able to depone to the facts of the case". In my considered view if parliament intended that a board resolution was a requirement for instituting a suit by corporation it would have stated so expressly. It seems to me therefore that the requirement for a company board resolution authorizing institution of a suit by a corporation is largely judge made law, traceable to the Bugerere Coffee Growers Ltd versus Sebaduka

and another [1970] EA 1471, which has been religiously followed by courts in this country”.

In addition to the above, with the advent of the principle of overriding objective which pursuant to Sections 3A and 3B of the Civil Procedure Code , Cap 33 R.E 2019 and Rule 4 of the High Court (Commercial Division) Procedure Rules, 2012 as amended by GN. No 107 /2019, requires our courts to deal with cases justly and have regard to substantive justice, I do not see any plausible reasons to strike out a case instituted by a Company for lack of a copy of a Company's Board resolution authorizing the institution of the case.

As regards the second point of preliminary objection, the CPC does not provide for a condition that an advocate instructed to represent a Company in court of law has to be appointed by a board of director and that such a fact has to be pleaded in the plaint. Dr Chacha has relied on the case of **Ursino Palms** (supra) to move this court bolster his argument in respect of the second point of preliminary objection. However, It has to be noted that the holding in the case of **Ursino Palms** (supra) was based on the provision of Rule 30 (3) of the Tanzania Court of Appeal Rules,2009 which provides specifically that a Corporation may appear either by advocate or by its director or manager or secretary , who is appointed by a resolution under the seal of the company, a sealed copy of which shall be lodged with the registrar. Therefore, as correctly submitted by Mr. Msando the holding in that case cannot be applicable in our case in hand as the Court of Appeal Rules are not applicable in this court.

Coming to the last point of Preliminary objection, I hasten to say that it lacks merits as it requires this court to embark on a task of investigating or making scrutiny on whether or not the one who verified the pleadings had authority to do so, thus it is not a pure point of law. At this juncture I wish to associate myself with the findings made by this Court in the case of **Resolute Tanzania Limited** (supra) in which Hon Judge Mruma said the following;

"..It would appear to me that pleadings by or against a corporation 'may' be verified by any person proved to the satisfaction of the court to be acquainted with the facts of the case and or it may not be so verified. If it is not so verified, it follows that it must be verified under sub-rule (1) of Rule 15 of Order VI of the Civil Procedure Code. This is so because while under the provisions of sub rule (1) of Rule 15 of order VI, the requirement that the pleadings must be verified by person mentioned therein is mandatory as the term used is 'shall' under the provisions of Rule 1 of order XXVIII of the Civil Procedure Code, the requirement that pleadings be signed and verified by the secretary, director, or principal officer of the corporation is optional. The term used there is "may" which denotes an option to the mentioned officers to sign and/or verify the pleadings, it follow that if the officer concerned does not exercise that option, any other person proved to the satisfaction of the court as directed by sub-rule (1) of Rule 15 of Order VI. In order to prove that an officer is versed with the facts of the case the court has to embark upon close scrutiny of facts before it and perhaps calling witnesses. This is not the purpose of preliminary objection as stated by the then East Africa Court of

*Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA at pg 701.***

That being the case I dismiss both preliminary objections related to the signing and verification of the pleadings of either party...

In addition, as correctly submitted by Mr. Msando, the law provides clearly that in suits involving a Corporation, any pleadings may be signed and verified on behalf of the Corporation by the Secretary or by any Director or other principal officer of the Corporation who is able to depose to the facts of the case. In this case the pleadings have been signed/ verified by the Credit officer who has stated that he is able to depose to the facts of the case. I am of settled view that what has been done by the plaintiff is in full compliance of the law. Again, if there are doubts on the authorization of the one who signed the pleadings for the plaintiff, then that takes us back to the holding in the Case of **Mukisa Biscuits** (supra), that is such a concern cannot be determined as a point of preliminary objection.

From the foregoing, I hereby dismiss all points of Preliminary objection with costs. It is so ordered.

Dated at Dar es Salaam this 9th day of July 2021.




B.K.PHILLIP

JUDGE