IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 86 OF 2022 and MISC. COMMERCIAL APPLICATION NO.135 OF 2022

NEW LIFE HARDWARE

COMPANY LIMITED..... 1ST APPLICANT/PLAINTIFF

MANWALY INVESTMENT LIMITED..... 2ND APPLICANT/PLAINTIFF

VERSUS

SHANDONG LOCHENG

EXPORT CO. LIMITED ..... 1ST RESPONDENT/DEFENDANT

TAISHAN TECHNOLOGY LIMITED... 2ND RESPONDENT/DEFENDANT

CRYSOR COMPANY LIMITED ..... 3RD RESPONDENT/DEFENDANT

Date of Last Order: 08.09.2022

Date of Ruling: 16.09.2022

RULING

MAGOIGA, J.

This ruling is on preliminary objection on point of law against the competency of both the Miscellaneous Application and the main suit to the effect that are bad in law for lacking of pleading or annexing in the plaint board of directors' resolution by the 1st and 2nd plaintiffs which were companies authorizing and sanctioning the 1st and 2nd plaintiffs to institute this suit against the 1st, 2nd and 3rd defendants and urged this court to strike out both the Misc. application and the main suit with costs.

The facts as gathered in the pleadings are simple and straightforward. It was alleged that in July, 2021, the 1st plaintiff who is regular customer of the 1st defendant ordered to be supplied with prime preprinted galvanized steel coils materials from China. Under this arrangement, the 1st plaintiff paid USD.565,003.00 for 16 containers. Further facts were that after initial payments, all necessary documents were sent to the 1st plaintiff through which he instructed the 2nd plaintiff to clear them from customs but in the course discovered that the 2nd defendant had instructed the 3rd defendant to clear the same goods. It was further alleged that the sale of the goods between the 1st defendant and the 2nd defendant was done without the knowledge and consent of the 1st plaintiff and without following procedures and the plaintiff decided to institute this suit claiming several reliefs as contained in the application and in the plaint.

Upon being served with the plaint, the defendants filed joint written statement of defence alleging that the sale of the disputed goods was done by the 1st defendant to the 2nd defendant lawfully after the 1st plaintiff failed to pay for them and 1st defendant opted to sale them to the 2nd defendant who, thus, lawfully instructed the 3rd defendant to clear them.

Against this back ground, this suit was instituted alongside with Misc. Application praying for temporary injunction to maintain status quo until the hearing and determination of the main suit.

Simultaneously, the defendants' learned advocate raised preliminary objection against the competency of the Misc. application and the main suit, hence, this ruling.

The plaintiffs/applicants are enjoying the legal services of Mr. Makaki Masatu, learned advocate from the legal clinic of MM Attorneys, whereas the defendants are enjoying the legal services of Mr. Augostino Kusalika, learned advocate from the legal clinic of GF Law Chambers (Advocates).

Arguing the objection, Mr. Kusalika told the court that, in the absence of facts pleaded to show written authorization to institute this suit and resultant Misc. application from the board of directors, then, both Misc. Application and main suit are incompetent. The learned advocate for the defendants' arguments were pegged on section 147(1) of the Companies Act, 2002 which makes it mandatory that companies are managed by resolutions. According to Mr. Kusalika, much as no single paragraph stated so and no resolution attached, then, it makes the whole application and the main suit

incompetent. To buttress his arguments, the learned advocate heavily relied on in the case of URSINO PALM ESTATE LTD vs. KYELA VALLEY FOODS LTD, CIVIL APPLICATION NO.28 OF 2014 quoting the cases BUGERERE COFFEE GROWERS LTD vs. SEBADUKA AND ANOTHER [1970] 1 EA 147 and PITA KEMPAP LTD vs. MOHAMED I.A. ABDULHUSSEIN, CIVIL APPLICATION NO.128 OF 2004 c/f 69 OF 2005 of which it was held and emphasized that legal proceedings by a company must be authorized either by a company resolution or Board of directors' meeting.

Other cases cited to cement the point are KATI GENERAL ENTERPRISES vs. EQUITY BANK TANZANIA LIMITED AND ANOTHER, CIVIL CASE NO.22 OF 2018 DSM (HC) (UNREPORTED) AND SOGECOA TANZANIA LIMITED vs. SYLVIA SIMOYO SAID NAMOYO (Administratrix of the estate of Said Namoyo) LAND CASE NO. 32 OF 2022 DSM (HC) (UNREPORTED) in which both judges of the high court affirmed the position that failure to state and annex the board resolution offends the provisions of section 147 (1) and makes the suit incompetent.

The learned advocate for the defendants went on to point out that in the above referred cases there are two reasons why this position is imperative; one, is to show the company exists, and two, the company must be

authorized by resolution and that makes it binding to its members and it saves costs, time and causing others to pay huge amount without their knowledge.

It was further argument of Mr. Kusalika that, the issue of board resolution is not an issue which need evidence because not all objections are enjoying the test in MUKISA's case as here the issue is the requirement of the law. Further arguments were that even in the plaint no facts were stated that the proceedings were instituted by virtue of board resolution which is missing here, hence, abrogating the law.

On the above reasons, Mr. Kusalika invited this court to find that the objection is merited and proceed to strike out the plaint and the Misc. Application with costs.

Mr. Masatu for the plaintiffs, unmoved with the submissions of Mr. Kusalika, in rebuttal prayed to adopt the written skeleton arguments and went on to argue that the argument by Mr. Kusalika are not supported by law. According to Mr. Masatu, the Court of Appeal in the case of **Ursino** (supra) was interpreting Rule 30(3) of the Court of Appeal Rules, 2009 and as such do not applies in the present situation we have and that no such provisions

in the Civil Procedure Code, hence, distinguishable. To support his stance cited the case of LEGAL AND HUMAN RIGHT CENTRE vs. THE MINISTER OF FINANCE AND PLANNING AND 2 OTHERS, DSM,MISC. CAUSE NO.11 OF 2021 DSM (HC) (UNREPORTED).

Mr. Masatu cited the case of CRDB BANK PLC vs. ARDHI PLAN LIMITED AND 4 OTHERS, COMMERCIAL CASE NO 90 OF 2020 DSM (HC) (UNEREPORTED) in which it was held that an issue which require evidence is not pure point of law as such cannot be raised as preliminary objection.

Mr. Masatu went on arguing that the provisions of section 147(1) of the Companies Act, 2002 contemplates certain matters that requires to be carried out by resolution and was quick to point out that institution of the suit is not among them. The matters that require resolution are capital increase, allotment of shares, appointment of directors but which have specific provisions under the Companies Act. Mr. Masatu charged that no single provision in the Act state that requirement of resolution is mandatory. On that note, Mr. Masatu argued that the decisions of the Court of Appeal cited are inapplicable in this matter. According to Mr. Masatu, the applicable law is Civil Procedure Code, which has no such requirement as was stated in

the case of PLASCO LTD vs. EFAM LTD AND ANOTHER, COMMERCIAL CASE NO. 60 OF 2012 (DSM (HCCD) (UNREPORTED).

Further, Mr. Masatu argued that in whole the objection raised is misconceived that failure to plead and annex resolution renders the suit incompetent. Mr. Masatu pointed out that Order VII Rule 1 enumerates several requirements but resolution is not among one of them. Further, was his argument that, even, Order XXVIII which governs suit by or against corporation has no such requirement.

On a further note, Mr. Masatu was of the strong view that the existence of resolution is an issue which require evidence, and as such ceases to be a pure point of law. Guided by this court's holdings in the cases of CRDB BANK PLC vs. ARDHI PLAN LIMITED, COMMERCIAL CASE NO. 90 OF 2020, DSM (HC) (UNREPORTED AND LEGAL AND HUMAN RIGHTS CENTRE vs. THE MINISTER FOR FINANCE AND PLANNING, MISC. CAUSE NO.11 OF 2021 DSM (HC) (UNREPORTED) in which it was held that any issue that require evidence is not a pure point of law.

Another case relied by Mr. Masatu is the case of ALPHONCE BUHATWA vs. JULIETH RHODA ALPHONCE, CIVIL REFERENCE NO. 9/01 OF 2016 DSM (CAT) (UNREPORTED).

Mr. Masatu went on to argue that the provisions of section 147(1) of the Companies Act, 2002 are not applicable to the situation we have nor provides how the suit has to be instituted but provides for management of companies. The learned advocate was of the strong view that section 147(1) is self-telling unless as specified under sections 193 (1), 170 (1) of the Companies Act. The powers of the company to instituted proceedings, argued Mr. Masatu, are by virtue of being incorporated and as such acquire corporate seal of being sued or to sue.

On that note, Mr. Masatu prayed that the objection raised be overruled with costs.

In rejoinder, Mr. Kusalika reiterated his earlier submissions and added that the requirement of board resolution is requirement that has been developed by judicial pronunciations, in particular, from BUGERERE case (supra) and has on several occasions been affirmed by the Court of Appeal through judge made law. According to Mr. Kusalika, section 147(1) is very clear in its

wording that a company registered under the Act, the plaintiffs inclusive, must be sanctioned by a resolution unless exempted by law. The institution of a suit, is among, the anything that required sanctions of the company resolution by so stating in the plaint as provided so under Order VII rule 1 (e) of the CPC, insisted Mr. Kusalika. Mr. Kusalika distinguished the cases of ELIAS MASIJA NYANG'ORO AND 2 OTHERS vs. MWANANCHI INSURANCE COMPANY LIMITED, CIVIL APPLICATION NO. 55/16 OF 2019 DSM (CAT) (UNREPORTED) by arguing that it was dealing with illegality and not incompetency of the case as it is here. As to the case of HUMAN RIGHT CENTRE(supra) it was his reply that is distinguishable to the matter at hand.

Mr. Kusalika in strong terms differs with Mr. Masatu that this is a pure point of law and that can be ascertained from the pleadings that is not there.

On that note, the learned advocate for the defendant/respondent prayed that this instant suit and its application be strike out with costs.

This marked the end of hearing of this hotly contested point of preliminary objection. The noble duty of this court now is to determine the merits or otherwise of this point.

Having dispassionately heard the rivaling arguments of the learned advocate for parties' on this point, I noted that there are some facts not in dispute in this point between learned advocates for parties. These are: **one,** there is no dispute that in the plaint and in the application subject of this objection no single paragraph stated that the suit was sanctioned by the companies' resolution and as such no resolution was annexed. **Two,** from the authorities cited by the learned advocates for parties, there is no dispute that as of this ruling, in the High Court of Tanzania there are two schools of thoughts on this point; one school of thought with strong view that resolution is legal requirement without which a suit becomes incompetent and the second school of thought is that this point cannot be a pure point of law because require evidence. **Three,** there is no dispute between parties' learned advocates that the primary purpose of section 147 of the Companies Act provides for management of the companies by directors or members.

However, what is in serious dispute is on whether the suit by a company registered under the Companies Act must state and if need be, annexed with resolution of the board of director to make it competent. Mr. Masatu on one hand, shares a different view, and whereas Mr. Kusalika on the other hand, seriously part ways with Mr. Masatu on this point. Each side has cited both

Court of Appeal cases and this court's cases to support their respective stances, which I need not repeat here but I have had opportunity to read each and follow its import.

In my own opinion, it is imperative to know the import of section 147 (1) of the Companies Act, in which the disputed objection is pegged. Section 147(1) is in **Chapter IV** of the Companies Act, on **'meetings and resolutions".** According to the Companies Act, reading from sections 133 to 151 of the Companies Act, companies' daily and major decisions are made in meetings and out of that meetings **'written resolutions'** are passed by the members, or directors for execution of what is agreed. The manner in which meetings are to be called is provided for in the Act. For easy of reference section 147 (1) provides as follows:

Section 147(1) Anything which in the case of a company may be done-

(a). by resolution of the company in general meeting, or

(b) by a resolution of a meeting of any class of members of the company,

May be done, without a meeting and without any previous notice be required, by resolution in writing signed by or on behalf of all members of the company who at the date of the resolution would be entitled to attend and vote at such meeting.

Provided that, nothing in this section shall apply to resolution under section 193(1) removing a directors before the expiry of his period of office or resolution under section 170(7) removing an auditor before the expiry of his term of office.

Going by literal wording of section 147 (1) it is obvious that anything a **company** does must be sanctioned by resolution in writing signed by or on behalf of all members of the company save for resolutions on matters expressly stated under section 193(1) and section 170(7) of the Act. The immediate questions is why written resolutions? The answer is simple, companies being legal person, need to operate and be managed by natural persons who for the interest of companies as distinct legal person must operate by way of meetings and resolutions, otherwise we may have a company run by one individual without knowledge of shareholders and directors at the detriment of the company itself or its members. The resolution binds members and directors of the company and in case of

dispute and liability lifting veil of incorporation becomes easier. The other reasons were as stated in the case of BUGERERE COFFEE GROWERS (SUPRA) that is intended to show the company still exists and decision has been reached with its constitution or articles of association and therefore legally binding to shareholders who may without their knowledge be subjected to pay huge costs.

With that background in mind and back to the objection in dispute, I find that in my considered opinion, I will not take the school of thought that company resolution is not necessary for the commencement of legal proceedings. The arguments advanced by this school of thought, is that is a matter which require evidence, hence, do not qualify to be a pure point of law. I would have agreed with this school of thought, if in this suit, the plaint clearly stated that by sanction of the board or members the suit was preferred. But with due respect to Mr. Masatu, in the absence of such statement in the plaint the issue of evidence cannot arise because is a trite law in our jurisdiction that parties are bound by their pleadings. I further add that even the evidence to be brought later must have been pleaded otherwise party may change goal posts at the detriment of other litigant and erode the fair trial expected between parties.

Therefore, much as in this suit no such statement was stated, then, one cannot expect such kind of evidence to feature in the case later. So the argument that is matter that needs evidence is devoid of merits in this suit because no single paragraph stated so. For clarity, where in the plaint by a company registered under the Companies Act, such statement is stated this cannot be a point of law but where no such statement is stated and the plaintiff is company registered under the Companies Act, as in this suit, an objection will stand.

From the above stance of this court, in my considered opinion, section 147(1) must be read together with Order VII Rule 1 of the Civil Procedure Code if the plaintiff is a company registered under the Companies Act.

I have equally considered the case of ALPHONCE BUHATWA (SUPRA) cited by learned advocate for the plaintiffs and after going through it, I noted that same was cited out of context because it was dealing with interpretation of Rule 48(4) on service on party or parties in the suit and Rule 55(1) on services to the necessary parties to the suit, hence, distinguishable.

Another reason, I find this objection merited is that even the other school of thought which Mr. Masatu argued for agrees that the requirement is largely

judge made law traceable to the BUGERERE COFFEE GROWERS (SUPRA) which has on several decisions been adopted by the Court of Appeal. This was clearly observed in the case of URSINO PALMS ESTATE LIMITED (SUPRA) in which the court observed that:

> **"when companies authorize the commencement of legal proceedings as resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes ..."**

With the above reasons, I find the arguments by Mr. Masatu far from convincing this court otherwise and the case laws cited find them distinguishable from the facts we have here in this suit.

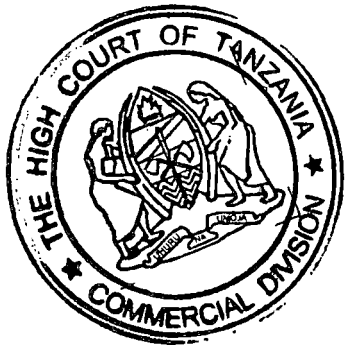
Legally speaking and for the good development of company jurisprudence, there are good reasons to have a resolution than not having one, otherwise companies may be left to be at the whims of individual at the detriment of other members.

That said and done and for the reasons state above, I quite agree and associate myself with the arguments of Mr. Kusalika that this suit and its

resultant application are both incompetent for want resolution and consequently both are hereby struck out with costs.

It is so ordered.

Dated at Dar es Salaam this 16th day of September, 2022.



S. M. MAGOIGA

JUDGE

16/09/2022