

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO.135 OF 2020**

EXIM BANK (TANZANIA) LIMITED.....PLAINTIFF

VERSUS

JANDU CONSTRUCTION & PLUMBERS LTD.....1ST DEFENDANT

BHARAT PURSHOTTAM BHORKATARIA (**ADMINISTRATOR OF THE
ESTATE OF THE LATE INDERJIT SINGH JANDU**)2ND DEFENDANT

HARSHARAN KAUR JANDU3RD DEFENDANT

JASPREET KAUR4TH DEFENDANT

MAJINDER KAUR JANDU5TH DEFENDANT

GUMINDER SINGH JANDU6TH DEFENDANT

Last Order:13/09/2022

Date of Ruling: 17/10/2022

RULING

NANGELA, J.:

The Plaintiff in this suit sues the Defendants jointly and severally praying for judgment and decree against them as follows:

- (1) An order for immediate payment
to the Plaintiff of the outstanding
amount of TZS 2,495, 751,

393.16, which amount is
outstanding as of 30th July 2021.

(2) Payment of general damages for
breach of the loan and facility
letters;

(3) Payment of interest on the
decretal amount from the date
due to the date of full payment
thereof at the prevailing
commercial rate;

(4) Payment of costs of the suit; and

(5) Any other relief(s) that this Court
may deem fit.

The Defendants were duly served and responded with
the filing of their written statement of defences. The 4th
Defendant raised a preliminary objection but, on the 22nd
August 2022, through a letter addressed to the Court, Mr
Emmanuel Safari, the learned Counsel for the 4th Defendant,
notified this Court about the 4th Defendant's withdrawal of the
objection from this Court.

On the other hand, the 5th Defendant's learned Counsel, Mr. Jerome Msemwa, did also file a notice of preliminary objection and raised four grounds upon which his objections to the suit were premised. The respective grounds of objection were as follows, that:

- (1) In the absence of Plaintiff's Board Resolution authorizing institution of the suit to be filed against the Defendants, the present suit is incompetent in law.
- (2) That, the Plaintiff suit against the 5th Defendant jointly with the 06th Defendant who is a deceased without joining the Administrator of the deceased's estate as a necessary party is bad in law and renders the suit incompetent.
- (3) The Plaintiff suit is incompetently before this Honourable Court for lack of

locus standi to sue the 5th
Defendant.

(4) The following prayers in the
Amended Plaintiff be struck out
as they have exceeded the
orders of amendment granted
by the Court as follows:

(a) Reliefs/prayers in the
amended plaintiff, (i), (ii), (iii),
(iv) and (v) for substituting
from alphabetical roman
renumbering as appeared in
the original pleading.

(b) Reliefs/prayers (i) in the Plaintiff
for omitting the words "by the
defendants of" appeared in
the original pleading.

(c) Reliefs/prayers in the plaintiff
reduced to five from six
appearing in the original
pleading.

This ruling, therefore, is in respect of above grounds
upon which Mr. Jerome Msemwa, the 5th Defendant's learned
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counsel, pegged his tent of objection. On the 11th August 2022, this Court ordered the parties to dispose of the objections by way of filing written submissions. A schedule of filing was given and they duly complied with it.

I will proceed, therefore, to consider their submissions and determine each point in light of the existing laws and precedents. In his written submission in support of the objections, Mr. Msemwa abandoned the second and third grounds and argued the first and the second ground.

As regards the first ground, Mr. Msemwa submitted that, the Plaintiff is a limited liability Company which is required in law to pass a resolution of the Directors of shareholders, to commence Court proceedings. He contended that, in the absence of Plaintiff's Board Resolution authorizing institution of a suit to be filed against the Defendants, the present suit is incompetent in law and should be struck out.

Mr. Msemwa submitted that, the above legal position finds support from the decision of **Bunyerere Coffee Growers Ltd vs. Sebaduka and Another** [1970] EA 142 where it was held that, when a Company authorizes the

commencement of legal proceedings, a resolution has to be passed either at the Company's or Board meeting and recorded in the minutes.

To buttress his submission, it was Mr. Msemwa's further reliance on the unreported decisions of the Court of Appeal in the cases of **Pita Kempap LTD vs. Mohamedi I.A. Abdulhussein**, Civil Application No.128 of 2004 and **Ursino Palms Estate Limited vs. Kyela Valley Foods Ltd & 20Others**, Civil Application No.28 of 2014.

Mr. Msemwa relied also on three decisions of this Court. These are the unreported cases of **St. Bernard's Hospital Company Ltd vs. Dr. Linus MaembeMlulaChuwa**, Commercial Case No.57 of 2004; **Tanzania Gluelam Industries Ltd & Scan Tanzania Ltd vs. Bjorn Schau & 4 Others**, Commercial Case No.103 of 2003; and **Toico Limited vs. B.F Technical Service and General Supply Limited**, Land Case No.41 of 2007.

As regards the fourth objection, it was Mr. Msemwa's submission that, earlier when the Plaintiff sought leave to amend the Plaint so as to substitute the name of the 2nd

Defendant who previously read as RITA (as the Administrator of the Estate of the Late Inderjit Singh Jandu), the Court granted the prayers and consequently, the Plaintiff made the necessary changes.

He submitted, however, that, instead of confining her self to the order of the Court, the Plaintiff has exceeded the mandate to amend the pleadings. He pointed at the relief(s)/ prayers No. (i), (ii), (iii), (iv) and (v) of the Plaint which he contended were substituted for from alphabets to roman renumbering and prayers in number (i) in the Plaint wherein the words "by the defendants of", appearing in the original pleadings, were omitted.

Besides, Mr. Msemwa pointed out that, the prayers in the amended Plaint were reduced to five from six which appeared in the original plant. He relied on the case of **Mhamal& Co.(T) Limited vs.Adil Bancorp Limited & Another**, Civil Case No.102 of 1999, (unreported), whereby, this Court, ((Manento, J.) as he then was), held a view that:

“When the Court gives limited rights of amendment, the said amendment should always be limited to the authority given by the Court. The amendment should not be allowed to introduce new things. For this matter, see the case of Amin vs. Patel, (1968) HCD 256. This leads me to conclusion that the amendment in the Plaint had exceeded authority given by the Court and such amendments must relate only to the motor vehicle TZJ 3698 as per the order of the Court made on 13th August 1999.”

In a further attempt to reinforce his submission on that issue of amendment, Mr. Msemwa relied on **Mulla, the Code of Civil Procedure**, 18th edn., at page 1749 where the learned author stated that:

“Every application for amendment shall be in writing

and shall state the specific amendment which are sought to be made indicating the words or paragraphs to be added or omitted or substituted in the original pleadings.”

On the strength of the above submissions, he urged this Court to uphold the objections and together with the amendments made to the Plaint, order that the suit be struck out with costs.

In response to the preliminary objections, Mr. NzaroKachenje, the learned counsel for the Plaintiff, relied on the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** (1969) EA 696 regarding what a preliminary objection is all about. He contended that, as a matter of principle, a preliminary objection must be on a pure point of law and should not be raised if any fact is to be ascertained.

He submitted that, the first objection does not qualify as there is no legal requirement anywhere that a board

resolution is needed to be attached in the Plaint or be pleaded by the Company in its pleadings. To that end, he referred to this Court the case of **CRDB Bank vs. Ardhi Plan Ltd and 4Others**, Commercial Case No.90 of 2020 (unreported) as well as **Mwananchi Insurance Corporation vs. The Commissioner for Insurance**, Misc. Commercial Cause No.2 of 2016 (unreported).

The learned counsel for the Plaintiff stated further that, the first preliminary objection calls for the ascertainment of evidence and, for that matter, it falls short of qualifying as a preliminary objection.

Commenting on the case of **Pita Kempap Ltd** (supra), Mr Kachenje submitted that, the learned counsel for the 5th Defendant seems to be misdirecting this Court either inadvertently or by design, given that, the Court of Appeal did not cite with approval, the case of **Bunyere** (supra) but only reproduced the argument relied on by Mr. Maira in that case.

As regard the second objection, Mr. Kachenje submitted that, the same does not qualify the test in the Mukisa Biscuits' case (supra). Moreover, he contended that, the overriding

objective principles would bail the Plaintiff out citing the case of **Erick Raymond Rowberg & 2 Others vs. Elisa Marcos & Another**, Civil Application No.517/02 of 2017. He thus urged this Court to dismiss the objections with costs.

The issue I am to address is one, whether I should uphold or dismiss/overrule the objections as proposed by both learned counsels depending on the position which each of them took. At least I should state that, the 2nd objection need not detain me since it is trivial when looked at in the eyes of the overriding objective principles. As such, coupled with the principle that the law should not be concerned with trivial things as those regarding renumbering etc, I will outrightly overrule that objection. But what about the first objection?

I have read the case of **CRDB Bank PLC vs. Ardhi Plan & 40 Others** (supra) which was cited by the learned counsel for the Plaintiff. In that case, the learned judge did point out that, at this Court there are two schools of thought. One school supports a view that, a Board resolution for a Company which seeks to initiate legal proceedings is necessary.

The Other school considers that as an issue of evidence hence not qualifying as a preliminary objection, meaning therefore, that, it holds that such a requirement is not necessary. The cases of **Plasco Ltd vs. Efam Ltd and Another**, Commercial Case No. 60 of 2012 was relied upon as supporting the second view that a Board Resolution is not a necessity where a Company seeks to file a suit in Court.

In the most recent case of **New Life Hardware Co. Ltd and Another vs. ShadongLocheng Export Co. Ltd and 2 Others**, Commercial Case No. 86 of 2022 and Misc. Commercial Application No.135 of 2022, (unreported ruling delivered on 16th September 2022) this very same Court (Magoiga, J.), upheld an objection which was couched on similar manner that, the Applicant/Plaintiff did not annex a Board Resolution authorizing the commencement of the proceedings in Court.

The Court further held that:

“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.”

As a matter of good practice, where there are conflicting decisions of the same Court, the latest decision is the one to follow unless it is departed from and with good reasons. In that decision of this Court, reliance was placed on the Court of Appeal decision in the case of **Ursino Palms Estate Limited vs. Kyela Valley Foods Ltd & 20Others**, Civil Application No.28 of 2014. In that case, which was also cited by Mr. Msemwa, the learned counsel for the 5th Defendant herein, the Court of Appeal, while discussing Rule 30(3) of the Court of Appeal Rules, stated that, that provision:

“derives its objective from the principle that institution of legal proceedings by a Company must be authorised either by a Company or Board of Directors’ meeting. In the case of *BugerereCofee Growers vs.*

Sebaduka and Another [1970] 1EA 147, which was cited with approval by this Court in the case of *Pita Kempap LTD vs. Mohamedi I.A. Abdulhussein*, Civil Application No.128 of 2004 c/f No.69 of 2005 (unreported) the High Court of Uganda held that: "when companies authorise the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Director's meeting and recorded in the minutes".

Looking at the above quoted statement from the decision of the Court of Appeal, it is clear to me that, the Court did recognise that, there exist a principle enunciated in the **BugerereCoffee Growers'** Case (supra) that, a registered company seeking to institute a case in Court has to be supported by a Company Resolution.

As I said, this Court, in the recent case of **New Life Hardware Co. Ltd and Another** (supra) has taken that

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route and upheld a similar objection as the one at hand. In that case, this Court went further and stated, and I find that to be a correct position in law, that:

“Section 147(1) [of the Companies Act], 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.”

In that case, the Court was also of the view that, in a situation where in the Plaintiff filed by a company registered under the Companies Act, has a statement which is to the effect that, by sanction of the board or members the suit was preferred, then, an objection like the first objection raised by the 5th Defendant herein 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 discussion, the question that follows will be whether the Plaintiff filed by the Plaintiff has such a qualifying

statement. Unfortunately, there is no such a qualifying statement in the Plaint to the effect that the suit was filed at the sanction of the Plaintiff's Board. In view of the above finding, there is no alternative route other than that of upholding the first objection raised by the learned counsel for the 5th Defendant and proceed to strike out the suit. I will not, however, order costs since the circumstance of this case demands that each party bear its own costs.

In the upshot of the above, therefore, this Court settles for the following orders:

1. That, the first preliminary objection raised by the 5th Defendant's learned counsel is hereby upheld.
2. This suit is **hereby struck out** for being incompetently brought before this Court.
3. Each party shall bear its own costs.

It is so ordered.

**DATED AT DAR-ES-SALAAM, THIS 17TH DAY OF
OCTOBER 2022**



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DEO JOHN NANGELA
JUDGE