

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 14 OF 2022

OXLEY LIMITED.....PLAINTIFF

VERSUS

NYARUGUSU MINE COMPANY LIMITED.....1st DEFENDANT

FERRANTI PROCESSING LIMITED.....2nd DEFENDANT

RULING

Date of last order: 14/12/2022

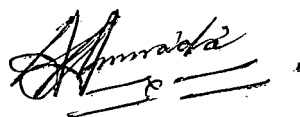
Date of ruling: 13/02/2023

A.A. MBAGWA, J.

This ruling is in respect of preliminary objection on point of law raised by the 1st defendant to the effect that;

'That the suit is unmaintainable for being filed without appending the company board resolution to the plaint as required under section 147(1) (a) and (b) of the Companies Act, No.12 [CAP 212 R.E 2002]'

The brief background of the matter may be told as follow; The plaintiff herein **OXLEY LIMITED** is a limited liability company duly incorporated and licensed to trade in Tanzania under the Companies Act. By way of a plaint, the plaintiff instituted this suit against the defendants jointly and severally for an order of attachment and sale of the defendants'



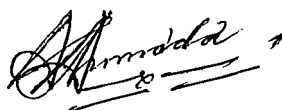
equipment forming the mineral processing located at Nyarugusu, among other reliefs. Upon service of the plaint, the defendants filed written statement of defence along with the above-mentioned preliminary objection. As such, the matter was scheduled for hearing of preliminary objection without further ado.

During the hearing of preliminary objection, the plaintiff was enjoying the services of Denis Tumaini, learned advocate, whereas the 1st and 2nd defendants were represented by Akram Adam and Kulwa Samson, learned advocates respectively.

Submitting in support of the preliminary objection, Mr. Akram Adam argued that the plaintiff being a company was bound to attach the company's board resolution as per the requirement of section 147(1)(a) and (b) of the Companies Act [CAP. 212 R.E 2002].

Furthermore, Mr. Adam lamented that the plaint was filed with no attachment of board resolution nor does it plead the existence of board resolution. The learned counsel stressed that failure to attach the resolution authorizing the institution of the suit leads to the suit being incompetent before the court. To bolster his argument, he cited the case of **Ursino Palms Estate Limited vs. Kyela Valley Food Limited and Two Others**, Civil Appeal No.28, Court of Appeal at Dar Es Salaam (Unreported) at page 5, where the Court of Appeal of Tanzania quoted with approval the holding in **Pita Kempap Ltd vs. Mohamed I.A Abdulhussein**, Civil Application No.128 of 2004 C/F No.69 of 2005 (Unreported) to the following effect;

"...When Companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or board of directors..."



On the strength of the above authorities, the learned advocate submitted that when it comes to the issues of litigation involving companies, an advocate must be appointed by a resolution to represent the company and where that is not done, the suit is bound to be dismissed. The counsel buttressed his position by citing the case of **Lwepisi General Company Limited and Another vs Richard Kweyamba Joseph Rugarabamu** Commercial Case No.06 of 2022, High Court of Tanzania (Commercial Division) at Dar es salaam where it was held that the attachment of the resolution for the commencement of the suit instituted by a company is mandatory.

The defendant counsel continued that the issue of attaching a board resolution does not require evidence to prove it for such fact can be gleaned from the pleadings. He supported his argument with the cases of **Kati General Enterprises Limited vs. Equity Bank Tanzania Ltd and Another**, Civil Case No.22 of 2018, High Court of Tanzania at Dar es salaam.

It was thus the counsel's conclusive submission that since there is no board resolution attached to or pleaded in the plaint to authorize the commencement of the proceedings, the suit is incompetent and should be struck out.

In reply, the plaintiff counsel Mr. Denis Tumaini contested the objection. He submitted that this is a suit instituted as a result of this court findings in Misc. Commercial Application No. 4 of 2021 hence the institution of the present suit is a remedy found under order XXI rule 62 of the Civil Procedure Code. The counsel expounded that the provision is to the effect that a party aggrieved by objection proceedings may refer the grievance



to the court making the decision by way of instituting a suit. He thus invited the court to consider the following issues;

1. Whether the requirement for board resolution applies even on the matters found under rule 62 of Order XXI of the CPC
2. Whether the plaint contravenes any of the rules of Order XXVII, VII, VI of the CPC or any specific rules.
3. Whether the doctrine of overriding objective may apply.

Mr. Denis Tumaini further strenuously submitted that the instant case is distinguishable from the cases decided by the defendant's counsel because the requirement was put to only matters where the party is commencing the suit for the first instance. He clarified that this case is a continuation of the case that has been in court namely, Commercial Case No. 4 of 2019.

In addition, Mr. Denis Tumaini argued that there are two schools with regard to the requirement of attaching the board resolution during institution of the case. He invited the court to have a look at Commercial Case No.90 of 2020 between **CRDB Bank PLC vs Ardhi Plan Limited and 4 others** where this court declined to uphold the objection.

In the alternative, the counsel submitted that the omission is curable as per Order III rule 4. As such, he prayed the court to invoke section 3 of the Civil Procedure Code on overriding objective principle and give a room for the plaintiff to produce the board resolution, if it finds it so mandatory. He continued that the plaintiff has still a room to file a list of additional documents which would have been filed before commencement of hearing. He argued that striking out the matter would be detrimental on the part of the plaintiff in terms of time and money while ordering an amendment would not affect any party. He referred the court to the case

of **Oxley Limited vs Nyarugusu Mine. Co. LTD and another, Commercial Case No. 14 of 2022**, High Court (Commercial Division). Finally, the plaintiff counsel urged the court to overrule the objection.

In rejoinder Mr. Akram Adam submitted that once a suit is instituted, it is a settled position that, it should be accompanied with a board resolution. He also submitted that the instant suit is totally different from Commercial Case No. 4 of 2019. He stressed that the suit is incompetent hence liable to be struck out with costs.

Having heard the submissions from both parties, the pertinent issue for determination is whether attachment of a board resolution to a plaint in the case instituted by a company is mandatory. Section 147 (1) of the Companies Act provides;

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 resolution of a meeting of any class of members of the company, may be done, without a meeting and without any previous notice being required, by resolution in writing signed by or on behalf of all the 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 a resolution under section 193(1) removing a director before the expiry of his period of office or a resolution under section 170(7) removing an auditor before the expiry of his term of office.***



It has been held by this court that the gist of the above provision is to ensure that the company's affairs are run and managed by board of directors to avoid unilateral decisions or acts of an individual person which might be detrimental to the company and other shareholders. As such, the requirement for board resolution before institution of the case is intended to safeguard the interests of shareholders who may be bound by the decision of the court of which they were not aware. See **New Life Hardware Company Limited and another vs Shandong Locheng Export Co. Limited and 2 others**, Commercial Case No. 86 of 2022 and Misc. Commercial Application no. 135 of 2022, HC (Commercial Division) at Dar es Salaam.

In the instant case, upon reading the plaint, it is common cause that board resolution was not attached to the plaint nor was it pleaded therein. The plaintiff's counsel does not dispute this fact. However, He was opined that the requirement is not mandatory in the circumstances of the case.

It is now a trite law that proceedings instituted by a company must be preceded by a board resolution and for that case it must be accompanied with the board resolution at the time of its institution in court. See **Ursino Palms Estate Limited vs. Kyela Valley Food Limited and Two Others (supra), Wakulima Tea Company Limited vs Joseph Lupungu and 9 others**, Land Case No. 17 of 2021, HC at Mbeya and **New Life Hardware Company Limited and another vs Shandong Locheng Export Co. Limited and 2 others**, Commercial Case No. 86 of 2022 and Misc. Commercial Application no. 135 of 2022, HC (Commercial Division) at Dar es Salaam.

In all the above decision it was clearly held that board resolution is a mandatory requirement for the proceedings instituted by a company in



terms of section 147 of the Companies Act and its absence renders the proceedings incompetent.

The plaintiff counsel submitted that the present suit originates from Commercial Case No. 4 of 2019 as such it is not subjected to the requirements of section 147 of the Companies Act. With due respect, his argument is unmaintainable for the relationship with the said Commercial Case No. 4 of 2019 does not oust the requirement of board resolution. This is a fresh suit instituted by a company hence the board resolution is required. Since the board resolution was neither attached to nor pleaded in the plaint, it necessarily follows that the suit is incompetent before the court and therefore liable to be struck out.

In the event, I sustain the preliminary objection and consequently strike out the case with costs.

It is so ordered.

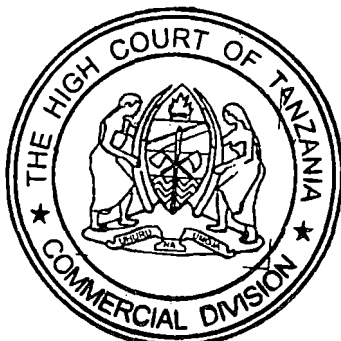



A. A. MBAGWA

JUDGE

13/02/2023

Court: the ruling has been delivered in the presence of Geraldina Paul, learned advocate for plaintiff, Asha Nganogela, learned advocate for the 1st defendant and in absence of the 2nd defendant this 13th day of February, 2023.




A.A. Mbagwa

JUDGE

13/02/2023