

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO.107 OF 2020**

WELLWORTH HOTELS AND LODGES LTDPLAINTIFF

VERSUS

EAST AFRICA CANVAS COMPANY LTD.....1st DEFENDANT

STIRLING ARVING HORSELY.....2nd DEFENDANT

ROBERT JAMES FLOWERS.....3rd DEFENDANT

GARY MCINTYRE.....4th DEFENDANT

ECO-STEEL AFRICA LTD.....5th DEFENDANT

Last Order: 08/06/2023.

Ruling date: 03/07/2023.

RULING

NANGELA, J.:

This ruling arises from a preliminary objection to a counterclaim filed by the **1st Defendant** (*East Arica Canvas Company Ltd*) (now **Plaintiff in the counterclaim**) on the 21st of April 2021. The main suit, (which still bears the same case number as **Commercial Case No.107 of 2020** filed on the 5th of November 2020 by the **Plaintiff** (*Wellworth Hotels and Lodges Limited*) (now Defendant in the counterclaim),

was, by order of this court dated 21st of November, 2021, struck out from the court's record.

The court made an order that, the hearing of the counterclaim was to proceed. In the counterclaim the Plaintiff in the counterclaim prayed before this court for Judgement and Decree against the Defendant in the counterclaim as follows:

- (a) Payment of **Kshs 3,562,480/=** paid by the 1st Defendant (Plaintiff in the Counterclaim) to Kenya Revenue Authority (KRA) on account of Value Added Tax (VAT).
- (b) Payment of **Kshs. 10,000/=** being penalties charged on item No. (a) hereabove.
- (c) Payment of **Kshs. 720,616/=** being interest charged on item No. (a) above as of 28th November 2018.
- (d) Payment of interest charged by KRA on item No.(a) above, owing at the date of Judgment and thereafter until date of full payment by the Plaintiff.
- (e) Payment of **US\$ 14,800** being storage charges incurred in respect of "Camp A",

and any further storage charges assessed as at the date of Judgement.

- (f) An order requiring the Plaintiff to take delivery of "Camp A", which is in the possession of the 1st Defendant (Plaintiff in the Counterclaim).
- (g) Damages for breach of contract and costs; and
- (h) any other relief this court deems fit to grant.

On the 4th day of May 2022, the counterclaim was set for final pre-trial conference. However, since the Defendant in the counterclaim was absent, an order to proceed *ex-parte* was made by this court and the case was set for hearing *ex-parte* on 2nd June 2022.

In line with this court's policy of ensuring that cases are disposed of expeditiously, a special clearance session was arranged by the court, and this case file was re-assigned to his lordship Hon. Mr. Justice A. A. Ndunguru, J., on the 27th of May 2022. However, while at his watch, and having called on this matter on the 6th day of June 2022, the same could not proceed any further, owing to an application by the Defendant

in the counterclaim to set aside the *ex-parte* order made by this court on the 4th of May 2022.

As such, since it was impossible to hear the matter during the special clearance session, the case file was re-assigned to me. At the same juncture, the application by the Defendant in the counterclaim to set aside the *ex-parte* order dated 4th of May 2022 was successful and, the parties were restored to their earlier state of contestation. The matters, thus, went through the pre-hearing stages and on the 31st of August 2022, it was scheduled for a full of both parties. The hearing was to commence on the 23rd of September 2022.

On the material date, however, the matter could not proceed as both parties informed the court that the parties had opted for a settlement route and negotiations were under way. Unfortunately, their negotiations could not yield positive results and the case was scheduled for hearing on the 5th and 6th June 2023.

On the material date, the learned counsel for the Defendant in the counterclaim raised a legal issue regarding the competence of the counterclaim itself. To be specific, the issue raised by the learned counsel was in respect of lack of a

“Board Resolution” to bring before this court a Counterclaim.

In his submission made in court following the Court’s decision to first hear and determine such a legal issue, Mr. Idrissa Juma, the learned counsel appearing for the Defendant in the Counterclaim contended that, it is now a settled legal position in this jurisdiction that, when a Company decides to institute a suit in Court, there must be filed in Court, a Board Resolution. He relied on several decisions of the Court of Appeal as well as this Court.

The relevant decisions include the case of **Pita Kempap Ltd vs. Mohamed I. A Abdulhussein**, Civil Appl. No.128 of 2004; the case of **Ursino Palms Estate Ltd vs. Kyela Valley Foods Ltd and 20Others**, Civil Appl. No.28 of 2014; **Exim Bank (Tanzania) Limited vs. Jandu Construction & Plumbers Ltd and 50Others**, Commercial Case No.135 of 2020, **Oxley Limited vs. Nyarugusu Mine Co. Ltd & Another**, Commercial Case No.14 of 2022.

The other case relied on was that of **National Insurance Corporation vs. Sekula Construction Co. Ltd** [1986] TLR 157 (in relation to the status of a counterclaim);

the case of **Bunyere vs. Ssebaduka** [1970] E.A, 147; **Stanbic Bank (T) Ltd vs. Sumry Bus Services and Company Ltd and 4Others**, Civil Case No.125 of 2018 as well as that of **The Registered Trustees of Community Research & Development Services (Cords) vs. Lilian Joseph Looloitai and 2Others**, Misc. Civil Appl.No.110 of 2016.

Mr. Idrissa submitted that, the rationale behind the principle set out in **Pita Kempap's case** (supra) is that of protecting a Company from futile and costly litigation which are commenced at the whims of the officers who are employees of the Company. He maintained that this rationale was also echoed in the case of **The Registered Trustees of Community Research and Development Services (CORDS)** (supra).

Mr. Idrissa contended that, the consequences of failure to attach the Board Resolution in the pleadings filed in court by the Plaintiff in the counterclaim or even not pleading it, is to strike out the suit. He relied on the decision of this court in **Exim Bank (T) Ltd** (supra) and that of **Oxley Ltd vs, Nyarugusu Mine Co. Ltd** (supra) to support his contention.

Mr. Idrissa contended that, the requirement and the consequences thereof, are no exception to the suit at hand which is by way of a counterclaim. He reasoned that much arguing that, in the eyes of the law, a counterclaim is a cross-suit or an independent suit altogether. To support his position, he relied on the case of **National Insurance Corporation vs. Sekulu Construction Co. Ltd** (supra).

Mr. Idrissa brought to the attention of the Court the most recent decision of the Court of Appeal in the case of **Simba Papers Converters Limited vs. Packaging & Stationery Manufacturers Limited & Another** (Civil Appeal Case 280 of 2017) [2023] TZCA 17273 (23 May 2023). He contended that, the court emphasized on the need to comply with the requirement of a Board Resolution even though the matter had involved internal struggles within the Company itself.

Reliance was also placed another recent case by this Court, the case of **Stanbic Bank Tanzania Limited vs. Sumry Bus Service and Company Limited & 4 Others** (Civil Case 125 of 2018), [2023] TZHC 17411 (26 May 2023), which referred to the Court of Appeal's decision in **Simba Papers** (supra) and proceeded to struck out the suit.

The two decisions being the most recent one, it was the submission of Mr. Idrissa that, in line with the decision of the Court of Appeal in the case of **Arcopar (O.M) S.A vs. Harbert Marwa and Family Investments Co. Ltd & 3 Others**, Civil Appl. No.94 of 2013 (unreported), (cited also in the case of **The Registered Trustees of Community Research and Development (Cords)** (supra), such most recent decision should be the one to be followed.

In view of all that, Mr. Idrissa urged this court to make a finding that, the counterclaim is incompetent and should be struck out with costs.

For his part, Mr. Munisi did spiritedly oppose the objection. In his spirited fight against the objection, Mr. Munisi submitted that, the gist of the objection raised by the learned counsel for the Defendant in the counterclaim, emanates from section 147(1) of the Companies Act, Cap.212 R.E 2019. He contended that, the effect of that respective section is that anything done by the Company must be done by way of Board Resolutions. He admitted that the said provision has been relied upon in several decisions of the court.

Mr. Munisi distinguished the cases relied upon by Mr. Idrissa arguing that, they are inapplicable to the present suit (i.e., the counterclaim) at hand. He argued that the Plaintiff in the present suit (counterclaim), is a foreign entity established by different laws other than the Tanzanian Companies Act. For that matter, he contended that, the Plaintiff in the counterclaim is not bound by the decisions cited or relied upon by the learned counsel for the Defendant in the counterclaim as the Plaintiff in the counterclaim is a creature of foreign laws.

Mr. Munisi contended that, in Kenya, a single person can become a director of a Company and the Company will stand and can still function its business. He contended that, there are even Court of Appeal decisions which states or hold that, a Board Resolution is not a necessity when a Company institutes a case in court. He argued that it will only be required in a situation where there is a conflict within the Company which involve the shareholders or directors. He relied as well on the case of **Simba Papers** (supra).

In his submissions, Mr. Munisi contended as well that, since this matter is a counterclaim which was filed while filing the written statement of defence in response to a Complaint filed

by the Defendant in the Counterclaim (Plaintiff in the main suit), this requirement cannot apply. He contended that the counterclaim was filed in tandem with the written statement of defence.

As such, Mr. Munisi contended that, there is no requirement when a Company files a counterclaim should file a Board Resolution as well authorizing it to do so, and the cases of **Stanbic Bank** (supra) and **Oxley Ltd** (supra) are distinguishable as they did not address such a fact regarding filing a response to the filed main suit and are of the High Court, hence, not binding.

As regards the case of **Pita Kempap** (supra), Mr. Munisi submitted that, the same is distinguishable from this case at hand. He contended that, the same was in respect of an application for execution unlike the matter which is before this court. He submitted, in the alternative, that, should this court find that in the present case there was a need for the Board Resolution then, the court should invoke the overriding objective principle and allow it to be filed instead of striking out the counterclaim because:

- (a) in our jurisdiction there are conflicting decisions with regard to this issue, both in the High Court and at the Court of Appeal;
- (b) this Court should consider the parties interest in terms of where they were incorporated; and
- (c) that, the managing director of the Plaintiff in the Counterclaim has filed a witness statement.

In view of the above, Mr. Munisi urged this Court to overrule the objections and proceed with the hearing of the merits of counterclaim.

Mr. Idrissa made a very brief rejoinder submission. He reiterated all what he submitted in chief contended and added that although the learned counsel for the Plaintiff in the counterclaim has admitted but contends that the Plaintiff in the counterclaim is a foreign entity the case of **Bugerere Coffee Growers Ltd vs. Sebaduka and another** [1970] 1 EA 147 shows that, the principle applies even elsewhere within in the East African region. He contended, therefore, that, there cannot be a denial of its applicability.

Mr. Idrissa rejoined further that, even the Kenyan Companies Act of 2015 does not make exception of the obvious need of Companies to arrive at their decision making by way of Board Resolution. He contended that, the practice is of global nature. According to Mr. Idrissa, to argue the case of Simba (supra) only apply where there is an internal conflict is a misapplication of the case.

He contended that, in the **Stanbic Bank's case** (supra), thus Court applied the said precedent and, therefore, the principle apply to all situations. He insisted that, a counterclaim is a suit in its own and the Plaintiff in the counterclaim ought to have complied with the requirements of the stated principle as well. In view of the non-compliance readily admitted, he urged this court to uphold the objection and proceed to strike out the matter from the court.

I have given a careful consideration to the rival submissions made by the learned counsels appearing for parties herein. The issue which I am called upon to address is whether this court should uphold the objection raised by the Defendant to the counterclaim. In essence, the issue is not novel to this court as it has re-surfaced times and again in the form of a

preliminary objection as the one at hand and has even seen decisions not only from this court but also from the Court of Appeal.

Some of relevant cases include the earlier cited cases of **Bunyere vs. Ssebaduka** [1970] E.A, 147; **Pita Kempap Ltd vs. Mohamed I. A Abdulhussein**, Civil Appl. No.128 of 2004; **Ursino Palms Estate Ltd vs. Kyela Valley Foods Ltd and 20Others**, Civil Appl. No.28 of 2014; and **Exim Bank (Tanzania) Limited vs. Jandu Construction & Plumbers Ltd and 50Others**, Commercial Case No.135 of 2020, **Oxley Limited vs. Nyarugusu Mine Co. Ltd & Another**, Commercial Case No.14 of 2022.

Agreeably, as submitted Mr. Munisi, the learned counsel for the Plaintiff in the counterclaim, the various decisions so far addressing the issue regarding whether lack of filing a Board Resolution which authorises a Company to sue is fatal or not, have come out with conflicting conclusions.

However, as correctly submitted by Mr. Idrissa, when a court is faced with conflicting decisions, the settled legal position as per the decision of the Court of Appeal in the case of **Arcopar (O.M) S.A** (supra), is that such most recent decision should be

the one to be followed. See also the case of **Ardhi University vs. Kiundo Enterprises T. Limited** (Civil Appeal No. 58 of 2018) [2021] TZCA 545 (21 September 2021).

In the counterclaim suit at hand, the preliminary objection raised by the learned counsel appearing for the Defendant to the counterclaim has been supported by the most recent decision of this court in the case of **Stanbic Bank's case** and the decision made recently by the Court of Appeal in the case of **Simba Papers** (supra).

In that case, the court addressed a somewhat similar issue regarding failure to file in court a Board Resolution as proof of a Company's authority to institute a suit. The court stated as follows:

"...., could the company which according to the record before us had 5 directors, commence a suit without the authority of the company? We do not think so. On this, we borrow a leaf from the case of BUGERERE COFFEE GROWERS LTD VS. SEBADUKA [1970] 1 EA 147 (HCU) which dealt with an akin situation. In that case, an

advocate instituted a suit in the name of the company challenging the appointment of new directors following the removal of old directors. As the Court found that there was no evidence adduced to prove authority of the company to institute the suit, it held the suit defective. In particular, it states: "*When companies authorize the commencement of legal proceedings a resolution have to be passed either at a company Board of Directors' meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings...*"

The Court went on to subscribe to the above position and stated that, the Court's acceptance of it is:

"to the extent that it relates to the institution of a suit by one or more directors in the name of the company ... In the premises, since the claimant was a company, it was not proper institute a suit on behalf of the

company without its formal authority.
This required the express authority by way of resolution of the Board of Directors to institute the case in the absence of which, the suit in the name of the company was defective and it ought to have been struck out."

It is from such a premise that the learned counsel for the Defendant in the Counterclaim has urged this court to struck out the counterclaim on the ground that, being a suit on its own merit, it ought to have been instituted in compliance with the already settled legal position by the Court of Appeal.

To support his submission, the learned counsel for the Defendant in the Counterclaim relied as well on the cases of Stanbic Bank (supra), **Exim Bank (Tanzania) Limited** (supra) and **Oxley Limited** (supra).

In my view, there is no doubt that, with the recent decision of the Court of Appeal in the Case of **Simba Papers** (supra), the dusts have been settled regarding whether a Board Resolution is a necessary document to be filed in court when a suit is instituted by a Company this being a means of evincing the authority to bring such a suit.

In this case, however, the counter argument from the learned counsel for Plaintiff in the counterclaim is that a counterclaim, being a cross-suit filed when the Defendant sues, files his or her written statement of defence against the Plaintiff's claims by including such a counterclaim therein, it follows that, the requirement stated in the **Simba Papers case** (supra) does not apply to it.

However, as correctly argued by Mr. Idrissa, citing the case of **National Insurance Corporation vs. Sekula Construction Co. Ltd** [1986] TLR 157, a counterclaim is a suit which is independent in its own and must be strictly proved just as one would be required to prove a suit instituted by way of a plaint. This position was also emphasised by this Court (Mackanja, J., (as he then was)) in the case of **Kibona vs. Tascan Timber Co. Ltd** [1995-1998] 1EA,121 at 130, where the Court stated as follows:

"A counter claim is a case in its own right, completely different from the plaintiff's case. It will fall or succeed on its own merits. In fact, it is a form of cross suit in which the parties transpose roles, whereby the

defendant becomes the plaintiff and the plaintiff the defendant although they retain their titles as shown in the pleadings. So, a suit is instituted by a plaintiff; since a counter claim is a suit distinct from the plaintiff's suit, it must be headed by the term 'Counter Claim' in bold capital letters which implies that although it is contained in a written statement of defence it is also a suit to which a written statement of defence is required. Even though the omission is not a fatal irregularity, learned counsel should always adhere to standard practice obtaining in drafting pleadings."

Order VIII Rule 9 (2) of the Civil Procedure Code, Cap.33

R.E 2019 does also provide for a plain view that cement the stated position herein. The Rule 9(2) of that Order provides inter alia that:

"Where a counterclaim is set up in a written statement of defence, the counter claim shall be treated as a

cross suit and the written statement shall have the same effect as a plaint in cross suit, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint.”

See also the case of **Kanyinda Abdallah Mnuta vs. Obocha Credit (T) Ltd** [2022] TZHC 15350 (27 December 2022) and **Ashraf Akber Khan vs. Ravji Govind Varsan** [2019] TZCA 86 (9 April 2019).

On the basis of the cases cited herein above and the foregoing discussion, I tend to agree with Mr. Idrissa’s submission that, a counterclaim being a separate and distinct suit on its own, once filed by a Company, the authority to institute it, which should be in the form of a Board Resolution will equally be need to be either annexed to the counterclaim or clearly mentioned in the pleadings failure of which the same fate will befall on the counterclaim as it would be to a main suit instituted by a Company without there being a Board Resolution evincing the authority to file it.

Mr. Munisi has contended further that, the principle in the **Simba Papers case** (supra) and rest of cases referred to

by the Defendant in the counterclaim should not apply to the present counterclaim should because the Plaintiff in the counterclaim is not incorporated under the laws of Tanzania but under the laws of Kenya.

Mr. Idrissa has, however, countered that submission by stating that, even under the Kenyan laws, companies transact their business decisions by way of Board Resolutions and, further, that, the case of **BUGERERE COFFEE GROWERS LTD** (supra) suggests that the principle relied upon applies across the East African jurisdictions.

I think Mr, Idrissa is correct in what he has submitted. I would also add that, since the Defendant has subjected himself to the jurisdiction of this court, he must follow the applicable rules and laws governing the filing of suit and cross-suits and, where he filed a cross-suit which violates any of the established principles, the same fate will befall on him.

Mr. Munisi has as well argued that, should this court find that the Plaintiff in the Counterclaim was supposed to include a Board Resolution in the pleadings constituting the counterclaim, then this court should invoke the overriding objective principles and make an order that the same be filed.

In my view, however, the overriding objective principles can not be relied upon to remedy a defect that goes to the very root of the matter. In fact, as it was stated by the Court of Appeal in the cases of **Mondorosi Village Council and 2 Others vs. Tanzania Breweries Ltd & 4 Others**, Civil Appeal No.66 of 2017 (unreported) as well as **Puma Energy Tanzania Ltd vs. Ruby Roadways (T) Limited**, Civil Appeal No.3 of 2018, CAT (unreported), the principle cannot be applied blindly.

In my view, in the absence of the Board Resolution, it means that the filing of the counterclaim in the name of the Company was defective for lack of the requisite authority to file it and, hence, the only remedy is to have it struck out. In the upshot of all such considerations, I will proceed to uphold the preliminary objection and settle for the following orders:

1. THAT, the preliminary objection raised by the Defendant in the Counterclaim is hereby upheld.
2. THAT, in view of the objection which this Court has herein upheld, the Counterclaim is hereby struck out.

3. THAT, in the circumstances of this case, I will not make orders as to costs and, thus, each party should bear its own costs.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 03RD DAY OF
JULY 2023**



DEO JOHN NANGELA
JUDGE