

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 19 OF 2023

BETWEEN

KURINGE REAL ESTATE CO LTD.....PLAINTIFF

Versus

USAFIRISHAJI MIKOANI LIMITED.....1st DEFENDANT

EMMANUEL SAMWEL MWALIWEULI.....2nd DEFENDANT

FRIDA SAMWEL MWALIWEULI.....3rd DEFENDANT

FLORA SAMWEL MWALIWEULI.....4th DEFENDANT

ELIAS SAMWEL MWALIWEULI.....5th DEFENDANT

ANNA SAMWEL MWALIWEULI.....6th DEFENDANT

Date of last Order: 17th April, 2023

Date of Ruling: 26th May, 2023

RULING

MKEHA, J:

The defendants have raised two points of preliminary objection regarding maintainability of this suit as follows:

1. That, the plaintiff has no cause of action against the 2nd to 6th defendants; and
2. That, the suit has been instituted by a company without indication of presence of a Board Resolution of the directors in the pleadings or being annexed to the pleadings.

It was submitted on behalf of the 1st defendant by Mr. Masuna Kunju learned advocate that, the requirement of presence of Board Resolution before instituting a civil suit on part of companies like the plaintiff was emphasized in the cases of **BUGERERE COFFEE GROWERS LTD Vs SEBADUKA & ANOTHER (1970) EA 147** and **PITA KEMPAMP Vs MOHAMED I.A ABDULHUSSEIN, CIVIL APPLICATION No. 69 of 2015 CAT, AT DSM**. The learned advocate submitted that, it was held in the cited cases that, when companies authorize commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors' meeting. In view of the learned advocate, non-pleading and failure to annex a board resolution to the pleadings renders the suit incompetent and untenable before the court.

On the other hand, Mr. Mashaka Ngole learned advocate submitted on behalf of the 2nd to 6th defendants that, in terms of the plaint, the agreement was executed between the plaintiff and the 1st defendant who is a legal entity capable of being sued. Therefore, there was no need of joining the 2nd to 6th defendants. The learned advocate submitted that, the directors could not be held personally liable for debts of their company unless and until the veil of incorporation of a company is lifted to establish any fraudulent acts on their part.

Mr. Francis Makota learned advocate for the plaintiff submitted in reply that, the requirement to plead presence of Board Resolution was not a statutory requirement. The learned advocate further submitted that, besides, there were conflicting decisions in the High Court regarding annexing and pleading of board resolution, hence the objection ought to be overruled.

Responding to the objection that there was no cause of action against the 2nd to 6th defendants, the learned advocate submitted that, there was no dispute that the said defendants had received consideration in respect of sale of the landed property in cash and through their respective bank accounts. The learned advocate made reference to paragraphs 6, 7 and 9

of the Written Statement of Defence of the 2nd to 6th defendants in which the fact regarding receipt of consideration by the said defendants had been admitted. In view of the learned advocate, while ascertaining presence of cause of action or otherwise, the court ought to consider not only the pleadings, but also annexures to the plaint.

There was no denial to the fact that, the plaintiff pleaded in paragraphs 6 and 7 of the plaint, the way the plaintiff paid consideration to the defendants, middlemen and advocates. These facts are admitted in paragraphs 6, 7 and 9 of the Written Statement of Defence by the 2nd to 6th Defendants. That being the case, the objection that there was no cause of action against the 2nd to 6th defendants is held to be without merit. The same is dismissed.

The learned advocate for the plaintiff admitted the fact that, the suit was filed without there being, a board resolution authorizing commencement of legal proceedings. According to the learned advocate, having a board resolution before commencement of legal proceedings, was not a statutory requirement.

As correctly submitted by Mr. Makota learned advocate for the plaintiff, having a board resolution before filing a plaint is not a statutory

requirement. That is possibly why, the position in **Bugerere`s case** was overruled by the Court of Appeal of Uganda in **UNITED ASSURANCE CO. LTD VS. ATTORNEY GENERAL, CIVIL APPEAL NO.1 OF 1986**. However, here at home, especially in the High Court, there are still divergent views on the issue. The Court of Appeal still maintains the position in **Bugerere`s case**. In **PITA KEMPAMP LTD VS. MOHAMED I. A. ABDULHUSSEIN, CIVIL APPLICATION NO. 128 OF 2004 c/f No. 69 of 2005, CAT, DSM** the Court of Appeal cited with approval, the decision in **Bugerere`s case**. The Court of Appeal was dealing with an appeal from Kinondoni District Court whose trial was governed by the Civil Procedure Code as the present suit. In a more recent decision, the Court has held that, where the claimant is a company, it is not proper to institute a suit on behalf of the company without its formal authority. **See: SIMBA PAPERS CONVERTES LIMITED VS. PACKAGING AND STATIONERY MANUFACTURERS LIMITED AND ANOTHER, CIVIL APPEAL NO. 280 OF 2017, CAT AT DAR ES SALAAM**, decided on 23/05/2023.

On strength of the decisions of the Court of Appeal cited hereinabove, the point of preliminary objection regarding absence of Board Resolution is held to be meritorious. It is therefore sustained. The suit is struck out for reasons of incompetence.

DATED at DAR ES SALAAM this 26th day of MAY 2023.




C. P. MKEHA

JUDGE

26/05/2023

Court: Ruling is delivered in the presence of Mr. Francis Makota learned advocate for the plaintiff and Ms. Beatrice Godfrey learned advocate for the defendant.




C. P. MKEHA

JUDGE

26/05/2023