

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 02 OF 2023

EQUITY BANK TANZANIA LIMITED.....PLAINTIFF

VERSUS

DAR LUX COMPANY LIMITED..... 1ST DEFENDANT

SIMAGUNGA GENERAL TRADING

COMPANY LIMITED 2ND DEFENDANT

DONALD XAVERY SIMAGUNGA3RD DEFENDANT

PENDO DONALD XAVERY4TH DEFENDANT

BY WAY OF COUNTER CLAIM

DAR LUX COMPANY LIMITED..... PLAINTIFF

VERSUS

EQUITY BANK TANZANIA LIMITED.....1ST DEFENDANT

NISK CAPITAL LIMITED2ND DEFENDANT

RULING

A.A. MBAGWA J.

This ruling stems from the preliminary objection raised against the competence of the counter claim. The plaintiff instituted this suit against the four defendants as indicated herein above. Upon service, the 1st defendant, DAR LUX COMPANY LIMITED filed her written statement of defence along with a counter claim against EQUITY BANK TANZANIA LIMITED and NISK CAPITAL LIMITED.



On being served with a counter claim, the 2nd defendant in the counter claim, NISK CAPITAL LIMITED raised a notice of preliminary objection against the competence of the counter claim to the following effect;

'The counter claim is incompetent for lack of a board resolution authorizing institution or filing of the same in court'

When the matter was called on for hearing, the plaintiff and 1st defendant to the counter claim, EQUITY BANK TANZANIA LIMITED was represented by Elly Mkwawa and Ashura Mansuri, learned advocates whereas the 2nd defendant to the counter claim, NISK CAPITAL LIMITED had the services of Mr. Zaharani Sinare, learned advocate. On the other hand, the defendants in the main suit and plaintiff to the counter claim jointly were represented by Mr. Obadia Kajungu, learned advocate.

At the very outset, Mr. Zaharani Sinare informed the Court that he had abandoned other grounds of objection and remained with one objection relating to board resolution.

Submitting in support of the preliminary objection, Mr. Sinare told the Court that, it is not disputed that the plaintiff in the counter claim did not plead or include in the counter claim a board resolution authorizing the plaintiff's company to institute the suit i.e., counter claim in the court. He said that it is a legal requirement for a company to have a board resolution



authoring institution of suit in the name of the company. To bolster his argument, Mr. Sinare cited the case of **Simba Papers Converters Limited vs Packaging and Stationery Manufacturers Limited and Another**, Civil Appeal No. 280 of 2017, CAT at Dar es Salaam. Further, the learned counsel argued that the decision has been followed by the High Court in several cases including **Wellworth Hotels and Lodges LTD vs East Africa Canvas Company LTD** and 4 others, Commercial Case No. 107 of 2020, **Oxley Limited vs Nyarugusu Mine Company Limited and another**, Commercial Case No. 14 of 2022 and **Erick John Machiwa vs Standard Chartered Bank Tanzania Limited**, Civil Appeal No. 232 of 2021. The counsel added, while citing the case of **Erick John Machiwa (supra)** that, a counter claim is a separate suit from the main suit hence a board resolution was necessary.

Based on the authorities cited above, Mr. Sinare urged the Court to strike out the counter claim with costs. The learned counsel clarified that he prayed for costs because in civil litigation, the general rule is that costs follow the event. In that regard, the learned counsel cited the case of **Shaban Fundi vs Leonard Clement**, Civil Appeal No. 38 of 2011, CAT at Dar es Salaam at pages 8, 9 and 10.



Mr. Elly Mkwawa, learned counsel for 1st defendant, on his part, concurred with the submissions by the counsel for the 2nd defendant. In addition, he prayed for reimbursement of costs which his client had incurred in filing the written statement of defence.

In reply, Mr. Obadia Kajungu opposed the preliminary objection for being devoid of merits. It was Mr. Kajungu's submission that every suit has its own facts. He proceeded that the requirement of a board resolution for instituting a civil suit has already been departed by this Court since the passing of the Company Act, 2002. The learned counsel submitted that the board resolution is the question of evidence as such, it does qualify to be treated as preliminary objection in the web of **Mukisa Biscuits Manufacturing Company LTD vs West End Distributors LTD (1969) EA 696** and **Investment House Limited vs Webb Technologies (T) Limited and 2 other**, Commercial Case No. 97 of 2015.

Mr. Kajungu urged the Court to apply the doctrine of precedent with caution in order to meet the end of justice. He emphasized that a board resolution is not mandatory under section 147 of the Companies Act.

Moreso, Mr. Kajungu argued that the decision in **Simba Paper (supra)** is distinguishable in the sense that the material facts are different from the present case.



However, the learned counsel submitted that in the event the Court finds the objection meritorious, he urged the Court to order amendment instead of striking out the counter claim. On this, the learned counsel relied on the case of **Kilombero North Safaris Limited vs Registered Trustees of Mbomipa Authorities Association**, Civil Appeal No. 273 of 2017 CAT at Dar es Salaam.

With regards to costs, Mr. Kajungu replied that costs are awarded at the discretion of the court. As such, he prayed the Court not to grant costs.

I have keenly read the counter claim under attack and the rival submissions made by the counsel. There is no gainsaying that the counter claim was filed without a board resolution. Equally, it is true that the plaintiff in the counter claim is a legal entity (company). It is further a settled position of law that a counter claim is a suit of its own. With these material facts, the question for determination is whether the counter claim being a separate and independent suit is incompetent for want of a board resolution.

I have belaboured to read various decisions on the subject including **Simba Papers Converters Limited vs Packaging and Stationery Manufacturers Limited and Another (supra), Ursino Palms Estate Limited vs. Kyela Valley Food Limited and Two Others**, Civil Appeal

A handwritten signature in black ink, appearing to read 'A. Amachi', with a horizontal line underneath.

No.28 of 2014, Court of Appeal at Dar Es Salaam at page 3 and **Boimanda Modern Construction Co. LTD vs Tenende Mwakagile and 6 Others**, Land Case No. 8 of 2022, HC at Iringa at page 6. In all the above decisions, it has been held that a board resolution is a mandatory requirement for institution of a suit in the name of the company and its absence renders the proceedings incompetent before the court. Section 147 (1) of the Companies Act from which the requirement for board resolution is derived 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(l) 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.

This Court in **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, while expounding on the gist



of the above provision, reasoned that a board resolution is intended to avoid unilateral decision of a few directors who may decide to institute legal proceedings under the company's name without consent of other directors or shareholders thereby exposing them to detrimental decisions which may possibly result from the case.

In the event, since the present suit (counter claim) was instituted by a company without a board resolution, it necessarily follows that it is incompetent before the Court.

In view of the above, I uphold the preliminary objection, the consequences of which I strike out the counter claim. As this ruling does not finally dispose of the suit to wit, Commercial Case No. 02 of 2023, I order that each party should bear its costs.

It is so ordered.

Right of Appeal is explained.




A. A. Mbagwa

JUDGE

11/09/2023