

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 134 OF 2022

SM HOLDINGS LIMITED

PLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE LIMITED

DEFENDANT

SANLAM GENERAL INSURANCE TANZANIA LIMITED.....NECESSARY PARTY

RULING

October 18th, 2023 & April 19th, 2024

Morris, J

This ruling is for two rival preliminary objections. The plaintiff has raised his objection that the witness statement by the defendant's prospective witness was filed out of time. However, the defendant challenges the case preliminarily for want of the plaintiff's competent board resolution to sue. Respectively, the parties are moving the Court to strike out the subject statement and suit. The objections were argued simultaneously by way of written submissions upon leave being granted by the Court. I will determine the defendant's objection first. Obviously, in the absence of a competent suit, witnesses have no litigation arena.

All parties are represented by legal minds. Relevant to the objections are Ms. Linda Bosco and Beda Kapinga, learned advocates for the plaintiff and defendant respectively. Submissions from each side were filed according to the schedule set by the Court.

The defendant's preliminary objection (PO) is that the plaintiff filed the suit without the requisite board resolution contrary to sections 147(1) (a) & (b) and 39 (1) & (2) of ***the Companies Act***, Cap 212 R.E. 2002. In essence, the defendant's PO is two-limbed. On the one, the defendant attacks the suit for lack of a competent resolution to the pleadings; and that if what is attached in lieu thereof is to be accepted as the resolution, the same lacks the company's seal and competent officers' signature, on the other.

The PO germinates from the history of the matter. Essentially, this suit was initially filed against the defendant and NBC Insurance Agency only. Later on, the Court (Hon. Nangela, J) found it wise to proceed with suit in which the insurance company above was party. Thus, the plaintiff was ordered to join him as a necessary party through amended pleadings. In the amended pleadings, the Agency was released and the above necessary



party joined instead. Notably, in the previous pleadings, the plaintiff had attached the resolution bearing the details of parties therein. With the amendment of the plaint, the plaintiff still attached somewhat a similar resolution. The defendant holds that the subject resolution cannot cater for the subsequent proceedings because the mandate in it did not envisage the joinder of other parties; and when the pleadings were amended, the previous record (annexures inclusive) ceased to exist. Consequently, to the defendant, the plaintiff's board has not sanctioned the current suit.

In regard to the execution, the defendant contends that the purported resolution is not affixed with the plaintiff's common seal and/or signed by its director and a secretary or two directors. Hence, the document's competency is wanting on such basis. Hereof, I was referred to various cases, including ***Stanbic Bank (T) Ltd v Sumry Bus Services & Co Ltd & Others***, Civ. Case No. 125 of 2018; ***Petrofuel (T) Ltd v Power Road (T) Ltd & Others***, Comm. Case No. 29 of 2012; ***Airtel (T) Ltd v Osc Power Solutions Ltd***, Civ. Appeal No. 206 of 2017; and ***Simba Papers Converters Ltd v Packaging and Stationery Manufacturers & Another***, Civ. Appeal No 208 of 280 of 2017 (all unreported).

On his part, the plaintiff did not support the PO. He maintained that the plaintiff duly sanctioned the filing of the present suit, the amendment of pleadings notwithstanding. He also argued further that the defendant did not specifically dispute the corresponding averment in the plaint. To him, so long as his pleadings state that the suit has been approved by the plaintiff's board; the PO is not only misplaced but also it goes beyond the scope of preliminary objection for want of evaluation of evidence. He also, insisted that the plaintiff complied with all pre-filing requisites as provided under relevant statutes. In addition to authorities cited by the defendant, the plaintiff referred to ***Bugerere Coffee Growers v Sebadduka*** [1970] 1 EA 147; ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*** [1969] EA 696; ***DP Shapriya Ltd v Yara (T) Ltd***, Misc. Comm. Appl. No. 80 of 2023; and ***Makoa Farm Ltd & 2 Others v Uduru Makoa Agr. & Marketing Cooperative Society Ltd***, Civ. Case No. 4 of 2022 (both unreported).

I have keenly and dispassionately considered the parties' submissions. However, the PO will not take long to dispose. It is now a settled law that the usefulness of the company's board resolution in instituting a suit is



dependent upon the nature of dispute. Naturally, the disputes involving the corporate person may be internal in nature or comprise external parties. The former type of dispute arises within the management (or mismanagement) of the company's affairs. However, the other type covers claims which the company maintains against the other party or parties. In law, the requirement for the resolution is ideal for the first category of disputes.

In this connection, I am inspired by the wise holding of the Court of Appeal in ***Mohan's Oysterbay Drinks Ltd v British American Tobacco Kenya Ltd***, Civil Application No. 70/01 of 2022 (unreported) that; the distinction of the company's disputes to be adjudicated is necessary in determining the mandatory requirement of the subject resolution. Accordingly, the requirement hereof serves to enable courts to assist companies to achieve their imperative objects in the ambits of express legal mandates.

It is not a misplacement, in my view, if I add that the essence of incorporation is to minimize interferences in the internal affairs of the duly registered company. That is why the law empowers directors to run the day-to-day errands of the corporate person. Further, so long as a company has

ample legal means to intercede in the wrongly initiated court proceedings; enjoining such company to reveal too much of almost its daily operations, to me, amounts to an overly intrusion into its privacy. I, also, put it forward an argument that if such compulsive interferences continue indiscreetly; parties to cases will poke their noses into otherwise confidential matters of companies.

After all, where will the finish line be placed thereafter? Possibly, after production of the resolution, attacks will be directed towards the competency of those who passed it; the coram and authenticity of signatures of those in attendance; scope of mandate of such signatories under the articles of association; and so-on-and-so-forth. An analogous reasoning is also found in ***Bugerere Growers Ltd v. Sebaduka*** (*supra*). I will rest this discussion here.

In view of what is reasoned above, I find and hereby hold that the defendant's PO is without requisite excellence. I overrule it.

The Court now turns to the plaintiff's PO. As introduced above, the plaintiff contends that the "witness statement of one Jackson Kindikwili for the defendant be struck out for having been filed out of time". For the Court

to determine this PO, it is obvious that cross-referencing three statutes is essential. Frequently, this undertaking is tricky and calls for a serene inventiveness for the Court to achieve coherent and just results. In the present case, the exercise encompasses appraisal of pertinent provisions in ***the High Court (Commercial Division) Procedure Rules***, 2012 as amended by ***the High Court (Commercial Division) Procedure (Amendment) Rules***, 2019 (elsewhere, ***the Rules***); ***the Interpretation of Laws Act***, Cap 1 R.E. 2022 (***ILA***); and ***the Law of Limitation Act***, Cap 89 R.E, 2019 (***LLA***).

According to the record, parties appeared for final pre-trial conference (FPTC) on September 5th, 2023. Amongst orders of the Court on that day, was for parties to file respective witnesses' statements according to the law. Consequently, the plaintiff and defendant filed own statements on September 18th, 2023 and September 19th, 2023 respectively. Like the plaintiff, the Necessary Party had his statements filed on September 18th, 2023. In essence, the PO under determination is to the effect that the defendant's statement was filed out of time.



Advocate Linda Bosco for the plaintiff submitted that, the statement of Mr. Kindikwili - for the defendant, was filed one day beyond the statutory time. She also argued that, according to rule 49 (1) & (2) of ***the Rules***, a party filing the statement for own prospective witness; is required by the law to lodge it in 14 days. To her, the wording is couched in mandatory terms that the statement "shall be filed within fourteen days of the completion of (FPTC)". Accordingly, therefore, 14 days expired on September 18th, 2023. Hence, the counsel reasoned that Mr. Kindikwili's statement was filed on September 19th, 2023; well out of time.

Further, it was argued that, pursuant to section 60 (1) of ***ILA***; computation of time in line with the wordings stated above, includes the day of FPTC. Thus, in this case, September 5th, 2023 is inclusive. Consequently, the 14th day falls on September 18th, 2023. Reference was made to cases of ***NBC Ltd v Partners Construction***, Civ. Appeal No. 34 of 2003; ***Petrofuel (T) Ltd v Power Road*** (*supra*); ***Africarriers Ltd UDA & Another***, Comm. Case No. 50 of 2019; and ***Isack & Sons Co Ltd v North Mara Goldmine***, Comm. Case No. 3 of 2020 (all unreported). Generally, these cases cover a fair range of legal aspects such as, computation of time; effects of

compulsive the word “shall” in a statute; role of advocates in courts of law; and the rationale for parties to comply with the rules of procedure, to name but a few. More emphasis, however, was cast on commencement of count down in terms of rule 49 of ***the Rules***. Finally, the learned advocate resounded the plaintiff’s prayer for the subject statement to be stuck out for being filed out of time, without leave of the court.

In reply Advocate Beda Kapinga, submitted that Mr. Kindikwili’s statement was filed timely. His arithmetic settled at September 19th, 2023 as an expiry day. According to him, the subject statement was thus, filed on the last day of the time prescribed by ***the Rules***. Likewise, the defendant cited section 60(1)(b) of ***ILA*** and argued that the Court order was specific that the statements ought to be filed in 14 days “from” that day of FPTC. To him, the Court suspended the wording of ***the Rules*** by adding the word “from today” (FPTC). Henceforward, the day of the subject conference should be excluded. He supported his arguments using the decision of this Court in ***Akiba Commercial Bank Plc v UAP Tanzania Co. Ltd***, Comm. Case No. 24 of 2018 (unreported).

It was the defendant's further contention that on the day of FPTC, parties remained in Court for almost the entire day; such that, the circumstances of this matter warrant liberal interpretation of the law in order to hold that the impugned statement was filed in time.

Having covered the nucleus of the opposing submissions above, I will now consider major arguments in such submissions. **One**, as it was correctly submitted for both parties, the timeframe for filing the witness statement is 14 days. **Two**, the appropriate law hereof is section 49 of *the Rules*. **Three**, calculation of the subject duration depends on the conduct of FPTC. **Four**, the only primary question which remains to be answered by the Court is whether the day of conducting FPTC is included or excepted. That is, I am being moved to determine when exactly 14 statutory days became exhausted.

According to the rivalry arguments of the parties, whereas the plaintiff contends that the FPTC day (05.09.2023) is included in computation of time; the defendant is of the conflicting conclusion. In the interest of clarity, the relevant part of the rule provides that;

"49 (1) [Not Applicable]

(2) *The statement shall be filed **within fourteen days of the completion** of the final pre-trial conference and served as directed by the Court"* (bolding rendered for emphasis).

Undisputedly, the Court's order was entered on September 5th, 2023. To appreciate whether such day is included or excluded, one needs to resort to the rules governing interpretation of laws and setting of time limits. According to section 19 of **LLA**, Cap 89 R.E, 2019; in computing the time for proceedings, the day from which such period is to be computed is excluded. Nonetheless, section 46 of **LLA** ratifies periods of limitation prescribed by other written laws. Hence, when the other written law provides for limitation of time, such period is considered on the basis of **LLA**. Contextually, the two statutes marry one another and become harmonious in application.

But then again, for a specific matter in which the other written law applies, time therein prevails. In other words, if both laws provide for time limitation, the duration in the specific law takes precedent [**James Sendama v Republic** (2013)]. On such legit foundation, the time in **the Rules** for the present suit carried the day. Subsequently, interpretation of

the commencement of the 14-day period under ***the Rules*** becomes imperative here.

The foregoing conclusion in the perspective, I will now make reference to section 60 (1) (a) and (b) of ***ILA***. It provides, thus;

"In computing time for the purposes of a written law-
*(a) where a period of time is **expressed to be** at, on, or **with***
***a specified day**, that day shall be included in the period;*
*(b) where a period of time is expressed to be reckoned **from, or***
***after, a specified day**, that day **shall not** be included in the*
period"(emphasis supplied).

Looking at the quotation above, it is evident that parties in this matter are locking horns regarding the suitable provision between the two. The plaintiff is for (a). Noticeably, the defendant picks (b) to be the applicable law. He is, though, not without the basis for such preference. In his submissions, he argues that the Court pronounced that parties were to file the statements within 14 days "from today" (on 05.09.2023). He expands his analysis that by so expressing, the Court *stricto sensu* suspended application of ***the Rules***. That is, if the rule to be applied was (a) its



bindingness was accordingly modified and transformed to (b) by the inclusion of the word "from" by the Court.

In my view, the words "a specified day" as couched above implies the day of the Court Order herein. Blending such meaning in the facts of this matter, therefore, it is vivid that the time set for witness statements under rule 49 of ***the Rules*** is "of the date of FPTC". In essence, the said phrase equates the spirit of "expressed to be with a specified day" used in (a) above. With adequate respect, I do not subscribe to the defendant's assertions that circumstance of this case warrant adoption of (b). I will account for my loathness. **Firstly**, in rule 49 (2) of ***the Rules***, there is no inclusion of the word "from". **Secondly**, section 60(1) b of ***ILA*** excludes "a specified day" only when words used in the statute/law are "from" or "after" only.

Thirdly, I have gone through the Court's record for the day under discussion. The overly-hoped for words by the defendant ("from today") are not there. I did not find it professionally healthy for the respective counsel to forcefully introduce misleading words contrary to the court record. In my view, if he was not clear as to what was recorded by the Court, he would have conducted perusal. For precision, the record thereof is particular that;



"Further Orders.

- (1) *Parties are to file their witness statements as per Rules 49 and 50 of the Commercial Court Rules of Procedure, 2012 (as amended by GN 107 of 2019).*
- (2) *Hearing of this case to commence on 9-10 of October 2023 at 9.00 am."*

In consequence therefore, as rightly submitted by the plaintiff; and in line with the courts pronouncement in ***NBC Ltd v Partners Construction*** (*supra*); ***Abid Ally Sykes @ Abid Ally Sykes t/a Afrinet Ltd v M-Pesa Ltd***, Comm. Case No. 15 of 2023; ***Kenafic Industries Ltd v Lakairo Investment Co. Ltd*** (all unreported); and pursuant to section 60 (1) (a) of ***ILA***, the date of FPTC is literally included in the computation of time herein.

Plainly put, counting from September 5th, 2023 the 14th day falls on September 18th, 2023. Incidentally, the witness statement under attack by the plaintiff was filed a day later. Therefore, as Mr. Kindikwili's statement herein was filed on Tuesday - September 5th, 2023; without the requisite Court's leave or ruling of extension of time, it goes without gainsaying that the same was filed beyond the time set by the law.

It is a cardinal principle of law that expressly limited time cannot be overridden by perceived or prevailing circumstances. The latter, however, may and should be used to account for time of the delay in pursuit of extension of time in appropriate avenues. Moreover, the law sets time limits not for cosmetic reasons. There are objectives to achieve. **One**, to promote the expeditious dispatch of litigation [*Costellow v Somerset County Council* (1993) IWLR 256]. **Two**, to provide certainty of timeframe for the conduct of litigation [*Ratman v Cumara Samy* (1965) IWLR 8]. **Three**, to enhance public trust to the judicial system. **Four**, to manage resources effectively. Consequently, it works in the advantage of party's proper management time and money.

In the upshot, the plaintiff's PO is sustained. Accordingly, the purported witness statement of Jackson Kindikwili is struck out and expunged from the record of the Court. The proceedings shall, thus, continue on that basis. That is, in the absence of the defence witnesses, the defendant is as good as being absent for the trial.



Therefore, plaintiff will prove his case *ex-parte* in so far as the defendant is concerned. For avoidance of any doubt, this order excludes the Necessary Party. It is so ordered.



C.K.K. Morris

Judge

April 19th, 2024

Ruling delivered this 19th day of April 2024 in the presence of Advocates Julieth Bujulu and Bedda Kapinga for the plaintiff and the defendant respectively. Ms. Bujulu also held the brief of Mr. Oscar Msechu, Advocate for the Necessary Party.

C.K.K. Morris

Judge

April 19th, 2024