

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 103 OF 2023

WHET COMPANY LIMITED.....PLAINTIFF

VERSUS

VILLAGE AMANI LIMITED.....DEFENDANT

RULING

2nd to 10th August, 2023

E.B. LUVANDA, J

The Defendant named above raised objections embedded into her written statement of defence, grounded that: One, the suit is untenable in law for having been brought/signed and verified by the person who obtained such capacity fraudulently and illegally; Two, the suit is untenable in law for not having accompanied with the company board resolution to institute the suit.

Ms. Hamida Hassani Sheikh learned Advocate and Killey Mwitasi learned Counsel for the Defendant on their joint written submission, submitted that according to the pleadings, the Plaintiff officer who signed and verified the plaint is Bilha Nachesa Hering who just identified as principal officer without further details of her position in the Plaintiff's company. They submitted that according to annexure VA4 to the plaint, indicate that Bilha Nachesa Hering

acquired such power to manage the affairs of the Plaintiff company from her power as administrator (sic, administratrix) of the estate of the late Wolfgang Hans Albert Hering via Probate Cause No. 48/2015 Kigamboni Primary Court. They submitted that Kigamboni Primary Court lacks jurisdiction over administration of estate of foreigner who have lived and professed Christian faith and buried in Christian as per cross marks indicated at the late tomb/grave. He cited section 18(1)(a)(i) of the Magistrate's Courts Act, Cap 11 R.E. 2019, for a proposition that the jurisdiction of primary court is on matters of Islamic and customary law. Also cited the case of **Rev. Frolan Katunzi vs Goodluck Kabumbire vs Rose Nestory kabumbire**, Probate Appeal No. 12 of 2020, HC Mwanza, page 4; **Yusufu Selemani Kimaro vs Administrator General & Another**, Civil Appeal No. 266/2020 CAT, for a proposition that once the judgment is established to have been obtained by fraud or collusion or illegally to sail through, the court can avoid it or treat it as a nullity. They submitted that the plaint was instituted, signed and verified by a person who fraudulently, illegally and unauthorized obtained such power and therefore should be dismissed.

On point number two, they submitted that it is the position of the law that, the company as a legal entity can sue and be sued on its own name and

when the company bring a suit, the law requires that there must be a board of directors' resolution giving permission to institute the said suit. They cited the case of **Simba Paper Converters Ltd vs Packaging and Stationary Manufactures Ltd & Another**, Civil Appeal No. 280/2017, CAT at page 12. They submitted that Bilha Nachesa Hering has instituted a suit in the name of the company without adducing evidence to prove whether the board of directors have allowed the institution of the suit and allowed her to sign the pleadings on that behalf.

In reply, Capt. Ibrahim M. Bendera learned Counsel for the Plaintiff submitted that the preliminary objections are not on point of law, on that for it to be determined need to be proved by facts on how the person who signed the pleading had obtained such capacity fraudulently and illegally. He cited **Mukisa Biscuit Manufacturing Company Limited** [1069] EA 696; **Alphonse Buhatwa vs Julieth Rhoda Alphonse**, Civil Refence No. 9/01 of 2016, CAT Dar es Salaam. He submitted that the Defendant who was not a party on a probate case want this court to take powers of a district court as appellate court over probate case decided by the primary court, contrary to section 20(1)(b) of Cap 11(supra). He distinguished **Gibson Kambire** (supra), on that therein it was within the jurisdiction of probate because it

was before the Probate Case Registry. He distinguished **Yusufu Selemani** (supra), on that facts leading to fraudulent and illegal nature had been factually determined at the high court. He submitted that the primary court issued a valid certificate (sic, letters) of administration to Ms. Bilha Nachesa Hering who was the wife (hence an heir) of the late Wolfgang Hans Albert Hering, which cannot be quashed through Land Registry by a preliminary objection.

On point number two, the learned Counsel submitted that the two share holders and directors namely Ms. Bilha Nachesa Hering and Mr. Erasmus Mathias Tarimo have been personally brought in this case by the Defendant's counter claim. He submitted that the fact that the Plaintiff allowed them to institute the main case and file the written statement of defence to the Defendas' counter claim, are apparent facts of which their authenticity will be a matter of facts to be proved at the hearing stage. He cited **Simba Paper** (supra) for a proposition that what was required was not a specific resolution but general permission and that resolution will be necessary where the suit involve a dispute between a company and one of its own shareholders or directors. He went on distinguishing **Simba Paper** (supra) on that this is not a case between shareholders or directors of the same

company; two, Gabriel and Co. attorney was instructed by the Plaintiff to issue demand notice to the Defendant, who did not responded to date; three, therein a case was fully heard where facts concerning non availability of a resolution from board of directors in a case where directors of the same company were in dispute, was determined.

On rejoinder, Ms. Hamida Hassani Sheikh learned Advocate and Killey Mwitasi learned Counsel for the Defendant, submitted that there is no principle of law in our legal jurisprudence which legalize the illegality. They submitted that in **Yusufu Selemani** (supra), the Court of Appeal clearly directed that even land court or any other court has the duty to nullify any decision brought to its attention which is found to have been illegally obtained without resorting to a particular judicial forum where the decision was made. For the second point they submitted that the suit is untenable in law for lack of board resolution.

On my part, regarding objection number one, the Counsel for Defendant faulted the plaint in particular signature and verification by one Bilha Nachesa Hering on that she identified as principal officer without further details of her position and that her letters of administration of the estate of the late Wolfgang Hans Albert Hering were granted by the Kigamboni

primary Court which lack jurisdiction over a Christian foreigner. The learned Counsel for Plaintiff said nothing regarding a call for further details of Bilha Nachesa Hering who signed and verified pleadings under a capacity of a principal officer. On my part, I have found no merit on this limb, it is the law that pleadings by a corporation can be signed and verified on its stead either by the secretary, director or principal officer of the company. Order XXVIII rule 1 Cap 33 (supra) with marginal notes subscription and verification of pleadings, speak louder, provide I quote,

*'In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other **principal officer** of the corporation who is able to depose to the facts of the case'*

Herein, Whet Company was incorporated via a certificate of incorporation No. 20553 annexure WCL-1 to the plaint and Bilha Nachesa Hering purport to sign and verify under the capacity of principal officer, which is within the purview of the law. Therefore, a call for further details or particulars of her position was legally untenable.

For the second limb of the objection number one, undeniably the late Wolfgang Hans Albert Hering is a foreigner German who professed

Christianity life and after demise, burial ceremony were conducted under Christian rite. Annexure A6 to the counter claim indicate that a grant of letters of administration were made before Kigamboni Primary Court. Arguably, Kigamboni Primary Court lack jurisdiction to entertain probate cause over a deceased who professed Christianity at the time of his death. Another crucial point, the letters of administration were directed against the shares in the company incorporated under the Companies Act including registered land/suit property, as per a letter of the Primary Court Magistrate in-Charge at Kigamboni addressed to the Director of WHET and minutes of a meeting for division of estate of the deceased annexure A6 to the counter claim. In the case of **George Kumwenda vs Fides Nyirenda** [1981] TLR 211, Kisanga, J as he then was, had this to say,

'Since section 14(1)(a)(i) excludes the primary court's jurisdiction over proceedings affecting the title to or any interest in land registered under the Land Registration Ordinance, the Temeke Primary Court's order for administration was invalid in so far as it related to the house built on a plot registered with the land office'

The learned Counsel for Plaintiff submitted that letters of administration issued to Ms. Bilha Nachesa Hering are valid and added further that cannot be quashed through Land Registry by a preliminary objection. Certain true that this court is not sitting as a probate appellate court neither having probate register/registry. However, that alone cannot be a ground for condoning illegalities found on the face of the records. In the case of **Yusufu Kimaro** (supra), at page 18 the apex Court had this to say, I quote,

'There is no doubt that having found the appointment of the second respondent to be highly questionable as to raise eyebrows, it would be an abdication of duty for the trial Judge to either play ostrich or keep her hands off the matter on the pretext that it did not fall within her jurisdiction...'

At page 20, the apex Court went on to say,

*'Going by the above-quoted commentary by the learned authors, two things are certainly discernable. **One**, that a fraudulent judgment, order or decree can be avoided without necessarily having recourse to setting it aside and **two**, that a judgement, order or decree obtained by fraud will be treated as a nullity by any court be it an inferior or superior court'*

Herein the letters of administration annexure A6 to the counter claim were not obtained by fraud, rather a grant was made by the Kigamboni Primary

Court which lack requisite jurisdiction to adjudicate probate cause over estate of the deceased who is neither a native nor bound by any customary law on the land or Islamic law by a fact that the deceased professed Christianity life and burial ceremony were done under Christian rite.

Now, in the circumstances the aftermath and proper route to take between the two options suggested by the apex Court, on my view for purpose of these proceedings, a course of avoiding the impugned letters of administration granted to Ms. Bilha Nachesa Hering will be the best option to take. As such it will be taken as no grant was made for purpose of these proceedings. In that respect, Ms. Bilha Nachesa Hering was unqualified to sign and verify pleadings. In other word pleading signed by her, offend the provision of Order VI rule 15(1) of Cap 33 (supra).

For objection number two, essentially the learned Counsel for Plaintiff did not dispel a fact that there is no board resolution. However his argument was that the same is relevant and necessary where a suit involves a dispute between a company and one of its own shareholders or directors and that this is a factual issue which require evidence at a hearing stage. I am unable to ascribe to the position of the learned Counsel for the Plaintiff for the reasons I am about to assign. Number one, the way the averments in the

plaint were pleaded, on it self call for the board resolution to sue. At paragraph ten of the plaint, it was averred, I quote,

*'That after the death of Mr. Wolfgang Hans Albert Hering it come to our knowledge that, our property known as Plot No. 1 Block A Ras Kanyegwa, Kigamboni, Dar es Salaam had been transferred to the Defendant **without the knowledge or approval of Directors and the shareholder**'* bold added

It is to be noted that the pleadings were signed by Ms. Bilha Nachesa Hering under the capacity of principal officer, whose mandate have been faulted above for invalid letters of administration, although she did not disclose a fact that she was holding letters of administration, only attached a certificate of death of the late Wolfgang Hans Albert Hering. A letter of administration annexure A6 was traced by the Defendant whose tracing arrangements were extended to include visit up to the cemetery at the womb of the deceased to establish rite of burial, including taking photographs forming part of annexure A6.

Be as it may, in the circumstances where the mandate of Plaintiff's officer who verified pleadings, is at stake, and so far in the plaint, pleaded facts regarding absence of knowledge and approval of directors to the impugned

disposition and transfer of the disputed land, to my view a resolution board of directors to sue is vital. Again the learned Counsel for the Plaintiff was of the view that even if a resolution of board of directors is necessary, the same is a matter of fact and its authenticity will be proved during hearing, citing implied permission for Ms. Bilha Nachesa Hering and Erasmus Mathias Tarimo who have been personally sued in the counter claim. However, the position of the law is that the express authority by the resolution of the board of directors or shareholders is for purpose of express authority to institute a suit and not at a stage of hearing. In the case of **Simba Papers** (supra), at page 20, the superior Court had this to say, I quote,

*'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 require the express authority by way of resolution of the Board of Directors to institute the case in absence of which, the suit in the name of the company was defective and it ought to have been struck out***' emphasis added

There was an argument by the learned Counsel for Defendant raised in the course of submitting that the plaint indicate was signed and verified by the Advocate and Principal Officer of the **Defendant** instead of the **Plaintiff**. But I ascribe to the view of the learned Counsel for the Plaintiff that it was

a mere topographical error, as such it is taken to have been raised as a matter of concern and not formal objection. Also, at paragraph fifteen of the plaint facts showing that the court has jurisdiction (pecuniary) were not specifically pleaded. But all the same, are points of concern.

The two objections are sustained.

The suit is struck out with costs.



E.B. LUVANDA
JUDGE
10/08/2023

Court: Ruling delivered in the presence of Ms. Nuru Jamal Advocate for the Plaintiff and Ms. Farida Ibrahimu Kelenge Advocate for the Defendant.



E.B. LUVANDA
JUDGE
10/08/2023