

TANZANIA / JUDGMENT

AL ADAWI COMPANY LIMITED

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SUB - REGISTRY OF
SHINYANGA AT SHINYANGA MISC. CIVIL APPLICATION NO. 43 OF 2023 (Arising from
Commercial Case No. 25 of 2023) AL ADAWI COMPANY LIMITED APPLICANT
VERSUS TIB DEVELOPMENT BANK 1ST RESPONDENT THE ATTORNEY
GENERAL 2ND RESPONDENT

RULING

14th February & 29th April, 2024. MASSAM J.: This ruling emanates from the Preliminary Objection raised by the Respondents after the applicant had filled a chamber summons made under order XXXVII Rule (1) (a) of the Civil Procedure Code, Cap 33 R: E 2019 seeking for an order of injunction based on the following reliefs; Ex- Parte,

- i. That, this honourable Court be pleased to issue ex- Parte interim order restraining the Respondents, its agents, workmen or any other person working under their instruction from evicting, selling, alienating or any other manner whatsoever tempering with the 1 Applicant's properties mortgaged to the 1st Respondent pending hearing of this application inter -Parte, ii. Any other relief (s) this Honourable Court may deem fit and just to grant. Enter- Parte;
1. That, this Honourable Court be pleased to grant temporary injunction restraining the Respondents, its agents, workmen or any other person working under their instruction from evicting, selling, alienating or any other manner whatsoever tempering with the Applicant's properties mortgaged to the 1st Respondent pending hearing and determination of the main suit.
2. This Honourable Court may be pleased to issue any other order it deems fit and just to grant
3. Costs of this application be provided for. Before respondent replied to his counter affidavit he raised a preliminary objections to the effect that,
- (a) The Application is untenable in law for contravention with the Proviso to Order XXXVII Rule 1 of The CIVIL Procedure Code Cap 33 IR: E 2019, which provides that, an order granting temporary injunction cannot be made against the government.

- (b) In alternative, this application is incompetent for being filled without any authorization by the Board Resolution of the Applicant's Company for instituting this application contrary to the requirement of the Law and recent precedents of the High Court and the Court of Appeal. On the hearing of this application the applicant was represented by Mr. Godfrey M. Tuli learned counsel while Mr. George Kalenda, learned state attorney represented the Respondents. By the consent of the parties the same was urged by way of written submission. In his support of the raised preliminary objection Mr Kalenda submitted that on the 1st preliminary Objection that, the 1st respondent is a parastatal organisation as defined under the provision of Section 2 of the Parastatal Organization (Financial Supervision & Control) Act No. 16 of 1975 to mean, "..... anybody corporate established by or under any written law other than (a) N/A, (b) N/A but includes any company the whole of the share capital of which is owned 3 by the Government or any parastatal organization (including any such company) Mr. Kalenda in support of his argument he referred this court in Section 26(4) of the Government proceedings Act, [Cap 5 R: E2019] as amended by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2020, which bares the definition of the word Government, and therefore the 1st Respondent is a Government entity and a parastatal organisation as provided under the above provisions of the laws. He further submitted that, as per the provisions of order XXXVII Rule 1, there is a word "shall" to mean the function so conferred must be performed as stipulated under section 53(2) of the Interpretation of the Laws Act [Cap 1 R: E 2019] and the case of Godfrey Kimbe Versus Peter Ngonyani, Civil Appeal No. 41 of 2014 CAT at Dar es Salaam (unreported) and the case of Mwanza City Council Versus Alfred Wambura, Civil Revision No. 01 of 2022, HC at Mwanza to the effect that a temporary Injunction cannot be issued against the Government. Coming to the second Preliminary Objection, Mr. Kalenda contended that, the applicant is a dully registered Company as per 4 Chapter IV of the Companies Act No. 12 [CAP 212 R: E 2002], thus under the provision of section 147 provides that, " Anything that company does must be sanctioned by resolution in writing signed by or on behalf of all members of the company save for the resolutions on matters expressly stated under section 193 (1) and section 170 (7) of the Act. He fortified it by referring to the cases of New Life Hardware Company td & Manwaly Investment Limited vs Shandong Locheng Export Co Ltd & 2 Others, Commercial Case No 86 of 2022, High Court of Tanzania at Mwanza, (Unreported), Boimanda Modern Construction Co Ltd Vs Tenende Mwakagile & 6 Others, Land case No 8 of 2022 HC at Iringa (Unreported) which insists on the importance of the board resolution of the company for a case to be instituted. Similarly, he also cited the case of Simba Papers Converters Limited Vs Packaging Stationery Manufacturers Limited & Dr Steve K. Mworio, Civil Appeal No 280 of 2017, Dar es Salaam (Unreported) where it was held: 5 "..... it was not proper to 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 bee struck out" Again Mr. Kalenda added that at Page 21 the court cemented that "whoever wishes to institute a similar suit on behalf of the company is at liberty to do so subject to obtaining the authority of the company" He also invited this court to crave the

case of Kishegena Transport Ltd Versus Azania Bank Limited & others, Civil Case No 02 of 2023, HC at Shinyanga on Pg 15, to insist his contention. So, he concluded that, since the applicant did not comply with above provisions of the law as it is mandatory requirement, then the matter is incompetent and ought to be struck out with costs. On his reply, the counsel for the applicant Mr. Tuli on the 1st Preliminary objection submitted by referring this court to the provisions of Order XXXVII Rule 1 of The Civil Procedure Code Cap 33 R: E 2019; “..... but the court may in lieu thereof make an order declaratory of the right of the parties”. 6 From the above quotation, he contended that, those words technically employ the same effect as the court has been declaring the government to be restrained to act on actions which might be prejudicial to the applicants’ interest and rights when not restrained. He further cemented his arguments by referring this court to the case of Registered Trustees of the Moravian Church in Southern Tanzania Versus Dar es Salaam City Council and two others, Misc. Land Application No. 09 of 2021 HCT at Dar es Salaam where it was declared that; “..... I allow the application and subsequently declare that the allocation / registration of the suit premise to other person will be prejudicial to the applicant’s interest /rights which await to be finally determined by this court in land case no 09 of 2021. Accordingly, the respondents are restrained from issuing offers /registering the plots in names of other persons pending determination of the main suit.....” Mr. Tuli therefore concluded that the preliminary objection is unfounded, this court is not under restrictions to issue interim order to 7 restrain the respondents from acts which at last may cause miscarriage of justice pending the hearing and determination of the main case. On the second ground of objection Mr. Tuli submitted it by referring this court to the case of St Benard’s Hospital Company Limited Vs Dr. Linus Maemba Mlula Chuwa, HCT Commercial case No 57 of 2004 (Unreported) at Dar es Salaam, cited in Simba Papers Converters Limited Vs Packaging Stationery Manufacturers Limited & Dr Steve K. Mworio, (supra), whereby the court declared the suit to be incompetent as was not sanctioned by lack of a company’s Board resolution. He insisted that it is only Board resolution required if the case filed emanates from either internal regulation or the conflict between directors, shareholders or any other concern itself whereby in this case the court is obliged to deal with it. Further to that, he backed his argument by referring this Court to the case of Ecobank Tanzania Limited Versus East African Fossils Co. Ltd, Commercial Case No. 38 of 2022 HCT, Commercial Division at Pg 29-30, the court commented on the provision of section 17 of the Companies Act (supra) that, “Whether section 147 of the companies Act makes it mandatory to plead and attach board resolution? I do not 8 have to be labour on this point. The court has treated it extensively in Sharif Shipping’s case. It is apparent that, that section does not make it requirement that for a company to institute case there must be a board resolution” Moreover, Mr. Tuli submitted that, the court ruled that (Ecobank Tanzania-supra); “It is interesting to note that the Bugerere’s case dealt with a 29 fraud in the company itself where an action in the name of the company was brought challenging the appointment of new directors. That is where resolution required on institution of case” Again he said that, at Pg 32 the court held that, “ this does not by extension mean that the CAT ruled that had the respondent sued or instituted the suit in the trial court then the board resolution would have

been necessary in every case, that will amount to putting words to the CAT which it never articulated. In the case at hand, it is the company itself that instituted the case against the defendants and there is neither plaintiff's member nor director who come for 9 complaining that there was no board resolution sanctioning the suit" Meanwhile, Mr. Tuli maintained that, a company cannot deprive its locus stand to sue merely because there was no board resolution save for the limited circumstances. He referred this court to the case of Boimanda Modern construction Co. Ltd Versus Tenende Mwakagile and Others, Land Case No. 08 of 2022 HCT at Mwanza (unreported) and Simba Papers Convertes Limited vs Packaging and Stationary Manufacturers Limited and Another, Civil Appeal No. 280 of 2017 which have to be distinguished on instant application since the dispute emanates from Credit Facility Agreement. Thus, Mr. Tuli concluded that, the raised preliminary objection is of less strength and should be overruled and be disallowed potentially. This court after read over the submission from both sides on the raised preliminary objection and the issue for consideration is whether the preliminary objection has merit. This court on starting with the first ground of objection that; The Application is untenable in law for contravention with the Proviso to Order XXXVII Rule 1 of The Civil Procedure Code Cap 10 33 R: E 2019, which provides that, an order granting temporal injunction cannot be made against the government. I wish to reiterate the preferred order; "1. Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit of or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or
- (b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders: Provided that, an order granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties." [Emphasis added]. 11 From the above provisions, this court is in line with the counsel for the respondent that an order for temporary injunction cannot be made against the Government rather a declaratory order. I am blessed with the holding of Mr Kalenda when cited the case of: Mwanza City Council Versus Alfred Wambura, Civil Revision No. 01 of 2022, where the Court ruled that' "On another complaint of issuing the temporary injunction against the Government, I think this issue should not detain me much because the provision of Order XXXVII Rule (1) and (2) is very clear that the order of the temporary injunction cannot be issued against the Government. The amendment brought by section 26 of the Written Laws (Miscellaneous Amendments) Act, 2020 that amends section 16 of the Government Proceedings Act, Cap. 5 R.E 2019 define the word Government shall include a local Government authority. " This is guided with the above principle and I must therefore hold without hesitation that a party cannot seek for temporary injunction against the

Government other than a declaratory order. This court is therefore blessed with the precedents cited by Mr. Tuli on account for 12 grant of an order of injunction, but sorry to say they are misplaced since the matter had been preliminary determined without going to the merit. With the second preliminary objection that this application is incompetent for being filled without any authorization by the Board Resolution of the Applicant's Company which is contrary to the requirement of the Law and the recent precedents of this court and the Court of Appeal. The counsel for the respondent cited numerous cases including the cases of Simba Papers Converters Limited Vs Packaging Stationery Manufacturers Limited & Dr Steve K. Mworio, Civil Appeal No 280 of 2017, Dar es Salaam (Unreported), New Life Hardware Company td & Manwaly Investment Limited vs Shandong Locheng Export Co Ltd & 2 Others, Commercial Case No 86 of 2022, High Court of Tanzania at Mwanza , (Unreported), at Pg 11 and 12, 15 and 16 and the case of Boimanda Modern Construction Co Ltd Vs Tenende Mwakagile & 6 Others, Land case No 8 of 2022 HC at Iringa (Unreported) which the Court held that there must be aboard Resolution approving or authorizing the commencement of legal proceedings by Companies. This court is aware that there are several conflicting decisions that have come up with two school of thought that it is mandatory to have 13 board resolution while others are saying it is not mandatory as suggested by the applicant's counsel while citing different cases which supports his allegation. In my view it is the principal of law that, the law requires the company to make Board resolution before the commencement of the suit. It is also the position of the law that, a company is a legal person (with corporate personality) independent from its members or shareholders as well as its subscribers. The position was highlighted in Solomon Vs. Solomon and Company (1879) AC 22. This means that being a legal person the company affairs are entrusted to its directors who perform all company's activities on behalf of all share holders. In other words, the company being a legal person acts only through a resolution and the power of the company can be given only by the company resolving to sue through a board resolution. The legal issue to be determined, is whether, it is compulsory for the company to get an authority from the board of directors through board resolution before filling a suit? As submitted by the counsel for the respondents, Section 147 of the Company Act Cap 212 R.E 2019 that;

- (1) Anything which in the case of a company may be done –
 - (a) by resolution of the company in general meeting, or 14
 - (b) by resolution of a meeting of any class of members of the company This provision evidently suggests that failure to comply with it renders the act so done by the Company to have no legal effect, hence, unenforceable, the reasons for, it is because the company is a legal person being operated and managed by the natural person who for the interest of the company operates by way of the meetings and resolutions and therefore in case of any matter regarding the interest of the company including institution of cases the Board's Resolution may come into agreement through minutes. In Ursino Palms Estate Limited vs. Kyela Valley Foods Limited & Others, Civil Application No. 28 of 2014, CAT at Dar es Salaam,

(unreported) where the Court observed that when companies authorize the commencement of legal proceedings a board's resolution or resolutions have to be passed. Also, In the Bugerere Coffee Growers (SUPRA) the court stated that; "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" 15 It went further highlighting the reasons for the importance of the resolution among others to show the company still exists and decision has been reached with its constitution or articles of association and therefore legally binding to shareholders who may without their knowledge be subjected to pay huge costs. Again, it is in the case of St Benard's Hospital Company Limited Vs DR. Linus Mlula Chuwa, commercial case No 57 of 2004 (Unreported) while cited in Simba Papers Convertes Limited Vs Packaging Stationery Manufacturers Limited & Dr Steve K. Mworira, (SUPRA) Kalegeya J said that: "Having carefully considered the matter, I have reached a settled conclusion that, indeed the pleadings (plaint) should expressly reflect that there is a resolution authorizing the filing of an action. A company which does not do so in its pleadings, risks itself to the dangers of being faced by any insurmountable preliminary objection as is the one at hand. I should hurriedly add however that in my view there solution should be of a general nature, (Emphasis is mine) that is, it is not necessary that a particular firm or person be specifically to do the task. It suffices if there solution empowers the company management to take the necessary action. I am making this insistence because from the wording in Bugerere case one may be led to believe that there solution should point out a particular person or firm." With the above reflects, the pleadings should show that there was a meeting with the Board of Directors authorizing the filing of the suit on behalf of the company not necessary a particular person is appointed to take the needed action but general permission which shows that this matter has been discussed by the management to file since a person cannot decide for the Company. Unfortunately, as per the applicant's pleadings there is no single paragraph that suggests that there is any sign of Board resolution to be relied upon nor a meeting giving that general permission to institute the matter as pointed out by the respondent's counsel. Basing on the above observations, principally a Company is a legal person with its management filing a suit without its authority is incompetent, therefore, I agree entirely with the counsel for the respondents that a Company's Board Resolution is mandatory, in the event non-compliance to it renders the suit filed incompetent. 17 From the above analysis, I must therefore conclude that, the preliminary objections raised by the respondent counsel has founded with merit, and therefore the matter is struck out. In regard with circumstances of this case, No order as to costs. DATED at SHINYANGA this 29th day of April, 2024. R. B Massam JUDGE 29/04/2024 18

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