

TANZANIA / JUDGMENT

final MALEKO HARDWARE ENTERPRISES TANZ

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2 April 2025

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA THE SUB-REGISTRY OF MOSHI AT
MOSHI CIVIL CASE NO. 22743 OF 2024 MALEKO HARDWARE ENTERPRISES CO.
LTD:.....PLAINTIFF VERSUS TANZANIA BUILDING AGENCY KILIMANJARO
REGION:.....1ST DEFENDANT PERMANENT SECRETARY, MINISTRY
OF WORK TRANSPORT & COMMUNICATION:.....2ND DEFENDANT THE
ATTORNEY GENERAL:3RD DEFENDANT

RULING

12th February & 2nd April, 2025. A.P. KILIMI, J.: The plaintiff herein has sued Defendants jointly and severally praying for judgment and decree against them. The plaintiff prays for the following Orders;

1. Declarations order that, 1st Defendant breached the building materials supply agreement she had with the plaintiff for not paying the building materials enjoyed from the Plaintiff.
2. An order for the payment of Tshs. 131,097,250/= say One Hundred Thirty –one million, ninety-seven thousand and Two Hundred and fifty shillings, being the costs for the building materials which the plaintiff had supplied to the 1st Defendant upon her request.
3. General Damages to be assessed by this Court 1
4. An order for payment of interest at the rate of 25% per annum from the June 2020 to the date of judgment and thereafter at the rate of 12% per annum from the date of Judgment till the date of full payment for the above prayers.
5. For costs of this suit and
6. Any other relief(s) this Honourable Court may deem fit and just to grant. Before the suit proceeded on merit, the defendants herein jointly filed a written statement of their defence denying the allegation and in alternative to that they filed a Notice to the Preliminary Point of Law ‘hereinafter the PO’ on the following;

1. That this suit was prematurely brought before this honourable Court without complying with the requirement of 90 days to the 1st, 2nd and 3rd Defendants contrary to section 6(2) and (3) of the Government Proceedings Act [Cap. 5 R.E 2019] as amended by the Written Law (Miscellaneous Amendment) Act No.1 of 2020
2. That, the Mandatory Ninety (90) Days' Notice is incompetent for lacking the plaintiff's sanction to sue. When the above objection was scheduled before me for hearing, Mr. Raphael J. Mtalima Senior State Attorney appeared for all Defendants whereas the plaintiff enjoyed the service of Mr. Gwakisa Sambo learned advocate. represented the plaintiff. With the leave of the court, it was agreed by the parties to be disposed by way of written submissions. 2 Arguing in support of the raised PO, Mr. Mtalima submitted that the suit was prematurely brought before this court without complying with the requirement of 90 days' notice to sue the 1st, 2nd and 3rd defendants. He said that this was contrary to section 6(2) and (3) of the Government Proceedings Act Cap 5 R.E 2019 as amended by the Written Law (Miscellaneous Amendment) Act No 1of 2020. He argued further that since the plaintiff was a Private Company limited by shares and operates as per the Companies Act No 12 of 2002 Cap. 212 RE 2019, as per section 147 of the Companies Act all of the affairs of the Company are entrusted in the hands of Board of Directors to perform the companies work on behalf of the shareholders. Mr Mtalima was of the view that among the actions of the board of Directors is to pass resolutions ordinary and special resolutions. He said that their functions include authorization in commencement of legal proceedings as it was decided in the case of Bugerere Coffee Growers Limited vs. Sebadduka and Another (1970) E.A 147 where a resolution must be passed to authorize commencement of any legal proceedings. 3 Mr. Mtalima also argued that although there were other school of thought on the requirement of a board resolution before commencement of any legal proceedings but it was under certain exceptions. He said that a company as a corporate body may be authorized to commence legal proceedings without sanction of the board of Directors but such authorization could only work through certain individuals who are also known as Directors, company secretaries, agents, authorized representatives or principal officers as it was expounded in the decision of Dangote Industries (T) Limited vs. Warnercom (T) Limited, Civil Application No. 266/16 of 2022 [2024] TZCA 166 (5 March 2024) at page 7. Mr. Mtalima was of the view that the plaintiff advocate was not among the people listed as per the above decision. He further expounded that the alleged 90's days' notice of intention to sue the defendants were served on 16th April 2024 without a board resolution to mandate the advocate to commence legal proceedings against the defendants. Mr. Mtalima added that the plaintiff served the defendants a plaint accompanied with the Board resolution dated 12th August 2024 after lapse of almost four months of the said mandatory notice. Thus, he opined that, since commencement of any civil proceedings against the defendants must be preceded with the said notice and since it was a statutory 4 requirement for a board of directors allowing commencement of legal proceedings, then a served 90 days' notice without the board of directors' blessings meant the suit was instituted without adhering the issuance of 90 days' notice. He supported his assertion by referring section 147 of the Companies Act Cap 112

and the case Pita Kempap ltd vs. Mohamed I.A Abdulhussein, Civil Application No. 128 of 2004 cf No. 69 of 2005. Untiringly Mr. Mtalima added by referring the Interpretation of the Laws Act Cap 1 R.E 2019 section 53(2) which provides and explains the word 'shall' meaning a mandatory requirement. He was of the view that the requirement for 90 days' notice as per the quoted provision was coached in a mandatory form, thus the plaintiff ought to issue the said notice prior to commencement of any legal proceedings against the defendants. To support his assertion, the learned state attorney invited this court to consider the decision of Mashaka Abdallah (The Administrator of the Estate of the Late Mhoja Juma) & Another vs. Bariadi Town Council & 2 others, Land Case No. 03 of 2020, High Court at Shinyanga and Zuweni Idd Kasabe vs. Muhimbili National Hospital & Attorney General, Civil Case No. 26443 of 2023 DSM registry (Both unreported). Therefore, he 5 prayed this court to see that notice was void ab initio which causes this matter to be struck out with costs. Responding to the above arguments, Mr. Gwakisa Sambo learned advocate strongly argued that the raised POs were not pure point of law as they call in for evidence as they are geared at challenging the 90 days' notice that was to be made after the board of directors made resolution. He was of the view that the requirement of the said board resolution requires proof of evidence which disqualifies the PO raised to be a pure point of law. Mr Sambo supported his argument with the decision of Legal and Human Right Centre vs. The Minister for Finance and Planning and 2 others, Misc. Cause No. 11 of 2021 at page 15. And prayed the same be overruled for not meeting the test of pure point of law. Contending further, the learned counsel was of the view that the PO raised were baseless because no provision of the law on either written or decided decision that gave the legal requirement that before issuing a 90 days' notice, the company has to pass a resolution sanctioning issuance of the said notice. The learned counsel said that he has perused section 147(1-

- 5) of the Companies Act cap 212 RE 2002 which provides nothing as to the need of a board resolution prior to the issuance of the 90' days' notice. 6 On the other way round, Mr. Sambo argued that the 90 days' notice was issued to the defendants as per annexure M-8 at paragraph 20 of the plaint. He said that the said notice was duly served to the defendants and that the suit was lodged properly after expiry of the said 90 days' notice, thus it was properly filed within time. Mr. Sambo submitted that the defendants counsel failed to indicate which law and authorities prohibited the legal advocate and or the law firm to serve a 90 days' notice to the government on behalf of his client. He argued that even the referred section 6(2) and (3) of the Government Proceedings Act does not set a legal requirement that there has to be a pre-attached board resolution prior issuance of the said notice to the defendants. In respect to cases referred by Mr. Mtalima, Mr. Sambo contended that the r decisions of Dangote Industries (T) Limited (supra) and Bugerere Coffee Growers Limited (supra) were distinguishable and irrelevant with the case at hand. He said that the referred decision dealt with resolution authorizing the company to commence legal proceedings where the plaintiff in this met the said requirements. He maintained that in the filed 7 plaint, the board resolution allowing the learned counsel to commence legal proceedings were pleaded at para 25 of the plaint as annexed as M-09. In conclusion Mr. Sambo was of

the view that commencement of legal proceedings which requires resolutions of the Board of Directors are only when there is conflicts within Directors or shareholders that is to say within the company and not only when the company is commencing the proceedings against the 3rd party like in the case at hand. He supported his view with the decisions of the Court of appeal in Simba Papers Converts Limited vs. Packaging and Statutory Manufacturing Limited and Another, Civil Appeal No. 280 of 2017 at page 18 and the case of Humprey Construction Limited vs. NMB Bank PLC, Civil Case No. 98 of 2023. In the end the learned counsel prayed for the dismissal of the raised PO with costs. Having considered the parties submissions, I see the raised PO's intertwined and the same can be condensed into one concern focused on the complaints that the served 90 days' notice to the defendants were prematurely issued prior of the authorization of Board of Directors of the plaintiff on commencement of legal proceedings against the defendants therefore it was like no notice were served to the defendants contrary to the 8 provisions of section 6(2) and (3) of the Government Proceedings Act which is coached in a mandatory form. Thus, the issue before me is whether the raised PO's can be sustained or overruled. I have considered the argument of both parties, the defendants learned state Attorney is not disputing that the 90 days' notice to sue the defendants was not served to the defendants on 14.4.2024 as per the plaint filed and annexed as M-8, what is disputing is that the said notice were served prior to authorization of plaintiff's board of directors' resolution on the commencement of the legal proceedings against the defendants. It is true, a company under the Companies Act [Cap 212 R.E 2002] is considered as a separate legal entity with capacity to sue and be sued, (see the decision of Salomon vs. A Salomon & Co Ltd AC 22). Under the companies Act (supra), the decision of the board of the directors are considered to be the decision of the whole company. Section 147 of the companies Act from which the requirement for Board Resolution is derived provides that; "147. (1) Anything which in the case of a company may be done—

- (a) by resolution of the company in general meeting; or
- (b) N/A
- (2) N/A
- (3) N/A.
- (4) A resolution agreed to in accordance with this section has effect as if passed—
 - (a) by the company in general meeting; or
 - (b) by a meeting of the relevant class of members of the company, as the case may be; and any reference in any enactment to a meeting at which a resolution is passed or to members voting in favour of a resolution shall be construed accordingly.
- (5) N/A." [Emphasis supplied] From the above provision anything to be done by the company has to be by resolution. This means that a board resolution is a mandatory requirement for institution of suits in the name of the company. See the decisions of Simba papers

Converters Ltd (supra) and Bugerere Coffee Growers (supra). Now back to the matter at hand, despite of the above authorities each case has to be decided according to its circumstances, in this case the filing of the plaint as not disputed above complied with the law and annexed the said Board resolution, the issue remained in dispute is whether the issuance of a notice to the defendants requires board resolution. According to the provision of section 6(2) and (3) of the Government Proceedings Act provides that; “6.- (2) No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney-General and the Solicitor General.

- (3) All suits against the Government shall, after the expiry of the notice be brought against the Attorney-General, and a copy of the plaint shall be served upon the Solicitor General, Government Ministry, Department or Officer that is alleged to have committed the civil wrong on which the civil suit is based.” [Emphasis supplied] 11 From the provision, I have asked myself what was the intention of the legislature for any person suing against the government institutions to comply with the said mandatory notice. In my interpretation the intention was to enable government bodies to know the claim against them in order to prepare for defence or to mitigate/ascertain the claim if at all is true. Second the wording above is clear and unambiguous, thus when interpreted literally, section 6 (2) says what is sent as notice to the Government is a claim whereas section 6 (3) restricts after expiry of the said notice then a plaint be filed in court and must be served to the Attorney General and its agencies. In my settled view of the above wordings, two limbs appear, first serving a notice of claim and second filing the suit and serving of the plaint. Now the next point to be considered is when the suit is instituted under the above legal position. According to Order IV rule 1(1) of Civil procedure Act Chapter 33 of the laws, provides that every suit shall be instituted by presenting a plaint electronically or manually to the court or such officer appointed in that behalf. Suffice to say this is the replica of section 22 of the same Act. 12 According to the above law and my interpretation above endeavors, it is my considered opinion that the suit is not initiated by the said 90 days’ notice or claim served to the defendants rather when the plaint is filed in the court of law as provided above. This shows that the claim filed to the defendants is not like a notice filed in court, a notice filed in court may be instituting the proceeding unlike a notice of claim stated above which is not mandatory be filed in the court as no provision provide for that compliance. Thus, what is needed in law is for the plaintiff to prove that the said notice of 90 days was served to the defendant. In view of the above, since the institution of the suit in this court was complied with as it was not disputed by Defendants’ counsel, I am satisfied this matter was instituted according to the law. Now, the next question arises is whether the said legal notice was duly served to the defendants. I am mindful the issue of notice and proof of service as provided under section 6 (2) of the Government Proceeding Act is a question of law touching the jurisdiction of this court in dealing with suits against the government. 13 As alluded above,

in their argument above it was not disputed that the defendants received the notice but what is disputed is that, the same was served before the plaintiff's board sanctioned the law firm served the said notice to do so. In my view as rightly argued by Mr. Sambo there is no law which requires the said notice to be mandatorily served with proof of Board resolution. I accept the contention that serving of the 90 days' notice to the defendants is mandatory procedure which ousts the jurisdiction of this court, but as alluded above the same does not amount to institution of the suit in the court of law. I also constrained to agree with the arguments of Mr. Sambo in respect to the cases referred by the learned State Attorney, (Bariadi Town Council & 2 others (supra) and Muhimbili National Hospital & Attorney General (supra), the facts on these cases proved that the defendants were not served with the said statutory 90 days' notice, unlike in this matter where the same was served and acknowledged as depicted above but only lacked evidence of the Plaintiff's Board resolution. In the premises, all cited cases by the Defendants' counsel are distinguishable and they cannot salvage his plight. Thus, since defendants acknowledge they received the said notice, I am settled that the law was complied with. 14 Be that as it may, it is also my take that, the issue on whether the said law firm served the said notice to the defendants under the authority of the Plaintiff's board resolution or not, as correctly pointed by Mr. Sambo remained to be the issue to be ascertained by evidence and not otherwise, thus in my view does not qualify to be a pure point of law. (See Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1960] EA 701). Nonetheless, since the defendants do not dispute to receive of the said notice 90 days before the case was instituted formally in this court, in my considered opinion under the said circumstances, even if there was an omission to observe a particular procedure existed if any, the same occasioned no injustice to any party in this matter since the intention of the law as discussed above was met. Therefore, it cannot be said the said omission met the threshold of occasioning a miscarriage of justice to hinder this court to proceed its core function of dispensing substantive justice. On the whole, on account of what I have endeavoured to discuss hereinabove, I find the two preliminary objections raised by defendants devoid of merit and are accordingly overruled. In the circumstances I make no order as to costs. It is so ordered. DATED at MOSHI this 2nd day of April, 2025. X JUDGE Signed by: A. P. KILIMI Court; Ruling delivered this 2nd day of April, 2025 in the presence of Mr. Patrick Paul holding brief of Mr. Gwakisa Sambo for Plaintiff, and Mr. Raphael Mtalima Senior State Attorney for Respondents. Sgd; A. P. KILIMI JUDGE 2/04/2025 16

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