

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPEAL NO. 264 OF 2018**

**(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)**

**SIMBA MOTORS (T) LIMITED.....APPELLANT**

**VERSUS**

**TANZANIA AUTOMOBILE MANUFACTURING CO. LTD.....1<sup>ST</sup> RESPONDENT**

**SWEYA AUCTION MART & COURT BROKERS LTD .....2<sup>ND</sup> RESPONDENT**

**[Appeal from the decision of the High Court of Tanzania at Dar es Salaam]**

**(Kalegeya, J.)**

**dated the 16<sup>th</sup> day of August, 2004**

**in**

**Civil Case No. 441 of 2001**

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**RULING OF THE COURT**

*26<sup>th</sup> September & 3<sup>rd</sup> October, 2022*

**MWAMPASHI, J.A.:**

In the instant appeal, the appellant, Simba Motors (T) Limited is appealing against the decision of the High Court of Tanzania at Dar es Salaam in Civil Case No. 441 of 2001. In that case, the appellant's suit against the respondents, Tanzania Automobile Manufacturing Co. Ltd and Sweya Auction Mart & Court Brokers, hereinafter referred to as TAMCO and 2<sup>nd</sup> respondent, respectively, was dismissed while the counter claim raised by TAMCO against the appellant was allowed.

Briefly, the facts from which the suit before the High Court arose hence the instant appeal, are as follows: On 15.09.1993, the appellant and TAMCO entered into an agreement for local sale agency whereby

the former as an agent of the latter, received and sold on behalf of TAMCO on commission basis, 40 TATA trucks which had been imported by the latter. The duration of the agreement was three years. However, by 2001 and according to TAMCO, TZS. 225,740,000/= was still outstanding and not yet paid by the appellant. Consequently, TAMCO engaged the 2<sup>nd</sup> respondent, as its debt collection agent for collecting the said outstanding amount from the appellant. In that process, the 2<sup>nd</sup> respondent, among other things, issued a demand notice and pressed for payment of the said balance by the appellant.

The 2<sup>nd</sup> respondent's pressure on the appellant, prompted the appellant to protest by instituting in the High Court Civil Case No. 441 of 2001 against the respondents, praying for, among other things, a declaration that the appellant was not indebted to TAMCO to the tune of TZS. 225,740,000/= and for a perpetual injunction restraining the respondents from threatening it with notices for disposal of its properties. In its written statement of defence, apart from resisting the appellant's claims, TAMCO raised a counter claim against the appellant claiming for, among others, payment of TZS. 225,740,000/=.

Having heard evidence from the parties, the High Court dismissed the appellant's suit with costs and as we have alluded to above, it allowed the 1<sup>st</sup> respondent's counter claim against the appellant to the

tune of TZS. 194,340,000/= plus 10% interest per annum on the decretal sum from 1998 to the date of judgement and also 7% interest per annum on the decretal sum from the date of judgment till payment in full.

Aggrieved, the appellant has filed the instant appeal raising a total of four grounds which, we however, for the reason that will be apparent shortly, shall not reproduce herein.

When the appeal was called on for hearing, the appellant was represented by Mr. Richard Rweyongeza, learned counsel, whereas TAMCO had the services of Ms. Mercy Kyamba, Ms. Happiness Nyabunya, both learned Principal State Attorneys and Mr. Boaz Msoffe, learned State Attorney. The 2<sup>nd</sup> respondent did not enter appearance, however, at the instance of Mr. Rweyongeza, the appeal against it was marked withdrawn by the Court in terms of rule 102(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Before the hearing could be commenced, we wanted to satisfy ourselves on the competence of the appeal before us, particularly on whether the High Court had jurisdiction to try, not only the appellant's suit against TAMCO but also the counter claim raised by TAMCO against the appellant. Our query was based on the fact that at the time of the institution of the case in 2001, TAMCO was already a specified Public

Corporation by virtue of GN. No. 33 of 1997 (the Order) which was published on 24.01.1997.

Mr. Rweyongeza was the first to respond to our above probing question. He briefly argued that since by the time the suit was being instituted by the appellant in the High Court, TAMCO was already one of the specified Public Corporations under the Public Corporation Act, 1992, then, under the Bankruptcy Act, leave ought to have been sought and obtained before the institution of the suit. Mr. Rweyongeza further submitted that as leave was not sought and obtained, the High Court had no jurisdiction to entertain the suit. For that reason, he urged the Court to nullify the High Court proceedings and quash the judgment. He also prayed for the resulting appeal to be struck out for being incompetent with no order as to costs.

On her part, Ms. Kyamba readily agreed with Mr. Rweyongeza that since TAMCO was a specified Public Corporation, in the absence of the requisite leave of the High Court, TAMCO was wrongly sued as it had as well, no capacity to raise the counter claim against the appellant. She further argued that the proceedings before the High Court were therefore illegal as it was for its judgment. That being the case, she urged the Court to nullify the proceedings before the High Court and strike out the appeal.

The only and simple issue for our determination is whether or not, the High Court had jurisdiction to entertain the suit in which one of the parties and particularly, TAMCO, was a specified Public Corporation.

To begin with, it is common ground that Civil Case No. 441 of 2001 by the appellant, was instituted in the High Court on 24.12.2001. By then, TAMCO had already been declared a specific Public Corporation in terms of the Public Corporation (Specified Corporations Declaration) Order 1997, GN No. 33 of 1997 dated 24.01.1997. It is also clear that under paragraph 2 of the Order, the provisions of the Public Corporation Act, 1992, became applicable to TAMCO from the date of commencement of the Order. The relevant provision in the Public Corporation Act, in as far as the instant case is concerned, is section 43 (1) (a) and (b) under which it is stipulated that:

*"43 (1)Notwithstanding any other law to the contrary, with effect from the date of publication of an Order declaring a public corporation to be a specified public corporation, the Commission shall-*

*(a)Without further assurance on appointment, have the power **to act as the official receiver of the specified public corporation**; and*

*(b)Have the power and all the rights of a receiver appointed in accordance with or pursuant to the Bankruptcy Act”.*

[Emphasis supplied]

It should be made clear at this very point, that according to section 2 of the Public Corporation Act, ‘the Commission” referred to in the above reproduced provision, is the Presidential Parastatal Sector Reform Commission (PSRC) established by section 21 of the Act. We are aware that the functions of PSRC were taken over by the Loan Adjustment Realisation Trust (LART) then the Consolidated Holding Corporation and finally by the Treasury Registrar.

It is therefore clear that, pursuant to section 43 (1) (a) and (b) of the Public Corporation Act, 1992 as amended by Act No. 16/1993, the PSRC became the official receiver of TAMCO and thus the provisions of the Bankruptcy Act became applicable. This takes us to section 9 (1) of the Bankruptcy Act, [Cap. 25 R.E. 2002 now R.E. 2019] which makes it mandatory for leave to be sought and obtained first before a specified public corporation can sue or be sued. It is provided under that provision that:

*" 9-(1) on the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and*

*thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose”.*

[Emphasis supplied]

From the above provisions, the law is therefore that, all suits against or by specified public corporations, are regarded as bankruptcy matters and according to section 97 of the Bankruptcy Act, such matters must be adjudicated by the High Court after leave has firstly been sought and obtained as per section 9 (1) of the Bankruptcy Act.

Fortunately, the issue on how suits against or by specified public corporations ought to proceed and particularly the application of the Bankruptcy Act, the appointment of official receivers and the requirement of leave, has already been dealt with by the Court. Thus, we are not treading into a virgin forest. In the decision of the Court in **Mathias Eusebi Soka v. The Registered Trustees of Mama Clementina Foundation and Others**, Civil Appeal No. 40 of 2001 (unreported) it was observed, among other things, that:

*"We have no doubts at all that the unambiguous words of section 43 of the Act are that once a corporation has been declared a specified corporation the PSRC becomes its official receiver and the provisions of the Bankruptcy Act are engaged".*

Further, in **Abubakar S. Marwilo and 172 Others v. National Insurance Corporation and 2 Others**, Civil Appeal No. 13 of 2019 (unreported) the Court stated that:

*"... it is clear that the section 9 (1) of the BA imposes the requirement of the leave of the court on any "creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy." The terms "creditor" and "debtor" are not defined under the BA, but insofar as the latter term is concerned, it poses no difficulty. It is a term of art in bankruptcy used to mean a person or entity subject to bankruptcy proceedings owing obligations to settle debts and liabilities".*

Again, in **Mwananchi Engineering and Contracting Co. Ltd v. Ahmed Mbaraka**, Civil Appeal No. 96 of 2016 (unreported) it was observed by the Court that:

*"...we agree with the learned counsel for the appellant that at the time the suit was instituted the appellant was a specified corporation. The*



*respondent was therefore obliged to seek and be granted leave to sue before the suit was instituted. That position was succinctly stated by the Court in the case of **Said Mhimbo and Others vs. State Travel Services Ltd** (supra) which was rightly cited by the appellant's counsel. That position was restated by the Court in the case of **Mathias Eusebi Soka (As personal representative of the late Eusebi M. Soka) and the Registered Trustees of Mama Clementina Foundation and Two Others** (supra)...".*

In the light of the above, we join hands with the learned counsel for the parties that since at the time of institution of the suit TAMCO had already been declared a specified public corporation, then the appellant ought to have sought and obtained leave first before instituting the suit. Likewise, TAMCO had no locus to raise the counter claim against the appellant without involving its receiver, that is, PSRC (now the Treasury Registrar).

As no leave of the court was sought and obtained before Civil Case No. 441 of 2001 was instituted, the High Court had no jurisdiction to entertain the suit. That being the case, we invoke our revisionary powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, nullify the relevant proceedings and quash the resulting

judgment. We also direct that any party who wishes to commence legal proceedings against the other should do so in accordance with the law. Owing to the circumstances of this matter, we make no order as to costs.

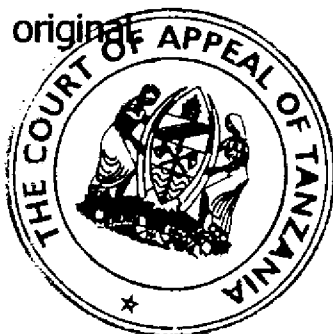
**DATED at DAR ES SALAAM this 29<sup>th</sup> day of September, 2022.**


S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Ruling delivered this 3<sup>rd</sup> day of October, 2022 in the presence of Ms. Jackline Rweyongeza, learned counsel for the Appellant and Mr. Boaz Msoffe, learned State Attorney for the 1<sup>st</sup> Respondent and in the absence of the 2<sup>nd</sup> Respondent, is hereby certified as a true copy of the original



  
S. P. MWAISEJE  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**