IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., ORIYO, J.A., And MMILLA, J.A.)

CIVIL APPEAL NO. 48 OF 2014

GODFREY HOSEA AYO.....APPELLANT

VERSUS

1. **CHRISTOPHER MICHAEL GEE**
2. **M/S TRANSIT CO. LTD.**
3. **REGISTRAR OF COMPANIES** .....**RESPONDENTS**

(Appeal from the Ruling and Order of the High Court of Tanzania at Arusha)

(Sambo, J.)

Dated the 5th day of June, 2012
in
Misc. Civil Cause No. 11 of 2010

JUDGMENT OF THE COURT

18th & 24th September, 2014

ORIYO, J.A.:

Initially, the appellant instituted Miscellaneous Civil Cause No. 11 of 2010 before the High Court. The application which was brought under the provisions of sections 121 (1), (2), (3), (4) and 400 (6) of the Companies Act, No. 2 of 2002, sought two orders, namely:-

(i) That, the Honourable Court be pleased to issue an order **restoring** M/S AFRICA TRANSIT COMPANY LIMITED to the register of companies.

(ii) That, the Honourable Court be pleased to issue an order **rectifying** the register of members of M/S AFRICA TRANSIT COMPANY LIMITED to include the name of the applicant.

(iii) Any other relief.

(iv) Costs.

The application was supported by an affidavit of Godfrey Hosea Ayo, the applicant. The matter was lodged in the High Court on 5th November, 2010. A counter affidavit of the first respondent, Christopher Michael Gee, was duly filed on the 20th April, 2011, followed by that of the third respondent sworn by one of its officers, namely, Rehema Kitambi, on 4th July, 2011.

At the closure of the pleadings, the hearing was scheduled for the 9th of August, 2011, and on the same date, the first respondent lodged a NOTICE OF PRELIMINARY OBJECTION contending:-

> *"The applicant **lacks locus standi** to institute this Application."*

The preliminary objection which was argued by way of written submissions was found to be meritous and upheld by the trial High Court. Consequently, the application for orders was struck out with costs on 5/6/2012; hence the appeal before us, which is pegged on three grounds

of appeal, but we think that ground one (1) thereof canvasses the remaining two grounds.

Ground 1 of appeal states:-

> *"That the learned judge erred in law in deciding the issue of **locus standi** as a preliminary objection."*

When the matter came before us for hearing, Mr. Elvaison Maro, learned counsel appeared for the first respondent and Mr. John Materu, learned counsel appeared for the appellant. The Registrar of Companies, the third respondent in this appeal was absent, though duly served. By consent both counsel, we ordered the hearing of the appeal to proceed notwithstanding the absence of the third respondent, in terms of Rule 112 of the Court Rules, 2009.

Both counsel duly complied with the requirements of Rule 106 (1) and (8) of the Court Rules, by filing their respective written submissions.

Arguing in support of the appeal, Mr. Materu, learned counsel submitted that the trial High Court upheld the preliminary objection on two grounds. **One** in holding that the applicant was not a member of the second respondent company and therefore had no **locus standi** to apply

for the orders sought. **Two**, that since the second respondent company had been struck off the register of companies, there was no register of members in existence which could be rectified by the court order sought.

It was Mr. Materu's forceful submission that the issue of whether the applicant was or was not a member of the second respondent company was a contentious issue raised in the affidavit of Godfrey Hosea Ayo in support of the application. He further submitted that in such circumstances, the trial court ought to have realized that the issue before it was not fit to be decided upon as a mere point of preliminary objection. He asserted that the trial court should have proceded to look into the merits of the allegations by the applicant and the denials by the respondents, so as to arrive at a reasoned, fair, decision.

Regarding the other limb of the objection against the restoration of the second respondent company to the register of companies, in terms of section 400 (6) of the Companies Act, Cap 212, it was Mr. Materu's contention that the application had been made under two distinct provisions, namely, Section 121 (1) (a), (2), (3), (4) and Section 400 (6) of the Companies Act. However, it was observed by the learned counsel that in disposing of the second limb of the application, the trial High Court

wrongly relied on section 400 (6) only and ignored the existence of the other provision cited as section 121 (1) (a), (2), (3) and (4) of the Companies Act. The learned counsel further submission was to the effect that for the purposes of determining the **locus standi** of the applicant, in terms of section 24 (1) of the Companies Act, the subscribers to the memorandum of a company automatically become its members upon the company's registration. He concluded that the appellant was entitled as a member, under section 24 (1) of the Companies Act, to bring the action as he did.

On the time limit of ten (10) years prescribed within which a member, company or creditor who feels aggrieved by a company struck off the register, may apply for its restoration, the leaned counsel submitted that the application was timely because the second respondent company was struck off the register on 15/2/2002 while the application was filed in court on 5/11/2010 which was within the prescribed period of time.

On his part, in rebuttal, Mr. Maro, learned counsel, prefaced his submission with observations to the following effect. **One**, that counsel for the applicant did not raise the issue in the High Court that it was not proper to dispose the issue of **locus standi** as a preliminary matter. **Two**,

that in arguing the first ground of appeal, Mr. Materu merely stated the legal principles and cited case law, without testing those principles and the facts obtaining in the present case. **Three**, that the approach made by Mr. Materu, learned counsel, towards the entire decision of the High Court was not proper; the trial court having disposed the matter only on the basis of section 400 (6) of the Companies Act. He contended that, instead, counsel for the appellant belabored on the applicability of sections 121 and 24 (1) of the Companies Act, provisions which, the trial High Court did not rule upon, either way on the appellant's right to bring an action as a member of the company.

It occurs to us that the appellant's complaints revolve around the trial court's decision in treating, determining and sustaining the issue of the appellant's **locus standi** to institute the application in the High Court as a mere point of preliminary objection. In our consideration of the learned counsel rival arguments on this matter, we propose to begin with what in law is a preliminary objection.

Fortunately, there is a plethora of authorities on this. The law on preliminary objection as set down in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (1969)

EA 696 is yet to change, at least in our jurisdiction. A preliminary objection is raised on a pure point of law, on the assumption that the facts are not in dispute and no exercise of judicial discretion is involved.

LAW, J.A., put it thus at page 700:-

> *".....a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued, as a preliminary point may dispose of the suit."*

And at page 701, SIR CHARLES NEWBOLD stated:-

> *"A preliminary objection is in the nature of what used to be a demurrer.* ***It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***
>
> (Emphasis ours)

In the affidavital evidence of the applicant found in his Rejoinder to the counter affidavit of the first respondent, the applicant states in paragraphs 4 and 5 the following:-

"4. That the contents of paragraphs 7 and 8 of the counter affidavit are seriously disputed and .....I further state that the ***Board Resolution Annexture A-1 is a forged document which I never signed****.*

5.That paragraph 9 of the counter affidavit is denied. I never wrote a letter annexture A-2 to the counter affidavit and I put the first respondent to strict proof. of the allegation thereof."

These two paragraphs are loud and clear that the applicant is alleging fraud in the transfer of his share in the second respondent company to the wife of the first respondent. Similarly, regarding the letter allegedly written by the applicant to the Regional Revenue Officer, Arusha, with notice of the closure of the business of the second respondent company; was another incident of fraud played on the applicant.

We find these two pieces of evidence from the applicant as contained in his rejoinder in paragraphs 4 and 5 above, to be serious evidence upon oath on the criminal activities perpetuated within the operations of the second respondent company; namely in the transfer of the applicant's shares and in the closure of the business of the second respondent

company. In our view, we think that it was upon the trial court, upon receipt of the rejoinder, to stop everything else to inquire into and ascertain on the allegations of fraud or otherwise. That did not happen here and the court proceedings proceeded to finality on 5/6/2012 when the decision was delivered to parties. The court found the preliminary objections to have been meritous and consequently the application in Miscellaneous Civil Cause No. 11 of 2010 was struck off with costs.

The immediate issue arising from the decision of the High Court is whether the preliminary objections before it were based on pure points of law, and not based on facts to be ascertained, as per the definition of a preliminary objection by **Sir Charles Newbold** in **Mukisa Biscuit Manufacturing Co. Ltd,** (supra).

As to whether the appellant had the requisite **locus standi**, the learned trial judge said the following:-

> *".....I am satisfied that at the time when the 3rd respondent was struck out (sic) of the register of companies the company known as M/S AFRICA TRANSIT WORKSHOP COMPANY LIMITED, on the 15th day of February, 2002,* ***the applicant was not among the members. It follows to***

state here that under section 400 (6) of the Companies Act, No. 12 of 2002, he had no colour of right to bring an application in this honourable court for the restoration of that company into the register of companies. Once the prayer under (i) of the chamber summons had *(sic)* ***crumbled down, the prayer under item (ii) of the same becomes absolutely meaningless and can't be granted****..."*

Making reference to and relying on the English decision,

In the matter of the Petition of Michael John Morris and Jane Elizabeth Rush,

the learned judge stated:-

"In the like manner, M/S AFRICA TRANSIT WORKSHOP LIMITED or the second respondent was struck off the register on the 15th day of February 2002, and todate the same does not exist. It means its register of members which ought to be rectified is not available, hence this court cannot make any order for the rectification of the register of members of a company which has ceased to exist."

We have already alluded to the existence of unascertained matters within the preliminary points of objection raised by the first respondent. Paragraphs 4 and 5 of the Rejoinder to the counter affidavit of the first respondent make it quite obvious that the membership of the applicant in the second respondent company was contentious and should not have been part of a preliminary objection in the absence of the issue having been ascertained, whether the applicant was fraudulently deregistered as stated in paragraph 4 of his affidavit (supra) or not. The trial High Court should have proceeded to inquire into the membership status of the applicant so as to arrive at a just decision. The learned judge merely believed the allegations made by the respondent in his counteraffidavit at paragraph 7 thereof where it was stated:-

> *"7.....The first respondent states that, the Applicant ceased to be a shareholder in the second respondent company as from 25th day of May, 1998 by transferring his one share to Mrs. Indrowtie Gee via a Board Resolution duly executed."*

It is established trite law that a preliminary objection has to raise a point of law based on ascertained facts, (as per **Mukisa Biscuits**),

(supra). This Court has, consistently followed this approach in its decisions since then, including the case of **COTWO (T) OTTU UNION and Another vs Honourable Iddi Simba Minister of Industries and Trade and Others**, [2002] TLR 88; which was raised in similar circumstances as the case under consideration. This was an application by the applicants to restrain the first respondent from issuing business licences to private entities. The learned Attorney General raised a preliminary objection that the said objection had been overtaken by event in that the said licences had already been issued. In overruling the preliminary objection by the Attorney General, the Court held:-

> *"(i) A preliminary objection should raise a point of law which is based on* ***ascertained facts****, not on a fact which has not been ascertained and, if sustained, a* ***preliminary objection should be capable of disposing of the case****.*
>
> *(ii) The preliminary objection in this case is based on some facts which are not ascertained and, even if sustained, the objection cannot dispose of the matter; as* ***such it fails to meet the laid down tests for a preliminary objection****."*

In another decision of the Court, in the case of **Anthony Leornard Msanze and Another vs Juliana Elias Msanze and 2 Others**, Civil Appeal No. 76 of 2012 (unreported); the Court was seized with an issue which arose from similar circumstances; on:-

> *"Whether the trial court was correct to sustain a preliminary objection and dismiss Land Case No. 26 of 2010 for want of cause of action and* ***locus standi."***

In allowing the appeal, the Court made the following observation:-

> *"It seems to us that with the claim manifested in their Plaint that they are legal administrators of the estate of a deceased person, the* ***High Court should not have concluded at that preliminary stage without further evidence that the appellants had no cause of action and locus standi*** *in Land Case No. 26 of 2010."*
>
> (Emphasis ours).

See also the Court's decision in the case of **Sharifa Twahib Massala vs Thomas Mollel and Others**, Civil Appeal No. 67 of 2011 (unreported).

We have yet to be given sufficient cause to depart from this consistent approach in similar matters.

In conclusion, and for the reasons we have given, we allow the appeal by quashing and setting aside the judgment of the High Court delivered on 5/6/2012. We direct that the record be remitted to the High Court to be heard on merit before another Judge. The appellant shall have his costs.

DATED at **ARUSHA** this 23rd day of September, 2014.

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. K. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL