

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CIVIL APPLICATION NO. 9 OF 2021

(Originating from Civil Case No. 3 of 2021)

MOHAMEDALI SADRUDIN MOHAMEDALI.....APPLICANT

VERSUS

MAHAMOUD MWEMUSI CHOTIKUNGU.....1ST RESPONDENT

NDANDA SPRINGS LIMITED.....2ND RESPONDENT

RULING

5th Aug. & 19th Nov. 2021

DYANSOBERA, J.:

Mohamedali Sadrudin Mohamedali, has, by a plaint filed in court on 9th March, 2021, sued the two defendants namely, Mahmoud Mwemusi Chotikungu (1st defendant) and Ndanda Springs Limited (2nd defendant) craving for several reliefs. In tandem, the plaintiff has also filed two applications by way of Chamber Summonses supported by his respective affidavits. In the first application, that is Misc. Civil Application No. 9 of 2021, the plaintiff is seeking interim injunctive relief that this Honourable

Court be pleased to issue interim orders to the second respondent to stop operations pending hearing and determination of the main suit currently pending in this Honourable court. Prayed also are costs and any relief. The second application which is registered as Misc. Civil Application No. 19 of 2021 two main prayers. One, that this Honourable court be pleased to issue interim orders to the 1st respondent to return in suit premises the properties removed from the suit premises and maintain the status quo. Two, that this Honourable court be pleased to order the 1st respondent to allow the applicant to enter into the suit premises to remove his personal belongings pending hearing and determination of the main suit currently pending in this Hon. court.

On 27th day of April, 2021, the counsel for the respondents raised a preliminary objection that the affidavit is defective for containing prayers. The same Counsel, on 30th day of April, 2021 filed a notice of preliminary objections on the following grounds:-

1. The application is time barred
2. The application is irregular and incompetent for want of proper form

3. The prayers in the Chamber Summons are improper and misconceived.

Further, on 7th day of May, 2021, the 2nd respondent filed a notice of objections on points of law on the grounds that:-

1. The application is time barred
2. The application is irregular and incompetent for want of proper form
3. The prayers in the Chamber Summons are improper and misconceived
4. The affidavit in support of the application is defective for containing legal conclusions and prayers.

With these preliminary objections, this court is moved to strike out the affidavit with costs.

Arguing in support of the first limb of preliminary objection that the application filed by the applicant is incompetent for want of proper suit, Mr. Benitho Mandele, learned Advocate for the respondents, submitted that the applicant has founded the application under Order XXXVII of Civil Procedure Code and is seeking for temporary injunctions under Order XXXVII rule 1 whose basic requirement is a suit. It is the argument of the

learned Counsel for the respondents that before this court there is no suit but a mere plaint commenced by Civil Case No. 3 of 2021 and that the basis of both the main suit and this application is the dispute which relates to affairs and management of the 2nd respondent, Ndanda Springs Limited. Mr. Benitho believes that when matters relating to management and affairs are at issue the provisions of the Civil Procedure Code do not apply but the Companies Act, sections 233 and 73, in particular. He stressed that under these provisions the applicant's complaints were supposed to come to this court by way of a petition and not suit which means that all the prayers which have been made in the Chamber Summons and the plaint are supposed to be contained in the petition so that this court can make an interim or final order. Counsel for the respondents was of the view that both the application and the plaint are out of place. Reliance was put on the cases of **John O. Nyaronga v. Captain Ferdinando Ponti and 2 others**, Commercial Case No. 62 of 2009 (Mruma, J.) and **James Ibrahim Manule and another v. Oswald Masatu Mwizarura**, High Court Civil Revision No. 11 of 2016 on the authority that actions under the Companies Act are to be brought by way of petition and not plaint.

Submitting on the second limb of preliminary objection that the application is time barred, Mr. Mandele, relying on section 73 (2) of the Companies Act which requires the applicant's grievances resulting from Board resolution to be made within thirty days from the date of the complained of resolution, contended that the applicant has raised concern basing on the extra ordinary Board Resolution which was passed on 14th day of July, 2020 when the resolution was made. This complaint was brought in March, 2021, that is eight months from the date of resolution which means that the applicant's complaints are time barred.

On the third limb of preliminary objection, Counsel for the respondents is attacking the applicant's affidavit in support of the application. According to him, the affidavit is bad in law as it contains prayers contrary to the rules governing affidavits. He cited the case of **Uganda Commissioner of Prisons Ex parte Matovu** [1966] EA 520. He informed this court that the said decision was followed by his Lordship Rugazia, J. in Civil Revision No. 30 of 2009 between the **Director, Ilala Municipal Council and 2 others v. Sincon Environment Limited and another**. Elaborating on the this aspect, Mr. Mandele made reference to paragraphs 10, 11 and 12 of the applicant's affidavit. He explained that

para 10 the affidavit is containing legal conclusion by stating that the respondent's acts are malicious and fraudulent couched to frustrate the entire understanding. It is Counsel's arguments that those words are legal conclusions and it is upon the court to reach that conclusion.

With respect to paragraphs 11 and 12, Counsel is arguing that the applicant is moving the court to grant the application. These are, according to him, pure prayers and seriously offend the rules of affidavit. The offending is not minor but fundamental and serious. Counsel moves the court to dismiss the affidavit and the entire case.

On the last objection, which is that the plaint is bad in law for the reasons analyzed in the first limb of the preliminary objection, Mr. Mandele submitted that under the provision of S. 233 (1) of the Companies Act in that the creature which was to be brought in this court is the petition and not the plaint. With those points, this court was moved to dismiss the application with costs.

Responding to the preliminary objections, Mr. Martin Rwehumbiza, learned Advocate for the applicant combined the 1st and 4th limbs of preliminary objection and argued them together. He submitted that before this court, there is a proper suit commenced by a plaint vide Civil Case No.

3 of 2021. With regard to the provisions of section 233 of the Companies Act, he pointed out that word used is "may" which means not mandatory. He explained that sub-section (2) of the said Section says that this section shall apply to a person who is not a member of the company. According to Mr. Rwehumbiza, the plaintiff/applicant is a member as well a share holder of the company. He urged this court to find that the 1st and 4th limbs of the preliminary objection are misplaced and that the cited authorities do not apply in this case.

Respecting the argument that the suit is time barred after the resolution, learned Counsel for the applicant insisted that there is no need of resolution of the Board as the plaint is loud and clear as the main issue is not based on the resolution.

On the third limb of the preliminary objection, Mr. Rwehumbiza submitted that basing on the advent of the principle of the overriding objective brought about by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2018 which requires the court to deal with the cases justly and with regard to substantive justice, this preliminary objection should be overruled and the case be heard.

Rebutting the submission of the learned Counsel for the applicant, Mr. Mandele contended that the replying submissions are misleading and that Counsel for the applicant has misconceived the laws and authorities cited on part of the respondents.

As regards section 233 (1) of the Companies Act, Counsel for the respondents submitted that the application of this law is mandatory and that the words "may" only relates to the option of either to file a petition or not to do so. He expounded that if the plaintiff/ applicant elects to file a plaint, it must be by way of a petition and not a plaint and that this is very loud in the judgment of Honourable Mruma, J in the cited judgment at page 5. In his view, the word has nothing to do with the procedures to be followed in instituting a plaint. He was of the view that section 233 (2) of the Companies Act has been wrongly misinterpreted in that it includes a person who is not a member to the company but is a person to whom shares have been transmitted by operation of law. Mr. Mandele insisted that the plaintiff/applicant is a member of the company by subscription of shares and that sub-section (2) applies to a shareholder to whom the shares has been given by operation of the law.

Counsel for the respondents also submitted that the provisions do not exonerate the plaintiff/applicant from being responsible. He was emphatic that the paragraphs through in the plaint, the affidavit and the affidavit in reply all stem from the resolution.

On the overriding principle, Counsel for the respondents contended that the principle does not entitle the court to overlook the defects in the affidavit as that is not the essence of overriding principle. He said that the only available option is either to expunge those paragraphs from the record or allow the amendment but that if the latter option is preferred by the plaintiff/applicant, that will attract cost for the respondents but if the former is exercised by the court, then the remaining paragraphs will be a mere skeleton of the affidavit resulting to the whole application being struck out.

I have considered the preliminary objection by learned Counsel for the respondents and the rival submissions of the learned Counsel for the parties. A close look at the preliminary objection reveals that the 1st, 2nd and 4th limbs seem to question the competence of the suit filed by the applicant. According to Mr. Benitho Mandele, the issue is whether the applicant should have filed a petition and not the suit as is here. Going by his submission, reading between words the contents of the affidavit in chief, the affidavit in reply together with the plaint, the dispute in this court relates to affairs and management of the of the 2nd respondent, Ndanda Springs Ltd. He emphasizes that this is the basis of the application and the main suit. According to him, when matters relating to the management and affairs are at issue, the provisions of the Civil Procedure Code do not apply,

rather, it is the Companies Act and Sections 233 and 73, in particular and therefore, the applicant's complaints have to come to court by way of a petition and not suit, Mr. Benitho pressed. It is in that line of argument he cited the cases of **John O. Nyaronga v. Captain Ferdinando Ponti and 2 others (supra)**, and **James Ibrahim Manule and another v. Oswald Masatu Mwizarura (supra)**.

Regarding the second limb on time bar, Counsel for the respondents referred to the time the Board Resolution was made while in the 4th limb of preliminary objection, Mr. Mandele reiterates that under the provision of section 233 (1) of the Companies Act, the complaints by the applicant had to be by way of petition and not the plaint.

On my part, I am aware of the general principle that points of law, especially on jurisdiction and limitation may be raised at any time. This is the position taken by the Court in the case of **Anwar Z. Mohamed v. Said Selemani Masuka**, Civil Reference No. 18 of 1997. I am also not unaware of the condemnation by the Court of Appeal of both the Eastern Africa and of Tanzania on the practice of raising preliminary objections. The instances are found in the case of **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd** (1969) EA 696 which was

followed in **Shahid Abdul Hassanali, Kassam v. Nahed Mohamed Gulamali Kanji**, and Civil Application No. 42 of 1999 and **Citibank Tanzania Ltd v. Tanzania Telecommunications Co. Ltd & others**, Civil Application No. 64 of 2003.

For instance, in **Mukisa Biscuit Manufacturing Co. Ltd** (supra), Sir Charles Newbold, at page 701, made the following observation:-

“The second matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objections. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop”.

What has taxed my mind is whether the preliminary objection based on the 1st, 2nd and 4th limbs is properly before the court. Preliminary objections on points of law save those of which the court can take cognisance whether or not the parties have raised them, such as limitation

and jurisdiction, on the amenability or otherwise of a suit, must be pleaded in the written statement of the defence. This is the legal requirement under Order VIII rule 2 of the Civil Procedure Code [CAP 33 R.E.2019] which stipulates as hereunder:-

'The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality'.

The above legal provision is as clear as moonlight but also case laws abound. For instance, this court (Hon. Nsekela, J. as he then was) in the case of **CRDB Bank Ltd v. Noorally K. Dhanani & Shiraz H.K.J. Dhanani**, Commercial Case No. 102 of 201...observed:-

'Notice of preliminary objection conceived out of a Written Statement of Defence was not part of the Defendant's pleadings, and such notice is deemed not to be properly before the court and so should be discarded.'

On the above legal position, I find the preliminary objection on the 1st, 2nd and 4th limbs not properly before this court. The same is struck out.

With regard to the 3rd limb of preliminary objection on the applicant's affidavit being incurably defective, I think Mr. Mandele is right. It is provided under O. XIX rule 3 (1) of the Civil Procedure Code that:

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications on which statements of his belief may be admitted.

This legal position was stressed in the case of **Mustafa Raphael v. East African Gold Mines Ltd**, Civil Appeal No.40 of 1998 by the Court of Appeal sitting at Dar es Salaam in the following words:-

An affidavit is not a kind of superior evidence. It is simply a written statement on oath. It has to be factual and free from extraneous matters such as hearsay, legal arguments, objections, prayers and conclusions

Further the same Court in the case of **Ignazio Messina v. Willow Investments SPRL**, Civil Application No. 21 of 2001 held:-

'The rules governing the forms of affidavit cannot be deliberately flouted in the hope that the court can always pick the seed from the

chaff, but would be abuse of court process. The only assistance the court can give in such a situation is to strike out the affidavit'

Mr. Martin Rwehumbiza, in his reply seems to admit the defects in the applicant's affidavit but urged the court that on the advent of the principle of overriding objective, the court should deal with cases justly and with regard to substantive justice.

With respect, I cannot agree. As the affidavit clearly depicts, the defects renders the whole application incompetent. This court in the case of **Nicodemus G. Mwita v. Bulyanhulu Gold Mine Ltd**, [2001] LCCD 97 at page 172 held:-

'On the issue whether a defective affidavit is a matter of technicalities, a defective affidavit affects the whole application it supports and therefore, going to the root of the matter'

On the submission presented by learned Counsel for the respondents and since the applicant has not seriously contested it, I find that the applicant's affidavit so defective that it has rendered the whole application incompetent.

I uphold the respondents' preliminary objection on the third limb and strike out the application.

The preliminary objection on the 1st, 2nd and 4th limbs are overruled and dismissed.

Costs to the in the main cause.

Order accordingly.

W.P. Dyansobera

Judge

19. 11.2021



This ruling is delivered this 19th day of November, 2021 in the presence of Mr. Martin Rwehumbiza, learned Counsel for the plaintiff/applicant and Ms Joha Mapondela, learned Advocate for both respondents/defendants

W.P. Dyansobera

Judge

