

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CASE NO 27 OF 2019

BETWEEN

CHANGE TANZANIA LIMITEDPETITIONER

Versus

REGISTRAR, BUSINESS REGISTRATION

AND LICENCING AGENCY.....RESPONDENT

Last Order: 26th Mar, 2020

Date of Ruling: 21th May, 2020

RULING

FIKIRINI, J.

This application was brought by Chamber Summons under sections 8 (1) (a) (b) (i), 13 (1) & (2) of the Companies Act, as amended by the Written Laws Miscellaneous Amendment, Act No. 3 of 2019 seeking orders of the Court that;

1. Declaratory order that the petitioner is entitled to alter its provisions contained in its Memorandum and Articles of Association in law.
2. An order directing the respondent to approve, accept and confirm the alterations made by the petitioner through a Resolution of a Board in its

Memorandum and Articles of Association which have already been filled to the office of the respondent in the BRELA ORS in which fees have already been paid.

3. Costs of the suit, and
4. Any other and further relief/reliefs that the Honourable Court may deem fit to grant.

The respondent, Registrar of Business Registration and Licensing Agency (BRELA), through her advocate raised five (5) points of preliminary objection namely:

1. That, the petition is bad in law for being overtaken by events;
2. That, the petition is bad in law for contravening Rule 10(1) of the High Court (Commercial Division) Procedure Rules GN No. 250 of 2012;
3. That, the suit is bad in law for being brought by non-existing Applicant;
4. That, the petitioner has no cause of action against the respondent; and
5. That, the petition is bad in law for suing non existing respondent.

At the hearing, Ms. Alesia Mbuya and Ms. Narindwa Sekimanga learned state attorneys appeared for the respondent while the applicant enjoyed the legal service of Mr. Mpale Mpoki learned counsel. Counsels asked for the leave of the Court, to argue the preliminary points objection by a way of written submissions, the request

which was granted under the following filing schedule: That the respondent to file their written submissions by or on 15th April 2020; reply written submissions by the petitioner by or on 30th April 2020 and rejoinder if any by or on 7th May 2020. This was to be followed by a ruling scheduled for 21st April 2020.

The respondent, submitted on the first and third grounds of objection together, while the the second, fourth, and fifth separately.

On the first and third grounds argued together, that the petition was bad in law for being overtaken by events and that the suit was bad in law for being brought by non-existing applicant. It was the respondent submission that at the time when the petitioner brought this petition before the Court, the petitioner was no longer legally existing in the Companies register, following de-registration by the operation of the law. In the circumstance the orders sought by the petitioner in this matter have already been overtaken by events and they cannot be obtained argued by the respondent.

Furthering the submission on non-existent of the petitioner; the respondent argued that it was due to the petitioner's failure to comply within the required period as stipulated under section 3A of the Companies Act, after it came into force on 30th June, 2019. The Court was then directed to Section 6 of the said law which

amended section 3 of the Companies Act, Cap. 212 R.E. 2002 (the Companies Act) by adding section 3A which provides as follows:

- (1) A company referred to under section 3(3) which was incorporated or registered prior to the coming into operation of this section, shall within two months from the date of coming into operation of this section be required to comply with provision of this act.*
- (2) A company limited by guarantee not having share capital incorporated or registered under this act and obtain certificate of compliance under the provision of Non- Governmental Organization Act, shall within two months from the date into coming of operation of this section be deemed to have been registered under the Non-Governmental Organizations Act and struck off from the register.*

Finalizing the submission regarding this point, the respondent submitted that, there was no company limited by the guarantee existing by the name of “Change Tanzania Limited” in the Companies register now or by the time of filing this petition. The Petitioner was given two months from 30th June 2019 to 30th August 2019, to comply with the law but failed, instead opted to file this petition on 3rd

September, 2019, when time had lapsed. Supporting their position, the cases of **Singida Sisal Production & General Supply v Rofal General Trading Limited & 4 Others, Commercial Review No. 17 of 2017, page 4&5; Waswa Primo v Moulders Limited, Miscellaneous Application No. 685 of 2017 and Fort Hall Bakery Supply Company v Fredric Muigai Wangoe (1959) E.A 474**, were cited.

The second ground, was that the petition was bad in law for contravening Rule 10 (1) of the High Court (Commercial Division) Procedure Rules of 2012 (the Rules) which clearly provides that the proceedings to be instituted by plaint or originating summons. The petitioner failed to comply with mandatory provision and therefore the petition should be dismissed with costs. Reinforcing the submission, the case of **Thomas Ngwaiya v The Attorney General & 3 Others, Civil Case No. 177 of 2013**, was cited, in which it was held that:

“Wrongful institution of proceedings in the court renders the whole application incompetent”.

On the fourth ground, the respondent contended that the petitioner has no cause of action against the respondent. It was the respondent’s submission that she did not enact the law which by its operation made the petitioner non-existing but rather the petitioner was rejected from the online registration system (ORS). By the

operation of law and failure to fit into qualification of the current provision of the law, then the petitioner was automatically rejected from ORS of (BRELA). Thus the non-existing petitioner does not have any cause of action against respondent.

On the fifth ground, that the petition was bad in law for suing non-existing respondent. The respondent denied the existence of any statutory entity capable of suing or being sued in the name of Registrar, BRELA. It was the respondent's submission that the petitioner was required to make inquiries or search to determine the correct entity to sue before coming to court. And this could have been made through the registrar of the Companies who is responsible for the registration of the Companies. The position was buttressed by citing the case of **Singida Sisal Production** (supra), which held that:

“non existing party does not have legs to stand, no hands to prosecute, no eyes to see and no mouth to speak either on her own or on behalf of any other person before any court of law”

The petitioner's counsels prefaced their response with a preamble that, the respondent filed her submission on 15th April 2020, when time had elapsed and without leave of the Court, instead of the fixed date of 13th April 2020. Ordinarily if no leave of the Court to file submission outside the date fixed by the Court, the filed submission should be ignored, and so are the raised preliminary points of

objection, they thus prayed to be dismissed for lack of prosecution. To strengthen their position, the case of **National Bank of Tanzania (NBC) Ltd v Sao Ligo Holdings and Another, CA, Civil Application No. 267 of 2015**, was referred, in which it was held that:

“The purpose of filing written submission was to speed up administration of substantive justice”

The petitioner also made reference to the Written Laws (Miscellaneous Amendments) Act of 2018, regarding overriding objective arguing that the said amendment was to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Turning to the preliminary points of objection raised, reacting on the **first point**, the respondent submitted that the petition was lodged in this Court on 30th August 2019, under certificate of urgency and expected to be admitted but since the Court Registrar was out of Dar Es salaam, nothing was possible until his return on 2nd September 2019. Therefore, the petitioner cannot be punished for the mistake caused by the Court. To support her position, the petitioner made reference to Article 107A (2) (e) of the Constitution of United Republic of Tanzania and cited a number of cases namely: **Jang Sing v Brijlal & Others, 1966 AIR 1631; Johri Singh v Suckh Pal Sigh 1898 AIR 2073; Githere v Kimungu 1976-1985 EA 101; Ndathi Mwangi & 2 Others v Benson**

Lumumba Ndivo, Civil Appeal No. 18 of 2015, and Kenya Commercial Bank Ltd v Kenya Planters Cooperative Union, Civil Appeal No. 85 of 2010.

Disputing the second ground of objection, that the petition was bad in law for contravening Rule 10 (1) of the Rules, it was the counsel's submission that the matter related to the rights and liabilities of the Company and the relevant law was the Companies Act. Whereby, the practice required all legal proceedings against the Registrar of the Companies was to be commenced by a way of a petition and not plaint or originating summons. To cement the position, the Court was referred to the case of **Mofaju's Investment Company Limited (1999) TLR, Miscellaneous Civil Cause No. 119 of 2003**, where the proceedings under the Companies Act were brought by a way of petition.

Responding to the **fourth ground** of objection, it was the respondent's argument that she did not enact the law, which by its operation made the petitioner non-existing after the ORS rejected the uploading of the petitioner's registration. There was therefore no existing cause of action against the respondent. Extending the submission, it was the petitioner's submission also that this point was not a point of objection as laid down in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 969**. The applicant clarified on this point arguing that the pleadings show the application for alteration of the article was submitted and filed on 14th August 2019, and rejection followed on 15th August

2019, which was before the due date of 1st September 2019. Therefore, all this time there was cause of action as there was no justification for the registrar to refuse to alter the memorandum and articles of association as intended by the petitioner, argued the applicant. The applicant cited the case of **John Byomborwa v Agency Maritime International (Tanzania) Ltd [1983] T.L.R**, where the Court of Appeal of Tanzania stated:

“We agree that for purposes of deciding whether or not the plaintiff disclose cause of action the plaintiff and not the reply should be looked at. But for the reasons we have given earlier on, we are satisfied that the plaintiff as filed adequately discloses cause of action”

The fifth ground of objection was that the petition was bad in law for suing non-existing respondent. Making reference to Order 1 Rule 9 of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC), the Counsel submitted that the provision provides that no suit shall be defeated by reason of misjoinder or non-joinder of the parties. The Counsel also cited Order I Rule 10 of the CPC, which allows the Court at any stage of the proceedings to strike out the name of the party improperly joined and join the name of the person who ought to have been a proper party.

Furthering the submission, the counsel submitted that since the Registrar of BRELA was not a legal entity and since the legal entity was the Registrar of the Companies, it was his prayer that based on Order I Rule 10 (2) of the CPC, the Court order the name of the respondent be struck out and the name of the Registrar of the Companies be added as the respondent.

In rejoining submission, the respondent's counsel submitted that the Court records will show that on 26th March 2020, the Court fixed the filing of written submissions order as follows: on 15th April 2020, respondent to file their submission while reply submission to be filed on or before 30th April 2020 and the rejoinder if any by or on 7th May, 2020. The respondent stressed to have filed their submission on 15th April 2020, the petitioner's submission that the respondent was unable to file their submission on time was thus incorrect. After all, the 13th April 2020 was Easter Monday, submitted the counsel.

The respondent counsel maintained her earlier submission that this application was presented on 3rd September 2019, as evidenced on record. Also, there was no proof that on 30th August 2019, the Registrar of this Court was out of office. And even if that was the case, still it did not mean that the registry office of the Court was not functioning.

Contesting on the issue of overriding objectives it was respondent's submission that the principle should not be applied blindly against mandatory provision of procedural law. Supporting their position, the counsel cited the case of **Mondorosi Village Council & 2 Others v Tanzania Breweries Limited & Others, Civil Appeal No. 66 of 2017.**

Controverting the submission on alteration to be made on memorandum and articles of association in relation to the case of **Transport Company** (supra) cited by the petitioner, the counsel submitted that the case was distinguishable from the scenario in this application at hand. In the cited case the issue was on confirmation of alteration made in the memorandum of the said company while in the case at hand the alteration made in the memorandum of the said company was to be consistent with the law, which was not the case and as a result, the petitioner's application was rejected by the BRELA's online registration system.

Concluding her submission on misjoinder and non-joinder of parties, she submitted that, for misjoinder and non-joinder of party to occur, it means the said party existed but not joined in the suit. It was thus the respondent's submission that the Registrar of BRELA should not have featured in the intended petition and therefore this petition was bad in law as it was against a party which does not exist.

In determining this matter, let me start by addressing the petitioner's introductory submission that the respondent's written submission was filed out of time. The first port of call was the Court records, which evidently indicated that what was being alleged was not correct as far as the filing of the written submission schedule was concerned. From the record, the respondent's written submission was to be filed by or on 15th April 2020, reply by the applicant by or on 30th April 2020 and rejoinder if any by or on 7th May 2020. The respondent therefore duly filed their written submission according to the Court directions. No leave of Court was therefore required. But even if the submissions were filed out of time and thus deserves to be ignored, yet in light of the overriding principle, the principle which the petitioner embraced well, I, for the interest of justice as well as of timely and affordable disposal of the proceedings, would have considered them. The case of **NBC Ltd** (supra), would have fully fortified my agreement to the submission in relation to filing of written submissions.

As to whether the preliminary points of objection raised are meritorious or not, I will examine all points raised.

The first ground, is that the petition is bad in law for being overtaken by events and the suit is bad in law for being brought by non-existing applicant. It is uncontroverted fact that on 30th June 2019, the Written Laws (Miscellaneous

Amendment) (No.3) Act, 2019, which through section 6 of the amended law, section 3 of the Companies Act, was amended and a new section 3A was added.

It is also undisputed fact that through this amendment the Government wanted to draw a clear definition and meaning (and therefore operations) of a Company on one side, NGOs on the other. The petitioner like any other NGOs were given a two (2) months transition period ending on 30th August 2019 to comply with the necessary requirements. By Failing to comply with the requirement as provided under the amendment that NGO would be deemed to have been registered under Non-Governmental Organizations Act and would be struck from the Companies register. The provision is reproduced below for ease of reference:

“A company limited by guarantee not having share capital incorporated or registered under this act and obtain certificate of compliance under the provision of Non-Governmental Organization Act, shall within two months from the date into coming of operation of this section be deemed to have been registered under the Non-Governmental Organizations Act and struck off from the register”

The petitioner was automatically deregistered from the Register by operation of the law after failing to comply. The petitioner cannot therefore sue through non-

existing incorporated name. The case of **Singida Sisal Production** (supra) referred by the respondent is relevant to the situation at hand, that:

“....non juristic person has no legs to stand, no hands to prosecute, no eyes to see and no mouth to speak either on her own, or on behalf of any other person before any court of law...”

The account that the petitioner approached the Court well before time prescribed has elapsed is not persuasive and especially when the reason is assigned to the Registrar of the Court. Perusal of the Court records and receipts therefrom indicate the matter was filed on 3rd September 2019 whereas the given time elapsed on the 30th August 2019. Both reasons advanced: *one*, that the Registrar one Mr. Anjelo Rumisha, of the Commercial Court Division was on safari out of Dar Es Salaam and the Registry office could do nothing until his coming back, and *two*, that upon his return and went through the pleadings and after noting the nature of the case formed an opinion that Judicial Review was the proper line to take. This however, changed after the petitioner visited the Registrar’s office and after discussion it was agreed that the proceedings by way of a petition can be filed. Whilst, this could be the truth of the matter, but unfortunately was not supported by evidence, an affidavit from the Registrar Commercial Court Division would have backed the petitioner’s assertion. Short of that the account remains mere words.

have backed the petitioner's assertion. Short of that the account remains mere words.

The referred cases of **Jang Sing; Johri Singh; Re Coles; Githere, Ndathi Mwangi, the Constitution of the United Republic of Tanzania** (supra), as amended from time to time and recent amendment which brought to life the overriding principle, all together advocated for among other things just determination of the proceedings, the position which I, entirely approve. Nonetheless, the provision cannot be easily invoked in the present situation, as I find. This is due to the fact that the anomalies have gone to root of matter. As pointed out in the case of **Mondorosi Village** (supra) where the Court underscored the fact on anomaly going to the root by saying:

.....According to the Bill to the amending Act, it was thus; The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory term.....”[Emphasis mine]

Being automatically deregistered by the operation of the law, and the fact that the petitioner cannot sue through “Change Tanzania Limited”, its non-existing incorporated name, the petition is thus inevitably overtaken by events. The petitioner is thus undoubtedly a non-existing entity.

This point has been stressed in the case of **Wasswa Primo** (supra), where the Court without mincing words stated:

“A suit filed by a non-entity is no suit at all as in the words of Templeton in the Fort Hall Bakery Supply Company v Fredrick Muigai Wangoe (1959) EA 474, a non-existent person cannot sue and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining an action it cannot allow the action to proceed.....” [Emphasis mine]

The Court decision in the above cited case speaks volume on the status of non-existing entity, which I fully subscribe to.

The first point of objection is therefore sustained.

Second ground, is that the petition is bad in law for contravening Rule 10 (1) of the Rules. This petition has been filed pursuant to sections 8 (1) (a) (b) (i), 13 (1) & (2) of the Companies Act, as amended by the Written Laws Miscellaneous Amendment, Act No. 3 of 2019, whereby mode in which an extent memorandum can be altered. Whereas the provision has provided for alteration of memorandum by way of an application to Court for confirmation, but according to the respondent the law has not stated that the same should be by way of petition, thus the

application is flawed. All matters pertaining to a company rights and liabilities while are governed by the Companies Act, and other relevant laws to the companies, despite that the law has not specifically stated so but practice has been any proceedings against the Registrar of Companies has been usually commenced by way of petition and not by plaint. This stance put forward by the petitioner, and the case of **Mofaju's** (supra), has impliedly reinforced the petitioner's position which I, support. Consequently, this point of objection is overruled.

Coming to the **third point** of objection, is that the suit is bad in law for being brought by non-existing applicant. The petitioner for failing to comply to the legal requirement which became operation after the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2019, has automatically been deregistered by the time this petition was filed. Since there was no longer a company limited by guarantee existing by the name "Change Tanzania Limited" in the Companies register, the petition was certainly brought by a non-existing petitioner.

This point of objection is sustained.

The **fourth point** of objection that the petitioner has no cause of action against the respondent, *first and foremost*, it is trite law that in deciding whether a plaint discloses cause of action or not, the Court needs to examine the issue within the four perimeters of the plaint and its annexures. **See: John M. Byombalirwa v.**

Agency Maritime Internationale (T) Ltd [1983] T. L. R. 1, which defined cause of action to mean:

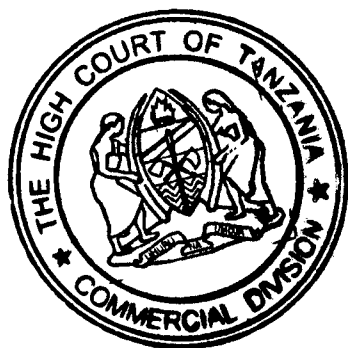
“essentially facts which it is necessary for the plaintiff to prove before he can succeed in the suit.”

Secondly, in order for the cause of action to be maintained against the respondent, the respondent has to be a proper and existing entity. The petitioner sued the Registrar of BRELA who is non-existing entity, the fact not controverted by the petitioner. *Thirdly*, the prayers and reliefs sought were in reference to Registrar of the Companies and nothing was directly made towards the respondent liability. The Registrar of Companies was thus the rightful entity to be sued. *Fourthly*, the respondent never exists in the eyes of law. To that end it is evident that, there is no cause of action established against the respondent, Registrar, BRELA.

Turning to the **fifth point** of objection that the petition is bad in law for suing non-existing respondent. It is undisputed fact that there is no any statutory entity capable of suing or being sued in the name of Registrar, and/or BRELA. Prior to instituting a suit, the petitioner was required to make inquiries or search to determine the correctness of the entity being sued to before coming to Court. The petitioner’s submission that pursuant to Order I Rule 9 and 10 of the CPC, that since the Registrar, BRELA is not a legal entity but the Registrar of Companies is, they thus pray for this Court to invoke its powers and under Order 1 Rule 10 (2) of

Admittedly, this Court has discretion to do as suggested by the petitioner, especially having in mind that the purpose to so will be to enable it effectually and completely adjudicate upon and settle all questions involved in a suit once and for all. The suggestion cannot however be applicable as the provision clearly refers to non-joinder and misjoinder of parties, meaning the intended parties existed but not made part of suit or wrongly made part of the suit. The respondent does not fit in any of the two description, for being non-existing party, therefore has no legs to stand on, hands to prosecute, eyes and mouth to speak either on her own or on behalf of any other person before the Court of law, as decided in the **Singida Sisal Production** (supra).

From the above findings I find the preliminary points of objection worth sustaining except the second point of objection which is overruled but carries less weight when compared to the sustained ones. The petition is dismissed with costs. It is so ordered.



P.S. FIKIRINI

JUDGE

21st MAY 2020