

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC. COMM.CASE NO. 17 OF 2002

IN THE MATTER OF THE COMPANIES ORDINANCE
AND

IN TH MATTER OF PRIME OCEANS LIMITED
BETWEEN

ALHUSSEIN DHANANI.....PETITIONER

AND

PRIME OCEANS LIMITED.....1ST RESPONDENT

TAN SIAK HAK2ND RESPONDENT

REGISTRAR OF COMPANIES.....3RD RESPONDENT

[Made under section 167 (E) (F), and 169 and 183 (1) of the Companies Ordinance
Cap.212 and Rule 31(1) of the Winding Up Rules (1929) as well as all other
enabling provisions of the laws]

R U L I N G

KIMARO, J.

The petitioner, Alhussein Dhanani has petitioned for the winding up of PRIME OCEANS LIMITED under Section 167 (e) and (f), 169 and 183 (1) of the Companies Ordinance Cap.212 and Rule 31(1) of the Winding Up Rules (1929) as well as all other enabling provisions of the Laws. The petitioner is a shareholder and Director of PRIME OCEANS LIMITED. The main reason given for the winding up is deterioration of the relationship between the petitioner and the second respondent. The petitioner asserts that the relationship has deteriorated to the extent that they cannot meet to run the business of the first respondent. The petition was filed by M/S M.A. Ismail & Co. Advocates.

Mr. Rweikiza, Learned Advocate for the 2nd Respondent raised preliminary objection as follows:

- " 1. That the same Petition had previously been instituted in court, and that it was dismissed with costs.*
- 2. That the Petitioner is not entitled to present a winding-up Petition.*
- 3. That the Affidavit supporting the Petition is incurably defective."*

The petition was assigned to Hon. Judge Nsekela, as he then was. He ordered that the preliminary objection be heard by written submissions. Fortunately, he was elevated to the Court of Appeal. Unfortunately, that happened before he composed the ruling. That gives an explanation why I am now dealing with the objection.

In support of the first ground of objection, it was submitted that there was Civil Case No.396 of 2001 which was filed at the High Court, Dar-es-Salaam Registry which was dismissed with costs on 31st May, 2002 because of the failure by the applicant to enter appearance. Mr.Rweikiza further submitted that

" Order IX r.9 prohibits the plaintiff to institute a fresh suit on the same cause of action as that of the dismissed suit. This is so my Lord, and even if the CPC did not apply, as to maintain order in proceedings. One cannot bring an action today, have it dismissed and one institutes the same matter either in the same court, or in a different court, registry or division of the court."

In response to this point of objection, the Advocate for the applicant made reference to the case of **George Shambwe Vs Tanzania Italian Petroleum Co. Ltd** (1995) TLR 20 which give conditions upon which the principle of res judicata is applicable. He argued that the dismissal in Civil case No.396 of 2001 (supra) was made at an early stage. This petition cannot be res-judicata because it was not finally heard and determined by a competent court.

The Advocate for the second respondent said Civil Case No. 396 of 2001 was dismissed because neither the applicant, nor his Advocate appeared in court. In the case of **George Shambwe** (supra), the court heard that for re judicata to apply, not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties, but also it must be shown that the matter was finally heard and determined by a competent court.

Since Civil Case No. 396 of 2001 (supra) was not heard and finally determined, this petition cannot be re- judicata. I would also add that in petitions for winding up, the principle of res – judicata is not applicable because existence of a company depends on many factors. If conditions are not conducive for a continued existence of the company, a petition for the winding up cannot be resisted on grounds of res- judicata, unless it is presumed that once a company is formed it will go on for ever. Secondly, petitions for winding up are governed by The Companies (Winding Up Rules 1929) and not the Civil Procedure Code 1966).

The second point of objection raised is concerned with the locus standi of the petitioner. In his submission, the Advocate concluded and I quote –

“ So the Petitioner herein is a contributory covered by S.169 of Cap 212. He has not shown in the petition where he derives the entitlement to bring this petition, by showing that he holds so much worth of shares for the stated time etc. This could have been done by pleading copies of share certificates, Register of Members, etc. In the absence of these anybody can file a petition, call himself a shareholder (contributory), and go away with an order for winding up of any company.”

The Advocate for the Petitioner responded by reproducing the provision of Section 159 of the Companies Ordinance which defines the term contributory.

From the 2nd respondent's own admission made in the submissions, the petitioner is a contributory. The argument raised that he has not shown where he derived the entitlement to bring the petition are matters of evidence which cannot be determined by the court at this stage.

The last point of objection was concerned with the affidavit. The Advocate for the second respondent said it was incurably defective.

Apparently the submission made in support of this point of objection does not show clearly what is being faulted in the affidavit. The submission made is vague. Although the Advocate for the Second Respondent says that the affidavit contains matters related to belief and apprehension, yet the deponent says that everything is to his own knowledge, while the law on affidavit requires the source for matter grounded on belief to be disclosed. The case of **Uganda V Commissioner of Prison Exparte Matovu [1966]** EA 514 was cited to support the submission.

The Advocate for the petitioner requested this court to follow the decision of **Ramadhani Nyoni Vs MS Haule & Company Advocates** 1996 TLR 71.

Having read the affidavit of the petitioner thoroughly, I do not see any defects in the affidavit. All matters deponed in the affidavit are related to the affairs of the first respondent. The petitioner deponed that he is a shareholder and director. The other shareholder and Director is the second respondent. Given the matters which are deponed in the affidavit of the petitioner one cannot say that they are derived from another source other than what the petitioner ought to know. Such matters ought to be known to the petitioner. Under the circumstances, the petitioner cannot say that the information was derived from another source. The matters deponed cannot be faulted on the grounds raised by the Advocate for the second respondent for the reasons already explained.

All the preliminary points of objection lack merit. The objection is dismissed with costs.

N.P.KIMARO,
JUDGE
29/12/2003

I Certify that this is a true and correct
of the original judge's signature
.....
Registrar

Commercial Court
Dar es Salaam

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Dated

14/1/04