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

MISC.COMM.CASE NO. 6 OF 2003

IN THE MATTER OF THE COMPANIES ORDINANCE CAP.212
AND
IN THE MATTER OF A PETITION OF WINDING UP OF
TRI TELECOMMUNICATION TANZANIA LTD.....APPLICANT

AND

CITIBANK TANZANIA LIMITED.....1ST RESPONDENT
MAYANK MALIK.....2ND RESPONDENT

R U L I N G

KIMARO, J.

There is a notice of motion filed under Rule 5(1) (e), Rule 8 (1) and Rule 223(1) and (2) of the Companies (Winding Up Rules 1929 and any other enabling provisions of the law in which Mr. Peter Clever Bakilana has requested for several orders against the Citibank Tanzania Ltd and Mayank Malik, the Managing Director Citibank Tanzania Ltd. They are the 1st and 2nd Respondents respectively.

Among the orders prayed for is a declaration that the respondents have deliberately committed acts of contempt upon orders issued by this court, the 1st Respondent acted fraudulently in complying with an agency notice law fully served upon it under the Income Tax and the Value Added Acts, the 1st Respondent committed fraud on the court and the 1st respondent has acted in obstruction

and/or interference with the due process by refusing to allow the Applicant to carry out investigations already ordered by the court.

The Applicant further prays for the arrest of the 2nd Respondent and committal to Civil Prison for the offence of contempt of court in contravention of Section 114 (1)(i) of the Penal Code and an order compelling the 1st Respondent to pay into A/C No.0IJI027845700 at CRDB Branch Azikiwe, the sum of USD 1,500,000 being money properly due from the 1st Respondent to Tanzania Revenue Authority. There are several other prayers against the 1st Respondent which in my considered opinion need not be mentioned at this moment because of the issues involved in this ruling.

This application is based on a ruling delivered by this court on 12/06/2003. In that ruling the court ordered the TRI Telecommunication Tanzania Ltd be wound up under Sections 167 (c) and 167 (f) of the Companies Ordinance Cap.212 for failure to pay debts.

The court also invalidated a Debenture which was purportedly created by Tri Telecommunication Tanzania Ltd in favour of Citibank Tanzania Ltd and Citibank N.A. Baharan. The reason for declaring the Debenture invalid was that it was created without a proper Resolution of Board of Directors of TRI Telecommunication Tanzania Ltd.

Mr. Peter Clever Bakilana was appointed as a Liquidator and was given a lot of responsibilities. Among them was the investigation

of the relationship of Tritel with Citibank Tanzania on the position of USD 14.0 million collateral with Citibank that TRITEL had represented was available as performance bond under its material licence obligation. The liquidator was also required to recover from Citibank Tanzania Ltd costs incurred by Anael P. Kavishe and Goffrid S.Tesha who were appointed Receivers/Manager of TRITEL by the Citibank Tanzania Ltd taken out of the assets of Tritel. He was also required to recover any money paid by the Receivers/Managers to the Citibank Tanzania Ltd out of the Assets of Tritel since 14th January 2003 and any other creditors that the Liquidator will prove to have carried out any business of Tritel with intent to defraud other creditors of Tritel.

To my understanding, the first respondent was aggrieved by the orders which were given by this court and filed proceedings in the Court of Appeal of Tanzania. Our Court record shows that there was Civil application No.112 of 2003 which was an application for revision of the ruling of this court. It was determined by a ruling of the Court of Appeal dated 10th March, 2004. Subsequent to the ruling our original record which had been with the Court of Appeal for determination of the proceedings filed there, was returned to this court for safe custody through the Registrar letter dated 18th March 2004.

The Applicant, Mr. Peter Clever Bakilana is represented by Dr. Florens Luoga Learned Advocate and the Respondents are

represented by Mr. Aloys Mujulis and Mr. D. Kesaria Learned Advocates.

The respondents have raised four grounds of preliminary objection;

> *" i) The application is not properly before the court.*
>
> *ii) The affidavit filed in support of the application is incurably defective and ought to be struck out.*
>
> *iii) This court does not have the jurisdiction to hear, determine and or commit the respondents for criminal contempt of the court as sought by the applicants.*
>
> *iv) This court is not currently seized with the jurisdiction to hear and determine any application in view of the matters yet pending in the Court of Appeal of Tanzania relating to the ruling and previous orders of this court."*

They prayed that the application be dismissed with costs.

I consider the case of **Citibank Tanzania Ltd V TTCL & Others**, Civil Application No.64 of 2003, cited by Dr. Luoga to be very important for setting out guidelines within which preliminary objection should be examined. In the said case at p.11, Hon Nsekela, JA quoted with approval the case of **Mukisa Biscuit**

Manufacturing Co. Ltd Vs. West End Distributor Ltd (1966) E.A 696 at pages 700 and 701. For an objection to be competently considered as preliminary objection it must satisfy the following conditions –

> *" i) The points of law must either be pleaded or must arise as a clear implication from the pleadings.*
>
> *ii) They must be pure points of law which do not require close examination or scrutiny of the affidavits or counter affidavits.*
>
> *iii) Determination of points of law in issue must not depend on the discretion of the court."*

The decision of the court of Appeal is binding on this court and it and it also involved the same parties.

The submissions by Mr. Mujuliz and Mr. Kesaria on the first ground of objection was that Rule 5 (1) (a) – (e) are detailed sufficiently to show which applications can be filed by way of Notice of Motion under Rule 8(1). They contend that all other applications must be made by Chamber Summons under Rule 8(2). In their rejoinder, the Advocates for the respondents agree with the principle governing preliminary objections as established in the case of **Mukisa Biscuit** (supra); This court was invited by Dr. Luoga to invoke its powers under Section 348 of the Companies Ordinance,

Cap.212 and exercise its discretion in construing Rule 8 of the Companies Winding Up Rules 1929 in accordance with the current practice now prevailing in the courts of allowing applications to be argued by written submission. According to Dr. Luoga, this practice has significantly modified matter to be heard in open courts and those which have to be heard in chambers.

With due respect to Dr. Luoga, resort need not be made to Section 348 of the Companies Ordinance in interpreting Rule 8 (1) Rule 8 (1) does not say that only matters listed under Rule 5(1) (a) – (e) can be heard in open court. It says that matters listed under Rule 5 (1) (a) – (e) must be heard in court. The court can add other matters that may be heard in court under Rule 5 (1)(f). Since the court has discretion under the rules to decide whether or not to admit any of the other prayers of the Applicant to be determined in court, going by the principles in the **Mukisa case** (supra) this point of preliminary objection cannot stand. I say so because it requires the discretion of the court in deciding whether or not all the prayers be heard in court or in chambers.

It is also not true that all other applications must be heard in chambers under Rule 8(2). All that the rule says is that an applicant who wishes to be heard in Chambers must move the court by way of Chamber Summons. However, an application made by way of chamber summons cannot take away the discretionary powers of he court given under Rule 5 (I)(f) to decide whether to hear the application in court instead of chambers. Moreover, Rule 5 (3) gives

the court the option to choose where to hear the application but it does not impose an obligation to hear other matter in chambers. To demonstrate what the two rules say, they will be quoted in full –

> *" 5. (f) Such matters and applications as the Judge may from time to time by any general or special orders direct to be heard in open court.*
>
> *5(3) Every other matter or application in the High Court under the Act to which the Rules apply, may be heard and determined in Chambers."*

The other argument raised by the respondents is misjoinder of the applications for the TRA Notices with an application for contempt. They argue that the orders are defective and the inclusion of an application for their correction is also tantamount to a misjoinder and the clerical errors should have first be rectified through independent proceedings.

This view was challenged by Dr. Luoga under Rule 223 (1) of the Winding Up Rules 1929 that the respondent's attempt to bring clerical errors as a preliminary point of objection is incompetent. The rule says-

> *" 223. – (1) No proceedings, under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding*

is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court."

Dr. Luoga said that the Applicant has been mandated by an order of this court to secure the beneficial winding up of he company under Section 177 of the Companies Ordinance, Cap.212. All creditors of the company are beneficiaries of the winding up order issued by this court. The Tanzania Revenue Authority are not only petitioners in these proceedings but under Section 259 of the Companies Ordinance Cap. 212 they are preferential creditors. The law envisages that debts owed to TRA are collected through the Applicant. What the application does is to bring to the attention of this court acts and examples of non-compliance to the orders of this Court as well as acts of obstruction or resistance to discharge the functions conferred upon the Applicant by law. Under the circumstances the presumed misjoinder is a misconception.

The respondents made a long submission in rejoinder in paragraphs 1.5, 1.6, 1.7 and 1.8. Essentially they have invited the court to examine the TRA Notice (Annexture ILM 10) to see that it was addressed to the 1st Respondent and not the Applicant, to refer to express provisions of the Notice to see that the 1st Respondent is only liable if there is tax due and payable and to refer to a copy of notification from the 1st Respondent to the TRA Commissioner proving that no funds were available. These arguments however, do not answer Dr. Luoga's points. Instead, the court is invited to

scrutinize the Annextures to the affidavit. This is contrary to the principles in the **Mukisa case** (supra) which the respondents confirm should guide the court.

The court was also invited by the respondents to find that the application is in competent because the application for order 12(i) – (iv) for the rectification of errors was made by Notice of Motion instead of by chamber summons as stipulated by Order XLIII Rule 2 of the Civil Procedure Code 1966 which require every application to the court to be made by chamber summons supported by an Affidavit. The Respondents say that it was fatally wrong for such an application to be included in the application preferred by way of Notice of Motion under the Companies (Winding Up) Rules.

With due respect to Mr. Mujuliz, I do not succumb to his views that the application before this court has been brought under the Civil Procedure Code 1966. The application was brought under the Companies (Winding Up) Rules 1929. The decision of the Court of Appeal in **Sadik Abdallah Alawi** Vs **Zulekha Seleman Alawi and National Bank of Commerce Civil Reference No.29 of 1997 (CAT) (unreported)** makes the position clear. The decision of the case is that where the proceedings are basically regulated by the provisions of the Ordinance and the Rules, but the provisions of the Civil Procedure Code are resorted to in certain circumstances, it cannot be said that the provisions of the Civil procedure Code 1966 control the proceedings because under such circumstances the Civil Procedure Code is resorted to, merely to supplement a procedure that

is basically regulated by the provisions of the Ordinance and the Rules.

Order LXIII Rule 2 of the Civil Procedure Code 1966 does not import the strict meaning that applications under the Civil Procedure Code made other than by Chamber Summons cannot be allowed to be heard in court. What the rules says is -

> *" 2. Every application to the court made under this Code shall, unless otherwise provided be made by a chamber summons supported by affidavit.*
>
> *Provided that the court may where it considers fit to do so, entertain an application made orally or where all the parties to a suit consent to the order applied for being made, by a memorandum in writing signed by all the parties or heir advocates, or in such other mode as may be appropriate having regard to all the circumstances under which the application is made."*

This means that under the Civil Procedure Code, there is nothing that stops an application made under Section 96 of the Civil Procedure Code 1966 to be made under Notice of Motion unless the court directs that it should not be so. This again is a matter dependent on the discretion of the court. Under the **Mukisa case** principles the matter cannot be canvassed as a preliminary point of objection.

The Respondent's Counsel have also criticized the Applicant strongly for drawing the attention of the court to the requirements of Rule 223 (1) of the Companies (Winding Up) Rules 1929. They said the rule is only a saving provision which can be used where the court mistakenly or inadvertently does something during the course of the proceedings which contravenes the Winding Up Rules. They submitted further that the purpose of the rule is to prevent the proceedings from being invalidated because of such a mistake or inadvertence so long as no substantial injustice is caused to a party.

Even if this court was to agree with the Learned Counsel that this is only a saving clause applicable when no substantial injustice is caused, this court observes that their complaint fails because they have not demonstrated to this court any substantial injustice suffered by the respondents by the clerical errors or by the joinder of the application to correct the errors with other applications. The proper construction of Rule 223 (1) is that no proceedings under the Act or the Rule shall be invalidated by any formal defect or by any irregularity so long as the formal defect or irregularity does not cause substantial injustice. In my considered opinion even formal defects and irregularities committed by the parties are included so long as the formal defects or irregularities do not cause any substantial injustices to the other party.

This court was also requested to take substantial note that the Applicant did not controvert or challenge paragraph 1.9 of their

submission in chief in respect of the prayers for orders No.3 and 4 which relate to fraud.

The allegations of fraud were made in paragraphs 19, 20, 24, 25, 34 and 35 of the Applicants affidavit dated 15th April 2004. The response was given by the respondent to paragraphs 19, 20, 24 and 25 of the Applicant's affidavit in paragraph 17 (16) of the Counter affidavit filed on 3rd May 2004 where it is stated that the allegations were speculative and or opinions by a person not informed on the subject. Paragraph 34 of the affidavit was not responded to by the respondents. Paragraph 35 of the affidavit was responded to by paragraph 17(23) of the Counter affidavit by stating that the applicant had taken a partisan – stand in concluding that the 1st respondent acted fraudulently with intent to defraud other creditors before commencing and concluding the investigation. The applicant replied to the counter affidavit in paragraphs 36, 45 and 46 of the reply filed in court on 6th May 2004.

From the above analysis, apart from the issue of misjoinder of contempt orders with orders of fraud which the applicant already answered as stated above, I do not think it would have been proper to answer the respondent's submissions on whether or not the respondents are guilty of the mischief because that answer would have necessarily go into the merits of the application.

After considering the submission's given by both parties, I reject and dismiss the first ground of the respondents' preliminary objection. I hold that the applications are properly before the court.

The second point of preliminary objection focuses on the affidavit filed in support of the application. The respondents assert that it is incurably defective and ought to be struck out with costs.

In determining this issue, the step to be taken by this court is to ask whether or not the application before this court is an interlocutory. This step has to be taken because the Advocates for the respondents submitted that the applications pending before the court are not interlocutory while the Advocate for the Applicant submitted that the matters commenced by the Liquidator in these proceedings are interlocutory applications. The respondents have, however, not given any reason why they said the applications should not be regarded interlocutory applications. In their submissions at paragraph 2.2 page 5, they concede that affidavits in support of interlocutory applications can include statements of belief and speculation.

On the other hand, Dr. Luoga supported his contention that the application is interlocutory because it is aimed at securing the preservation of assets and other properties of the company in liquidation in the course of winding up. It does not seek to yield a final determination of any matter and the application has been taken

in Miscellaneous Commercial Cause No. 6 of 2003 which is pending in this court.

This court agrees with Dr. Luoga and state that most of the orders which were issued by the court in the ruling dated 7th June 2003 were interlocutory orders to be executed pending further orders of the court. One example is the investigations ordered by the court. Another was the order to have any money paid to the Liquidator, the Applicant, has to be paid pending further orders of this court and provided the ranking in Section 259 of the Companies Ordinance Cap 212 is followed, the money will have to be paid to all creditors who have proved their debt to the Liquidator including the 1st Respondent if it proves it debt to the Liquidator.

There is yet another point raised by Dr. Luoga which has not received any comment from the Respondents. He argued that the proper procedure for a party to expugne any offending depositions in an affidavit is to make a formal application so that the court can grant a hearing. The matter can not be raised by way of a preliminary objection. Following the decision of the case of **Citibank Tanzania Ltd V TTCL & Others**, Civil Application No.64 of 2003 referred to earlier, the facts argued by the respondents in paragraphs 2.3 to 2.14 on pages 5 to 10 of their written submission have to be ascertained by examining the affidavits. This means that this point is not fit to be raised by way of a preliminary objection; It may be brought by a formal application to strike out the affidavit.

I agree with Dr. Luoga on the second point too. In the case of **DSM Education Office Stationary and Another Vs NBC Holding Corporation and Two Others**, Civil Application No.39 of 1999 (CAT) (Unreported), Hon. Ramadhan J.A refused to struck out an affidavit because it was argumentative or because it contained prayer. He said:

> *" It is true that paragraphs 7 and 8 are argumentative instead of stating matters of fact. Admittedly, again, the Affidavit is concluded with a prayer. These two matters are contrary to O. XIX R.3 of the Civil Procedure Code as expounded in* ***Uganda v. The Commissioner of Prisons*** *dealing with a Ugandan rule which is in pari materia with our rule cited above. Mr. Mbuna was willing to adjourn the matter to enable the applicant amend his affidavit. However, in order to save time, he agreed that because the affidavit is severable, it could be read omitting the offending paragraphs. I am of the decided opinion that matters of form and procedure are there to ensure that a respondent or a defendant is not prejudiced in the preparation of his defence. It is correct that an affidavit is required to contain only matters of fact and not arguments. It is equally correct that at the hearing an applicant is required to present arguments based on the facts deponed to in the Affidavit. So, according to O.XIX R.3 the sequence is that facts are given in the affidavit while arguments are made in court. But both have to be done. It is just a question of when, where and how. If that is the case, could it in the name of justice, be*

said that advancing arguments in an affidavit is so offensive as to cause an application to be struck out and thereby deny this final Court of justice an opportunity to determine the matter on merits? Forms and procedures are handmaids of justice and should not be used to defeat justice (per BIRON.J. in ***General Marketing Co. Ltd v A.A.Shariff*** *[1980] T.L.R 61 at 65).*

I hold the same view with respect to prayers contained in the affidavit. Prayers have to be made in Court at the hearing otherwise there is no point of making the application. ***So, making them prematurely in an affidavit should not be a reason for avoiding determining the application.****"(emphasis supplied)*

The 3rd point of objection is concerned with the jurisdiction of this court to hear, determine and commit the 2nd respondent for criminal contempt of court sought by the applicant.

The Respondents gave clarification in their rejoinder that in their objection, they do not mean to say that this court is not vested with jurisdiction to hear contempt proceedings. All that they are saying is that this court has no jurisdiction to determine the Criminal charges and convict the 2nd Respondent for criminal contempt contrary to Section 114(1) of the Penal Code as prayed for in the Notice of Motion (prayer 5). The respondents further argued that the reference made by the Applicant to Sections 265 (1) of the Companies

Ordinance Cap 212 and rule 5(e) and 217 to 220 of the Companies Winding Up Rules 1929 were cited out of context. However, they did not show how these provisions of the Law have been cited by the Applicant out of context.

Dr. Luoga submitted that since the jurisdiction of this court to entertain the winding up proceedings was not challenged, it is incompetent for them to challenge the court's application of the laws governing winding up proceedings. This court is guided by the provisions of the Companies Ordinance and the Companies (winding Up) Rules 1929 as the principal legislation on the winding up. The principal legislation governing winding up create offences which can be tried by this court. The acts of contempt fall within the offences listed under Section 265 (1) of the Companies Ordinance Cap 212. Contempt is also specifically listed under Rule 5(e) and Rule 217 to 220 provide for the procedure for arrest and commitments.

It was further submitted by Dr. Luoga that the offence of contempt of court is an offence which is intended to protect the integrity of the court when an act of contempt is committed in respect of specific orders of the court, the first step is to keep the court informed of such a contempt. If the court is satisfied that the facts constitute contempt of court, the court will give directions that the culprits be arrested and charged with such contempt.

Dr. Luoga does not agree that there is any provision of the law preventing this court from giving directions that a criminal trial be

conducted before another court of competent jurisdiction or else hear the case itself. He tried his best to make the point clear that the question of jurisdiction of the court to entertain any ensuring criminal proceedings (if any) is not one which can be dealt with as a preliminary point of law. He said the prosecution of any person found to have acted in contempt of court is a fact matter which cannot be covered through a preliminary objection. I share the same view as Dr. Luoga. Prayers 5 is for an order to arrest and commit the 2nd Respondent to prison until the 1st respondent complies with all the orders of the court related to it. I cannot agree that this point of objection by the Respondents is valid as a preliminary objection. So the 3rd point of objection is equally dismissed.

The last point is concerned with the competency of the court to entertain the applications while there are pending applications in the Court of Appeal. Counsel for both parties have made submissions on this point and Counsel for the respondents have referred me to a number of authorities of the Court of Appeal, including that of **Independent Power Tanzania Limited Vs VIP Engineering Ltd,** Civil Appeal No.54 of 2002 unreported.

With respect to the Counsel for the Respondents, the authorities of the Court of Appeal they have referred to me are not relevant to the present proceedings before me. The matters before me are applications for enforcement and execution of the courts orders. I am guided by the authority of the Court of Appeal in **Emanuel Mbeiyani Vs Katibu Kukundi Nkoanekoli**, Civil Application

No.21 of 1996 (unreported) at pages 2 and 3 where Kisanga J, A as he then was stated that institution of an appeal is not a bar to execution: He said:

> *" This argument however is of avail. The relevant parts of rule 9 of the Court of Appeal Rules provides that: 9(2)(b) – subject to the provisions of sub rule (1), the institution of an appeal shall not operate to stay execution, but the court may, in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 76, order Stay of Execution, on such terms as the court may think fit. Sub-rule (1) and paragraph (a) of sub-rule (2) are not relevant to the facts of this case. But the remaining provisions of the rule make it plain that the mere filing of a notice of intention to appeal is not a bar to the execution of a decree, and by analogy the mere obtaining of leave to appeal is equally not a bar to the execution of a decree. A decree is open to execution unless and until an interested party has applied for, and obtained a stay of its execution."*

In addition to the above reasons, the 4th ground of preliminary objection also fails on another ground because the matters said to be pending at the Court of Appeal were not disclosed in the counter affidavit of the respondents to give an opportunity to the Applicants to respond. I will again refer to the case of **Citibank Tanzania Ltd V TTCL and Others**, (supra) which cited with approval the **Mukisa**

case, also referred to earlier. One of the principles laid down in the case is that the points of law must be either pleaded or must arise as a clear implication from the pleadings. The absence of the averments of the relevant facts in the Counter Affidavit to support the 4th point of objection renders it incompetent as a preliminary objection, on a point of law. It is therefore accordingly dismissed.

As all the preliminary points raised have failed, the preliminary objection is eventually dismissed with costs. The application to proceed to hearing on merit.

N.P.KIMARO,
JUDGE
20/07/2004

26/07/2004
Corum : N.P. Kimaro, J.
For Applicant – Mr. Lugaiya and Asha Kassim/ Dr. Luoga.
For he Respondents – Mr. Mujulis.
Court: Ruling delivered today.

Order: The preliminary objection is dismissed. The hearing of the application to proceed on merit by written submissions.

Order: Written submissions in support of the application to be filed by 9/08/2004 – Reply to be filed 27/08/2004 – Rejoinder if any by 6/09/2004 – Ruling on 30/9/2004.

N.P.KIMARO,

JUDGE

26/07/2004

5,083- words

JD.

I Certify that this is a true and correct of the original/order Judgement Ruling

Sign _____

Registrar Commercial Court Dsm.

Date 27/7/04