IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CAUSE NO. 27 OF 2023

IN THE MATTER OF PETITION UNDER SECTION 233 (1)(2) AND (3) (a-c) OF THE COMPANIES ACT, CAP 212 OF 2002

AND

IN THE MATTER OF PETITION FOR UNFAIR PREJUDICE AND OPPRESSION OF THE MEMBERS RIGHTS IN THE COMPANY

BY

GOPALJI VALLABHDAS CHAVDA..... 1ST PETITIONER

GOPALJI VALLABHDAS CHAVDA (*Administrator of Late Vallabdas Mulji Chavda's Estate*) ..... 2ND PETITIONER

VERSUS

PRAVINCHANDRA GHIRDHALAL CHAVDA..... 1ST RESPONDENT

PREETI PRAVINCHANDRA CHAVDA..... 2ND RESPONDENT

BUILDERS (V.M. CHAVDA) LTD.....3RD RESPONDENT/INTERESTED PARTY

RULING

February 6th, 2024 & March 15th, 2024

Morris, J

The petitioners' move to challenge the alleged unfair prejudice and oppression of members' rights in the company by the respondents, does not seem to commence with a smooth take off. The respondents, apart from the reply to petition; have filed a six-point preliminary rebuff. The subject preliminary objection (PO) challenges the petitioners' *locus*

standi; mode of the proceedings; timeliness of the petition; verification of the petition; petition's page limit; and absence of the affidavit in support of the petition.

The Court ordered the PO to be argued by way of written submissions. The filing pattern thereof was complied with. Messrs. Robert Rutaihwa and Frank Mushi, both learned counsel; advocated for the petitioners and respondents respectively. In pursuit of the PO, the respondents have opted to drop four (4) of the six (6) grounds thereof and argue only two grounds, namely:

1. *The petition is bad for being brought by persons are who not members/shareholders of the 3rd Respondent Company within the meaning of section 233(1)(2) or (3) of the Companies Act, Cap 212 of 2002; and*
2. *The petition brought under section 233(1)(2) or (3) of the Companies Act, Cap 212 of 2002 is bad for being misconceived for an ordinary suit to claim shareholding status by the 1st and 2nd Petitioners in the 3rd Respondent Company.*

The retention of two points above notwithstanding, the respondents' counsel has argued them simultaneously. His appreciation of the requisites of PO aside, Mr. Mushi argues that, so long as the petitioners allege in their petition that their shareholding and membership

in the 3rd respondent ceased by 1981; they cannot legally commence these proceedings. That, they lack the legal mandate to do so. To him, the petitioners should pursue restoration into their alleged status first for them to qualify as competent petitioners under the law.

In other words, the respondents' advocate maintains that the present petition can only be preferred by the member(s) of the 3rd respondent: no less, no more and no alternatives. Auxiliary to that argument, the respondents contend that appropriate initial-recourse for the petitioners is to file a suit to reclaimed restoration in the 3rd respondent company following which success they can competently query the fairness of the company's operations.

The respondents' counsel has sewn his contention in the holdings of courts in ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors*** [1969] EA 696; ***Re Smith and Fewcett Ltd*** [1942]1Ch 304; ***Re Jermyn St. Turkish Baths Ltd*** [1971]1WLR 1042; and ***Re Meyer Douglas Pty Ltd*** [1965] VR; and unreported cases of ***Gerald Paul Gedi v Azam Media Ltd and 9 Others***, Civil Case No. 32 of 2021; ***Soitsambu Village Counsel v TBL and Another***, Civ. Appeal No. 105 of 2011; ***Mary Deogratias Magumo @Mary Boniface Fungo and 2***

Others v The Registrar of Companies, Misc. Comm. Cause No. 192 of 2023; ***Yasmin Haji v Kenyatta Drive Properties Ltd and Another***, Misc. Comm. Cause No. 14 of 2022. The respondents prayed for dismissal of the petition with costs.

In yet another equally interesting line of disputation, the respondents are argued that, if the petitioners were to be spared under the first limb of the PO (*locus standi*) above; the wrath of time limitation would catch up with them. To the respondents, as long as the petitioners are alleging that their removal from the 3rd respondent's membership/shareholding wayback 1976 and 1981 respectively; the petition herein is time-barred. That is, this petition being considered as a suit [reference made to ***Rupesh Kumar Soni v. Vidon Kumar Soni and 2 Others***, Misc. Comm. Cause No. 25 of 2022 (unreported)]; the time line for the same is six (6) years.

The strength of the foregoing argument is found in the respondents' treatment of the dispute between parties herein as "breach of shareholding contract". Hence, a contractual dispute whose time limit is the stated time above. The respondents, thus, reiterate the prayer that the present matter is incompetent for want of timeliness; and has to be

dismissed with costs. Although the respondents voluntarily abandoned this point from the outset of their submissions; which would otherwise warrant petitioners not to labour in countering it, for reason(s) given later in this ruling, the Court will briefly delve into this contention. For now, I will stop here.

In counter-arguments, the petitioners submit this matter is proper before this Court. It is contended by their counsel that throughout the parties' pleadings, the rival sides are respectively moving the Court to find that the petitioners are lawful members/shareholders, on the one hand; and that they are not, on the other. That is, for the Court to conclusively determine such dispute, it will have to embark on analysis of pleadings, evidence and submissions of each side. To the petitioners, if this approach is to be adopted, the Court will go off-rails.

Reference is made to ***Mukisa Biscuit's Case*** (*supra*); and ***Meckmar Corporation (Malaysia) Benhard (in liquidation) v VIP Engineering and Marketing Ltd and 3 Others,*** Consolidated Civ. Applications. Nos. 190 and 206 of 2013 (unreported) to buttress the argument that a PO not based on pure point of law; or that calls for the

court's inquiry into evidence in order to determine it, is not worth such name. That is, it disqualifies from being treated as PO.

In addition, the petitioners are at issue with the respondents' argument that the 3rd respondent maintains the register of members and that the dispute herein is based on breach of shareholders agreement. To them, the two corporate concepts are not only misconstrued by the respondents but also, they are a forceful creation of the latter; and hopelessly introduced in this case in order to defeat but nothing. The petitioners contends that their pleadings have nothing to do with the wished-for shareholders agreement nor do they refer to the register of members as maintained by the Registrar of Companies but as per section 115 of ***the Companies Act***, Cap 212. To this conclusion, the petitioners argued that the cited cases by the respondents are irrelevant and/or distinguishable hereof. Hence, they pray that the so-called PO should be overruled with costs.

I have dispassionately considered the two rival sides arguments above. Not in dispute are more than a few matters. I will state some of them now. **First**, that a PO must be a point of law which disposes the whole suit preliminarily without needing evidence-in-proof. **Second**,

company affairs perceived as being conducted unfairly thereby prejudicing interests of its members may be contested in court by any member of such company. **Third**, the petition for unfair prejudice (and oppression of members' right in the company) may handily be treated as a suit.

Midst of such undisputed matters, the court has rivalry invitations from each side of the case. On his part, the respondents' advocate (Mr. Mushi) prays that the court should apply the orthodox principle: to dismiss with costs the petition for want of both *locus standi* and timeliness of the proceedings. To the contrary, the petitioners (through Mr. Rutaihwa) meekly pray for the PO to be overruled with costs. I now steer the Court towards determining whether the raised PO has any merit.

It is correct, as submitted by Mr. Mushi, that a person petitioning for an order that the company is being unfairly or prejudicially managed; must have a requisite legal mandate to do so – the *locus standi*. Indeed, such mandate entitles the petitioner to move the court for the desired reliefs. It is the law. Section 233 of ***the Companies Act***, Cap 212 is couched in an unambiguous text in this regard. Thus, a party cannot legally engage the court if he lacks *locus standi.* Discernibly, a matter so

filed by a person without legal mandate, becomes incompetent. It fails preliminarily.

I am also mindful of the fact that *locus standi* is an integral part of the jurisdiction. That is, in its absence, the case is rendered as incompetent. See, for instance, ***Registered Trustees of SOS Children's Village(T) v Igenge Charles & 9 Others***, Civil App. No. 428/08/2018; and ***Peter Mpalanzi v Christina Mbaruka***, Civil Appeal No. 153 of 2019 (both unreported). Hence, legal mandate is intrinsically a jurisdictional concern because the court, as the general rule, cannot adjudicate on a suit which is initiated by a person lacking capacity. Further, *locus standi* marry into yet another crucial concept in law - the cause of action. Normally, only people with *loci standi* have causes of action against opponents.

Notwithstanding the foregoing compulsive dictates of the law; whether or not the petitioners herein, pursuant to their pleadings, have the necessary qualifications is, is a tricky matter. As is the case in the present suit, when one person alleges to possess the *locus standi*; and the opponent party disputes such allegation, the court cannot guess who between the two is completely truthful. In my considered view, it would

be unsafe for the court to speculate which side should be believed most. Thus, evidence to prove each side's version of averment becomes inevitable.

In line with the above, I hastily look at the rivalry pleadings of the opposing sides herein. The relevant parts of paragraphs 8 of both the petition and the joint reply to the petition are quoted below to show a portion of the dispute between parties herein. They comparatively run as follows:

> *"8 (petition). The 1st petitioner therefore, became **the member** and shareholder of the company with 105 shares held in his name (forming 17.5% shares of the company) while the other 105 shares were still in the name of Vallabhdas Mulji Chavda (the 2nd Petitioner)...This position **remained the same** until 1976 when the shares were increased but **maintained at the same ratio** in terms of the percentage but this time at 1750 for the **petitioners** respectively, 2000 for Mohanlal Jayram Chavda (M.J. Chavda) and 4,500 shares for the estate of the late Kadvi Jiwa. This **status** is the one the petitioners recognize as demonstrating the **correct and proper position** of the company as regards to shareholders and **members of the company to-date**."*

*"8 (joint-reply to petition). The contents of paragraph 8 of the Petition are **denied**...We further state that by the time of his death in 1990, the 2nd **Petitioner had already ceased** to be a shareholder way back in 1976"* (bolding rendered by the Court for emphasis).

From the foregoing excerpts, the various contentions of parties become ostensible. **One**, as the respondents deny the 1st petitioner acquiring membership in the 3rd respondent company, the subject petitioner is placed to task to substantiate his status. **Two**, the shareholding pattern of the 3rd respondent pre and post 1976 calls for validation. **Three**, petitioners are to justify the legal basis of their holding that the membership/shareholding status of the company herein has remained unchanged from 1976 all through to the present. **Four**, the respondents put themselves on onus to prove that the 2nd petitioner passed on after losing his shareholding status in the 3rd respondent about a decade and a half before.

Five, in the course of the envisaged proceedings, questions like whether or not there has ever been a lawful transfer of shares between petitioners; validity of the alleged transmission of shares; whether there has ever been any unwholesome compliance of mandatory procedures in

handling of shares and membership in the 3rd respondent; *et cetera, et cetera* will have to be addressed and answered.

Trite is the law that in civil procedure, when a fact is pleaded by one party to a suit and disputed by the other, each party must marshal evidence to prove the respective averment. Proving and disproving such fact is undertaken during the hearing of the suit. Therefore, it gets out of the realm of preliminary points of objection. That is, a PO must constitute pure points of law; no more [***Mukisa Biscuits' case*** (*supra*) and ***Aggreko Energy Rentals (T) Ltd v Cata Mining Co. Ltd,*** Comm. Case No.5 of 2021 (unreported); followed].

From the above-quoted paragraphs from the pleadings, the highlighted aspects are matters in controversy which can be determined conclusively upon procurement and admission of evidence during the trial. This position is further evidently cemented by the submissions of the opposing parties hereof. Each side is trying to sneak in the court's record or appealing to the Court to look at this or that in the pleadings and/or annexures as if the latter have already been admitted in evidence.

In my view, none of the opposing parties can be taken to have conclusively established the allegations so far. To hold that the veracity

of petitioners/respondents' averments in the pleadings is incontestable in the present circumstances, will amount to overstretching the elasticity of PO. I desist yoking myself in such a trap.

Another adjunct argument of the PO, as stated above, is that the matter herein is time-barred. The respondents' counsel prayed to abandon it at the beginning but later purported to submit on such point in the guise of prematurity of the present petition. Though expressly abandoned, I will discuss this point. I have reasons to do so. **Firstly**, after the respondents abandoned it, the Court did not make a ruling or order thereof. Hence, I am not *functus officio*. **Secondly**, both parties extensively submitted on the same. Hence, they both earned and exercised their respective right of being heard on the matter.

Thirdly and perchance the most significant one, the nature of the raised point does not allow sidestepping it. It is an objection on the time line of commencement of these proceedings. Time limitation is a serious legal principle which goes to the root of courts' jurisdiction. It, thus, deserves serious consideration. See, for instance, ***Barclays Bank Tanzania Limited v Phylisiah Hussein Mcheni***, CoA Civil Appeal No. 19 of 2016; and **John Cornel v. A. Grevo (T) Ltd**, HC Civil Case No. 70

of 1998 (both unreported). In the latter case, it was insisted that the "law of limitation, on actions, knows no sympathy or equity. It is a merciless sword that cuts across and deep into ail those who get caught in its web".

Principally, both the foregoing cases support the Latin maxim that *vigiiantibus non dormientibus jura- subveniunt;* implying that, the law assists the vigilant and not one who sleeps over his rights. Hence, parties to a case must comply with time-frames set out in the law. That said and done, I will now discuss this point.

By a way of recap, the respondents' PO hereof is that this petition is misconceived for an ordinary suit. That, the reliefs sought by the petitioners can only be pursued after a successful suit of reclaiming their alleged status. Weirdly, the submissions in support of this point ended in introducing a side-argument that this petition, being a suit arising from a contractual dispute; has been filed out of statutory time. Seemingly, the respondents' standpoint is that the petitioners cause of action arose in the late seventies and/or early eighties when their membership/shareholding was arguably taken away.

I muscularly agree with the respondents' argument that the statutory time limit for a suit arising from a contractual disagreement is

six (6) years. Nevertheless, I will distance myself from them regarding the countdown point to start from. Whereas respondent claim that the alleged petitioners' status in the 3rd respondent was lost in 1976 and 1981 respectively; the petitioners contend that the alleged removal in both years, are part of the prejudices and oppressions complained of in their petition.

For obvious basis, this point will not detain me for so long. In view of what I have laboured to explicate in the first line of PO above, to ascertain the pivot of the cause of action not only calls for taking and evaluation of evidence in such regard.

In other words, in a case where the petitioners are, for example, alleging that the prejudices/oppressions by the respondents are continuous and perpetual (paragraph 25 of the petition) which allegation is disputed by the latter (para 26 of the joint reply to petition); it will be an exercise in futility for the Court to merit the PO. Indeed, such task parallels going on a wild goose chase.

In view of the conclusions and reasons I have reached at and given above, the PO is barren of merit. It is inept. Accordingly, I overrule it. As parties are close relatives, each will bear own costs. It is so ordered.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION

C.K.K. Morris
Judge
March 15th, 2024

Ruling delivered this 15th day of March 2024 in the presence of Advocates Robert Rutaihwa and Frank Mushi for the petitioners and respondents respectively.

C.K.K. Morris
Judge
March 15th, 2024