

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISCL. CIVIL APPLICATION NO. 137 OF 2004

PROF. J. SANGAWA.....APPLICANT

VERSUS

THE MANAGING DIRECTOR.....1ST RESPONDENT

**TANZANIA ELECTRIC SUPPLY LTD
(TANESCO).....2ND RESPONDENT**

**PRESIDENTIAL PARASTATAL SECTOR
REFORM COMMISSION.....3RD RESPONDENT**

RULING

KALEGEYA, J:

The Applicant represented by Mr. Mudamu, Advocate, is before this court urging for the following orders:-

"(i) That the ... court be pleased to grant leave to the application to sue the 1st Respondent which is a specified Corporation by the 2nd Respondent under Public Corporations Act 1992 as amended.

(ii) *That the court be pleased to grant leave to join the 2nd Respondent in the intended suit against the 1st Respondent".*

The application is supported by Prof. Sangawe's affidavit which Mr. Mudamu fully adopted in his submissions.

Upon full consideration of the affidavit evidence and submissions, I find both prayers sought to be superfluous. Why?

I fully appreciate that under the Public Corporations Act, 1992 as amended by Act 16 of 1993, PSRC (2nd Respondent) becomes an automatic Official Receiver of every Specified Public Corporation upon specification (S.43(1). And, I am also versed with **S.9 of the Bankruptcy Ordinance** which provides that a body placed under an Official Receiver cannot be sued for **claims provable in Bankruptcy** until and unless leave to sue is sought and secured.

Further to the above, although the Applicants did not bother to so state and point out the relevant GN, in terms of S.59 of the

Evidence Act, 1967, I have taken judicial notice of the existence of GN No.543 of 1997 (22/8/97) which specified the 1st Respondent. It is thus beyond controversy that the 1st Respondent is a Specified Public Corporation placed under PSRC as an Official Receiver and any suit against it, based on claims provable in bankruptcy, must secure court's leave before it is instituted. **The question is whether the suit intended to be instituted is based on claims provable in bankruptcy hence requirement of leave first and also whether in suing the 2nd Respondent the Applicant or any party requires leave.**

Starting with the latter question, with respect to Mr. Mudamu, I know of no law, which prescribes what he is proposing. PSRC is a legal entity capable of suing and being sued. No leave is thus required.

Regarding the first question, while generally granting such a prayer is almost automatic because it is simply aimed at compliance with the statutory requirements, in my considered view, in the present situation, it is not required. I am of the settled view that

leave to sue a Specified Public Corporation is required where the intended suit/action is **based on claims provable in Bankruptcy** (S.9 of the Bankruptcy Ordinance). **S.35 of the Bankruptcy Ordinance** provides:

"35(1) demands in the nature of inliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy". (emphasis mine)

Now, what the Applicant intends to claim from the Respondents is clearly put in a proposed plaint annexed to the chamber application. Paragraphs 4-6 and 9 thereof have the following:-

- "4. *That the Plaintiff entered into a lawful contract with the Defendant Company for electricity supply to the Plaintiff's residential premises.....house No.250vide Electricity energy metre No.04088205424 and an agreement for the purpose of electricity supply dated **17th day of February, 2000**.....*
5. *That the Plaintiff at all material time he has been connected with electricity supply, he has been paying his bills in time through the said LUKU Metre System.*
6. *That **on 28th day of October 2002** without any colour of right he was disconnected from electricity supply by the defendant company.....*
7. *.....*
8. *.....*
9. *That the Plaintiff suffered general damages due to the said disconnection amounting to shillings fifty million.....".*

Clearly, the claims are pegged on a contract entered into by the parties subsequent to the specification date and therefore are not claims provable in bankruptcy in terms of S.35 of the Bankruptcy Ordinance quoted above. It would have been different if the contract for the supply of electricity had been in existence by the specification date. In such a situation, indeed there would be an inter-connection but not in this case.

I am aware that this court has two varying views on the matter. One view holds that once a Corporation is specified it can't be sued **for any claim** unless leave is **obtained (i.e Civil Appeal No. 180 of 1992, Salum Mohamed Hassan Mohsin vs National Shipping Agencies Co. Ltd & others)** while the other view is that leave is only required in claims provable in bankruptcy **(i.e. Civil Case No.273 of 1999, Ultimate Security Ltd and Commissioner for VAT, NBC (1967) Ltd. And TRA)**. I subscribe to the latter view as I have variously decided in other cases including, **Commercial Case No. 105/2002, Sanyou Service Station Ltd vs BP and (HC) Civil Case No. 174 of 2004, Bertha Msemwa**

vs Clarence Solomon Mjukuu; Watson Kihaka t/a Lupelo Investment and NIC of (T) Ltd).

In **Mohsin case** referred to above, my brother Luanda, J, observed:

"Elsewhere I have said ... once a Corporation has ...been declared a Specified Public Corporation, it ceases to exist as a legal entity. It cannot sue and be sued. The powers of running the affairs of that Corporation including ownership of properties is vested with the Presidential Sector Reform Commission - the Official Receiver. The said PSRC is vested with powers to sue and being sued in respect of that Specified Public Corporation. But the law allows to sue such a "dead body" after getting leave of the court. To allow a "dead body" to be sued after getting leave to say the least is a misnomer. Something should be done to this obvious anomaly".

With greatest respect to my brother judge, I hold a different view. In my considered opinion, a substantial part of the above views seems not take into consideration the spirit and content of the Public Corporations Act 1992 as amended by Act 16 of 1993 in their

totality and also does not take into consideration the generally accepted roles that can be performed by a Receiver.

As I had an occasion to observe in **Civil case No. 296 of 1997, Said Mnimbo & Others versus State Travel Services Ltd and Tourism Services Tanzania and PSRC**, the role of a Receiver is wide and depends on how the appointment is made. Therein I observed:

"The way I understand their (Counsel) arguments, they seemed to propose that a Receiver is only appointed in ventures which have to be liquidated or under liquidation. With respect this is not necessarily the case. A distinction here should be made between Receiver and Liquidator although the former may also be appointed the latter and also between Receivers appointed by courts and those by individuals or specific statutes.

*As defined in the **Halbury's Laws** of England (Fourth Edition), Vol. 39, Para. 801,*

"A receiver is a person appointed for the collection or protection of property. He is appointed either by the court or out of court by individuals or Corporations. If he

is appointed by the court, he is an officer of the court deriving his authority from the court's order. If he is appointed out of court, he is an agent and has such powers, duties and liabilities as are defined by the instrument or statute under which he is appointed and derive from the general law of agency."

A receiver is often appointed in general terms over all the property and assets, and his powers and duties must depend on the terms of his appointment. This would depend on the object of the appointment. It could be for the purposes of determining the rights of parties or to ascertain what encumbrance exists on the venture and what their priorities are or to settle dispute as to title.

A receiver could also at the same time be appointed a manager of the venture.

What the above exposition leads to is that a Receiver can be appointed even for ventures not under liquidation nor expected to be liquidated, the controlling purpose for such appointments being the collection or preservation of the relevant property for the benefits of persons who have an interest in it. It was under this principle that, by statute, PSRC was formed and

appointed an Official Receiver of all Specified Public Corporations' so designed under Act 16 of 1993..."

Thus, with respect, the mere fact that a Public Corporation is specified and in terms of S.43(1) of the Act, is placed under PSRC as an Official Receiver does not 'kill' such corporation so as to define it as a *"dead body."* Under the Act, PSRC is given very wide powers over Specified Public Corporations including Liquidation and restructuring. The Act as drafted is not without problem but for sure one thing is clear in that PSRC becomes controller or responsible of such corporations for liabilities/claims provable in bankruptcy on the specification date and leaves the corporation alive unless it finally decides to liquidate it.

In Civil Application No. 45 of 1999, Kampuni ya Uchukuzi Tabora (Ltd) and Plaxeda Paulo and T.M.K. Mrema, the Court of Appeal observed as follows:

"The crucial question raised in this application seem to be: what are the effects of placing the applicant Corporation under receivership of PSRC? Section 39(1) of

The Public Corporations (Amendment) Act which Mr. Mutaki relied on provides that:

"39(1) Where a Public Corporation has been declared a Specified Public Corporation, the Commission shall from the effective date be responsible for the restructuring of that Specified Public Corporation".

I can see nothing in this provision which suggests that upon being placed under receivership a Public Corporation ceases to exist as a legal person or ceases to own property. What the provision says is that from the effective date the PSRC shall be responsible for the restructuring of the Corporation, which continues to be a living person, with a view to improving its performance".
(emphasis mine)

The court then proceeded to **S.43(1)**, and after quoting it, observed further,

"The provision vests in the PSRC the power to act as the official receiver of the Specified Public Corporation, and also the power and the rights of a receiver appointed under the Bankruptcy ordinance".

And after quoting **S.9 of the Bankruptcy Ordinance**, the Court went on,

*"The provision does not transfer the assets and liabilities of the Specified Public Corporation to the PSRC as claimed by Counsel. **It merely constitute PSRC the receiver of the property of the Corporation in question, but it does not say that the said corporation ceases to own property. My understanding of the provision is that a public Corporation under receivership can continue to own property, and that its creditor of any debt provable in bankruptcy can, with the leave of the court, proceed against such property. Of course, there is nothing to prevent such creditor from joining the PSRC, the receiver, as a Co-defendant.....***

...

I think that the applicant Corporation continues to exist in law, continues to be the owner of its property and that, with the leave of the court, a creditor of a debt provable in bankruptcy can proceed against its property". (emphasis mine)

It is clear therefore that though placed under PSRC, the 1st Respondent in this matter is still an active legal entity that can sue

and be sued; that can enter into various contractual obligations. But for creditors who have claims against the Corporation and **whose claims are provable under bankruptcy as at the specification date** they must seek court's leave first before mounting an action.

In the case at hand, in terms of paragraphs 4-6 and 9 of the plaint in the intended suit, the contract between the parties was entered into in 2000 and it is alleged to have been breached in 2002. Either date is beyond the specification point. The claims are not therefore provable in bankruptcy hence no leave is required. And, as I have already observed, in this aspect also, the Applicant requires no court's leave to sue the 2nd Respondent. As no leave is required to sue either Party, the application was wrongly filed and it is accordingly struck out.

L. B. Kalegeya

JUDGE

Date: 8/7/2005

Coram: Kalegeya, J.

For Applicant: Mr. Luguwa for Mr. Mudamu.

Ruling delivered.

L. B. Kalegeya

JUDGE

8/7/2005