

IN THE HIGH COURT OF TANZANIA

AT DODOMA

MISC CIVIL APPLICATION NO 01 OF 2013

HAMZA F. KIMBENGLEAPPLICANT

VERSUS

1. TANZANIA POSTS CORPORATION

2. THE CONSOLIDATED HOLDING CORPORATION.....RESPONDENTS

A. MOHAMED, J:

RULING

This ruling is in respect of a preliminary objection on a point of law raised by the 1st respondent Tanzania Posts Corporation that the applicant Hamza Kimbengele's application is incurably defective for being filed under non enabling provisions of the law.

The applicant has filed his Application No. 7 of 2013 before this court seeking leave to commence legal proceedings against the 1st respondent under the official receivership of the 2nd respondent, the Consolidated Holdings Corporation.

When the matter came up for hearing on 21/7/2015, the parties consented to arguing the PO by way of written submissions and both duly complied with this court's scheduling order.

In support of the 1st respondent's PO, Ms. Zuhura Pinde, learned counsel urged this court to strike out the application for non-citation of the enabling provisions of the law. She averred the applicant had cited section 9 (1) of the Bankruptcy Act [Cap 25 R.E 2002] ("the Bankruptcy Act") which only directs the effect of a receiving order. She argued that the applicant had omitted to cite section 43 (1) (a) and (b) of the Public Corporations Act [Cap 257 R.E. 2002] ("the Public Corporations Act") which renders the application to be incompetent.

The learned counsel went on to cite several authorities on the consequences of wrong citation of enabling provisions of the law including **China Henan International Corporation Group Vs. Salvand K.A Rwegasira**, Civil reference No. 22 of 2005 (unreported) which held that;

"It is now settled that wrong citation of a provision of the law or rule under which the application is made renders the application incompetent."

She concluded that section 9 (1) of the Bankruptcy Act must be read together with section 43 (1) (a) and (b) of the Public Corporations Act which reads;

"(1). Notwithstanding any other law to the contrary, with effect from the date of publication of an order declaring a public corporation to be a specified corporation, the Commission shall-

- (a) Without further assurance on appointment have the power to act as the official receiver of the specified public corporation, and**
- (b) Have the power and all rights of a receiver appointed in accordance with or pursuant to the Bankruptcy Ordinance."**

Resisting the 1st respondent's contentions, Mr. Wasonga for the applicant contended that the 1st respondent did not abide by this Court's 21/7/2015 order that he file a notice of the PO. Instead he filed written submissions in support of the PO without filing the notice of the PO and as such no notice of the PO was filed.

Without prejudice to the above, Mr. Wasonga countered the 1st respondent's submission that this rendered the application incompetent as the applicant had failed to cite section 43 (1) (a) and (b) of the Public Corporations Act and he contended that the said provision simply provides for powers of the Commission in restructuring specified public corporations. The learned counsel went on to argue that the section does not deal with the granting of leave by the court to commence legal proceedings against a specified public corporation under receivership. It only provides for powers of the Commission in restructuring specified public corporations and have the power and all rights of a receiver in accordance with the Bankruptcy Act.

Having gone through and given my consideration the respective contentions, I find merit in those of the applicants.

I begin with the applicant's argument that the 1st respondent failed to file a notice of the PO. I think this argument is misconceived as on 21/7/2015, the 1st respondent prayed to withdraw his first PO and further prayed to file another one which prayer was granted. Thus there was verbal notice of the PO and when he filed his written submissions, the substance of the PO was contained therein and the applicant was not prejudiced in any way as he was afforded sufficient time to file his submissions.

I now move to the main contention between the parties that the applicant's failure to cite section 43 (1) (a) and (b) of the Public Corporations Act that he argued was to be read together with the section 9 (1) of the Bankruptcy Act rendered the application incompetent.

I do not think so. Section 9 (1) of the Bankruptcy Act is indeed the enabling provision for the application as it requires leave of the court to commence such proceedings.

Section 43 (1) (a) and (b) of the Public Corporations Act merely recognizes and vests the Commission (the Parastatal Sector Reform Commission) with powers of a receiver pursuant to provisions of the Bankruptcy Act..

In a nutshell, my reading of the above provision is that it is merely declaratory in recognition of the relevant provisions of the

Bankruptcy Act including the Commission being the receiver in respect of specified public corporations. It is thus, not an enabling provision.

In view of the above discourse, the preliminary objection lacks merit and I hereby dismiss it with costs.

It is so ordered.



A. MOHAMED
JUDGE
22/10/2015