

(ORIGINAL)

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

WINDING UP PETITION NO. 492 OF 2016

Pursuant to section, 279 (1) (e) and 281

of the Companies act No. 12 of 2002

IN THE MATTER OF THE COMPANIES ACT NO. 12 OF 2002

AND

IN THE MATTER OF NGERENGERE ESTATE

(FORMERLY TUKWA ESTATE COMPANY)

EDNA DAMARIS SITTA 1ST PETITIONER
CLEMENT TUKWA 2ND PETITIONER
SIMON TUKWA 3RD PETITIONER
CHILIMO TUKWA 4TH PETITIONER

VERSUS

NGERENGERE ESTATE COMPANY

(FORMERLY TUKWA ESTATE COMPANY)..... RESPONDENT

Date of Last Hearing: 24/11/2017.

Date of Ruling: 16/02/2018.

RULING

I. ARUFANI, J.

The above named petitioners filed in this court the petition under sections 279 (1) (e) and 281 of the Companies Act No. 12 of 2002 seeking for an order to wind up the Ngerengere Estate company

J. Arufani

Limited mentioned above as the respondent. Upon the respondents being served with the petition they resisted the same and filed a notice of preliminary objection containing the following points of law:-

- (a) The Hon. Court has not been properly moved to exercise the jurisdiction invoked.
- (b) The petition is bad for want of a cause of action.
- (c) The affidavit verifying Winding up Petition is incurably defective.
- (d) The Petition is bad for want of Locus stand of the Petitioners.
- (e) The Honourable Court has no jurisdiction.
- (f) The Petition is time barred.

While the petitioners were represented in this matter by advocates from the Tanganyika Law Society under the legal aid basis, the respondents were represented by advocate Audax Kahendaguza Vedasto from Auda & Company Advocates. The counsel for the parties prayed and allowed to argue the points of preliminary objection by way of written submission.

The learned counsel for the respondents argued in relation to the first point of objection that, the petition filed in this court to wind up the respondent is made under section 279 (1) (e) and 281 of the Companies Act. He argued that, section 281 cited in the petition has two subsections which the first subsection regulates the petitions for winding up of a company at the instance of the company itself, creditors, contributories or administrators and the second

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subsection regulates voluntary winding up of a company by official receiver or any other person authorized in that behalf. He argued that, the act of the petitioners to cite section 281 without particularizing which subsection is applicable in the matter amount to citing a general provision of the law which apply only where there is no specific provision of the law governing the concern situation.

He submitted that, as the petitioners failed to specify in the petition they are moving the court under which specific subsection of section 281 of the Companies Act it amounts to wrong citation of the law. To support his submission he referred the court to the case of **China Henan International Co-operation Group V Salvand K. A Rwegasira** [2006] TLR 220 where it was stated that, wrong citation of a provision of the law or rule under which an application is made renders the application incompetent. He stated that, the powers of the court to entertain the petition at hand is found under sub-section (1) of section 281 of the Company Act which was not cited in the petition to move the court to grant the order of winding up the company prayed by the petitioners.

He cited in his submission the case of **Edward Bachwa & three others V. The Attorney General & Another**, Civil Application No. 128 of 2006 CAT (Unreported) where it was stated that, wrong citation of the law, section, sub-section and or paragraph of the law or non-citation of the law will not move the court to do what is asked and renders the application incompetent. He also cited the case of **Rashid Abdullah Rashid El Sinan V. Mussa Haji Kombo and**

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Another, [1998] TLR 530 which its decision is similar to the one reached in the above case. He submitted that, as the court has not been moved properly the application be dismissed with costs.

In response to the above submission the petitioners raised in their submission a point of law that, the respondent's reply to the petition was filed in court after the elapse of twenty one days from the date of being duly served instead of seven days as provided under Rule 35 of the Companies (Winding up) Rules, 1929. He submitted that, there is no proper legal reply filed in court by the respondent. He referred the court to the case of **Jeeten Singh Sehmi V. Jaski Limited**, Misc. Civil Cause No. 111 of 2005 and **Gautam Jayram Chavda V. Covell Matthews Partnership Ltd**, Misc. Civil Appeal No. 62 of 2000 to support his submission.

The court will not dwell in the above points raised by the learned counsel for the petitioners because they were not raised in the known procedure of raising points of objection as it was raised in the submission of the counsel for the petitioners. Even if it was raised under the normal procedure used to raise points of preliminary objection but as rightly stated by the learned counsel for the respondent the provision of the law upon which is based is a dead law as it was replaced by the Company (Insolvency) Rules, 2005 which came into operation in 2009 through GN No 45 of 2012. Therefore all the cases cited to support the said point of law were decided before the new Rules came into existence.

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Back to the points of objection raised by the learned counsel for the respondent, the petitioners argued in relation to the first point of objection that, the powers of the court to wind up a company is provided under section 279 (1) (e) of the Company Act and supplemented by section 281 (1) of the same law. They argued that, it is a principle of law that, no supplementary provision should stand without a specific provision. They submitted that, as the specific provision is properly cited in the application no way it can be said the respondents have been embarrassed by the omission to cite the relevant subsection in the petition. The respondents argued that, the omission is fatal when it create an injustice to other parties. To support their submission they referred the court to the case of **A. M Mlenda V. Juma Mfaume** [1989] TLR 145 where it was stated that, omission to cite provision of the law in the chamber summons is not fatal.

It is the petitioners' submission that, omission in the matter at hand does not go to the root of the matter and therefore cannot render the application incompetent. They submitted further that, even if it will be found the omission goes to the root of the matter and make the application incompetent the remedy is to strike out the case and not to dismiss it as prayed by the respondent. They supported their submission by referring the court to the case of **China Henan International Group** (Supra). They prayed the court to proceed to deal with the application, as the omission in citation is curable and does not go to the root of the matter.

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The court has carefully considered the rival submission from both sides in relation to the first point of objection and come to the finding that, it is true that the petition before the court is made under section 279 (1) (e) and 281 of the Companies Act. It is also true as rightly argued by the learned counsel for the respondent and without being disputed by the counsel for the petitioners that, section 281 has two subsection which deals with different scenario upon which a company can be winded up. As stated by the counsel for the respondent subsection one deals with winding up of a company at the instance of the company itself, creditors, contributories and administrators while subsection two deals with winding up of a company by official receiver or any other person authorized in that behalf.

Under that circumstances the petitioners were required to specify the petition is made under which subsection and paragraph of section 281 of the Companies Act as each of those subsections have paragraphs. The argument by the petitioners that, section 281 is a supplementary provision to section 279 (1) (e) of the Companies Act therefore failure to specify the subsection of the said supplementary provision to the petition has not caused miscarriage of justice to the respondent as the specific provision is cited has been found by this court is not supported by any provision of the law or case law. Even if it would have be accepted that section 281 is supplementary provision to section 279 of the Companies Act but to the view of this court if that provision of the law was supposed to be

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cited to supplement that other provision of the law it was supposed to be cited properly as legislated.

Failure to cite the same properly amounted to non-citation and the position of the law as stated by the Court of Appeal of Tanzania in the cases of **China Henan International Co-operation Group** and **Edward Bachwa & 3 Others** and **Edward Bachwa and Three Others** cited in the submission of the learned counsel for the respondent renders the petition incompetent. The above position of the law was cemented by the Court of Appeal of Tanzania in the case of **Lugano S. Kalomba & 22 Others vs the Permanent Secretary, Ministry of Education and Vocational Training and the Honourable Attorney General**- Civil Appeal No. 78 of 2008 where the Justices of Appeal stated that:-

“We think that the law is now settled that where a wrong provision of the law is cited or where one exists and is not cited in support of an application, a court before which the application is placed cannot be said to have been properly moved, and so such a matter is said to be incompetent and so liable to be struck out.”

In the strength of the above stated position of the law it is the finding of this court that, as the petitioners did not specify the petition is made under which subsection and paragraph of section 281 of the Companies Act then the petition is incompetent as the relevant subsection of that section upon which the petition would

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have been made is not cited. The court has gone through the case of **A. M Mlenda V. Juma Mfaume** cited in the submission of the petitioners where it was stated omission to cite a proper provision of the law in chamber summons is not fatal to the application and come to the finding that, that case was decided by the High Court long time ago before the Court of Appeal of Tanzania decided the cases referred hereinabove which this court is bound to follow. In the premises the court has found the first point of objection raised by the counsel for the respondents has merit that the court has not been properly moved to exercise its jurisdiction to grant the reliefs the petitioners are seeking from this court.

Though the above finding would have been enough to dispose of the matter before the court but the court has found proper to go through the fourth point of preliminary objection which is stating that, the petition is bad for want of locus standi of the petitioners. The counsel for the respondent referred the court to the case of **Josiah Balthazar Baisi and 138 others V. Attorney General and Another**, [1998] TLR 331 which defined what is locus standi. He argued in his submission that, section 281 (1) of the Companies Act states clearly that, the class of people who have the locus standi to bring the petition for winding up a company before the court of law is company itself, creditor or creditors, contributory or contributories or an administrator.

He submitted that, according to paragraph 12 of the petitioners' affidavits, the second, third and fourth petitioners are neither the

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Though the above finding would have been enough to dispose of the matter before the court but the court has found proper to go through the fourth point of preliminary objection which is stating that, the petition is bad for want of locus standi of the petitioners. The counsel for the respondent referred the court to the case of **Josiah Balthazar Baisi and 138 others V. Attorney General and Another**, [1998] TLR 331 which defined what is locus standi. He argued in his submission that, section 281 (1) of the Companies Act states clearly that, the class of people who have the locus standi to bring the petition for winding up a company before the court of law is company itself, creditor or creditors, contributory or contributories or an administrator.

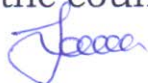
He submitted that, according to paragraph 12 of the petitioners' affidavits, the second, third and fourth petitioners are neither the

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company nor creditors, nor contributories nor administrators. He argued that, annexure NGE 6 to the petitioners' affidavit which is a report from BRELA dated 29th day of November, 2006 shows the above mentioned petitioners were not in any of the above listed classes. He submitted that is enough to establish the petition has been preferred by wrong parties who do not have the locus standi to move the court to grant the order sought. To fortify his submission the learned counsel for the respondent referred the court to the case of **Mohamed Abdul Hussein V. Pita Kempap Limited** [2005] TLR 383 where it was stated that, an application which is supported by a defective affidavit lacks the necessary support and is incompetent.

In response to the above submission the petitioners states in their submission that, the locus standi for the second, third and fourth petitioners to file the instant matter in this court is clearly provided under section 281 (1) of the Companies Act. They argued that, since the petitioners are the shareholders and directors of the company they fall under that provision of the law. They submitted that, as the forfeiture of shares of the second, third and fourth petitioners was illegally conducted it could not deprive their rights and interest over the company in dispute hence the said petitioners still have the locus standi over the company in dispute.

After considering the submissions of the counsel for the parties in relation to the issues of the locus standi of the second, third and fourth petitioners to file the matter at hand in this court, the court has found as rightly submitted by the counsel for the respondent and



without being disputed by the petitioners, the mentioned petitioners are not the shareholders or contributories in the respondent's company. The court has arrived to the said finding after seeing as rightly argued by the respondent's learned counsel annexure NGE 6 to the affidavit of the petitioners shows from 29th day of November, 2006 the second, third and fourth petitioners were no longer shareholders or contributors in the respondent's company.

If they were no longer contributories in the company from that period of time up to when the matter was filed in this court in 2016 it is obvious and as correctly submitted by the respondent's learned counsel that, under section 281 (1) (a) (i) and (ii) of the companies Act the mentioned petitioners have no locus standi to institute the instant matter in court. The said provision of the law states as follows:

“(a) a contributory shall not be entitled to present a winding-up petition unless—

(i) either the number of members is reduced below two; or

(ii) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder;”