IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

MISC CIVIL CAUSE NO. 21 OF 2017

IN THE MATTER OF THE COMPANIES ACT, CAP. 212 R.E. 2002

IN THE MATTER OF AN APPLICATION MADE UNDER SECTION 281(1) OF THE COMPANIES ACT, CAP. 212 R.E. 2002; RULE 111 AND 112 OF THE COMPANY (INSOLVENCY) RULES, 2004

G.N.NO.43/2005

IN THE MATTER OF WINDING UP BY THE COURT OF "MWANANCHI INSURANCE COMPANY LIMITED

ELIAS MASIJA NYANG'ORO .....1ST PETITIONER

EDNA M. NYANG'ORO .....2ND PETITIONER

VERSUS

MWANANCHI INSURANCE COMPANY LIMITED..... RESPONDENT

I. MAIGE, J

RULING

The respondent is a limited liability company duly incorporated under the Companies Act, Cap. 212, R.E., 2002 ("the Companies Act"). The petitioners are shareholders in the company. They are, in these proceedings, petitioning for the winding up of the company on account that it is just and equitable that it be wound up . Their factual assertion in the petition is that; for the reason of deadlock between the petitioners and the remaining shareholders, the company has failed to

hold general meeting such that there is no possibility of smooth and effective operation of the company as a going concern.

Upon filing of the petition, the matter was set for mention with an order that the respondent be served accordingly. Upon being served, the respondent filed a notice of preliminary objection to the effect that the petitioners have no *locus stand* to institute the winding up petition in terms of section 268 and 281(1) of the **Companies Act**. When the parties appeared before me **on the return day**, the petitioners, through their counsel, **Mr. Kimaay**, informed me that he was objecting to the appearance of the respondent and his counsel.

I requested the parties to address me on these issues. **Mr. Salimu Mushi**, learned advocate for the respondent, was the first one to address the Court on the preliminary issues. He submitted that under section 281(1) of **the Companies Act,** a winding up of a company by the court may be initiated by the company itself, creditors, contributories or administrators. He submitted in the first place that; the petitioners being the debtors to the company by virtue of the of the decree of the High Court Commercial Division in **Commercial Case No. 135 of 2015**, are incompetent to initiate winding proceeding before liquidating the debt. He henceforth urged the Court to hold that the petition has been brought in bad faith so as to deny the respondent to claim its debts. With all respects to the counsel, this contention raises an issue of fact which cannot be determined at this stage.

In the second place, it was the submission for the respondent that, for the reason of holding fully paid up shares, the petitioners cannot petition for winding up of a company as contributories unless there are special allegations in the petition to demonstrate that they have sufficient interests as to entitle them to ask for winding up of the company. He referred the Court to the English authority in **Rica Gold Washing Co (1879) 11 Ch. D. 36** as per Jesse M.R. He therefore urged the Court to hold that the petitioners do not qualify to petition for winding up of the respondent.

In his submission in refutation, Mr. Ipanga Kimaay, learned advocate for the petitioners thinks that this Court is *functus officio* to determine the issue of *locus standi* of the petitioners to initiate these proceedings as contributories. His submissions is based on the decision of this Court in **Miscellaneous Civil Cause No. 18 of 2016** wherein my learned sisiter Magimbi struck out a winding petition involving the same parties for the reason of omission to state the amount of paid up capital. In the understanding of the learned counsel, by so holding, my learned sister was making a finding on the point of law that stating the amount of paid up capital in the petition does by itself confer *locus standi* to the petitioners. Let me opine right away and without misusing the precious time of the Court that; this submission is not properly placed. The reason being that the proceeding in the respective ruling has nothing to do with the instant one. It is a different proceeding which was determined according to its own merit. In any event, the striking out of the petition in the said decision was not for want of *locus standi*. It was on account of being "incurably defective for having failed to state the amount of paid up capital of the company", if I can use the words of my learned sister.

The issue raised in this matter does not pertains to defectiveness of the application but competency of the petition to institute the same.

Remarking on whether the petitioners are contributories, it was the submission for the respondent that; reading the provision of section 268 in line with section 281 of the **Companies Act**, the petitioners being the present members of the company are contributories for the purpose of insolvency proceedings regardless of the status of their shares. He also placed reliance on the commentary of the learned author Cain in his **Company Law, 10th edition, 1972 at page 438** where he remarked as follows:-

> *"The term contributory means any person liable to contribute to the assets of the company in the event of its being wound up...,it includes the present members and certain members of the company.."*

Submitting on the issue of the right to appear on the part of the respondent and its counsel, the counsel submitted, in the first place that, the petition was mistakenly served on the respondent. In his view, a petition for winding up cannot be set for hearing unless all the interested parties including the company and shareholders have filed a notice of appearance and affidavits in support or opposition of the winding up. His submission is based on his understanding of the provision of rule **102** (1) and (2) of the Companies (Insolvency) Rules, GN No. 43 of 2005 ("the insolvency rules")

In the second place, the counsel challenges the appearance of the respondent and his counsel for want of board resolution. In that respect,

the attention of the Court was drawn to decision of this Court in **Milo Construction Company Ltd v. Mary Florence Mtetemela and Another, Commercial Case No. 16 of 2009 (unreported),** where it was held that a proceeding by a company has to be sanctioned by a board resolution.

In his counter submission on issue of appearance, Mr. Salim Mushi, learned advocate for the respondents thinks that his learned friend is confusing the positions of the company, the subject of the winding up and other interested parties. In his understanding of the law, while the company is as of right entitled service of petition within 14 days before the return date and an automatic right to appear on the said day and the subsequent days, other interested parties can only have audience after issuing a notice of appearance and an affidavit in support or opposition of the winding up. The requirement for service of petition to the company, the counsels submits, is a mandatory requirement under rule 111(5) of the **insolvency rules**. He clarified further that, on filing of the petition, the Court has, under rule 111(3), to fix **the return date** on which, unless the Court directs otherwise, the petitioner and the company has to attend before the court for directions to be given in relation to the procedure on petition. He submitted further that, under rule 112 (1) thereof, the direction to be given by the Court includes any other matter affecting the procedure on the petition or in connection with the hearing and disposal of the petition.

With the above disposition of the rival arguments, it is appropriate to consider the objections. I propose to start with the issue of appearance of the respondent. The gist of the submissions by the counsel for the petitioners is that, the respondent cannot appear unless he files a prior

notice of appearance and an affidavit in support or opposition of the winding up. With respect, I cannot agree with this submission. The provisions of the **insolvency rules** on the appearance of the company, the subjection of the petition, is very clear. Under rule 111(5) of the **insolvency rules**, Mr. Salim is right, the company, as the proper respondent is entitled as of right service of petition within 14 days before **the return day**. In accordance with rule 111(3) of the **insolvency rules**, on **the return day**, the the company is obliged to appear in Court unless directed otherwise by the Court. Rule 112 (1) of the **insolvency rules** provides as follows:-

> *112-(1) "On the return day, or at any time after it, the court shall give such directions as it thinks appropriate with respect to the following matters-*
>
> *(a) service of petition, whether in connection with the venue for a further hearing, or for any other purpose.*
> *(b) Whether particulars of claim and defense are to be delivered and generally as to the procedure on the petition.*
> *(c) Whether, and if so by what means, the petition is to be advertised.*
> *(d) The manner in which any evidence is to be adduced at any hearing before the judge and in particular but without prejudice to the generality of the above as-*
> *(i) the taking of evidence wholly or in part by affidavit or orally.*
> *(ii) The cross examination of any deponents of affidavits.*
> *(iii) The matter to deal with in evidence.*
> *(iv) Any other matter affecting the procedure on the petition or in connection with the hearing and disposal of the petition.*

The provision just referred as I understand it provides for the procedure to deal with preliminary matters and to determine the procedure

through which the petition may be entertained. In my view, in pursuit of the respective provision, the Court may deal with any preliminary issues including setting a date of hearing of a preliminary objection under item (iv) of paragraph (d) of the subsection. The service of petition referred in paragraph (a) of the subsection in my understanding, relates to service of summons to any interested parties who have filed a notice of appearance under rule 104 (1) of the **insolvency rules**. For, as I said elsewhere, the service of summons to the petitioner is governed by the provision of 111(5) of the **insolvency rules** which provides as follows:-

> *(5) The petitioner shall, at least 14 days before the return day, serve a sealed copy of the petition on the company.*

The contention that the respondent and his counsel cannot appear without there being a board relation is misplaced, if I can say. The requirement of board resolution as clearly stated in **Millo Company Limited (*supra*)**, is relevant in any legal proceedings commenced in any court of law. It does not, in my understanding, apply where, like in the instant matter, the company is a defendant or respondent. The reason being that; while instituting a proceeding for and on behalf of the company is a matter of choice; defending a suit on behalf of the company is obligatory so that if the company does not, a judgment against it can be pronounced in its absence. That resolution could not be passed because of the absence of some board members, cannot be a defense for the delay to file written statement of defense by a company.

In my opinion therefore, the respondent and its counsel has the right of audience to appear and to be heard without filing any notice of

appearance or affidavit in support thereof. Therefore, the preliminary objection by the counsel for the petitioners is hereby overruled.

This takes me to the issue of the *locus standi* of the petitioners to petition for winding up of the company. The instant petition is preferred under section 281 (1) of the **Companies Act**. Under the said provision, it is apparent that a petition for winding up of a company can be preferred by the company itself, creditors, administrator or contributories. There was a hot debate between the counsel as to who is a contributory. In the opinion of Mr. Salim, the shareholder to the company is a contributory if he is liable to contribute to the assets of the company to the amount sufficient for payment of its debts and liability. In his view, the liability cannot apply to a shareholder whose share is fully paid up. In reaction, the counsel for the petitioners submitted that any current member of the company is a contributory for the purpose of winding up. He placed heavy reliance on the commentary of the learned author Cain in his Company Law, 10th edition, 1972 at page 438 where he remarked as follows:-

> *"The term contributory means any person liable to contribute to the assets of the company in the event of its being wound up...,it includes the present members and certain members of the company.."*

Let me start by saying that, under section 281 (1) of the **Companies Act**, a contributory can petition for winding up of a company. Though the word contributory is not defined in the respective section, I entertain no doubt that for the purpose of winding up of a company, any current shareholder to the company may qualify as a contributory regardless of whether his shares are fully paid up or not. The reason being that being a contributory to a company does not only entitle the holder of the share to initiate winding up proceedings but to enjoy distribution of the assets

of the company which survives upon liquidation of the debts of the company as well. It is a fact however that; while a shareholder whose shares are fully paid up will not be obliged in the winding up to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, the one holding unpaid up shares will be obliged. This is put clear in the provision of section 268 (d) of the **Companies Act** which provides as follows:-

> *268. In the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, subject to the provision of section 269 and the following qualifications-*
>
> *(a).....*
> *(b).....*
> *(c).....*
> *(d) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as present or past member.*

While I agree with Mr. Kimai that the petitioners are contributories for the purpose of winding up, I am on the other hand in agreement with Mr. Salim that the interests of these two categories of contributories in winding up proceedings are quite different. While the petitioners would be much assured for allotment of the balance of the assets of the company after liquidation, they would in the same way have neither liability nor entitlement where the company in liquidation is substantially insolvent. It is on that account that the common law rule in **re Rica Gold Washing Co. Ltd** *supra* becomes useful in determining the extent to which a contributory whose share capital is fully paid up can be

entitled to petition for winding up of a company. In the said decision, His Lordship Jesse made the following instructive remarks:-

> *Now I will say a word or two on the law as regards the position of a petitioner holding fully paid up shares. He is not liable to contribute anything towards the assets of the company, and if he has any interest at all, it must be that after full payment of all the debts and liabilities of the company there will remain a surplus divisible among the shareholders of sufficient value to authorize him to present a petition. That being his position, and the rule being that the petitioner must succeed upon allegations which are proved, of course the petitioner must show the court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding up of the company. I say "sufficient interest' for mere allegation of surplus or of probable surplus will not suffice".*

It may be interesting to note that, even the learned author Cain, in his book , **the Company Law** (*supra*) relied upon by the counsel for the petitioners is in agreement with this proposition of the law. At pages 438 and 439 of his work the learned author revisits the rule in the following words:-

> *"The court will not , as a rule, make an order on a contributory's petition unless the contributory alleges and prove , at least to the extent of a prima facie case , that there will be assets for distribution among the shareholders, or that the affairs of the company require investigation in respects which are likely to produce a surplus of assets available for such distribution. The reason is that unless there are such assets, the contributory has no interest in a winding up".*

I am extremely inspired by the rule above stated. I accept it as the correct principle of law regulating *locus standi* in a petition for winding up by a contributory. I thus take it to be the law that; where, like in this case, the petition for winding up of a company is made by a member as a contributory he whose shares in the company are fully paid up, he or she is bound to demonstrate in his petition sufficient allegations as to establish a *prima facie* case that; there will be a surplus of assets

available for distribution among shareholders or that the affairs of the company require investigation in respects of which are likely to produce such surplus. The rationale behind the rule is that unless the company to be wound up is solvent, a contributory whose share capital is fully paid up will neither have liability nor entitlements in the affairs of the company in liquidation sufficient to establish an interest in the winding up process.

I have taken time to study the winding up petition and its attachments and, I am satisfied that the same does not demonstrate *prima facie* factual allegations that the respondent is solvent. Neither does it demonstrate any factual allegations to the effect that; the affairs of the company require investigation in respects of which are likely to produce such surplus.

In my opinion therefore, the petitioners do not posses the necessary *locus standi* to petition for winding up of the company as a contributories. The preliminary objection is henceforth sustained. The petition is accordingly struck out.

It is so ordered.

I.MAIGE
JUDGE
29/03/2019

Ruling delivered this 29th day of March 2019 in the presence of Mr. Salim, learned advocate for the respondent and Mr. Ipanga Kimaay, learned advocate for the petitioners.

HON. MWAKATOBE
Ag DR
29/03/2019