IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISCELLANEOUS CIVIL CAUSE NO. 1 OF 2021

STANSLAUS MASUNGA NKOLA ..... 1ST PETITIONER

BENJAMIN JOSEPH NCHORE ..... 2ND PETITIONER

MADUHU MULOLA NKINDA ..... 3RD PETITIONER

VERSUS

THE BOARD OF DIRECTORS, NYARUGUSU

MINE COMPANY LIMITED & OTHERS ..... RESPONDENTS

RULING

8th July, & 31st August, 2021

ISMAIL, J.

The petitioners have moved this Court to grant assorted orders. The petition stems from the parties' misunderstanding and dispute with respect to ownership and control of stakes in the respondent company. The dispute pits the petitioners against members of the board of directors of the respondent company, and numerous other respondents. It resides in the transfer of shares from some of the shareholders to other shareholders, and

the contention is, *inter alia*, that such transfer did not get the blessing of other shareholders. It is further alleged that the respondent company never called or issued a notice to call for the extra ordinary general meeting to discuss the agenda. It is also alleged that the meeting of the board of directors of the company was convened without the authority of shareholders, and that the resolution passed for sale and transfer of shares was without any authority of shareholders.

As a result of the alleged violation, the petitioners urge the Court to pass a raft of orders as follows:

1. That the Court should declare that the changes effected in the company by BRELA are illegal and should be nullified;
2. That the Court should issue a restraint order the current management of the company from engaging in nay activities of the company;
3. To declare that sale of the shares by Dotto Hussein, Ntobi Kishegena, Redempta Timoth Samjela, John Alphred Olwanda and other shareholders was never resolved by shareholders in proper meeting hence never followed the procedure and illegal;

4. That the Court should strike out names of new members for failure to follow the procedure under the memorandum and articles of association of the company;
5. Declaration that the meeting and resolution passed to remove the previous management and appoint new directors and company secretary was illegal and in violation of the laws;
6. That names of new shareholders and their shares be struck off the register as the registration was in violation of the memorandum and articles of association of the company and the laws;
7. An order of reinstatement of the company status by the Registrar of Companies and maintain the status that there was before slae of the said shares;
8. An authority be granted to enable the petitioners to institute a civil suit in the name of the petitioners against members who sold their shares without paying for them and without issuing the share certificates; and
9. Costs of the matter and such other orders as the court may think fit to grant.

The respondent company's reply to the petition was swift and relent less. In the reply to the petition, the competence of the petition is queried through seven grounds of objection. These are:

1. *That the Court lacks jurisdiction to grant reliefs prayed in clauses 1, 2, 3, 4, 5, 6 and 7 of the petition;*
2. *That the Court lacks jurisdiction to entertain the claimed reliefs as prayed for in clause 8 as the same is res sub-judice in the pending Civil Case No. 20 of 2019;*
3. *That the relief prayed in clause 2 is res-judicata and/or res-subjudice on account of the fact that the same had already been determined by the Court in Civil Case No. 20 of 2019 or that the same is still pending in the said case;*
4. *That the petitioners lack the cause of action against Nyarugusu Mine Company Limited on account of the fact that the company is not apparently named as the respondent in the instant petition;*
5. *The petition is incurably defective for non-joinder of the Business Registration and Licensing Authority (Brela) as the necessary party for purposes of having effective determination of the grant of the reliefs sought by the petitioners;*
6. *That the petition is defective as it lacks the joint verification by the named three petitioners.*

7. Alternatively, the petition is misconceived and/or incompetent on account that there is no either party therein being expressly named/pleaded and joined as the respondent therein.

These objections were argued by way of written submissions in conformity with the schedule drawn by the Court to guide the filing. Mr. Constantine Mutalemwa, learned counsel represented the Board of Directors of Nyarugusu Mine Co. Limited, while Mr. Akram Adam, learned advocate, had his services enlisted by the petitioners.

With respect to jurisdiction, Mr. Mtalemwa submitted that the Court is not vested with jurisdiction to grant reliefs sought in the petition. He argued that the reliefs that are available to minority shareholders in petitions are as provided under section 233 (3) of the Companies Act, Cap. 212 R.E. 2019. These are orders to:

(a) Regulate the conduct of the company's affairs in future;

(b) Require the company to refrain from doing or continuing tan act complained of by the petitioner or to do an act which the petitioner has complained it had omitted to do; and

(c) Authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court mat direct.

It was the counsel's contention that the reliefs pleaded in the petition fall outside the ambit of the Court's jurisdiction. Mr. Mutalemwa further argued that there are cases in which jurisdiction of the court may be determined by the type of reliefs sought. He backed up his contention by citing the Court of Appeal of Tanzania's decision in ***Olam Tanzania Limited & 3 Others v. Seleman S. Seleman & 4 Others***, CAT-Civil Revision Nos. 2-6 of 2010 (unreported), in which the superior Court quoted Stroud's Judicial Dictionary of Words and Phrases, and held at p. 10 as follows:

> *"In the narrow and strict sense the jurisdiction of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference.*
>
> *1) to the subject matter of the issue or*
> *2) to the persons between whom the issue is joined*
> *3) to the kind of relies (sic) sought or to any combination of these factors."*

Turning on to the prayers sought in items 8 of the reliefs, Mr. Mutalemwa took the view that the said prayer is not known in the company law. He argued that the only relief available under section 233 (3) (c) of Cap. 212 is for authorization of institution of the civil proceedings in the name and

on behalf of the company, and not in the name of the company as prayed by the petitioners.

With respect to the competence of the petition, the learned counsel's contention is that the same is *subjudice* because issues involved in the instant petition are still under judicial investigation in Civil Case No. 20 of 2019 which pending, and the parties thereto are the present petitioners and the company. Mr. Mutalemwa argued that, glancing through paragraph 6 of the plaint, it is gathered that the company's allegation against the petitioners is that sale of the shares was approved by the company's directors and that necessary transfers were signed by respective sellers. These facts were, however, disputed by the petitioners in their statement of defence. With respect to the appointment of the company secretary and directors, which is the petitioners' complaint in the instant petition, Mr. Mutalemwa's contention is that paragraphs 8, 9 and 10 of the statement of defence made replies to the company's allegation. He argued that this matter is yet to be resolved and the main suit is still pending.

Regarding the objection on *res-judicata*, the counsel's submission is that, the question of restraint against the current management of the company from engaging in the company's activities was resolved through a consent order issued by the Court (Hon. Rumanyika, J) dated 29.07. 2019.

Arguing in support of ground four of objection, Mr. Mutalemwa's take is that failure to name eight individuals as respondents in the petition was a legal flaw, and that, though Cap. 212 does not stipulate the procedure on how the petition should be drawn, the known procedure is that there should be opposite parties in every petition. These are the parties against whom adverse reliefs are pronounced. The learned counsel argued that the petitioners would easily borrow the English practice by having majority shareholders feature as respondents whenever the minority shareholders feature as petitioners.

With regards to the fifth point of objection, the contention by the counsel is that Brela is a necessary party that should have been involved in the matter. Failure to join it, the counsel argued, had the potential of leading to a failure, by the Court, to pronounce effective orders in respect of the reliefs in clauses 1, 2, 3, 4, 5, 6 and 7 of the petition.

On the last ground of objection, Mr. Mutalemwa's argument is that allegations pleaded in the petition cannot be acted upon because of lack of a verification clause which would assure of the authenticity of the allegations stated therein.

The counsel prayed that the petition be struck out with costs.

Submitting in rebuttal of the first ground of objection, Mr. Adam argued that the Court is clothed with jurisdiction, as all prayers 1, 2, 3, 4, 5, 6 and 7 are premised on the provisions of section 233 (3) (a-d) of Cap. 212 which falls under the unfair prejudice remedy. Such provision, the Counsel argued, relates to the conduct of affairs whose management has prejudiced their rights and those of the company itself. On the relief number 8, Mr. Adam argued that the missing words "on behalf of the company" do not have the effect of rendering the relief fall outside the ambit of the law. He argued that the prayer itself is self-explanatory in that respect, as the intention is to commence civil proceedings in the company's name. The counsel argued that the contention that the relief is not known to law is a misdirection and a narrow interpretation of the law. He argued that the ***Olam case*** is distinguishable as the matter at hand related to company matters unlike the land issues which were involved in the Olam case. Mr. Adam further argued that the interpretation was merely a quotation from the dictionary and not the court's determination on the its jurisdiction.

On whether the matter is *sub-judice*, Mr. Adam held a divergent view. He argued that issues in the instant petition are dissimilar to the issues in Civil Case No. 20 of 2019. He argued that comparison ought to be made on causes of action and not prayers. On this, the counsel cited the case of the

M & Five B Hotels and Tours Limited v. Exim Bank Tanzania Ltd, HC-Commercial Case No. 104 of 2017 (unreported). He argued that, whereas the claim in the pending suit is for declaration that the defendants be stopped from interfering with the company's operations, the petitioners' cause of action in the instant matter is on unfair prejudice to the minority rights of the members and interest of the company. With respect to prayers, the argument is also that the injunctive prayers in the suit are different from orders for regulating the affairs of the company in the petition.

On *res-judicata*, Mr. Adam's contention is that parties were different in the two matters, and that Misc. Civil Application No. 95 of 2019 was not finally determined. He argued that the consent order was merely on whether the mining activities should be opened and whether the same should be run by the current management. He urged the Court to be persuaded by the decision of the Court in ***Athnas T, Masinde t/a Abet Primary School v. National Bank of Commerce***, HC-Comm. Case No. 34 of 2016 (unreported). In this case, the Counsel argued, the doctrine applies to a suit or issues between the past litigation and the litigation that is under investigation by court, and that the court needs to ascertain if issues in the former suit were finally determined. The counsel argued that issues in Misc. Civil Application were not identical to issues in the present suit.

On failure to name eight individuals as respondents, Mr. Adam argued that there is no rule or guideline on how the parties are to be impleaded. He argued that the respondent has not shown that any law has been violated. The counsel argued that the respondents' counsel has not shown that no English law authority has been cited to that effect. He argued that, the fact that the respondents have appeared and pleaded means that they are proper parties.

With regards to the fifth ground of objection, the counsel's contention is that non-joinder of BRELA was not a flaw, and as such, no party would not be affected by any of the prayers sought. The counsel's further argument is that the petitioners have no cause of action against BRELA, adding that the latter only acted on the instructions of the board of directors. On this, he cited the decision of the Court in ***Christina Jalison Mwamlima & Another v. Henry Jalison Mwamlima & 6 Others***, HC-Land Case No. 19 of 2017 (unreported), in which determination of a necessary party was laid bare through application of the reasoning in ***Amon v. Raphael Tuck & Sons*** [1956] 1 All E.R. 273. Mr. Adam argued, in the alternative, that non-joinder cannot result in the striking out of the suit. Instead, the Court can only order that the non-joined party be joined as a party.

On non-verification of the petition, the counsel argued that this is not provided by law and that the respondents' counsel has not shown that any law has been infracted.

The counsel urged the Court to overrule the preliminary objections with costs.

Submitting in rejoinder, Mr. Mutalemwa maintained that the prayers in the petition are shareholders' personal reliefs under section 233 of Cap. 212 and that pursuit of corporate rights has to be done through the shareholders' derivative rights under section 234. With respect to relief 8, the counsel argued that pursuit of an action in the name of the company is not synonymous with a legal action in the name and on behalf of the company under section 233 (3) (c) of Cap. 212. He argued that, in that respect, the Court has no jurisdiction.

With regards to the fourth objection, Mr. Mutalemwa maintained his stance and quoted a paper by St John's Chambers on a ***Practical Guide to unfair Prejudice petitions and their Interaction with Derivative Claims***, in which it was held that in such cases the respondent becomes the majority shareholders, and that the company should be named as a respondent. He implored the Court to be persuaded by the English position and sustain the objection.

Submitting on the fifth legal point, the counsel argued that the test of whether or not a party is a necessary party is as laid down in ***Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman & Another***, CAT-Civil Revision No. 6 of 2017 (unreported), in which it was guided that a necessary party is one whose presence is indispensable to the constitution of a suit, and in whose absence no effective decree or order can be passed. The counsel argued that no orders can be made with respect to reliefs 1 and 7 without involvement of BRELA as a party. He argued that the convenient cause is to strike out the petition with leave to re-institute the same with all parties inclusive.

On verification, the counsel's argument is that the trite law is that verification of a pleading makes it authentic and enables the Court to act on it. He maintained that this is a legal point that stands as a demurrer towards challenging the legal sufficiency. The counsel cited the decision of the Court of Appeal in ***Mount Meru Flowers v. Box Board Tanzania Limited***, CAT-Civil Appeal No. 260 of 2018 (unreported).

He argued that the objections are meritorious and that the Court to sustain them.

I will embark on the disposal journey by first tackling ground five of the objections. This is to the effect that the petition is incompetent for want

of joinder of the Business Registration and Licensing Agency (BRELA). While the contention by Mr. Mutalemwa is that BRELA is a necessary party whose presence in the proceedings is indispensable, the argument by Mr. Adam is that proceedings and orders sought in the application can be issued without necessarily having BRELA as a party.

It should be noted that, the choice of who should be impleaded as a defendant or respondent in a suit is entirely that of plaintiff, applicant or petitioner as the case may be. Such choice is exercisable where any right to relief in respect of, or arising out of the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative. Such joinder would only be permitted where, if such persons brought separate suits, any common question of law or fact would arise. This is the import of Order 1 Rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019.

The parties herein are haggling over the involvement of the involvement of BRELA, one believing that it is a necessary party while the other claims it is not. These rival arguments raise a pertinent question of who is a necessary party to a suit. This question featured in appeal proceedings in ***Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman & Another*** (supra). In resolving the question, the Court of Appeal relied on

the Indian case of ***Baranes Bank Ltd. V. Bhagwandas***, A.I.R. (1947) All 18, and laid down the description of a necessary party in the following words:

> *"... The full bench of the High Court of Allahabad laid down two tests for determining the questions whether a particular party is necessary party to the proceedings. **First**, there has to be a right of relief against such a party in respect of the matters involved in the suit and; **second**, the court must not be in a position to pass an effective decree in the absence of such a party. The foregoing benchmarks were described as true tests by the Supreme Court of India in the case of **Deputy Comr., Hardoi v. Rama Krishna**, A.I.R. (1953) S.C. 521."*

The upper Bench concluded, as Mr. Mutalemwa quoted (p. 6 of the judgment):

> *"We, in turn, fully adopt the two tests and, thus, on a parity of reasoning, a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from a case to case depending on upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joinder party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."*

The next follow up question is whether, using the tests described above, BRELA is, in the circumstances of this case, a necessary party. My unflustered answer to this question is in the affirmative. The pending petition has a relief against BRELA, which requires it to do a certain action that is mandated by law, in this case, nullification and de-registration or deletion of the names of certain parties from the list of shareholders and members of the board of directors. There is also a prayer for reinstatement of the company status as it was before such changes. The nature of the petition is such that no effective order or decree may be passed in the absence of the said party, lest the Court finds itself trapped in the temptation of having the said party ordered to take an action without being heard. It would require taking such a party on board, and have it put a case, not only on the viability of the orders, but also on the practical possibility of the orders sought to be issued by the Court. This reasoning, then, draws a deviation from what Mr. Adam contended and I hold that BRELA is, for all intents and purposes, a necessary party whose presence in the proceedings cannot be wished away.

The foregoing position draws an inspiration from the decision of the Court of Appeal of Tanzania in ***Ngerengere Estate Company Limited v.***

Edna William Sitta, CAT-Civil Appeal No. 209 of 2016 (unreported, wherein it was held:

> *"In view of the settled law on the right to be heard, we are of a serious considered view that, it will be absurd for this Court to make any order against the Registrar of Titles as prayed by the appellant without availing her opportunity to be heard. In this regard, we agree with Mr. Lutema that, the Registrar of Titles ought to have been joined as a party in the application before the High Court failure of which amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing the appeal."*

The important take away from the foregoing excerpt is that non-joinder of a necessary party, in this case the BRELA, is not a matter that can be easily wished away as Mr. Adam would want us believe. It is a far more serious infraction amounting to a procedural error of a profound and intolerable proportion, and may occasion a miscarriage of justice.

Absence of the necessary party and the consequence it carries was given further prominence in the superior Court's discussion and deliberation in the case of ***Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman & Another*** (supra). It was held as follows:

"... There is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and non-joinder of non-necessary parties. On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass an effective decree. It would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff.

Since, as we have just remarked, the legal representative of the deceased was a necessary party, her non-joinder was fatal and the trial court, either on its own accord, or upon a direction to the 1st respondent, was enjoined to strike out the name of the 1st respondent and substitute to it her name .... Unfortunately, that was not done and, indeed, the non-joinder of the legal representative in the suit under our consideration is a serious procedural in-exactitude which may, seemingly, breed injustice."

From the totality of the foregoing, I am persuaded that failure to implead BRELA as a necessary party to these proceedings was a non-joinder of parties and it constituted an infraction of the law. Consequently, I hold that the petition is incompetent and I strike it out with costs.

Since this ground of objection is enough to dispose of the matter, I find the rest of the grounds of objection superfluous and I choose not to delve into them.

It is so ordered.

DATED at **MWANZA** this 31st day of August, 2021.

M.K. ISMAIL

JUDGE

Date: 31/08/2021

Coram: Hon. C. M. Tengwa, DR

Petitioner: Mr. Hassan Adam, Advocate

Respondent: Mr. Constantine Mutalemwa, Advocate

B/C: P. Alphonce

Court:

Ruling delivered today in the presence of the Counsel of both sides.

C. M. Tengwa

DR

At Mwanza

31st August, 2021