

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**MISC. CIVIL CAUSE NO. 353 OF 2021**  
**IN THE MATTER OF COMPANIES ACT, 2002**  
**IN THE MATTER OF THE PETITION FOR WINDING UP OF**  
**CSS SOLUTIONS LIMITED (COMPANY No. 123185)**

**ALIRAZA MOHAMED RAWJI..... PETITIONER**

**VERSUS**

**CSS SOLUTIONS LIMITED.....RESPONDENT**

**RULING**

*Date of last Order: 27/10/2021.*

*Date of Ruling: 03/12/2021.*

**E.E. KAKOLAKI, J**

Before this court is the company winding up petition filed by one **Aliraza Mohamed Rawji**, the petitioner, on two grounds, one, conflict of interest amongst the directors of the respondent and second, mismanagement of the company's resources/funds by the two co-directors to the petitioner. When served with the petition, the respondent filed the affidavit duly sworn by one Cyrus Kers Dupetawalla, principal officer to the respondent, strenuously challenging the merits of the petition. Subsequent to that, the respondent

raised a Notice of preliminary objection on points of law challenging competence of the petition to the effect that:

1. That the petition for winding up is incurably defective for want of endorsement by the petitioner.
2. That the petition for winding up is incurably defective for want of affidavit verifying winding-up petition.
3. That the petition for winding up is incurably defective as no advertisement of the winding up petition was made before winding up petition was preferred against the respondent.

Basing on those grounds, the respondent is inviting this court to dismiss the petition with costs. When the matter was called for hearing of the raised preliminary objection both parties appeared represented and were heard viva voce. Mr. Abdallah Shaibu and Mr. Joseph Mabula, both learned advocates represented the petitioner and respondent respectively. It is Mr. Mabula who took the floor first and informed the court that, he was prepared to argue all three grounds of preliminary objection separately.

Submitting on the first ground of objection Mr. Mabula said, the petition for winding up of the company in court is regulated by form 281a of the Companies (Forms) of 2005, which provides for endorsement in the petition

of the date when the petition was presented in court, name and address of the court, date and time of hearing as well as the name, address and contact of the petitioner's advocate. He contended, the petition before the court lacks the said endorsement, thus incurably defective. As to the second ground the court was told that, the petition is not verified by an affidavit contrary to the requirement of Rule 95 read together with 100(1)(2)(a)(b) and (c) of the Companies (Insolvency) Rules, GN. No. 43 of 2005, something which renders it incurably defective hence deserving dismissal and he so prayed. With regard to the third ground Mr. Mabula contended, the petitioner failed to advertise in the Government Gazette and one newspaper widely circulated in the country within seven (7) days of service of the petition to the Respondent, which is a company, contrary to the mandatory requirement under Rule 99(1)(2) (b) and 3(a)(i) and (ii), 3(b),(c),(d) (e) and (f) of the Companies (Insolvency) Rules GN. No. 43 of 2005. Since the petition was not advertised the same ought to be dismissed under Rule 99(4) of the same Rules, Mr. Mabula contended and implored the court to so act. The learned counsel placed reliance on the decision of this court in the case of **Pamela Essau Shayo Vs. Unity Schools Ltd and 9 Others**, Civil Case No. 20 of 2017 (HC-unreported), where it was held, advertisement of the petition

ought to be done by the petitioner within seven (7) of the service of petition to the Company. He submitted further that, the petitioner contravened the provisions of Rule 102 (1) and (2)(a)(b) and (c) of the Rules, GN. No. 43 of 2005 which make it mandatory for the petitioner's advocate to file a certificate proving that, he has complied with the requirement of advertising the petition. Since the respondent was not served with the copy of advertisement by 02/09/2021, that was a proof of non-compliance by the petitioner, Mr. Mabula contended and invited the court to dismiss the suit on such grave infraction of the provisions of the law by the petitioner.

In his response Mr. Shaibu for the Petitioner, conceded to the first and second grounds of objection and prayed for waiver of costs while submitting that, the contravention were not rendering the petition incompetent. He urged this court to rescue the petition by invoking the principle Overriding Objectives for the interest of justice which its main objective is to further disposition of parties disputes fairly and timely, by allowing the petitioner to endorse and attach the missing affidavit to the said petition. As for the third ground he resisted Mr. Mabula's submission submitting that, it is misconceived as the wording of Rule 99(2) of the Rules, GN. No. 43 of 2005 provides that, advertisement of the petition shall be made within seven (7)

days prior to the hearing date in which in this case it was yet to be set and that, Rule 102(1) of Rules, GN. No. 43 of 2005, provides that the petitioner's advocate has to file the certificate in court showing compliance of advertisement five (5) days before the date set for hearing of the petition in which the petitioner is still in time as the hearing date is yet to be set by the court. He argued, the case referred by Mr. Mabula is distinguishable to the circumstances of this matter as in the said case the petitioner had delayed to advertise and file the certificate to so exhibit compliance of the law after three years had passed, while in this case the petitioner encountered the preliminary objection soon after filing the petition, thus could not comply with the law for awaiting for disposal of the points of objection raised. He added, the petitioner would have complied with the requirements of the law but for the preliminary objection raised before his compliance he could not have continued with compliance as that would amount to preemption of the preliminary objections. With such submission, Mr. Shaibu invited this court to dismiss the preliminary objections raised by allowing the petitioner to comply with requirement of the law. In the alternative he argued, should the court find the alleged infractions of the law are incurable then, the right course is to strike out the petition with leave to refile and he so prayed. In

his rejoinder submissions Mr. Mabula reiterated his submission in chief on the conceded first and second grounds of objection insisting that, the same are incurable therefore renders the petition bad in law hence this court has no option than to dismiss the same. He said, the prayer to invoke overriding objectives principle is not accommodative as the same is inapplicable in a clear violation of rules of procedure. As regard to the issue on non-compliance of advertisement of petition under Rule 99(2) (a) and (b) of Rules GN. No. 43 of 2005, he insisted once the petition has been served to the company (Respondent) the same must be advertised with seven (7) days as held in the case of **Pamela Essau Shayo** (supra) which he stressed is applicable in this matter as if the duration of 3 years spent in that case by the petitioner were rendered violative of the law, equally even one day can so be. To him it is not the number of days passed which matters but rather mere violation of the law. On the prayer for striking out the petition in lieu of dismissal as prayed by the respondent he argued, the law directs for dismissal and not in the alternative as the petitioner would want to imply. On the basis of that submission he reiterated his prayer for dismissal of the petition with costs.

Having narrated both parties' submissions in extensor it is time for me now to apply the law to the facts of the matter and proceed to determine the raised preliminary objections. To start with is the first and second grounds of objection in which the petitioner has invited the court to invoke the principle of overriding objective and allow him to endorse the petition and attach the affidavit as per the requirement of the law. As to the endorsement of the petition I find the prayer by the petitioner is tenable as Mr. Mabula cited no law that renders the petition incurably defective nor did he indicate the respondent will be prejudiced should the petitioner be allowed to endorse the petition. That being the position I hold the omission is curable and can be fixed by allowing the petitioner to endorse the petition. With regard to the requirement of attaching the affidavit to the petition under the second ground of preliminary objection, I find it to be mandatory as provided under Rule 95(1) read together with Rule 100(1)(3) and 4 (a) and (b) of Companies (Insolvency) Rules, GN. No. 43 of 2005. I so do as affidavit in law is evidence. See the case of **Bruno Wencenslaus Nyalifa Vs. The Permanent Secretary, Ministry of Home Affairs and Another**, Civil Appeal No. 2017(CAT-unreported). The provision of Rule 95(1) of the Rules, provides in respect of the petition for winding up by contributories thus:

*95(1) The petition, verified by affidavit in accordance with rule 100 shall be filed in court. (Emphasis supplied)*

Further to that Rule 100(1),(3) and 4(a) and (b) of the Rules provide:

*100.-( 1) **The petition shall be verified by an affidavit that the statements in the petition are true or are true to the best of the deponent's knowledge, information and belief.***

*(2) N/A.*

*(3) **The petition shall be exhibited to the affidavit verifying it.***

*(4) The affidavit verifying the petition shall be made-*

*(a) **by the petitioner** or if there are two or more petitioners, anyone of them; or*

*(b) **by some person such as a director**, company secretary or similar company officer, or an Advocate, who has been concerned in the matters giving rise to the presentation of the petition; or*

*(Emphasis added)*

My interpretation of the above cited provision is that, the law is instructive for any petition filed in court by either the petitioner or director to the company to be verified by an affidavit exhibiting that ***the statements in the petition are true or are true to the best of the deponent's knowledge, information and belief.*** The essence or object of having that affidavit verifying the statements in the petition is not far-fetched as it serves as *a prima facie evidence* to the court exhibiting that all the



statements contained in the petition are nothing but the truth to the best of the knowledge of the deponent, thus the court can determine the petition basing on the said statements. The importance of attaching the said affidavit to the petition is overemphasized by Rule 100(6) of the said Rules which states thus:

*(6) The **affidavit shall be the prima facie evidence of the statements in the petition** to which it relates. (Emphasis supplied)*

Basing on that instructive condition of the law as cited above that, the affidavit shall be the prima facie evidence of the statements made in the petition, I hold its omission renders the petition incurably defective. I am of the increased views that, under the circumstances the petitioner's prayer for invocation of the principle of overriding objective is not accommodative as the omission to attach the said affidavit to the petition is a clear violation of the rules of procedure which goes to the heart of the petition itself and therefore rendering the petition incompetent. It is from that base I sustain the second preliminary objection and refuse Mr. Shaibu's invitation to allow the petitioner to attach the said affidavit. This ground has the effect of disposing of the petition, but I find it imperative also to determine the last ground.

Next for determination is the third ground where the issue is whether it was mandatory for the petitioner to advertise the petition in the Gazette and one newspaper widely circulated in the country before the date of hearing and file in court a certificate to so prove. It is the law under Rule 99(2)(b) of Rules GN. No. 43 of 2005, once the petition is filed in court and served to the company (Respondent) the same must be advertised with seven (7) days prior to the hearing date. The petitioner if served the petitioner is obliged to do the advertisement within 7 days of service and does not need to await for the fixed hearing date. The said Rule 99(2)(b) of the Rules GN. No. 43 of 2005 provides thus:

*(2) The advertisement shall be made to appear in either the Gazette or newspaper –*

*(a) if the petitioner is the company itself, not less than 7 working days before the day appointed for the hearing, and*

*(b) otherwise, **not less than 7 working days after service of the petition on the company**, nor less than 7 working days before the day so appointed. (Emphasis added)*

Similar stance on the interpretation of the said section was taken by this court in the case of **Pamela Essau Shayo** (supra) where the Court held that:

*“It is obvious from the cited provision that, where the winding up petition is not made by the company itself, such as this one, **the Petitioner is required to make advertisement in either the Gazette or newspaper not less than seven working days after service of the petition on the company or not less than seven days before the date appointed for hearing...** This court is of the views that, **once a winding up petition has been filed and served on the company the next essential part of the process is for the petition to advertise the petition. The Petitioner doesn’t have to wait for the parties to appear in court and the date of hearing be fixed in order to advertise the petition.**” (Emphasis added)*

As to the issue of certification, the law requires under Rule 102(1) and (2) of the Rules, GN. No. 43 of 2005, that the petitioners advocate should within five (5) days before the hearing file in court a certificate proving service and advertisement of the petition in the Gazette or newspaper, failure of which may render the court to dismiss the petition under Rule 102(3) of the Rules. Rule 102(1)(2) and (3) of the Rules provide that:

*102.-(1) The petitioner or his advocate shall, **at least 5 days before the hearing of the petition, file in court a certificate of compliance with the Rules relating to service and***

***advertisement and a copy of the advertisement, and of the petition shall be filed in court with the certificate.***

*(2) The certificate shall show-*

*(a) the date of presentation of the petition;*

*(b) the date fixed for the hearing; and*

*(c) the date or dates on which the petition was served and advertised in compliance with the Rules. (3) Non-compliance with this Rule is a ground on which the court may, if it thinks fit, dismiss the petition.*

Now applying the above position of the law to the facts of this case, I distance myself from Mr. Shaibu's submission that since the hearing date was yet to be set then the petitioner was still in time to advertise the petition as he ought to have so done within seven (7) days after service of the petition to the respondent as already held above. Similarly the petitioner ought also to have filed the certificate proving the service and advertisement within 5 days prior to the hearing. Now the only remaining issue in this matter is when did the time start to run? Or when was the service of the petition effected to the respondent so as to reckon the said seven (7) days. Indeed neither the respondent nor the petitioner informed the court of such date. What Mr. Mabula informed the court is the date when perusal was made to ascertain whether the petitioner had complied with the requirement

of the law or not for advertising and filing of the certificate, only to note there was none lodged or filed. It is Mr. Shaibu's argument that by the time when the perusal was made, the preliminary objection had already been filed. Therefore, any attempt to comply with the law would be tantamount to preempting it. I am tempted to believe and accept the petitioner's defence that under the circumstances it was prudent to refrain from advertising and lodging the certificate of compliance with the law given the fact that, there is no specific date disclosed under which he was supposed to comply with the law. As the reckoning date is unknown, this court is rendered unable to determine as to when the petitioner was supposed to have advertised the petition in the Gazette and/or newspapers and file the certificate proving compliance of service and advertisement as required by the law. Thus, there is no proof that, the petitioner was in violation of the law under Rule 99(2)(b) and Rule 102(1) and (2) both of the Companies (Insolvency) Rules, GN. No. 43 of 2005 as claimed by the respondent. The third ground of appeal is therefore dismissed for want of merit.

In the circumstances and given the fact that the second point of preliminary objection has been sustained for violation of the provisions of Rule 95(1) read together with Rule 100(1)(3) and 4 (a) and (b) of Companies

(Insolvency) Rules, GN. No. 43 of 2005, this petition is rendered incompetent before the court and the same is struck out with costs.

It is so ordered.

DATED at DAR ES SALAAM this 03<sup>rd</sup> day of December, 2021.



E. E. KAKOLAKI  
**JUDGE**  
03/12/2021

This Ruling has been delivered at Dar es Salaam today on 03<sup>rd</sup> day of December, 2021 in the presence of the Mr. Edwin Hezron advocate holding brief for Mr. Josephat Mabula advocate for the Petitioner, and Ms. **Asha Livanga**, Court clerk and in the absence of the Respondent.



E. E. KAKOLAKI  
**JUDGE**  
03/12/2021

