

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PETITION NO. 4 OF 2021

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

AND

IN THE MATTER OF MSOKE NASHALO FARMS LIMITED

AND

**IN THE MATTER OF PETITION FOR WINDING UP BY COURT OF "A
COMPANY" MSOKE NASHALO FARMS LIMITED**

AND

**IN THE MATTER OF THE PETITIONER WHO IS A CONTRIBUTORY OF MSOKE
NASHALO FARMS LIMITED**

DAPHROSA EDITH MUSHI PETITIONER

VERSUS

MSOKE NASHALO FARMS LIMITEDRESPONDENT

RULING

MUTUNGI .J.

The Ruling is subject of the petition for winding up of Msoke Nashalo Farms Limited, a limited liability company (herein referred as the respondent). The same was incorporated in Tanzania on 23/04/1983 through a Certificate of

Incorporation No. 9337 with its registered office at House No. 44, Chagga Street, P.O. Box 569, Moshi Tanzania. The petitioner, Ms. Daphrosa Edith Mushi is one of the 19 shareholders of the Company. The petition is filed under section 275, 279 (1), (b)(d)(e) and 281 of the Companies Act Cap 12, [R.E 2002] and Rule 90 (1) and (2) of the Companies (Insolvency) Rules, 2005. She is moving the court for the following orders: -

- (i) That, Msoke Nashalo Farms Limited be wound up by the Court under the provisions of the Companies Act, No. 12 of 2002.
- (ii) That, Hellen Mahuna & Jeremiah Tarimo, be appointed liquidators to take over the control of the assets and liabilities of the Company.
- (iii) Cost for the Petition be provided for.
- (iv) Further, orders to be made and given by this Court as it deems fit and just to grant.

Having advertised the notice of winding up, the respondent strenuously objected the Petition on the ground as summarized from the affidavit of one Simpilis Valentine Tilisho, (Farm Manager) that, the Company is still operational thus, does not call for the winding up of the same. In the course of

hearing Ms. Hellen Mahuna and Mr. Jeremiah Tarimo learned advocates represented the petitioner and respondent respectively. The petitioner had three witnesses and consequently the respondent called two witnesses.

Shading light on the petition, **PW1 Daphrosa Edith Mushi** (the petitioner), a shareholder of Msoke Nashalo Farm Ltd contended, she knew the Company from the time of its inception upon registration in 1983. In 2007 the Directors convened a meeting and allotted 100 shares each to 19 shareholders herself inclusive. To prove its legality, she tendered a Certificate of incorporation dated 23/04/1983 and memorandum and Articles of Association dated 19/04/1983 which were collectively admitted as **Exhibit P1**. She also tendered a Letter of allotment of shares from the Business Registration and Licensing Agency (BRELA) dated 10/05/2007 which was admitted as **Exhibit P2**. She further informed the court the underling objectives of the company were to carry out agriculture and livestock keeping and to process farm and dairy products. However, the Company is no longer operational due to the fact that, the above objectives are no longer realized. More so, the Company has no physical offices as portrayed in the registration documents

to wit; Chagga Street within Moshi town. In proof thereof notice of situation of registered office or of any change therein dated 26/03/1983 was admitted as **Exhibit P3**. She further contended, the Company has got no Directors at the moment as Emmanuel Kisinane Tarimo, Aquilin Kisinane Tarimo and Joseph Kisinane Tarimo who were founders and major Directors have passed away. She added, since the demise of the last Director one Aquilin Kisinane Tarimo on 14/11/2014, the Company has never been legally operational. Cementing on the fact that the Company had previously two Directors, PW1 tendered the search document dated 8/11/2021 admitted as **Exhibit P4**.

PW1 expounded further, she is confident the Company is no longer operational in line with the search at BRELA which reveals no annual returns had been filed for more than 10 years. She had also visited the Siha Director's License Office and was informed the Company had never applied for a trading license. She also went to Moshi Municipal Office and was told the Company had never applied for any trading license. She further contacted the NSSF to inquire, she learnt there was no record of the Company submitting funds for its employees. At TRA she found no returns for several years and

there were pending tax liabilities. Letter dated 11/10/2021 from NSSF, letter dated 22/11/2021 from Moshi Municipal Council, letter dated 20/10/2021 from Siha Director's Office and letter dated 16th February, 2022 from BRELA were collectively admitted and marked **Exhibit P5** as proof thereto. She went on to narrate, there has never been conducted shareholder's meetings for several years now and the Company has an outstanding tax liability of Tshs. 26,125,000/= as seen in Exhibit P5, (report from TRA). The report from BRELA shows the debt up to 16/02/2022 was Tshs. 4,170,000/=. Finally she raised her concern for the winding up of this Company that, it has been more than 30 years, yet they have never got any profit or any information as shareholders. The sole asset owned by the company is the farm situate at Naibili (Sanya juu) Siha District, Kilimanjaro Region of 1,070 acres. In that regard so to say, the company is non-operational and there has never been any legal attempt or measures by the company to appoint new Directors.

Collaborating the petitioner's testimony **PW2, Thecla Walter Shangali**, also a shareholder told the Court, she was allotted 100 shares but since all the Directors are dead the Company has become non-operational. In her settled view, she

lamented the company is not doing business that was registered for neither is there one to run the same. On the same footing the same should be wound up, since it is commercially crippled and has failed to meet its main objectives.

PW3, Harriet Krigo Eliufoo, a shareholder was in full support of the petition that, the Company should be wound up since it is not operating thus not qualified to be called a company. She added, the same has no business license, no known TIN number or VAT certificate. It also has no physical address or Directors. To cap it all it has no activities at all to operate its business.

Objecting the winding up, **DW1, Simplis Valentine Tilisho**, explained to the Court that, he was employed by the late Aquiline Kisinane Tarimo, (one of the Directors) in 2011 as the farm manager of Msoke Nashalo Farm. The same is located at Sanya Juu, Kilimanjaro Region and they had been dealing with agricultural and livestock activities, thus his duties have been supervising the day to day farm activities.

According to him, there are 7 majority shareholders out of 19 owning 100 shares each who are not in favour of the winding

up i.e. Veronica Meela, Victoria Guido, Theresia Marandu, Catherine Sinane, Beata Kanondo, Helen Mushi and Theopista Kisumo. These are the ones he had been reporting to as a farm manager and he has been co-operating with the Siha Local Council and Village authorities in respect of farm activities. As a result the Local Government Authorities firmly and legally recognize their various farm activities. He has been able to run the farm since the seven shareholders engage in farming and livestock activities in which each year they leave 1/4 of the yields to develop the farm and the rest 3/4 lands in their pockets for their personal use.

Regarding taxes, DW1 told the Court, they pay rent, farm taxes and other levies to the Local Government authorities thus, there are no debts or outstanding liabilities. He added, there are 400 – 500 casual labourers employed for each season for both farm and livestock activities. That apart, the seven shareholders have been running the Company since 2014 after the demise of the last Director. These do co-operate with each other, owning 150 cows, 200 goats and 120 sheep which produce farm products. They had no bank account and in view thereof he would remain with the money. The company was otherwise receiving nothing, out

of the activities carried out on the farm by the seven shareholders. He further declared he did not know the distinction between the "farm" as an asset and the "company". To his knowledge these were one and the same.

DW1 further told the Court that, the villagers surrounding them do benefit from the farm in terms of employment and building items such as sand and stones. According to him this was clear proof of the good relationship with the neighboring local authorities and villagers. He tendered a letter from Majengo village requesting the farm to remain with Msoke Nashalo family. The same was admitted as **Exhibit D1**. As to how he got on the farm, DW1 confirmed he was simply called on friendly basis by one of the Directors. He was otherwise never issued with a letter of employment but worked out of good will and trust. He finally prayed, the winding up should not be effected so that he can proceed working on the farm. More so, this being a family property the Court should consider the family's welfare despite the fact, the rest of the shareholders had disassociated themselves from the running of the farm.

Moving on, **DW2, Victoria Guido Kisinane Kinabo**, one of the shareholders painfully told the Court, their late father before his death had requested them to never resolve or liquidate the Company. She averred the 19 shareholders are children from three different mothers, 12 of which are still surviving while others have passed on. She stated, in 2004 one of the Directors allowed all the shareholders to cultivate the farm, thus at the moment she co-operates with DW1 and 6 other shareholders to manage the Company's farm which has about 150 cows, 170 – 200 goats, 150 sheep and buildings.

DW2 further narrated the 1,070 acres farm is their inheritance sought to remain throughout all the generations as per their late father's wishes, thus if the Company is wound up, they will never get such vast land. Further, in order to run the farm, they get farm yields which enable them to pay land rent and all the liabilities including the Local Government levies and Government taxes. DW2 was in unison with the farm Manager that, the seven shareholders were cultivating the farm for their personal gains. Even though some of the farm products were supplied to her school, but she would pay up for the same to the farm Manager who was the custodian of the money.

Finally, DW2 prayed, since all shareholders have never met after the demise of the last Director due to their differences, this Court should not wind up the Company, instead the petitioner and other shareholders in support of the winding up of the company be paid their respective shares after valuation at the market value and the Company left as a going concern in honour of their late father's wishes.

After the close of the case, parties filed their final submissions of which I commend them for the thorough research done. I will thus consider them in my analysis while writing the Ruling. The pertinent issues framed and to be determined are: -

- (1) Whether the company is doing business registered for.
- (2) Whether there is a justifiable reason for the company to the wind up.
- (3) What reliefs are to parties entitled to.

Starting with the 1st issue on whether the Company is doing business registered for, it was the petitioner's testimony that the Company had ceased to operate as per the Memorandum and Articles of Association (MEMARTS). On the other side of the coin, the respondent claims the company is operational as per the MEMARTS. What then were the

activities of the company on inception. Accordingly the 1st, 2nd and 3rd objectives as laid down in the Memorandum of Association are provided in part as hereunder: -

- (a) To acquire and develop land for crop and dairy farming*
- (b) To manufacture crop and dairy products*
- (c) To carry on the business of buying and selling crop and dairy produce, livestock, poultry, vegetables, meat, hides and skins and wools.*

These main objectives were also undisputedly testified by both parties. The petitioner and her witnesses informed the Court that none of the above are in progress. On the other hand DW1 and DW2 testified these activities are exactly what they are doing on the farm, including keeping livestock which generate enough income that keeps the Company operational.

DW1 and DW2 were loud on this that, the activities at the farm (growing crops and livestock keeping) were done by only seven shareholders out of personal initiatives and not that of the company. Considering this piece of evidence it is clear that, the activities done are not carried out by the

Company *per se* but by the 7 shareholders camouflaged under the umbrella of the "Company". They own personal projects and get benefit from the produce thereof. It should be borne in mind that business activities must include all economic activities carried out by a Company during the course with a purpose of creating value to shareholders. This is not the case in the petition at hand. No acquisition of land, manufacturing of crop and dairy products or buying and selling of crops, livestock, poultry, vegetables and the rest was ever done for several years creating value to the shareholders.

More so, according to Exhibit P5 a letter from the District Executive Officer, the Company has never acquired a business license within Siha District or Moshi Municipal. It is not clear therefore how those objectives of the Company as per the MEMARTS were done if the Company had no license to do so, no Directors for several years and shareholders had not conducted any meetings to oversee the activities of the company.

The foregoing notwithstanding, the Company has no office, employees, Tax Identification Number, bank accounts or any

books of accounts, showing records of income and expenditure for one to claim the Company is operational and is doing business that it was registered for. In light of the foregoing, the first issue is therefore answered in the negative.

In answering the 2nd issue, I had to visit the relevant law regarding winding up of a company as specified under section 279(1) (a) & (d) of the Companies Act (**supra**) that;

"A company may be wound up by the court if;

(i) The company has by special resolution resolved that the company be wound up by the court;

*(ii) The company does not commence its business within a year from its incorporation **or suspends its business for a whole year.***

*(iii) **The number of members falls below two***

*(iv) **The company is unable to pay its debts***

(v) The court is of the opinion that is just and equitable that the company should be wound up." (Emphasis mine).

In respect of the above listed reasons for winding up the 2nd, 3rd and 4th items fit in the Petition at hand. Starting with the

second part of **item ii** above regarding suspension of business for a whole year, the petitioner through Exhibit P5 has managed to convince this Court that, since its incorporation in 1983, the Company filed its Annual Returns for the last time in 2007 thus indebted Tshs. 4,170,000.00 from 2007 to 2021.

Likewise, DW1 and DW2 testified, they have been paying all the taxes and land rent as required by law, however, they did not bother to provide any evidence to that effect. To the Contrary, the Petitioner tendered a Tax Demand Notice from Tanzania Revenue Authority (TRA) at a tune of Tshs. 26,125,000.00 which is outstanding. The amount is for the years 2014, 2015, 2016, 2017 and 2018, which implies the same has not been paid since the demise of the last Director. All these in the settled view of the court, question the functionality of the Company in this Petition as to whether the same is really operational. It had thus suspended its business not only for a year but several years.

Regarding **item iii** on the numbers of members, Article 18 of the Articles of the Association of the Company provides that;

"The quorum of Directors for transacting business shall unless otherwise fixed by the Directors, be two."

Since the Company as unanimously admitted by the two sides has no Directors at the moment and there is no shareholders meeting confirming on how the Company should be run, it is safe to conclude there is no one legally or recognized by law running the Company at the moment. DW1's role is questionable in this petition. He admits he works for the farm but is not legally employed by the company. He further admits he knows nothing towards the affairs of the company. In view thereof it can well be concluded that, the company has not transacted whatsoever since it did not meet the required number of Directors in order to carry out its businesses.

As for **item iv** regarding failure to pay debts, exhibit 5 as briefly explained above, reveals the Company owes TRA Tshs, 26,125,000.00 being tax revenue and penalties from 2014 to 2018. Likewise, the Company owes BRELA Tshs. 4,170,000.00 as annual returns from 2007 to 2021. These debts will accrue if the Company is not wound up. To put salt to the wound the

respondent's witnesses became aware of the same when this petition was filed. This clearly shows lack of responsibility by any of the shareholders while evidently knowing well the non-existence of Company Directors. The evidence on record uncontrovertibly proves the respondent has failed to pay its debts. All said and done the second issue is answered in the affirmative that, there are reasonable or justifiable grounds to wind up the Company.

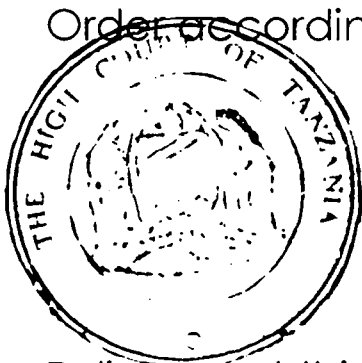
In view of the ongoing analysis and answering the last issue, this Court is of the firm opinion that, the Company had lost all its Directions after the demise of the last Director and is non-operational. Both parties undisputedly agree there has never been a shareholders' meeting due to lack of understanding between themselves. There is no meeting point while others use the Company's asset for personal gain, yet there are accruing liabilities. In that regard I am satisfied that, Msoke Nashalo Farms Limited qualifies to be wound up.

Guided, by the provisions of law cited and the reasons stated herein, I find the Petition meritorious and the Winding up Order sought by the Petitioner as the only remedy in the given

circumstances which is accordingly granted on the following terms: -


1. MSOKE NASHALO FARMS LIMITED, a Limited Liability Company, incorporated in Tanzania on 23/04/1983 through a Certificate of Incorporation No. 9337 with its registered office at House No. 44, Chagga Street Moshi - Tanzania is to be wound up under the provisions of section 279 (1) of the Companies Act.
2. Ms. Hellen Mahuna and Jeremiah Tarimo are hereby appointed as liquidators to take over control of the assets and liabilities of the Company in terms of Section 294 of the Companies Act Cap 12 R.E. 2002.
3. I make no order to costs.

Order accordingly.

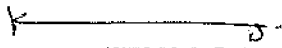


B. R. MUTUNGI
JUDGE
2/06/2022

Ruling read this day of 2/06/2022 in presence of Mr. Charles Mwangani holding brief for Mr. Jeremiah Tarimo for the respondent and in absence of the petitioner dully notified.


B. R. MUTUNGI
JUDGE
2/06/2022

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
2/06/2022