THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

(IN THE HIGH COURT OF TANZANIA)

AT MOROGORO

MISC. CIVIL CAUSE NO. 6 OF 2021

IN THE MATTER OF THE COMPANIES ACT, 2002, ACT NO. 12 OF 2002 AND IN THE MATTER FOR ORDERING THE RESPONDENT TO COMPLY TO ITS MEMORANDUM AND ARTICLES OF ASSOCIATION AND TO ASSURE THAT THE PETITIONER STATUS AND POSITION AS THE DIRECTOR OF THE COMPANY BE RESPECTED

BETWEEN

MIRIAM JOSEPH GWERDER @ MARIAM GWERDER

@ MIRIAM ..... PETITIONER

VERSUS

TAN -SWISS ENTERPRISES LTD .....RESPONDENT

JUDGEMENT

Hearing date on: 26/6/2022

Judgement date on: 11/7/2022

NGWEMBE, J:

The petitioner being a natural person, alleges to have been appointed director of the respondent which is a legal person for some years, but later on her directorship was removed without genuine cause. Thus, claims for the following reliefs:-

1. *The respondent to be ordered to operate as per the companies Act and to the MEMART.*
2. *The petitioner to be declared as a valid Director of the respondent and to be entitled to all the rights and liabilities thereof;*
3. *The court to order the respondent to pay general damages to the petitioner;*
4. *Costs to be paid by the respondent.*

In this petition both parties rightly and timely filed their pleadings. Thus, allowed this court to set out for a hearing date of the Petition. On the hearing date, both parties procured legal services of learned advocates, while Mr. Mziray represented the Petitioner, the respondent had the legal services of Prof. Binamungu. Both counsels agreed on one substantive issue to be proved during trial, to wit; *Whether the petitioner is a director of the respondent from March 2010 to date. The subsequent issue was on parties' reliefs.*

In proving the petitioner's case, she invited two witnesses who testified under oath. At the end of the petitioner's case, the respondent raised a defense of no case to answer. Therefore, the evidence on record is only of the petitioner. Obvious, this court will discuss extenso on the right of a respondent/defendant to plead no case to answer especially on civil related cases as opposed to criminal trials.

The brief recap of the petitioner's evidence was to the effect that, the Petitioner on oath, gave brief evidence that, she was appointed a director of the respondent in year 2010. This fact was not opposed by the respondent, thus admissible. Further testified by saying that, initially the respondent had two directors, namely, Joseph Walter Gwerder and Augustino Raphael Mtemi and were also shareholders holding 98% and 2% shares respectively. This point likewise was not objected.

Went further to testify unequivocally that Joseph Walter Gwerder was a majority shareholder of the respondent as well as her husband whose marriage was celebrated in year 2005. She tendered a certificate of incorporation and a copy of Memorandum and Articles of Association, same were received and admitted in court marked exhibits P1 and P2 respectively. Further testified that, her salary was fixed at Tsh. 2,000,000/= per month, which was paid to her in a lump sum in 2017, after signing a deed of amicable settlement.

Following execution of that deed of settlement, she was paid a lump sum of Tsh. 30,000,000/= on the date of signing the deed of settlement, and the last instalment of Tsh. 20,000,000/=was paid on 2018, forming an aggregate of Tsh. 50,000,000/=. She tendered a settlement deed dated 18TH January 2017, which same was admitted as exhibit P3.

Testified further that, in the same year (2017), she received a letter from Joseph Gwerder, her husband, informing her that she resigned from

directorship. According to her, the letter was not from the company, rather was from Joseph Gwerder. Thus, never recognized it as proper resignation from directorship of the respondent.

In addition, she testified that the two were involved into a matrimonial dispute, which ended into a court of law as Petition for divorce No. 2 of 2017 at Kilosa District Court. She prayed this court to take judicial notice of the judgement of that court. Finally, she prayed for restoration of her directorship to the respondent together with all her entitlements.

In cross-examination, PW1 testified that she made an official search from BRELA on 11th February 2021. The search revealed that the respondent had two shareholders that is, Joseph Walter Gwerder and Lucy Peter Matemba. Likewise, the search indicated that the directors were Joseph Walter Gwerder and Lucy Peter Matemba.

In regard to deed of settlement (P3), she acknowledged that it was prepared by her lawyer from Dar es Salaam, signed by herself at Mikumi in front of her lawyer, likewise, Mr. Joseph Walter Gwerder signed the same.

She also admitted that, the settlement deed was about her salaries, but disputed that it had nothing to do with her removal from directorship. She was shown clause three of the settlement deed whose contents is as quoted:-

"That, its hereby mutually agreed that OWNER will remove the DIRECTOR of his duties as part of this settlement agreement and the relevant forms would be filed in the companies records in BRELA"

PW1, refused to read the clause claiming that she doesn't know English.

In regard to the matrimonial cause at Kilosa District Court, she said the court prohibited her from approaching the company's premises, disturbing workers and its assets. She conceded that the order is still in force since her appeal to the High Court was filed out of time by her lawyer, hence it was dismissed.

In re-examination, PW1 testified that, Joseph Walter Gwerder was the one who gave her a termination letter from her directorship and not the respondent (company). Further that, the matter in Kilosa District Court was about herself and her husband which did not involve the company (the respondent). Upon closure of her evidences, the petitioner invited the last witness whose evidence was purely an expert opinion on what is in BRELA's records.

The second witness, **Fatma Jumanne (PW2),** affirmed and proceeded to testify that, she is an employee of BRELA at the section of companies registration. According to BRELA, the directors of the respondent were initially, Joseph Walter Gwerder and Mtemi Augustino.

However, the petitioner joined the company as a director on March, 2010. She however pointed out that, the current directors of the respondent are **Joseph Walter Gwerder and Lucy Peter Matemba.** Such changes were entered on September 2020.

Added that the petitioner has never been a shareholder of the respondent and that she was not appointed to the position of directorship by way of company resolution, but by filing form No. 210A. That, she was likewise, removed by filing form No. 210B (termination of directors). Therefore, the petitioner was neither appointed to the post of directorship by board resolution nor was removed by board resolution rather was by filing the respective forms.

When PW2 was shown exhibit P3, clause 3, she confirmed that, it was a binding agreement between the petitioner and the company and it was justified to remove her from directorship as she consented to it. She finally, clarified the status of the petitioner in the company when she said that a director is an employee of the company.

Upon summarizing the prosecution's case, and since the respondent entered into a plea of no case to answer, then this court granted time to the disputants to file their final written arguments, which they complied with and this court appreciate for their industrious input.

The respondent justified its plea of no case to answer and that no witness for the respondent would be procured in court. Proceeded to cite

the rule found in the case of **Daikin Air Conditioning (E.A.) Ltd Vs. Havard University [1996] T.L.R 1,** which principle is repeated in the case of **Mwalimu Paul John Mhozya Vs. Attorney General (No. 2) [1996] T.L.R.229**, at page 237 the court held:-

> *"Can a defendant, at the close of a plaintiff's case submit in law that there is no case to answer? .... I ventured to answer that question in the affirmative"*

This Court went on starting on the applicable tests when such a submission is made at the closure of the Plaintiff's case as follows:-

> *"As I understand the law, when the dismissal of the plaintiff's case on the basis that no case has been made out is prayed for, the court should not ask itself whether the evidence given and/or adduced by the plaintiff establishes what would finally be required to be established, but **whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff"** [bolding mine].*

With these two decisions, the respondent/defendant may, at the end of the plaintiff's case, plead no case to answer. In so doing, the duty is left to the court to answer *whether there is evidence upon which a court,*

applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff?

Such question is answered based on the activities of mind in line with the evidence on record as to whether the case or complaint is reasonably built on a balance of probabilities against the respondent/defendant? In respect to this petition the another equally important question is whether the two witnesses for petitioner, built any viable case against the respondent? To answer these questions, I find important to consider the petitioner's final written arguments in line with the evidences adduced therein.

Rightly the petitioner's advocate pointed on undisputed facts that; first, the petitioner was appointed as a director of the respondent since 2010 as per the evidence of PW1 and PW2 together with exhibit P3; second, it is equally correct that she was removed not based on article 28 of the articles of association of the respondent, rather was appointed and removed based on forms filed to BRELA as per the evidence of PW2; third, the deed of settlement was between JOSEPH GWERDER and MIRIAM MWANGOLE, though had the effect to the respondent; fourth, the removal of the petitioner from the directorship was accompanied with payment of lump sum amount of money as per P3; fifth, the petitioner was paid lump sum amount of money as her salaries of directorship, same was placed in an executed deed of settlement. The rest of facts are disputed and subject to the analysis of both facts and law.

Based on the undisputed facts, I am inclined to agree with the respondent that, in case the petitioner/plaintiff fails to adduce evidence on balance of probability, the respondent/defendant may plead no case to answer, but should proceed to justify as to why he pleads so. Otherwise, if the court find that a case is built to the preponderance of probability, obvious the case will be decided without having an advantage of hearing the defense case.

To justify the assertion that, the petitioner has failed to build her case, the learned advocate for the respondent went further to submit that the petitioner is no longer a director of the respondent. This fact is drawn from the evidences of PW1, that she signed a deed of settlement in January 2017 immediate thereafter, she was paid her salaries to the tune of Tsh. 50,000,000/= payable in two instalments as per exhibit P3, which empowered the company to remove her from the position of directorship.

Above all, it is admitted that she was given a letter removing her from position of directorship. Accordingly, she was removed from directorship. The learned advocate referred this court to the case of **UMICO Limited Vs. Salu Limited, Civil Appeal No. 91 of 2015, (CAT** – Iringa) where the Court of Appeal held:-

> *"We wish to begin by stating that it is trite principle of law that generally if the parties in dispute had reduced their agreement to a form of a document, then no evidence of oral agreement*

or statement shall be admitted for the purpose of contracting, varying, adding to or subtracting from its terms (see Sections 100 and 101 of the Evidence Act, Cap. 6 RE 2002)"

Both learned counsels have tirelessly referred this court to exhibit P3, which was executed by the petitioner and Joseph Walter Gwerder. Such document is fundamental in final determination of this suit. According to PW1, the deed of settlement was prepared by her advocate stationed at Dar es Salaam, out of that deed of settlement she signified her acceptance on its contents by signing it. But none of the counsels exhaustively discussed on its contents. Thus, forced this court to recap hereunder.

Its preamble had the following:-

"This deed of Settlement is made this 18th day of January, 2017 between Joseph Walter Gwerder ...(Owner) and Miriam Mwangole ...(Director)

A. *Whereas the owner appointed the Director in 2010 to be part of TANSWISS Enterprises LTD*
B. *Whereas the owner has agreed with the Director to settle amount of TZS. 50,000,000/= that was claimed by the Director as wages for a period covering 2010 to 2016 amicably by offering to pay the Director the said sum in two instalments"*

The contents of the deed of settlement had this:-

1. *That, the parties have agreed and consented to have this matter settled amicably once and for all as full and final payment towards the amount claimed of TZS. 50,000,000/=.*
2. *N/A*
3. *That, it is hereby mutually agreed that the Owner will remove the Director of his duties as part of this settlement agreement and the relevant forms would be filed in the companies records in BRELA"*

Such deed of settlement was prepared by VAM Associates (Advocates) and same was signed by both parties before advocate Ahmed S. Elmaamry, advocate of the petitioner.

The question is, whether the contents of that deed of settlement is related to the alleged matrimonial dispute at Kilosa District Court? I find no where in the deed of settlement referred to the alleged matrimonial cause. The contents therein referred the two parties as owner and director. Joseph Walter Gwerder acted as the owner of the respondent, while the Petitioner was referred as Director of the Respondent as opposed to husband and wife. This court is surprised to find that the petitioner's advocate tried to link up exhibit P3 with matrimonial cause at Kilosa District Court. The whole Deed of settlement was purely related to the respondent not otherwise.

It is well established in our jurisdiction that, when parties agree and reduce their agreement into writing, the contents of that written document shall remain as true evidence. Section 100 of the **Evidence Act Cap 6 R.E. 2019** speaks louder on this principle as quoted hereunder:-

> *"When the term of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provision of this Act"*

This section is *in pari material* with Indian Code of Evidence, whereby **Sarkar on Evidence Fifteenth Edition at page 1269** amplified by giving breath to the section as follows:-

> *"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents. Whenever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being*

used, either as substitute for such instrument, or to contradict or alter them".

In similar vein the Court of Appeal in the case of **Univeler Tanzania Ltd Vs. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009** observed that: -

"Strictly speaking under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute"

Similarly, the Court of Appeal repeated in **Civil Appeal No. 22 of 2017 between Miriam E. Maro Vs. Bank of Tanzania.** I fully subscribe to that guidance of the Court of Appeal.

Therefore, going by the evidence in exhibit P3; the testimony of the petitioner that she received a letter from Joseph Walter Gwerder removing her from directorship is a fact not in dispute. However6, she disputed if that letter was from the respondent or from Joseph Walter Gwerder? This is a valid question, but its answer is simple. Exhibit P3 is the direct answer which was signed by Joseph Gwerder as majority shareholder or Owner of

the respondent holding 98% of the total shares of the respondent and obvious, he signed on behalf of the Respondent. The petitioner signed as a director not as Miriam Mwangole. Therefore, it is known a company is a legal entity, which has neither brain nor blood, but acts and performs its duties through natural persons employed therein and shareholders. Thus, questioning the titles of the signatories of that deed of settlement, is nothing than wastage of valuable time of the court and parties.

Evidently, the testimonies of PW1 and PW2 together with exhibit P3 leave no iota of doubt that the petitioner is not a director neither by ***de facto nor by de jure*** of the respondent. Thus, entitled to no relief in this petition.

In view of the foregoing, this petition is misplaced and lacks merits, same is dismissed with costs.

I accordingly order.

Judgement delivered in chambers this 11th day of July, 2022

P.J. NGWEMBE

JUDGE

11/7/2022

Court: Judgement is delivered at Morogoro in Chambers on this 11th day of July, 2022 in the presence of Advocate Josbert Kitale holding brief

for Advocate Mizray for the petitioner who is also present and Prof. Binamungu, barned advocate for the Respondent.

Right to appeal to the Court of Appeal explained.

P.J. NGWEMBE

JUDGE

11/7/2022