IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 15 OF 2022

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION
AND
IN THE MATTER OF THE COMPANIES ACT, CAP 212 RE 2002
BETWEEN

AFRICA FLIGHT SERVICES LIMITED .....APPLICANT
VERSUS
THE REGISTRAR OF COMPANIES .....1ST RESPONDENT
THE ATTORNEY GENERAL.....2nd REPONDENT

RULING

24 June & 30 Aug, 2022
MGETTA, J:

Pursuant to a leave granted to the applicant on 28/4/2022 in Miscellaneous Civil Cause No. 5 of 2022 to apply for orders of certiorari, mandamus and prohibition, the applicant, Africa Flight Services Limited on 11/5/2022, filed a chamber summons made under **section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310** and **Rules 8 (1)(a),(b), (2), (3) & (4) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules 2014** (henceforth the 2014 Rules).

The chamber summons is supported by an affidavit affirmed by Mr. Mohamed Abdillah Nur, the Managing Director of the applicant. It is also

accompanied by a statement of the applicant. In the chamber summons, the applicant moved this court to grant the order of certiorari to quash the decision of the Registrar of Companies (hereinafter referred interchangeably as the Registrar and or the 1st respondent) made on 2/2/2022 removing the applicant name, Africa Flight Services Limited and replacing it with the applicant's previous name of Alliance Cargo Handling Company Limited; the order of mandamus for purposes of directing the Registrar to restore the applicant name in the register of companies; and, the order of prohibition to restrain the Registrar from removing the applicant name in the register of companies in future.

On the other hand, the application was opposed by the respondents who filed a joint counter affidavit sworn by Mr. Seka Kasera, the Principal Officer in the employment of the 1st respondent and a statement in reply also made and signed by the said Principal Officer.

During the hearing, Mr. Gabriel Simon Mnyele and Mr. Deogratias John Lyimo Kiritta, both learned advocates appeared for the applicant; while, the respondents enjoyed a legal service of Mr. Boaz Albany Msoffe and Ms. Grace Godlove Umoti, both learned state attorneys.

In his submission, Mr.Lyimo adopted the contents of the affidavit and statement made in support of the application and stated further that the decision made by the 1st respondent to remove the applicant name

and replace it with the applicant previous name of Alliance Cargo Handling Company Limited, based on complaints brought before him by purported members of the company was unprocedural and without afford the applicant a right to be heard. As a result, he contravenes the principles of natural justice to the detriment of the applicant.

He further submitted that if the 1st respondent would have given the applicant the right to be heard he would have been in a better position to realize that the complainants were not members of the applicant after their shares have been forfeited. The applicant's application for change of name to the Registrar was made in compliance with **section 31 of the Companies Act, cap 212 RE 2002** (henceforth the Act) and by virtue of a special resolution made by majority of the applicant's members, the special resolution that was submitted to the Registrar for the approval of the change. He submitted further that after approving the change, the Registrar became *functus officio* and did not have powers under **section 31 of the Act** to strike out the certificate of change of applicant name and reinstate the previous one. Therefore, he acted without jurisdiction.

Mr. Lyimo was of the view that, the change of company name is an internal affairs of the company itself; and upon receiving complaints, the 1st respondent was duty bound to advise the complainants to sort the issues internally in the company, instead of restoring the previous name.

He further submitted that, joint counter affidavit of the respondents suggests that the company resolution was wrongly passed. He said that goes onto the merit of the case. He insisted for example that order of certiorari is of procedural defects of reaching the decision. A certain decision might be good and proper, but unprocedurally reached; so is the decision of the 1st respondent which should by quashed by this court.

The second issue emanates from the joint counter affidavit to which Mr. Lyimo submitted that the respondents disputed the deponent's status in relation to the company. He submitted that Mr. Mohamed Abdullah Nur, the deponent in the affidavit is the applicant's Managing Director by virtue of employment. Under the circumstances, he is not bound to be registered by the 1st respondent. The respondents appear to confuse the concept of board of directors and the management. He referred to section **181 of the Act** which provides for directors and other officers of a company.

Basing on the above cited section, the company management is divided into two groups which are board of directors and the management; whereas, the role of the board is to supervise the activities of the management through board meetings; and, the management runs the affairs of the company. Therefore, the fact that the deponent of the affidavit stated he is a Managing Director that is a mere choice of name of the senior member of a team and that does not make him a director

within the meaning of the Act. He concluded by seeking this court to grant the orders prayed for with costs.

Supporting Mr. Lyimo's submission, Mr. Mnyele emphasized that once the 1st respondent accepted the applicant name, the applicant got proprietary right of that name and had the right to use it. Thus, before deciding on the rights of the parties by cancelling or deleting the applicant name and replacing it with the previous one, the 1st respondent was duty bound first to afford the applicant a right to be heard (to hear the complainants and the applicant). The 1st respondent did not do that. He simply got the complaints from purported shareholders, and without notifying the applicant, he proceeded to change the applicant name.

Mr. Mnyele insisted that while interfering with the rights of the parties the observance of Principles of Natural Justice is very fundamental. Wherever it is proved that a party was not heard, such a decision must be quashed. He referred to the case of **M/S Olam (T) Limited versus Leonard Magesa and 2 Others**; Misc. Civil Cause No. 6 of 2019 (HC) (Mwanza) (unreported).

As regard to jurisdiction, he referred to **sections 30 and 31 of the Act**. He said **section 30(1) of the Act** applies when the company is in registration process for the 1st time. **Section 31(1) of the Act** applies while the company has already been registered. Here, the Registrar is

empowered to change a name by vetting out the names and he may approve or refuse to approve it. In this situation, the Registrar having received the special resolution, vetted it, accepted it and issued a certificate of change of applicant name under **section 31(3) of the Act**. As the law stands, once the Registrar issued certificate of change of name, he ceased to have powers to revoke it or change it again because he became *functus officio*. He acted without power to do so, the action becomes void. He referred to the case of **Sanai Mrumbe & Another versus Chacha** [1990] TLR 54 whereby the Court of Appeal stated that if public officer acts without jurisdiction, his decision must be quashed.

He added that the change of the applicant name was internal matter of the Company, that's why the Registrar before changing the name must be satisfied that internal matters of the company were followed. Thus, upon receipt of the complaints, the Registrar was duty bound to refer the complaints to the applicant, the company, to sort out the problem internally.

He submitted further that stating in counter affidavit, that the special resolution was wrong, not properly passed, that goes to the merit of the decision of the 1st respondent, while in this application the concern is the procedures adopt to reach such decision; which he submitted it was wrong. He insisted the decision reached unprocedurally must be quashed.

Hence, the court has to consider whether the decision of the 1st respondent to cancel or remove the applicant name and replace it with the applicant previous one was done procedurally or unprocedurally, and not to consider the merit of the decision.

In response, Mr. Boaz started by attacking the affidavit and the reply to counter affidavit affirmed by Mohamed Abdullah Nur. He argued that the deponent is not the Managing Director of the company as he is not registered with the 1st respondent in a prescribed form No. 210 A which is found in the company's form. He further averred that Mr. Mnyele has not cited any law which distinguish the Managing Director of the Company from a Director of the Company and a Director by employment. He didn't back up his position by law. To his understanding, there is no specific law which distinguishes the two. The Managing Director cannot be distinguished from the Directors of the company and the law does not state so. The counsel for the applicant has not proved that Mr. Mohamed Abdullahi Nur (the deponent herein) was employed as a Managing Director. In the absence of such proof, it is the extract of the 1st respondent which shows who are the directors of the company and who are the shareholders. He referred to annexure R2 of the counter affidavit which provides for the extract of the company which provides for six directors of the company, but the deponent is not found therein as one of

the directors, rather he appears in the list of shareholders or members of the company. Therefore, affirming that he is a Managing Director of the company is a lie. It is cardinal principal of the law that a court should not rely on the affidavit which contains untruth information.

He further alluded that the 1st respondent has powers to change names when he deals with renewal or appointment of Directors of the company in compliance with **section 210 of the Act** which provides for Register of Directors and Secretaries of the Company. He added it is so improper for any person to claim to be a Managing Director in absence of proof to that effect. The safest place for the court to act is to rely on the search result of the company (annexure R2). Finally, he referred this court to the case **of Jaliya Felix Rutaihwa Versus Kalokora Bwesha and Another**, Civil Application No. 392/01 of 2020 (CA) (DSM) (unreported)at page 11-12 in which the Court stated that it is unsafe for the court to act on the affidavit which contain false disposition.

He further averred that **Rule 8 (3) of the 2014 Rules** requires that the affidavit must be made by the applicant in person or by an authorized officer of the applicant. But in the instant application, the deponent was not authorised in writing by the company to lodge the application. He insisted that the affairs of the company are run by the Resolution and not wishes of one person as per **section 147 (1)(a) and**

(b) of the Act, but by resolution of a company in a general meeting or by resolution of a meeting of any class of members of the company. Therefore, in the absence of special resolution the action of the applicant offended **rule 8 (3) of 2014 Rules**. The case of **Kati General Interprises Ltd Versus Equity Bank of Tanzania Ltd**, Civil Case No.22 of 2018 (HC) (DSM)(unreported) at page 13 on the 2nd paragraph in which the High Court insisted that the deponent must first obtain the resolution before instituting the suit.

With regard to the grievances of the applicant of the right to be heard, he had firm view that is a misconception of facts. He clarified that through the appended AFS 5 to affidavit, the Registrar informed the applicant on the irregularities he encountered that the resolution used to change the name from Alliance Cargo Handling Company Limited to the applicant name was improper as it was not a special resolution as required by the law but rather it was a board resolution. **Section 143 (1) of the Act** defines what is a special resolution. The resolution submitted before the Registrar by the applicant was not a special resolution. After receiving a complaint letter of 13/12/2021 from other shareholders of the company, it was when the Registrar noted that error that the resolution used to change the name was not correct. Therefore, the change of the name was also incorrect. Then he decided to communicate to and informed the

applicant and then he proceeded to revert back to the previous name due to that anomaly. The Registrar could not let the name remain in the register while it was improperly changed without following the law. That was a reason in his letter dated 2/2/2022 the Registrar directed the applicant to submit correct special resolution as required by **section 31(1) of the Act** so that the change of the name would be effected in accordance to law. He insisted that the right of the applicant to be heard is at their disposal and the applicant is required to correct the anomaly at any time. The applicant didn't and as result, he filed this application. Under **section 143 (1) of the Act** special resolution has to be made by 75% of shareholders of the company. The submitted resolution was not a special resolution but a board meeting resolution which was attended by only 65% instead of 75% of the shareholders or members of the company. He finalised this point by justifying that the cancellation of change of the applicant name by the 1st respondent was therefore inevitable as the change he made previously was not in compliance with the provision of the Act.

Further, it was his submission that, the applicant was supposed to exhaust available remedies which were availed to him by the 1st respondent through a letter dated 30/12/2021 in which the applicant was informed about the cancellation of change of name due to illegalities

pointed above and invited the applicant to bring a correct resolution, so that their wishes of changing the name could be effected. He insisted that, prerogative orders are issued when the applicant has no other remedies and the decision seeking mandamus has to be final. To buttress his point, he referred to the case of **John Mwombeki Versus Bukoba Regional Commissioner and 2 Others** [1986] TLR 88 which provides for the conditions of issuance of prerogative orders that an applicant should not have any other remedy. That in the present application, the applicant has an alternative remedy of submitting proper and correct special resolution according to law. He insisted that the order of forcing that 1st respondent to restore the applicant name cannot be executed by this court as it will amount to acting as an appellate machinery which does not have such power. He also cited the case of **Sanai Murumbe & Another Versus Muhere Chacha** [1990] TLR 54 at page **56.**

On whether the 1st respondent was *functus officio*, he submitted that to be fallacy as section **51 of the Interpretation of laws Act,** CAP 1 R.E 2019 provides that any exercise of any power can be corrected. Therefore, when the Registrar restored the previous name of the company he properly acted and had power to correct any error that was previously done in previous transaction and thus *functus officio* does not operate if the aim is to correct the error. He further averred as per annexure R2 of

the joint Counter affidavit that the complainants are still shareholders of the company. That the alleged forfeiture of shares has not yet been executed as there was still a pending **Commercial Case No. 81 of 2022** at the High Court Commercial Division with regard to that matter. He conceded that the change of name to be an internal affairs of the company, but the same is subject to the approval by the 1st respondent and compliance with the law. He insisted that the breach of the law was already there; and, he who was the mandate to correct such breach was the Registrar who did it and then informed the applicant. Finally, he prayed for the dismissal of the application with Costs.

In a rejoinder, Mr. Lyimo reiterated what he submitted in submission in chief and further stated that, there is nowhere in the law where a company is required to pass a board resolution to initiate a litigation. However, he submitted the same has been settled with the Court of Appeal decisions and that the whole submission of the respondents' counsel is misconceived and misplaced. He added that before any act is done by the registrar he ought to afford the applicant with the right to be heard first. He also insisted that the alternative remedy envisaged in law is legal remedy. Accepting the Registrar decision of changing the applicant name without being heard amounts to infringement of the applicant's right to be heard. This court has power to grant prerogative orders

sought. He added that, the complainants who are not party to the application are no longer the members of the applicant since their shares have been forfeited in company's internal arrangement and to have them registered is just the matter of formalization.

Furthermore, Mr. Lyimo submitted that the employment of directors of the company is an internal affairs of the company. He insisted that directors are appointed as employees and their names are not required to be registered by the 1st respondent and their duty is to see day-to-day activities in the management of the company. Therefore, the applicant did not offend **rule 8 (3) of the 2014 Rules**. He distinguished the case of **Kati General Interprises ltd** (supra) to the effect that the said case was referring to civil suit, and not to application. He added **section 147(1) (a) (b) of the Act** talks about general meeting of the company to pass resolutions and the resolutions which can be passed by general meeting are prescribed by the Act.

Mr Mnyele on his rejoinder added that prerogative orders are concerned with the legality of the procedures used to reach a decision and not the merits of the decision. Therefore, it was wrong to submit on the validity of the resolution. That this court should stick on the procedure used to remove the applicant name. He insisted that the applicant was not accorded with the right to be heard before the 1st respondent had

made a decision to remove the applicant name and replace it with the previous one. He insisted that while the Registrar has the powers to correct errors occurred previously, such powers must be exercised judiciously.

Having the rival submissions in mind, in the course of composing this ruling I also came across a decision in the case of **Hamad Masauni and Two Others Versus Mohamed Abdilah Nur & Three Others**; Misc. Commercial Cause No. 33 of 2021 (High Court Commercial Division) (DSM) (unreported). I then invited the parties in this application to address me on that decision. None of the learned counsel had something substantial to tell me. In that case, the issue of change of name of Alliance Cargo Handling Company Limited to the applicant name was discussed. The petitioners complained that the name was changed to the present applicant name without their knowledge and without being involved as minority shareholders. It is on the record that the petitioners in that case appears to be the authors of a letter dated 13/12/2021, annexure R1 to the joint counter affidavit. It was that letter that prompted the Registrar to cancel the applicant name and replace it with the previous name of Alliance Cargo Handling Company Limited.

In that case, the respondents claimed that the change of name to applicant name was made in accordance to Articles of Association of the

Africa Flight Services Limited and the law, that the petitioners were invited to attend the Board Meeting that passed the resolution to change the name, but refused to attend. At the end, before passing the decision, Hon. Magoiga, J. observed three points. In this ruling, I am concerned with two of them: **one**, that the special resolution was made by majority shareholders alone in a meeting without involving the other shareholders; and, **two** that **section 31 of the Act** which allows the company to change its names by a special resolution with the approval of the Registrar was not complied with. Finally, my learned brother made an order, amongst the orders, and I quote that:

> *"6. I further order that the change of the name of the 4th respondent (**Africa Flight Services Limited)** was illegally done and petitioners by the order of this court are hereby directed to notify and present to the REGISTRAR of Companies this Court's order directing him/her to delete the illegally changed name of AFRICA FLIGHT SERVICE and substitute with the former name of ALLIANCE CARGO HANDLING COMPANY LIMITED."* **(bold mine)**

I am of the considered view that the above quoted order made on 8/7/2022 by Commercial Division retrospectively blessed the decision

made on 2/2/2022 by the Registrar of restoring the previous name of the company after he had received a complaint letter from other shareholders who appeared to be petitioners in the Commercial Division case and who had complained to the Registrar that they were not involved to such change of the applicant name. In his letter of Ref: Na. MIIT/BRELA/RC/72844/58 dated 2/2/2022 addressed to Mkurugenzi, Africa Flight Services Limited, the Registrar stated that:

> *"Ofisi ya Msajili imepokea barua kutoka kwa Hamad Masauni, Arthur Mosha, Juma Mabakila, Thabit Katunda na Yahya Sudi, wanahisa wa kampuni tajwa hapo juu, ikieleza juu ya ukiukwaji wa sheria katika ubadilishwaji wa jina la kampuni kutoka ALLIANCE CARGO HANDLING COMPANY LIMITED na kuwa AFRICA FLIGHT SERVICES LIMITED ambapo kifungu cha 31 (1) cha Sheria ya Makampuni, Sura 212 kinachotaka mabadiliko ya jina la kampuni kufanywa kwa upitishwaji wa azimio maalum la wanachama wenye umiliki usiopungua asilimia 75% kilikiukwa kwa azimo la mabadiliko hayo kupitishwa na wakurugenzi wa kampuni.*

Kutokana na upungufu huo wa kisheria, Msajili ameamua kufuta badiliko hili la jina na kuendelea kutambua jina la awali ambalo ni ALLIANCE CARGO HANDLING COMPANY LIMITED"

In this application, I am invited by the applicant to grant the order of certiorari to quash the decision of the Registrar; the order of mandamus directing the Registrar to restore the applicant name in the register of companies; and, the order of prohibition to restrain the Registrar from removing the applicant name in the register of companies in future. In the circumstances of the presence of the decision made by the High Court Commercial Division, I do hesitate to issue prerogative orders sought. I think my decision would be an awkward decision if I will pass such orders in favour of the applicant in disregard to the existing decision of the Commercial Division mentioned hereinabove which declared that the change of the name of Alliance Cargo Handling Company Limited to the applicant name was illegally procured or done.

I therefore retrain to issue the order of certiorari, mandamus and prohibition against the respondents. In other words, my decision would impliedly be over turning the Commercial Division decision if I find that in the course of restoring the names of Alliance Cargo Handling Company Limited, the Registrar was wrong as the procedure was not followed, while

my learned brother had already ordered the Registrar to do so, although he had already done even before the Commercial Division decision was passed. It is on the strength of this finding that I would avoid making conflicting decision. I am of further view that the issue before me would have been properly addressed before the High Court Commercial Division in Misc. Commercial Cause No. 37 of 2021, the case that was instituted before the present application was lodged.

In the same vein, I have examined the records of this application and considered the rival submissions of the parties. I have found that the applicant is also challenging the Jurisdiction of the Registrar and the breach of principle of natural justice. The decision of the Registrar made on 15/4/2016 of changing the company's name from Alliance Cargo Handling Limited to Africa Fright Services Limited was null and void ab-nitio since the company did not comply with the requirement of **sections 31 (1) and 143 of the Act,** when the applicant submitting the board resolution instead of the special resolution to the Registrar. **Section 31 (1) of the Act** reads:

> *"**31**.-(I) A company may by special resolution and, with the approval of the Registrar signified in writing change its name. If the Registrar refuses to give his approval, he shall give his reasons"*

Basing on **section 31 of the Act**, a company may by special resolution and with the approval of the Registrar signified in writing change its name. Therefore, the applicant was required to file special resolution for that change as observed by Hon. Magoiga J when deciding the matter on merit before him. The special resolution referred here can be traced under **section 143 of the Act** where it is provided that it has to be passed by a majority of not less than three-fourths of such members of the company.

As regard to the issue of whether the defectiveness of affidavit can be entertained at this stage, Mr. Mnyele submitted that it was wrong for Mr. Boaz to raise issues that have point of objection in nature without prior notice to the court. While partly conceding Mr. Mnyele's submission that by practice a point of objection has to be raised with notice before a court, with due respect I partly depart from his submission in the sense that the said practise lies to the objection which are purely point of law or of both law and facts. Reference is made to the case of **Mukisa Biscuits Manufacturing Ltd. Versus West End Distributors Ltd;** [1969] 1 EA 696.

However, in this matter Mr. Boaz pointed out that the affidavit is defective for containing false information by the deponent identifying himself in the affidavit that he is Managing Director of the Company. To

prove or disapprove that the deponent is or is not a Managing Director of the applicant and was authorised or not, to affirm the affidavit on behalf of the applicant, requires production of evidence from both parties as it is a fact in dispute, and not a pure point of law. The court was notified of this issue at paragraph 3 of the joint counter affidavit. As they were served with the joint counter affidavit, the counsel for applicant could not complain that they were taken on surprise. In the 1st paragraph of the affidavit the deponent has introduced himself as a Managing Director of the applicant. But according to **annexure R2** to the joint counter affidavit, the deponent is a mere shareholder or member of the Company and not a director or a Managing Director. However, the established principle is that an affidavit which contains false information is not affidavit at all and cannot be relied upon to support the application and or be acted upon to resolve any issue before this court as it was well stated in the case of **Iganazio Messina vs Willow Investments SPR**, Civil Application No. 21 of 2001.

Similarly, **rule 8 (3) of the 2014 Rules** cited above mandates the affidavit to be deponed by the applicant itself or its authorised officer or director by the resolution of the company to act on behalf of the company, including instituting this application. In this application, it is undisputed that there was no resolution of the company which authorised the

deponent herein to act (including to affirm an affidavit) on behalf of the applicant. Therefore, I find that this application is improperly before this court as it is accompanied by an affidavit of unauthorised person. Hence, the application is rendered incompetent for want of genuine affidavit.

In sum, for reasons stated herein above, I accordingly find this application wanting and I proceed to dismiss it. In the circumstances of this application, I order each party to bear its own costs.

It is accordingly ordered.

Date at **Dar es Salaam** this 30th day of August, 2022.

J.S. MGETTA

JUDGE

COURT: This ruling is delivered today this 30th August, 2022 in the presence of Mr. Deogratias John Lyimo Kiritta, the learned advocate for the applicant and in the presence of Mr. Boaz Albany Msoffe, the learned state attorney for the respondents.

J.S. MGETTA
JUDGE
30/8/2022