IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY

AT MWANZA

CIVIL CAUSE NO. 6 OF 2022

IN THE MATTERS OF UNFAIR PREJUDICE ACTIONS BY DIRECTORS OF THE RETRUS TANZANIA LIMITED

MASANORI KOTANI (*Through the Power of Attorney by Eliphas Nguka Odingo*) ..... **PETITIONER**

VERSUS

RETRUS TANZANIA LIMITED.....**RESPONDENT**

RULING

17th August & 15th September, 2022

Kahyoza, J.:

Masanori Kotani (*through the Power of Attorney by Eliphas Nguka Odingo*) (Petitioner) instituted this matter under the Companies Act, alleging the Respondent issued an illegal notice calling for an extra-ordinary meeting on 15th July 2022. He prayed for among other things, a declaration that a notice issued by the Respondent on the 26th June, 2022 is invalid and ineffective.

Retrus Tanzania Limited (the Company) replied to the petition refuting the allegation that the notice was illegal. She stated that the notice was not illegal as the management was not in talking terms and on several occasions shareholders' attempts to convene proved futile. The respondent's advocate refuted the allegations that directors and some other members embezzled the respondent's fund. They contended that the petitioner based the allegation on the report from an accounting firm which was nothing than a hired gun.

Before, I determine the issue of whether the notice is valid or not, I wish to comment on the issue the respondent raised while replying to the petitioner's submission. The respondent submitted that the petitioner has no *locus standi.* He submitted that the *Locus standi* is governed by common law accordingly to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered. He cited the case of **Lujuna Shubi Ballonzi vs. Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203.

The petitioner's advocate submitted that the petitioner had locus standi and that there was attached a document to prove that the petitioner was a done of the power of attorney.

I will not dwell on this issue for reasons that the respondent raised the preliminary objection via a backdoor. The respondent's advocates are fully aware of the procedure to raise a preliminary objection. They were duty bound to bring to the notice of the court and the opponent party that they will raised a preliminary point of law and provide its content. The adversarial system does not allow a party to take the court and the adverse party off

guard. All in all, even if, I was to consider it, the finding is negative. The Petitioner in this case is **Masanori Kotani** vide a person holding the power of attorney. **Masanori Kotani** stated the reasons for granting the powers of attorney, which I found to be a sounding ground. **Masanori Kotani** has interest in the affairs of the respondent. He is shareholder.

Was the notice calling for an extra-ordinary meeting valid?

Having a cursory review of the pleadings and after considering the submissions is obvious that there is only one issue centre to the parties' dispute, whether notice calling an extra-ordinary meeting was valid. The parties vehement argued in support and in opposing of the allegation of embezzlement of Tzs. 2,109,000,000/=. The petition and submission raised another issue whether funds were embezzled. However, given the nature of the remedies the petitioner seeks from this Court I find the issue whether funds were embezzled is irrelevant. It is out of scope. It would be an academic exercise to determine the issue which has no bearing to the prayer. It is one of the cardinal principles of pleadings that parties are bound by their pleadings and the court can grant what is prayed. The petitioner prays for-

1. a permanent injunction of the Respondent to conduct an extra-ordinary meeting emanating from the 26th June, 2022 notice;
2. a declaration that a notice issued by the Respondent on the 26th June, 2022 is invalid and ineffectual;
3. the Respondent to pay costs incidental to the Petition; and
4. any other relief(s) that the honourable court deems it fit.

The petitioner's argument is that the notice was invalid as it violated the requirement of section 135(1) of the Companies Act, which states that the notice to convene an extraordinary ought to be at least 21 days' notice.

The petitioner's other contention was that an extra-ordinary meeting may be convened at the request of members who must be holding at least one tenth of paid up capital. Looking at the share structure of the Respondent (the Company) RETRUS Company holds 6000 shares out of 10000 shares and the rest of the shareholders hold 75 shares, which is less than one tenth.

The petitioner further challenges the validity of the notice of meeting because some of the directors emblazed the respondent's funds.

The respondent contends that the notice was valid as the Art. 50 of the Articles of Association of the Company provides for a shorter period of notice.

The petitioner's advocated contended that section 135(1) of the Act allows for a shorter period for adjourned meeting. He submitted that the meeting under consideration was not an adjourned meeting.

Indisputably, an extra-ordinary meeting must be called by issuing a notice. Parties' lock the head-on what is required time of the notice. The Companies Act section 135 sub-sections (1), (2) and (3) state categorically that a notice calling for an extra-ordinary meeting must be at least 21 days' notice. However, a shorter notice may be issued under section 135(2) for an adjourned meeting. The articles of association of **RETRUS Tanzania**

Limited provide for a shorter period of a notice calling for an extra-ordinary meeting than that provided in the Companies Act.

The sub section (1), (2) and (3) of section 135 provide that-

135.-(I) ***Any provision of a company's articles shall be void in so far as it provides for the calling of a meeting of the company other than an adjourned meeting by a shorter notice than twenty-one days****; and every such notice shall be in writing.*

(2) Save in so far as the articles of a company make other provision in that behalf (not being a provision avoided by subsection (1)), a meeting of the company other than an adjourned meeting may be called by twenty-one days notice in writing.

(3) A meeting of a company shall, notwithstanding that it is called by shorter notice than that specified in subsection (2) or in the company's articles, as the case may be, be deemed to have been duly ***called if it is so agreed****: -*

(a) in the case of a meeting called as the annual general meeting, by all the members entitled to attend and vote thereat; and

b) ***in the case of any other meeting, by a majority in number of the members having a right to attend and vote at the meeting, being a majority together holding not less than ninety-five per cent in nominal value of the shares giving a right to attend and vote at the meeting, or, in the case of a company not having a share capital, together representing***

not less than ninety-five per cent of the total voting rights *at that meeting of all the members. (Emphasis is added)*

It is a position of corporate law that where the articles of association are inconsistent with the Companies Act, the requirements of the Companies Act override those of the articles of association. For that reason, the respondent was required to comply with the requirement of the section 135 of the Companies Act by issuing a 21 days' notice. Since the notice issued was less than that it was invalid. Consequently, I declare the notice issued on 26.7. 2022 calling an extra-ordinary meeting invalid.

In addition, I scrutinized the articles of Association of the respondent keenly, nowhere did I find that it allowed for calling a meeting by a notice less than 21 days. Art. 50 states categorically that *all meetings of members shall be called by twenty-one days' notice.* It further provided that a shorter notice to convene a meeting may be issued with consent in writing of all members entitled to receive notice from the Company. In the present case, members did not consent in writing for a meeting to be convened by a notice of less than 21 days. Consequently, the notice was invalid.

I also considered the respondent's argument that section 135(2) the Companies Act allows the Company to convene a meeting by a notice less than 21 days. To say the least the respondent did not move me. Truly, section 135(2) the Companies Act provides that the Company may issue a notice less than 21 days to convene a meeting. However, the meeting so convened must be an adjourned meeting. It states that "...*a meeting of the company other than* ***an adjourned meeting*** *may be called by twenty-one days' notice in writing."*

I wish to point out that I did not give weight the petitioner's argument that the notice was invalid on a reason that some directors and the Company Secretary embezzled funds. Parties advocates argued at length, one party submitting that funds were embezzled and the other refuting. The issue central to this court is whether the notice was valid or not. The question whether funds were embezzled or not it is opportune not for this Court to decide. I decline the invitation.

Having found that the notice was invalid, I now consider the reliefs available to the petitioner. The petitioner prayed for a permanent injunction to restrain the Respondent to conduct an extra-ordinary meeting emanating from the 26th June, 2022 notice, which I would not grant. I will simply declare the notice the respondent issued on 26th June, 2022 a nullity. The respondent is at liberty to issue a notice in accordance with the law and proceed to hold meetings as per law and the articles of association. To transact her business properly and legally, a Company must convene meetings and pass resolutions.

I grant the petition to the extent that the notice the respondent issued on 26th June, 2022 is a nullity. Consequently, I quash it with costs.

It is so ordered.

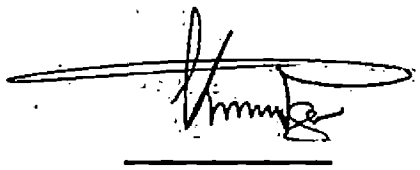
THE HIGH COURT OF TANZANIA
MWANZA

JOHN.R.KAHYOZA.

JUDGE.

15/09/2022

Court: Ruling delivered in the presence of Mr. Emmanuel Heri, advocate for the applicant and Mr. Silas John for the respondent. B/C Ms. Jackline (RMA).



JOHN.R.KAHYOZA.

JUDGE.

15/09/2022