

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 09 OF 2022

**IN THE MATTER OF THE COMPANIES ACT, NO. 12 OF 2002 (Cap.
212 R.E. 2019)**

AND

**IN THE MATTER OF TANZANIA CHAMBER OF COMMERCE,
INDUSTRY AND AGRICULTURE (TCCIA)**

AND

IN THE MATTER OF APPLICATION BY;

ERNEST NDUTTA NYORORO PETITIONER

VERSUS

PAUL FARAJ KOYI 1ST RESPONDENT

TANZANIA CHAMBER OF COMMERCE,

INDUSTRY AND AGRICULTURE (TCCIA) 2ND RESPONDENT

NEBART MWAPWELE ... 3RD RESPONDENT [As a Necessary Party]

RULING

13th & 17th January, 2022

ISMAIL, J.

This petition has been taken at the instance of the Ernest Nduzza Nyororo, who has introduced himself as a member of the 2nd respondent, with a membership number 006499. He has instituted this petition seeking several orders against the respondents as follows:

- (a) A declaration that the affairs of the 2nd respondent are run in a manner that is prejudicial to the interest of the members and the company (2nd respondent) itself;
- (b) A declaration that 3rd respondent's appointment as the 2nd respondent's Executive Director is invalid, illegal, null and void *ab initio*;
- (c) Issuance of a temporary injunctive order, restraining the 1st and 3rd respondent from running the company's affairs and allow Ms. Judith Jeremiah Karangi to perform her duties;
- (d) Issuance of permanent injunction against the 3rd respondent from running the 2nd respondent's affairs;
- (e) Costs;
- (f) Any other order or relief that the Court may deem fit, just and equitable for enabling smooth and proper running the 2nd respondent's affairs and protection of interests of the 2nd respondent, the shareholders and the petitioner.

The allegation by the petitioner is that the 1st respondent is involved in *malafide* acts which are prejudicial to the interests of the 2nd respondent. The acts, are considered to be a breach of the provisions of Clauses 35 (a) (v) and 39 (a) of the Memorandum and Articles of Association (Memarts), and they include:

- (i) Termination of the appointment of a Ms. Judith Jeremiah Karangi, hitherto the 2nd respondent's Executive Director, while powers for such termination are allegedly vested in the National Executive Council;
- (ii) Appointment of the 3rd respondent as the 2nd respondent's Executive Director. The petitioner's contention is that the appointment was un-procedural and illegal;
- (iii) Removal of Dr. Kingu Mtemi as a member of the 2nd respondent's National Executive Council and the Board of Directors;
- (iv) Removal of Ms. Judith Karangi from the list of signatories of the 2nd respondent's bank accounts and replace her with two other signatories.

The petition has been valiantly opposed by the respondents. Through their joint replies to the petition and the supplementary petition, the allegations by the petitioner have been slammed. The respondents'

averments are that the 3rd respondent's appointment was on an acting capacity, subject to approval by the 2nd respondent's National Executive Council, whose meeting was slated for 15th January, 2022. The respondents further contended that Ms. Karangi was serving on a probation, pending a confirmation by the 2nd respondent's National Executive Council, on a recommendation by the Board of Directors.

With respect to 3rd respondent, the respondents' averment is that he took up the position in an acting capacity at Ms. Karangi's instance, following her travel to Nairobi.

Hearing of the petition, which was done orally, saw Mr. Kennedy Mgongolwa, learned counsel, representing the petitioner, as Mr. Malima David, learned counsel, had his services enlisted by the respondents.

Getting us under way was Mr. Mgonngolwa, who stated that the petition had been preferred under section 233 (1), (2) and (3) of the Companies Act, Cap. 212 R.E. 2019, together with Articles 41 and 42 of Table C of the Schedule to Cap. 212. He submitted that the petition stems from what he alleges to be acts of mismanagement done by the 1st respondent, by making several decisions which are prejudicial to the 2nd respondent's affairs. The incidents complained about are those that are averred in paragraph 9 of the petition and proved by Exhibit TC 4 attached

to the petition. Mr. Mgongolwa argued that the Memarts (Exhibit TC 3), under Article 39 (a), has vest powers in the National Executive Council (NEC) to appoint the 2nd respondent's Executive Director. That notwithstanding, Mr. Mgongolwa contended, the 1st respondent terminated Ms. Karangi and Dr. Kingu as Executive Director and Board members, respectively, in blatant violation of the cited provision on the Memarts. He roundly condemned the action, terming it illegal and un-procedural.

Learned counsel further argued that the 1st and 3rd respondents went far overboard by presenting documents to the 2nd respondent's banker (Exhibit TC 2), communicating the change of signatories. The change, learned counsel contended, saw Ms. Karangi removed while Anna Wille and Justin Marwa were brought in her stead. He argued that appointment of signatories to the bank accounts is done by the board of directors and not the president. Mr. Mgongolwa argued that no board convened to deliberate on the issue of signatories. He argued that not even an acting role would be sanctioned by the 1st respondent.

Taking a swipe at the replies to the petition and supplementary petition, the petitioner's advocate took the view that putting an allegor to strict proof was an affront to the law as we know it, and as accentuated in ***EA Cables Limited v. Spencon Services Ltd***, HC-Misc. Commercial

Application No. 61 of 2016; and ***Gilbert Zebedayo Mrea v. Mohamed Issa Makongoro***, CAT-Civil Application No. 369/17 of 2019 (both unreported). He argued that the consequence of all is that such denial is considered to be an admission of the allegation.

The petitioner's counsel urged the Court to grant orders sought in the petition.

In his swift rebuttal, Mr. David found nothing blemished in the 1st respondent's conduct. Learned counsel began with contending that the name of the 3rd respondent appearing in the petition was dissimilar to the 3rd respondent's actual name. While his real name is Nebart, the petition has Nerbert as the name of the 3rd respondent. He called upon the Court to consider amending the petition or guide as appropriate.

With respect to the petitioner's involvement in the petition, Mr. David contended that the petitioner is not a subscriber of the 2nd respondent. This is because he is not in the Companiers Register as required under section 24 (1) and (2) of Cap. 216.

Regarding the alleged illegality in the appointment of the 3rd respondent, learned counsel saw no legal flaws in the appointment. He argued that, given the falling out witnessed within the membership of the board of directors of the 2nd respondent, decisions had to be made to allow

a smooth conduct of the 2nd respondent's affairs. Being the president, chair of the NEC, Board and Annual General Meeting he was empowered, under Clause 18 (b) of the Memarts to act and address the stalemate. Part of the efforts, argued Mr. David, involved writing a letter (Attachment 2) to inform regional chairmen of the goings in the Chamber.

On the appointment of the 3rd respondent, Mr. David argued that his was merely an act of addressing the gap and that his action was subject to approval by the NEC. He argued that Ms. Karangi who was working on probation had not been confirmed to the position. He argued that the 3rd respondent's position would be resolved on 15th January, 2022 when members of the NEC were set to convene and deliberate on the matter.

With regards to removal of Dr. Kingu, the argument put forward is that he was given time to evaluate his suitability to continue serving as a board member, taking into account the fact that he was a civil servant whose involvement is prohibited by Article 24 (iii) of the Memarts. Mr. David contended that Dr. Kingu is a medical doctor employed and working at Lugalo Military Hospital.

On the legitimacy of the 3rd respondent to sign documents, Mr. David held the view that the 3rd respondent's involvement came as a result of the Ms. Karangi's absence from office and asked the 3rd respondent to deputize

for her. This is when the latter signed the documents disputed by the petitioner. Mr. David challenged the circular resolution (Exhibit TC 4) because it had failed to conform to the requirements of Article 36 of the Memarts which provides for the quorum requisite for transacting business. In this case, the number is four members, three of whom are officers of the Chamber. In this case, the resolution shows that there are four members, including Dr. Kingu. He argued that Articles 18 and 19 (a) and (b) define who the officers are. On a reflection, however, Mr. David agreed that Dr. Kingu was an eligible member.

With regards to Ms. Karangi's removal from the list of signatories, Mr. David contended that this decision was unanimously reached by members through a resolution for a meeting which was held in Dodoma. It was not the 1st respondent's own affair.

He urged the petitioner to let the NEC discuss, deliberate and resolve the matter amicably.

Rejoining to the rebuttal submission, Mr. Mgongolwa began by conceding to the contention that name of the 3rd respondent was wrong. He argued that this was a mere slip that can be cured by applying the principle of overriding objective, as spelt out in ***Sanyou Service Station***

Ltd v. BP (T) Limited & 2 Others, HC-Civil Case No. 329 of 2002 (unreported).

On the powers of appointment, learned counsel maintained that the 1st respondent is not vested with such powers; while with respect to Ms. Karangi's misconduct, Mr. Mgongolwa's take is that such allegations are not part of what is alleged in the pleadings. He urged the Court to consider it as a mere submission made from the bar, and that the same should be disregarded.

Mr. Mgongolwa contended that no evidence had been adduced to prove that Dr. Kingu was a civil servant, adding that matters pertaining to his eligibility ought to have been determined at the meeting of the members.

Defending the resolution tabled by the petitioner, Mr. Mgongolwa argued that Article 37 of the Memarts states that a circular resolution is only issued on an emergency basis. In the instant case, learned counsel contended, the resolution came after the Dodoma meeting.

He urged the Court to intervene and make a finding that will forestall any possible exclusion of the said members from the meeting of the National Executive Council.

I have scrupulously reviewed the pleadings filed by the parties, the accompanying documents, and counsel's oral submissions. I am now ready to address issues raised by the parties. What is clear is that removal of Ms. Karangi, Dr. Kingu, and appointment of the 3rd respondent is what constitutes the heart of the parties' consternation. The central question is whether such actions were regular and consistent with the instruments that govern the conduct of proceedings in the 2nd respondent.

I will begin the disposal journey by addressing an issue which was raised by the respondents' counsel. This is with respect to the legitimacy of the petitioner to found these proceedings. The relevant provision in this respect is section 233 (1) of Cap. 212 which provides as hereunder:

"Any member of a company may make an application to the court by petition for an order on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. If the court is satisfied that the petition is well founded, it may make such interim or final order as it sees fit for giving relief in respect of the matter complained of."

Section 24 of Cap. 212 talks about membership of a company, and it provides that subscribers of the company shall become members whose rights to commence proceedings against possible unfair prejudice to company affairs are provided for under section 233 (1) cited above. In the instant case, the petitioner's membership has been ascertained through attachment of a membership certificate and a payment receipt against payment of membership subscription fees (Exhibit TC 1). In my view, this is sufficient evidence that proves the petitioner's membership to the 2nd respondent. One would not require production of a company register to prove that he is a constituent member of the company as the respondents' counsel argues. It is simply not a requirement of the law. I take the view that the petitioner's membership status is ascertained and it qualifies him as a member that can found an action under section 233 (1) of Cap. 212.

There is also a nagging issue on the impropriety of the 3rd respondent's name that the petitioner's advocate has conceded to. While the actual name is Nerbat, the petition has picked Nerbert as the 3rd respondent's name. As both counsel agree, this is a trifling error which has less or no effect to the legitimacy of the proceedings. It is a misstep that can be cured through an amendment and without any prejudice on the

respondents' part. Consequently, I consider this to be a tolerable error and I choose to give it less weight.

As stated earlier on, the critical point of contention relates to removal of Ms. Karangi and Dr. Kingu, and the installation of the 3rd respondent as Ms. Karangi's successor. Related to that, is the deletion of Ms. Karangi's name as a signatory of the 2nd respondent's bank accounts. It should be appreciated that the latter action is resultant of what happened in the former. If, for any reason, Ms. Karangi's tenure as Executive Director came to an end, such cessation would definitely affect her status as the signatory of the accounts for, such responsibility was bestowed on her by virtue of her role as the company's executive Director. It follows, therefore, that the decision on the regularity or otherwise of her termination is what will determine if she should continue to serve as a signatory to the bank accounts.

As stated by Mr. Mgongolwa and duly acknowledged by Mr. David, running of the affairs of the 2nd respondent is governed, primarily, by the provisions of the Memarts. These are the constitution of the company in which organs of the company and the role that they play are spelt out. These include the Executive Council, the Board of Directors and officers of the Chamber, in the descending order. Each of these organs has specific

functions. With respect to appointment of staff, such powers are vested in the NEC. This is in terms of Article 39 (a) of the Memarts which provides as hereunder:

"The National Executive Council shall appoint an Executive Director for the Chamber following interviews and recommendations by the Board of Directors. At the following Annual General Meeting or Extraordinary General Meeting, the delegates shall be informed of the appointment.

The Executive Director shall be responsible to the Board of Directors of the Chamber and he shall be the spokesperson of the Chamber on operational matters."

What we gather from the quoted excerpt is that there is no shared responsibility between the NEC and any other company organ with respect to appointment of the 2nd respondent's Executive Director. This is exclusively the domain of the NEC, on the recommendation of the Board of Directors. It is also a known fact that the organ that is vested with powers of appointment also enjoys the powers of termination of employment. Thus, the powers of appointment enjoyed by the NEC include the exclusive powers to sever links with the employee that it hired or employed. It goes without saying, therefore, that it is the NEC that enjoys the exclusive

powers of termination, as far as the position of the Executive Director is concerned.

Mr. David has not seriously disputed the fact that Ms. Karangi's services were dispensed with by the 1st respondent. His only contention is that circumstances of this case were such that intervention of the 1st respondent, the president, was necessary, in order to save the 2nd respondent from hitting the bottom of the trough. He argues that the 1st respondent's intervention was intended to salvage the affairs of the 2nd respondent, and that, being the Chair of the Board, NEC and Annual General Meeting, the 1st respondent was justified in his intervention. Learned counsel has also argued that Ms. Karangi was not terminated. Rather, she was on probation and left her position because she was not confirmed.

In my considered view, these arguments are hollow and failing to resonate. While the 1st respondent's efforts to address the uncertainty that marred the 2nd respondent's operations are lauded and were well intentioned, the undeniable fact is that such acts were *ultra vires* the constitution of the company. My conviction is that the 1st respondent, has no business meddling in the issues relating to engagement or termination of the Executive Director. His being a chair of the meetings of the organs

does not, in any way, place him on par with the NEC or even the Board of Directors that recommends appointments to the NEC. Simply stated, the 1st respondent is not the Executive Director's employer. It follows that the 1st respondent's unilateral decision to terminate the then Executive Director was nothing short of a wanton infraction of the provisions of the Memarts, and an abhorrent infringement of the powers vested in the NEC. It would matter less, if the intention of such usurpation was to save the 2nd respondents from the imminent blushes that were caused by endless bickering among different players in the company.

The net effect of the 1st respondent's *ultra vires* acts is in the mould of what the House of Lords decided in the case of ***Ashbury Railway Carriage and Iron Co. Ltd v. Riche*** (1875) LR 7 HL 653, wherein *ultra vires* actions of the directors that defied the objects of the Memorandum and Articles of Association of the company were held to be void *ab initio* and invalid, unable to be ratified at a later stage.

The respondent's learned counsel has introduced yet another argument. It is to the effect that Mr. Karangi was serving on probation basis. As I struggle to make sense of what he intended to achieve in using a probationary status of an employee, it behooves me to state, albeit *en passant*, that even in cases that involve laying off employees who serve

on probationary basis, there is an elaborate procedure whose application is a matter of imperative requirement. This is in terms of the provisions of the Employment and Labour Relations Act; Cap. 366 R.E. 2019; and the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. These pieces of legislation provide a detailed process that the employer must follow if termination is to be considered fair. The process implicitly requires that termination of one's services must be done by a body that enjoys the powers of termination. In our case, such body is the NEC and not the 1st respondent.

In view of the foregoing and, borrowing a leaf from the principle enunciated in the cited English decision, I take the view that the conduct exhibited by the 1st respondent deserves nothing but a comprehensive censure. I hold that Ms. Karangi's ouster from her position in 2nd respondent company was marred by irregularities that are too profound to see the light of the day. I agree with the petitioner that such infraction was prejudicial to the company's interests, and it was within the respondent's right to enlist this Court's assistance and get the flawed decision out of the way. Most importantly, such flaws confirm the petitioner's contention that running of the 2nd respondent's affairs smacks of serious prejudice to the interests of the members and the 2nd respondent.

Equally horrendous, is the subsequent decision by the 1st respondent, to crown the 3rd respondent as Ms. Karangi's successor. Once again, this was an appointment, done by a person who overstepped his mandate, rendering it an intolerable travesty of justice. Appointment of staff is the power bestowed upon the NEC, as it is to fire employees, and it would not operate differently in the case of the 3rd respondent's appointment as Ms. Karangi's successor. It follows that his appointment to the position of Executive Director, whether on permanent or acting position, is shrouded in flagrant violation of the provisions of the Memarts. It bred a disturbing and intolerable consequence that justifies the prayers sought by the petitioner.

Finally, there is a question of whether Dr. Kingu was removed from his position, and whether the alleged removal was justified. This question is not hard to resolve, essentially because the letter that the petitioner relies on is quite clear. It merely required him to weigh his position and make his own conclusion regarding his suitability to sit on the two forums amidst the allegation that he was a civil servant, contrary to Article 24 (iii) of the Memarts. Exhibit TC 4 clearly states in part as follows:

"On behalf of National Executive Council and in considering your employment status in public service and the provisions of the above articles of TCCIA MEMARTS, you

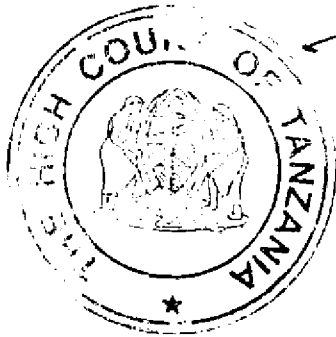
are advised to evaluate WHETHER or NOT your position as NEC and Board Membership is tenable.”

Exhibit TC 4 was purportedly communicating the position made by the NEC, a body that is vested with powers to inquire into such matters. But even assuming that the 1st respondent sent the said correspondence without any instructions from the NEC, the fact remains that no decision had been made to terminate Dr. Kingu’s membership in the Board of Directors, or at all, as contended by the petitioner. I am not persuaded, one bit, that Dr. Kingu’s tenure as a board member was truncated pursuant to the communication that the petitioner relied on. In my considered view, up until now, no position has been taken with respect to Dr. Kingu’s board membership. It is on the basis thereof that I find nothing plausible in the petitioner’s contention in that respect, and I reject it out of hand.

Overall, save for the contention with respect to Dr. Kingu’s tenure in respect of which I find nothing convincing, I hold that Ms. Karangi’s termination and appointment of the 3rd respondent to succeed Ms. Karangi was irregular and violative of the Memarts. Consequently, I declare them invalid and void *ab initio*. Accordingly, the same are quashed and the application is granted with costs. As I do that, I grant the petitioner’s item (a) of the reliefs sought.

Order accordingly.

DATED at **DAR ES SALAAM** this 17th day of January, 2022.



M.K. ISMAIL
M.K. ISMAIL

JUDGE