IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISCELANEOUS CIVIL APPLICATION NO. 37 OF 2022

IN THE MATTER OF AN APPLICATION BY REEF GOLD LIMITED AND GOLD AFRICA LIMITED FOR LEAVE TO APPLY FOR PREROGATIVE ORDERS OF CERTIRARI AND MANDAMUS

AND

IN THE MATTER OF REVOCATION OF DEFAULT NOTICES ISSUED BY THE MINING COMMISSION

AND IN THE MATTER OF SECTIONS 63(1) AND (2) OF THE MINING ACT, [CAP 123 RE 2019]

LEEF GOLD LIMITED.....1ST APPLICANT

GOLD AFRICA LIMITED .....2ND APPLICANT

VERSUS

THE MINING COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL .....2ND RESPONDENT

RULING

13/09/2022& 21/10/2022

MZUNA, J.:

This ruling is in respect of the raised preliminary objection by the 1st and 2nd respondent to the effect that the application for leave is untenable in law. Leave is being sought for grant of prerogative orders of Certiorari, Mandamus and Prohibition. The preliminary objection is couched as under:-

(i) *There is no decision for judicial review which is being challenged before this court, which is a prerequisite condition for seeking leave for judicial review.*

(ii) *Mr. Abdiel Mengi, who deponed to be the Director of two companies had no sanction from both companies to institute the suit and therefore he does not represent the applicants in the instant application.*

It is therefore submitted that the application should be dismissed.

During hearing of this preliminary objection, both parties had representation, Mr. Michael Ngalo, learned advocate appeared for both applicants whereas Mr. Boaz Msofe, Mr. Mathew Mfuko and Hadija Ramadhani, the learned State Attorneys' appeared for the respondents.

The main issue is whether the application suffers from legal shortfalls required for institution of an application for leave?

I propose to start with the second limb of the preliminary objection, *the question to ask is, is the requirement to have authorization of the Company's Board of Directors Resolution a mandatory requirement of the law before instituting an application at leave stage or after leave is granted?*

In his submission, the learned counsel capitalized on the provisions of Section 147 (1) (a) and (b) of the Companies Act, Act No. 12 of 2002 to

emphasize a point that the affidavit is silent on the authorization to represent the two companies. That even Mr. Ngalo, the learned counsel had no such authorization to represent the applicants in this case. Since the two companies are legal entities, they must be represented by the officer appointed in the Company's meeting to avoid any likelihood of impersonation. The learned counsel referred this court to the case of **Kati General Enterprises Limited v. Equity Bank Tanzania Limited & Another**, Civil Case No. 22 of 2018.

Another provision of the law which he relied on is the provision of Rule 8(3) of the **Law Reform (Fatal Accidents and Miscellaneous Provisions)** (Judicial Review Procedure and Fees) Rules, 2014 **(Rules 2014)** in that the affidavit shall be made by the applicant in person or by an authorized officer of the applicant which is not the case here. The case of **Africa Flight Services Limited v. The Registrar of Companies & Another,** Misc. Cause No. 15 of 2022, High Court, Main registry (unreported) which interpreted that provision was also cited. He instead that since there is another Director who claims not to have instructed the applicant to institute the application the application should be dismissed for being incompetent with costs.

Opposing the preliminary objection, Mr. Ngalo, the learned counsel submitted that the raised preliminary objection does not constitute pure point of law in that issue of mandate to sue and decision sought to be challenged needs further evidence. That, since the application is for leave where the court exercises its discretion to grant or not grant, it has nothing to do or deal with the main application. The learned counsel referred this court to the case of **Mechmar Corporation (Malysia) Benhard (In liquidation) v. VIP Engineering & Marketing Limited,** Consolidated Civil Application No.190 & 206 of 2013 Court of Appeal (Unreported) at page 10, 11, 12 & 13 cited with approval in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1EA 696. He insisted that a preliminary objection which needs evidence to ascertain is not a Preliminary objection. It can be determined in the main suit.

At best he found that submission from the Bar by the defendant cannot be said to be a preliminary objection as it was so held in the case of **Colour Print (T) Ltd v. The Open University of Tanzania,** Commercial Case No. 27/2008, High Court Commercial Division (unreported) P.5. That it is the party who alleges who bears a burden of proof of any fact which he alleges.

On the issue of legal authorization to institute the application by the Board resolution, it is submitted that there is no provision of the law which requires annexing Board Resolution. Reference was made to the case of **Kabushiki Kaisha Hitachi Seisakusho (d/b/a Hitachi, Ltd) v Dick Alex Shayo,** Commercial Case No.3 of 2017, High Court Commercial Division (Unreported) page 9 where it was held that "disputed matters of evidence cannot constitute the basis of preliminary objections". The case of **Legal and Human Right Centre v. The Attorney General & 4 Others,** Misc. Land Application No. 22 of 2005, High Court (Unreported) at P4-5 where the court found that presence of the Board resolution needs evidence and therefore does not qualify to be a preliminary objection. Moreover, the requirement to attach board resolution to institute a suit cannot be entertained.

The learned counsel further said that the cited cases of **Kati General Enterprises Limited v Equity Bank Tanzania Limited and Another** (supra) and **Africa Flight Services Limited v. The Registrar of Companies & Another** (Supra) are distinguishable.

Mr. Ngalo distinguished the Court of Appeal Rules which requires board resolution to be annexed on the application. The Case of **Ursino Palms Estate Ltd v. Kyela Valley Foods Ltd & 2 Others,** Civil

Application No. 28 of 2014, Court of Appeal of Tanzania (Unreported) was cited. He insisted that in the instant application, the directors have different interests at the prejudice of the Company. Mr. Ngalo agree in principal that the Advocate must seek approval from the board resolution but the case relied upon of **Ursino Palms Estate Ltd** (Supra) dealt with CAT rules and therefore distinguishable.

Mr. Ngalo further submitted that a judge should not lightly dissent from the considered opinion of his brethren. This was well articulated in **Ally Linus & Eleven Others v. Tanzania Harbours Authority & The Labour Conciliation Board of Temeke District,** Civil Appeal No. 7 of 1983 CAT (Unreported) at page 11. That there must be reasons to depart from the decision of fellow judges.

Mr. Ngalo is very articulate that the raised preliminary objection be it on the need to annex copy of the board resolution or whether there is a decision are matters which should be dealt with at the hearing of the main application on merits instead of dealing with technicalities which defeats the overriding objective principle. The preliminary objection should therefore be dismissed with costs.

In rejoinder submission Mr. Msoffe submitted that the principle of overriding objective presupposes that the application is incompetent. The

position of the law is that the principle cannot overrule mandatory provisions of the law. Supporting his submission, he referred this court to the case of **Mondorosi Village Council & 2 Others v. Tanzania Breweries Ltd & 4 Others,** Civil Appeal No. 66 of 2017, CAT (Unreported) at page 14 & 15 to emphasize a point that the overriding objective principle should not be applied blindly. That, in the instant case, failure to annex document authorizing institution of the suit and representation cannot overrule relevant requirement of laws and rules especially Section 147(1)(a)(b) and Rule 8(3) of the Rules, 2014.

He insisted that this application is incompetent and urged the court to be persuaded by the most recent decision of this court by Hon. Mugetta, J who cited Rule 8 (3) of the Rules and that of Hon Kakolaki, J, who cited section 147(1)(a) & (b) of the Companies Act. That necessity of board resolution is required before institution of a suit.

On the issue that the preliminary objection is not pure point of law, he submitted that there has been development that the preliminary objection can be raised from pleadings and annexure citing the case of **Moto Matiko Mabanga v. Ophir energy PLC,** Civil Appeal No. 119 of 2021, CAT (unreported) page 14. That, the raised PO is therefore pure point of law. The respondent in support of his argument relied as well on

the case of **Bugerere Coffee Growers Limited v. Sebaduka & Another** (1970) EA 147.

On the allegation that the preliminary objection should be raised and determined in the main application, Mr. Msoffe submitted that he who comes to equity must come with clean hands. There must be determination of the sanctity of the application at hand. That judicial discretion must be exercised judiciously by observing the laid down procedure.

I have keenly followed the submissions in support and against the raised preliminary objection. I am tasked to determine the two preliminary objections. The 2nd preliminary objection says the application is incompetent for want of legal authorization. In answering this point, I find it opportune at this juncture to define the term Preliminary Objection. It was held in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd** at p. 700-7001 (Supra) that;

> ""*So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the* ***jurisdiction of the***

court, *or a* ***plea of limitation,*** *or a submission that the* ***parties are bound by the contract giving to the suit to refer the dispute to arbitration.*** "[Emphasis added].

Sir Charles Newbold P. on page 701 added:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. ***It cannot be raised if any fact has to be ascertained*** *or* ***what is the exercise of judicial discretion.*** (Underscoring mine).

The question to ask, is there ***"any fact which has to be ascertained"***? Mr. Ngalo sternly resisted the preliminary objection, that it is not on pure point of law and attracts more evidence as it raises issues of law and fact specifically on the mandate to sue. That, the **Bugerere's** case (Supra) is applied in the instance where the court is inclined to the position of protecting corporate bodies such as the company and the person suing on behalf of the company must specifically plead to have that authority. That it can best be dealt with at the hearing stage.

The cited cases by the learned counsel for the respondent I dare say are distinguishable. Rule 8 (3) of the Rules deals with hearing of

application ***"after leave to apply for judicial review has been granted".*** The case of **Africa Flight Services Limited v. The Registrar of Companies & Another** (Supra) was dealing with an application after leave had been granted. It cannot be used to cover the case under discussion because the facts are different.

Similarly, the case of **Moto Matiko Mabanga v. Ophir energy PLC,** (Supra) which was dealing with time bar is also distinguishable. We cannot go into determining on the annexed documents which forms the basis of the main application and of course are contentious points. In the case of **Cosmas Mwaifwani v. The Minister for health, Community Development, Gender, the Elderly and Children and 2 others,** Civil Appeal No. 312 of 2018, CAT at Dar es Salaam (unreported), page 9 it was held that:-

> *"...We are in agreement with Mr. Tibanyendera that, the trial court wrongly dealt with the preliminary objection under discussion. The reason being that, in accordance with the affidavit and counter affidavit on the record, whether the appellant was availed with the outcome of the decision after expiry of more than a year and* ***whether the delay was calculated so as to deny the appellant his right to seek remedies against the decision of the first respondent was seriously contentious.*** *Therefore, if the principle in* ***Mukisa Biscuits Co. v. West End***

Distributors *(supra) had been followed by the trial court,* ***the factual depositions in the affidavit would have been presumed to be true. As a result, the purported preliminary objection should have been overruled for being premature and the application heard on merit"***

That case was dismissed at leave stage on preliminary point of objection, however the Court of Appeal restored it based on the above stated reasons. The facts are more or less similar to the case under consideration. I am therefore not prepared to fall in the same error.

In our case, such facts subject for the preliminary objection had been pleaded in the counter affidavit under paragraph 3 where the respondents' alleges that "...Abdiel **Mengi** is not authorized to depone or to sign any document on behalf of the applicants because he is neither the director nor the principal officer of the applicants." (Copy of the ruling annexed as MC 1). The applicants under paragraph 9 of the reply to the respondents' counter affidavit say that document MC1 is "misleading."

That issue of authorization as a director is indeed contentious and therefore ought to have been argued and resolved at the stage of hearing of the main application. The preliminary objection was therefore raised prematurely. I dismiss it.

The first preliminary objection is premised on the allegation that annexture LGL 10 is a default notice not a challengeable decision as it is a mere letter. That in view of Section 63 (2) (a) of the Mining Act, Cap 123 RE 2019, there was issued a default notice followed by cancellation or suspension. That a licence had never been cancelled and therefore the application was prematurely filed.

On account of the above averment, it is my view that the argument that the application is untenable in law as it falls short on the prerequisite conditions for seeking leave for judicial review for want of decision, needs production of evidence to resolve whether the decision of the Mining Commission in nullifying a letter with Ref. No. BA 73/250/27/20 dated 29th September 2021 amounts to a decision or not. It forms the basis of the main application. It can best be decided during hearing of the main application where proof by evidence as stated in the affidavit and counter affidavit can be determined.

Similarly, the allegation under paragraph 6 of the applicants' affidavit whether it amount to giving direction to rectify all defaults or is a decision, is also subject to adducing evidence. Much as I appreciate the arguments advanced by Mr. Mathew Mfuko, the learned State Attorney

on this point, I urge him to spare it until at the stage of hearing of the main application.

On the allegation that there is another Director who says never instructed the deponent of the affidavit and the advocate to act on their behalf, I urge the interested party whose interest is likely to be affected by this application to follow the laid down procedure under rule 14 (1) of the Rules, 2014. That provision reads:-

> *14 (1) Any person who is not a party but desires to be heard in opposition shall at any time before the hearing apply to be made a party to the application.*
>
> *(2) The Court shall hear the person referred to under sub-rule (1), if it is of the opinion that he is a proper person to be heard."*

That provision just like rule 8 (3) of the Rules 2014, apply after leave is granted.

In conclusion therefore, I would answer in the negative the question raised as to whether the application suffers from legal shortfalls required for institution of an application for leave. It is therefore not a requirement to have authorization of the Company's Board of Directors Resolution before instituting an application at leave stage. That may be subject for discussion after leave is granted (if it is contentious as in our case) in view

of the decision in the case of **Cosmas Mwaifwani v. The Minister for health, Community Development, Gender, the Elderly and Children and 2 others,** (Supra).

That said, I proceed to dismiss the raised preliminary objection with no order as to costs.

DATED at **DAR ES SALAAM** this 21st day of October, 2022.

M.G MZUNA,

JUDGE.