

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 100 OF 2020

IN THE MATTER OF COMPANIES ACT

BETWEEN

JITESH JAYANTILAL LADWA

AND

IN THE MATTER OF APETITION FOR UNFAIR PREJUDICE

JITESH JAYANTILAL LADWA.....PETITIONER

VERSUS

SIMBA MOTORS TANZANIA LIMITED.....1ST RESPONDENT

CHANDULAL WALJI LADWA.....2ND RESPONDENT

DHIRAJLAL WALJI LADWA.....3RD RESPONDENT

BHAVESH CHANDULAL LADWA.....4TH RESPONDENT

AATISH DHIRAJLAL LADWA.....5TH RESPONDENT

NILESH JAYANTILAL LADWA.....6TH RESPONDENT

RULING

Date of last order: 27/09/2022

Date of Judgment: 04/11/2022

E.E. KAKOLAKI, J.

The petitioner Jitesh Jayantilal Ladwa instituted the instant petition against the above-named respondents praying for the following orders:

- (i) Declaration that there is a serious unfair prejudice of the Company affairs and the petitioner's interest.
- (ii) An order that Respondents jointly and severally should not interfere with the company's assets without prior written consents of the petitioner.
- (iii) An order that the respondents should not execute or participate into companies' management.
- (iv) An order that any prior sale if any and or dealing of the Company assets made without prior written authorization of the petition was illegal and void.
- (v) An order that the petitioner be allowed to institute Civil Suit against the respondent jointly and or severally for damages.
- (vi) Cost of the suit be borne by the Respondent.
- (vii) Any other relief or order that this Court shall deem just, proper, fair and fit to grant the petitioner.

The petition is supported by an affidavit of the petitioner verifying the contents of his petition. Briefly it is his complaints in the petition that, the

respondents herein who are co-shareholders to the 1st respondent company, have been making unlawful decision which are prejudicial to him and the company, without his knowledge, hence exposing him personally and the company to joint liabilities. He laments that, on 12/12/2014, the respondent fraudulently and without his knowledge, jointly and severally executed a loan document which allowed another company M/S Houses & Homes Limited to obtain loan of USD 1,500,000/= from Tanzania Investment Bank (TIB) and offered 31 certificates of title in respect of lands owned by the 1st respondent to TIB Bank as collaterals plus another title with CT. No. 186004. The petitioner contends further that, in executing guarantee agreement on 16th December 2014, the respondents forged his signature and that, the 2nd respondent forged the signature of Jayantalal Walji Ladwa purporting to be a third party mortgagor's signature, the forgery which was reported at police and criminal proceedings initiated against them as a result the 2nd and 3rd respondents were arraigned before the Resident Magistrate Court of Dar es salaam at Kisutu, facing charges in 21 counts including the offences of forgery and obtaining money by false pretence. It is gleaned from the averments in the petition that, the two respondents were subjected to plea bargaining process in which had their counts reduced to one count of

obtaining money by false pretence, whereby they allegedly admitted the charge. It appears prior to conclusion of the criminal proceedings against them, the two on 28th October 2019, wrote to the managing director of TIB bank informing the bank that, the petitioner has never authorized, consented and signed any loan documents nor benefited whatsoever in any way. Further to that, the 2nd and 3rd respondents wrote a written apology note to the petitioner with confession regarding their fraudulent conducts against the petitioner. It is out of those asserted facts, the petitioner claims his interests and company's affairs have been prejudiced by the dishonest acts of the respondents as the Company affairs have been conducted without approval and/or petitioner's knowledge, hence the present petition in which he claims if the prayers sought are not granted, both his interests and/or rights and that of the Company will keep on being affected for carrying liabilities which they never consented to. It is out of those facts he is praying this Court to issue the orders sought as enumerated above.

Following the filing of this petition in court, the 2nd respondents on behalf of other respondents filed the answer to petition and later on joint affidavit by the 2nd and 6th respondents in support of their defence, resisting the claims in the petition that, the running and operation of the company was in

order and in accordance with the Memorandum and Articles of Association and the laws of the country as it is also based on mutual understanding and trust of the parties herein, while denying pendency of any criminal proceedings against them as claimed by the petitioner. Respondents averred further that, lending and securing loans is amongst the objects of the company and that, since the petitioner is the managing director of M/S Houses and Homes Ltd, the beneficiary company of the faulted loan transactions, he had actual or constructive notice to all the transactions and had never contested the alleged loan before as he was too enjoying the proceeds thereof. They averred, the petition is a mere speculations and that, since the company's decision are sanctioned by the resolutions of the company, the 1st respondent operations and other respondents functions cannot be suspended as prayed by the petitioner, unless all its liabilities are settled as the petitioner cannot solely run it. They therefore prayed for dismissal of the petition in its entirety with costs for want of merit.

When the matter was called for hearing on 27/07/2022, Mr. Sisty Bernard learned advocate represented the petitioner, while respondents were represented by Robert Rutaihwa, learned counsel. The matter was disposed

by way of written submission, as the filling schedule orders of submissions were issued and complied with by parties to the letters.

Having narrated the facts in extensor the concomitant issue for determination by this Court is whether the petitioner has advanced sufficient grounds warranting the Court grant him the prayed orders. Before embarking on its determination, I find it pertinent to address briefly on the competence of part of the pleadings filed by the parties in which this Court will rely on to base its decision. As stated above in response to the petition the 2nd respondent on behalf of other respondents filed an answer to the petition. Further to that before hearing could take off on 28/04/2022, Mr. Rutaihwa counsel for the respondents prayed the Court for leave of the respondents to file an affidavit in support of their defence which prayer was granted upon no objection from Mr. Bernard, counsel for the petitioner and the matter ordered to proceed for hearing on 27/07/2022 and 27/09/2022, when instead an order for hearing by way of written submission was entered. It is however noted from the affidavit filed by the 2nd and 6th respondents on 13/05/2022 that, instead of adducing evidence in support of their defence entered through the answer to the petition filed in Court on 14/05/2020, the respondents re-entered a reply or answer to the petition which is contrary

to the order of the Court made on 28/04/2022. It is the principle of law that, *Court orders must be respected and complied with by the parties*. This principle has been built on the rule that, court orders and directives are issued for the purposes of regulating the conduct of court proceedings, hence must be obeyed and complied with. Courts of law should not therefore be ready to condone any unwarranted failures. See the decisions of this Court in the cases of **P 3525 Col. Idahya Maganga Gregory Vs. The Judge Advocate General**, Court Martial Criminal Appeal No. 4 of 2002 and **Tanzania Breweries Ltd Vs. Edson Dhobe & 19 Others**, Misc. Civil Application No. 96 of 2000 (all HC-unreported). In the present matter the respondents' act of re-stating facts and denials in their affidavit in reply to the petition already averred in their answer to the petition filed on 14/05/2020, no doubt went against the order of this Court of 28/04/2020, sanctioning them to bring an affidavit containing evidence in support of their defence already made through the answer to the petition. As stated in the cited case such conduct cannot be condoned by this Court as the only penalty to them is to disregard the said affidavit, which course I hereby take. I will therefore summarize and analyze parties' submissions based on the properly filed pleadings in light of the existing facts and law applicable to this petition.

In support of the petition and having adopted the contents of the petition and its annexure to form part of his submission, Mr. Bernard submitted that, vide credit facility with reference Number TIB/ORG/18 dated 17th November, 2014 and TIB/CONS/4174/VOL.II dated 19th July, 2016, mortgage agreement between M/S Houses and Homes Limited and TIB Development bank was created, and amongst the principal securities offered by the said M/S Houses and Homes Limited, in execution of Mortgage were plots No. 151,155,157,159,161,163,165-168, 170-178, 353,355,379-382,384-387 and 389 situated at Blok J, Mapinga Pwani, all owned by the 1st Respondent herein. He contended that, for any company to transact in its properties there must be prior resolution passed to that effect by the board, which resolution is missing in this matter as the 1st respondent had never at any material time convened meeting or passed a resolution to the effect that, its property be offered as a security for the loan secured by M/S Houses and Homes Limited from TIB bank. In his view, this proves also the fact that, the 1st respondent never conducted general meeting to discuss its affairs and see if are conducted in a fair manner or not. Mr. Bernard went on arguing that, apart from the fact that, there was no company resolution to approve companies' properties to be used as security, the petitioner filed Land Case

No. 26 of 2020, which is pending before the High Court Land Division, challenging the process of mortgaging the said properties for being surrounded with forgery and fraud, the case which was stayed pending hearing and determination of Commercial Case No. 120 of 2020. In winding up his submission, he prayed the Court to find that, the petition has merit and grant the prayers as sought therein.

Opposing the petition Mr. Rutaiwa, having adopted the contents of the answer to the petition and the joint affidavit deposed by the 2nd and 6th respondent as part of his submission argued that, the averments in the petition represents bare statement without an iota of truth since the same remain mere pleadings than carrying evidential value, as the petitioner bothered not prove the same by an affidavit or otherwise. He contended that, the petitioner filed a document titled affidavit verifying a petition which to him, is unknown in laws governing the petitions like the present one. In his view, this petition requires no consideration at all for lack of veracity or evidence to supports the same. Concerning the mortgage created in favour of TIB bank, it was his submission that, this complaint apart from being completely new, is not true and therefore misleading. He added that, M/S

Houses and Homes Limited, who is not a part to these proceedings nor TIB Bank, had never offered the alleged plots.

He argued further that, a quick glance at the pleadings does not reflect the complaints that, the mortgage by first respondent is challenged for want of Board Resolution or minutes of the Company meetings. In his view, the petitioners counsel has completely departed from the pleadings, which departure is against the law, Mr. Rutaihua stressed. He contended that, apart from petitioner's complaint based on forgery of his signature in the mortgage documents and the loan fraudulently obtained, there was no complaints about lack of Companies Resolution. He submitted further that, all allegations in the petition are completely lies. According to him, all the documents supporting the said mortgage were perfect, bearing the petitioner's signature and names. In his view, it is not enough for the petitioner to allege fraud and forgery only, and leave it to the Court to investigate the matter. He argued that, the petitioner was bound to prove his allegations. Mr. Rutaihua further submitted that, in law the claim of forgery when raised in civil proceedings the same is treated with caution as the standard required before the court can rely on, is far beyond the preponderance or probabilities of evidence. To fortify his stance, he relied

on the case of **Omari Yusufu Vs. Rahma Ahmed Abdulkadr** (1987) TLR 169 at page 17. He then contended that, the petition is far from meeting the standards in the above cited case, hence fall short of merit for not meeting the threshold set out under section 233 (1) of the Companies Act, requiring a well-founded petition for the same to stand. He therefore submitted, the petitioner has failed to establish his complaints against the respondents either severally or jointly and implored the Court to dismiss the same with costs. Mr. Bernard for petitioner had nothing to reply in response to the petitioners' submission instead prayed for ruling in which this Court proceeded to set its date.

Having revisited the pleadings and passionately considered the fighting arguments by the parties, let me now proceed to determine the issue as raised herein above. However before doing that, I wish to preface this ruling by addressing Mr. Rutaihwa's assertions that, in his submission the petitioner has raised new a fact which was not pleaded or raised in his petition to the effect that, the 1st respondent never conducted general meeting nor resolution sanctioning the mortgaging of its titles to secure loan for the third party M/s. Houses and Homes Limited. After having a glance of an eye to the petition, it is true and I fully subscribe to Mr. Rutaihwa's submission that,

the alleged missing company resolution allowing the 1st respondent to offer its properties as security to the loan by Ms. Houses and Homes Limited from TIB bank, does not form part of his complaints in the petition. It is the law that, the fact not pleaded or averred by the petitioner in the affidavit cannot be canvassed during submissions or hearing unless the party seeking to rely on it, first amends his/her pleadings. This legal stance is founded on the cardinal principle that, parties are bound by their pleadings as any attempt to deviate from them is tantamount to taking the other party by surprise which practice cannot be condoned by this Court, hence such raised issue must be disregarded. See the cases of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012, **Astepro Investment Co. Ltd Vs. Jawinga Company Limited**, Civil appeal No. 8 of 2015 (both CAT-unreported) and **Yara Tanzania Limited VS. Charles Aloyce Msemwa**, Commercial Case No. 5 of 2013 (HC-unreported). The Court Appeal in the case of **Charles Richard Kombe t/a Building** (supra), on the issue of parties going against the averments in their respective pleadings had this to say:

"It is cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings

unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted the defence ought not to have been accorded any weight.”

Applying the above principle to the facts of this matter, since the submission by the petitioner to the effect that, the 1st respondent did not enter resolution offering her properties to be mortgaged to TIB bank was raised without having first his petition amended, I hold the same cannot be considered at this stage, hence I throw it out of my attention as well as consideration by this Court. Having so found, let me now turn to the main issue as to whether the petitioner has advance sufficient grounds warranting this Court grant him the prayed orders. In this issue I will be guided by the applicable law which is section 233 (1) of the Companies Act and the principles that he who alleges must prove and further that, the burden of proof lies on the party who would lose, if the facts so alleged are not established, which in this case is the petitioner. The principle is also consistent with the provision of sections 110 (1) and (2) and 111 of the Evidence Act, [Cap. 6 R.E 2022]. See also the cases of **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 and **Berelia Karangirangi Vs. Asteria**

Nyalwambwa, Civil Appeal No. 237 of 2017 CAT – (both CAT-Unreported).

Now on what the petitioner is required to do for the sought orders to be granted, section 233(1) of the Companies Act, provides thus:

*233.-(I) 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 or 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 matters complained of.*

From the above excerpt of the law, for the petitioner to succeed in the petition like the present one he has to prove that, the conduct of the company's affairs are being conducted unfairly and in a manner prejudicial to either his interest as a member of the Company or other members generally or prejudicial to the company itself. And that the, conduct complained off conduct must be the conduct of the company itself. This Court when construing the above provision of the law in the case of

Bhavesh Chandulal Ladwa & Others Vs. Jitesh Chandulal Ladwa,

Misc. Commercial Case No. 35 of 2020, had this to say:

The conduct complained off must be conduct of the Companies affairs... It is the affairs of the Company which are being or have been conducted in an unfairly prejudicial manner or that, it is an act or omission of the Company that is or would be so Prejudicial...Refusal by a company to convene a general meeting for instance would be an act of the Company, although whether it was either unfair or prejudicial it will all depend on the circumstances. It means therefore that, actions or omissions in compliance or contravention of the Articles of Association of a Company may or may not constitute the conduct of the Companies affairs depending on the precise facts.

In this petition, the petitioner is lamenting that on 12/12/2014, the respondents fraudulently, jointly and severally executed loan documents which allowed M/s. Houses and Homes Limited to secure loan of USD 1,500,000/= from Tanzania Investment Bank, pledging 31 plots of lands of the 1st respondent as collaterals without his involvement and by forging his signature in the mortgage documents. In reply submission, Mr. Rutaiwa contended that, there is no evidence to support petitioner's claims as apart from filing the petition, what is termed affidavit verifying the petition apart

from not being supported by the law does not contain any evidence proving the said claims. It is true and I agree with Mr. Rutaihwa's proposition that, the alleged affidavit verifying the petition does not contain any evidence nor does it form part of the petition. I however distance myself from his assertion that, since the said affidavit was verifying the petition only then there is no evidence to support petitioner's claims for want of affidavit to support it. The reason I am so holding is not far-fetched as one, Mr. Rutaihwa has not cited no provision of the law nor case law to support his assertion that the petition ought to have been supported by affidavit. Second, my leading of the law leads me to the conclusion that, the petition preferred under section 233(1) of the Companies Act, does not require it to be accompanied with the affidavit. The law is very categorical under section 233(1) of Companies Act, that, any member of the company seeking Court's order on the ground that, the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interest of its members generally or of some part of its members, may apply to the Court by way of petition only. Since the requirement of the law is for the member to pursue his/her right by way of petition, I am of the firm view that all the evidence sought to be proved are and must be contained therein. Thus, though not provided by the law, there

is no harm for the petitioner herein to verify what is stated in her petition by affidavit as he did so as to support the sought orders or reliefs therein as stated in paragraph 4 of the said affidavit, where is deposed that:

4. That I am making this affidavit conscientiously believing the same to be true and in support of the orders or reliefs sought in the petition.

Having so found I now move to consider the grounds advanced by the petitioner in support of the sought prayers. It is the law under section 233(1) of the Companies Act that, for the petitioner to succeed in the petition like this, he has to prove to the court's satisfaction that, the conduct of the company's affairs has been unfairly prejudicial to the petitioner's interest as a member of the Company. See the case of **Bhavesh Chandulal Ladwa & Others** (supra).

As stated earlier on in this matter, the petitioner avers that, when the decision for mortgaging company's titles in favour of the loan obtained by M/S Houses and Homes Ltd was entered, he was not notified by the 1st respondent and worse enough, his signature was forged in the mortgage documents. In response, Mr. Rutaiwa contended that, the 1st respondent, did nothing illegal for its decision as borrowing, lending and securing money

is one of the objects of the company and that, the petitioner participated fully in the entire process. Having perused the annexures in both petition and answer to the petition by the respondents, it is clear to me that, annexures PT-4 (guarantee agreement) and PT-5 (mortgage deed) do perfectly prove the complaints raised by him in the petition concerning the mortgaging procedure of the 1st respondent's properties without his involvement. This fact is further proved by annexure PT- 9 (letter to TIB by the 2nd and 3rd respondents) and PT-10 (apology letter by the 2nd and 3rd respondent to the petitioner). Annexure PT-9 though claimed to be written without prejudice indicates that, the petitioner never authorized, consented and or signed any loan document or benefited in anyway by the loan of USD 1.5 million obtained from TIB by Houses and Homes Limited. And further in annexure PT-10, it is evident the 2nd and 3rd respondents were extending their apology to the petitioner for their fraudulent conducts against him in respect of criminal Case No. 154 of 2019 which was facing them in court. To me the confession by the 2nd and 3rd respondent on their involvement in the fraudulent conducts and further assurance and confirmation to TIB bank that, the petitioner never signed documents, authorized and or consented to the loan in respect of USD 1.5 issued to M/S Houses and Homes Ltd and in

absence of any contrary evidence to contradict it, is sufficient and enough evidence to strictly prove to this court's satisfaction of the purposes of this petition that, petitioner's signature was forged hence the 1st respondent's decision to guarantee loan for M/S Houses and Homes Ltd using company's properties was arrived at without his involvement. I so hold as such evidence meets the standard or test as set out in **Omari Yusufu case** (supra) where it was held that:

"I think it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases, the logic and rationality of the rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of strict standard of proof...."

In view of the above stated findings of this Court, such proof solidifies the position that, the company affairs were run without involvement and or participation of the petitioner and that, the decision to guarantee loan for M/S Houses and Homes Ltd, was entered without his notification. Respondents' assertion that the loan subject of complaint herein has already been adjudged on in Commercial Case No. 120 of 2020 lacks basis as

annexure PT-9 and PT-10 tells it all that the petitioner did not authorize, signed the documents or consented to it, hence was not involved in taking such loan. It is the law that a member of the company who owns shares and contributed to the capital as part and owner of the company's business must be involved in the companies' affairs or decisions unless there are genuine reasons for not so doing. It was held in the case of **Irene Simon Kahemele Vs. Ndiyo United Co. Limited & Others**, Misc. Civil Cause No.3 of 2018, (HC-unreported), that:

*As part of the business and company owners, the petitioner as one of the shareholders have the right to participate in a business and company's affairs and profitability as long, she owns the shares and contributed to the capital and growth of the business. It should be noted that as the shareholder and contributor to the business and company capital, **the petitioner has inalienable rights to be consulted or informed before the company takes a particular action.***
(Emphasis supplied)

Guided by the above principle and in view of the above findings, and taking into account the status of the petitioner within the Company which is uncontested, it is my settled view that, him being put aside in taking part to the Company's affairs including decision regarding guaranteeing the loan

taken by M/S Houses and Homes Ltd and other complained of conducts as listed in paragraph 12 to 23 of the Petition, I am satisfied that the 1st respondent's conduct and other respondents' conducts constituted unfair prejudicial to the Petitioner's interests. This Petition, therefore should succeed for being founded on justifiable grounds hence the issue is answered in affirmative.

Now having so found the next issue for determination is what reliefs is the petitioner entitled to out of seven (7) prayers sought. Before I list down the granted reliefs, I wish to comment albeit briefly on the third relief as sought by the petitioner that, an order be issued to the effect the respondents should not execute or participate into companies' management. Notably the 1st respondent is the company itself, and the rest of the respondents are directors of the company. Indeed I find the prayer in this relief to be impracticable. The reason I am so holding is not far-fetched, as being directors and main stakeholders to the company directly involved into company affairs and decision making, the respondents' participation in handling the affairs of the 1st respondent is so pivotal as will save a safety valve that will forestall any possible mishandling of the Company affairs. I therefore find that, instead of issuing an order restraining them from

participating into companies' management and affairs, the course which is likely to cripple the 1st respondent's operations, Solomonic wisdom dictates that, I make an order that the operations of the 1^s respondents should forthwith fully involve the petitioner. Meaning that, nothing will be done concerning the company's affairs or business without petitioner's involvement.

In the event, and having taken into account the totality of the matter as reflected above, I hold that this petition is meritorious and therefore granted.

The Court pronounces the following Orders:

- (i) The petitioner being the lawful director and shareholder of the 1st respondent, it is declared that, the respondents acts, omissions and conducts complained off are contrary to the law, Memorandum and Articles of Association of the 1st Respondent, posing unfair prejudicial to the petitioner's interest.
- (ii) The Respondents are ordered jointly and severally not to interfere with the Companies assets without involvement or mutual understanding by the petitioner.
- (iii) The operations of the 1st respondents should henceforth fully involve the petitioner.

- (iv) Save for the legality of the Respondents' decision to mortgage the 1st respondent's properties to TIB Bank in favour of the loan of USD 1.5 million to M/s. Houses and Homes Limited, which is subject of the case in Land Case No. 26 of 2020, pending before this Court, any dealing of the company assets made without involvement or prior written authorization of the petitioner is declared illegal and void.
- (v) The Petitioner is authorized to commence civil proceedings in his name as against the Respondents jointly and severally and or any other person(s) as he shall deem necessary in order to protect his interests.
- (vi) Costs of this petition be borne by the Respondents.

It is so ordered.

Dated at Dar es Salaam this 04th November, 2022.



E. E. KAKOLAKI

JUDGE

04/11/2022.

The Ruling has been delivered at Dar es Salaam today 04th day of November, 2022 in the presence of Mr. Sisty Benard and John Chuma, advocates for the applicant, Mr. Mahfudhu Mbagwa for the respondents and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
04/11/2022.

