IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 166 OF 2021

ANTONY HAJI ..... APPLICANT

VERSUS

YASMINE HAJI ..... 1ST RESPONDENT

KINGSWAY PROPERTIES LTD ..... 2ND RESPONDENT

RULING

11th October, & 7th November, 2022

ISMAIL, J.

The instant application has been taken at the instance of the applicant, a shareholder in the 2nd respondent. He is seeking to move the Court to grant the following substantive reliefs:

(a) A declaration that the applicant is the lawful shareholder of Kingsway Properties Limited "the 2nd Respondent" and that the attempted transfer of share was ineffectual for contravention of the Memorandum and Articles of Association of the 2nd Respondent;

(b) An order compelling the 1st Respondent to submit the required documents and credentials for the online updating of the 2nd

Respondent in compliance with the directives of the Business Registration and Licencing Agency (BRELA);

(c) An order compelling the conduct of Extra Ordinary General Meeting of the shareholders for deliberation of the affairs of the 2nd Respondent in order to ensure compliance with the laws of the United Republic of Tanzania;

(d) A permanent injunction order restraining the 1st respondent, her agents, assignees, workmen or any other person acting under her instructions from removing items from the property of the 2nd Respondent situated at Plot No. 23, Laibon Road, Dar es Salaam or dealing with the said property in any manner whatsoever without the sanction of the board of directors of the 2nd Respondent;

The applicant, along with the 1st respondent, his sibling, are the surviving shareholders of the 2nd respondent. Two of the four shareholders are now deceased. The surviving duo is involved in a legal tussle that narrowly touches on the legality of the transfer of one share from the applicant to the 1st respondent, but broadly involved in dispute over the manner in which the affairs of the 2nd respondent are run. The applicant imputes unfairness in its running and non-compliance with the law and the Memorandum and Articles of Association. This informs the decision to move the Court to grant a

prayer for calling of an extra ordinary meeting of the shareholders and issuance of a permanent injunction to restrain the 1st respondent from dealing with the affairs of the 2nd respondent until final determination of the instant application.

The respondents have denied that the applicant owns any stake in the 2nd respondent, as he transferred his share to the 1st respondent and that such transfer, effected on 15th November, 2010, was approved by the 2nd respondent's board of directors on 17th November, 2010. The respondents contended that approval of the transfer signaled completion of the transfer process under the Memorandum and Articles of Association. The respondents averred that the applicant had no business meddling in the affairs of the company subsequent to such transfer.

When the parties entered appearance in court an order was granted for disposal of the application by way of written submissions. These submissions were filed in compliance with the drawn schedule.

The submissions by the parties, especially the respondents, has brought up an issue of the manner in which the application was preferred. Cognizant of the fact that the raised contention touch on

the competence of the application, it became imperative that this matter be resolved first, before I delve into the merits and/or demerits of the substance of the application.

The contention raised by counsel for the respondents on this issue is that, since a majority of the substantive prayers sought by the applicant pertains to the general management and affairs of the company, then this a matter founded on unfair prejudice and the applicable provision is section 233 (1) of the Companies Act, Cap. 212 R.E. 2019. Learned counsel argued that the requirement under section 233 (1) is that reliefs sought under it must be preferred by way of petition, and not by way of chamber summons as is in the instant application. The respondents took inspiration from the decision of the Court in ***James Ibrahim Manule & Another v. Oswald Masatu Mwizarura***, HC-Civil Revision No. 11 of 2016 (unreported), in which it was held:

> *"Where the matter relates to the management and affairs of the company, in terms of section 73 (2) and 233 of the Companies Act, it has to be originated by way of petition and the proper forum according to section 2 of the Companies Act, was the High Court."*

The Court further held that prayers made through chamber summons are meant to deal with simple interlocutory matters which do not conclusively determine the rights and liabilities of the parties.

The applicant is valiantly opposed to this contention. The applicant's counsel contends that, whereas the provisions of section 233 (1) of cap. 212 deal with unfair prejudice and management of the affairs of the company, the instant application has nothing to do with any of that, and that section 233 (1) of Cap. 212 has no application. The applicant was convinced that the reliefs sought, such as a compulsion to conduct a meeting, perfectly fall under the ambit of section 137 (1) of cap. 212, and no other. Defending the invocation of the provisions of section 95 of the Civil Procedure Code, Cap. 33 R.E. 2019, the applicant contended that the settled position is that, in the absence of any specific provision in the Companies Act, the fitting provision is section 95 which provides for the Court's inherent powers. On this, a number of cases were cited. These are: ***Aero Helicopter (T) Ltd v. F.N. Jansen*** [1990] TLR 142; and ***New Arusha Limited v. Registrar of Companies & 69 Others***, HC-Misc. Application No. 689 of 2019 (unreported). The applicant was insistent that the powers

derived from section 95 are there to be exercised whenever it is necessary for making ends of justice meet.

As I tackle this issue, the starting point is to reproduce section 233 (1) around which rival arguments revolve. It provides as hereunder:

> *"Any member of a company 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."*
> [Emphasis supplied]

The clear message distilled from the excerpt is that a matter by a member of a company on the running of the affairs of the company, in a manner that is prejudicial to his interests, must be preferred as an application, by way of a petition. Whereas the contention by the respondents is that this is purely a matter falling under the auspices of section 233 (1),

the view held by the applicant is that this is a simple application under section 137 (1) of Cap. 212 and section 95 of Cap. 33, both of which do not instruct that applications be made by way of a petition.

What is clear is that preference of a petition is only applicable where the claim touches on the unfair or prejudicial running of the affairs of the company. The narrow question that follows this legal reality is whether the instant application is of the nature envisioned in section 233 (1) of Cap. 212.

The applicant's consternation, as gathered from the chamber summons and the supporting affidavit, is that the purported transfer of his share to the 1st respondent is what triggered the alleged exclusion from the running of the 2nd respondent. To capture the applicant's the discontentment, I find it apposite to reproduce the averments made in paragraphs 13 and 14 of his affidavit. They are as follows:

> *13. That in regard of the 1st Respondent refusal to acknowledge me as a shareholder, I issued a notice of the Extra Ordinary General Meeting on 26th January 2021 for deliberation of the affairs of the company, which among others, include the online update of the 2nd Respondent as per BRELA directives and obtaining the Tax Identification Number (TIN) of the 2nd Respondent. Despite receiving the said notice, the 1st Respondent has not responded to the said notice and no meeting has been conducted. A copy*

of the said notice is hereby annexed and marked "A6" so as to form part of this Affidavit.

14. *That since the 1st Respondent has categorically refused to acknowledge my ownership of the share in the 2nd Respondent and the existing hostility between us as directors, the affairs of the 2nd Respondent cannot be run properly unless there is intervention of this Honourable Court*.

What I gather from these depositions is that interests of the applicant in the 2nd respondent are in serious jeopardy in that the running of the affairs of the the 2nd respondent, by the 1st respondent, is prejudicial to the applicant's interests as a member of the company. Refusal to convene meetings of the company, failure to update and comply with BRELA directives are some of the instances of how badly the company affairs are allegedly run.

In my considered view, these attest to the fact that there is an unfair prejudice in the running of the company, thereby placing the applicant's interests in a danger. This means that the instant matter is an effort to stem what the applicant considers to be the 1st respondent's prejudicial conduct. This, without doubt, falls within the ambit of section 233 (1) of Cap. 212 and the orders sought, such as the permanent injunction are intended to permanently address the anomalies pointed out in the affidavit. They are, as

counsel for the 1st respondent has alluded to, weighty issues which must result in a decision which will address the heart of the parties' dispute, not only over ownership of the shares, but also the manner in which the company is run.

This interpretation, which is predicated on the letter and spirit of section 233 (1) is fortified by two English decisions. In ***Re: RA Noble & Sons (Clothing) Ltd*** [1983] BCLC 273, Slade J, interpreted the provisions of section 459 of the English Company law which are in *parimateria* with section 233 (1) of Cap. 212, and held:

> *"The test of unfairness must, I think, be an objective, not a subject one. In other words it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, I whether a reasonable bystander observing the consequences of their conduct would regard it as having unfairly prejudiced the petitioner's interests."*

The foregoing reasoning picked a leaf from the earlier decision in ***Elder v. Elder & Watson*** [1952] SC. 49, in which Lord Cooper took the following position:

"Unfairly prejudicial conduct could exist where there was a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

It is my conviction, from the totality of the foregoing, that matters similar to the applicant's grievances ought to have been taken up by way of a petition, spelt out in section 233 (1) of Cap. 212, not by way of a chamber summons which is a creature of the Civil Procedure Code (supra). This brings me to the conclusion that the instant application suffers from competence crisis because of the manner in which it was preferred. It defied the requirements of the law, making it untenable.

Consequently, I sustain the contention raised by the 1st respondent and I strike out the application with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 10th day of November, 2022.

M.K. ISMAIL

JUDGE

10/11/2022