

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

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 596 OF 2021

IN THE MATTER OF THE COMPANIES ACT [CAP 212 R.E 2002

AND

IN THE MATTER OF KARIAKOO AUCTION MART CO. LIMITED

DIRSHAD OTHMAN HASSAN.....1ST PETITIONER

DEUS MRAMBA.....2ND PETITIONER

ABDALLAH LYUU.....3RD PETITIONER

AND

KARIAKOO AUCTION MART CO. LIMITED.....RESPONDENT

RULING

19th April, 2022 & 6th May, 2022

E.E. KAKOLAKI, J.

The petitioners here in lodged this petition under the provisions of section 137 (1) and (2) of the Companies Act, [Cap 212 R.E 2002], praying for the following orders;

- (i) An order that a meeting may be called, held and conducted by the Kariakoo Auction Mart Co. Ltd in such a manner as this honourable Court think fit.

(ii) Such other orders as this honourable court may deem fit to grant.

(iii) Cost of this petition.

When served with the petition, the respondent filed the reply to the petition strenuously challenging the petition. Subsequent to that, the respondent raised a notice of preliminary points of objection challenging the competence of the petition to the effect that:

- (1) The petitioners have no *locus standi* to bring this petition.
- (2) That the petition is misconceived in law and a non-starter as the issue of failure to file annual returns and rectifications of the company register at the office of the Registrar of the Companies is not tantamount to failure to call meetings as envisaged by section 137 (1) of the Companies Act.

As per the courts practice, where a preliminary objection raised before the court, the court has to determine it first before embarking into the subject matter of the case. It is from that practice parties were ordered to submit on the said objection orally. At the hearing of the said points of preliminary objection, both parties appeared represented. The Petitioners hired legal services of Mr. Nehemiah Nkoko learned Advocate, while respondent enjoyed

the services of Mr. Edward Chuwa and Anna Lugendo both learned advocates.

Staging the floor first in support of both preliminary objections, Mr. Chuwa started by explaining the term *Locus standi* as defined in the case of **Lujuna Shubi Balonzi vs Registrar of Chama cha Mapinduzi** (1996) TLR 203 and **Gervas Masome Kulwa Vs. The Returning Officer and Another** (1996) TLR 320, as cited in the case of **Ally Ahmed Bauda (Administrator of the Estate of the late Amina Hussein Senyange) Vs. Raza Hussein Ladha Damji and Others**, Civil Application No 525/17 of 2016 (Unreported). He said, in the above cited cases the court insisted that, the matter of *locus standi* is not the matter of evidence but rather the matter of law as it goes to the jurisdiction of the court. And that being a jurisdictional issue a person cannot maintain a suit or action unless he has shown interest in the subject matter as well stated in the case of **Godbless Jonathan Lema Vs. Mussa Hamis Mkanga and 2 Others**, Civil Appeal No. 47 of 2012 (CAT-unreported) when cited with approval the Malawian Supreme Court decision in the case of **The Attorney General Vs. The Malawi Congress Party and another**, Civil Appeal No. 22 of 1996. Thus, to him the court cannot entertain the suit or matter in which the party has no any

interest or locus standi for being a jurisdictional issue. To glue the above submission he further argued that, in **Ally Ahmed Bauda**, (supra) the Court of Appeal interpreted the term *locus standi* as a common law principle which requires that, a person bringing a matter into court should be able to show that his rights or interest has been interfered with. He contended further that, for the court to entertain this petition brought under section 137 (1) and (2) of the Companies Act [Cap 212 R.E 2002], it has to satisfy itself as to whether petitioners have locus standi as for the person to have interest in the company he must have shares that entitle him to bring the suit or petition as the present one. He stated, in the company's memorandum and articles of association attached to petition by petitioners, there is no evidence to indicate that, the petitioners were allotted shares by the company or acquired them by way of transfer since its incorporation in 1975. According to him there is nothing in the petition to entitle this court to observe and establish whether the petitioners were once shareholders of the respondent's company. In his view the issue of shareholding must be apparent on face of pleadings as it does not require presentation of evidence in court. It was his submission therefore that, in absence of any indication that petitioners are

shareholders of the company or have any interest whatsoever therein, they lack locus standi to petition against the respondent.

On a different note while referring to the pleadings Mr. Chuwa contended that, in annexure KB1 of the petition (a letter by petitioners to the Company Registrar), it is indicated shareholders of the Company are 82, something which contravenes the provisions of section 27(1) (b) of the Companies Act, that limits a number of members of the private company to 50 members only. He thus repeated his prayer requesting this court to strike out the petition with costs.

In reply, Mr. Nkoko attacked the submissions by the respondent' counsel terming it as a total misdirection for bringing in the issue of jurisdiction as an afterthought since the same cannot be mingled with the issue of locus standi. On a similar note, he distinguished the case of **Ally Ahmed Bauda** (supra) cited by the respondent counsel on locus standi as one which was dealing with harmonization of names of parties before the court while in the present matter the issue is for an order of calling the company meeting, hence the case is inapplicable. As to whether the issue of locus standi as raised by the respondent qualify to be an objection on point of law, Mr. Nkoko responded it does not as according to the case of **Mechmar**

Corporation (Malaysia) Benhard (In Liquidation) Vs. VIP Engineering and Marketing Ltd, Consolidated Civil Applications No. 190 and 206 of 2013 (CAT-unreported) where it was held locus standi cannot qualify to be an objection on point of law. Further to that he argued, the same does not fit in as an objection on point of law for want of proof by evidence as to whether petitioners are shareholders or have any interest in the company to entitle them bring any cause against the respondent. To support his prepositions, Mr. Nkoko cited to the Court the case of **Mount Meru Flowers Tanzania Limited vs Boxboard Tanzania Ltd**, Civil Appeal no 260 of 2018 at page 6,7 & 8 where the court explained on what amount to preliminary objection. In his view, for the preliminary objection to qualify as a point of law the same must meet the tests as provided for by the case of Mukisa Biscuit.

On the issue of number of members of the company as listed in the MEMARTS he argued, the same are 11 and not 10 as submitted by Mr. Chuwa, and added that, the company's profile has changed that's why the present petitioners were made members and shareholders of the respondent's company. He was of the views that, as per page 5 paragraph 16 of the MEMATS, it is indicated that, an extra ordinary general meetings

may be held by at least 200. With regard to annexure KB1 Mr. Nkoko submitted that, the Registrar of companies at BRELA did not question about ownership of shares by the petitioners but rather required their verification so as to put his record clear. With that submission he invited this court to find the preliminary objections raised are without merit and dismiss them with cost.

In his brief rejoinder, Mr. Chuwa reiterated his submission in chief while stressing on the point discussed in the case of **Ally A. Bauda** (supra) that the issue of *locus standi* must be determined by the court at the earliest stage. He was of the view therefore that, in this matter petitioners ought to have shown in the petition as to how are they interested in the matter by attaching form No 55 (a) and (b) showing the allotment of shares which they failed and not mere allegations that they are shareholders of the respondent company. Due to that failure concluded that, petitioners have no locus stand to bring this petition thus the petition ought to have been struck out.

I have dispassionately considered the contending submissions by the learned counsels from both sides. In my opinion, the issues calling for determination by this court are two. One, whether the issue of locus standi can be raised as preliminary objection on point of law. Second, if the first issue is answered

in affirmative, whether under the circumstances of this matter the issue of locus standi has a status of being a preliminary objection.

To start with the first issue I am at one with Mr. Chuwa that Locus standi being a common law principle and therefore a rule of equity in which a person cannot maintain a suit or actions unless he has an interest in it, raises a jurisdictional issue which as a matter of law has to be established or determined at the earliest possible stage of the matter. See the case of **God bless Jonathan Lema** when cited with approval the Malawian Supreme Court decision in the case of **AG Vs. The Malawi Congress Party and another** (supra) where the Court observed thus:

"Locus standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that it to say he stands in a sufficient close relation to it as to give a right which requires prosecution or infringement of which he brings the action."

Similar position to the above was also held by the Court of Appeal in the case of **Peter Mpalanzi vs Christina Mbaruka**, Civil Appeal No. 153 of 2019 (CAT-unreported) where the Court had this to say:

"...locus standi is a point of law rooted into jurisdiction. It is for that reason that it must be considered by a court at the earliest opportunity or once it is raised."

In light of the above position of the law, I differ with Mr.Nkoko's proposition that the issue of locus stand does not qualify to be raised as a point of law in any matter, particularly when cited the case of **Mechmar Corporation (Malaysia) Benhard** (supra). I find this case is distinguishable to the above cited cases on the status of locus stand as a point of law since the Court of Appeal in **Mechmar case** never stated that locus stand has no status of being raised as a preliminary point of law. What the Court considered is the issue as to whether the issue locus standi of the applicant to sue in that particular matter could stand without answering the questions as to why and how, and concluded that the same required evidence, hence disqualification of the preliminary objection raised from being a point of law. In view of the above the first issue is answered in affirmative.

I now move to the second issue as to whether under the circumstances of this matter the issue of locus standi has a status of being a preliminary objection. It is Mr. Chuwa's contention is this matter that, relying on petition and its annexures there is no evidence to show that, the petitioners were allotted shares or received them by way of transfer since the company's incorporation on 1975, thus under section 137 (1) and (2) of the Companies Act, are not authorized to sue and therefore lacks locus standi to lodge the

present petition. While I am appreciative of the proposition that, the issue of locus standi is a jurisdictional matter and can be raised and determined at the earliest possible stage of the suit as rightly submitted by Mr. Chuwa and so found by this court, I differ with him that petitioners have no locus standi to sue the respondent. I so hold as in is my humble view, this matter is mixed of law and facts which require proof. It is trite law that, a pure point of law does not arise if there are contentions on facts yet to be ascertained by evidence. Once any raised point of objection requires proof through evidence the same suffers a risk of being disqualified from being considered as a preliminary objection on point of law in the light of the principle set out in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs West end Distributors Ltd [1969] EA**. On same beats the Court of Appeal in the case of **the Soitambu Village Council Vs. Tanzania Breweries Limited & Another**, Civil Appeal No 105 of 2011 (unreported) observed that:

Where the Court is to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law... it will treat as a preliminary objection only those points that pure law, unstained by facts or evidence.

In the instant application, what is gathered from the first paragraph of the petition is that petitioners are alleging to be members and shareholders of the respondent company, while on the other side respondent disputing the said allegation. In such situation in my considered opinion, the question as to whether the petitioners are members or shareholders of the company or not cannot be resolved without inviting parties to present evidence in court proving such fact. This fact is also manifested in Mr. Chuwa's submission when observed that, the petitioners failed to bring evidence to prove the fact that are either members or shareholders of the company to entitle them with locus to sue. With such understanding, the tests set out in **Mukisa Biscuits' case** are not met in the raised objections as the issue as to whether petitioners are shareholders or not needs evidence to be proved during hearing of the petition and not at this stage. The Court of appeal in its recent decision decided on 21st February 2022, in the case of **Ibrahim Abdallah (the administrator of the Estate of the late Hamisi Mwalimu vs Selemani Hamisi (the administrator of the late Hamisi Abdallah)**, Civil Appeal No. 314 of 2020 (CAT-unreported), when faced with similar situation where the raised preliminary objection contained both point of law and fact had the following to say:

It is a settled law that where a preliminary objection raised contains more than a pure point of law, say law and facts it must fail because factual issues will require proof, be it by affidavit or oral evidence.

Applying the above cited principle to the facts of this matter where the issue as to whether petitioners are member or shareholder or not, requires ascertainment I hold the issue of locus stand as raised by the respondent cannot be determined at the stage of preliminary objection for want of proof of evidence to that effect. I would add that, the same can be properly determined on merit in the course of hearing this petition. Thus the second issue is answered in negative.

In the premises and for the fore stated reasons, this court is of the findings that, the preliminary points of objection raised by the respondent are devoid of merit and I hereby proceed to dismiss them as I hereby do. The petition is to proceed with hearing on merits.

I order each party to bear its own costs.

It is so ordered.

DATED at Dar es salaam this 06th day of May, 2022



E. E. KAKOLAKI

JUDGE

06/05/2022.

The ruling has been delivered at Dar es Salaam today on 06th day of May, 2022 in the presence of Mr. Nehemiah Nkoko advocate for the petitioners, also holding brief for Mr. Edward Chuwa advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

06/05/2022

