

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

MISC. CIVIL APPLICATION NO.2 OF 2022

IN THE MATTER OF THE COMPANIES ACT. NO. 12 of 2002, (CAP 212 R.E 2002)

AND

IN THE MATTER OF DUDUMERA PLANTATIONS LIMITED

AND

**IN THE MATTER OF APPLICATION BY; NATHA CHANA MODHWADIA (A
personal legal representative
of the estate of the late CHANA UKA MODHWADIA
& RUPI CHANA MODHWADIA)PETITIONER**

VERSUS

**DEVCHI CHANA MODHWADIA.....1ST RESPONDENT
JASHU JETHA (A person legal representative of the
estate of the late JETHA CHANA MODHWADIA2ND RESPONDENT
DUDUMERA PLANTATIONS LIMITED.....3RD RESPONDENT (Necessary party)**

RULING

24/01/2023 & 27/04/2023

GWAE, J

The petitioner, Natha Chana Modhwadia, a legal representative of his late father, Ghana Uka Modhwadia and his late mother, Rupia Chana Modhwadia. He has brought this petition under section 233 (1) (2) (3), section 121 (1) (2) (3), section 137 (1), (2), (3) and Article 26,27, 28 of the Table "A" 1st Schedule to the Companies Act, No. 12 of 2002 and any other enabling provisions of the law. The petitioner was granted a pendent

lite on 8th December 2021 by the court vide Misc. Civil Application No. 96 of 2021.

The factual background of this petition is as follows; the 1st respondent, Devchi Chana Modhwadia is young brother to the petitioner and 2nd respondent, Jashu Jetha sued as a personal representative of her late Jetha Chana Modhwadia (the sister-in-law to the petitioner and 1st respondent). Whilst the 3rd respondent is a limited liability company duly registered in 1984 under the then Company Ordinance Cap 12 of Tanzania Laws authorized to conduct its business within Babati District in Manyara Region.

That, the 3rd respondent's shareholders as per the copy of certificate of incorporation appended to the petition are; Mr. Chana (200 shares), Mrs. Chana (150 shares), Mr. Jetha (50 shares, the petitioner (50 shares) and 1st respondent (50 shares). The said Jetha was the oldest son to the family of the late Chana married to the 2nd respondent (widow). The said late Chana Modhwadia and late Jetha Chana Modhwadia before their demises were directors to the 3rd respondent and they met their demises in 2008 in 2015 respectively.

It is also clear from the parties' pleadings that, the petitioner and his young brother (1st respondent) are citizens and residents of United Kingdom whereas the 2nd respondent is a citizen of United Kingdom

however she is a resident of United of Republic of Tanzania in Manyara Region.

According to the petition, since its inception, the 3rd respondent was smoothly and successfully running its business until the demise of her director, the late Chana followed by impersonation of the 2nd respondent as a director when it is unable to pay its debts, salaries to its employees, contributions to fund and pendency of cases. The petitioner is further alleging that, since his appointment as a temporary administrator, the 2nd respondent has vividly denied him access to the 3rd respondent's affairs, dividends, or bonuses any benefits attaching to the shares and that, the 2nd respondent has obtained injunction restraining the petitioner from entering or dealing with any 3rd respondent's affairs. Hence, this institution of this petition against the respondents jointly and severally for the following orders;

1. A declaratory order that the conduct and operations of the affairs of the 3rd respondent run in a manner prejudicial to the interest of the members and company itself
2. An order declaring the petitioner as legal representative in respect of the shares held by the late Chana Uka Modhwadia and Rupi Chana (late parents) in Dudumera Plantation Limited (farm)
3. An order directing the 1st respondent and the applicant to rectify the 3rd respondent company's register and register the

petitioner as personal representative in respect of share (s) by his later parents

4. A permanent restraining order against the 2nd respondent from taking part in the management and running of affairs of the 3rd respondent and declare her impersonation in directorship as invalid and illegal
5. An order for an immediate meeting to shareholders to appoint new directors and an order regulating the 3rd respondent Company's affairs in future
6. An order directing and authorizing civil proceedings to be brought for, and on before of the company by the petitioner to compel the 2nd respondent make good all losses and business distortions incurred as a result of misappropriation of the 3rd respondent funds and mismanagement of the company of the 3rd respondent
7. Costs of this suit
8. Any other that this court will deem fit, just and equitable to grant to enable smooth and proper running of the Farm's affairs in protection of the interest of the company and petitioners (sic)

Upon service and upon appearance through his advocate, one Mariam Saad, the 1st respondent did not oppose the petition through his reply to the petition whereas Mr. Mpaya Kamara, the learned counsel representing both 2nd and 3rd respondent filed joint answer to the petitioner's petition. However, the joint answer was accompanied with a notice of preliminary objection comprised of three points of law to wit; **Firstly**, the petitioner

has no locus standi to bring an action the legal representative of the late Chana. **Secondly**, that, the petition is incompetent for want of a proper verification and **thirdly**, that, the petition is improperly combines reliefs that cannot be simultaneously heard.

The preliminary objection canvassed by the 2nd and 3rd respondent was not determined first as it used to be the case for an obvious reason that, the same found requiring ascertainment of some facts. Therefore, Mr. Mpaya sought leave to incorporate the same during hearing of the petition.

Resisting this petition, the 2nd and 3rd respondent averred that, the farm has never been formally run save a family entity. That, the petitioner and 1st respondent were given the Chana's properties in UK-Wakerley and the late Jetha was given the farm in the year 1996 under the family arrangement and that the 3rd respondent is properly and smoothly run by the 2nd respondent (the widow). It is also the version of the 2nd and 3rd respondent that, any claim or any attempt to claim interest in the farm by the petitioner is aimed at swindling the estate of the late Jetha Chana under the purport of shares (interests) in the farm immediately after his demise. The 2nd and 3rd respondent's reply is to the effect that, there were no successive annual returns with BRELA since inception of the 3rd respondent neither were there any formal shareholders' meetings.

On 24th March 2022, court framed issues after having involved the petitioner's advocates namely, Mr. Ombeni Kimaro and Mr. Mjema for the petitioner as well as Ms. Mariam Saad and Mr. Mpaya Kamara for the 1st respondent and 2nd and 3rd respondent respectively.

1. Whether the petitioner has locus standi to bring this petition
2. Whether the affairs of the 3rd respondent have been run in prejudicial to the interest of its members
3. Whether the 2nd respondent is taking part in the management and running affairs of the company in exclusion of other directors /shareholders
4. Whether the Petitioner is entitled to any shares held in the 3rd respondent
5. To what extent of reliefs parties are entitled

After farming of the above issues, the parties' advocates reached consensus that, the proof or otherwise of the petition be made by way of filing affidavits and where necessary parties' may call deponents by virtue of Order XIX Rule 1 and 2 of the Civil Procedure Code, Cap 33, Revised Edition, 2019.

In proving the matter at hand, the petitioner filed his affirmed affidavit on 19th May 2022 which basically reiterated what is principally contained in his petition. The petitioner's affidavit is accompanied by a grant pendente lite issued by the Magugu Primary court on 8th December

2021, a BRELA's report not signed and not sealed. There are also, a copy of letters of administration of estate of the late Jetha Chana to the 2nd respondent issued 4th January 2016, 3rd respondent's certificate of incorporation issued on 25th May 1984 and 3rd respondent's statement of Tax Account purporting to have been issued by TRA on 30th November 2021.

The cross-examination to the petitioner was virtually conducted on 18th November 2022 whereby Mr. Mpaya cross examined on the 3rd respondent's secretary, whose pays for the bill and if there were annual reports and the like. The petitioners replies were; that, he does not have any share certificate relating to the 3rd respondent which, is a family business. That, he has not personally paid any levy to the Government since incorporation of the 3rd respondent. He further replied that, the 3rd respondent had no company Secretary neither auditors when the it was successfully operating its business. He went on answering that, he had never been given dividends.

The petitioner also replied to the negative by stating that, there were no any annual report/annual returns and that he had no proof of cases filed against the 3rd respondent instituted by any Government Agencies. He however told the court that the 2nd respondent is neither the director nor shareholder to the 3rd respondent.

The 2nd respondent and 3rd respondent was able to physically bring the 2nd respondent (DW1) who also reiterated what is contained in the joint answer to the petition. The evidence of the 2nd respondent was corroborated by affidavits of Pratap Sisodiya (DW3) who averred how the late Chana told him of the distribution of his properties to his sons (Natha, Jetha and Devchi. That, the property in Tanzania to be owned by Jetha and those properties in UK by the petitioner and 1st respondent. The DW3, maintained the same stance during examination.

Another affidavit is that of Harish Jiwa Oghad corroborated by that of Ashok Sisodiya who witnessed meetings relating to the parties' dispute under the auspices of Maher Community. The affirmations substantiated that, the depositions of Dipak Odedra (DW2), which is to the effect that, the suit farm is the estate of Jetha Chana who fully paid the petitioner, and 1st respondent their shares indicated in the 3rd respondent's certificate of incorporation is nothing but the truth of what happened during meetings.

The 2nd and 3rd respondent also annexed and tendered some exhibits through DW1. The documents so tendered and admitted during hearing are, proceedings and its judgment granting letters of administration to the petitioner in relation to Probate and Administration Cause No. 45 of 2016 before Babati Primary Court as well as the proceedings of this court vide

Misc. Civil Application No. 32 of 2021. Both documents were collectively admitted as DE1 and BRELA's report dated 1st day of February 2022 duly signed by one Shirima (Registrar of Companies).

After the close of the parties' case, the advocates representing the parties sought and obtained leave of the court to present their respective closing submissions which shall be a guidance towards making of this ruling. Now, to the court's determination of the issues framed herein above;

1. *Whether the petitioner has locus standi to bring this petition.*

The term "locus standi" signifies the right to sue, appear, or be heard, in legal proceedings. Literally, it envisages a place of standing. To say that a person saying or submitting that a person or party has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to (see **Gouriet v. Union of Post Office Workers** (1977) 3 All ER 70).

Therefore, locus standi is the right of a person as an individual or legal entity to bring a legal action or a right to sue or be sued in a legal proceeding is fundamental right, which must be in existence in order for a person to institute a case. The court of Appeal of Tanzania stresses the requirement locus standi, in **Chama cha Wafanyakazi Mahoteli na**

Mikahawa Zanzibar (HORAU) vs. Kaimu Mrajis wa Vyama vya Wafanyakazi na Waajiri Zanzibar, Civil Appeal No. 300 of 2019

(unreported) stating that:

"We observed that, although the learned High Court Judge struck out the respondent's notice of preliminary objection for being improperly moved, still the issue regarding appellant's locus standi was very vital and we think, the High Court ought to have considered it. This is due to the fact that, the appellant's claims could not be established by a person who is not entitled to claim before the court."

Another emphasis by the Court of Appeal was in **Hassani Ng'anzi Khalfan vs. Njama Juma Mbega** (person representative of the late Mwanahamis) **and another**, Civil Application No. 336/12 of 2020 (unreported) where it stated;

"With serious note, to remind the parties to always indicate the names of the parties and their respective capacities in the application so as to avoid unnecessary confusion. This is crucial in the determination whether a certain party is sued in his personal capacity or not".

In our case, the petitioner is purporting to have been given a grant pendent lite pending Probate and Administration Cause No. 31 of 2021 by the court thorough Misc. Civil Application No. 91 of 2021. However, he

admitted to have been given temporary power. Examining the said grant pendente Lite issued on 8th December 2021, it is clear that, it was meant for temporary necessary actions to prevent the estate from wastes or damage or misappropriation of the estate of the late Chana Uka Modhwadia but not the late Rupia Chana Modhwadia as wrongly reflected in the petition. I have further looked at MD-3 in which I have found none like grant of pendent lite or letters of administration of the estate of late Rupia w/o Chana Modhwadia in favour of the petitioner.

Assuming that, the petitioner had temporary locus standi for both deceased persons (his late parents) yet it could not be easy to get what he sought against the 2nd and 3rd respondent since it is the 2nd respondent who filed her caveat against the petition in respect of Probate And Adm. Cause No. 31 of 2021. The practicable the petitioner ought to have sought is temporary injunctive order restraining disposal of the suit farm by the 2nd respondent or any other act injurious to the 3rd respondent pending hearing and determination of the main case where the 2nd defendant is an objector/ caveator. For the above stated reasons, the petitioner has is found to have no locus standi to sue under the capacity of personal representative of the late Chana Uka Modhwadia and late Rupia Chana Modhwadia.

2. Whether the affairs of the 3^d respondent have been run in prejudicial to the interest its the members

Despite the fact that, the determination of the 1st issue is capable of disposing this petition yet for the interest of justice I would like to determine the 2nd issue herein above. At the paragraph 9 of the petition and para. 4 of his affidavit, the petitioner is alleging inter alia that, there is failure to pay taxes, failure to file annual returns on the part of the 2nd respondent, alleged accrual of debits followed by institutions of case by government agencies against the 3^d respondent. However, the petitioner's assertions are found to have not been proved to the hilt. Let the parts of his evidence when cross examine speak for themselves herein under;

"I do not therefore have any financial report. I have stated in the paragraph 9 of the petition that, there are 3^d respondent's debts but I do not have any case against the 3^d respondent instituted by any Government Agencies. I have appended a copy of statement of Tax Account which I have obtained it from Babati TRA. The document is not signed neither name of officer who issued the same is indicated thereto. The statement is certified copy (The witness show with certification.) I have not seen final assessment by TRA. I have never seen any decision from TRA Commissioner I have not seen any communication in written from TRA regarding 3^d respondent's debts except statement of Tax account. I do not have any figure /amount as to the claims by PSSF on mandatory

contributions nor do I have any debts against the 3rd respondent relating to the employees' salaries. Statement of Tax account is a computer-generated document from TRA'S office. Didas is an advocate I do not have any document from TRA which is certified. There is no indication that, the document was delivered to the 3rd respondent. I got the document from TRA though it does not bear any signature nor name of mine. I have a copy but it is not a certified one. I am aware of the last date of license 2005 – 2013 when my late father Chana and elder brother were directors.

The 2nd respondent was not in control of the company from 2005-2013. The 2nd respondent would understand the progress of the company. The 2nd respondent would convey a family meeting. I was appointed as an administrator in 2016. It is a judgment of Babati Primary Court via Cause No. 45 of 2016 which it appointed me as an administrator. I know one Nirmaladevi and Urmila and as appearing at the judgment of Babati Primary Court, they were in Tanzania in 2016 and that is in accordance with proceedings of Primary Court.

According to the High Court proceedings, the said Urmila was in Tanzania for last period in 2015 that is the latest year for my sisters being in Tanzania meaning that, they were not present in Tanzania in the year 2016. I do not remember if my sisters appeared and testified before Babati Primary Court in 2016..."

With due scrutiny of the above quoted replies by the petitioner when cross-examined by the counsel for the 2nd and 3rd respondent, it goes without saying that, the petitioner has absolutely failed to prove his accusations against the 2nd and 3rd respondent. It is trite law that, the one who desires any court of law to give a judgment or order as to a legal right or liability dependent on the existence of facts, which he asserts, and which he or she must prove the existence of such facts.

Examining the evidence adduced by the parties and the standard of proof imposed to a person alleging existence of certain facts under section 110 of TEA, I have come have come up with an observation that, the petitioner's evidence is so weak to support his version and the same is unrealistic. Worse enough, even the documents tendered by him like of TRA or BRELA were neither signed nor sealed. Hence, they are not reliable documents. In **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported), the Court of Appeal had these to say;

"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof It is ancient rule founded on consideration of good sense and should not be departed

from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...".

In the light of the evidence adduced by the petitioner nothing is credible to support the petition except mere assertions that, there are accrued debts and that, the 3rd respondent's affairs are being run in loss or prejudicial. Moreover, there is no proof on the part of the petitioner if, in previous years that is since 1984 to 2008, there were 3rd respondent's annual returns. I am holding so since BRELA report dated 1st February 2022 indicates that, since 1986 no successive annual returns that were submitted to BRELA to date. If so, how is it possible for the petitioner coming to the court complaining that, the said impersonated director (2nd respondent) of the 3rd respondent has not complied with filing of annual returns.

Similarly, she is the one who is not only in possession but also who is currently carrying out day-to-day activities of the 3rd respondent. Above all, looking at the proceedings of the Babati primary court instituted by the petitioner, it is clear that the, 2nd respondent and or her daughters

were not enlisted as beneficiaries of the estate of their beloved grandfather and grandmother (**Mr. Chana and Mrs. Chana**). That being the case, it is premature to declare the petitioner as a legal representative of the estate of the late, Chana and Rupi Chana. Worse still, in these civil proceedings (See his 2nd and 3rd relief above) there are prayers which are not grantable in this petition instead, they can be granted in Probate and Administration Cause No. 31 of 2021 before the court. In these situations, it is not proper and just to grant the orders and reliefs sought by the petitioner at this juncture as doing so will even be more problematic. Hence, subsequent, Court's determination of 3rd and 4th issues should not be determined as of now since the same may inevitably preempt a decision of the court in future if the petitioner is granted letters of Administration of the estate of his late parents and desirous to pursue the matter of this nature.

Consequently, the petitioner lacks the requisite locus standi to sue in the capacity of the administrator of the late Chana Uka Modhwadia and his late Rupi Chana Modhawadia. The petition is accordingly struck out. As for now there no grounds advanced by the petitioner, leave alone his lack of locus standi, to warrant the court to direct institution of Civil Proceedings on behalf of the Company. Given the nature of the case by the petitioner who was brotherly required to take of the 2nd respondent

and her family, instead of unnecessary and premature institution of this proceeding, the petitioner shall therefore bear the costs of this petition

It is so ordered.

DATED and **DELIVERED** at **ARUSHA** this 27th April, 2023


M.R. GWAE,
JUDGE

Court: Ruling delivered in the presence of the 2nd respondent who also appears for the 3rd respondent as well as Ms. Mariam Saad, the learned counsel for the 1st respondent and in the absence of the petitioner and his advocates. Copies of ruling, proceedings and drawn order are collectable by today




M.R. GWAE,
JUDGE
27/04/2023