IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 5 OF 2023

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR PREROGATIVE ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE COMPANIES ACT, ACT NO. 12 OF 2002

AND

IN THE MATTER OF REEF GOLD LIMITED ("THE COMPANY")

BETWEEN

GOLD AFRICA LIMITED .....APPLICANT

AND

1. **BUSINESS REGISTRATIONS AND LICENSING AGENCY.....1ST RESPONDENT**

2. **THE ATTORNEY GENERAL.....2ND RESPONDENT**

RULING

5/05/2022 & 22/05/2023

KAGOMBA, J.

Before the Court, the Applicant has lodged an application for grant of leave to apply for orders of *certiorari*, *mandamus* and prohibition against the

1st Respondent's decision contained in a letter dated 30th September, 2022 concerning a company called Reef Gold Limited. The points raised as per notice of preliminary objection filed by the Respondents, are stated as follows:

1. That, the Application is untenable in law for being preferred against a wrong party.

2. That, the Application is untenable in law for lack of decision sought to be challenged.

3. That, the Applicant has no locus standi.

On the date set for hearing of the preliminary objection, Mr. Daniel Nyakiha, learned State Attorney who appeared for the Respondents dropped the third ground of objection and proceeded to argue on the first two grounds above stated.

Submitting on the first point of preliminary objection, Mr. Nyakiha said that the application is preferred against a wrong party. He argued that the Business Registrations and Licensing Agency ("BRELA"), who is the 1st Respondent, was not a proper party to be sued because in judicial review remedies are sought against the person who made a decision and not the institution. He added that, it was trite law that BRELA being an executive agency is, incapable of being sued in its own name save for contract matters only.

On the second point of objection, Mr. Nyakiha attacked the application for not being attached with the right decision intended to be challenged by the Applicant during judicial review. According to him, this Court doesn't have before it the decision made against the Applicant as the decision referred to under paragraph 22 of the supporting affidavit ("annexure A14") was made against Reef Gold Limited. He argued that absence of that decision rendered the application incompetent. To cement this contention, he referred the Court to the case of the **Attorney General and Another vs Valerian Bamanya t/a Tanzania Associated Merchandise**, Civil Appeal No. 79 of 2005, CAT at DSM. He prayed the court not to entertain the application but proceed to struck it out.

In his reply, Mr. Michael Ngalo, the learned Advocate for the Applicant, started by expressing his concern that the learned State Attorney was supposed to give enough details of the preliminary objection so as not to take other party by surprise. He cited, in this regard, the case of **James Burchard Rugemalira vs The Republic and Another**, Criminal Application No. 59/19 of 2017, CAT, Dar es salaam.

However, Mr. Ngalo went on to reply in respect of the first objection, that the applicant sued BRELA because the decision the Applicant intends to challenge came from no other place but BRELA, and bore BRELA's Reference Number, as was shown in the affidavit.

On the argument that BRELA could only be sued on matters of contracts, he argued that the application was against BRELA on its administrative duty of regulating Companies in Tanzania, in which case its

administrative decisions are subject to judicial review. He added that where there was a duty there was a right. Hence, he found nothing wrong at all to prefer the application against BRELA, who is thus the correct party.

Mr. Ngalo further added that the affidavit described BRELA and the Counter affidavit did not dispute that fact; and that even the person who swore the affidavit stated that he works for BRELA.

Arguing as an alternative, Mr. Ngalo submitted that since the arguments put forth necessitates the Court to seek evidence as to who is the correct party to be sued, the point of objection would be unqualified to stand as a preliminary objection in the eyes of law.

Coming to the second point of objection, Mr. Ngalo replied that Annexure 14 to the supporting affidavit is a decision that the Applicant intended to challenge. As to the argument that the attached decision was made against Reef Gold Limited, and not the Applicant, he replied that the Applicant owns 90% shares of Reef Gold Limited, hence an interested party. He argued further that since the Applicant was aggrieved by that decision for some illegalities, she wanted to challenge it.

He referred the Court to the case of **DPP vs Farid Had Ahmed and 9 Others**, Criminal Appeal No. 148 of 2014 for a point that at this stage the court doesn't have to fish information as to whether the applicant has been aggrieved or not. He also cited the decision of Court of Appeal in **Mechmar Corporation (Malaysia) Benhard (In liquidation) vs. VIP Engineering and Marketing Ltd. & 3 Others**, consolidated Civil

Application No. 190 and 260 of 2013 concluding that the two points raised could not therefore be determined as pure points of law and prayed the court to overrule the same.

Rejoining, Mr. Nyakiha reiterated what he submitted in chief and added that the requirement that a point of objection be detailed is applicable in the Court of Appeal as it is originates from Rule 107(3) of the Court of Appeal Rules, which do not apply in this Court.

He also rejoined that the Applicant was supposed to sue the person who made a decision who is the Registrar of Companies and not BRELA which is an executive agency. He referred S. 3(6) of the Executive Agencies Act for this position. He also insisted that annexure 14 of the supporting affidavit is not a decision for this Court to consider its validity because it was not intended for the Applicant despite the two companies sharing directorship.

Having heard submission from both parties, the issues for determination by this Court is whether the points of preliminary objection raised have merits.

Before determining the substantive issue framed above, I should briefly address the concern raised by Mr. Ngalo on lack of sufficient details in the notice of preliminary objection. I agree with him that no party should be taken by surprise in hearing a preliminary objection, and even in any other matter. This should be so if a hearing is to be fair. However, such a wish can be said arise from practice rather than a legal requirement as far

as this Court is concerned. As correctly said by Mr. Nyakiha, the position taken in the cited case of **James Burchard Rugemalira (supra)** is based on the provision of Rule 107 of the Court of Appeal Rules, which does not apply in this Court. The Court of Appeal stated at page 10 of the copy of Ruling supplied to this Court, as follows:

> *"At the time when the objection was raised i.e 28/2/2018 the Rules had already been amended vide GN 362 published on 22/9/2017. One of the Rules which was amended is Rule 107 which deals with notices of objection in civil matters. Now it requires, inter alia, the notice of objection to provide with such particulars so as to enable the adversary party as well as the Court understand the nature and scope of the point of objection raised".*

Thereafter the Court of Appeal went on to reproduce the amended Rule 107 where by under sub-Rule (3) a respondent raising a preliminary objection is mandatorily required to provide "*such necessary particulars to enable the Court and the other party to grasp the nature and scope of such objection*". Since the said position has its root in the cited Court of Appeal Rules, which are not applicable to this Court, I find no legal basis to enforce it in this matter, despite its obvious desirability.

As regards the first point of objection and its corresponding issue; whether the Application is untenable in law for being preferred against a wrong party, Mr. Nyakiha referred this Court to the provision of section 3(6)(b) of the **Executive Agencies Act, Cap 245.** A glance at this

provision of the law reveals that, indeed, executive agencies cannot be sued in their own names save in matters of contracts only. The law under sub-section (6) of section 3 of the said Act, clearly states:

> *"(6)* ***Notwithstanding any other law, an Executive Agency shall–***
>
> *(a) N/A ;*
>
> *(b)* ***be capable of suing and being sued in its own name only in contract****; and in that respect all laws applicable to legal proceedings other than Government Proceedings Act, 1967, shall apply to legal proceedings to which the Agency is a party";*

From the pleadings as well as Mr. Ngalo's submission, the Application before the Court is not arising from contractual matters rather from BRELA's administrative duties as a regulating authority for all companies in Tanzania. Obviously, the above cited provision of the law does not permit BRELA to be sued in its own name other than in contract matters.

This Court has previously deliberated on this issue in **African Banking Corporation Tanzania LIMITED vs Tanzania National Road Agency (TANROADS)**, Misc. Commercial Application No. 235 of 2016 where my brother Songoro, J. had the following to say;

> *"So, reading between the lines of Section 3(6) (b) of the Executive Agencies Act as amended by Finance Act No 18 of 2002, it appears there are precise and unambiguous words which*

states that, Executive Agency like TANROADS may not "be sued" in its own name except on matter based, on contract".

Therefore, because the dispute is not contractual, BRELA was not a proper party to be sued. Now, since the 2nd Respondent was only joined to fulfil the requirement of the law, being a necessary party to any proceedings against the government, it remains that there is no proper respondent against whom this matter can proceed. It is the position of the law that when a wrong party has been sued in any suit, the court should not allow that suit to proceed any further.

In the case of **M/S Mkurugenzi Nowu Eng vs. Godfrey M. Mpezya**, Civil Appeal No. 188 of 2018, available at www.tanzlii.org, the Court of Appeal having noted that the Appellant therein, who was a respondent before the Commission for Arbitration and Mediation (CMA), was wrongly sued as employer of the Applicant, went on to observe on what should have been done by CMA. The Court stated;

".....having been informed by the respondent, in his evidence, that his employer was DW1 and not the appellant, the wrongly instituted labour dispute against the appellant ***was supposed to end there and the respondent be advised to take necessary steps and institute labour dispute against the proper party".*** **[Emphasis added]**

In the above cited case, the Court of Appeal held that suing a wrong party vitiated the proceedings.

For the foregoing reason, I find merits in the first point of preliminary objection, which is accordingly sustained. The Application is rendered incompetent for having been preferred against BRELA, who is a wrong party. Having so determined, it would be inconsequential to labour on the second point of objection, as the first objection disposes of this Application.

As for the consequences of the above determination, I take guidance from the decision in **Thomas Peter @ Chacha Marwa vs The Republic**, Criminal Appeal No. 322 of 2013, CAT, Mwanza, where the Court of Appeal stated;

> *"It is now common knowledge in our jurisprudence, that an incompetent proceeding cannot be determined on merit. It can only be struck out."*

Accordingly, the Application is struck out. No order as to costs. The Applicant may wish to take necessary steps to reinstitute his Application by observing the law.

Dated at **Dodoma** this 22nd day of May, 2023.

ABDI S. KAGOMBA

JUDGE