

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA
CIVIL CASE NO. 15 OF 2022

LIQUIDATOR, ENERGY DEVICES Co. LTD PLAINTIFF
VERSUS

SANDER ROBERT Van De WAAL 1ST DEFENDANT
ENERGY DEVICE Co. LTD 2ND DEFENDANT
SMILEY'S SPORT- GRILL LTD 3RD DEFENDANT
MWANAHARUSI ABUBAKAR SUMRA 4RD DEFENDANT
GODSON JOEL NGOMUO 5TH DEFENDANT

RULING

21st April & 19th May, 2023

TIGANGA, J.

The 2nd defendant is a company limited by shares which on 4th October, 2019, resolved to voluntarily wind up due to inadequate performance which led to its failure to discharge the company's operations. In their special resolution, the board of directors and shareholders 1st defendant inclusive, further resolved and appointed the plaintiff as a liquidator to carry out and finalize the winding up legal procedures.

According to the pleadings, a year later, the company got back to its feet, and on 20th October, 2020, it was resolved that, they resume back



to business. They also resolved to terminate the plaintiff's services and notified him through a letter dated 21st December, 2020 of their decision to terminate her service of liquidation. Following that notification, the plaintiff sued the defendants claiming that, in his performing his duties he realized that, the 1st and 5th defendants being shareholders and directors of the 2nd Defendant jointly and severally collected a number of the 2nd defendant's assets, sold, transferred and possessed them without the company's approval.

Further to that, the plaintiff claims that, the 1st defendant has refused to hand over everything relating to the company to him to liquidate hence obstructing him from performing his duty as the liquidator. He thus prays that this court orders the defendants to surrender the properties they personalized or pay the amount equal to their value, and the ones they sold including motor vehicles sold to the 4th defendant and the 1st defendant's wife so that, he could finalise the liquidation process.

All defendants disputed the claims. The 1st and 4th defendants in their written statement of defence raised the Counter Claim in which they contended that, since the appointment of the plaintiff back in 2019, he had not finalized the liquidation process, instead he took over the company and continue to run its business. They also said after the



business had resumed, they made another resolution compelling him to hand over the company assets and stop the liquidation process but contrary to their expectations, the plaintiff filed this suit against them. In that counterclaim, they prayed for this court to compel the plaintiff to hand over the 2nd defendant's assets, pay all the taxes accrued from the business transaction he kept on conducting, and pay all of the loss of income caused to the 2nd defendant.

Before the suit was heard on merit, the 1st to 4th defendants filed a notice of preliminary objection on points of law as hereunder;

1. That, the suit is grossly incompetent for being preferred without necessary leave, and or sanction of the company.
2. The plaintiff has no cause of action at all against the defendants herein.
3. The plaintiff has no *locus standi* to sue and claim on matters not falling within an ambit of liquidation.

During the hearing of the preliminary objection which was by way of written submissions, the plaintiff was represented by Mr. Haruni I. Msangi whereas the 1st to the 4th defendants were represented by Mr. Matuba Nyirembe, both learned Advocates.

Submitting in support of the preliminary objection raised, Mr. Nyirembe stated that, the liquidator, one Kassim Selemani Mfinanga has



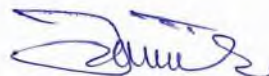
sued shareholders and directors of the company but according to section 301 of the **Companies Act**, No. 12 of 2002 the liquidator has no automatic right to sue them. He averred that, according to that section, the liquidator may bring or defend any action or other proceedings in the name and on behalf of the company with the sanction of the court, the committee of the inspection, or the creditors. That, the company did not pass any resolution sanctioning him to institute this suit against them. Further to that, Mr. Nyerembe submitted that, much as the plaintiff has not made any declaration of solvency, he has neither obtained the sanction from the Court, the Committee for inspection or the creditors to proceed with this matter in court.

As to the 2nd and 3rd grounds of objection, learned counsel argued them jointly that, the law is very certain in respect of *locus standi* which generally means; he who is entitled to bring the matter to court as defined in the case of **Lujuna Shubi Ballonzi, Senior vs Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203. He asserted that, in the current suit, the plaintiff has no right to institute a suit against the defendant because he sues for operational matters which occurred a long time before his appointment. More so, he has not been sanctioned either by the directors or shareholders to pursue such claims.



It was Mr. Nyirembe's further submission that, there is no cause of action against the defendants because the plaintiff's claims are centered on the unfair conduct of the defendants as governed by section 233 (1) of the Companies Act. That, the said section provides for any member of the company to make a petition to the court when matters of the company have been conducted in a manner that is unfairly prejudicial to the interest of members. However, the plaintiff is not a member of the company, thus, he can neither file a petition nor complain against the conduct of the company.

Another issue that Mr. Nyirembe addressed is the fact that the plaintiff has not given the proper description of the landed property as one of the assets in conflict while the law requires a proper description of the property in dispute. He referred the court to Order VII, Rule 3 of the **Civil Procedure Code**, Cap 33 R.E. 2019 and the case of **Agast Mwamanda (suing as an administrator of the estate of the late Abel Mwamanda) vs Jena Martin**, Misc. Land Appeal No. 4 of 2019 (unreported) in which, giving description and the size of the suit land was emphasized. He prayed that, the preliminary objection raised be sustained and the suit be struck out with cost.



Opposing the objection raised, Mr. Msangi submitted that, by the company appointing the plaintiff as a liquidator through the resolution dated 4th October, 2019, he can exercise his powers including instituting the claim or defending the company. He argued that, the law does not require the liquidator to file a declaration of insolvency and that, a declaration of solvency shows that, the company can settle its liabilities without being supervised by Court as in creditors winding up. He further submitted that, the special resolution does not apply to section 301 of the Companies Act as under such provision, the directors are required to hand over the company's documents relating to the company's business to the liquidator.

It was learned counsel's further submission that, under section 358 (1) of the Companies Act, the liquidator in voluntary winding up with a sanctioned resolution of the company, may exercise powers given in section 301 (d), (e), and (f). He also asserted that, the provision which applies in the winding up by the court in relation to getting the company's properties also applies to voluntary winding up. He finally submitted that, the points of objection raised are not purely points of law as underscored in the case of **Mukisa Biscuit Manufacturing Company Ltd vs West**



End Distributors Ltd (1969) EA 696. He prayed that the objection raised be dismissed with cost.

In rejoinder, Mr. Nyirembe reiterated his earlier submission and added that, the plaintiff was initially appointed as the liquidator on 4th October, 2019 through a company's special resolution. However, such appointment was revoked through another special resolution dated 14th October, 2020. In the circumstances, considering the fact that, the plaintiff was not sanctioned by the 2nd defendant he does not have the power to sue for or defend the company as he claims. As to the application of section 358 (1) (a), (b), of the Companies Act, Mr. Nyirembe argued that, the plaintiff's counsel has misunderstood it because, in the institution of a case for or against the company, the sanction is still needed. He also pointed out that, reading from the pleadings, the company is still operative hence according to section 336 of the Companies Act, upon commencement of the winding up, the company ceases to carry on its business.

Further to that, he also submitted that, section 344 (1) of the Companies Act, provides that, the liquidator's position is not permanent but limited to one year, and without extension from the company or Registrar of Companies the plaintiff had no power to institute this suit. He



maintained that, there is no cause of action and the plaintiff had no *locus standi* to institute this suit.

I have gone through the parties' pleadings and carefully considered the arguments advanced by both of them. I find that the preliminary points of objections raised to challenge the competency of the plaintiff in instituting this case against the defendants.

Generally, to understand the whole context of the gist of what is in contention I find it apt to look at the two concepts, who is the liquidator and what are his functions or powers. On who is a liquidator, according to the Black's Law Dictionary, 8th edition, a liquidator is a person who is appointed to wind up a business's affairs, especially by selling off its assets. In the matter at hand, it is an undisputed fact that the plaintiff was appointed as the 2nd defendant's liquidator after the company decided to voluntarily wind up. Paragraphs 4 to 8 of the resolution which appointed the plaintiff a liquidator which he dully signed read;

**4. M/s KADA AND ASSOCIATES, Public Accountants
Public Practice, P.O. Rox 38505, Dar es Salaam UNDER
Arusha office, P.O. Box 12200, Arusha ARE hereby
appointed liquidators of the company from forthwith.**



5. The company bankers, **M/s First National Bank Tanzania PLC, P.O. Box 72290, Dar es Salaam** THROUGH her Arusha branch, info@fnb.co.tz be served with the decision and stop honouring all authorization of monetary instruments by current company signatory and be replaced by Mr. Kassim Selemani Mfinanga, who is the representative of appointed liquidator in Arusha office.

6. The appointed liquidator shall ensure she obtains an officially signed acceptance and engagement letter for liquidation a winding up of M/s Energy Devices Company Ltd concluded the contract agreement.

7. The Audited Financial Statements as of 31 December 2019 to be pursued by the existing Auditors would be used by the liquidator in accomplishing the legal financial processes.

8. The management and those charged with governance for company financial statements shall avail to the liquidator "solvency declaration form" declaring a list of assets and liabilities at Fair Value on the date the business ceased operations.

Having in mind what was tasked to him, I now proceed to determine the points of objection raised starting with the third point which is whether the plaintiff has *locus standi* to sue and claim on matters not falling within the ambit of liquidation. *Locus standi* is a crucial issue and central in every



proceedings, therefore, the person suing has to show that s/he has the right or capacity to bring an action or appear in court. In **Lujuna Shubi Balonzi, Senior vs Registered Trustees of Chama cha Mapinduzi** (supra) the court held that;

"In this country, locus standi is governed by Common law. According to that law, in order to maintain proceedings successfully, a plaintiff or applicant must show not only that the court has the power to determine the issue but also that he is entitled to bring the matter before the court."

Also, the Court of Appeal of Tanzania in the case of **Godbless Jonathan Lema vs Mussa Hamis Mkangaa and Others**, Civil Appeal No. 47 of 2012 quoted with authority the decision of Malawian Supreme Court in the case of **The Attorney General vs Malawi Congress Party and Another**, Civil Appeal No. 32 of 1996 whereby it had this to say:-

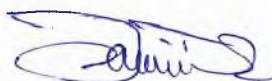
"Locus standi is a jurisdictional issue. It is a rule of equality that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say unless he stands in sufficiently close relation to it so as to give a right which requires prosecution or infringement of which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

Applying the principles in these authorities to the 3rd objection raised in the suit at hand, the 1st and 4th defendants argue that, the plaintiff has no locus standi to institute a suit against them as he has no *locus standi*



to do so. The plaintiff on the other hand disputes the allegation and argued that, as a liquidator, he had the right to sue for or defend the company. From the outset I join hands with the defendants and the following are my reasons. **First;** looking at the tasks quoted above, none of them sanctioned him to bring the suit on behalf of the defendants. In a nutshell, he was tasked to collect assets, act as a signatory on the company's bank accounts, obtain officially a signed acceptance and engagement letter for liquidation, and obtain a "solvency declaration form" declaring a list of assets and liabilities at fair value on the date the business ceased.

Second; it is an undisputed fact that, the plaintiff was appointed by the 2nd defendant through a resolution dated 4th October, 2019 to be a liquidator upon the voluntary winding up of the company. However, on 14th October, 2020 due to the fact that the company wanted to stop the winding up and proceed with business, another resolution was passed and the plaintiff was terminated as a liquidator. He was notified of the same through a letter dated 21st December, 2020. In the circumstances, the plaintiff is no longer a liquidator of the 2nd defendant hence he is not in a position to act for the company in any capacity.



Third; the plaintiff argued that, under section 358 (1) (a) of the **Companies Act**, when a company is winding up voluntarily, he can exercise his powers including filing a suit or defending any action for and against the company as provided under section 301 (d), (e) and (f) of the same Act. For clarity, the two sections read;

358.-(1) The liquidator may-

(a) in the case of a members' voluntary winding up, with the sanction of a special resolution of the company, and, in the case of a creditors' voluntary winding up, with the sanction of the court or the committee of inspection or (if there is no such committee) a meeting of the creditors, exercise any of the powers given by paragraphs (d), (e) and (f) of subsection (1) of section 301 to a liquidator in a winding up by the court;

301.- (1) The liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection –

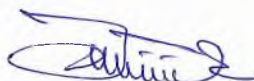
(a) n/a;

(b) n/a;

(c) n/a;

(d) to pay any classes of creditors in full;

(e) to make any compromise, or arrangement with creditors, or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future,



certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(f) to compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof.

Reading these provisions between the lines, none of the two gives the plaintiff the right to bring an action or defend it not only against the 1st and 4th defendants but also the 2nd defendant who is the center of the whole saga. Also, there are neither the creditors nor the sanction of the court or the committee of inspection, sanctioning the plaintiff to act the way he did, therefore, relying on such law makes his claims unfounded, because he was not sanctioned to do so.

In the event, the plaintiff has no *locus standi* at all to file a suit against the defendants as the resolution which he claims gives him the mandate to collect assets become redundant since 20th October, 2020.

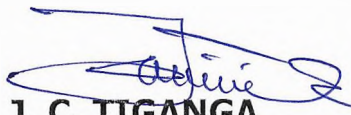


With this point of objection sustained, I find no need to proceed with other objections for without the legal right to bring actions against the defendants, the plaintiff's suit remains superfluous, misconceived, and to the best untenable before the eyes of the law. The same is dismissed with cost. On the other hand, the suit will proceed in respect of the counterclaim filed by the defendants against the plaintiff on the dates that will be scheduled by the court.

It is so ordered.

Dated and delivered at **Arusha** this 19th day of May, 2023.




J. C. TIGANGA
JUDGE