

IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA
CIVIL CASE NO. 3 OF 2021

MOHAMEDALI SADRUDIN MOHAMEDALI PLAINTIFF

VERSUS

MAHAMOUD MWEMUSI CHOTIKUNGU.....1ST DEFENDANT

NDANDA SPRINGS LIMITED2ND DEFENDANT

RULING

13th & 27th June 2023

LALTAIKA, J.

The Plaintiff, **MOHAMEDALI SADRUNI MOHAMEDALI**, has instituted this case claiming against the defendants the following reliefs:

- (i) *An order for immediate payment of Tshs.36,400,000.00 (being monthly dues from July 2020 to February 2021)*
- (ii) *A declaratory Order that the first Defendant's act of transferring the properties of the second defendant without the consent of the Plaintiff is null and void*
- (iii) *An order of this honourable court directing the second defendant to conduct an audit of the accounts and assets of the company in order to allow the Plaintiff to dispose (exit) his shares in the company*
- (iv) *An order to the first defendant to submit the report on the profit from transportation business carried by the first defendant by using the motor vehicles of the second defendant*
- (v) *Payment of Tshs.500,000,000/= as general damages*
- (vi) *costs of the suit.*

On 4/5/2021 the first and second Defendants lodged a joint Notice of Preliminary Objections and Joint Written Statement of Defence. The preliminary of objections are as follows

- (a) *The Plaintiff is irregular and bad in law for want of proper procedure and form,*

- (b) *That the suit against the 1st defendant is not maintainable, hence irregular, and bad in law*
- (c) *That the plaint does not disclose any cause of action against the 2nd defendant. Hence, unmaintainable and*
- (d) *The court has no jurisdiction to entertain and try this case.*

When this matter was called on for hearing of the points of preliminary objection the Plaintiff was represented by Mr. **Stephen L. Lekey**, learned Advocate while the Defendants were jointly represented by **Mr. Benitho L. Mandele**, learned Advocate. The parties agreed by consent to dispose of the preliminary objections on points of law by way of written of submission. I thank the learned counsel for their diligence and spot on compliance with the court's order issued on 24/2/2023.

Submitting in support of the preliminary objections, Mr. Mandele at the outset prayed for the leave to abandon two objections, namely, that the suit against the 1st defendant is not maintainable; hence irregular and bad in law and the suit does not disclose any cause of action against the 2nd defendant, hence not maintainable. The two objections abandoned by the Defendants are preliminary objection (b) and (c) as appears herein above.

Submitting on the first limb of preliminary objection, Mr. Mandele contended that the objection is premised on **Sections 233(1) of The Companies Act. [Cap. 212]**. The learned counsel contended that the plaintiffs' claims in the plaint were founded on the conduct of a co-share holder (the 1st defendant) and on the running and affairs the company (the 2nd defendants). Mr. Mandele submitted further that for the reasons above, the plaintiffs' complaints and/or claims against the defendants, fall within, and attract the mandatory dictates of sections 233(1) of the Companies Act, (supra).

That being the case, Mr. Mandele reasoned, it is a mandatory legal requirement that the proper way to move the court for the remedies under the plaintiffs' plaint is by way of a Petition and not a plaint, as is the case here. To bolster his argument, Mr. Mandele cited two cases of this court: **JAMES IBRAHIM MANULE & ANOTHER VERSUS OSWALD MASATU MWIZARURA** CIVIL REVISION NO. 11 OF 2016 AND **JOHN O. NYARONGA VERSUS CAPTAIN FERDINANDO PONTI & 2 OTHERS** Commercial Case No. 62 of 2009; (Both unreported).

The learned counsel for the Defendants stressed that in all the above cases, the ratio of the decisions is that in cases where the management and affairs of the company are involved, the proper way of bringing an action is by way of a petition and not a plaint. Mr. Mandele further contended that the plaintiffs' claims are irregular for want of proper form and procedure, hence incompetent, and the plaint should be dismissed with costs.

On the fourth preliminary objection that this Court has no jurisdiction to entertain and try the suit, the learned counsel submitted that there are two points revolving around this objection. He contended that these points are: (a) the facts and reliefs sought disclose a cause of action based on an employment contract because the plaintiff is claiming some monthly payments/salaries that are due to him. The learned counsel insisted that this aspect of the claims suggests employment arrangements which attract monthly salaries/payments. Mr. Mandele maintained that, accordingly, the proper forum for such claims is the labor courts, which have exclusive jurisdiction over such matters.

The second point relates to pecuniary jurisdiction. Mr. Mandele submitted that the monetary reliefs sought by the plaintiff in his plaint are well below the minimum amount of money on which this court can entertain and try the suit. He stressed that, thus, the total sum of money the plaintiff is seeking under the plaint falls within the jurisdiction of subordinate courts. Consequently, Mr. Mandele reasoned, in terms of **Section 13 of the Civil Procedure Code [Cap. 33]**, the lowest court enjoined to try this suit is the District Magistrate Court. In conclusion, the learned counsel prayed for this court to dismiss the Plaint with costs.

In response, Mr. Lekey at the outset contended that the objections are without merit and should be dismissed with costs. Responding to the first objection, the learned counsel submitted that the Defendants argued that the Plaintiff should have mandatorily complied with Section 233(1) of the Companies Act [Cap. 212], which requires the Plaintiff to file a petition and not a plaint. To support his argument, the learned Counsel cited the decisions of this Court in the cases of **JAMES IBRAHIM MANULE & ANOTHER AND JOHN O. NYARONGA** (supra) cited by the Defendants.

Mr. Lekey submitted that the Plaintiff is a minority shareholder who has opted out of the company. He contended further that the provision of Section 233(1) of the Act should not be applied for the following reasons: (i) The section uses the word "may," which is interpreted under Section 53(1) of the **Interpretation of Laws Act [Cap. 1 R.E 2019]** to mean not compulsory, and (ii) The cited section does not oust the jurisdiction of this Court.

In the circumstances of this case, Mr. Lekey reasoned, Section 233(1) of the Act will not be applicable, and therefore the cases cited are distinguishable from the facts of this case. The learned counsel went further and submitted that assuming that the cited section provides for the proper and ONLY procedure to be followed and thus the case was wrongly filed, the remedy available is not to dismiss the case as prayed by the Defendants, but to strike it out, as His Lordship Mruma, J did in the case of **JOHN O. NYARONGA** (supra) cited by the Defendants.

Replying to the second ground, Mr. Lekey submitted that the plaintiff is a shareholder and a director of the second defendant hence, on that premise; no employer-employee relationship exists. To fortify his argument, the learned counsel cited the case of **MOHAMED SAID KILUWA V. KILUWA STEEL GROUP CO. LTD & OTHERS**, Misc. Commercial Cause No. 30 of 2020 (unreported)

As for the assertion that the total sum claimed falls within the jurisdiction of the subordinate court and whether the case should have been filed there, Mr. Lekey submitted that the plaintiff seeks a valuation of the properties of the Company so that he can dispose of his shares. He contended that by reading Section 2 together with Section 175 of the Act, "Court" is defined to be the High Court, thus this Court has jurisdiction to entertain this suit.

Alternatively, Mr. Lekey submitted that if it does not have jurisdiction, the remedy is not to dismiss the plaint but rather to transfer it to the court competent to try it, pursuant to **Section 21(1)(a) of the Civil Procedure Code [Cap. 33 R.E 2019]**. In view of the foregoing, the learned counsel

contended that the objections raised are without merit and thus prayed to have them dismissed with costs.

In rejoinder, Mr. Mandele stressed that Section 233(1) of the Companies Act enacts a mandatory requirement that suits relating to company affairs must be commenced by way of a Petition and not a Plaint. He submitted further that the Plaintiff's assertion that the use of the word "may" in the section implies/means not compulsory is a misunderstanding of the section and rules of interpretation.

The learned counsel submitted that the contextual meaning of the section, reading along with Section 73(2) of the Act, imports the meaning that the requirement of a Petition is mandatory and not optional as the plaintiff is trying, though wrongly, to assert. Mr. Mandele invited the attention of this court to the court's interpretation of the words "may" as used in Section 233(1). He reproduced the text on page 7 of the case **JOHN O. NYARONGA VS. CAPTAIN FERDINAND PONT & 2 OTHERS** emphasizing that what his Lordship Mruma J. meant was that it was the right of a member of a company to institute an action or not.

Mr. Mandele submitted further that the Plaintiff's act of presenting a Plaint instead of a Petition in this court is a total defiance of the law governing proceedings under the Companies Act. Consequently, Mr. Mandele reasoned, jurisdiction of this court to entertain the Plaint is effectively ousted by the law. Owing to this jurisdictional fact, asserted Mr. Mandele, the appropriate remedy is to dismiss the Plaint. He prayed for this court to do so with costs.

As for the second limb of objections, Mr. Mandele reiterated his earlier submission and insisted that the facts in the Plaintiff disclose a cause of action based on employment relations between the parties. With regard to the claims of salary arrears and other monthly payments in the Plaintiff, the learned counsel stressed that the Plaintiff should bring the action within the ambit of a labour dispute, hence effectively ousting the jurisdiction of this court.

Additionally, the learned counsel submitted that the fact that the plaintiff is/was a shareholder does not rule out the possibility of him being employed by the company, because the company, being an incorporated entity, assumes legal personality and becomes independent from its shareholders. He further contended that the company can legally employ any one of its shareholders, entitling them to monthly payments, as the plaintiff is claiming, though mistakenly.

Regarding the argument that this court lacks pecuniary jurisdiction, Mr. Mandele reiterated that the aggregated claims of the Plaintiff, as per the prayers in his Plaintiff was well below the jurisdiction of the High Court.

It was Mr. Mandele's submission further that the Plaintiff's attempts to seek refuge under section 21(1)(a) of the **Civil Procedure Code** [Cap. 33 R.E 2019] by pleading transfer of the case by reasons of want of jurisdiction is flawed. He argued that the move is now being billeted as an objection is in place and needs to be decided upon. He stressed that the cited section only applies when the move is initiated in the absence of the Preliminary Objection. He maintained that since the Preliminary Objection has been

raised and is being heard, albeit through Written Submissions, the section is not applicable.

To fortify his argument, he referred this court to the decision of the Court of Appeal decision in **STANDARD CHARTERED BANK & ANOTHER VERSUS VIP ENGINEERING & MARKETING LIMITED AND OTHERS** Civil Application No. 222 of 2016 (Unreported), which prohibits any preemptive move against Preliminary Objection once it has been raised. Based on the reasons above, as well as those in the submission in-chief, Mr. Mandele humbly moved this court to find the objections meritorious and proceed to uphold them, dismissing the plaint with costs.

I have dispassionately considered the written submissions both for and against the preliminary objections. At the outset, I am inclined to accept the Defendant's request to abandon the second and third limbs of the preliminary objections raised. Before delving into the determination of the remaining points of the preliminary objection, it is imperative to address an important issue that emerged during the hearing.

Mr. Lekey requested the transfer of this matter to a competent court in the event that the objections are sustained. This prayer is untenable and therefore denied. It is a settled position of the law in our jurisdiction that once a notice of preliminary objection is lodged in court, the opposing party cannot pray for the withdrawal of the matter or request a transfer or rectification of the alleged defect.

As they say in football the game must proceed, there is no escape ***mechi lazima ichezwe hakuna kuweka mpira kwapani.*** The proper

procedure is for the court to hear the objections and decide on their merits. The Apex Court of our jurisdiction in the case of **STANDARD CHARTERED BANK & ANOTHER VERSUS VIP ENGINEERING & MARKETING LIMITED AND OTHERS** (supra) pp 8-9 proffered the following binding position:

"It is a trite principle that when a party raises a preliminary objection in a case, the other party cannot be allowed to rectify the defect complained of by the objecting party. This is because doing so would amount to pre-empting the preliminary objection."

In the light of the above decision, the prayer by Mr. Lekey to transfer this matter to the competent court pursuant to section 21(1) (a) of the **Civil Procedure Code** is unacceptable because it is not the proper remedy in case the preliminary objection will be sustained. In other words, the learned counsel tried to pre-empt this court on the remedy to be issued.

Premised on the above standing, I move on to determine the merits or otherwise of the preliminary objection. Regarding the first objection, which states that the Plaint is irregular and legally defective due to improper procedure and form, I have carefully reviewed the Plaintiff's Plaint and I am convinced that its contents and the reliefs sought by the Plaintiff are solely related to **managerial complaints concerning the company's management and affairs**, which are alleged to have been conducted in a manner unfairly prejudicial to the Plaintiff's interests.

For instance, in paragraph 4 of the Plaint, the Plaintiff claims payment of TZS. 36,400,000/= as unpaid monthly dues from July 2020 to February 2021. Additionally, the Plaintiff challenges the first Defendant's act of transferring the company's properties to the second Defendant without

consent. Paragraph 5 covers the incorporation of the second Defendant as a Limited Company, continuing the business of production and supply of water under the brand name Ndanda Spring Water, and it also addresses the number of shares held by the Plaintiff and the first Defendant.

Paragraph 6 of the Plaint highlights the successful operation and management of the business under the Plaintiff's supervision until July 2020. Furthermore, paragraph 7 discusses a special resolution passed during an extraordinary meeting on 14/7/2020, which ordered the Plaintiff to hand over the industry's operations and all related documents.

Moreover, in paragraph 9 of the Plaint, the Plaintiff alleges that on 17/12/2020, through his lawyer, he issued a notice requesting an extraordinary meeting to be held on 23/12/2020 to discuss his position and affairs within the second Defendant. Additionally, in paragraph 12 of the Plaint, the Plaintiff alleges that he has been completely excluded from participating in the business and operations of the second Defendant to the extent that the first Defendant refuses to even meet and discuss company affairs despite several reminders. The reliefs claimed from (i-iv) are closely related to the management and affairs of the second Defendant.

Based on the aforementioned contents of the Plaintiff's Plaint and the reliefs sought, I am convinced that the Plaintiff's complaints solely pertain to the management and affairs of the second Defendant, which are alleged to have been prejudiced by the Defendants. All these fall **within the purview of Section 233(1) of The Companies Act [Cap. 212]**, which governs the means of bringing or instituting the Plaintiff's complaints against the Defendants.

Moreover, I subscribe to the position taken by my esteemed senior

brother, His Lordship Mruma, J, in the case of **JOHN O. NYARONGA VS. CAPTAIN FERDINAND PONT & 2 OTHERS** (supra), where it was stated that the word 'may' used in section 233(1) signifies the right of a member of a company to either initiate an action or choose not to do so. However, once the decision to initiate an action is made, then, in accordance with **sections 73(2) and 233(1) of the Companies Act, 2002**, the action must be brought in the form of a petition. For the sake of clarity, section 73(2) of the Companies Act reads as follows:

'(2) An application under this section shall be made by petition within thirty days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.'

In the matter at hand, one of the Plaintiff's complaints is regarding the transfer of the company's properties by the second Defendant and the need for audits of the company's accounts and assets in order to enable the Plaintiff to dispose of their shares in the company. Section 233(1) should be interpreted in conjunction with section 73(2) of the Companies Act. Therefore, as articulated by Mr. Mandele, the present suit should have been filed in the form of a petition and not a plaint.

Furthermore, based on the aforementioned reasons, the argument that the Plaintiff was required to file a labor dispute to claim unpaid dues from the second Defendant is unfounded. This is because the relationship between the parties involved does not pertain to an employer-employee relationship; rather, their relationship is based on their status as shareholders of the second Defendant.

The contention by Mr. Mandele that a director can also be a salaried

employee is valid, but evidence would be required to prove such a relationship. It goes without saying that once production of evidence arises, the purported preliminary point of objection ceases to be one. Preliminary objections must be purely on a point of law.

The above incongruity notwithstanding, I subscribe to Mr. Mandele's submission and reasoning that initiating the suit through a plaint instead of a petition renders it legally flawed. Consequently, I hereby strike it out with costs.

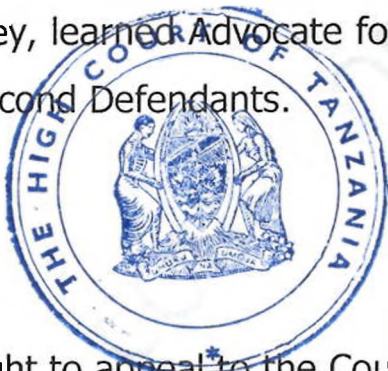
It is so ordered.




E.I. LALTAIKA
JUDGE
27.06.2023

Court:

Ruling delivered this 27th day of June 2023 in the presence of Mr. Stephen L. Lekey, learned Advocate for the Plaintiff and a representative of the first and second Defendants.




E.I. LALTAIKA
JUDGE
27.06.2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.




E.I. LALTAIKA
JUDGE
27.06.2023