

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

AT BUKOBA

MISC. CIVIL CAUSE NO. 01 OF 2023

IN THE MATTER OF COMPANIES ACT NUMBER 12 OF 2002

IN THE MATTER OF UNFAIR PREJUDICE

IN THE MATTER OF ARAB GLOBE INTERNATIONAL LIMITED

BETWEEN

BUGSHAN TANZANIA COMPANY LIMITED PETITIONER

VERSUS

HILAL SEIF HAMAD 1ST RESPONDENT

ABDALLAH SEIF HAMAD 2ND RESPONDENT

NEELAKANTAN S.S. SUBBRAMANIAN 3RD RESPONDENT

ARAB GLOBE INTERNATIONAL LIMITED 4TH RESPONDENT

RULING

Date of Last Order: 24.08.2023

Date of Ruling: 25.08.2023

A.Y. Mwenda J.

This ruling is in respect of the objection to the tendering/admissibility of document.

In the cause of hearing this petition, the petitioner's side vide PW.1 prayed to tender three documents. These are the 4th Respondent's Form 55a -Return of Allotment of shares dated 23rd August 2016 allotting 4,000 ordinary shares to the petitioner; Tax clearance Certificate Number 0141055 dated 14-03-2017, The 1st respondent transferring 500 ordinary shares to the petitioner; Tax Clearance Certificate Number 0141054 dated 14-03-2017, the 2nd respondent

transferring 500 ordinary shares to the petitioner. The prayer to tender the said documents was challenged/objected by Mr. Kabunga, learned Counsel for the Respondents on the grounds that they are photocopies and are about to be tendered contrary to section 63 and 66 of the Evidence Act [CAP 6 R.E 2019]. In his argument Mr. Kabunga submitted that if the witness is intending to tender the photocopy on the ground that the original is in possession of the 1st and 2nd respondents, he ought to have filed a notice to produce as provided for under Section 68 of the Evidence Act [CAP 6 R.E 2019]. According to him, instead of directing the notice to produce to the 1st and 2nd respondent, the petitioner issued a notice to produce to nobody and as such that notice does not qualify to be referred to as notice to produce under S.67 and 68 of the Evidence Act [CAP 6 R.E 2019]. In support to this point, he cited the case of DANIEL APAEL URIO V. EXIM (T) BANK, CIVIL APPEAL NO. 185 OF 2019 at page 13 to page 15. Further to that, Mr. KABUNGA submitted that the said documents are even not certified as they are a mere photocopy. He then concluded by praying his objections to be sustained.

In reply, Mr. Balomi, the learned Counsel for the Petitioner said that the objection to the tendering of the said document is misconceived. He said that the intended exhibits are listed in the filed in the petitioner's notice to produce photocopies of the documents which was filed vide section 67(1) (c) (f) and 68(f) of the Evidence Act [CAP 6 R.E 2019]. He contended that the position is now settled that he who wishes to rely on the secondary evidence should issue

notice to the adverse party. He said that the circumstances stated under S. 67(1)(a) of Evidence Act [CAP 6 R.E 2019] does not align to the scenario submitted by Mr. Kabunga. He said that the document intended to be tendered were issued by TRA and BRELA which are authentic. On the other hand, Mr. Balomi prayed this Court to invoke oxygen principle vide section 3A of the Civil Procedure Code and admit the said documents. He concluded by submitting that the case cited of DANIEL APAEL URIO V. EXIM (T) BANK, CIVIL APPEAL NO. 185 OF 2019 is distinguishable.

In rejoinder, Mr. KABUNGA said that what he is contending is the admissibility of the said documents. He said that section 67(1) (c) and (f) of Evidence Act [CAP 6 R.E 2019] can be applied only when the original is destroyed and upon certifying the intended copy. He said that the petitioner ought to have complied with S. 68 of the Evidence Act [CAP 6 R.E 2019] which directs a party intending to use secondary document to firstly issue notice to produce to the adverse party. He said if the adverse party do not produce the same upon receipt of the notice to produce then he can rely on secondary evidence. Regarding the prayer by Mr. Balomi beseeching the Court to invoke oxygen principle, Mr. Kabunga said that, that cannot be applied to defeat the clear provisions of the law.

That being the summarized submission by the learned Counsel for the parties, the issue is whether the raised preliminary objection is meritorious.

It is trite law that the contents of document may be proved by either primary or secondary evidence. However, in order to rely on secondary evidence conditions, set under section 67 of the Evidence Act [CAP 6 R.E 2019] have to be met. In the instant matter such conditions were not met. During submission the learned Counsel for the petitioner said that the said documents are in possession of the 1st and 2nd respondents but the petitioner's notice to produce photocopies of the documents issued does not align with the requirements set under section 68 of the Evidence Act [CAP 6 R.E 2019]. As it was rightly submitted by Mr.Kabunga, if the document intended to be relied on is in possession of the adverse party, the one intending to use it has to issue a notice to produce to the adverse party and if the adverse party fail to so produce he can tender the same/secondary evidence. In the present matter, the so-called notice to produce does not qualify to be called as such as it is addressed to no body. Strangely while during the hearing, the petitioner's side alleged the said documents are in possession of the 1st and 2nd respondent, in the petitioner's notice to produce photocopies of documents dated 4th August 2023 he said that he was going to produce copies of documents relied upon since the originals are not accessible without telling how.

On the other hand, Mr.Balomi prayed the court to invoke the principle of overriding objectives, however this principle cannot be applied when there are express requirements set by the law. In the case of JERMIAH K. KUNSINDAH

V. LEILA JOHN KUNSINDAH, Civil Appeal No. 260 of 2017, the Court of Appeal held:

“The overriding objective principle was not meant to be a magic wand for those who disregard procedural rules.”

Also, in NJAKE ENTERPRISES LTD V. BLUE ROCK LTD AND ANOTHER, CIVIL APPEAL No. 60 of 2017, it was held inter alia that:


“The overriding objective principle cannot be applied blindly on the mandatory provision of the procedural law which goes to the very foundation of the case.”

On account of what transpired in this case, it is my considered view that the error committed by the petitioner’s side cannot be cured by oxygen principle.

In the event, I find the objection raised meritorious and I sustain it as the intended documents are inadmissible.

It is so ordered.




A.Y. Mwenda
Judge

25.08.2023

Ruling delivered in chamber under the seal of this court in the presence of Mr. Alex Balomi learned counsel for the petitioner and in the presence Mr. Aaron Kabunga learned counsel for respondents.



A.Y. Mwenda
A.Y. Mwenda

Judge

25.08.2023