

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**AMENDED PETITION CAUSE NO. 2 OF 2023**

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

**AND**

**IN THE MATTER OF THE AFRICAN UNDER CANVAS SAFARIS LIMITED**

**AND**

**THE MATTER OF PETITION BY**

**MOHAMED SAAD BIN JUNG.....1<sup>ST</sup> PETITIONER**

**ASMA SANGEETA JUNG.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**ALLY KEA ALLY.....1<sup>ST</sup> RESPONDENT**

**SARAH MOSSES KAISOE.....2<sup>ND</sup> RESPONDENT**

**THE AFRICA UNDER CANVAS SAFARIS LIMITED.....3<sup>RD</sup> RESPONDENT**

**NYUMBU LUXURY COLLECTION LIMITED.....4<sup>TH</sup> RESPONDENT**

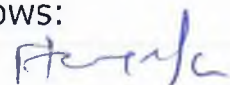
**BASHIRI IBRAHIM MALLYA.....5<sup>TH</sup> RESPONDENT**

**RULING**

14/08/2023 & 12/09/2023

**MWASEBA, J.**

This is a ruling on the preliminary objection raised by the learned counsel for the respondent on the points of law as follows:



- 1. That the amended petition is fatally defective for being constructed beyond court order made on 5<sup>th</sup> April, 2023 before hon. Mwaseba J. In alternative the amended petition is fatally defective for joinder of parties without obtaining leave of the court*
- 2. That the amended petition is bad in law for containing a defective jurat of attestation made contrary to the Notary Public and commissioner for oaths, Cap 12 R.E 2019 the Laws of the United Republic of Tanzania*

During the hearing of the preliminary objection Mr. Boniface Joseph learned counsel represented the petitioners, while Mr. Daniel Lyimo learned counsel appeared for the respondents. The preliminary objection was disposed of by way of written submission.

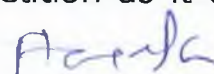
Submitting in support of the first point of objection, Mr. Lyimo stated that the learned counsel for the petitioners asked the court to effect the amendment based on the discoveries of new facts. However, the amendment to the petition has gone beyond the court order. He clarified that the previous petition had two petitioners and three respondents. In his amended petition he has introduced new parties which were not forming party to the previous petition. He argued that, amending the petition beyond court order is disrespectful to the court order, the



consequence to that is to struck out the amended petition. He bolstered his argument by referring this court to the Court of Appeal decision in **Karori Chogoro v. Waitihache Merengo**, Civil Appeal No. 164 of 2018 [2022] TZCA 83.

Mr. Boniface strongly faulted the argument that the amended petition violated the court order. He argued that, leave to amend the petition was granted without any restriction including any restriction with regard to joining parties. This is due to the fact that leave was granted on the basis that new vital and material facts had been discovered which necessitated the amendment. Naturally, such a leave would include leave to join such parties that may be involved in such facts. Without this, it is nearly impossible for the petitioners to properly seek relief in the context of those facts. He insisted that the leave that was granted was never restricted.

Submitting on the issue of joinder of parties, he referred this court to **Order 1 Rule 9 of the Civil Procedure Code**, Cap 33 R.E 2019 which stipulates that a suit is not defeated by reason of non-joinder or misjoinder of parties. Therefore, the prayer for striking out the petition is untenable. He was further of the view that the 1<sup>st</sup> point of objection is a mere technical point that cannot dispose of the petition as it does not



qualify the factors set by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** (1969) E.A 696 in which it was settled that the preliminary objection should be purely on a point of law. Lastly, he urged this court not to be tied up with technicalities. See **Article 107A (2) (b) and (e) of the Constitution of the United Republic of Tanzania**, and **Section 3A (1) of the Civil Procedure Code**. Therefore, he was of the view that the 1<sup>st</sup> limb of preliminary objection is devoid of merit and should be overruled.

Submitting on the 2<sup>nd</sup> limb of objection, Mr. Lyimo averred that the jurat or oath made in the amended petition was made under **Section 11 of the Notaries Public and Commissioners for Oaths Act** by the person under the umbrella of foreign service. He was of the view that the law under that provision insists that a person needs to have qualification to practice as notaries public and commissioners for oaths in Tanzania. He referred this court to Section 3 of the mentioned Act which provides for qualification of a person to practice as notaries public and commissioners for oaths. Further to that, Mr. Lyimo complained that looking at the jurat of attestation of the amended petition it does not contain signature of the attesting officer, the rubber stamp placed is not

of the notaries public and commissioners for oaths, designation is not of the advocate rather a minister. So he was of the view that the same is in violation of the laws and jurisprudence of this country.

Mr. Boniface replied to the 2<sup>nd</sup> point of objection that the learned counsel for the respondent has misinterpreted the provisions of **sections 10 and 11 of the Notaries Public and Commissioners for Oaths Act.**

He was of the view that they have complied with the above provision to the fullest as the notarization of the petition at hand was done in accordance with **Section 11 (1) and (2) of the Notaries Public and Commissioners for Oaths Act.** This provision empowers a foreign service officer of Tanzania to attest and administer oaths. He further stated that **Section 3 (1) (a) and (b) of the Act** does not impose the requirement that a person administering an oath must be entitled to practice as an advocate of the High Court. It was his contention that looking at the jurat of attestation of the amended petition it can be clearly observed that there is a handwritten name of the foreign officer who administered oath, his signature, his designation, place where oath/affirmation was taken and the rubber stamp.





Having gone through the submissions from both parties and the record, the pertinent issue that calls for my determination is whether the preliminary objection has merit or not.

Starting with the first point of objection, the record shows that on 3<sup>rd</sup> day of May, 2023, Mr. Boniface learned counsel prayed orally before this court to amend their petition as they discovered new facts. He clarified that after filing this matter, the petitioner had discovered that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have joined together and formed a new entity namely Nyumbu Luxury Collection Ltd which is doing the same business done by the 3<sup>rd</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have taken over better party of the assets owned by the 3<sup>rd</sup> respondent which is subject to the pending petition in this court. More to that, through a new entity, the 1<sup>st</sup> and 2<sup>nd</sup> respondent have taken over all the established business and goodwill of the 3<sup>rd</sup> respondent. Therefore, he prayed before this court to amend his petition in order to include all these discovered facts and join this new entity for the purpose of determining the real question of the dispute between the parties.

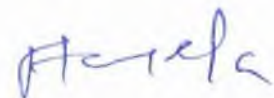
On his side, Mr. Lyimo had no objection to the prayer and so the court granted it and ordered the same to be filed within 14 days. I appreciate, that the petitioners filed their amended petition timely.



Through this order, the court expected the petitioner to join the 4<sup>th</sup> respondent namely Nyumbu Luxury Collection Ltd and to amend facts therein to reflect the said new entity. However, the petitioner went further to add the 5<sup>th</sup> respondent namely Bashiri Mallya who was not subject for his prayer and he did the same without the leave of the court. Therefore, I agree with Mr. Lyimo that the amendment of the petition has been effected in contravention of the court order.

It is settled that the court may at any stage in the proceedings, allow either party to alter or amend their pleading. See **Order VI Rule 17 of the Civil Procedure Code**, Cap 33 [R. E 2019]. The said amendment can only be done to the extent allowed by the court. This position was well stated in the case of **Jovent Clavery Rushaka and Another v. Bibiana Chacha**, Civil Appeal No. 236 of 2020 (unreported), where it was stated that:

*"It is settled law that a pleading can be amended at any stage of the proceedings **only to the extent allowed by the court** on such terms as may be just and such amendment should be limited to what will be necessary for determining the real question in dispute between the parties."* (Emphasis added)



See also the cases of **Salum Abdallah Chande t/a Rahma Tailors v. The Loans and Advances Realization Trust (LART) and Two Others**, Civil Appeal No. 49 of 1997 (unreported) and **Paulo Elias Maro v. Amin Kibwana Kondo**, Civil Case No. 11 Of 2021 HC DSM (unreported)

From the above settled principle, it goes without saying that amendment to the pleadings can only be done upon the leave of the court and must be restricted to the court directives. The petitioner herein asked the court for leave to amend the pleadings by adding new discovered facts and joining the new entity namely Nyumbu Luxury Collection Ltd. The court granted leave to the extent of his prayer and expected to have a total of four respondents. However, in his amended petition he has joined the fifth respondent namely Bashiri Mallya who was not subject for his prayer and an order of the court. Thus, I concur with Mr Lyimo learned counsel that the amendment has contravened the court order and ought to be struck out. The Court of Appeal in the case of **Karori Chogoro v. Waitihache Merengo**, (Supra), had this to say:

*"Court orders should be respected and complied with. Courts should not condone such failures. To do so is to set bad precedent and invite chaos. This should not be allowed to occur..."*





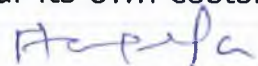
A similar position was held by this court in the case of **Daud Godluck Sollo v. Dar es Salaam Institute of Technology Saccoss Ltd** (Misc. Application 197 of 2022) [2022] TZHCLD 930 and **Mustaquim Murtaza Darugar na Wanzagi Selemani Makongoro na Wenzake 2** (Maombi Marejeo 43 of 2022) [2022] TZHCLD 802.

Being guided by the above settled principle, I find that the first limb of objection has merit and the amended petition deserves to be struck out.

Coming to the 2<sup>nd</sup> limb of objection, the same should not take much of my time. Both parties agree that the jurat of attestation of the amended petition is made under **Section 11 of the Notaries Public and commissioners for Oaths**. As it was well presented by Mr. Boniface the provision empowers a foreign officer to administer oaths. There is no where the provision requires the said officer or minister to be a practicing advocate. **Section 11 (2)** of the Act directs that the seal to the jurat is not subject to be questionable. Looking at the jurat of attestation of the amended petition it has met the requirement of section 8 of the Act. Thus the 2<sup>nd</sup> limb of objection has no merit.

Since the 1<sup>st</sup> point of objection was sustained, I find that the preliminary objection has merit. Hence, the amended petition is hereby struck out.

To reduce multiplicity of cases, each party should bear its own costs.



Ordered accordingly.

**DATED** at **ARUSHA** this 12<sup>th</sup> day of September, 2023.



A handwritten signature in blue ink, appearing to read "N.R. Mwaseba".

**N.R. MWASEBA**

**JUDGE**