

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR-ES-SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL CAUSE NO. 589 OF 2023

**IN THE MATTER OF AN APPLICATION MADE UNDER SECTIONS 281 OF THE
COMPANIES ACT**

AND

**IN THE MATTER OF COMPULSORY WINDING UP OF KAHAMA OIL MILLS
LIMITED**

BETWEEN

EQUITY BANK (TANZANIA) LIMITED 1ST PETITIONER

EQUITY BANK (KENYA) LIMITED 2ND PETITIONER

VERSUS

KAHAMA OIL MILLS LIMITED RESPONDENT

RULING

S.M. MAGHIMBI, J:

The petition beforehand was lodged by the two applicants moving the court to make orders as follows:

1. That the respondent be wound up by the Court under the provisions of the Companies Act, No. 12 of 2002.

2. That the official liquidation be appointed as Liquidator of the Company to take possession of the assets, properties, books, Accounts and records of the Company forthwith.
3. Costs of the petition be provided for.
4. The Court appoints Mr. Shakibu Nsekela of Perterms Consultants Limited as a liquidator.
5. Further, orders be made and directions be given by this Honorable Court as may deem fit and proper.

On the on the 5th October 2023, the respondent lodged a notice of preliminary objection on point of law that:

- (i) The petition is not accompanied with a resolution of the Board of Directors of the Petition
- (ii) The petition was misconceived and an abuse of court process in view of the presence of Commercial case no 7 of 2023 filed on 3rd July 2023
- (iii) The statutory Notice of 21 days was issued after the filing of Commercial Case No. 78 of 2023 which was filed on 3rd July 2023 and after the filing of the counter Claim on 26th July 2023.
- (iv) The petition is fatally defective

On the 20th day of October, 2023 when this matter came for necessary orders, this court ordered that the Preliminary Objections be argued by way of written submissions. Before me, the petitioner was represented by Mr. Shalom Msakyi, learned advocate while the respondent was represented by Ms. Halima Semanda, learned advocate.

In disposing the objections, I will begin with the 2nd to 4th points of objections which the respondent opted to argue them together. In principle, the points are challenging the petition on ground that it is misconceived and abuse of court process in view of the presence of Commercial Case No 78 of 2023 filed on 3rd July 2023. Ms. Semanda submitted that it is undisputed fact the Petitioner and the Respondent are litigating on the pending matter at the High Court of Tanzania (Commercial Division) at Dar es Salaam in Commercial Case No. 78 of 2023 ("the Commercial Case"). That in the said Commercial Case, the Respondent disputes the existence of debt amounting to USD 46,658,396. Comparing the cause of action there and the subject of this petition, Ms. Mmanda submitted that the basis and facts given in this petition by the Petitioner emanates from the dispute stated in Commercial Case through which it has not been resolved and determined by this Court.

She went on submitting that by way of Counterclaim, in the Commercial Case, the Petitioners are praying for payment of USD 46,658,396

from the respondent. Further that the Petitioners are cognizant that on July 5th, 2023, an injunction was granted by the court, preventing them from taking recovery measures until the final determination of Commercial Case. Referring to the provision of Section 8 of the Civil Procedure Code [Cap. 33 R.E 2019], she submitted that the provisions restrict other courts of the same level to try or entertain any suit already tried and adjudicates by another court of competent jurisdiction over the same subject matter as between the same parties. Her conclusion was that pursuing this petition at this stage would be an abuse of the court process, considering the ongoing proceedings in Commercial Case.

On the statutory Notice of 21 days, it was Ms. Semanda's argument that the petitioner filed the notice issued after the filing of Commercial Case filed on 3rd July 2023 and after the filing of the claim on 26th July 2023, is fatally defective. She submitted that the provision of Section 280(a) of the Companies Act defines situations where a company will be deemed unable to pay its debts. That it includes, when a notice is served upon a company making a demand of a debt exceeding fifty thousand Tanzanian shillings then due and requiring the company to pay the same and the company has for a period of twenty one days neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. Further that

the value of the company's 3 assets is less than the amount of its liability taking into account the contingent and prospective liabilities of the company.

To this end, she submitted that on the 30th of July 2023, the Petitioners served a statutory demand lasting 21 days, aiming to recoup a debt totaling USD 46,658,396 from the Respondent. That the debt is currently under scrutiny in the Commercial Case. In that case, she submitted, the Respondent contests the existence of the USD 46,658,396 debt, and the Petitioners, in turn, have filed a counterclaim on 26th July 2023, seeking the court's intervention for the recovery of the same amount.

Ms. Semanda submitted further that the act of issuing a statutory demand of 21 days to the Respondent, while there is already a case filed, and the Applicant has filed a counterclaim can be considered as overtaken by events. This is because the Petitioners should have done so only if the matter had not been filed already, and there was no pending dispute in court regarding the debt of USD 46,658,396. She then cited Longman Dictionary of contemporary English where the meaning of "overtaken by events" was defined as when the situation changes so that your plans or ideas are not useful anymore.

She submitted that as a result, the petitioners' objectives and intentions to serve a statutory demand notice of 21-day to the Respondent

have lost their significance. She then cited the case of **Grey Investment Company Limited Vs Hashim Ally Sechonge And Another, Misc. Land Application No. 396 Of 2018**, where this court, Land Division at Dar es salaam held that;

"In Consequence, even though both the judgments the subject matter of the intended appeal and the present application preceded the amendment at hand, the applicants intended appeal would no longer be subject to obtaining leave of the High Court to Appeal to this court. In the premises the Applicants present pursuit for extension of time to apply for leave to Appeal is of no useful purpose, it has been overtaken by events,

It was Ms. Semanda's conclusive prayer that this application for the petition be struck out with costs for the same having been initiated without adhering to the rules and procedures through which the Court can act upon it and determine it on merits.

In reply, Mr. Msakyi submitted that winding-up proceedings specifically deals with insolvency issue while civil suit determine the general rights of the parties. Hence, these are distinct recourses provided for under the law. He then argued that since jurisdiction is a creature of the statute and that

this court sitting as a Company Court is vested with the requisite jurisdiction to determine the matter. That the Respondent cannot choose for the petitioner if the jurisdiction of this court is not barred by the statute in explicit terms. He cited a decision of the Court of Appeal in the case of **SCOVA Engineering S.P.A & Another Vs. Mtibwa Sugar Estates Ltd and 3 Others, Civil Appeal No. 133 of 2017** where the court held at page 12 that;

"As a starting point, we wish to express our full agreement with the statement of principle by the learned counsel for the parties, based on Theodore Wendt (supra), that the jurisdiction of the High Court of any court for that matter, having been conferred by statute, it is not capable of being ousted by agreement of the parties except by statute in explicit terms". [Underlined for Emphasize]

On the Respondent's submissions that Section 280 (a) of the company Act that was used to issue 21 days' notice to the Respondent whilst there is another case filed under commercial Case No. 78 of 2023 and that the prayers are abuse of court process, his reply was that the cited case of *Grey investment Ltd v Hashim Ally, Sechinga Supra* is inapplicable as it involves an application for extension of time and leave to appeal with no mention at

all of winding up proceedings or contain any issues related to this present matter.

Mr. Msakyi then argued that the presence of another case does not preclude the issuance of a notice or filing of a winding up Petition as the Petitioner herein as a creditor has a remedy to file for an application for stay of proceedings under section 283 of the Companies Act. That the Notice issued and the pending case are very two dissimilar cases and procedure hence cause no injustice. He concluded that this point of objection is somewhat similar to the above already submitted objection and it is entirely argumentized. That this particular submission is based on facts and allegations which is to be addressed on the hearing the petition in merit as submitted above. He prayed for the objection to be overruled with costs.

I have heard the submissions of both parties and on the onset, I am in agreement with the Counsel for the respondent that the current petition is an abuse of process. Much as I am in agreement with Msakyi's contention that that the presence of another case does not preclude the issuance of a notice or filing of a winding up Petition, however, in determining whether parallel proceedings of a Civil Suit and that of a winding up may be concurrently determined, the court must see whether the petition is not presented ostensibly for a winding-up order; but really to exercise pressure.

In such cases, the subsequent winding up petition will be dismissed, and may be stigmatized as a pure abuse of the process of the Court and the remedy will be to dismiss such petitions.

On the other hand, in the case where a debt is not disputed on some substantial ground, the winding up petition may be determined and order be made thereto. The rationale behind is that although a winding up petition is an appropriate remedy and a mode of execution against a company unable to pay its debt, it is not an alternative to the ordinary procedure for realization of the debts due from the company.

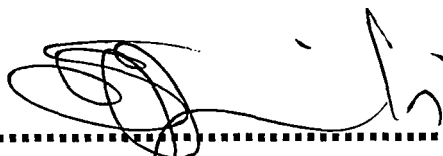
In the case at hand, since, the respondent/creditor had already resorted to the civil suit, and a counterclaim filed thereto, the court has discretion to dismiss the petition. What the court has to carefully consider is whether the petition for winding-up cannot be used as a pressure tactics, where a suit has already been instituted for recovery of debt, under such circumstances, like is the case at hand, the proceeding are in the nature of parallel proceedings in respect of the same cause of action. As a such, continuing with the current course should not be considered by this court so to avoid conflict of jurisdiction of findings by two parallel courts of competent jurisdiction.

It is undisputed that at the time when the current petition was lodged in this court there is a pending Commercial Case at the Commercial Court, the cause of action and subject matter therein is the same subject matter that the petitioner is moving the court to wind up the respondent. The amount of debt is in vigorous contention between the parties herein before the Commercial Court. Therefore on the face of records there are parallel litigations on the same subject matter in the same court sub-detailed in different registries. Since the Commercial Case was lodged before this petition, it is obvious that the petition beforehand will have an effect of pre-empting the Commercial Case on the amount of debt to be recovered and the recovery machinery, hence an abuse of process.

For the reasons stated above, the petition before me, being a pure abuse of process is hereby struck out with costs awarded to the respondent.

Dated at Dar-es-Salaam this 20th day of March, 2024




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S.M. MAGHIMBI
JUDGE