

**IN THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM**

MISC. COMMERCIAL CASE NO.56 OF 2009

IN THE MATTER OF THE COMPANIES ACT, CAP.212 R.E 2002

AND

**IN THE MATTER OF WINDING UP THE FRAMBE COMPANY LTD
(COMPANY NO.63222)**

BETWEEN

MBEMBETU NDIKWEGEPETITIONER

AND

FRAMBE COMPANY LTDRESPONDENT

Date of hearing: 30/06/2011

Date of final order: 30/06/2011

Date of judgment: 02/09/2011

JUDGMENT IN PETITION

MAKARAMBA, J.:

This is a judgment on a company winding up petition the Petitioner Mr. MBEMBETU NDIKWEGE, lodged in this Court on the 12th day of August 2009. In this Petition, the Petitioner is asking for order of this Court winding up the Respondent Company, FRAMBE COMPANY LIMITED. The Petition has been preferred under the provisions of section 275, 279(1)(e) and 281(1) of the *Companies*

Act, Cap.212 [R.E. 2002] and Rule 3.2(1) of the Companies (Insolvency) Rules 2003. The Petitioner is seeking for the following orders:

- (i) *That Frambe Company Limited may be wound up by the Court under the provisions of Section 279(1)(e) of the Companies Act, Cap.212 R.E 2002.*
- (ii) *That such other orders may be made as the Court thinks fit.*

I wish to state here at the outset that the provisions of Rule 3.2(1) of the Companies (Insolvency) Rules 2003, the Petitioner cited in the Petition are inapplicable since they are yet to be operational. As such in proceedings for winding up a company the applicable rules are still the *Companies (Winding Up) Rules, 1929*.

As could be gathered from the pleadings, the Respondent Company, FRAMBE COMPANY LTD (the Respondent Company) is a private company incorporated in Tanzania on the 29th day of November, 2007, with Mr. Mbembetu Ndikwege, the petitioner, and Mr. Francesco Gandini as its shareholders, the former being a majority shareholder with 51% of shares, while the latter being a minority shareholder with 49% of the shares. The principal objective for establishing the Respondent Company as per its Memorandum and Articles of association was among other things, to acquire projects associated with hotel, apartments, farming, buildings, shares

and land either by purchase, lease, exchange or otherwise in Tanzania.

In this winding up proceedings, the Petitioner is represented by Mr. Mbwambo, learned Counsel while Mr. Wassira, learned Counsel is representing the Respondent Company.

The grounds for the winding up of the Respondent Company as could be gleaned from the Petition are as follows:

- (a) *That there is long going dispute among the shareholders as to the ownership and management of the properties and business of the company.*
- (b) *That the incompatibility of character and the difference between the shareholders/directors is so serious that they are unable to convene a shareholder's or Board meeting or to make a decision in accordance with the requirements of laws and articles of the company.*
- (c) *That there is a serious disagreement between the Petitioner and Francesco Gandin who are the only members and shareholders of the Respondent's Company.*
- (d) *That the two shareholders/Directors are at a dead lock on all the issues pertaining to the company.*
- (e) *That the two active directors are not at talking terms, the company is unable to function at all in accordance with its Memorandum and Articles of Association and laws of the land.*
- (f) *That the said Francesco Gandin has been acting and making serious decisions unilaterally contrary to the Memorandum and Articles of Association or the laws of the country.*

- (g) *That the shareholders have even failed to meet and discuss the amount of capital that should be credited as paid that should be credited as paid up capital, and that*
- (h) *That any attempts to resolve the misunderstanding in an amicable way have proved futile to the date of filing this suit.*

From the pleadings, the Petitioner is seeking the Respondent Company to be wound up by this Court due to existence of some irreconcilable differences and incompatibility between the parties. It is the claim of the Petitioner that the parties Mr. Mbembetu and Mr. Francesco Gandini, the two sole directors and shareholders of the Respondent Company, have reached a point that they cannot hold any constructive talks between them on how to manage and carry on the business of the Company and hence the Court is being sought by way of an order to wind up the Respondent Company.

The record shows that the Petitioner, Mr. MBEMBETU NDIKWEGE and Mr. FRANCESCO GANDINI, are the only members, shareholders and directors of the Respondent Company. They have agreed that the Respondent Company be wound up by an order of this Court. However, they are not in agreement as to the provisions of the law under which the Respondent Company should be wound up. The Petitioner insists that the Respondent Company should be wound up under section 279(1)(e) of the Companies Act, Cap.212 [R.E. 2002]. The Respondent maintains that the Respondent

Company should be wound up under section 279(1)(b) and (e) of the Companies Act Cap.212 [R.E. 2002]. I shall revert to consider this controversy in due course.

Judgment in this matter was fixed for the 16th day of February 2010. However, on that very day, Mr. Malima, learned Counsel holding the brief of Mr. Mbwambo, learned Counsel for the Petitioner, appeared and informed this Court that in the course of the Counsel for the Petitioner reading the submissions by Counsel for the parties, he has realized that there a number of allegations, which have not been well substantiated, as well as documents annexed, which are alleged to have been forged and hence in the circumstances, this Court be pleased to fix a date for hearing of the matter by way of adduction of evidence through witness testimony and documentary evidence, which prayer this Court duly granted and set the 30th day of June 2010 for the hearing.

At the hearing, the Petitioner summoned **MR. MBEMBETU MARTIN** who testified as **PW1** and **MR. CHRISTOPHER BUKE** who testified as **PW2**. The Respondent summoned **MR. FRANSISCO GADIN** who testified as **DW1**, **Mr. MAKOKO MUSA** who testified as **DW2** and Mr. **IBRAHIM SAID** who testified as **DW3**.

In his testimony, **PW1, MR. MBEMBETU MARTIN**, a businessman living at Bagamoyo Block B stated that he is holding a Company, Frambe Company Limited, the Respondent Company in this suit, which was incorporated on the 29th day of November 2007.

PW1 testified further that the Respondent Company was incorporated with two shareholders, Mr. Francesco Gandini and Mr. Mbembetu Ndikwege respectively, the sole directors of the Company, Mr. Mbembetu holding 51% of the shares, and Mr. Francesco 49% of the shares. PW1 testified further that the Company's name "**FRAMBE**" is a derivation from the name of its two shareholders, that is, Mr. Francesco (**FRA**) and Mr. Mbembetu (**MBE**). PW1 tendered in this Court the ***Memorandum and Articles of Association*** of Frambe Company Limited, **Exhibit P1** and ***Certificate of Incorporation*** of Frambe Company Ltd, **Exhibit P2**.

It was the further testimony of PW1 that the purpose for which the Respondent Company was established was to acquire lands and build houses as guest houses, hotels and bar etc. PW1 testified further that the Company successfully managed to hold lands and houses and that the Company has also been issued with a Letter of Offer of Right of Occupancy by the Land Officer at Bagamoyo Town on the 12th day of November 2008, which offer was duly signed by Mr. Mbembetu Martin and Francesco Gandini. PW1 tendered in this Court the Letter of Offer of Right of Occupancy, **Exhibit P3**.

PW1 testified further that the atmosphere at the Company is worse because apparently its two sole directors are not in talking terms with each other, and that they have even failed to convene a statutory meeting of the Company to discuss how its shares should be paid up. DW1 testified further that the Company has also failed to

employ lawyers, auditors and secretary for the same reasons and therefore the only solution is to wind it up.

On being cross-examined by Mr. Wassira, learned Counsel for the Respondent Company, PW1 testified that he (PW1) was taken in by Mr. Francesco Gandin to take care of all the activities of the Company in consideration for allotment of 51% of the shares of the Company. PW1 testified further under cross-examination that they (PW1 and Mr. Francesco) are not talking to each other because he (PW1) was thrown out of the Company by Mr. Francesco while he (PW1) is still its director. PW1 testified further that thereafter he (PW1) wrote a letter to Mr. Francisco disputing his being thrown out of the Company and being vacated from being the Company's director. PW1 testified further that Plot No.65 is different from Plot No.140 and 145 and further that Plot No.65 was acquired by the Company from the District Land Officer at Bagamoyo town after making a request.

PW2, MR. CHRISTOPHER GERVAS BUKE, who lives at Bagamoyo testified that he (PW2) knows both Mr. Mbembetu and Francesco who are jointly running a guest house and a bar in Bagamoyo. PW2 testified further that he (PW2) was told that Frambe Company Ltd was owned by both parties in this case.

DW1, MR. FRANSISCO GANDINI testified that he (DW1) knows Mr. Mbembetu, who he (DW1) invited to join him (DW1) four years ago. DW1 testified further that he (DW1) bought Plot No. 43/45 from one Mr. Patrick Manfred in 1997, and tendered "*Hati ya*

Mauziano ya Kiwanja Na. 43/45 Kitalu P. Magambani Bagamoyo' dated 10th day of October 1997, **Exhibit D1**. DW1 also tendered a letter with Refer. No.BAG/2471/2 from the Land Department at Bagamoyo dated the 8th October 1997, **Exhibit D2**. DW1 testified further that he (DW1) is living in the same Plot, Plot No.43/45 Block P at Bagamoyo.

DW1 testified further that he (DW1) entered into agreement with Mr. Mbembetu appointing him (Mr. Mbembetu) to oversee his (DW1's) properties on trust and tendered the ***Trust Agreement*** dated 19th April 2008 between Mr. Fransesco and Mr. Mbembetu, **Exhibit D3**. It was the further testimony of DW1 that sometimes in 2009 he (DW1) issued notice to Mr. Mbembetu to vacate from the Company and tendered a letter from Kishaluli & Company Advocates dated 11th June 2009, **Exhibit D4**. DW1 testified further that he (DW1) bought Plot No.43/45 before he (DW1) appointed Mr. Mbembetu to act as trustee for him (DW1). On being cross-examined by Mr. Mbwambo, learned Counsel for the Plaintiff, DW1 testified that he (DW1) has a permit to live in this country.

DW2, MR. MAKOKO MUSSA testified he (DW2) knows Mr. Mbembetu and Mr. Francesco, the former since 2006, and the latter before 2006. DW2 testified further that he (DW2) was working at the hotel of Mr. Francesco as a technician and that he (DW2) came to know of Frambe Company Ltd after the quarrel between Mr. Mbembetu and Francesco ensued. DW2 testified further that Mr. Mbembetu was assisting Mr. Francesco in his (Mr. Francesco's)

activities. It was the further testimony of DW2 that he (DW2) doubts the allegation that the plot under dispute was jointly purchased by Mr. Mbembetu and Mr. Francesco.

MR. IBRAHIM SAID, testifying as DW3 for the defence stated that he (DW3) has known Mr. Francesco since 2006 and Mr. Mbembetu since 2005. DW3 testified further that he (DW3) rented in the same house as Mr. Mbembetu, and that in 2006 Mr. Mbembetu shifted to the house of Mr. Francesco as at that time Mr. Francesco was looking for someone to take care of his (Mr. Francesco's) properties. DW3 testified further that the disputed Plot No.65 belongs to Mr. Francesco and that it was purchased even before Mr. Mbembetu shifting to the house of Mr. Francesco.

Let me now, having summarized the testimony of witnesses, also consider the closing submissions of learned Counsel for the parties. In his closing submissions, Mr. Wasira, learned Counsel for the Respondent submits that his client has no objection on the Company being dissolved. Mr. Wassira submits further that however, both section 279(1)(b) and section 279(1)(e) of the Companies Act Cap.212 [R.E. 2002] are applicable because since its incorporation the Company has never transacted any business. Mr. Wassira submits further that Mr. Mbembetu has been doing business in his name, a year before the Company was formed. Mr. Wassira submits further that some of the evidence tendered in this Court has been issued in the name Mr. Mbembetu, for example, the Tax Payer's Identification Number (TIN) dated 29th December 2006, the license

to run hostel issued on 23rd October 2007 and the licence to sale intoxicating liquors, all of which were issued before the Company was incorporated.

Mr. Wassira submits further that in 1997, Mr. Francesco had bought Plot No.43/45 from one Patrick Manfred, and as per **Exhibit P4**, a letter from Kishaluli & Company Advocates dated 11th June 2009, Mr. Mbembetu was taken in and joined the company to take care of the properties of Mr. Francesco and that Mr. Mbembetu accepted to be a trustee of the properties of Mr. Francesco including the Company itself and that cash which was in an account at the Tanzania Investment Bank (TIB). Mr. Wassira submits further that later, Mr. Mbembetu convinced Mr. Francesco to convert Plot. No.43/45 to Plot No.65 and a Letter of Offer was issued, and that Mr. Francesco was given a piece of paper which he signed outside the Land Offices.

Mr. Wassira submits further that Mr. Mbembetu despite being the majority shareholder of the Company, has not contributed anything towards its capital, and therefore all of the assets of the Company should remain to be the property of Mr. Francesco Gandin. Mr. Wassira submits further that since the two sole directors of the Company are not in talking terms, the Company should be wound up under the provisions of section 279(1) (b) and section 279(1)(e) of the Companies Act Cap.212 [R.E. 2002].

In his closing submissions, Mr. Mbwambo learned Counsel for the Petitioner, submits that the objectives of the company was to

acquire lands by way of purchase, to hold interest in hotels, apartments, farming, exploration, prospecting and mining and also to acquire land by way of lease or exchange. Mr. Mwambo submits further that on the 12th day of November 2008, the Company managed to acquire land located at Plot No.65 Block B in Bagamoyo Town and that the Company has erected hotel apartments, restaurant and bar which are now in operation.

Mr. Mbwambo submits further that **Exhibit D1** shows clearly that Mr. Francesco is the legal owner of Plot No.43/45, thus Plot No.65 Block B and Plot No.43/45 P are not the same, and should therefore be differentiated. Mr. Mbwambo submits further that the same goes for **Exhibit D2**, a letter of offer of right of occupancy referring to Plot No.43 and 45.

Mr. Mbwambo submits further that there is no any evidence adduced in this Court showing any payment or the whole process for the acquisition and development of the Company's properties. Mr. Mbwambo submits further that a company cannot be incorporated by a sole director as apparently shown in **Exhibit D3, the Trust Agreement** dated 19th April 2008 between Mr. Fransesco and Mr. Mbembetu. Mr. Mbwambo submits further that under Tanzanian laws Mr. Francesco being a foreigner cannot own land. Mr. Mbwambo submits further that the hotel business operating license is in the name of the Petitioner and that the Petitioner has been doing hotel business before the incorporation of the Company. According to Mr. Mbwambo this is therefore a fit case for the Court to exercise its

discretion on a just and equitable basis under section 279(1)(e) of the Companies Act Cap.212 [R.E. 2002]. In support of this contention, Mr. Mbwambo cites the decision of this Court by Hon. Kalegeya, J. (as he then was) in **ABDULMOUNIUM SALEH JIDAWI V. LUFT TRAVEL & CARGO LTD, Misc. Application No. 28 of 2003**, whose facts are on all fours with the case at hand.

On the evidence on record and from the witness testimonies given at the hearing of this matter and the closing submissions of Counsel for the parties, it is without much dispute that Mr. Francesco Gandin and Mr. Mbembetu Ndikwege jointly formed a Company, known as Frambe Company Ltd, the Respondent Company in this case, on the 27th day of November 2007 as per **Exhibit P1**, with Mr. Mbembetu Ndikwege as the majority shareholder holding **51,000** shares and Mr. Francesco Gandin holding **49,000** shares. The share capital of the Company is **TZS 500,000,000/=** (Say Five Hundred Million Tanzania Shillings) divided into 100,000 ordinary shares valued at **TZS 5,000/-** (Five Thousands Shillings) each. Both parties in this case being the shareholders and directors of Frambe Company Ltd have conceded on their failure to run the Company on the grounds that they are not talking to each other; that they have failed to hold statutory meetings; and that there is a serious disagreement between them as active directors of the Company. On the strength of the decision of this Court in the case of **ABDULMOUNIUM SALEH JIDAWI V. LUFT TRAVEL & CARGO LTD, Misc. Application No.28 of 2003** cited by Mr. Mbwambo in his closing submissions,

exposing similar reasons for winding up the company, I am at one with both Counsel for the parties and as conceded to by the parties in this proceedings, that Frambe Company Ltd. the Respondent Company in this Petition by an order of this Court be wound up as prayed by the Petitioner.

On the record on file, the two parties in this Petition however, are in disagreement over the provisions of the Companies Act, Cap.212 [R.E. 2002] under which the Company is to be wound up by this Court. Mr. Mbwambo, learned Counsel for the Petitioner on his part insists that the Company can only be wound up by the Court under the provisions of section 279(1)(e) of the Companies Act (Cap.212 R.E. since it has commenced business within a year of its incorporation. Mr. Wassira, learned Counsel for the Respondent on his part maintains that the Company be wound up by this Court under both the provisions of section 279(1)(b) and (e) of the Companies Act (Cap.212 R.E. 2002), since it has failed to commence its business within a year of its incorporation, and also that it is just and equitable that the Company be wound up.

Clearly, while both parties in this Petition seem to be agreeable that the winding up of the Company be proceeded with under section 279(1)(e) of the Companies Act [Cap.212 R.E. 2002], the Petitioner adds that only section 279(1)(b) instead of section 279(1)(e) of the Companies Act [Cap. 212 R.E. 2002] alone should be invoked by this Court in making an order for winding up the Company. As I intimated to earlier, apparently this is the only and main controversy in this

proceedings, the two parties in this Petition having been agreeable that the Company be wound up.

In the Petition, the Petitioner has asked this Court to wind up the Company under 279(1)(e) of the Companies Act Cap.212 [R.E. 2002]. The Respondent on his part is asking this Court for the Company to be wound up under section 279(1)(b)&(e) of the same Act. These two provisions are therefore central to this petition. Section 279(1) (b) of the Companies Act Cap.212 [R.E. 2002] provides as follows:

*"279(1) A company may be wound up by the court if–
(a)....(N/A)
(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year."*

Section 279(1)(e) of the Companies Act Cap.212 [R.E. 2002] on the other hand stipulates as follows:

*"279(1) A company may be wound up by the court if–
(c).....(N/A)
(d).....(N/A)
(e) the court is of opinion that it is just and equitable that the company should be wound up."*

In a nutshell, the main argument by the learned Counsel for the Petitioner in support of his stand that the Company be wound by the court under the provisions of section 279(1) (b) and (e) of the Companies Act (Cap.212 R.E.2002) is that the Company commenced

its business soon after its incorporation and that it has carried on several transactions in line with its objectives as stipulated in its **Articles and Memorandum of Association, Exhibit P1**. It is the further submission of the Petitioner's Counsel that the Company had acquired land and built structure thereon for a hotel and other business purposes on Plot No.65 Block "P" in Bagamoyo Township, and that it has also leased out its premises for business purposes. In support of this contention, the Petitioner has attached to the Petition a copy of hotel business license; Intoxicating Liquors License and Certificate of Registration for Tax payer from TRA (Annexure "A") and a copy of Letter of Offer of Right of Occupancy (Annexure "B").

There is however some amount of controversy surrounding the ownership of the land on Plot No.65 Block "P" in Bagamoyo Township, the Petitioner claims that the Company had acquired and built structure thereon for a hotel and other business purposes. According to DW1 he bought Plot No. 43/45 from one Mr. Patrick Manfred in 1997, as evidenced by **Exhibit D1**, "*Hati ya Mauziano ya Kiwanja Na. 43/45 Kitalu P. Magambani Bagamoyo*" dated 10th day of October 1997 and as per letter with Refer. No.BAG/2471/2 from the Land Department at Bagamoyo dated the 8th October 1997, **Exhibit D2**. According to DW1 he bought Plot No.43/45 before he appointed Mr. Mbembetu to act as trustee for him. The Trust Deed between Mr. Francesco and Mbembetu, **Exhibit D3**, was concluded on the 19th day of April, 2008. According to Mr. Mwambo on the 12th day of November 2008, the Company managed to acquire land located at

Plot No.65 Block B in Bagamoyo Town. In his closing submissions Mr. Wassira, submitted that Mr. Mbembetu convinced Mr. Francesco to convert Plot. No.43/45 to Plot No.65 which Mr. Francesco claim to have bought in 1997 as per **Exhibit D2**, and a Letter of Offer was issued, and that Mr. Francesco was given a piece of paper which he signed outside the Land Offices. In his closing submissions Mr. Mbwambo contends that as per **Exhibit D1**, Mr. Francesco is the legal owner of Plot No.43/45, thus Plot No.65 Block B and Plot No.43/45 P are not the same, and should therefore be differentiated and further that the same goes for **Exhibit D2**, a letter of offer of right of occupancy referring to Plot No.43 and 45, which has nothing to do with Plot No.65 evidenced by "Letter of Offer of Right of Occupancy", **Exhibit P3**, dated 12.11.2008.

Mr. Wassira, for the Respondent submitted that since the incorporation of the Company on the 29th day of November 2007, it has never transacted any business to this day. Further, that the Company has remained inoperative for all this time because despite the allotment of shares of 51% for the Petitioner he has never contributed any money towards the operation of the Company. The Respondent submitted further that the said Plot.65 Block "P" was actually a result of collusion between the Petitioner and one Land Officer on the 12th day of November 2008, who fraudulently converted a parcel of land belonging to the Petitioner at Plot No.43 and 45 Block "P" into Plot 65 Block "P", and the Letter of Offer of Right of Occupancy", **Exhibit P3**, dated 12.11.2008 that was issued

in the name of FRAMBE COMPANY was without the prerequisite transfer of right of occupancy. In his bid to substantiate this allegation the Respondent has attached Offer Ref. BAG/2471/2 of 8th October 1997 from the Land Department at Bagamoyo which was admitted and marked as **Exhibit D2**.

It was the further submission of the Respondent's Counsel that on the 19th day of April, 2008, the Petitioner undertook to be a Trustee of the Property of the Respondent by virtue of the Petitioner being a national. The Respondent has attached the agreement as Annex FG "B" which was admitted and marked as **Exhibit D3, the Trust Agreement** dated 19th April 2008 between Mr. Fransesco and Mr. Mbembetu. Mr. Wassira submits further that despite the Trust Agreement, the Petitioner in breach of trust has appropriated the dollar account of the Respondent which is with the Tanzania Investment Bank and proceeds from the Respondent's business which he handled during the absence of the Respondent from the country. However, there was no evidence which was led by the Respondent at the hearing of the Petition to substantiate this particular allegation. Mr. Wassira submits further that the Petitioner who arranged for the issuance of residence permit "Class C" for the Respondent, Mr. Francesco in collusion with some junior Immigration Officers in Bagamoyo, set to blackmail the Respondent claiming it to be a fake. The Respondent has attached annexure of the letter of complaining to Immigration Department as "FG-C."

The Petitioner has strenuously resisted all the allegations leveled at him by the Respondent saying that they are untrue and put the Respondent to strict proof thereof.

The Petitioner's Counsel claims that the Company commenced its business within a year of its incorporation. The Petitioner has substantiated this claim by stating that the Company acquired a piece of land designated as Plot No.65 Block "P" located at Bagamoyo and has attached a Letter of Offer of Right of Occupancy Annexure Frambe "A" **Exhibit P3**, dated 12.11.2008. According to Mr. Mwambo in his closing submissions on the 12th day of November 2008, the Company therefore managed to acquire land located at Plot No.65 Block B in Bagamoyo Town. This, the Respondent has refuted alleging that it was obtained fraudulently.

I have examined the said Letter of Offer of Right of Occupancy, **Exhibit P3**, which is on record. It was issued in the name of FRAMBE COMPANY LTD. for a term of 99 years commencing from the 1st day of October, 2008 in respect of Plot No.65 Block P in Bagamoyo Township. With due respect to Mr. Wassira, learned Counsel for the Respondent, unfortunately it is not open for this Court to determine the substance of this Letter of Right of Occupancy so as to determine whether or not it was obtained fraudulently as alleged since this is not in issue in the present petition. As per the existing laws on land use and ownership in this country matters pertaining to the use and occupation of land are within the province of Land Courts and not this Court, which deal with cases of

commercial significance. This Court which is divested of jurisdiction in land disputes is therefore not in a position to make a finding or otherwise of the fact of ownership of the said piece of land in controversy. If the parties are still minded they are at liberty to pursue this issue elsewhere subject to limitation period.

Mr. Mbwambo for the Petitioner has submitted that the Company built on that land he claims it belongs to the Respondent Company, apartments or rather hotel apartments and that the Company operates them as a hotel, restaurant and bar and he has attached as Annexure "B" to the Reply to the answer to the Petition a hotel business license, intoxicating liquor license and other revenue certificates showing that the apartments are operational. Mr. Mbwambo for the Petitioner submitted further that the Company has let the Petitioner to operate the hotel business and apartments and therefore with all these now going on in the Company, the provision of section 279(1)(b) of the Companies Act [Cap.212 R.E, 2002] cannot be said to apply since the Company has commenced business and cannot therefore be wound up under the provisions of section 279(1)(b) as proposed by the Respondent's Counsel. The only way the Company could be wound up is under section 279(1)(e) of the Companies Act [Cap.212 R.E. 2002] as proposed by both parties, which leaves the matter to the discretion of the court, Mr. Mbwambo surmised.

Mr. Mbwambo for Petitioner has cited to this Court the case of **ABDUL MOUNIM SALEH JIDAD and LUFT TRAVEL & CARGO**

CO LTD Misc. Civil Case No.28/2003 (H/Ct) Commercial Division (per Kalegeya, J. as he then was). In that petition, which was based on section 167 of the repealed Companies Act, which is *pari materia* with section 279 of the current Companies Act, the Court revisited a number of authorities. In that case two directors and shareholders became incompatible in running the company's activities, including failure to hold statutory meetings and other personal indifferences, which is exactly what happened in this matter.

Mr. Wasira for the Respondent submitted that both section 279(1)(b) and (e) of the Companies Act (Cap.212 R.E. 2002) are applicable to the present matter. Mr. Wasira conceded that although the two sole directors of the Company had intention to start business as evidenced in the issued ***Articles and Memorandum of Association*** of the Company, **Exhibit P1**, the objects stipulated therein however are not evidence that the Company had commenced its business. Mr. Wasira submitted further that the Company was incorporated in November, 2007 but as Annexure Frambe "B" shows, Mr. Mbembetu, the Petitioner herein, has been doing business before the Company was incorporated. This is evident from the tax payer certificate which was issued to him on 29/12/2006, and in his name, a year before the Company was formed. Similarly, the Business License for running a hotel was issued on 23/10/2007, a month before the company was incorporated, and also the intoxicating liquor license which was issued in his name. Mr. Wasira surmised that all these documents were issued in the name of Mr. Mbembetu, the

Petitioner and he was doing business but not the Company because Frambe Company had not yet been incorporated at the time of the issuance of those documents. In his submissions Mr. Wassira also went at length on how the purported plot of land the Petitioner claims that the Company was operating thereon the hotel and apartment business was fraudulently obtained, which Mr. Mbwambo for the Petitioner tried to refute by arguing extensively on the history showing that there was no fraud in the manner the said plot of land was obtained. As I intimated to earlier however enticing this argument may sound, I have deliberately and with due respect to learned Counsel for the parties, refrained from being dragged into matters pertaining to the issues of the legality in the acquisition of the said landed property claimed to belong to the Company for the simple reason that this essentially being an issue in land dispute, it is beyond the jurisdiction of this Court. In any event it does not constitute a determining factor in the present petition for the consideration of this Court. However, in order to set the record straight I shall consider albeit very briefly the reach and import of the evidence tendered in this Court as it relates to the business of the Respondent Company.

I have considered the closing submissions by Mr. Mbwambo, learned Counsel for the Petitioner that the Company was issued with Letter of Offer of Right of Occupancy by the Land Officer at Bagamoyo Town on the 12th day of November 2008, **Exhibit P3**. This Letter of Offer shows that Frambe Company was in the process

of acquiring Plot No.65 Block P at Bagamoyo Town. There is therefore no any other evidence on the further steps taken by the Company over the said plot of land. Much as the controversy over the existence or not of a Letter of Offer would better be left to the appropriate court with jurisdiction to determine suffice to point out here that in terms of section 29 of the Land Act, Cap.113 [R.E 2002] the best proof of ownership of land in a surveyed area is by the Certificate of Right of Occupancy. Section 29 of the Land Act, Cap.113 [R.E 2002] stipulates as follows:

*"29(1) Where the Commissioner determines to grant a right of occupancy to a person who—
(a) has accepted a letter of offer of a right of occupancy; or
(b) is in occupation of land under a right of occupancy or under an acceptance of an offer of a right of occupancy; or
(c) is otherwise entitled to a right of occupancy,
he shall issue a certificate, referred to as a 'certificate of occupancy' to that person.*

Emanating from the foregoing provisions of the law, the best proof of ownership of land in a surveyed area is by a Certificate of Right of Occupancy and not a Letter of Offer, which in my view, is only a promise to acquire title over land in a surveyed area. I wish also to point out here that in terms of section 40 of the Land Registration Act, [Cap.334 R.E 2002]:

"A certificate of title shall be admissible as evidence of the several matters therein contained."

A Letter of Offer on a Right of Occupancy in my view is only a step in the process of acquiring the Right of Occupancy over a certain piece of land, the final stage being the issuance of the Certificate of Right of Occupancy itself by the relevant land authorities, which as per the law is conclusive evidence in a court of law of ownership and other matters stipulated therein. It is under such circumstances that this Court finds it unsafe to declare that Frambe Company Ltd is holding Plot.No.65 Block P at Bagamoyo town merely by relying on **Exhibit P3.**

There was also some intimation from Mr. Mbwambo in his closing submissions that Mr. Francesco Gandin being a non-citizen is prohibited under Tanzanian law from holding land. I wish to point out here and with due respect to Mr. Mbwambo that this is not entirely true when it comes to investment laws obtaining in this country momentarily. In terms of section 20(1) of the Land Act, Cap.113 [R.E 2002] a non-citizen cannot be allocated or granted land unless it is for investment purposes as stipulated under section 23 of the Tanzania Investment Act. This is an exception to the general rule on prohibition of non-citizen to acquire land which Mr. Mbwambo seems to be its greatest disciple. On the basis of the provisions of the relevant laws I have cited above, it is not therefore entirely true as Mr. Mbwambo contends that a non-citizen cannot be allocated land under Tanzanian law. The law makes it very clear that if it is for investment purposes a non-citizen may therefore obtain land in Tanzania for investment purposes as per section 19(2) of the Land

Act. Mr. Francesco established in this Court that he has a permit to live in this country. He cannot therefore be faulted on grounds of citizenship for acquiring land for investment purposes. In any event, if anything, the land which Mr. Francesco acquired does not belong to Mr. Francesco as a natural person but to Frambe Company, as a legal person, which in the eyes of the law having been incorporated under the laws of Tanzania it passed as a Tanzanian registered company and not a foreign company. In his submissions Mr. Mbwambo did not go far to inform this Court also whether a locally registered company with a foreign and local shareholder/members is prohibited from acquiring land for investment purposes. It is the finding of this Court that the Respondent Company, Frambe Company Ltd, established its offices on Plot. No.43/45 Block P in Bagamoyo Town, which Plot belongs to Mr. Francesco, as a natural person and who is among the two sole Directors and Shareholders of the Respondent Company.

In my considered opinion, the law in Tanzania does not prevent a company from establishing its offices in any building or piece of land without necessarily owning the building or that piece of land over which it is established, and can as well rent or otherwise acquire a building for its business. It is for the foregoing reason that this Court finds that the Respondent Company, Frambe Company does not possess any title over land in this Country. Furthermore, this Court finds that the business which the Petitioner claims that it was the business of the Company, as evident from the various documents

the Petitioner produced in this Court in support of the Petition, was that of the Petitioner as an individual and not that of the Respondent Company in its own name. This Court is therefore satisfied that the Respondent Company had not commenced its business within a year of its incorporation. The only substantial thing the Company did as evidenced by Letter of Offer of Right of Occupancy (Annexure Frambe "A") was to acquire land which in any case happened in 2008, about two years after the Company's incorporation. Considering the fact that the Company attempted to acquire land as per **Exhibit P3** and the fact that Mr. Mbembetu was allotted shares in the Company in consideration for taking care of the properties of Mr. Francesco in trust as per **Exhibit D3, the Trust Agreement** dated 19th April 2008 between Mr. Francesco and Mr. Mbembetu, it goes to show that the Company had never commenced its business. It is evident that Mr. Mbembetu was invited to take care of the business of Mr. Francesco who went to the extent of sheltering Mr. Mbembetu as testified by **MR. IBRAHIM SAID (DW3)** that Mr. Mbembetu who was living in the same rented house as DW3 shifted to the house of Mr. Francesco in 2006 as at that time Mr. Francesco was looking for someone to take care of his (Mr. Francesco's) properties.

The two parties involved in the present petition are torn between the two worlds of the process of the court winding up an incorporated company under section 279(1) of the Companies Act, [Cap.212 R.E. 2002]. One of the shareholders, Mr. Francesco,

maintains that the company is a non performing entity from its inception as it has never commenced its business after incorporation and should therefore be wound up under section 279(1)(b) and (e) of the Companies Act [Cap. 212 R.E. 2002]. The other shareholder, Mr. Mbembetu, the Petitioner, insists that the Company has been a going concern from inception, as it has acquired landed property and was conducting a hotel and apartment business in its name, and therefore it should be wound up under section 279(1)(e) of the Companies Act, Cap.212 [R.E. 2002].

The controversial scenario presented above takes us to a consideration of the relevant provisions of the law applicable in the circumstances of the present petition. In my view, the manner in which section 279(1) of the Companies Act has been drafted could very easily plunge litigants into a legal wrangle over the exact reach of that provision particularly when it come to cases under which the Court can exercise its discretion in making an order for winding up of a company. This therefore calls for the application of general principles of statutory interpretation.

In my view, the "circumstances" or "cases" mentioned in (a) to (e) of section 279(1) of the Companies Act [Cap.212 R.E. 2002] as justifying the winding up of a company by a court of law are such that anyone or more of those "circumstances" or "cases" may apply or in combination. In my considered view, the situation would have been different had the said provision been drafted using the conjunction "and" or "or" in the enumeration of the circumstances or

cases enumerated from (a) to (e) of section 279(1). Section 279(1)(b) of the Companies Act on the other hand, calls for a determination of the issue whether or not the company to be wound up has commenced its business within a year from its incorporation or suspended its business for a whole year. In the present petition the main controversy falls within the first limb, which is whether the company commenced its business within a year from its incorporation. Otherwise the parties do not seem to be in disagreement on the use of section 279(1)(e) of the Companies Act [Cap.212 R.E. 2002] in the winding up process. In my view, in the event it is established that the Company did not commence its business within a year from its incorporation, then the provisions of section 279(1)(b) of the Companies Act [Cap.212 R.E. 2002] would apply as being one of the "cases" or "circumstances" in which the Court may exercise its discretion in making an order for the winding up of the Company. This however, does not mean that the cases mentioned under section 279(1)(b) of the Companies Act [Cap. 212 R.E. 2002] cannot apply jointly with the cases under section 279(1)(e) of the Companies Act [Cap.212 R.E. 2002]. As I intimated to earlier, the way section 279(1) of the Companies Act [Cap.212 R.E. 2002] was drafted provides an opportunity for more than one of the enumerated "cases" or "circumstances" to be considered by this Court in a petition for winding up of a company.

In the circumstances of the present petition there is no harm in my view, if this Court in the event it is of the opinion that it is just

and equitable that the company should be wound up in combination with the establishment of the fact that the company has or has not commenced its business within a year from its incorporation to grant the petition as prayed. In that regard I am at one with Mr. Wasira, learned Counsel for the Respondent, that both provisions of section 279(1)(b) and (e) of the Companies Act [Cap.212 R.E. 2002] may apply in the present petition. In any event as submitted by Mr. Wasira and rightly so in my view, since each party has categorically stated that it will bear own costs, and further that the winding up of the Company under section 279(1)(b) of the Companies Act would not burden the Respondent, this provides an opportunity for this Court to consider the petition under the provisions of section 279(1)(b) and (e) of the Companies Act [Cap.212 R.E. 2002].

Since the winding up of a company under section 279(1)(e) calls for the exercise by this Court of its discretion, suffice to point out here that given that the differences between the Petitioner and the Respondent are irreconcilable as both the Petitioner and Respondent admit, it is only just and equitable in such circumstances that they should be allowed to part company by allowing for the winding up of the company to take place. As submitted by Mr. Wasira and to which submission the learned Counsel for the Petitioner seems to be in agreement, the two shareholders cannot meet and transact business through the company they claim they jointly established. The only viable option therefore is for each of the shareholder to go his own way. The two shareholders and directors of the company

have failed to part ways voluntarily and therefore the only option left under the law is for a court of law to do that job for them. In the circumstances and for the foregoing reasons this Court finds that it is just and equitable that the Respondent Company be wound up by order of this Court.

Let me now consider the second limb of the arguments by the learned Counsel which are premised on section 279(1)(b) of the Companies Act [Cap.212 R.E. 2002]. The said provision of the law stipulates that if the company does not commence its business within a year from its incorporation or suspends its business for a whole year, the Court can order the company to be wound up. In the present petition the issue therefore becomes whether or not the Respondent Company commenced its business within a year from its incorporation. Neither the Petitioner, who holds 51% shares in the Company nor the Respondent with 49% shares, disputes the fact that Frambe Company they now seek to be wound up by this Court was incorporated on the 29th day of November, 2007 and was issued with ***Certificate of Incorporation*** or registration No.63222, **Exhibit P2.**

Under the provisions of section 279(1) (b) of the Companies Act [Cap.212 R.E. 2002] if the company does not commence its business within a year from its incorporation, then it is also a fit case for a winding up by the Court. In my considered view, the business that was intended under the provision of section 279(1)(b) of the Companies Act Cap.212 [R.E. 2002] was that of the company itself as

an independent legal entity and not that of its shareholders in their own names. This is based on a well established legal principle in Company Law which was developed in the now much celebrated case of **SALOMON vs SALOMON** that after its incorporation and being issued with a Certificate of Incorporation (Registration) by a competent authority and in our case, the Business Registration and Licensing Authority (BRELA), which happened on the 29th day of November, 2007 as per **Exhibit P2**, such a company and in this case, FRAMBE COMPANY LTD, acquired independent legal existence from its shareholders and directors, with perpetual succession. As from the date of its incorporation as evidenced by ***Certificate of Incorporation*** of FRAMBE COMPANY LTD, **Exhibit P2**, which marked the legal birth of the Respondent Company as a artificial legal person capable of suing or being sued in its own name as well as acquiring and disposing of property in its own name.

I have examined Annexure Frambe "B", which is a Certificate of Tax payer issued to Mr. Mbembetu in his name on **29/12/2006**. This Certificate, despite the fact that it was issued to the Petitioner in his own name and not that of the Company, was issued even before the Company had been registered. It cannot therefore be validly argued as Mr. Mbwambo for the Petitioner wishes this Court to believe, that the Respondent Company had started doing business within a year of its incorporation when it was issued with the Taxpayer Certificate. Similarly, the Business License for running a hotel which was also issued on 23/10/2007, a month before the

Company's incorporation, which also holds true of the Intoxicating liquor license which was also issued in the name of the Petitioner and not the Company. It is for the foregoing reasons that I am at one with the submissions by Mr. Wasira that it is Mr. Mbembetu, the Petitioner, as a natural person who was doing business but not the Company as a legal person because by the period Mr. Mbembetu claims that the Respondent Company was doing business in line with its objects as stipulated in its ***Memorandum and Articles of Association, Exhibit P1***, the Respondent Company had yet to be incorporated so as to acquire independent personality making it capable of holding its own property and doing business in its own name independent of its shareholders. I should also point out here that the business of the company mentioned in section 279(1) (b) of the Companies Act [Cap.212 R.E. 2002] means the business of the Company and not that of the individual shareholders of the company even if we were to believe, which we are not, that the Company had commenced its business within a year from its incorporation.

Much as the business of the Company is clearly stated in the ***Articles of Association and Memorandum (Exhibit P1)*** as submitted by the Petitioner, I am at one with Mr. Wassira that merely by being stated in the Memorandum the objects of the Company are not evidence that the Company had commenced its business. So long as the Company had not yet commenced business within a year from its incorporation in its own name as required under the law, the intention of its shareholders remained as stated in the objects in the

Memorandum and Articles of Association without being manifested in practice.

The business of the Company if there was any, which was not, as evident from the various documents the Petitioner presented to this Court in support of the Petition was that of the Petitioner as an individual and not that of the Company in its own name. I am therefore satisfied that the Respondent Company had not commenced its business within a year of its incorporation. The only substantial thing the Company did as evidenced by Letter of Offer of Right of Occupancy was to acquire land which in any case happened in 2008, about two years after the Company had been incorporated and which as I have indicated above is shrouded in some legal mysteries which are beyond the jurisdiction of this Court to unravel.

In the event and for the foregoing reasons, this Court is satisfied that the Respondent Company is a fit subject to be wound up by an order of this Court exercising its discretion under the provisions of section 279(1)(b) and (e) of the Companies Act, [Cap.212 R.E. 2002]. The provisions of section 279(1)(b) & (e) applies where it appears that the company has failed to commence its business within a period of one year since its incorporation while the application of section 279(1)(e) is in the discretion of the court, where it is equitable and just that the company should be wound up. The reverse is also obvious. If it is established that the company has commenced business within one year from its incorporation or has not suspended its business for whole year, then the provisions of

section 279(1)(b) of the Companies Act, Cap.212 [R.E. 2002] would be inapplicable in its winding up.

In his closing submissions Mr. Mbwambo submitted that the Company has been running a hostel, a restaurant and a bar and also that the Company has managed to acquire land as per **Exhibit P3** and further that **PW1** told this Court that the Company successfully managed to hold lands and houses. I have traversed the evidence on record but could not manage to come across any evidence that the Respondent Company, Frambe Company Ltd has been running a hostel, a hotel, a restaurant or bar as alleged. The evidence on record shows that the purported business of hotel, hostel, restaurant and bar was carried out in the name of Mr. Mbembetu in person and not by the Company. The license to run a hostel and intoxicating liquor was issued in the name of Mr. Mbembetu and therefore has got nothing to do with Frambe Company. It is for these reasons that this Court finds that there is no any evidence which proves that the Respondent Company, Frambe Company Ltd was running the business of a hostel, hotel and/or selling intoxicating liquors.

In the present case the foregoing evidence has amply established that the Respondent Company had not commenced its business within a year from its incorporation. This therefore will make the provisions of section 279(1)(b) of the Companies Act applicable for the winding up of the Respondent Company by an order of this Court.

I shall now turn to consider the applicability of section 279(1)(e) of the Companies Act, Cap.212 [R.E. 2002] in this case which provides as follows:

"279(1)(e)

"279(1) A company may be wound up by the court if-

(c).....(N/A)

(d).....(N/A)

*(e) the court is of opinion that it is **just and equitable** that the company should be wound up."*(the emphasis is of this Court)

The phrase "***just and equitable***" appearing in section 279(1)(e) of the Companies Act, Cap.212 [R.E. 2002] in my view would involve situations as pertaining in the present case where the two sole shareholders and directors of the Respondent Company are not in talking terms and have even failed to comply with the statutory requirements in running the Company. The parties are therefore in agreement that the Respondent Company should be wound up by an order of the court themselves having failed to agree on a voluntary winding up.

It should be noted here that in terms of section 282(2) of the Companies Act, Cap.212 [R.E. 2002], where the winding-up petition is presented by **members of the company as contributories** on the ground that it is "***just and equitable***" that the company should be wound up, the court if it is of opinion-

(a) That the petitioners are entitled to relief either by winding up the company or by some other means; and

(b) *That in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make a winding up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."*

Logically, the basis for the court to make an order for winding up a company on the basis of "**just and equitable**" is absence of any other remedy or other means of winding up. In the present case clearly the circumstances are such that there is no any other remedy or other means of winding up the Respondent Company other than by an order of this Court.

In fine, and for the foregoing reasons, the Respondent Company, FRAMBE COMPANY LTD. with Certificate of Registration No.63222 is hereby wound up under the provisions of section 279(1)(b) and (e) of the Companies Act, Cap.212 [R.E. 2002].

It is further ordered that pursuant to section 287 of the Companies Act, Cap.212 [R.E. 2002] that the Respondent Company, FRAMBE COMPANY LTD immediately forward to the Registrar of Companies for registration the order of this Court winding up the Respondent Company.

Considering the circumstances and the nature of this Petition, and given that the parties have agreed that each shall bear its own costs in this Petition, accordingly this Court shall not make any order as to costs. Each party shall bear its own costs for this Petition. It is accordingly ordered.



.....
R.V. MAKARAMBA

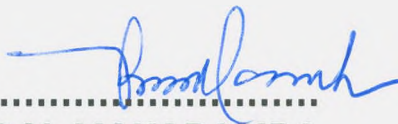
JUDGE

02/09/2011

Judgment delivered this 2nd day of September 2011 in the presence of:

For the Petitioner: Mr. Madaha for Mbwambo.

For the Respondent: Madaha for Wassira


.....
R.V. MAKARAMBA
JUDGE
02/09/2011

8,990- words