IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC COMMERCIAL CAUSE NO. 67 OF 2009

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

AND

IN THE MATTER OF APPLICATION BY
ANTHONY CHAMUNGWANA.........................PETITIONER
VERSUS
VANESSA DOREY (a.k.a VANESSA MORGAN) AND
RICHARD DOREY................................1ST RESPONDENT
DR. CHRISTOPHER RICHARDSON.......2ND RESPONDENT
CAD SECURITIES LIMITED..................3RD RESPONDENT

R U L I N G

Hon. Mruma, J.

The petitioner Antony Chamungwana has petitioned to this court for the following orders:

a) *A declaration that the Board of Directors of the Company did not hold any meeting on 30th day of November, 2009.*

b) *A declaration that no notice to pay for shares allocated to the petitioner has ever been made to him.*

c) *A declaration that the petitioner has paid up for all the shares allocated to him.*

d) *An order for winding up the company.*

e) *Costs be provided for.*

f) *Any other reliefs this court may deem fit to grant.*

Upon being served with the chamber summons the Respondents Vannesa Dorey and three (3) others filed an affidavit in opposition to the petition. The affidavit is sworn by the 1st Respondent Vanesa Morgan. Together with this affidavit but in a separate sheet, the Respondents have filed notice of preliminary objections raising five (5) points as preliminary objections on points of law coached in the following styles:

i. *That the petition which is based on section 233 (1), 275 and 279(e) of the Companies Act, Cap 212 RE 2002 is incompetent for wrong citation of the enabling provisions of the law.*

ii. *That the petition is prematurely filed in this honourable court as the petitioner has no locus standi.*

iii. *That the provisions of the law upon which the petition is found cannot concurrently be prosecuted and or pursued in the honorable court without creating confusion or resulting into an omnibus ruling/outcome.*

iv. *That the petition form and contents are defective in law for non compliance with the Companies (Winding Up) Rules 1929.*

v. *That the petitioner has wrongly joined the 1st and 2nd Respondents to the petition as is no cause of action against them.*

Submitting in support of the 1st preliminary objection, Mr. Mtafya, counsel for the Respondents contended that the citing of sections 233(1), 275 and 279(1) of the Companies Act as enabling provisions of the law was wrong because the petitioner's membership in the company is in dispute therefore he cannot rely on the said provisions of the law to support his petition.

The learned counsel contended further that in order for one to sue or petition on the ground of affairs of the company he must be a share holder in that company. He said that the ground used by the petitioner in this petition is available and therefore relevant if all share holders are prejudiced.

The learned counsel submitted further that because the petitioner is not a member of the company and because he is not complaining on the business of the company he cannot rely on the provisions of the cited sections and therefore its citing amounts to wrong citation which makes the entire petition incompetent and not maintainable. The Counsel referred this court to a number of its own decisions and decisions of other jurisdictions relating to wrong citation of the provisions of the law or rule among them:

i. *Hodi (Hotels Management Co. Ltd vrs Jandu Plumbers Ltd – Misc. Comm. Application No.15 of 2009.*

ii. Misc. Comm. Application No.10 of 2008 between Norconsult Vrs Tanroads and;

iii. Kaguma Vrs (2004) EA P.68.

Submitting in support of his second objection point, Mr. Mtafya contended that section 281 (1) of the Companies Act list persons who can apply for winding up of a Company. Among them is a member of the company.
The counsel argues that because the petitioner's membership in the company is disputed he does not qualify to ask for its winding up. Mr. Mtafya's view is that the petitioner ought first to have applied to this court for his membership in the company to be declared valid before he can have the right to ask for the winding up of the Company. Otherwise, according to Mr. Mtafya, he has no locus standi.

Arguing the third point, Mr. Mtafya contended that the enabling provisions of the law quoted to support this petition cannot be called into play without creating confusion or resulting into an omnibus ruling. The learned counsel said that the reliefs under section 233 (1) are found in sub-section (3) of the same section. Section 287 stipulates the consequences of a wound up order including an order for appointment of a liquidator. The learned counsel concern is how can this court issue a winding up order and proceed to regulate the affairs or conduct of the company in future? At what material time should we say the winding up proceedings has commenced? Will the court stop the winding up proceedings and start to solve this issue of share holding?

In respect of the 4th preliminary point, the learned counsel submitted that the petition is defective in both form and contents for non-compliance with the Companies (Winding Up) Rules 1929.

The learned counsel contended that the petition is not accompanied by a verifying affidavit as required by Rule 29 of the Rules. He referred this court to the decision of the Commercial Court of Kenya in the case of ***Re-Sheela Super Markets Ltd (2004) 2 EA 264*** where the court struck out the petition for failure to file a separate verifying affidavit because there was no indication of separate fees is required by rule 25 which is equivalent to our rule 29 of the Companies (Winding Up) Rules 1929.

Regarding the contents, the learned counsel submitted that the contents of the present petition violates the mandatory requirement of rule 25 which requires that the winding up petition be in a particular form and the relevant form is form No.4. The Counsel attacked the present petition saying that it has not revealed the share capital of the companying and it has mixed up winding up reliefs with other reliefs like damages which are not awardable under Winding Up proceedings.

The last preliminary objection is about mis-joinder of the parties. The learned counsel has submitted that the 1st and 2nd Respondents were wrongly joined in these proceedings because no remedy asked for can bind or touch them. The learned counsel contends that whatever done by them was done by the company therefore there is no point of joining them as parties in these proceedings.

Responding to Mr. Mtafya's submissions, Mr. Malimi, counsel for the Respondents attacked the preliminary objections on the ground that they were raised separately (from pleadings) and without leave of the court. The learned counsel contended that the Respondents were granted leave to file an answer to the petition but not to file a notice of preliminary objection.

Regarding wrong citation of the enabling provisions of the law, the learned counsel maintained that the cited provisions the law, i.e. sections 233(1), 275 and 279(1)(e) are proper and applicable law because the petitioner is seeking merely for declaratory orders which can only be granted under section 233(1) which permits a share holder to seek court intervention when he feels that the affairs of the company are being conducted to his prejudice. The learned counsel contends further that the question here is not about the petitioner's membership in the company but whether he has paid up for his shares in the company or not.

On the issue of locus standi, Mr. Malimi is of the view that the objection is misconceived because under the provisions of section 233 (1) any member of a company is entitled to come to court and ask for any remedy which he believes it can do justice to him. He said that because the petitioner is a share holder he properly cited section 233(1).

Regarding the third ground, the learned counsel submitted that sections 233(1), 275, and 279(1)(e) of the Companies Act can be applied concurrently.

According to Mr. Malimi, section 233(1) confers the right to the share holder to come to court and seek any remedy while section 275 vests jurisdiction on this court to order winding up of the company which is one of the remedies sought by the petitioner and section 279(1) stipulates the circumstances under which a winding up order can be issued.

Responding in respect of the 4th preliminary objection, Mr. Malimi contends that the entire petition before this court is about mismanagement of the company. He said that the petitioner feels that the company should be wound up because it is badly managed. The learned counsel submitted that S.233(1) of the Companies Act is a self contained section because it sets out its own procedure to be adopted and it does not require to be complimented or supplemented by the Winding Up Rules of 1929.

He contended further that in terms of section 486 of the Companies Act, the Winding Up Rules of 1929 are applicable to proceedings commenced before the Companies Act, Act No.12 came into force but the law is silence of the procedure to be followed after he coming into force of Act No.12 of 2002.

Regarding the issue of misjoinder of the parties, the learned counsel maintained that the two first Respondents were joined because they purport to have held a meeting which diverted the petitioner's shares. The counsel submitted further that even if there was misjoinder, rule 9 of order 1 of the CPC is very clear that a suit cannot be defeated by a mere reason of misjoinder.

The three (3) first grounds raised in the preliminary objection have caused me to reconsider once again what is a preliminary objection. In the case of ***Mukisa Biscuits Manufacturing Co. Ltd V. West End Distributors Ltd (1969) EA 696,*** the then Eastern Africa Court of Appeal (Sir Charles Newbold, P.) observed that:

> *"A preliminary Objection is in the nature of what is used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It can be raised if any fact has to be* ***ascertained*** *or if what is sought is the exercise of* ***Judicial discretion****......" [emphasize mine].*

In Civil Application No.49 of 2005 between sugar Board of Tanzania Vrs The 21st Century Food and Packaging & Two others Nsekela, J.A;(unreported) said;

> *" A preliminary objection is in the nature of legal objection not based on the merits or facts of the case, but on the stated legal, procedural or technical grounds. Such an objection must be argued without reference to evidence. The fundamental requirement is that any alleged irregularity, defect or default must be apparent on the face of the notice of motion so that the objector does not condescend to affidavits or other documents accompanying the motion to support the objection."*

As regards the 1st objection, Mr. Mtafya stated that the petitioner cannot rely on the provisions of section 233 (1), because that section requires the petitioner to be a member of the company while in the present case the petitioner's membership in the company is in dispute. On the other hand the petitioner claims that he is a member of the Company and he paid up for all of his shares. From these rivalry arguments it goes without saying that the 1st preliminary objection cannot be argued without reference be made to evidence as to the status of the petitioner in the company. Therefore this cannot be disposed of as a pure point of law. The issue can conveniently be decided in the normal manner in the course of arguing on and proving the substantive petition before this court.

Similarly the second preliminary point of objection cannot be dealt with as a preliminary objection on the point of law. It is alleged that the petitioner has no locus standi. Admittedly a member of the company has a locus standi to bring a petition for company's winding up. The issue of membership to the company of the petitioner is in dispute therefore the issue of his locus standi cannot be decided without calling evidence.

Regarding the third preliminary objection it is argued that the cited provisions of the law cannot be called into play without creating confusion or resulting into omnibus ruling. There can be no doubt that powers of the court under the provisions of section 282(1) of the Companies Act are discretional. In the case of ***Sugar Board of Tanzania (Supra),*** a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion of the Court. In the instant petition what is sought by the petitioner is the exercise of judicial discretion under section 282(2) of the Companies Act therefore under the principle laid down in **Sugar Board's Case (supra)**, it cannot be determined by way of preliminary objection.

The fourth ground of preliminary objection raised is undoubtedly a pure point of law. The complaint is that the petition does not comply with the provisions of rule 29 of the Companies (Winding Up) Rules 1929. It is submitted that there is no verifying affidavit as required by Rule 29. It is further submitted that the petition does not comply with the mandatory requirement of rule 25 which requires the petition to be in a particular form and the form in point here is form No.4.

Counsel for the petitioner responded by submitting that Companies (winding Up) Rules 1929 are applicable to proceedings instituted before the coming into force of Companies Act No.12 of 2002.

Regarding proceedings instituted after the coming into force of the new Companies Act, the learned counsel says that the law is silence. He referred this court to section 486 of the Companies Act.

Section 486 of the Companies Act provides that:

> *"The provisions of this Act with respect to winding up shall not apply to any company of which the winding up has commenced before the coming into operation of this Act, but every such company shall be wound up in the same manner and with the same incidents as if this*

Act had not been passed, and for the purposes of the winding up, the repealed winding up shall be deemed to remain in full force."

Admittedly, these proceedings were instituted after the coming into force of the present companies Act, therefore section 486 does not apply. In other words the provisions of this Act with respect to the winding up apply to these proceedings.

Under the provisions of section 479 of the new Companies Act, it is provided that:

"The Minister may make rules for carrying into effect the objects of this Act and for any matter or thing which by this Act is to be or may be provided for by rules. Any rules made under this section which are in the nature of the Rules of court shall not be made except after obtaining the advice of the Chief Justice."

Section 484 (1) of the new Act is a saving provision for subsidiary legislation of a repealed law and it provides that:

"Notwithstanding the provisions of section 485, subsidiary Legislation brought into force by or made under the repealed Companies Act, shall in so far as and to the extent that it is in force on the appointed day remain in force after the appointed day until it is revoked in the manner prescribed in sub-section (3)."

The Companies (Winding Up) Rules 1929 were brought into force by section 348 (1) of the repealed Companies Act which provides that:

"Unless and until the High Court makes rules under the powers conferred by section 285 of this Act, the Companies (winding Up) Rules 1929 made pursuant to the Companies Act, 1929 (imperial), dated the 29th August 1929 are declared to be in force in Tanzania and shall be read with and considered part of this Act."

Because there is no evidence that the Companies (Winding Up) Rules 1929 have been revoked and new rules made as per section 479 of the new Companies Act, I entertain no doubt that reading section 484 (1) of the new Companies Act together with section 348(1) of the repealed Companies Act, will reveal that the Companies (Winding Up) Rules, 1929 are still in force until such time when the Minister will make new Rules under section 479 of the current Companies Act.

Now, having held that the Companies (Winding Up) Rules 1929, under the repealed Act are still in force, I now turn to determine the issue whether the petition is defective both in form and contents in that it lacks verification affidavit and it is not in the form prescribed by form No.4.

Rule 25 of the Companies (Winding Up) Rules 1929 provides that:

"Every petition for the winding-up of a company by the court or subject to the supervision of the court ***shall*** *be in the forms No.4 and 5 in the Appendix with such variations as circumstances may require."*

I have carefully gone through the petition in this matter and form No.4 in the appendix to the Winding-Up Rules (England), and I am convinced that the petition is not in the form required by form No.4.

Similarly, the petition is not accompanied by an affidavit verifying the petition as required by Rule 29 of the Companies (Winding Up) Rules 1929 which provides that:

> *"Every petition for the winding up by the court, or subject to the supervision of the court **shall** be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners if more than one, or in case the petition is presented by a corporation by some director, secretary or other principal officer thereof and shall be sown after and filed within four days after the petition is presented, and such evidence shall be sufficient prima facie evidence of the statements in the petition."*

Both the provisions of rule 25 and 29 of the Companies (Winding Up) Rules, 1929 are coached in mandatory terms, the compliance of which is a must.

In the result I find that the petition for winding-up which does not comply with the provisions of rules 25 and 29 of the winding up rules is not maintainable.

In fine therefore, I sustain the preliminary objection on the fourth ground. The petition is accordingly struck out with costs.

Sgd by A.R.Mruma

Judge

28/2/2011

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