

IN THE HIGH COURT OF TANZANIA  
COMMERCIAL DIVISION  
AT DAR ES SALAAM

MISC COMMERCIAL CASE 207 OF 2015

IN THE MATTER OF AMALGAMATION OF KILIMANJARO CABLES (T)  
LIMITED INTO AL HATIMY ENTERPRISE LIMITED

BETWEEN

AL HATIMY ENTERPRISES LIMITED ----- 1<sup>ST</sup> PETITIONER  
KILIMANJARO CABLES (T) Limited -----2<sup>ND</sup> PETITIONER

VERSUS

THE REGISTRAR OF COMPANIES ----- RESPONDENT

RULING

Date of hearing; 24/2/2016  
Date of the Ruling; 2/3/2016

SONGORO, J

AL Hatimy Enterprises Limited, the 1<sup>st</sup> Petitioner, and Kilimanjaro Cables (T) Limited, the 2<sup>nd</sup> Petitioner relying under Sections 229 and 231 of the Companies Act, No 12 of 2002, filed a Joint Petition applying for court orders to the effect that;

1. Kilimanjaro Cables Ltd the 2<sup>nd</sup> Petitioner's amalgamate with AL-Hatimy Enterprises Limited, the 1<sup>st</sup> Petitioner.
2. That, the Al Hatimy Enterprises Limited the 1<sup>st</sup> Petitioner be allowed to acquire assets, liabilities, affairs and undertakings of Kilimanjaro Cables Limited, the 2<sup>nd</sup> Petitioner, and
3. That, once amalgamation is ordered, and done, the Kilimanjaro Cables Limited, the 2<sup>nd</sup> Petitioner be dissolved without being winding up.

The Joint Petition is supported by affidavits of Aliasgar Hatimali Ezzi, Director of AL-Hatimy and of Yusuf SK Hatimali Mulla Abbashai Ezzi, Director of Kilimanjaro Cables Ltd.

In their respective affidavits the two directors, jointly stated that, members of their companies have unanimously agreed on the proposed amalgamation. The Respondent in the Petition is the Registrar of Companies.

Thus on the 24/2/2016 when the Petition was called for hearing Mr. Ntalula, Learned Advocate appeared on behalf of the two Petitioners and argue the petition, whereas Mr. Noel Shani, Learned Advocate appeared for the Registrar of Companies, the Respondent.

In pursuing the Petition, Mr. Ntalula relying on the affidavits of Aliasgar Hatimali Ezzi, and Yusuf SK Hatimali Mulla Abbashai Ezzi, directors of AL Hatimy Co Ltd, and of Kilimanjaro Cables Company Limited, informed the court that, Members of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners have unanimously agreed to amalgamate their two companies.

The Counsel then explained that, reasons for amalgamation are that, the objects of carrying business in their Memorandum, and Articles of Associations of two companies, empowers, and enables Petitioner's to amalgamate, and continue to do business.

Secondly, the Counsel argued that, the proposed amalgamation will enable, Petitioners to carry their business more economically, and efficiently. Also, the amalgamation will enable them to effectively compete in the market, and eliminate unnecessary costs.

The Counsel then drew the attention of the court on affidavits of Aliasgar Hatimali Ezzi which states that, members of AL-Hatimy Company Ltd in their Extra Ordinary Meeting held on the 24/8/2015 unanimously passed a Special Resolution to amalgamate with Kilimanjaro Cables Ltd.

Also in the affidavit, it is stated that, Members of the Meeting agreed to take assets, liabilities and undertaking of Kilimanjaro Cables Limited which is their sister company.

The Counsel drew the attention of the Court Annexure AL-1 the Minutes of the Meeting of AL Hatimy which indicate that, in the Meeting held on the 24/2015, a Special Resolution to amalgamate the two Companies was passed.

Further the Petitioner's Counsel drew the attention of the Court on Minutes of Extra Ordinary General Meeting of Kilimanjaro Cables Annexure AK-K which shows the Extra Ordinary Meeting was held on the 28/8/2015, which shows a Special Resolution of amalgamation

with the 1<sup>st</sup> Petitioner's Company was passed and it was agreed the Second Petitioner's company will be "dissolved".

Thus relying on the Petition's, affidavits in support of the Petition, and Special Resolutions passed by the Petitioner's companies, Mr. Ntalula humbly requested the court to issue an order of amalgamation of the two Petitioner's Companies, and the 2<sup>nd</sup> Petitioner's company be dissolved as prayed in the Petition.

In response to the Petition, Mr. Noel Shani, Learned Advocate who appeared for the Registrar of Companies, did not oppose to the Petition. Instead he supported it and left the matter to the Court to decide.

The court has carefully considered, Petitioners Petition and finds it made under Sections 229 and 231 of the Companies Act No 12 of 2002, which allows compromise, and arrangement of company on the condition once certain condition stated in the two sections are fulfilled.

Some of the conditions which has to be fulfilled under Section 229 (1) of the Companies Act, No 12 of 2002, is that, the proposed "arrangement, or amalgamation" is the intended arrangement must be proposed to the company, and its creditors. Indeed Section 229 of the Companies Act, No 12 of 2002 states that

229. (1)Where a compromise or arrangement is proposed between a company and its creditors., or any class of them, or between the company and its members or any class of them, the court may, on the application (in a summary way) of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members as the case may be, to be summoned in such manner as the court directs.

Thus from the wording of Section 229 of the Companies Act No 12 of 2002 referred above, the words which states " a compromise or arrangement is proposed between a company and its creditors" appearing in the first and second sentence of the section, in my view set a condition that, an arrangement or compromise including " amalgamation" has to be proposed to the company and its creditors first, before it is referred to the Court for sanction.

But when I perused the Petitioner's Petition, the court did not see any statement from Petitioners which suggests that, the companies or members of the companies proposed the proposed the intended amalgamation to their creditors, and even responses of their creditors was not stated in the Petition.

In absence of explanation that, the proposed amalgamation was proposed to the creditors of the 2<sup>nd</sup> Petitioner, who intends to transfer its liabilities the key issue before the court for determination in the Petition, is whether or not the Court relying on Sections 229 and 231 may make an order sanctioning amalgamation

of the two companies and transferring of liabilities without creditors being notified and being heard.

In addressing the above, the court found Section 229 of the Companies Act No 12 of 2002. insist that, a compromises and arrangement of company which in my view involves amalgamation which is being proposed in the present petition has to be proposed to the creditors, their responses must also be presented together with the Petition to be considered by the court. It seems the wording of Section 229 of the Companies Act, No 2 of 2012, statutorily requires, at least creditors must be consulted on the proposed scheme.

In my view the basis of statutory condition that, the proposed arrangement must be proposed to the creditors, is simple to understand that, once the proposed arrangement is sanctioned, by the court order, the amalgamation and transfers of the liabilities automatically bind creditors, and other people who had pecuniary interests of the 2<sup>nd</sup> Petitioners Company notwithstanding the fact that, they were not consulted, or given an opportunity of being heard on their liabilities. The issue is whether it will be fair to the creditors to be treated like that.

Considering the manner in which the proposed amalgamation was agreed upon, and the Petition was filed, the fact that, there are liabilities to be transferred, and creditors of the 2<sup>nd</sup> Petitioners were

not consulted, it is certain that, if the Proposed amalgamation is sanctioned by the court order, without their knowledge, their right to be heard will be curtailed by court order, which in my view, it is unfair to creditors.

More the court find, the essence of filing, and presenting the proposed amalgamation in court, is to enable the court to satisfy itself on whether or not the proposed scheme, has at least substantially complied with the provisions of Sections 229 and 231 of the Companies Act, Cap 212. Secondly, the court has to satisfy itself, if the proposed amalgamation is at "least fair and reasonable".

Honestly, I find this is even the legal position which is stated in the case of Indian Building Contractor Versus R.B Purohit [1965] 1 E.A 342. In the said case it was stated that, the duty of the Court in considering proposed amalgamation or scheme is to assess "whether or not the proposed amalgamation or scheme has substantially complied with the Provisions of Section 207 of Companies Act of Uganda which is pari-material with Section 229 of the Companies Act."

The court in Indian Building Contractor referred above, also said the object of Section 207 of Uganda Companies Act is to allow specified majority to bind creditors.

Also, the court in the case of Indian Building Contractor Versus R.B Purohit supra, went ahead to state that, in assessing a "compromise or arrangement" the Court has to be satisfied if the proposed "arrangement" is being proposed in good faith, and it is at least fair, and reasonable to the extent that, an intelligent and honest man, who is member of that class, and acting alone, in respect of his interest as such member might approve of it.

Honestly, I find the legal guideline stated in the case of Indian Building contractor that creditors must be consulted on the proposed arrangement , it appears that is even the spirit of Section 229 of our Companies Act, that creditors must be involved in the arrangement of companies.

Guided by Section 229 of the Companies Act Cap 212 and legal guidelines stated in the case of Indian Building Contractor Versus Purohit [1965] 1 E.A 342 , I assessed the proposed scheme of amalgamation between the two petitioners, and the fact that, there are liabilities of the 2<sup>nd</sup> Petitioner which will be transferred to the 1<sup>st</sup> Petitioner, and find since the amalgamation was not proposed to creditors of the 2<sup>nd</sup> Petitioner `s Company, and no even prior notice was sent to Creditors about amalgamation, it will be unfair and unreasonable for the court sanction and order amalgamation of the Petitioner's Companies without giving a prior notice to the creditors,



on proposed amalgamation, and transfer of the liabilities without any notice to the creditors.

On foregoing reasons, I decline to issue any order of amalgamation, and hereby dismiss the Petition.

Petitioners are at liberty to file a fresh petition which complies with the provisions of the Law. Also, right of appeal fully explained to the parties. I make no order as to costs.

Dated at Dar es Salaam this 2<sup>nd</sup> day of March, 2016

  
H.T. SONGORO  
JUDGE

Delivered at Dar es Salaam this 2<sup>nd</sup> day of March, 2016

  
H.T. SONGORO  
JUDGE

The Ruling was delivered in the presence of Mr. Mtaki Learned Advocate for the Petitioner and holding a brief of Mr. Shani, Learned Advocate of the Respondent.