

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 288 OF 2014

**THE NATIONAL INVESTMENTS
COMPANY LIMITED “NICOL”.....APPLICANT**

VERSUS

**THE REGISTERED TRUSTEES OF
THE PUBLIC SERVICE PENSION FUND
(PSPF).....1ST RESPONDENT**

**THE REGISTERED TRUSTEES OF
THE PARASTATAL PENSION FUND
(PPF).....2ND RESPONDENT**

**THE REGISTERED TRUSTEES OF
THE LOCAL AUTHORITIES PENSION
FUND (LAPF).....3RD RESPONDENT**

**THE REGISTERED TRUSTEES OF
THE GOVERNMENT EMPLOYEES
PENSION FUND (GEPF).....4TH RESPONDENT**

**CAPITAL MARKETS AND SECURITIES
AUTHORITY.....5TH RESPONDENT**

**KINONI ADAM WAMUNZA,
(INTERIM MANAGER OF
THE NATIONAL INVESTMENTS
COMPANY LIMITED).....6TH RESPONDENT**

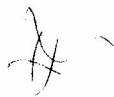
JUDGMENT:

Mansoor, J:

Date of JUDGEMENT- 18th MARCH 2016

The Applicant was the 1st Respondent in Misc. Civil Case 4 of 2012. The Applicant is aggrieved by the order of this Court made in Misc. Civil Case No. 4 of 2012 made by Hon Judge Bukuku J, on 29th February 2012, allowing the Respondents herein, the following orders, as prayed in their petition:

1. a declaration that the 1st Respondent's (NICOL) acts, omissions and conduct as pleaded in the petition were contrary to and prejudicial to the interests of the Petitioners i.e. (PSPF, PPF, LAPF and GEPP);



2. an order appointing interim management to take over management of NICOL pending restructuring and putting in place a new management acceptable to the petitioners and Capital Markets and Securities Authority (CMSA);

3. an order directing Capital Markets and Securities Authority (CMSA) to facilitate and convene the petitioners and the rest of the shareholders to restructure and set up a new management of NICOL within a period of six months.

On that material date i.e. on 29th February 2012, NICOL being the 1st Respondent did not enter appearance. Senior State Attorney Mwakitalu, appeared for CMSA, and he acknowledged service of the Petition and did not object the prayers in the petition. The Court, therefore, ordered as follows:



Court: *“the prayers sought by the Applicants in the petition are hereby granted.”*

The Court was informed by Counsel Thadayo for the Petitioners that both NICOL and CMSA have been served. The Court did not enquire as to proof of service of the 1st Respondent. i.e. “NICOL.”

Having seen the background of the matter therefore, the first point for consideration in this application is whether the Order passed by the Court on 29th February 2012 by Hon Bukuku J, in Misc. Civil Case No. 4 of 2012, was a consent order or an *exparte* order.

It is clear from the records that NICOL was not present when the Order was passed by the Court. It is also clear from the records that State Attorney Mwakitalu appeared for and on behalf of CMSA, he did not appear on behalf of NICOL. It is clear that there was no undertaking given by NICOL to the Court at all. Also, it is clear from the records that there is neither an affidavit nor a settlement deed drawn by the parties to Misc. Civil Case No. 4 of 2012 which contains an



undertaking given by NICOL recording the settlement and filed in court to constitute the consent decree. It is manifest that any person appearing before the Court can give an undertaking orally by a clear and express oral undertaking that he has no objections to the prayers contained in a suit or petition and incorporated by the Court in its order. It is therefore clear that the consent order extracted in Misc. Civil Case No. 4 of 2012 had been passed on the basis of the no objection undertakings given by the State Attorney Mwakitalu appearing on behalf of CMSA. I am, however, unable to find any material on record which contains such an undertakings given by NICOL or on behalf of NICOL, as NICOL was not present when the consent Order was entered by the Court. It is clear that the Consent Order was between a compromises arrived at between the Petitioners and CMSA and a consent order was passed by the Court at the instance of the Petitioners and CMSA only. As submitted by the counsels for the Applicant, I agree that the Court can pass consent orders judgements and decree under Order XV rule 1 of the Civil Procedure Code, Cap 33 R:E 2002, which reads as follows:



“Where at the first hearing of a suit, it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce judgement”

I also agree with the findings made by Court of Appeal of Tanzania in the case of **NATIONAL BANK OF Commerce AND ANOTHER VS AHMED ABDERHAMAN (1997) TLR 259**, where the Court observed that *“since the advocate who appeared on behalf of the defendant conceded to one issue only, it was wrong for the Judge to enter a consent judgement on both the main and the alternative issues or legs of the reliefs”*.

It is no doubt that the order against CMSA was a consent order, since the parties present on 29th February 2012 were not at issue on any question of law and of fact on the petition. However the order passed against NICOL was passed ex parte, since NICOL was not present when the order was passed, NICOL did not intimate to the Court in any way, either through affidavit, or through a compromise undertaking or a



memorandum of settlement or even orally before the court that they are not at issue with the issues raised in the petition.

Now, having held that the order passed against NICOL was an exparte Order, the law gives the remedy for setting aside the exparte orders, judgements and decrees under order 9 Rule 13 of the Civil Procedure Code, Cap 33 R:E 2002, and since NICOL was out of time for making the application to set aside the exparte order, it is correct for them to apply for extension of time and the Court is having power under the provisions of the Law of Limitation Act, as well as under Section 93 of the CPC to extend the time already granted, even after its expiry as that section under the CPC, clearly reserves in favor of the court the power to enlarge the time required for doing an act prescribed or allowed by the Code of Civil Procedure.

However, before I determine the merits of the application, i.e. the merits of an application for extension of time to file the application to set aside the exparte decree/order , and an application for setting aside the exparte order, it is important



to determine as to who is entitled to bring an action for and on behalf of NICOL.

On deciding this question, I will take guidance from the famous English case of Foss vs. Harbottle reported at (1843) 2 Hare 461. I shall also make reference to texts in Company Actions in the Modern Set-Up' by S. C. Sen, First Edition, 'The New Frontiers of Company Law' by S. C. Sen, 1971 Edition and 'Guide to Companies Act', by A. Ramaiya, 17th Edition, and some other authorities as I shall be quoting hereunder. In short, the below is the summary of what the above provides:

“In company jurisprudence, company actions are divided into different groups:-

- (a) Actions by the Company - for enforcement of Company's rights.
- (b) Derivate actions - i.e., actions by shareholders for enforcement of the Company's rights.



- (c) Representative actions - i.e., actions by shareholders for enforcement of their class or corporate rights.
- (d) Personal actions by shareholders - for enforcement of their personal rights.”

There is a clear distinction between individual and corporate membership rights of shareholders. A member can always sue for wrongs done to himself in his capacity as a member. A shareholder in a company has many rights emanating from his memberships, such as, a shareholder is entitled to have his name entered and kept on the register of members, to vote at meetings of members, to receive dividends which have been duly declared, to exercise pre-emption rights conferred by the articles, and to have his capital returned in proper order of priority on a winding up or on a properly authorized reduction of capital. A shareholder also is entitled to restrain the company from doing acts which are ultra vires, to have a reasonable opportunity to speak at meetings of members and to move amendments to resolutions proposed at such meetings to transfer his shares; not to have his financial



obligations to the company increased without his consent; and to exercise the many rights conferred on him by the Companies Act, Cap 212 R:E 2002, such as his right to inspect various documents and registers kept by the Company.

“ A shareholder can take action for violation of personal rights as a single shareholder suing alone and not even on behalf of other shareholders may make the company a defendant and obtain his reliefs”. This is what was done in Misc. Commercial Application No. 4 of 2012 by GEPF, PPF, LAPF, and PSPF.

“It is a derivative action, where a wrong has been done to the company and an action is brought to restrain its continuance or to recover the company's property or damages or compensation due to it and an action can be filed by the company in its name”. This could be a dispute between the company on the one hand and third parties on the other, and not a dispute between the shareholders. “It makes no difference in principle that the third parties may accidentally happen to be the directors or controlling shareholders of the

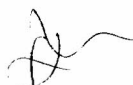


company. Foss vs. Harbottle (supra) itself is an illustration of such an action. "Where such an action is allowed the member is not really suing on his own behalf nor on behalf of the members generally but on behalf of the company itself. In a derivative action, in the framing of the suit for the purpose of compliance of the formalities the plaintiff had to describe himself as a representative suing for and on behalf of all the members other than the wrong-doers. In a true derivative action the plaintiff shareholder is not acting as a representative of the other shareholders but is really acting as a representative of the company. In a derivative action, the company would be the only party entitled to sue for redressal of any wrong done to it. **However, since a company is an artificial person, it must act through its directors.** (emphasis mine). Where the wrong is being done to the company by the directors in control, the company obviously cannot take action on its own behalf. It is in these circumstances that the derivative action by some shareholders (even if they are in a minority) becomes necessary to protect the interest of the company."

The plaintiff in a derivative action will be brought in the name of the company, and the person bringing the action or authorized to bring the action in court, and verify the pleadings on behalf of the company, would be authorized by a board resolution or a members resolution.

“As a general rule, the courts will not interfere in matters of internal administration. It is for the majority of shareholders to decide the manner in which the affairs of the company are to be conducted.” This principle was laid down in the celebrated case of *Foss vs. Harbottle* (supra), and this is done through general meetings or ordinary or extra ordinary meetings of the shareholders and the directors. The court held in the case of *Foss vs Harbotle* “that in the case of an injury to the corporation, it is for the corporation to sue in its own name and individual shareholders cannot assume to themselves the right of suing in the name of corporation.”

This means that “the person filing a derivative claim has to show that the company has a right to sue but being indulgent in the matter is not likely to sue and, therefore, he gets a



derivative authority to sue". (Birch vs. Sullivan; 1958 (1) All ER 56]. This type of action is a derivative action, i.e. the right to sue and enforce the right are derived from the company. The shareholders as such have no such right. If their own personal rights are being infringed they may bring a representative action. Satya Charan Law quoted in an Indian case of STARLIGHT REAL ESTATE (ASCOT) MAURITIUS LIMITED & ANR. Vs JAGRATI TRADE SERVICES PRIVATE LIMITED & ORS.

brings out the essence of such an action in the following words:-

"A company is a mere abstraction of law. By registration under the Companies Act, a company is vested with corporate personality, which is independent of and distinct from its members. It is a legal person with perpetual succession and common seal. It is a body corporate having a separate identity and distinct from the directors and shareholders. The property of the company is not the property of the shareholders."



An action by the company in the company's name has to be authorized and sanctioned by the board of directors or members resolutions passed at its special ordinary or extra ordinary meetings. I have not seen in the pleadings, as to who NICOL is in this application, and who is suing for and on behalf of NICOL, or who has been authorised by the Board of Directors of by the members of NICOL to bring an action in Court in the name of NICOL. In fact in this application, it appears to me there are two different management of NICOL. The management that was ousted following the Order made but Hon Judge Bukuku on 29th February 2012, in Misc. Civil Application No. 4 of 2012 in which Hon Judge Bukuku declared that NICOL's omissions and conduct are contrary to and prejudicial to the interest of the petitioners and directed CMSA to facilitate and convene the NICOL meetings of shareholders to restructure and set up a new management of NICOL within a period of six months.

It is on record that following the meeting of the shareholders, Mr. Kinoni Adam Wamunza was appointed the interim



Manager of NICOL, and since then Mr. Kinoni Adam Wamunza has taken over the management of NICOL.

It is also on record that NICOL's meeting was held on 14th April 2012, after the Ruling of the Court, at which the shareholders disbanded NICOL's Board of Directors and removed one Mr. Felix Gamaliel Mosha and one Ms. Kathleen Armstrong from their positions as the Chairman and the Chief Executive Officer, respectively. The meeting appointed the Interim Board of Directors and the Interim Management assumed full control of the affairs of NICOL. The affidavit accompanying the present application was taken by Felix Gamaliel Mosha, he pleaded in paragraph 1 of the affidavit that he is the Chairman of the Board of Directors of NICOL. He said, and I quote:

"That I am the Chairman of the Board of directors of the applicant company. I am conversant with the facts of this case and that I'm able and empowered to depose unto them."



The deposition of Mr. Felix Gamaliel Mosha are in contradiction to what is on record, as it is on record that Mr. Felix Gamaliel Mosha has been removed as the Chairman of the Board of NICOL held on 14th April 2012.

Even if we were to take into consideration Hon. Dr. Fauz Twaib's Ruling in Misc. Commercial Case No. 16 of 2011 , that Ruling categorically stated in an obita dictum that, his decision did not affect in any way the decision made by Hon Judge Bukuku J made on 29th February 2012. Page 18 last paragraph of the Ruling of Dr. F Twaib, J dated 06/03/2012 is of relevance here and it reads as follows:

“before I pen off, I wish to add the following: I'm aware of the consent orders of the Commercial Decision of this Court in Misc. Civil Application No. 4 of 2012 between the Registered Trustees of the following Pension Funds: the Public Sector pension Fund (PSPF), the Parastatal Pension Fund (PPF), the Local Authorities pension Fund (LAPF), and the GE Pension Fund (GEPF). In that case, on 29th February 2012, my sister Judge Bukuku J.,



granted consent orders on, inter alia, the appointment of interim management to take over management of NICOL, pending restructuring and putting in place a new management, and the calling of a shareholders meeting. My decision herein does not in any way alter the substance of that order....”

Again, in an order made on 11 November 2015, in Misc. Civil Cause No. 16 of 2011, Hon Dr. Fauz Twaib confirmed his dictum that his decision in Misc. Civil Cause No. 16 of 2011, did not effect in anyway the decision of Hon Judge Bukuku made in Misc. Civil Case no. 4 of 2012, made on 29th February 2012.

Mr. Felix Gamaliel Mosha was removed as the Chairman of the Board of Directors in a meeting held by the company's shareholders, and there is no decision of the Court which reversed or nullified the resolution made by NICOL in its general meeting held on 14th April 2012.



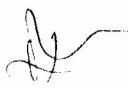
In any case, Mr. Felix Gamaliel Mosha did not file in Court, in support of his deposition, any minutes of the meeting of the shareholders or directors authorizing him to take a derivate action or any action for and on behalf of the company and in the name of the company. It is to be noted that the respondents are the majority shareholders of NICOL and they contend that Mr. Felix Gamaliel Mosha had no authority to represent NICOL or to take any proceedings in the name of NICOL. The respondents, being the shareholders alleges that the said Felix Gamaliel Mosha has fraudulently represented himself as the chairman of the Board of Directors of NICOL .It appears from the reading of the affidavit of Mr Felix Gamaliel Mosha and from the reading of Rulings of Hon Dr Fauz Twaib, and Hon Judge Bukuku J that it is essentially a personal cause of action against the Respondents or against the current management of NICOL. It is obvious that there is a dispute with regard to the internal management of NICOL. There is nothing on record showing that Mr Felix Gamaliel Mosha is still the Director or the Chairman of the Board of NICOL, and



that he is authorised by the Board to bring this action in Court for and on behalf of NICOL, and in the name of NICOL.

Even if, Mr Felix Gamaliel Mosha was a shareholder of NICOL neither could he have initiated these proceeding in the name of the company in a derivative action and claim any relief on behalf of the company. It is the company who alone can initiate and/or defend such proceeding.

The pleadings in this application if taken, as a whole, would clearly indicate that Mr. Felix Gamaliel Mosha is seeking to enforce his personal cause of action as opposed to derivative action. In case of a dispute with regard to the internal management of the Company and as to who would represent the company and/or authorize to represent the company, the proper course is to file a suit for declaration and injunction and to seek appropriate remedy against the miscreant directors and for persons asserting their right as directors. In the instant case, it appears that there are disputes with regard to the internal management of NICOL. The Rulings of the Court referred herein above and the affidavit of Mr. Felix



Gamaliel Mosha disclosed in this proceeding would not show that Mr. Felix Gamaliel Mosha or the Counsels representing NICOL in this case or any other person whatsoever, were not authorized to represent NICOL in the present application. It is pleaded by the Respondents that the Mr. Felix Gamaliel Mosha have ceased to become the chairman of the board of directors since 2012, April. The said Mr. Felix Gamaliel Mosha was not entitled to hold himself as the chairman of the Board of directors and the action initiated by him in the name of the company, purporting himself to be the Chairman of the Board is not maintainable and barred by law.

Based on the above, this application is dismissed with costs.

Having dismissed the suit on that ground, the rests of the arguments fronted by the Counsels of the parties regarding extension of time to file an application to set aside exparte decree, and an application to set aside the expate decree shall not be determined.

Application dismissed with costs.



DATED at DAR ES SALAAM this 18TH day of MARCH, 2016

Mansoor

MANSOOR

JUDGE

18TH MARCH 2016

