

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 136 OF 2018

(Arising from Commercial Case No. 260 of 2017)

MARTHA KAVENI RENJU-----APPLICANT

VERSUS

AMBROCE BRIXIO LUGENGE----- 1ST RESPONDENT

JOSEPH MAKANDENGE ----- 2ND RESPONDENT

RULING

B.K. PHILLIP, J

The applicant herein has lodged this application under the provisions of sections 416(1) and 253(1) (a)(e)(w)(2)(a) &(3) of the companies Act, Cap 212 R.E. 2002 and Rule 415 and 419 (1)(2) (3) of the Companies (In solvency) Rules, 2005 praying for the following;

- i. Confirmation that neither Mr. Joseph Makandenge nor Mr. Ambroce Brixio Lugenge could serve in any office in the Company, whether as Director or Chairman or howsoever; and

- ii. The said Makandegé and Lugenge be restrained from acting as or holding themselves out as officers or agents of the Company.

The application is supported by an affidavit sworn by the applicant, Martha Kaveni Renju. Two counter affidavits in opposition to the application were filed in court. The first one was sworn by Joseph Makandegé while the second one was sworn by Ambroce Brixio Lugenge. The applicant also filed a rejoinder to her affidavit. At the hearing of this application the learned Advocate Gasper Nyika represented the applicant while the respondents were represented by the learned Advocate Alex Balomi.

The controversy in this application is over the management of Independent Power Solutions Limited [herein after to be referred to as "IPTL"]. The applicant alleges that she was appointed by Standard Chartered Bank (Hong Kong) Limited to be the receiver and manager of all the assets of IPTL with effect from 21st December, 2009, thus, she deponed that she has powers to remove and appoint the directors of IPTL. The applicant alleges that she saw an advertisement in a newspaper indicating that the first respondent is the chairman of IPTL and the second respondent is the Managing Director and Chief Executive of the same. The applicant deponed further that, she has never appointed the respondents to the above mentioned positions in IPTL, thus they are wrongly designating themselves to hold those positions.

On the other side, the 1st and 2nd respondents deponed that they were appointed by a duly constituted board meeting to be the principal officers of IPTL and Pan Africa Power Solutions Limited (henceforth 'PAP'). That the

applicant has no mandate to appoint either the chairman of the Board of Directors and the Managing Director or Chief Executive of IPTL which is private company governed by its Memorandum and Articles of Association, and the company laws applicable in Tanzania.

For a better understanding of the coming discussion, I think it is worth mentioning here that in 2016 Standard Chartered Bank (Hong Kong) Limited and Standard Chartered Bank Malaysia Berhad lodged claims against IPTL, VIP Engineering and Marketing Limited and Pan Africa Powers Solutions (T) Limited at the High Court of Justice Queen's Bench Division, Commercial Court. On 16th November, 2016, a judgment against IPTL for amounts due under the loan agreement to a tune of US 168,800,063.87 was entered by the High Court of Justice Queens Bench Division Commercial Court, by Hon. Mr. Justice Flaux. In his judgment, Hon. Mr. Justice Flaux made the following orders among others.

- *All the rights, title and interest of the Banks under (i) the Facility Agreement, (ii) the Security deed, (iii) in the Shareholder Support Deed, and (iv) the Charge of Shares became vested in the First Claimant [the Bank];*
 - *With effect from 17th August, 2005, as signee of Donaharta pursuant to the Deed of Assignment of that date; and*
 - *With effect from 25th October, 2005, as sole Bank pursuant to the Novation Notice.*

- *From and after 17th August, 2005, the First Claimant [the Bank] has been entitled to receive all those payments of interest made under the Facility Agreements that have been made.*
- *By reason of the matters declared by paragraph 4,6 and 9 above, the First Claimant [the Bank] has been, and has been entitled to hold itself out as being, a secured creditor of [IPTL] since 17th August, 2005.*
- *The security constituted by the Security Deed has become and is enforceable in accordance with the terms of the Security Deed.*

Pursuant to the terms of the security deed, the Standard Chartered Bank (Hongkong) Limited appointed the applicant to be the receiver and manager (Administration receiver) of all the estate in the property and assets of IPTL.

Back to the application in hand, in his submission the advocate for the applicant, Mr. Nyika submitted that under the provisions of section 253(2)(a) of the Companies Act, Cap 212 R.E. 2002 (henceforth Cap. 212) the applicant is vested with powers to appoint or remove a director from that position. Mr. Nyika contended that, the appointment of the 1st and 2nd respondents as chairman and Managing Director/Chief Executive of IPTL respectively could only have been made by the applicant as a administrator receiver of all the business property and assets of IPTL not otherwise, thus the, purported appointment of the respondents is illegal.

Mr. Nyika referred this court to the judgment of Hon. Mr. Justice Flaux, dated 16th November, 2016, the security deed and the Ruling of this court by Hon. Sehel, J as she then was, dated 9th February, 2017, in which she registered the aforementioned judgment of Hon. Mr. Flaux, the deed of appointment and the Brela forms for the registration of applicant as the receiver and manager of the properties of IPTL.

On the other side Mr. Balomi submitted that, the applicant lacks *locus standi* to make this application. He contended that, the whole application is an abuse of the court process for being contemptuous of the injunctive order issued by Hon. Twaib, J in Misc. Civil Application No. 174/2014 at the High court of Tanzania (District Registry), in which the applicant and her principal, Standard Chartered Bank (Hong Kong) Limited were jointly and severally restrained from anyhow interfering with the affairs of IPTL pending conclusive hearing and determination of Civil Case no. 60/2014. Mr. Balomi, submitted further that, the alleged deed of assignment of the loan dated 17/8/2005 is not valid for want of registration or authentication in Tanzania and lack of stamp duty, thus that document has no evidential value. Furthermore, Mr. Balomi contended that, the judgment dated 16th November, 2016 by Hon. Mr. Justice Flaux was wrongly registered in this court by Hon. Sehel, J as she then was, as she usurped the powers vested in the registrar of the High Court of Tanzania.

Also, Mr. Balomi was of the view that this application is an abuse of the legal process in that, the applicant seeks to circumvent, pre-empt

and frustrate this Honourable court's determination of the consolidated Misc, Commercial Case No. causes No. 67 and 75 of 2017 whose hearing is pending and in which the applicant's appointment by Standard Chartered Bank (Hongkong) Limited as an administrative receiver of IPTL is among the contested issues.

Mr. Balomi insisted that the respondents are lawfully appointed by a duly constituted and convened board meeting of the board of directors of IPTL. That IPTL is comprised of different shareholders and directors including EURASIA, HI-TIDE, and SIMBA TRUST which collectively own majority shares of 60%, thus the applicant has no mandate to appoint either the Chairman of the Board of Directors or the Managing Director or the Chief Executive of ITPL.

In his rejoinder Mr. Nyika submitted that, the issue of deed of assignment was conclusively dealt with in the judgment of Hon. Mr. Justice Flaux, which was registered by this court. He was of the view that this court is *functus officio* to deal with the validity of the deed of assignment now, which is referred in the judgment of Hon. Mr. Flaux as security deed or charges of shares.

Having analyzed the submissions made by the learned advocates as well as the contents of the affidavits and counter affidavits filed by the parties, let me start with the issue of *locus standi* of the applicant, as it goes together with the issue of validity of her appointment as the administrative receiver of IPTL, thus, I will dwell on the later whose determination will

consequently determine the former, that is whether the applicant has the *locus stand or not*.

From the pleadings and the submissions made by the learned advocates, there is no dispute on the existence of the judgment of Hon. Mr. Justice Flaux and the registration of the same in this court by Hon. Sehel, J as she then was. I have noted the arguments raised by Mr. Balomi, that the said judgment was wrongly registered in this court. With due respect to Mr. Balomi, his aforesaid argument cannot invalidate the ruling of this court by Hon. Sehel, J, as she then was as far as the registration or recognition of the judgment of Hon. Mr. Flaux is concerned. I am alive that the decision of Hon. Sehel, J as she then was, in which she registered the judgment of Hon. Mr. Flaux Justices Flaux is being challenged, however, as of now, I am of a settled view that the appointment of the applicant, as a receiver and manager of IPTL which has its bases on the decision of Hon. Mr. Justice Flaux, as I have elaborated earlier in this ruling is valid, until when, it is decided otherwise.

In addition to the above, I have read the Deed of Appointment of the applicant as Receiver and Manager signed by Standard Chartered Bank (Hong Kong) and the corresponding Brela form, all show that the applicant's appointment as receiver and manager of IPTL is in order. Thus, I am of a settled view that the applicant has *locus standi* to file this application.

As regards, Mr. Balomi's arguments that the deed of assignment of the loan is not valid for want of registration or authentication in Tanzania and stamp duty, I am inclined to agree with the submissions by Mr. Nyika, that issue was discussed and decided by Hon. Mr. Justice Flaux in his judgment, thus this court after registering that decision cannot deal with that issue now, it is *functus officio*.

Having held that the appointment of the applicant as receiver and manager of IPTL is in order, the next issue is her powers as receiver and manager of the properties of IPTL; The instrument under which the applicant derives her powers as a receiver and manager of IPTL which titled, "**The Deed of Appointment of receiver and manager of Independent Power Tanzania Limited** states clearly that the applicant, that is Martha Kaveni Renju was appointed **to be the Receiver and Manager of all the estate in the property and assets charged by the security deed upon the terms and conditions and with all the powers conferred by the security deed and /or by law.** The Brela form No.106 (a) that was filed following the appointment of the applicant as a receiver and manager of the properties of IPTL also states clearly that, the notice in the aforesaid form No. 106 was intended to notify the registrar of companies that the applicant was appointed as a **Receiver and Manager of the property of IPTL.**

From the foregoing, it is evident that, the applicant's powers are specifically in respect of the properties/ assets of IPTL under the deed of security and not administrative issues. To my understanding the powers

of the receiver and manager of the properties are confined to the charges created on a loan and do not include administration matters of the company as per the provisions of section 253 of Cap 212. I have noted that, Mr. Nyika in his submission relied upon on the provisions of sections 253 (2)(a) &(3) of the companies Act, Cap 212, which specifically provide for the powers of an administrator, however, the evidence adduced in court shows that the applicant was not appointed as an administrator of IPTL as envisaged in the provisions of section 252 and 253 of Cap 212. The administrator appointed under section 252 has powers to do all such things as may be necessary for the **management of the affairs, business and property of the company.** In moving this court to entertain this application, Mr. Nyika has included Section 416 (1) of the companies Act, Cap 212, which provides for the powers of the administrative receivers and states that, the powers conferred to an administrative receiver of a company by debentures by virtue of which he was appointed are deemed to include (except in so far as they are inconsistent with any of the provisions of those debentures) the powers specified in Section 253. Section 416(2)(b) of Cap 212 provides that, in the application of section 252 to the administrative receiver of a company, reference to the property of the company are to the property which he is or, but for the appointment of some other person as the receiver of part of the company's property, would be the receiver or manager.

From the above mentioned provisions of the law, it is my considered view that, the administrative receiver deals with the properties involved in the


Charge/ Debenture not administrative issues such as appointment of Directors and Management team of the company. Therefore, the powers specified in Section 416 (1) of Cap 212 are applicable to the administrative receiver as far as the properties in the Charge or Debenture are concerned.

Having said the above, I am therefore inclined to agree with Mr. Balomi that, the applicant has no powers to appoint or remove the respondents from their positions. The administrative issues pertaining to the appointments of the Board of Directors , the Chairman of the Board of Directors and Chief Executive of IPTL, being a private company are governed by its Memorandum and Articles Association.

I will not deal with the issue of the shareholders of IPTL which emerged in the course of the submissions of the learned advocates appearing herein as it was not the subject of this application. In the upshot, this application has no merit. I hereby dismiss it with costs.

Dated at Dar es Salaam this 2nd day of April, 2019.




B.K. PHILLIP
JUDGE