

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT ARUSHA**

**MISC. COMMERCIAL APPLICATION NO. 2 OF 2020**

**IN THE MATTER OF THE COMPANIES ACT, No. 12 OF 2002 [CAP  
212 R. E. 2002]**

**AND**

**IN THE MATTER OF IMPALA HOTEL LIMITED**

**AND**

**IN THE MATTER OF APPLICATION BY**

**JANETH WILLIAM KIMARO ..... 1<sup>ST</sup> PETITIONER**

**MICHAEL MREMA ..... 2<sup>ND</sup> PETITIONER**

**VIV MREMA ..... 3<sup>RD</sup> PETITIONER**

**(AS JOINT PERSONAL LEGAL REPRESENTATIVE OF THE OF THE LATE MELLEO AUYE MREMA)**

**VERSUS**

**PELAGIA AUYE MREMA ..... 1<sup>ST</sup> RESPONDENT**

**RANDLE MREMA ..... 2<sup>ND</sup> RESPONDENT**

**IMPALA HOTEL LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**Date of last Order:30/06/2020**

**Date of Ruling:08/07/2020**

**RULING.**

**MAGOIGA, J.**

The petitioners, JANETH WILLIAM KIMARO, MICHELLE MREMA AND VIV MREMA under the provisions of sections 233(1)(2) (3), 121(1) (2) (3) of the Companies Act, No.12 of 2002) and Articles 26,27, and 28 of Table A of

First Schedule to the Companies Act, No. 12 of 2002 and any enabling provision of the law instituted the instant petition against the above named respondents praying this honourable court be pleased to grant the following prayers against the respondents jointly and severally as follows:

- i. Declaration that the affairs of the 3<sup>rd</sup> respondent company are run in a manner prejudicial to the best of the members and company itself.
- ii. An order to declare the petitioners as personal legal representative in respect of share(s) held by the late MELLEO AUYE MREMA in Impala Hotel Limited.
- iii. An order directing the 1<sup>st</sup> respondent to rectify the 3<sup>rd</sup> respondent register and register petitioners as personal legal representative of the share(s) held by the late MELLEO AUYE MREMA in Impala Hotel Limited.
- iv. An order for permanent injunction against the 2<sup>nd</sup> respondent from running the affairs of the third respondent company and declare his directorship as being invalid and illegal.
- v. An order for immediate meeting to appoint new directors.
- vi. Cost of the petition

- vii. Any other order or relief that this honourable court will deem fit, just and equitable to grant to enable smooth and proper running of the 3<sup>rd</sup> respondent's business affairs in protection of the interest of the company and petitioners' interests.

Upon being served with the petition, the respondents, filed a joint reply to petition and simultaneously raised preliminary objection on points of law to the effect that:

1. That the petitioners are with no *locus standi* to institute this application at hand.
2. The Misc. Commercial Application No. 02 of 2020 is bad in law for being irregular and contrary to law.

The petitioners, are enjoying the legal services of Mr. Richard Valerian Masawe, learned advocate from Arusha based legal clinic of Dexter Attorneys. The respondents, are equally enjoying the legal services of Mr. Gwakisa Sambo, learned advocate, from Arusha based legal clinic of Patriotic Legal Consultants.

When this application was called for hearing, and upon Mr. Sambo invited to argue his preliminary objection on points of law, instantly informed the

court that he is abandoning the second ground of objection and will argue the first limb of objection alone. Arguing the first limb of objection, which is to the effect that the petitioners are with no *locus standi* to institute this application, the learned advocate for the respondents submitted that, the issue of *locus standi* will be argued in two fronts; one, that the petitioner have no legal legs to institute this petition, and second, that the appointment of the petitioners ceased to function after elapsed of six months from the date of their appointment as shown in annexure JMV3 to the petition and as such by the time they instituted this petition had no legal legs to stand to institute the instant petition.

In support of the first part of the objection, Mr. Sambo cited the case of YACOBO OSURTUT v. SIPITEKI KIPAHA, LAND APPEAL No. 15 OF 2015(HC) ARUSHA(Unreported) in which the appellant was found to have no *locus standi* for want of being appointed administrator of Osurtut estate, the original owner of the land in dispute. Another case cited was the Labour case of HEMED A. KIBULE v. SIMBA PLASTIC CO. LIMITED, REVISION NO. 351 OF 2019(HC) DSM (Unreported) in which a stranger to a suit raised a preliminary objection which was upheld by Commission for Mediation and Arbitration but upon the matter went for revision to the High Court, it was

found that the stranger to a suit had no *locus standi* to raise a competent preliminary point of objection.

Mr. Sambo, therefore, was of the strong view and submissions that, according to the case laws cited above and the provision of section 233(1) of the Companies Act, No 12 of 2002, it is only members of the company who can bring petition, if any. Mr. Sambo went on to argue that, petitioners are not members of the Impala Hotel Limited, hence, lacking necessary *locus standi* to institute the instant petition. According to Mr. Sambo, a mere appointment of the petitioners to be legal person representative alone, is not enough unless and until are bequeathed with the shares of the deceased, and that, is upon that stage that they become automatic members.

Further arguments by Mr. Sambo were that, even if they had bequeathed themselves the shares of the company, they would have brought the instant petition in their personal capacities as beneficiaries and not in their legal personal representative.

On the second front of argument, Mr. Sambo premised his arguments in the case of MUKISA BISCUITS MANUFACTURING COMPANY LTD v. WEST END DISTRIBUTORS LTS (1969) EA 696 in which it was held at page 701 that:

**"... a preliminary objection consists of the point of law which have been pleaded or which arise by clear implication out of the pleadings and which if argued as preliminary objection may dispose of the suit.**

**..... a preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which if argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

On that note, the learned counsel for the respondents argued that, the documents before this court, in particular, annexure JMV3 leaves no doubt that the petitioners were appointed on 23<sup>rd</sup> July 2019, and that, the petitioners were given six months to collect and distribute the properties of the deceased, but, to the date, when this petitioned was filed on 25<sup>th</sup> March 2020, their powers to administer the estate varnished on 23<sup>rd</sup> January 2020.

The learned counsel for the respondent, therefore, argued that pleadings before this court do not state that, the petitioners extended their time of administration of the estate. According to Mr. Sambo, failure to show in their pleadings that, their powers were extended, leave them with no capacity, as their capacity extinguished after elapse of six months given by the court. It was further submission of the learned counsel for respondent that, because the pleadings are silent, it means the petitioners are working outside the time given to them to accomplish the distribution process.

Mr. Sambo pointed out that, sub section (2) of section 233 cited refers to a person who has been bequeathed and not a mere administrator or administratrix of estate.

Based on the above reasons, Mr. Sambo learned advocate for the respondents, humbly invited this court to sustain the preliminary objection and proceed to dismiss the instant petition with costs.

On the other hand of the petitioners, Mr. Masawe, learned advocate dismissed the whole submissions by Mr. Sambo as misplaced because all what was submitted, according to Mr. Masawe, were questions of facts

which need evidence, hence, not qualifying to be a preliminary objection on a point of law.

Mr. Masawe starting with the second line of argument that the appointment of the applicants has elapsed, replied that, this is an issue that need evidence and concluded that once an issue needs evidence, then in line with MUKISA BISCUITS case (supra) ceases to be appoint of law. Mr. Masawe further cited the case of SHARIFA TWAHIB MASSALA v. THOMAS MOLLEL AND 3 OTHERS, CIVIL APPEAL NO. 67 OF 2011 (ARUSHA) CAT (Unreported) in which the Court of Appeal found that matters that are to be ascertained by production of evidence, ceases to be pure point of law.

Mr. Masawe still undaunted cited the case of ANTHONY LEONARD MSANZE AND ANOTHER v. JULIANA ELIAS MSANZE AND 2 OTHERS, CIVIL APPEAL NO. 76 OF 2012 (CAT) ARUSHA (Unreported) in which an issue of *locus standi*, the appellants who were legal administrators of the deceased estate were held to have sufficient interest in the estate of the late Elias Leonard Msanze, hence, having *locus standi* to institute the landed matter.

Lastly, the learned advocate for the applicants cited the case of AQUATECH LIMITED v. PAES WEGS INTERNATIONAL B.V AND 4 OTHERS, MISC. CIVIL

CAUSE NO 09 OF 2018 (HC) MOSHI(Unreported) in which it was held that any matter or issue that require evidence ceases to be a preliminary objection on point of law.

On that note, Mr. Masawe concluded that what was submitted by the learned advocate for the respondents on the second front of his arguments are matters that require evidence and as such ceases to be point of law.

On the argument that after six months of the appointment of the petitioners as indicated in annexure JMV3 elapsed, it was the brief reply of Mr. Masawe that, when a person is appointed personal legal representative his powers cease upon filing inventory, and argued that no such evidence is here in this application. The above stance was supported by the holding in the case of AHMED MOHAMED LAAMAR v. FATUMA BAKARI AND ANOTHER,(CAT) TANGA(Unreported) in which it was held that, in law, the probate proceedings, were effectively closed when the inventory and accounts are filed and the matter closed. Based on that holding by the Court of Appeal, Mr. Masawe argued in reply that, no such evidence was in this petition and as such the petitioners have all necessary legal capacity to institute and prosecute this petition as presented.

Mr. Masawe whose submissions in reply were mainly backed up by judicial pronouncements, cited Indian cases of MT. NAZMUNESAA BEGUM v. VIDYASAGAR COTTON MILLS LTD, AIR 1962 CAL 380 AND WORLDWIDE AGENCIES (P) LTD v. MARGARET T. DESOR AND OTHERS (1990) 67 COMPCAS 589 DELHI which in their totality were discussing sections 397 and 398 and articles 26 of the Indian Companies Act, which are in pari materia with our section 233 and articles 26,27 and 28. In these Indian cases the courts of India held that legal representative of the deceased have legal interest and are entitled to present a petition under section 397 and 398 for they step into the shoes of the deceased member.

Further reply by Mr. Masawe was that, the argument that petitioners can only have *locus standi* upon bequeathed with the share by way of distribution; it was the reply of Mr. Masawe that, that according to wording of section 233(1) of the Companies Act, 212 of 2002, no such legal requirement.

Mr. Masawe back to our domestic laws submitted that Article 26 of the First Schedule to the Companies Act, No.12 of 2002, is very clear that legal personal representative have interest in the shares of the deceased member. This interest, according to Mr. Masawe, amounts to *locus standi*

for purposes of instituting the instant petition. The only exception, according to Mr. Masawe, is attending meetings, unless and until transmission of the shares is done.

Mr. Masawe further distinguished all cases cited and relied by Mr. Sambo, for reasons that parties thereto had no interest as opposed to the instant petitioners who have legal interest to protect.

In the totality of the above reasons, the learned counsel for the petitioners prayed that the preliminary objection raised be dismissed with costs.

In rejoinder, Mr. Sambo submitted that the raised preliminary objection do not require evidence because same was raised out of pleadings and that it was made clear that preliminary objection must consist of point of law which raises by clear implication out of the pleadings, and which, if argued successful, may dispose of the case. Mr. Sambo forcefully argued that, in this petition no need of evidence, but the point raised can be discerned from the pleadings.

The argument that the petitioners have interest by virtue of being administrators/administrix of estate of the deceased, Mr. Sambo submitted that is not true at all, unless transmission of the shares to them as

beneficiary is concluded. On that note, Mr Sambo distinguished all cases cited and relied by Mr. Masawe in his reply, because transmission of the shares is incomplete, no inventory has been filed, and the Indian situation is different from ours.

On the interpretation of articles 26-28 of the First Schedule to the Companies Act and sections 397 and 398 of the Indian Companies Act, Mr. Sambo was brief that, all submissions by Mr. Masawe were all misplaced and misconstrued as the circumstances of those articles and sections in India do not apply here. Conclusively, the learned advocate insisted that the petitioners have no *locus standi* and reiterated his prayers for the dismissal of the petition with costs.

That marked the end of hearing of the preliminary objection. The task of this court now is to determine the merits or demerits of the contentious preliminary objection on point of law as argued.

Having dispassionately considered the rival arguments of the legal minds of the learned advocates for parties, I am of settled observation that there are some facts which are not in dispute between parties, which in a way will help this court in resolving the legal dispute between parties. These are:

**One**, there is no dispute that, the petitioners instituted the instant petition at the capacity of being personal legal representative by virtue of being duly appointed administratrix/administrator of estate of the late MELLELO AUYE MREMA. **Two**, there is no dispute that, the deceased and the first respondent were the only registered members of the third respondent herein.

Notwithstanding, it is my considered opinion that issue of *locus standi* in our jurisdiction through judicial pronouncements even without citing any case here, is a settled save for exceptions to the general that, any person who institute a suit must demonstrate to have an interest in the matter capable of bringing the suit in question. And, I am entitled to add that there are situations where this point can be a pure point of law and there are others, where it may need evidence. So, each case has to be decided based on its own peculiar facts.

However, what is in serious dispute and which parties' learned advocates for parties lock horns is, whether the petitioners by virtue of their being appointed administratrix/administrator of the estate of the deceased, have *locus standi* to institute the instant petition. Without repeating the learned advocates submissions, which I have carefully and dutifully considered, with

due respect to Mr. Sambo, I am of the considered opinion that, his submissions are misplaced and misconceived and not legally tenable. I will give reasons. **One**, as noted above, there is no dispute that the deceased was the registered members of the 3<sup>rd</sup> respondent, therefore, in law, any person appointed as administrator/administrix enter into the shoes of the deceased and by virtue of that appointment, and as such is legally empowered to do anything in respect of the affairs of the deceased estate, including instituting legal proceedings in the course of administering the estate, the instant petition, inclusive. See section 44 of the Probate and Administration Estates Act,[Cap352 R.E.2002]. So, the argument that, it is until the appointed administrator/administrix has finished distribution of the estate is misconceived and misplace on the part of the respondents, and is hereby rejected. **Two**, the cases cited by Mr. Sambo, as rightly argued by Mr. Masawe, and rightly so, in the opinion of this court, are distinguishable for reasons that; one, in the first case of **Yakob Usurtut case (supra)**the appellant had not been appointed as administrator of the estate of the deceased, and two, the other one of **KIBULE (supra)** stranger to a suit by all strength of imagination cannot have *locus standi* to raise a preliminary objection, so to speak. In this petition, the petitioners are interested by

virtue of their appointment, and hence, stepping into the shoes of the deceased, therefore, with full capacity to defend the rights of the deceased estate in the course of administering the estate, hence, are entitled to all rights belonging to the deceased with powers to sue and be sued. **Three,** the arguments that, it is until when the distribution or inventory has been filed, is when the applicant can have capacity is misconceived and lacks legal back up in this petition and as such rejected too.

On the totality of the reasons given above, I agree with the learned advocate for the petitioners that, the petitioners have *locus standi* to institute the instant petition and without much ado, do hereby overruled the preliminary objection for want of legal legs to stand. In the event, this preliminary objection is hereby overruled with cost to follow the outcome of the petition.

It is so ordered.

Date at Arusha, this 08<sup>th</sup> day of July, 2020.



  
**S.M.MAGOIGA**

**JUDGE**

**08/07/2020**