

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

Misc. Commercial Cause No.35 of 2020

IN THE MATTER OF MOTORRAMA (T) LIMITED

AND

**IN THE MATTER OF PETITION FOR UNFAIR PREJUDICE
UNDER SECTION 233 (1) AND (3) OF THE COMPANIES
ACT, 2002**

BY

BHAVESH CHANDULAL LADWA.....1ST PETITIONER

AATISH DHIRAJLAL LADWA.....2ND PETITIONER

NILESH JAYANTILAL LADWA.....3RD PETITIONER

MOTORRAMA (T) LTD..... 4TH PETITIONER

VERSUS

JITESH JAYANTLAL LADWA.....RESPONDENT

Last Order, 05/08/2020.

Date of Ruling, 18/09/2020.

RULING

NANGELA, J.:

On the 18th June 2020, the four petitioners herein filed this petition, under section 233(1) and (3) of the Company Act, 2002, seeking for the following orders:

1. An order declaring the conducts and operations of the Respondent were and are unlawful and prejudicial to the

- interests of the Company and the Petitioners as shareholders, directors and members of the Company;
2. An order restraining the Respondent permanently from taking part in the management of the affairs of the Company and an order directing the management of the Company to be placed in the hands of the 1st, 2nd, and 3rd Petitioners.
 3. An order compelling the Respondent to vacate the office and business premises for the use of the Company only and relocate his personal business ventures from the company's premises.
 4. An order that all directors and shareholders be allowed an access to the Company's Office.
 5. Payment of general damages to the petitioners as the Court may assess.
 6. Costs of the suit be borne by the Respondent.
 7. Any other relief or order the honourable Court shall deem fit and proper to grant in the circumstances.

Before this Court had the opportunity to decide if or not the Petitioners are entitled to their prayers, the Respondent raised a preliminary objection to the effect that **'this Petition is improperly verified and signed'**. This ruling, therefore, addresses the preliminary objection. Before going to the crux of the matter, I will set out its background, albeit briefly.

This Petition was filed under a certificate of 'extreme urgency'. Four grounds were raised in the certificate to certify the urgency of the matter and I need not reproduce them here. On

25th June 2020, when the parties appeared before me, Mr. Patrick Kaheshi, learned counsel, represented the Petitioners while Mr. Elly Musyangi, also a learned counsel, appeared for the Respondent.

On the material date, Mr. Kaheshi informed this Court that the Petitioners have approached this Court because the Respondent is conducting himself in a manner that is prejudicial to the interests of the Petitioners. He narrated the kind of orders which the Petitioners are seeking from the Court, noting that, the Respondent, who is a minority shareholder, ought to act and conduct the affairs of the 4th Respondent under the directions of the majority shareholders.

For his part, Mr. Musyangi, who appeared for the Respondent, informed this Court that he was served with the Petition on the 23rd June 2020 and was yet to file an answer to it. He prayed for 21 days to do so. Mr. Kaheshi did not favour the granting of the 21 days arguing that the matter was filed under certificate of urgency and the Company Act does not say that an answer to a petition should be filed within 21 days.

Having heard the concerns raised by both parties, and taking into account the grounds of urgency under which the Petition was filed, I made an order granting the prayers by Mr. Musyangi to file an answer to the Petition, but within 14 days instead of 21

days. The answer to the Petition, therefore, was to be filed on or before 8th July 2020 and the Petitioners were to file their reply to it on or before 15th July 2020. I set the hearing on 5th August 2020 at 12.00 noon. When the parties appeared before me on the scheduled hearing date, they were represented by the same advocates who appeared before me on the 25th July 2020. The Court was set to hear the parties' oral submission.

Before going to the matters set before the Court, Mr. Kaheshi informed this Court that, although the Petitioners were supposed to file their rejoinder to the Respondent's answer to the Petition on or before 15th July 2020, the Respondent served the Petitioners his answer to the Petition on the 21st July 2020, just four days before the date set for the hearing. He prayed for time to file the rejoinder. He also pointed out that in the answer to the Petition; the Respondent has raised a preliminary point of law in objection to the Petition. He therefore prayed for a hearing date of that preliminary objection. Mr. Musyangi did not object to the prayer and the Court granted it as prayed, directing that, the rejoinder to the answer to the Petition should be filed on or before 12th August 2020.

Furthermore, since there was raised in the answer to the Petition a preliminary objection, I directed that the same should be disposed by way of filing written submissions as follows, that:

- (a) The Respondent shall file his written submission on or before 14th August 2020 and serve the Petitioners not later than 3.30 pm of the date of filing.
- (b) The Petitioners shall file their Reply submissions on or before 24th August 2020 and serve the Respondent not later than 3.30 pm of the date of filing.
- (c) Rejoinder submission be filed on or before 31st August 2020 and be served on the Petitioners not later than 3.30 pm of the date of filing.
- (d) Ruling on 18th September 2020 at 9.30 am.

The parties duly adhered to the above scheduling order and they also filed their written submissions. I will, therefore, summarize and analyze, here below, the parties' written submissions in support of and in opposition to the preliminary objection.

Mr. Musyangi, the learned counsel for the Respondent commenced his submissions by providing a definition of what amounts to an objection, referring this Court to the case of **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] E.A 696**. The Respondent's counsel referred this Court to page 700, where the Court in that case stated as follows:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of

the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration." (*Underline supplied by the Respondent*).

At page 701 of that decision, the Court stated that:

"a preliminary objection is in the nature of what 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 cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."

Further still, citing the cases of **Chama cha Walimu Tanzania v Ezekel Tom Oluoch, Misc.Application No.49 of 2020 (unreported)** and **Shabida Abdul Hassanali Kassam v Mahed Mohamed Gulamali Kanji**, Civil Appeal No.42 of 1999 (unreported), the learned counsel for the Respondent submitted that the Court in these two cases further clarified on the aim of a preliminary objection. In the latter case, the Court stated that:

"the aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily."

In his submissions, Mr. Musyangi submitted that the facts disclosed on the petition are to the effect that the petition was signed and verified in Dar-es-Salaam by the first petitioner who resides in the UK. It was contended that, such a petitioner has not been in Dar-es-Salaam for quite a long time. Referring to paragraph 1 of the Petition, it was argued that, since it has been

clearly shown that all Petitioners reside in Britain, to verify that the petition was verified in Dar-es-Salaam while the pleadings clearly show that the Petitioners are residing in Britain, renders the petition defective and should be dismissed with costs.

Mr. Musyangi, referred to this Court Order VI Rule 15 (3) of the Civil Procedure Code, Cap. 33 [RE.2019]. That provision of Order VI reads as follows:

"The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."

In view of the above, Mr. Musyangi submitted that, it is a well settled principle of law that parties are bound by their pleadings. He contended that, the verification clause in the instant Petition is defective for being improperly verified at to the place in which it was pleaded which is in fact not true as appearing in the Petitioner's own pleadings. He referred to this Court the case of **Roba General Merchant v Director General Tanzania Harbour Authority and 2 Others, Civil Case No. 161 of 2004 (unreported)**, arguing that, this Court dismissed the case before it with costs, for having been defectively verified. Based on the foregoing, Mr. Musyangi urged me to follow the same route and dismiss the Petition with costs.

In response, the Petitioners filed their written submissions. In their submissions, the Petitioners submitted that, the fact that

the 1st Petitioner do reside and work for gain in the UK does not impede him to verify the petition in Dar-es-Salaam. It was argued that, that contention will attract evidence whether the same was verified or not and, doing so, will amount to departure from the cardinal principal of law that the preliminary objection should be based on a point of law and not otherwise. The learned counsel for the Petitioners held a view that, going by that line of argument, the point of objection which the Respondent has raised will suffer a serious blow in terms of its particularity and focus, meaning that, it will no longer be a point of law but one of fact, as it calls for evidence.

Referring to this Court what the Court sated in the case of **Mukisa Biscuits** (supra), it was argued that, a point of law must be one in the nature of *`a pure point of law which is argued on the assumption that all fact pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained...'* Mr. Kaheshi submitted that, what the Respondent has raised and argued is a point which attracts evidenced to be furnished to the Court and that cannot be a point of law. He argued further that, under Order VI rue 15(3) of the CPC, Cap 33 [R.E.2019], the requirement there is for the verification being signed by the person making the pleading and who should also state the date on which and the place at which it was signed. He contended

that, that is exactly what was done by the 1st Petitioner. He finally urged this Court to find that the preliminary point of law is unmerited as it calls for procurement of evidence and not just a pure argument based on the law.

Mr. Kaheshi submitted further that, since the preliminary objection does not even go to the root of the matter, it cannot be argued or sustained by this Court as it aims at frustrating or exasperate and delay the justice in the Petition. Citing section 3A of the CPC, Cap.33 [R.E. 2019] on the overriding objective principle, Mr. Kaheshi submitted that, the law requires that substantive justice be rendered expeditiously, proportionately and in an affordable manner of resolving disputes. He contended, therefore, that, in the light of the Overriding objective principle, the preliminary objection should be dismissed with costs, on the basis of that principle.

Having given due consideration to the written submissions by the parties, let me point out here that the Respondent did not file a rejoinder submission. For that matter, I will proceed on the basis of what is filed before me. To begin with, I find it necessary to comment on the reliance on the overriding objective principle which the counsel for the Petitioners has implored me to rely on in this case.

While it is true, as discussed in the case of **Yakobo Magoiga Gichere v Peninnah Yusufu, Civil Appeal No.55 of 2017, CAT (Unreported)**, that, the focus of our courts should essentially be that of promoting the need to achieve substantive justice, let me state here that, the principle needs to be invoked very sparingly and where justice so demands. It cannot just be invoked in each and every case as if it was meant to be “a magic wand”. I therefore see no need to invoke it in this matter before me.

Having said so let me, herein, consider the objection raised and argued by the parties. The gist of Respondent’s objection is that: **‘this Petition is improperly verified and signed’**. It has been argued that, the Petitioners are residents of the UK and have not for a long time been in Dar-es-Salaam, hence, it is not proper to state in the pleadings that they verified and signed the Petition in Dar-es-Salaam. This line of argument has been denounced by the petitioners as being unmerited. The issue therefore is **whether the preliminary objection is meritorious**. Having looked at the preliminary objection and the submissions made by the Respondent’s learned counsel; I find that, the objection is not meritorious.

As contended by the learned counsel for the Petitioners, what the learned counsel for the Respondent has argued in the

submission in support of the objection are matters that call for evidence or proof. The Petitioners have contended that, while it is true that the 1st Petitioner resides and works for gain in the UK, which does not mean that he cannot verify the petition. In the first place it is not true that all petitioners are residents of the UK. The 4th Petitioner is said to be a juristic person, a limited liability company incorporated under the laws of the United Republic of Tanzania.

As for the rest of the Petitioners, what I gather from the submission by the learned counsel for the Petitioners is that, whether they have been or not been in Dar-es-Salaam for a long time or not (as contended by the Respondent's learned counsel) that is purely a matter of fact which will need to be ascertained through evidential proof. As such, it makes the objection an issue which could be argued not by way of raising a preliminary objection, as it will not meet the set standards for a pure preliminary point of law as per the existing authorities, which, ironically, have been cited by the Respondent's legal counsel to support his case. Unfortunately, they do not play in his favour.

In the case of **Chama cha Walimu Tanzania v Ezekel Tom Oluoch, Misc.Application No.49 of 2020 (unreported)** and **Shabida Abdul Hassanali Kassam v Mahed Mohamed**

Gulamali Kanji, Civil Appeal No.42 of 1999 (unreported), this Court made it clear that:

“a preliminary objection must first raise a point of law based on ascertained facts and not on evidence. Secondly if the objection is sustained, it should dispose of the matter as it was held in the case of *COTTWU (T) OTTU Union and Another and Hon. Iddi Simba Minister of Industries and Trade and Others, Civil Application No. 40 of 2000 (unreported)*”.

In this instant case, as I stated earlier, what is at stake, in the instant case, is the allegation that the Petitioners verified the pleadings in Dar-es-Salaam while it is indicated they are resident of the UK. In other words, the Respondent is questioning the possibility of the happening of that fact, as he submits that, the 1st Petitioner has not been in Dar-es-Salaam for quite a long time. In my judgement I find this to be purely an issue of fact and not of law and, it must require evidence to be brought before the Court to show that the Petitioners have never been in Dar-es-Salam.

Consequently, and for the reasons set out herein, the submissions by the learned counsel for the Respondent cannot support the so-called preliminary objection. The objection must thereby crumble for failure to meet the requisite qualities of what a preliminary objection should be. With that in mind, this Court settles for the following orders, that:

1. The preliminary objection is hereby dismissed.

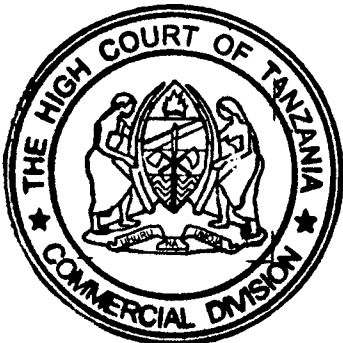
2. Costs to follow events.
3. The Petition should proceed to its hearing.

It is so ordered.



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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
18 / 09 / 2020

Ruling delivered on this 18th day of September 2020, in the presence of the Mr. Patrick Kaheshi, Advocate for the Petitioners, and Mr. Elly Musyangi, Advocate for the Respondent.



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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
18 / 09 / 2020