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

MISC.COMMERCIAL APPL. NO. 182 OF 2020

(Arising from Misc. Commercial Appl.No.42 of 2020)

AFRISCAN CONSTRUCTION
COMPANY LTD.....1st APPLICANT
DAVID JOSEPH MAHENDE.....2nd APPLICANT

VERSUS

AFRISCAN GROUP (T) LTD.....1st RESPONDENT
ULF NILSON LTD.....2nd RESPONDENT
HON. ATTORNEY GENERAL.....3rd RESPONDENT

RULING

Date of Last Order: 01/07/2021
Date of Ruling: 16/08/2021

NANGELA, J:.,

The Applicants herein brought this application under section 68 (c) and (e), section 95 and Order XXXVII Rule 1 (1) of the Civil Procedure, Cap.33 R.E.2019. The Applicants seek for the following orders, namely, that:

1. The honourable Court be pleased to grant a permanent restraint order, restraining the 1st and 2nd Respondents from collecting the

proceeds of arbitral award in favour of the 1st Respondent from the Government of Tanzania though the Ministry of Agriculture amounting to **TZS 2,390,660,48.6** pending the determination of all proceedings among and between the parties.

2. The honourable Court be pleased to order the 3rd Respondent to facilitate the payment of the said arbitral award monies to the Deputy Registrar of the Commercial Court of Tanzania for safe keeping pending determination of all disputes that are pending as between the parties.
3. Costs to be in the cause.

The Application is supported by an Affidavit of Mr David Joseph Mahende, the 2nd Applicant filed in this Court on 2nd December 2020. On 24th December 2020, the Respondents filed their counter affidavits, and, on 14th April 2021, the necessary party filed its counter affidavit.

Besides, the 1st and 2nd Respondents filed a Notice of Preliminary Objection and, raised two points of law, to wit, that:

1. The application has been filed without there being a board resolution resolving and/or sanctioning the 1st Applicant Company to file this application.

2. That, the Applicants' counsel was, on several occasions, employed by the 1st and 2nd Respondents when the said counsel was a partner at Marando, Mnyele Co. Advocates, hence, there exists a conflict of interest contrary to the ethical rules governing the practice of advocates in Tanzania and as previously disqualified by this honourable Court.

On 31st of May 2021 when the application was called on for the hearing of the Respondents' preliminary objections, it was agreed that, the two preliminary legal issues be disposed of by way of written submissions. A schedule of filing was issued and the parties have duly complied with it. I will consider those submissions before I proceed to deliver my findings and verdict.

In their submissions, the 1st and 2nd Respondents contend that, the application should be struck out because, its institution as a legal proceeding by a Company, were not authorised by the Company's board of directors.

To bolster their submission, they relied on the decision of the Court of Appeal in the case of **Ursino Palm Estate Limited vs. Kyela Valley Foods Ltd, and 2 Others,** Civil Application No.28 of 2014, CAT (unreported); **(**citing the case of **Bugere Coffee Growers Ltd vs. Sebaduka and Another** [1970] 1 EA

147, and **Pita Kempap Ltd vs. Mohamed I.A. Abdulhussein**, Civil Application No.128 of 2004 c/f No.69 of 2005 (unreported).

It was argued further that, the second applicant is representing himself as a principal officer of no description but, since he is a shareholder, there are proper procedures for shareholders to follow which are provided for under the Companies Act. On that ground, the Respondents have called upon this Court to make a finding that the application is incompetent.

As regards the 2nd ground of objection, the Respondents contended that, the learned counsel for the Applicant had been employed by the Respondents at different occasions in the past. In view of that, the Respondents have raised the issue of possible conflict of interest.

This Court was called upon to take note of its own order (Makaramba J., (as he then was), in which Mr Mnyele had prayed to withdraw his previous law firm (**Marando, Mnyele & Co. Advocates** from representing Mr David Joseph Mahende due to conflict of interest. It was contended further that, in **Commercial Case No.87 of 2013**, before Nyangarika, J (as he then was) the law firm of **Marando, Mnyele & Co. Advocates** did

disqualify itself from the conduct of the case on similar reasoning.

Referring to Rule 45 (2) and (3) and 52 (1) (a) and (b) of the Advocates (Professional Conduct and Etiquette) Regulations, 2018, it was argued that, apart from being impartial, advocates are suppose to conduct themselves in a manner that avoids conflict of interest in the legal profession. It was submitted, therefore, that, the Applicant's advocate is conflicted and, that, the application should be struck out with costs.

In his reply submission, the learned counsel for the Applicant conceded, that, there was indeed no company's board resolution attached to the application. He contended that, currently, there are three schools of thought regarding whether a board resolution is necessary. He cited the case of **Investment House Ltd vs. Webb Technology (T) Limited, Commercial Case No.9 of 2015,** as the case which this Court should follow as it resolved that, availability or otherwise of a resolution is a matter of fact that cannot be ascertained at the stage of a preliminary objection.

Mr Mnyele submitted that, be that as it may, the application at hand is a peculiar one. It is an application in which it has been impracticable on the part of the shareholders and directors of the 1st Applicant to get

together and pass a resolution to file an application to compel the government to deposit money into the Court. He argued that, the shareholders and the directors have been at logger heads since 2006. For that reasons, he contended that there is a deadlock in both the company and the board of director's level. It was submitted, therefore, that, taking into account the **"ratio decidendi"** in the case of **Ursino Palm (supra)**, if a Company is forced to institute proceedings to safeguard its interests the question of resolution does not arise.

On the other hand, Mr Mnyele invited this Court to invoke the overriding objective principle in case this Court is not convinced by the submission advanced by the Applicants. He contended that, there is a need to do justice to the case without undue regard to technicalities as the Court may still remove the 1st Applicant from its record and be left with the 2nd Applicant. He relied on section 3A of the Civil Procedure Code and Rule 4 of the Commercial Court Procedure Rules, GN 250 of 2012 (as amended), as well as Article 107 A (e) of the Constitution. He argued that, the removal of the 1st Applicant from the application will not prejudice any party.

As regards the second objection, Mr Mnyele took a strong exception regarding how it was raised and argued by the Respondents. He contended that, it shows

vindictiveness on the part of the Respondents and their advocates. He also argued that, the same does not reflect the truth of how he was involved in the matters surrounding the application, though he conceded that, he was a partner in the legal firm of Marando, Mnyele Co. Advocates and, that, an objection of this same kind was raised in Commercial Case No. 87/2013, Commercial Cause No 80 of 2013 and Misc. Commercial Application No 42.of 2006.

Mr Mnyele submitted that, the ruling by His Lordship Makaramba, J (as he then was) was not made because there was any interest which the legal firm of Marando, Mnyele Co. Advocates had, but because Mr Marando, being principled and astute advocate, got tired of such a flimsy objections which kept on being raised by Mr Rutabingwa from time to time. He contended, therefore, that, even so, His Lordship Makaramba, J., rejected the objection.

Mr Mnyele referred this Court to its decisions in the cases of **Jitesh Chandulal Ladwa vs. Bhavesh Chandulal Ladwa,** Misc.Civil Appl. No.98 of 2020 (unreported) and **Magweiga Munanka Samo vs. Aloyce Kisenga Kimbori & Another,** Land Case No.80 of 2017 (unreported), regarding the need to establish the circumstances of conflict of interest. He

contended that, as for him, his hands are clean and his conscious very clear as he has nothing to jeopardize or prejudice the interests of his clients arising from the alleged representation or interaction with the respondents.

However, Mr Mnyele did also submit, in the alternative, that, should this Court find that he should be disqualified from this matter, then, his clients should be given an opportunity to find another advocate who will represent them. He held that alternative view because legal representation by an advocate of one's choice is a constitutional right within our jurisdiction. He argued that, such a decision will augur well with the overriding principles of administration of justice, rather than striking out the application as prayed by the Respondents' counsel.

By way of rejoinder submissions, Mr Rutabingwa, rejoined that, the Court should not accept to be misdirected. He argued that, while the decision of this Court in **Investment House Ltd (supra)** is well acknowledged, this Court is, by virtue of the doctrine of precedent, bound to follow the decisions of the Court of Appeal. For that purpose, he cited the Court of Appeal decision in **Ursino Palm's case (supra)**, which he

argues to be a good law in respect of the issue regarding requirement of board resolution, if a company is to sue.

As regards the applicability of the overriding objective principles to the case, Mr Rutabingwa was of the view that the oxygen principle cannot just be invoked blindly. He supported his views by bringing to the attention of this Court, the Court of Appeal decision in the case of **Puma Energy Tanzania Ltd vs. Ruby Roadways (T) Ltd, Civil Appeal No.3 of 2018 (unreported)**. He insisted, therefore, that, the application should be struck out with costs.

As regards the issue of conflict of interest, Mr Rutabingwa rejoined by reiterating his earlier position that, there is a clear conflict of interest on the part of the learned advocate for the applicant and, for that reason, the matter should not be allowed to stand. Relying on the **Ladwa's case (supra)** and on that case of **Magweiga Munanka Samo (supra)**, Mr Rutabigwa was of the view that, both decisions have stated the correct position of the law and, for that matter, this Court should find that Mr Mnyele is conflicted.

Taking into account the above submissions made by the learned advocates for the parties herein, let me proceed to deliberate on their validity and find out whether the objections raised by Mr Rutabingwa are

meritorious. I will commence my deliberations by looking at the 2nd objection first. This is about the alleged conflict of interest on the part of Mr Mnyele.

According to Rule 3 of the **Advocates (Professional Conduct and Etiquette) Regulations of 2018, Government Notice No. 118 (published on 09/03/2018)** the term conflict of interest is defined as hereunder:

> "Conflict of interest" includes a situation that has the potential to undermine the impartiality of an advocate because of the possibility of a clash between the advocate's self-interest and the public interest."

The Blacks Law Dictionary, 8th edition, defines conflict of interest as:-

> 1. "A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.
> 2. A real or seeming incompatibility between the interests of two of a lawyer's clients, such that, the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent."

It is also stated, in "*A Concise Restatement of the Law Governing Lawyers*" § 121 (*Ame.Law Inst.2007*) that:

> "The basic formulation of the conflicts of interest rule is that, a conflict exists, if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or **by the lawyers' duties to** another current client, **a former client**, or a third person." (Emphasis added).

In the present case, there has been an allegation which the Applicant's Counsel, Mr Mnyele, has not denied. He does concede that at some point the legal firm in which he was affiliated to, that is to say, **Marando, Mnyele Co. Advocates**, was once engaged to provide legal services to the Respondents at different occasions in the past. The thorniest issue has remained, therefore, whether by doing so he should be disqualified.

In the **Ladwa's case (supra)** this Court held, as a matter of principle, if it may be so deduced from it, that, where an advocate served in a particular law firm and later forms a firm of his own, he cannot, under the banner of the newly formed law firm; appear against a client whom the previous firm was representing. The new

law firm will have developed a conflict of interest. In the end, the Court struck out the matter.

In this case, it is clear to me that Mr Mnyele was well aware that, while working under the banner of **Marando, Mnyele Co. Advocates,** his previous firm did, at some point, serve or defend the Respondents' interests. As I stated, he seems to acknowledged that fact.

As firmly reiterated by this Court in the **Ladwa's case (supra) (citing the case General Trading Co. Ltd vs. Skjevesland (2002) EWCA Civil 1567** which was also cited in **Magweiga's case (supra):**

> "[This Court has] the power, under its inherent powers, to prevent abuse of its procedure, to restrain an advocate from representing a party if it is satisfied that there [is] a real risk that his continued participation would lead to a situation where the order made at a trial would have to be set aside on appeal. In exceptional circumstances, that power could be exercised even if the advocate did not have confidential information."

Looking at, Rules 3 and 45 of the **Advocates (Professional Conduct and Etiquette) Regulations of 2018, Government Notice No. 118 (published on 09/03/2018)** I cannot hold my breath but state that,

allowing Mr Mnyele to continue with the case as an advocate for the Respondents will undermine the noble principles governing the practice of legal profession.

It is important to stress, and indeed so, that, law and its practice is a professional responsibility and nobleness. If this Court will not be vigilant when there arises before it matters that exhibits breach of the ethical and etiquette principles that protects the nobility of this profession, there will no wonder be a danger of ruining the public image of the entire profession.

If that should happen, no doubt, we will be bringing to or rekindling in, the very eyes of the public, the unpopular sentiments of the past captured in Peter Coss (Ed.), **Thomas Wright's Political Songs of England (1996)**, to wit, that:

> "Attorneys in country, they get silver for naught;
> They make men begin what they never had thought;
> And when they come to the ring, they hop if they can.
> All they can get that way; they think all is won for them
> With skill.
> No man should trust them, so false are they in the bile."

It is from that premise I find that, far from it that such a scenario should be allowed to happen. In the circumstances of this case, since Mr Mnyele had worked for **Marando, Mnyele Co. Advocates**, he cannot be allowed at this juncture to stand against a client whom the said legal firm represented in the past and more so,

in respect of matters arising from the same sources. He is disqualified from handling this matter.

I do take into account the submission made by Mr Mnyele that, in case I make a finding that he is disqualified, then, his client should be allowed to look for another advocate. Indeed, the right to be represented is a fundamental right in the delivery of justice. For that matter, I cannot see a reason why I should take the approach suggested by Mr Rutabingwa, of striking out the Application.

Having said that, what about the first objection? Can it warrant that I strike out the matter from the Court? As I stated earlier, the first objection is premised on the fact that, the application was preferred without there being a board resolution resolving and/or sanctioning the 1st Applicant Company to file this application. Reliance has been placed on the Court of Appeal decision in the case of **Ursino Palm Estate Limited (supra).**

In his submission, Mr Rutabingwa has contended that, by virtue of the doctrine of precedent, the above being a decision of the Court of Appeal, this Court is bound to follow it. He has urged me not to follow the decision of this Court in **Investment House Ltd (supra).**

Let me state that, I am fully aware that a precedent is not to be followed blindly. It is well settled that, a little difference in facts or additional facts in a particular case may make a lot of difference in the precedential value of a decision.

Perhaps the Indian Supreme Court's decision in the case of **Bharat Petroleum Corporation Ltd & Another vs. N.R Vairamani & Another, AIR 2004, SC 4778** may be more illustrative here. In that case, the Court was of the view that:

> "Court should not place reliance on decisions without discussing as to how the factual situation fits in with situation of the decision on which reliance is placed. Observations of the Courts are neither to be read as Euclid's theorems nor as provisions of the statute nor too taken out of context. These observations must be read in the context in which they appear to have been stated."

I have looked at the case of **Ursino Palm Estate Limited (supra)**, which Mr Rutabingwa wants me to follow. The principle enunciated in that case is that, institution of legal proceedings by a company must be authorised either by a company or Board of Director's meeting. The cases of **Bugerere Coffee Growers Ltd vs. Sebaduka and Another** [1970] 1E.A 147, which the

Court of Appeal approved in the case of **Pita Kempap Ltd vs. Mohammed I.A Abdulhussein,** Civil Application No.128 of 2004 c/f No.69 of 2005 (unreported) were cited with approval.

However, the facts in this present case seem to have some peculiarities of their own. In his submission, Mr Mnyele has contended that, there was an impossibility to get together the shareholders and the directors of the 1st Applicant to pass a resolution because they are at logger heads since 2006.

He submitted that, there is as of now, a deadlock in both the company and at the Board of Directors' level. In such a situation, I cannot envisage a possible meeting of the Company and/or directors from which a unanimous resolution to commence proceedings would be obtained. That fact, in my view, brings a distinctive trait not considered in the **Ursino Palm Estate Limited (supra).**

It is on the basis of such a fact I find that, the first objection raised by Mr Rutabingwa cannot stand as the two cases seem to harbour different factual situations. I therefore proceed to overrule it.

In the upshot, this Court settles for the following orders, that:

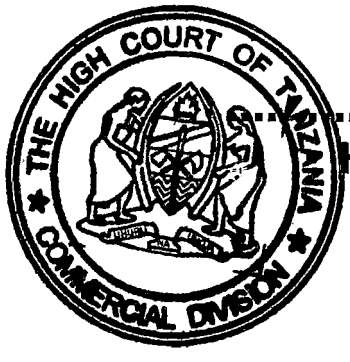
1. the second objection is partially upheld, in that, this Court finds that

Mr Mnyele cannot act for the Applicant as doing so will create a conflict of interest as he once acted for the Respondents in the past.

2. Given the above situation, instead of striking out the application as prayed by Mr Rutabingwa, the Applicants are given **up to 6th September 2021,** to look for another legal counsel who shall represent them in this matter before this Court.
3. The first objection is hereby overruled.
4. This Court makes no orders as to costs.
5. Mention on 19th ~~August~~ SEPTEMBER at 9.00AM.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 16TH AUGUST 2021



HON.DEO JOHN NANGELA
JUDGE