

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 61 OF 2021

GOLD AFRICA LIMITED APPLICANT

VERSUS

REEF GOLD LIMITED RESPONDENT

Date of Last Order: 05/05/2022

Date of Ruling: 17/06/2022

RULING

MAGOIGA, J.

This ruling is on legal representation of the respondent as noted by this court whereby two opposing counsel represent the respondent. The applicant instituted this application praying, among others, for ex-parte order to order the respondent to conduct a meeting of the company in the manner provided in the Articles of Association with a sole agenda of appointing the directors of the company representing the applicant who are Abdiel Mengi and Benjamin Abraham Mengi. This court declined to entertain the application ex-parte and ordered that Company secretary one Sylvia Mushi and Mr. Bulaya-director of the respondent be served and the matter be heard inter parties and the matter was scheduled for orders on 16/11/2021.



On that date, Mr. Roman Masumbuko, learned advocate appeared for the respondent and Mr. Philimon Rutakyamirwa, learned advocate appeared for the same respondent each contending to have been instructed by Ms. Mushi and Bulaya respectively.

Each filed a counter affidavit. Mr. Masumbuko wholly supporting the application, and Mr. Rutakyamirwa wholly opposing the application. I probed parties' and their learned advocates at length eventually I directed that meeting be held not with one agenda but with agenda as may be proposed by each party because it is obvious parties have long mistrust among themselves, and in particular, after the demise of the late Reginald Abraham Mengi. A lot of water have gone under the bridge and I had to compose two different rulings on this matter.

On 05/05/2022 when this matter was called on for orders, I invited learned advocates for the respondent to address me on the point because it seems this matter cannot proceed with two opposing counsel representing the same party, hence, this ruling.

Mr. Rutakyamirwa arguing the point started by giving the history of the matter and the appearance of the two advocates with opposing counter



affidavits. According to Mr. Rutakyamirwa, the counter affidavit of the Mr. Bulaya was annexed with the JOINT VENTURE AGREEMENT and MEMARTS of the respondent. Mr. Rutakyamirwa pointed out that, according to that Joint Venture Agreement, in particular, item 10, the management of the company are manned by the board of directors, which was composed of by the late Reginald Abraham Mengi and Mr. Elias Bulaya, and this according to Mr. Rutakayamira, is in accordance with the items 75-78 of the Articles of Association.

Mr. Rutakyamirwa argued that secretary is appointed by board of directors to assist directors. Upon the death of Mr. Mengi, Mr. Rutakyamirwa pointed out that, the respondent remained with only two directors who are; Elias Bulaya and Godfrey Bitesigirwe and as such the person responsible to represent the company are directors and not the company secretary.

Mr. Rutakyamirwa argued that, much as Mr. Masumbuko supports the application, he can join hand with Mwitasi to represent the applicant and not the respondent. As to Sylvia Mushi, as company secretary, Mr. Rutakyamirwa argued that has conflict of interest because she is the



same company secretary of Gold Africa Limited so she cannot represent two companies with a serious legal battle like this one.

Further, Mr. Rutakyamirwa pointed out that section 181 of the Companies Act, 2002 is clear that directors of the company have all powers in the management of the company and not company secretary.

On that note, the learned advocate concluded that, the person who has powers to represent the company (respondent) is the director and for this application is Mr. Elias Bulaya and invited the court to expunge the counter affidavit of the company secretary and proceed to determine the application based on the counter affidavit by Br. Elias Bulaya.


On the other hand, Mr. Masumbuko argued that the application was served to the Company secretary in her principal office. The learned advocate pointed out that he was instructed through a letter dated 12/11/2021 to represent the interest of the respondent. Mr. Masumbuko, pointed out that under Order XXVIII of the Civil Procedure Code, [Cap 33 R.E.2019] on suits by or against the company, the summons and pleadings can be directed and signed by the secretary, director, or other principal officer respectively. Much as the instant application was served



to the company secretary, who upon being served appointed and instructed them to represent the respondent. Mr. Masumbuko argued that up 15/11/2021, Mr. Rutakyamirwa was not involved to this application but came afterwards after the court noted the contending conflict of interests via EB HANCE COMPANY LIMITED vide petition No. 38 of 2021 which was filed by Mr. Bulaya with the help of Mr. Rutakyamirwa advocate. From the conduct of Mr. Bulaya, Mr. Masumbuko pointed out that, he is against the company and as such cannot represent a company under the circumstances.

According to Mr. Masumbuko, the proper way was for this court to order EB HANCE COMPANY LIMITED to be joined in this application under Rule 10 of Order 1 of the CPC.

Further, Mr. Masumbuko argued that once a company is incorporated, members become distinct from the company and the same is managed by board of directors as such members cannot directly interfere in its affairs. Mr. Masumbuko went on arguing that, Mr. Bulaya and all his claims is that much as all shareholders have not paid for their shares no meeting can be held, and according to Mr. Masumbuko, those are matter that can be discussed in the meetings.



Mr. Masumbuko argued that to the moment, there is no properly constituted Board of Directors because what is in place is 1:1 and not 3:1. On that note, Mr. Masumbuko argued that the company secretary is the proper person to represent the company in all matters, this one inclusive. So he concluded that his instructions are proper and urged this court to hold so.

Further, Mr. Masumbuko argued that Mr. Rutakyamirwa cannot act for the respondent because he represented Mr. Bulaya in petition No. 38 of 2021 for derivative action, so will be against the spirit of Regulations 45 and 46 of the Advocates (Professional and Etiquettes) Regulations, G.N. 118 of 2018. Mr. Masumbuko pointed out that, Regulation 35 of the same Regulations is clear what an advocate is supposed to do and much as Mr. Rutakyamirwa did not disclose the interest he has in this matter, so is unfit to represent the respondent. According to Mr. Masumbuko, the company secretary was appointed by the board of directors and not Mr. Bulaya alone. And, that Mr. Bulaya is not a board of directors nor appointee to act for the company.

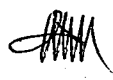
On section 181 of the Companies Act, Mr. Masumbuko argued that it is true under that section the board of directors are the one to exercise



powers of management but was quick to point out that in our case no duly constituted board of directors and Mr. Bulaya cannot be self appointed director to manage the affairs of the company. The learned advocate insisted that, even if it can be found otherwise on his representation by the court, but still believes in the circumstances we have, this court cannot allow Mr. Bulaya and his lawyer to represent the respondent.

On that note, Mr. Masumbuko urged this court to expunge the counter affidavit filed by Mr. Bulaya and proceed to determine this application based on their counter affidavit.

In rejoinder, Mr. Rutakyamirwa argued that petition No.38 of 2021 do not exists, so it cannot be basis of any finding on the point raised by the court. On that note, argued that no conflict of interest exists as well. In Misc. Application No.181 of 2021, the learned counsel for the applicant was exercising his legal rights to bring an action on behalf of the 1st respondent to defend the interest of the company and not suing the company- Gold Africa Limited. Mr. Rutakyamirwa pointed out that the sections cited by Mr. Masumbuko are irrelevant to the situation we have here.

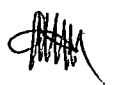


Mr. Rutakyamirwa went on arguing that article 98 of the Articles of Association is very clear who is to represent the company. The situation we have, Mr. Rutakyamirwa argued that if the director differing with the company secretary and in such a situation, the director has to take precedence because has legal interest in the company.

On Order I Rule 10 of CPC was his brief rejoinder that it was misplaced citation for being inapplicable here.

On that note, Mr. Rutakyamirwa prayed that the counter affidavit filed by company secretary be expunged and his client's counter affidavit be retained and considered for the determination of this application.

This court invited Mr. Mwitasi as an officer of the court to say something on the point in issue. Mr. Mwitasi boldly told the court that they served the company secretary and Mr. Bulaya and his advocate cannot represent REEF GOLD LIMITED because their conduct makes them unfit to represent the company. Without pinpointing the conduct in issue regarding Mr. Bulaya and Mr. Rutakyamirwa, promised to bring a decision of the Court of Appeal of Tanzania on what an advocate representing a client with conflicting interest should do.



As I am composing this ruling, Mr. Mwitasi supplied to this court a decision of CAT in the case of SWABAHA MOHAMED SHOSI vs. SABURIA MOHAMED SHOSI, CIVIL APPEAL NO. 98 OF 2018 CAT (TANGA) (UNREPORTED) in which an advocate prayed to withdraw from representing his wife- the appellant in the spirit of Regulation 35 of the GN. 118 of 2018 which requires advocate not to represents a client when interest of an advocate or interest of any person in the firm are in conflict.

Having carefully followed the rivaling submissions of the learned advocates for the respondent, I find imperative first to see what does the law provides for these two positions in a company. Starting with Civil Procedure Code, [Cap 33 R.E. 2019], and in particular, the provisions of Rules 1 and 2 of Order XXVIII are very clear and loud that pleading may be served, signed and verified by three categories of people of behalf of the company; these are: **secretary to the company, any director or principle officer of the company dully authorized to.** Rule 3 gives the court power to require personal attendance of officer of the company able to answer material questions relating to the suit.



So, the above Order deals with the service, signing, verification and answering material questions relating to the suit.

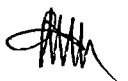
However, section 181 of the Companies Act, 2002 stipulates that the management of the company shall be under the directors. For easy of reference, the said section provides as follows:

Section 181-Subject to any modification, exceptions, or limitations contained in the Act or in the company's articles of association, the directors of a company have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of a company.

(Emphasis mine)

The wording of the above provision is very clear that directors of the company have all powers necessary for **managing, and for directing and supervising the management of, the business and affairs of the company. (emphasis mine).**

Reading through the provisions of sections 182 to 186 directors are, in doing the above duties obliged to act in good faith and in the best interest of the company, have regards to the interest of the employees,

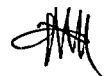


exercise their powers for proper purposes, exercise duty of care to the company and are at least to be two.

Section 187 (1) (2) and (3) of the Companies Act is equally clear that secretary is appointed by directors and upon appointed works under the authorities of directors and not otherwise. This is to say, secretary of the company has no mandate to act of his/her own will but under supervision and authority of directors.

From the above wording of section 181 of the Act, it is plainly clear without any ambiguity, in my respective opinion that, management, directions and supervision of the company is legally vested to the directors and not secretaries. Secretaries are just employees of the company with limited duties and powers that are supervised by the directors.


Another point worth consideration is the dictates of the Articles of Association of the respondent. Having gone through the Articles of Association of the respondent, I have noted that under Article 90 it stipulates clearly that directors may appoint any company, firm, or person or body of persons whether nominated directly or indirectly by the



directors to be the attorney or attorney for the company for such purposes and with such powers, authorities and discretions. For easy of reference article 90 provides as follows:

"Article 90- The directors may from time to time and at any time by power of attorney appoint any company, firm, or persons or body of persons, whether nominated directly or indirectly by directors to be the attorney or attorney for the company for such purposes and with such powers, authorities and discretion(not exceeding those vested in or exercisable under these articles) and for such period and subject to such conditions as they may think fit, and any such powers of attorney may contain such provisions for the protection and convenience of persons dealing with such attorney as the directors may think fit and may also authorize any such attorney to delegate all or any of the powers, authorities and discretions vested in him."

Under the Articles of Association, in particular, under article 109 a secretary is appointed by the directors. For easy of reference the said article provides as follows:



“ Articles 109-The Secretary shall be appointed by the directors for such term, at such remuneration and upon such conditions as they may think fit and any Secretary so appointed may be removed by them.”

So, it is plainly and legally clear that Secretary of the company has no such powers to appoint an attorney for any specific business but any attorney for the company as per the Articles of Association is to be appointed by the directors.

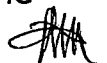
With that legal background, and back to the instant point, having considered all submitted, with due respect to Mr. Masumbuko, I find that the instructions given by the company secretary to Mr. Masumbuko were exercised without the mandate of directors and was a matter assumed without proper authorization. There is no where both in the Companies Act and in the Articles of Association of REEF GOLD LIMITED where the Secretary of the Company is vested with such powers.

Mr. Masubmuko argued that given the circumstances that Ms. Sylvia Mushi was appointed with Board of Directors, then, must have powers to appoint an attorney, but no such authority was produced in this court to



have extended such powers to the Secretary in this application. Another point argued was that much as Mr. Bulaya had filed Petition No. 38 of 2021 and Misc. Application No.181 of 2021 for winding up the company and for derivative action respectively as such is a person by that move against the interest of the company. This point as correctly argued by Mr. Rutakyamirwa, and rightly so in my own opinion, will not detain this court because Petition No. 38 of 2021 and Misc. Application No.181 of 2021, the latter was withdrawn and as such is not in our records. More so, even if it was still in our records as is in Misc. Commercial application No.181 of 2021 but it should be legally noted that Directors or shareholders are among the people who can petition for winding up of the company as contributory and for derivative action. See sections 234 and 281 of the Companies Act, 2002.

Another point argued by Mr. Masumbuko was that Mr. Rutakyamirwa representing Mr. Bulaya under the provisions of Regulation 35 is supposed to disqualify himself from the conduct of this matter because of conflict of interest. I have carefully studied the said provisions and the case cited by Mr. Mwitasi for the applicant but I find that same were quoted out of context and do not apply against Mr. Rutakyamirwa in the



situation we have here. Under our company legal regime, a director/contributory is given powers to act where the interests of the company are in jeopardy and can engage an advocate for that matter. So this point has to fail as well.

Lastly Mr. Masumbuko argued that much as Mr. Bulaya was not appointed by board of directors, then, despite being a director, he is to be under the supervision of the Secretary who was appointed by the board of Directors. I have carefully considered this argument which technically sound good but with due respect to Mr. Masumbuko, as earlier said above no evidence was put before this court that appointment of the Secretary included to supervise and manage the company over above the directors or any director. The company secretary, I have said and I repeat it here and insisted that at any rate their duties to the company are basically secretarial and administrative rather than managerial as per the Companies Act. On that note, thus, this argument do not serve the act done without any power to do so and to hold otherwise will amount to clear abrogation of the law.

In the totality of the above reasons, I am inclined to agree with Mr. Rutakyamirwa that much as he was appointed by the director in the



circumstances, his representation is legally sound and should stand in the circumstances of this application.

That said and done, the representation by Mr. Masumbuko is hereby barred from representing the respondent and the counter affidavit filed by Company Secretary is expunged for want of proper authority.

Mr. Rutakyamirwa is to represent the respondent and counter affidavit filed by Mr. Bulaya is intact.

It is so directed.

Dated at Dar es Salaam this 17th day of June, 2022



S.M.MAGOIGA

JUDGE

17/06/2022