IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 33 OF 2021

HAMAD MASAUNI ..... 1ST PETITIONER

ARTHUR MOSHA ..... 2ND PETITIONER

JUMA MABAKILA ..... 3RD PETITIONER

VERSUS

MOHAMED ABDILLAH NUR ..... 1ST RESPONDENT

UMMUL KHEIR MOHAMED ..... 2ND RESPONDENT

WINGS FLIGHTS SERVICES LIMITED ..... 3RD RESPONDENT

AFRICA FLIGHT SERVICES ..... 4TH RESPONDENT

Date of Last Order: 16/06/2022

Date of Ruling: 08/07/2022

RULING

MAGOIGA, J.

The petitioners, HAMAD MASAUNI, ARTHUR MOSHA, AND JUMA MABAKILA upon grant of leave by this court dated 18th December, 2020 instituted the instant petition under section 234 of the Companies Act, 2002 for derivative action against the above named respondents praying for orders that:-

i. A declaration that the 3rd respondent under the leadership of the 1st and 2nd respondents breached the Joint Venture Agreement and the Share Transfer Agreement;

ii. A declaration that the 3rd respondent unjustly enriched itself at the expenses of the 4th respondent;

iii. An order to the 3rd respondent to surrender 50% of the 65% of the shares allotted to the latter to be returned to the 4th respondent and for the same to be divided amongst the minority shareholders on a pro rata basis;

iv. An order appointing a fair, just and legal management to run the affairs of the 4th respondents;

v. General damages against the 1st, 2nd, and 3rd respondents;

vi. An order invalidating the illegal change of name of the 4th respondent by the 3rd respondent;

vii. Any other reliefs that this court considers apt to meet the equitable exigencies raised in the petition;

viii. An order for the costs of this petition to be reimbursed by the 1st, 2nd, and 3rd respondents to the petitioners;

In the petition, the petitioners stated the grounds and reasons why this petition should be granted as prayed.

Upon being served with the petition, the 1st, 2nd, and 3rd respondents filed a joint reply to the petition stating the grounds and reasons why this petition

should not be granted. Simultaneously, the 1st, 2nd, and 3rd respondents raised a five set of preliminary objection to the effect that:-

a. The leave to file this petition was improperly procured for failure by the petitioners to serve the 1st, 2nd, 3rd and 4th respondents the copy of the application in Application No. 164 of 2020 and proceed to have the application heard ex-parte thus denying the respondents' right to be heard in the application;
b. The petition is not a proper petition under section 234 of the Companies Act, [Cap 212 R.E. 2002] as all the relief sought by the petitioners are not for the benefit of the 4th respondent but for the petitioners' in their personal capacities. The petitioners have therefore not disclosed a cause of action under derivative action;
c. The petition is improperly and prematurely filed before the court for want of statutory notice under section 234 (a) of the Companies Act, [Cap 212 R.E. 2002]
d. In so far as the cause of action in the petition is based under paragraphs 4, 7,8,9,10,13,16 and 18 of the petition, this petition is time barred;

e. The 4th respondent has been improperly joined as the respondent in this petition.

On the strength of the above points of preliminary objection, the respondents urged this court to dismiss/struck out this petition with costs to the two counsel.

Upon being served, the 4th respondent filed reply to the petition through its principal officer one, ABDIWALI ISACK ALI- director that all complaints by the petitioners are not true and are bare allegations and strongly urged this court to dismiss this petition with costs.

The petitioners filed reply to the 1st, 2nd, and 3rd respondents answer to the petition.

The facts of this petition as gathered from the pleadings are simple and straight forward. On 7th February 2011, PARADISE GROUP OF COMPANIES LIMITED entered into JOINT VENTURE AGREEMENT (to be referred herein as **'JVA'**) with ALLIANCE CARGO HANDLING COMPNY LIMITED in respect of operation, ownership, financing and composition of Alliance Cargo Holding Company Limited in which the latter had lease/concession holder in respect of all that land and subsequent structures at the Julius Nyerere International Airport between Tanzania Airport Authority dated 20th June

2011. Also, on the same date, the same companies entered into SHARE PURCHASE AGREEMENT (to be referred herein as **'SPA'**) for PARADISE GROUP CO. LIMITED to acquire 65% issued shares of ALLIANCE CARGO HANDLING COMPANY LIMITED in consideration of USD.4,000,000.00 (say Four Million United States Dollars) to be deposited into the account of the company.

Further facts are that while the process was underway, the 1st and 2nd respondents (who are directors of the PARADISE GROUP OF COMPANIES LIMITED) without the knowledge of the petitioners intimated that WINGS FLIGHTS SERVICES LIMITED (the 3rd respondent herein) is a merger of the PARADISE GROUP CO. LIMITED AND ALLIANCE CARGO HANDLING COMPANY LIMITED the predecessor of the AFRICA FLIGHT SERVICES (the 4th respondent).

Further facts went on that given the above stated facts, the 3rd respondent at the expenses of the 4th respondent contravened the terms of the JOINT VENTURE AGREEMENT and changed the name of the ALLIANCE CARGO HANDLING COMPANY LIMITED to AFRICA FLIGHTS SERVICES LIMITED.

It is thus alleged that the whole process was made in contravention of the breach of the JVA, SHA and was calculated by the 1st and 2nd respondent to

enrich the 3rd respondent at the expenses of the 4th respondent and was facilitated with the unilateral arrogation of the control of the affairs of the 4th respondent company at the exclusion of the petitioners from the affairs of the 4th respondent, including borrowing USD.300,000.00 from the bank without the knowledge of the petitioners.

It is against the above background, the petitioners filed the instant petition praying for orders as contained in the petition, hence, this ruling.

On the part of the respondents they denied to have breached the Joint Venture Agreement, Share Holding Agreement and that their conduct was in compliance with the Joint Venture Agreement, the Companies Act and the law generally and strongly denied to have committed or done anything injurious to the 4th respondent or prejudicial to the affairs of the 4th respondent as alleged. On that note, they invited this court to dismiss this petition with costs.

The petitioners, at all material time have been enjoying the legal services of Mr. Alex Mgongolwa, learned advocate and the respondents have been enjoying the legal services of Messrs. Gabriel Simon Mnyele and Deogratius John Lyimo Kiritta, learned advocates.

This petition was argued by way of written submissions on both preliminary objection and the substantive petition. As matter procedure, I will deal with the preliminary objections first, which if are merited will be enough to put this matter to rest. But if they fail, I will go to the merits or otherwise of the substantive petition.

Mr. Mnyele arguing the objections told the court they filed five set of preliminary objections but have decided to drop the first and fifth limbs of objections. These two were so marked. Mr. Mnyele sought and premised his arguments in the famous case of MUKISA BISCUITS MANUFACTURING CO. LIMITED vs. WEST END DISTRIBUTORS LTD [1969] EA 696 on what a preliminary objection is and the case of ALI SHABAAN AND 48 OTHERS vs. TANZANIA ROAD AGENCIES AND HON. ATTORNEY GENERAL, CIVIL APPEAL NO. 261/2020 (UNREPORTED) which was followed in the case of MOTO MATIKU MABANGA vs. OPHIR ENERGY PLC AND OTHERS, CIVIL APPEAL NO.119 OF 2021 both on account of being time barred as pure point of law.

Mr. Mnyele, therefore, argued that petition is tantamount to a suit and as such the Law of Limitation Act applies in this petition.

Mr. Mnyele arguing the 2nd limb of objection told the court that derivative action under the provisions of section 234 (1) and (2) (a) of the Companies Act is clear directors can bring action on behalf of the company. According to Mr. Mnyele, the duty to defend, prosecute, bring or discontinue the proceedings lies with the directors and they can only do that after complying with the following; notifying other directors, obtaining leave, the action must be on behalf and for the benefit of the company. To buttress his point cited an English case of FOSS vs. HARBOTTLE (1843)67 ER 189 in which it was stated that:-

> **"when some wrong is done to the company, the shareholders can bring an action for the wrong done as they are not suing under their own right but under the right of other members whose relief is sought. The company has to be joined as the co-defendant so that the company is bound by judgement given. When an action is against the third part is called a derivative action as individual member sue under a claim which belong to the company thus the rights is derived from it."**

Guided by the above position and the case of ALI SHABANI AND 48 OTHERS (supra), Mr. Mnyele concluded that looking at the pleadings and

reliefs sought nothing is for the benefit of the company or shareholders generally but applicants are suing for their own interests they believe originate from the Joint Venture Agreement.

Listing the relief sought, Mr. Mnyele concluded that the instant action is incompetent and according to him same was to be bought under section 233 which allows members to complain on how affairs are run and conducted.

Another point argued is that section 234 do not envisage after obtaining leave, the petition should come by way of petition under the same provisions because the section is silent on how to come but is only referring to defending, prosecuting, intervening or discontinuation of the action.

According to Mr. Mnyele, the petitioners were to come by way of normal civil suit under the CPC. Failure to do so, in his view, rendered the whole petition incompetent and urged this court to strike out this petition with costs.

On the other part, Mr. Mgongolwa like Mr. Mnyele started with laying the premises on which a preliminary objection may be grounded and cited the case of IBRAHIM ABDALLAH (THE ADMINISTRATOR OF THE ESTATE OF THE LATE HAMIS MWALIMU vs. SELEMAN HAMISI (THE AMDINISTRATOR

OF THE ESTATE OF THE LATE HAMISI ABDALLAH), CIVIL APPEAL NO.314 OF 2019 in which it was held and insisted that preliminary objection must be on pure point of law and on facts which are not contentious.

According to Mr. Mgongolwa, in this petition, every fact is disputed as such do not qualify to be a preliminary objection.

Replying on the fist limb of objection, Mr. Mgongolwa argued that the reliefs claimed which are basis of the first limb of objection are exclusively and wholly for the best interest of the 4th respondent in which the petitioners are shareholders. According to Mr. Mgongolwa, much as the petitioners are shareholders of the 4th respondent are in law, allowed to come to court the way they came and insisted that the instant petition is proper and competent.

In rejoinder, Mr. Mnyele had nothing useful to add save that they reiterated their earlier submissions.

On my part, I wish to state that according to the provisions of section 234 of the Companies Act, the word used is **'person' (the applicant).** And the word person is defined under the Interpretation of Laws Act, [Cap 1 R.E.2019 to mean **"any word or expression descriptive of a person**

and includes a public body, company, or association or body of persons, corporate or unincorporated."

From the above definition and after going through the provisions sections 233 and 234 which were introduced in our company legal regime in 2002 both have a purpose to serve. These two provisions, in my respective opinion are meant to protect the minority shareholders against the long celebrated rule of majority rule whereby they can manage the company at the detriment of the minority shareholders. See the case of FOSS vs. HARBOTTLE (supra). My further opinion after reading the said provisions is that, the only notable difference is that while under section 233 members can bring an action by way of petition for their own interests generally or some part of its members or a member but under section 234 the action by way of petition must be brought on behalf and for the interest of the company. In the later situation same must be preceded by leave of the court, while in the former no leave is required.

With that legal background in mind, I find that the first limb of objection was based on whether the reliefs were for the 4th respondent or for the benefit of the applicants. Having gone through the prayer reliefs sought in the petition, it is clear as day light that all reliefs claimed were for the

benefit of the 4th respondent and as such the instant petition is at home and dries with the provisions of the 234 of the Companies Act, 2002.

Therefore, the arguments by Mr. Mnyele on the first limb of objection are misconceived and have no merits in the circumstances we have and are rejected and dismissed.

The second part of the objection was that after obtaining leave the petitioners were to bring a suit under the CPC and not petition as they did. Without much ado, this point will not detain this court much. The learned counsel for the respondents are blowing hot and cold on the same point. While at page 3 of the written submission in chief in support of the objections argued that all proceedings save for appeals have been described to amount to suit, the petition inclusive, but are now challenging a petition to be not a suit. This was unfortunate to them. So this limb as well, has to fail.

In the foregoing, I find the arguments by Messrs.Mnyele and Kiritta on this first limb of objection without legal back up and are dismissed for want of merits in the circumstances we have here.

This takes me to the second preliminary objection that the petition is improperly and prematurely filed before the court for want of statutory

notice under section 234 (a) of the Act. Mr. Mnyele strongly argued that no notice was issued to the directors as required under section 234 (2) (a) as such the instant petition is improperly and premature. The learned advocates of the respondents to buttress their point cited the case of ULIMWENGU ABDUL KIGINA vs. CRDAB BANK PLC AND OTHERS, LAND CASE NO. 2019 (HC)(UNREPORTED) whose copy was said to have been annexed in the submissions but was not. In that case the court interpreted the provisions of section 127(2) (d) of the Land Act [Cap 113 R.E.2019] and then, held the essence and the absence of 60 days notice of default in those proceedings. However, much as the judgement of the court was not annexed and the quoted part of the judgement did not tell the consequences, I will not consider the holding in that case.

Another case equally cited but not annexed was the case of ALOYCE CHACHA KENG'ANYA vs. MWITA CHACHA WAMBURA AND OTHERS, HC (MUSOMA) (UNREPORTED) in which was dealing with the provisions of section 6 of the Government Proceedings Act. This case as well falls under the deficiencies of the above cited case. Advocates are expected to annex a copy of the judgement of an unreported decision to give the court an opportunity to follow the reasoning of the fellow judge and the

interpretation that was at issue. The seasoned advocates of the respondents did not do so, and hence, this court cannot rely on extract parts alone.

Further, Mr. Mnyele argued that the purported notice annexed in the petition as AM9 was not served to one of the directors as required by law. On that note urged this court to find and hold that no reasonable notice was served to the directors of the 4th respondents and as such making the instant petition premature and urged the court to strike it out.

On the other part, Mr. Mgongolwa argued that the notice was issued on 11th July, 2016 and met the requirements of the law by informing the other directors to take necessary action to avoid legal proceedings but did not to do so. On that strength of his submissions, the learned advocate for the petitioners urged this court to dismiss this objection.

In rejoinder, Mr. Mnyele argued that the letter was not a notice for reasons of failure to be addressed to the directors, was not intended to bring derivative action, nature of wrongs was not stated and the complaint is about breach and concluded that the letter was not a notice required under section 234 and as such the petition is incompetent.

I have carefully followed and considered the rivaling arguments of the learned advocates for the parties in this petition on this point, but with due respect to Messrs. Mnyele and Kiritta, this point was raised and argued technically to block this petition but cannot be a point of law at this point of the petition and has to be dismissed in its face value. I will explain why I have taken the above stance. **One,** once the legal notice is issued become relevant during the application for leave and not now. **Two,** the wordings of sections 127 (2) of the Land Act [Cap 113 R.E 2019] and section 6 of the Government Proceedings Act, [Cap 5 R.E.2019] are not in pari materia with the provisions of section 234 (2) (a) and their interpretation cannot be equated with that of the decisions cited but not annexed. **Three,** the issue whether the said notice was served or not is matter that requires evidence as such ceases to be a point of law. **Four**, much as issue of notice is pursued in the Court of Appeal, it cannot be determined here taking into account that the learned Judge granted leave based on the same legal notice.

In the foregoing, I hereby find and hold that this point is devoid of any useful merits to be point of objection and same is hereby dismissed as well.

The last point of objection was that the instant petition is time barred. Mr. Mnyele argued that much as the instant petition is pegged on paragraphs 4, 7, 8, 9, 10, 13,16 and 18, then, is time barred. The learned advocates for the respondents pointed out that paragraph 4 complains of the breach of the Joint Venture way back in 2011, paragraph 7 failure to submit investment schedule within 28 days, so 28 days ended up on 7th March 2011, paragraphs 8 and 9 complains of failure to disburse of USD.4,000,000/=, paragraphs 10 complains of lack of disclosure of how the investment was done, paragraph 13 complains on 1st and 2nd respondents passing a resolution to open an account of the 4th respondent on 2014, paragraphs 15 and 16 complains on 1st respondent promoting the interests of the 3rd respondent and paragraph 18 complains on borrowing USD.300,000/= by the 4th respondent in 2014. According to Mr. Mnyele, the Law of Limitation Act, [Cap 89 R.E. 2019] applies to this petition and the prescribed time to institute the same is six years. However, Mr. Mnyele pointed out that this petition was instituted in 2021 after elapse of 9 years.

On that note, the learned advocates for the respondents urged this court to finds so and proceed to dismiss this petition with costs.

On the other part, Mr. Mgongolwa argued that much as the parties are at issue as to when the breach started and it was not clearly stated in the pleadings, then, guided by the Court of Appeal decision in the case of IBRAHIM ABDALLAH (ADMINISTRATOR OF ESTATE OF THE LATE HAMIS MWALIMU) vs. SELEMANI HAMISI (THE ADMINISTRATOR OF ESTATE OF THE LATE HAMISI ABDALLAH) CIVIL APPEAL NO. 314 OF 2020 CAT (ARUSHA) (UNREPORTED) in which the Court of Appeal held that:-

> **" ... although we agree that the time barred matter deserve to be dismissed in terms of section 3 of the Law of Limitation Act, this is subject to ascertaining proof by evidence be it oral or affidavit. In the premises, in the wake of contentious facts on the point of objection, the High Court could not conclusively determine the point of preliminary objection at that stage."**

Mr. Mgongolwa further argued that where there is continuing breach, then, section 7 of the Law of Limitation Act, [Cap 89 R.E.2019] cures the limitation much as the breach continues. In support of this cited the case of ALBERT R. MOSHI vs. ENGAREOMOTONY COOPERATIVE SOCIETY LIMITED [2008] TLR 41.

On the strength of the above two cited cases urged this court to find and hold that much as there is continue breach, then, no way it can be safely said the instant petition is time barred and urged this court to dismiss this ground of objection.

In rejoinder, Mr. Mnyele pointed out that the cited the case of MOTO MATIKU MABANGA AND ALI SHAABAN AND 48 OTHER (supra) is clear on this point and strongly urged this court to find that the instant petition is time barred.

Having carefully followed and considered the rivaling arguments of the learned advocates, with due respect to the learned advocate for the respondents, this point has to fail. I will explain. **One,** reading the pointed paragraphs in isolation of other paragraphs in the petition may create a picture pointed and painted by Mr. Mnyele that the instant suit is time barred. But reading the whole petition no doubt that the issue of breach was first pointed out on 11th November, 2014 and the 1st and 2nd respondent were given time to rectify the conduct, well within time and it was followed by legal notice in July 2016 and on 12th October 2017 the 1st respondent admitted in writing there were issues of concern and promised to rectify but in vain. **Two,** It should be noted that, in our company legal

regime, and in particular, any action under section 234 of the Companies Act, time of any breach in my respective opinion, start to run after issuance of the notice to rectify the complained actions or omissions to bring an action under the said provision. In this petition, the time started to run in 2017 when the 1st respondent admitted in writing that there are concerns on the management of the company and promised to rectify and this answer positively that the respondents were served with legal notice. The said admission is seen again in answering paragraph 31 of the petition. Therefore, the six years are to expire in 2023 and the instant petition no doubt was filed in 2021, hence, in time, home and dries with the law. Therefore, much as the instant petition was instituted within four years after notice, no way it can be said to be time barred.

Three, even if it can be argued the other way around as argued by counsel for respondents most of the actions complained of were done in 2016 such as changing of the name connoting, as rightly argued by Mr. Mgongolwa, and rightly so in my opinion, that the breach if any was continuous process that cannot be gauged under cast and paste period of time in 2011 or any other period.

On the foregoing reasons, the three sets of preliminary objections argued are hereby all dismissed for want of merits.

Having dismissed the preliminary objections, I am now obliged to determine the substantive merits or otherwise of the petition.

Mr. Mgongolwa in support of the petition adopted the contents of the petition and its verifying affidavit together with the exhibits/ annexures. The learned advocate for the petitioners gave background information of the relationship between parties relating to the JOINT VENTURE AGREEMENT AND SHARE PURCHASE AGREEMENT. According to Mr. Mgongolwa, the signing of both Joint Venture Agreement and Share Purchase Agreement, the 4th respondent became minority shareholder with 35% of shares and the 3rd respondent became majority shareholder with 65% of shares. Under that business arrangement, the learned advocate pointed out and argued that the 3rd respondent was obliged to deposit into the account of the 4th respondent USD.4,000,000.00 for investments purposes as per clauses 4.1 and 6.1 as consideration of the shares purchased from the 4th respondent. The said money, Mr. Mgongolwa argued were to be deposited into the account and be used in accordance with the business plan and direct supervision of the Board of Directors as per clauses 4.3 and 4.5 of the JVA.

Another point argued was that the managerial aspect of the 4th respondent was also to be through Board of Directors which consists of 7 persons for which the 3rd respondent was entitled to 4 members and the 4th respondent was entitled to 3 members.

It was Mr. Mgongolwa's view and arguments that since the execution of the JVA, the 3rd respondent through 1st and 2nd respondents have negligently and intentionally contravened all terms of the JVA and SPA, hence, breach of the very root of the agreements.

Arguing on particulars of breach, Mr. Mgongolwa argued that the 3rd respondent has never deposited financial business plan and has never deposited into the account of the 4th respondent any money and no meetings of Board of directors were called, hence, constituting a fundamental breach to the agreements.

Moreover, it was Mr. Mgongolwa submissions that, breach of contract is defined under the Black's Law Dictionary 8th edition to mean a failure without legal excuse, to perform any promise that forms all or part of the agreement. To buttress his point cited the cases of MIRIAM E. MARO vs. BANK OF TANZANIA, CIVIL APPEAL NO. 22 OF 2017 CAT (DSM) (UNREPORTED) AND LULU VICTORY KAYOMBO vs. OCEANIC BAY LIMITED

AND ANOTHER, CONSOLIDATED CIVIL APPEALS NO 22 AND 155 OF 2020, in which in both cases the Court of Appeal held and insisted that:-

> **"... parties are bound by the terms of the Agreement they freely entered into as there is doubt that parties to the agreement has agreed on how their contract should be performed."**

Guided by the above holdings, Mr. Mgongolwa argued that the 3rd respondent was bound by the contents of clauses 6 and 4 which required the 3rd respondent to furnish consideration under the Joint Venture Agreement this being the reason why parties executed the JVA. Mr. Mgongolwa argued that the remedy under the circumstances is rescission since the breach is fundamental and goes to the root of the JVA. The learned advocate argued that the whole JVA becomes void and cited section 25 of the Law of Contract Act, [Cap 345 R.E.2019] to buttress his point.

Mr. Mgongolwa contended that under the directorship of the 1st and 2nd respondent took the control of the 4th respondent and conducted it in a very prejudicial to the 4th respondent company by making several decisions at the expense of the 3rd respondent and as such the 3rd respondent assisted the 1st and 2nd respondent to breach the terms of the JVA.

Further Mr. Mgongolwa pointed out the prejudicial conducts at the expenses of the 4th respondents are as follows;

i. Appointment of new directors of the 4th respondent;

ii. Appointment of the company secretary;

iii. Removal of directors

iv. Change of the 4th respondent's name without involving the petitioners;

v. Fraudulently obtaining overdraft facilities amounting to USD.300,000.00 from Equity Bank and wrongly created debenture over the entire assets of the 4th respondent company contrary to clause 7(1) (f) (6) of the JVA.

Mr. Mgongolwa went on submitting that the above decisions are evidenced in paragraphs 13, 14 and 18 of the petition. According to Mr. Mgongolwa, the petitioners have managed to show how the 3rd respondent did breach the JVA and have discharged their burden as provided for under section 110 (1) of the Tanzania Evidence Act, [Cap 6 R.E 2019].

Moreover, Mr. Mgongolwa contended that looking at the reply of the respondents on the material allegations by the petitioners, the respondents have utterly failed to provide the adequate reply to the material allegations

made by the petitioners. He gave an example regarding the USD.4 million what was given is copy of bill of quantity which is not enough because clause 6 of the JVA mandatorily required the deposit of the money and any thing was to be done and supervised by board of directors. This was not done, insisted Mr. Mgongolwa.

Further Mr. Mgongolwa submitted that, investment if done, without adherence to what parties agreed was done at their own peril and no one should be allowed to benefit from his own wrong. To buttress his point Mr. Mgongolwa cited the case of HAMISI BUSHIRI PAZI AND 4 OTHERS vs. SAUL HENRY AMON & 3 OTHERS, CIVIL APPEAL NO.166 OF 2019 CAT (DSM) (UNREPORTED) in which it held that:

> **"... whatever investment she injected on the suit property contrary to the agreement was at her own risk."**

Guided by the above holding, Mr. Mgongolwa argued that no investment was done. And, in case it was done, then, it was done at the peril of the respondents for failure to adhere to what parties agreed in JVA, insisted Mr. Mgongolwa.

In conclusion Mr. Mgongolwa invited this court to grant the prayers as contained in the petition with costs.

Mr. Mnyele in reply to the submissions at the opening of their reply pointed out that the facts surrounding these proceedings are highly controverted and went on arguing that the whole petition and the fronted allegations are bare without scintilla of evidence. According to Mr. Mnyele, in their 14 pages answer to the petition, they effectively traversed the entire allegations with substantial documentary evidence that have not been controverted and as such equated the instant petition as frivolous and vexatious to be dismissed with costs.

Mr. Mnyele went on arguing that the doctrine of derivative action has its roots from the common law principles in the case of FOSS vs. HARBOTTLE [1843] 67 E.R. 189 and was statutorized in our laws in 2002 under section 234 of the Companies Act. Mr. Mnyele further argued that going by the principle in that case and the case of SOLOMON vs. SOLOMON [1897] AC 22 is that the company as separate legal entity from its shareholders a matter cannot be entertained by shareholder. Mr. Mnyele pointed out that there are exceptions such as where the company acted ultra vires, where act done without special resolution, fraud, personal derivative action, breach of duty and oppression by the majority and mismanagement of the company.

Mr. Mnyele acknowledged the enactment of section 234(1) of the Companies Act but was quick to argue that the instant petition cannot stand for two reasons, namely; one, that there is nothing wrong that the 1st, 2nd, and 3rd respondents have done at the detriment of the 4th respondent, and two, that nothing has been pleaded to fall under the exceptions. The learned advocate for the respondents cited the provisions of section234 and pointed out that for it to apply, four conditions must co-exists which are; seeking leave, legal notice to take an action, the applicant to act in good faith and the action must be for the benefit of the company or its subsidiaries.

From the above legal position, Mr. Mnyele argued that the instant petition is on breach of the two contracts, namely JVA and SPA annexed as AM2 in the petition. However, he acknowledged that in the two agreements the petitioners are shareholders of the 4th respondent. According to Mr. Mnyele, breach of the two agreements is outside the scope of the management of the company much as the money was invested and the mere procedural error of not depositing into the account of the company did not prejudice the company. The learned advocate for the respondent insisted that injection of USD.4 million is evidenced by bill of quantity, valuation report

worth Tshs.8,165,000,000.00 and Tshs.2.2 billion for machinery and other equipments.

In short they submitted that the petition cannot be brought under section 234 (1) of the Companies Act, 2002.

Furthermore, Mr. Mnyele argued that failure to channel the money, not utilized for purposes stated in the JVA and not supervised by the Board was his brief reply that why did the petitioners lay low profile for more than ten years. This to him, is malice on their part and went on insisting that the instant petition do not qualify for derivative action.

On the third complaint that the 1st, 2nd, and 3rd respondents breaching the terms of the JVA by making decisions in absence of the Board of directors, it was the reply of Mr. Mnyele that a Board of directors was constituted in which the 1st and 3rd petitioners were appointed ad per BRELA records annexure F but they absconded the meetings despite invited and much as the 3rd respondent has majority shareholders to make lawful decisions. According to Mr. Mnyele, this complaint do not by itself constitute a derivative action but a mere complaint about the breach of the JVA and SPA that do not fall under the genres of cause of action referred as derivative.

On the decisions cited by the petitioners' advocate, Mr. Mnyele replied that are distinguishable and none was on derivative action.

On that note, the learned advocates for the respondents prayed and strongly urged this court to dismiss this petition with costs on reasons that it was not derivative action, not benefiting the 4th respondent, breach cannot be under derivative action and for failure to show any exception provided for under the Foss case (supra).

In rejoinder, Mr. Mgongolwa argued that all proof regarding the running of the 4th respondent affairs and the breach of the two agreements are exhibited in the petition with its annexures. According to Mr. Mgongolwa, the respondents were legally bound to disprove the proven allegations of breach of the JVA and SPA and their failure is to allow this court to grant the petition as prayed.

As to the exception in FOSS case, Mr. Mgongolwa argued that they fall squarely within the ambit of this petition, which the petitioner have managed to prove that the affairs of the 4th respondent are mismanaged at the detriment of the 4th respondent.

On the applicability of section 234 it was his brief rejoinder that all what is legally required was complied with and by the respondents doing to the

contrary to what was agreed at the detriment of the 4th respondent is breach which is one of the exception.

On the meetings and decision making, Mr. Mgongolwa argued that it was the basis of their complaint by the 3rd respondent taking advantage of the minority shareholders and mismanaged the affairs of the 4th respondent by deliberately breaching the clauses and consequently acting *malafide* in the management of the 4th respondent.

Morever, Mr. Mgongolwa submitted that the 3rd respondent is generating income at the expenses of the 4th respondent while she invested nothing in the business.

And conclusively reiterate his earlier prayers in submission in chief.

This marked the end of hearing of this hotly contested petition on derivative action.

Having carefully gone through the pleadings and the written submissions for and against their respective stances, I have noted that there are some facts which are not in dispute. These are: **one,** there is no dispute that the on 7th February 2011 the 3rd respondent (by then going by the name of **Paradise Group of Companies Limited)** and 4th respondents (by then

going by the name of **Alliance Cargo Handling Company Limited**) entered into Joint Venture Agreement and Share Purchase Agreement which enabled them to work under the name of the **Alliance Cargo handling Company Limited** for purposes as established when incorporated. **Two,** there is no dispute that under the SPA, PARADISE GROUP OF COMPANIES LIMITED was to inject into the account of the then Alliance Cargo Handling Company Limited USD.4 Million being consideration for the purchase of shares to be used for operation expenses, and construction of the building under the supervision of the Board of Directors. **Three,** there is no dispute that the names of the original companies in the JVA and SPA were changed to WINGS FLIGHTS SERVICES LIMITED AND AFRICA FLIGHT SERVICES LIMITED respectively. **Four**, no dispute that a dispute ensued between the parties' behoving them exchange letters and notices for seeking amicable solution which did not work and eventually this petition was brought into this court's attention for its determination, hence, this ruling.

However, what is in serious disputed is whether this petition is within the exceptions for derivative action, and if so, if the petitioners have proved what is alleged in their petition. I will answer these two hotly contested issues one after the other. Starting with the first issue as to whether the

instant petition was within the acceptable exception. Messrs. Mnyele and Kiritta forcefully argued that, the instant petition for derivative action is not tenable, for do not fall under the exceptions as decided in the case of FOSS vs. HARBOTTLE) (supra) for what is complained of is not for the benefit of the 4th respondent, and what is complained of are mere internal errors which do not fall under the purview of the derivative action and lastly urged this court to dismiss this petition.

On the other hand, Mr. Mgongolwa argues to the contrary that the instant petition based on the reasons stated in the petition is well within the law and urged this court to grant the petition as prayed.

I have carefully considered this issue with both legal eyes and minds and read the law on this point and case law, in particular, the provisions of sections 233 and 234 of the Companies Act, 2002 and wish to point out that these two sections forming **PART IV of the Companies Act, 2002** were legislated in our company legal regime purposely as an exception to the majority rule and proper party principle as enunciated in the case of FOSS vs. HARBOTTLE (supra). Their object, therefore, in my considered opinion, were legislated and introduced in our company legal regime to protect the minority shareholders against the majority principle and proper party

principle. In other words, in our company legal regime now, majority shareholders do not enjoy absolute powers against the minority shareholders.

On the face of the statutory provisions of sections 233 and 234, it is clear that while the provisions of section 233 for **'unfair prejudice'** were meant for minority shareholder seeking person relief, but the provisions of section 234 for **'derivative action'** were meant for minority shareholder seeking relief on behalf and for the company. This is the remarkable different between these two sections and the reasons, for each section may overlap and are sometimes the same. In my considered opinion, the relief draws a big line but in both cases, the parliament intended to achieve the protection of the minority shareholders in the management of the companies in our jurisdiction.

Further reading the face of the statutory provisions shows that the court's powers are wide if it finds in favour of the petitioner in both situations. See section 233 (3) and section 234(3) of the Companies Act respectively.

It is further to be noted that under the provisions of section 233 clearly stated that a member of the company may make an application to the court or person whose shares have been transferred by operation of the law. On

that same note, I hold that even in section 234 members are the one to petition and the range of persons to be respondents depends on the involvement of the other members especially majority shareholders and factual background that parties have fallen out to each other.

With the above legal background and back to the instant petition, the first issue I am to determine is whether the instant petition is within the ambit of derivative action or not. Mr. Mnyele extensively argues that this is not and cited a number of instances to show that the reliefs sought were for the benefit of the petitioners. While his adversary share firm different view.

Without much ado this is what was raised in the second point of preliminary point of law and was dismissed on simple reason, among others, that looking at the reliefs sought none was for the benefit of the petitioners but for the 4th respondent. For easy of reference, the relief(s) clause was thus couched:-

i. A declaration that the 3rd respondent under the leadership of the 1st and 2nd respondents breached the Joint Venture Agreement and the Share Transfer Agreement;

ii. A declaration that the 3rd respondent unjustly enriched itself as the expenses of the 4th respondent;

iii. ***An order to the 3rd respondent to surrender 50% of the 65% of the shares allotted to the latter to be returned to the 4th respondent and for the same to be divided amongst the minority shareholders on a pro rata basis;***

iv. ***An order appointing a fair, just and legal management to run the affairs of the 4th respondents;***

v. ***General damages against the 1st, 2nd, and 3rd respondents;***

vi. ***An order invalidating the illegal change of name of the 4th respondent by the 3rd respondent;***

vii. ***Any other reliefs that this court considers apt to meet the equitable exigencies raised by the petition;***

viii. ***An order for the costs of this petition to be reimbursed by the 1st, 2nd, and 3rd respondents to the petitioners;***

Much as the said reliefs were all for the benefits of the 4th respondent and much as the said petition was preferred by members of the 4th respondents, then, without much ado, I hereby hold and find that the instant petition is proper, dry and at home with the law.

The arguments by Messrs. Mnyele and Kiritta, on this point well considered are misconceived, misleading and with no merits, hence, I do not associate with them.

Now is prudent that I address the issue whether the petitioner have discharged their legal obligations and whether the respondent have so far controverted the assertions by the petitioners. In other words, I am prepared now to determine the petition on merits or otherwise which will depend on the strength of the evidence adduced by either parties.

The basis of the petition is the breach of the JVA and SPA and other continuous breaches as alleged. The petitioners by their pleadings gave background relationships between the parties herein leading to creation of the two pertinent documents which are not in dispute. See paragraph 3 of the Reply to the petition. Attached to these two documents was the requirement to deposit USD.4 million and the use of the same as per the agreement. The petitioners argue that according to JVA, the amount of USD.4 million was to be deposited into the Company account and be for purpose stated in the JVA. See clauses 6 and 4.3 of the JVA and SPA respectively and argues that this was not done. The respondents, on the

other hand, argued that they used the funds as agreed for construction of the premises as agreed and gave bill of quantity and valuation report.

Having considered the rivaling arguments, I find merits that no funds were deposited as agreed by parties because no depository evidence of the amount was tendered and no other evidence was tendered to show actually what parties agreed was complied.

Even if deposited or used for the same amount but no evidence was led to show and prove that the money were used for the purposes as parties agreed. What the respondents tendered in disprove of this point is a bill of quantity and valuation report without any other supporting documents which were to show how the same was used. A mere bill of quantity is, in my considered opinion, no prove at all. No Board of directors meeting sanctioning such use as earlier agreed was put on evidence.

On the totality of the above, I find this allegation is proved to the standard required in civil cases i.e on balance of probability that no money was ever deposited and used as agreed by parties, which in my opinion, is breach of the fundamental term of the contracts which goes to its roots and vitiates the entire agreements for want of consideration. For clarity, much as no consideration was proved, then, the two agreements became void ab initio.

Another point for determination is whether the 3rd respondent unjustly enriched itself at the expenses of the 4th respondent. In this it was the petitioners' allegations that as result of the breach of the JVA by the 3rd respondent and unilateral arrogation of the control of the affairs of the company and the exclusion of the petitioners from the affairs of the company, then, to nub the unfair prejudice asked this court to order diluting the shares of the 3rd respondent in the 4th respondent by 50% to redress the inequities and be divided to the minority shareholder on pro rate basis.

The above state of affairs, it was submitted was clear breach of the agreement. In this it was argued that, failure to deposit the money which was consideration for the JVA by 3rd respondent and which was to be used in accordance with business plan, under directive/supervision of the board and this being the reason why parties entered into agreement.

The respondent strongly disputed these allegations and according to reply to the petition, the petitioners were to provide particulars and failure to provide particulars, then, makes the petition baseless and unfounded.

Having seriously considered this point against what is alleged and disputed, these allegations, in my considered opinion stand uncontroverted because much as the management of the 4th respondent have been and are in the

hands of the 1st, 2nd and 3rd respondents, one would expect them to bring particulars of how they have managed the affairs of the 4th respondent. These details were to include the accounts, finances and expenses in the entire period of dispute. This proves that the whole management of the 4th respondent is legally questionable, and as the 3rd respondent was in charge through the 1st and 2nd respondents' one would expect them to bring the details of the investment and business operations. Failure on the part of the 1st , 2nd, and 3rd respondents to rebut the above allegations is other than that the affairs of the 4th respondent have been badly run to the extent even the 1st and 2nd respondent through the 3rd respondent have enriched themselves at the expenses of the 4th respondent.

In the circumstances, therefore, this court makes a finding, thus, that the affairs of the 4th respondent company are run in manner prejudicial to the interest of the 4th respondent and minority shareholders at the benefit of the 3rd respondent.

Another worth point for determination is the allegations that the change of the 4th respondent's name without involving the petitioners. According to the petitioners, the breach went on and unfairly, the 1st and 2nd respondents changed the name of the 4th respondent from ALLIANCE CARGO HANDLING

COMPANY LIMITED to AFRICAN FRIGHT SERVICES LIMITED without even the knowledge and involvement of the petitioners as minority shareholders.

On the part of the 1st, 2nd and 3rd respondents replied the change was made in accordance with the Articles of Association of the 4th respondent and the law. The respondents pointed out that the petitioner were invited to attend Board Meeting that passed the resolution to change the name but refused to attend and in proof of the invitation attached two letters marked annexure "G" and 'H' respectively.

I have opted to revisit the Articles of Association of the 4th respondent and the law and JVA on this point before determining this rivaling point on change of name between parties. My findings are that; **one,** the special resolution attached to the reply to the petition was made by majority shareholders alone in a meeting held on 5th March 2016. **Two,** according to section 31 of the Companies Act, 2002, allows a company to change its name by a special resolution, and with the approval of the Registrar. No such approval was annexed into the reply. **Three,** the two letters annexed "G" and 'H' in reply to paragraph 14 of the petition do not show how and when were served to the petitioners. This is in accordance to JVA clause 20 which require that notice to be served by prepaid registered post and fax.

The same clause provided that in proving service by letter, it must have stamp, properly address and placed in the post of delivered or left at the current address if delivered personally. I have examined the letters but I noted that no stamp was shown to prove service nor was it stated that it was delivered personally. As to fax much as no number of fax was indicated, then, that mode was not employed at all. The cumulative effects of these deficiencies in inviting the petitioners to the meetings, clearly indicates and proves that the change of name was done without proper services as parties agreed in their agreements. This was the same with SPA as well.

I have as well gone through the Articles of Association of the 4th respondent, and I have noted that no notice was served in accordance with the Articles of Association which requirements are the same to those in the JVA. Therefore in the circumstances, the complaints by the petitioners are merited. Therefore, the statement in reply that the petitioners were invited to Board meeting that passed that resolution but refused are empty and without any support from how parties are to invite each other to the meetings.

Undeterred by the above findings, and in the interest of justice, I have no doubt and I am constrained to hold that the notices of meeting for change of name of the 4th respondent was not served to the petitioners in accordance with what parties agreed and as such the whole meeting was illegal and unfair to the interest of the 4th respondent for failure to comply with the procedure requirement which parties agreed both in the JVA, SPA and Articles of Association of the 4th respondent.

Equally the allegations that the 1st, 2nd and the 3rd respondents have been conducting meetings in segregation of the petitioners as minority shareholders from the management of the 4th respondent thus denying them information about the operations, accounts and finances of the 4th respondent company are proved by the petitioner because no known notice of meetings involving them was sent as parties agreed. Because notices annexed in reply of this allegation suffers the same fate as that of annexure "G" in the reply to the petition as discussed above.

Another point worth for determination is the taking of loan of USD.300,000.00 and creating debenture thereof in the name of the 4th respondent contrary to clause 7 (1) (f) (6) of the JVA. For easy of reference the said article provides as follows:

THE CONDUCT OF THE JOINT VENTURE.

7(1) While this agreement remains enforce, the parties shall procure that except with the consent of both of them;-

(f) the JVA shall not and shall not agree to

(6) create or issue any debenture, mortgage, charge or other security over any assets of the JVC except for the purpose of securing sums borrowed from its bankers in the ordinary and usual course of business for purposes stated herein.

In response to the above allegations, basically, the 1st, 2nd, and 3rd respondents did not deny taking the said loan but their reply was that same was used for the benefit of the 4th respondent and it has been fully repaid.

All these, among others, are prejudicial actions which are against the interest of the 4th respondent, and any member, the petitioners inclusive, were entitled to bring an action for and on behalf of the 4th respondent to protect the continuous breach that have been on without their involvement. One would expect to have a fully detailed report of how the same was used but instead there is general sweeping statement that same was used for the 4th respondent. The petitioners taking up the matter as they did in the

circumstances of this petition was, in my considered view, a warranted move. Much as the petitioner obtained leave to bring this action, same is merited.

Lastly was the allegation of appointment of new directors of the 4th respondent, opening new account and designed themselves signatories, new company secretary and removal of directors without involvement of the petitioners at the expense of the 4th respondent. The respondent did not dispute doing all the above allegations but their defence was that were entitled so because they are majority shareholders and that nothing bad or prejudicial was done to the companies and the petitioners.

Having considered the above allegations and the reply thereto and the whole submissions of the points without much ado same stand proved and indeed, the affairs of the 4th respondent need this court's intervention.

It is, therefore, my considered finding that the petitioners have successfully managed to prove all their claims against the respondents. All taken into account and considered this petition succeeds and under the provisions of section 234(3) of the Companies Act this court is inclined to proceed to make the following orders, that:-

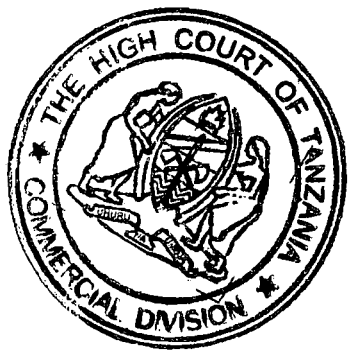
1. I declare that the 3rd respondent under the leadership of the 1st and 2nd respondents breached the Joint Venture Agreement and the Share Purchase Agreement for failure to deposit USD.4,000,000.00 as agreed rendering the entire JVA and SPA void abi initio for want of consideration;
2. I declare as well that the 3rd respondent has at all material time unjustly enriched itself at the expenses of the 4th respondent;
3. I further order the 3rd respondent surrender the 65% of the shares allotted to her and same be returned to the 4th respondent and the same be divided among the minority shareholders on a pro rata basis and immediately hand over the management of the 4th respondents to the petitioners
4. I further direct parties after complying with item (3) above the petitioners and other members continue with management of the 4th respondent in a fair, just and legal manner;
5. The 1st, 2nd, and 3rd respondent are condemned to pay general damages to the tune of USD.500,000.00 to the 4th respondent
6. I further order that the change of the name of the 4th respondent was illegally done and petitioners by the order of this Court are hereby directed to notify and present to the REGISTRAR of Companies this

court's order directing him/her to delete the illegally changed name of AFRICA FLIGHT SERVICE and substitute with the former name of ALLIANCE CARGO HANDLING COMPAMY LIMITED;

7. The 1st, 2nd and 3rd respondents to bear costs of this petition.

It is so ordered and directed.

Dated at Dar es Salaam this 8th July, 2022



S. M. MAGOIGA

JUDGE

08/07/2022