

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC.COMMECIAL CAUSE. NO.45 OF 2021**

IN THE MATTER OF THE COMPANIES ACT, 2002

AND

IN THE MATTER OF PETITION FOR WINDING UP

BETWEEN

TIKI FREDRICK MUSHI1ST PETITIONER

ANDREW KITIGANDA MAGESA.....2ND PETITIONER

VERSUS

LAFAYETTE INTERNATIONAL CORP.(T) LTD.....RESPONDENT

Date of the Last order: 11/07/2022

Delivery of the Ruling: 19/08/2022

RULING

NANGELA, J.,:

This is a winding up petition. It was brought to the attention of this Court by the Petitioners herein under section 275, 279(1) (e), 282 (1) and 295 (1) of the Companies Act, Cap.2002, R.E 2002. The winding up orders are pegged on the ground that it is 'just and equitable that the Respondent be wound up' owing to there being a complete breakdown of relationship among the directors of the Respondent.

Briefly stated, the Petitioners are natural persons as well as directors and shareholders of the Respondent Company. The Respondent was incorporated on the 11th June 2015 under the Companies Act, with a nominal capital of **TZS 600,000,000** divided into **100,000** shares of **TZS 6,000** each. The Petitioners allege to be owning a total of 15,000 paid up shares in the Respondent worth **TZS 90,000,000/.** According to the Petition, the amount of capital paid up or credited as paid up is **TZS 150,000,000.**

At the incorporation stage, therefore, the Respondent was granted a Certificate of incorporation No.117995, with its registered office being at Plot 89, Mwananyamala kwa Kopa, Kinondoni District, Dar-es-Salaam.

In this petition, the Petitioners are seeking for the following orders, that:

1. The Company be wound up by Court under the provisions of the Companies Act.
2. That, the Court be pleased to grant interim and/or '*preservatory*' orders

to safeguard the Company and its
Petitioners (sic) pending granting of
a winding up order including, but not
limited to:

(a) Appointment of a provisional
liquidator to take into custody
and control of the Company's
affairs, books, record and assets;
freezing the Company's bank
accounts styled as "Lafayette
International Corporation Tanzania
Limited" operated at Standard
Chartered Bank under Bank
Account No.0102092126800 for
(TZS), and A/c
No.0102092126801 for (TZS) and
USD A/c No.8702092126800 and
CRDB Account No.
015C571432100;

(b) Appointment of a provisional
liquidator to take into custody
and control of the Company's
assets, namely: **Five Motor**

Vehicles, make Toyota IST with
Reg. No. T 810 DVH; T 166 DVV;
T 232 DVB, T571 DUS and T575
DVA. Seventeen Tri-cycles make
LAFA with Reg. No. MC 989 CUA,
MC 993 CUA, MC 104 CUB, MC
997 CUA, MC998 CUA, MC 239
CVS, MC 252 CVS, MC 230 CVS,
MC 307 CTR, MC 304 CTR, MC
290 CTR, MC 284 CTR, MC 842
CTG, MC 861 CTG, MC 840 CTG
and MC 858 CTG; and TEN (10)
Unregistered Tri-cycles with
Chassis numbers: LB6HDM
ZK4L1A20118, LB6HDMZK6L1A
20119, LB6HDMZKXL1A20124,
LB6HDMZK1L1A20125, LB6HD
MZK9L1A20129; LB6HDMZK7L1A
20131, LB6HDMZK9L1A20123,
LB6HDMZK2L1A20124, LB6HDMZ
K4L1A20135; LB6HDMZK9L1A20
115 kept at Block No.Mbezi Beach

Industrial Area, Kinondoni Dar-
es-Salaam;

3. Appointment of a Provisional Liquidator to take into custody and control of the Company's assets styled as 84 Generators make Macforth Brand kept at Goba Police Station for investigation registered in the name of "Lafayette International Corporation Tanzania Limited;"
4. Appoint a provisional liquidator to take into custody and control of the Company's assets styled as 150 JACK HAMMER kept at Goba Police Station for investigation and 49 JACK HAMMER kept at company warehouse at Industrial Area Mbezi Beach registered in the name of "Lafayette International Corporation Tanzania Limited."
5. Appointment of a provisional liquidator to take into custody and control of the Company's assets

styled as 100 DRILL MACHINES kept at Goba Police Station for Investigation, 90 JACK HAMMERS kept at the Company's warehouse at Industrial Area Mbezi Beach registered in the name of "Lafayette International Corporation Tanzania Limited."

6. Issue an arrest warrant against Mr JEFF ZHOU as the Petitioners have probable cause to believe that he is likely to abscond from Jurisdiction of the Court; including preventing Mr JEFF ZHOU from absconding and /or concealing and wasting any of the Company's property that the same should be kept in safe custody until such time as the Court may determine the Winding up Petition.
7. Such other orders as the Court deems fit.

Following the filing of this Petition, the Respondent filed an *Affidavit in Opposition to the Petition for Winding up* on the 22nd March 2022. The said affidavit was responded to by the Petitioners through a joint reply affidavit filed on 31st March 2022. Besides, the Petitioner did file in Court a certificate of compliance under Rule 99 and 102 of the GN No.43 of 2005 (The Companies (Insolvency) Rules).

On the other hand, an interested Creditor, in the name of the **Board of Trustee of National Social Security Fund** (hereafter to be referred to as the NSSF) lodged a notice of appearance under Rule 104 (1) and (2) (a), (b) and (c) of the Companies (Insolvency) Rules, GN 43 of 2005.

Although the NSSF did not intend to oppose the Petition, theirs was a search for an opportunity before this Court to be recognised as an interested creditor. The NSSF Notice of Appearance shows that, the Respondent owes to the NSSF a total of **TZS 44,530,000/=** this amount being Respondent's outstanding arrears of statutory contributions.

In Court, the Petitioners were represented by Mr Hardson B. Mchau, learned advocate while the Respondent enjoyed the services of Mr Eric Aggrey Mwanri, learned advocate. On the 15th day of June 2022 this Court issued an order that, the matter at hand should be argued by way of filing written submissions. I did issue a schedule of filing and the parties duly complied with it. I will, thus, consider the parties' pleadings and submissions before I proceed with further determination of this petition.

Submitting in support of the winding up of the Respondent Company, the learned counsel for the Petitioners adopted the petition and the joint affidavit in reply filed by the Petitioners as forming part of his submission. He contended that, there is now a serious misunderstanding between the directors whereby currently the Petitioners stand charged with the offence of Stealing by Directors, a matter pending at Resident Magistrate's Court of Kuvukoni at Kinondoni as Criminal Case No.172 of 2021 and Police investigation is on-going.

Mr Mchau submitted that, the conflict between the Petitioner's and the Managing Director of the Respondent started

in 2018 following the latter's introduction to the Company, one, Ms. Christine Christian Ndunguru, without consultations with the Petitioners.

He contended that, the said Christine Ndunguru was put in charge of the affairs of the Respondent while she was neither a shareholder nor a director of the Respondent, a fact which sparked misunderstandings between the directors to the extent of failing to call for annual general meetings of the Respondent Company. It was Mr Mchau's submission that, in such a circumstance, a winding up order is necessitated.

To buttress his contention the learned counsel relied on the cases of **Ernest Andrew vs. Francis Philip Temba** [1996] TLR 287 and that of **In the Matter of Winding Up of Albero Italian Restaurant & Italian Restaurant & Hotel Limited between Joelle Dahan and Albero Italian Restaurant & Hotel Limited Another**, Misc. Civil Cause No.3 of 2017, HC (Arusha District Registry) (unreported).

Mr Mchau submitted, as the second reason for the winding up orders sought, that, the Respondent is in a state of compliance

failure, given that, the Company has failed to comply with her legal obligations to the NSSF, whereby she is indebted to that Fund to a tune of more than **TZS 40,000,000**. He contended as well, that, the Respondent has not complied with the legal requirements under the Workers Compensation Act, Cap.263 and Workers Compensation Regulations GN.185 of 2016, and stands indebted to the WCF to a tune of **TZS 171,178,361.83**.

Relying on the decision of this Court in the case of **In the Matter of Winding Up Petition of Benson Informatics Ltd, Misc. Commercial Cause No.57 of 2020**, (Unreported), Mr Mchau contended that, failure on the part of a Company to comply with her obligations to regulatory authorities is one of the reasons for winding up of such a company.

In his third line of reasoning, Mr Mchau submitted that, the Respondent Company has also failed to convene statutory meetings since its incorporation in 2015 to date. He contended, therefore, that, the Respondent Company has contravened the mandatory provision of section 133(1) of the Companies Act, Cap.212 R.E 2002.

He contended that, failure to convene statutory annual general meetings of the company stands as one of the reasons for winding up of such a company. He supported his view by reference to the decision of this Court in **the Matter of Petition for Winding Up of Kilwa Resources Limited and Kilwa Ruins Limited, between Amir Ramadhani Mpungwe and Michael John Lancaster Warren and Others**, Misc. Commercial Appl. No.14 of 2021 (unreported).

It was a further submission by Mr Mchau, as the fourth reasons in support of this winding up petition, that, the Managing Director of the Respondent, Mr Jeff Zhou has registered a Company in the name of **AXY Enterprises Corporation Tanzania Limited**, whose objectives are similar to those of the Respondent Company.

Mr Mchau contended that, the act of the Respondent's Managing Director to actively and directly participate in the new company as its shareholder and Director violates the principle of good faith and honesty by director to the best interest of the

Respondent Company as required under section 182(1) of the Companies Act.

He further submitted as a fifth reason that, the Petitioners have been denied access to the books of accounts of the Respondent which books are kept in line with the requirements of section 151(1) of the Companies' Act. He submitted that, being directors of the Respondent, the Petitioners have a right and enjoys powers to access the Companies book of accounts and, for that matter, he contended that, the act of denial of access by the Respondent's managing director, is contrary to section 151(3) and 181 of the Companies Act.

Mr Mchau submitted further, as the sixth and seventh ground for the winding up of the Respondent Company that, there is a failure on her part to declare dividends since its incorporation in 2015 and failure on the part of the Respondent to pay salaries to the Petitioners as directors since the year 2016.

He contended that, as per section 180 (1) and (2) of the Companies Act, every company is required to call for an annual general meeting to declare dividends and where a

recommendation of its directors is rejected or varies, a statement to that effect must be included in the Company's Annual Report. He submitted, however, that, Mr Jeff Zhou who is the Managing Director of the Respondent, has refused or failed to call for the annual general meetings of the Respondents since the year of incorporation to date and, that, since then, i.e., 2015, no dividends have ever been declared.

Besides, and relying on section 183(1) of the Companies Act, Mr Mchau contended that, the Petitioners, being both directors and employees of the Company have never been paid salaries from the Respondent Company, a fact which he argues to be contrary to the Articles of Association of the Respondent and section 183(1) of the Act.

Finally, Mr Mchau submitted that, the Respondent needs to be wound up given that, there is on the part of its managing director, an active concealment of assets and misuse of the Respondent Company's funds. Assets alleged to be concealed include 5 motor vehicles Make Toyota IST, and 10 Tricycles and the petitioners as co-directors are unaware of their whereabouts.

He contended that, the actions by the Respondent's managing director are contrary to section 181 of the Act, and includes a diversion of funds from the Respondent's account No.8702092126800 (USD) which the managing director used for his own (personal) needs.

On those grounds and submission, Mr Mchau prayed that, the Respondent Company be wound up under the provisions of section 279(1) (e) and 281(1) of the Companies Act, R.E 2002 and, this Court be pleased to appoint an official liquidator under section 294 of the Act while costs of this petition be borne by the Respondent.

As I stated earlier here above, the Respondent is opposed to this Petition for winding up. Through her Managing Director, one Jeff Zhou, an affidavit in opposition was filed in Court.

Submitting in opposition to the Petition, therefore, Mr Mwanri, the learned counsel for the Respondent commenced his submission by informing this Court that, the Business Registration and Licensing Agency (BRELA) has of recent confirmed that the Petitioners did fraudulently forge the signatures in the documents

filed with BRELA which documents entitled them to be members and directors of the Respondent. He relied on a letter **Ref. No.AB.62/114/01-A/178** dated 27th June 2022.

Mr Mwanri submitted that, the above fact was pleaded in the affidavit in opposition to this Petition, in particular, under paragraph 8(c) thereof. From that factual revelation, Mr Mwanri urged this Court to decline this Petition, since, in the first place, the Petitioners never had locus to become members and directors of the Respondent.

In his submission, the learned counsel for the Respondent contended that, the Petitioners do not own 15,000 shares as claimed and have not been able to show any evidence to that. He submitted that, their alleged call for meeting where they were issued with 25000 shares is a lie since it contradicts their earlier assertion that the Respondent has never convened any meeting since inception in 2015. He, thus, questioned how possible were the Petitioners allotted the shares.

He submitted that, the Respondent lodged a complaint with BRELA regarding the alleged directorship of the Petitioners and

their removal from the register could not proceed as there is a pending criminal matter in Court. He denied there being any misunderstanding between the directors as alleged by the Petitioners but that, the Petitioners used that as a excuse having been found in possession of the merchandise belonging to the Respondent Company. He even denounced the allegation that Respondent's introduction of Ms Christine Christian Ndunguru to the Company was the source of the dispute.

Mr Mwanri urged this Court to dismiss the Petition since the Criminal Case No.172 of 2021 pending at Kivukoni RM's Court, which involves the Petitioners and another accused, is yet to be determined. He contended that, the case was filed prior to the filing of this petition. He submitted as well that, the Creditor's submissions should not be entertained given that, the NSSF Certificate of Registration No.1029872 was issued on 14th April 2021 and any claim from them, hence, should have been on transactions commencing that date.

As regards the issue of no-calling of the meetings, Mr Mwanri submitted that, according to section 131(4) of Cap.212,

where there is a default there is an option which the Petitioners never exhausted. He also submitted that, the allegation that Mr Zhou opened another Company is baseless as nobody is hindered from opening a Company as long as there is compliance with the law. He contended that, even one of the Petitioners has registered a Company named Lafayette Co. Ltd which was registered in November 20th, 2020 with similar objects as those of the Respondent Company.

Mr Mwanri denied the averments that the Petitioner have been denied access to the company's books of Account. He contended that, legally, that cannot even constitute a ground for winding up a company. He maintained that, the Petitioners herein were mere officers of the Respondent and that; they ought to have proved their alleged non-payment of salaries.

He also stated that, the Respondent has not been making profits and, hence, the issue of non-payment of dividend cannot arise. He as well denounced the alleged concealment of assets by the Respondent arguing that no evidence was availed to the Court in that regard.

In his rejoinder the learned counsel for the Petitioners assailed the submission by the Respondent and the letter from BRELA, **Ref. No.AB.62/114/01-A/178** dated 27th June 2022. He contended that, the letter was brought to the attention of this Court improperly and backed his submission by the decision of this Court in the case of **Modestus Rogasian Kiwango vs. Hellen Gabriel Minja**, Civil Appeal No.72 of 2019. Indeed I agree with him in that aspect and will not go further than that.

In his rejoinder, the learned counsel for the Petitioners submitted that, the Petitioners were issued with 15000 shares and that is sufficient evidence that they are shareholders of the Respondent. He reiterated his earlier submission in chief and I need not go to it again.

I have carefully considered the above rival submissions and also the submission by the Creditor which is in support of the winding up of the Company. One thing which the Petitioners have not dealt with is the effect of what they are seeking from this Court while there is already, in the RM's Court, a pending criminal

matter involving the properties of the Respondent and, themselves being involved in that matter.

The learned counsel for the Respondent has addressed it and has urged this Court to dismiss this Petition which was filed in Court after the commencement of the criminal case at Kivukoni RM's Court. I have given due consideration to this noted issue as well.

Certainly, there is no dispute that, the criminal proceedings are still pending at Kivukoni RM's Court. On that account, I find it uneasy to proceed with this matter to the extent of issuing an order to dissolve or wind up the Respondent Company while there are pending allegations of forgery and stealing by Directors in respect of the same Company.

In my view, taking such a route will not be a prudent idea. All things considered, as such, I find that the skies are not falling and Petitioners can still buy time until when they are done with the pending criminal. In view of those facts, I do not see it wise; therefore, to lower the Respondent's curtains as the Petitioners would like me to do. I am of the solid view that, doing so would

ruin, complicate or prejudice the conduct of the criminal matters and allegations which are still pending in Court.

One may argue that, as for now, the best of what could be done is to have this matter stayed pending determination of the criminal case No.172 of 2021. Well, that could be a possibility. However, I am also not prepared to do so, because; doing so will be tantamount to turning this Court into 'a parking lot' for case files in respect of matters which may still be brought to the Court in the opportune time.

For the time being, therefore, I will proceed to struck out the petition with leave to re-file it once the proceedings at Kivukoni RM's Court are brought to an end.

In those premises, thus, I will not labour much on all other issues raised and argued by the parties, but settle, as I hereby do, for the following orders:

1. That, the current Petition is
struck out with no orders as
to costs.
2. The striking out of it is on
account of there being a

criminal case against the
Petitioners, as Directors of the
Respondent, which is yet to
be resolved.

3. That, the striking out is with
leave to re-file this matter
once the Criminal case No.172
of 2021 is determined.

It is so ordered.

DATED at DAR ES SALAAM ON THIS 19TH DAY OF
AUGUST, 2022



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DEO JOHN NANGELA
JUDGE