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

MISC.COMMECIAL CAUSE. NO.81 OF 2022

IN THE MATTER OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE COMPANIES ACT, R.E 2002

BETWEEN

AFRICA FLIGHT SERVICES LIMITED.....APPLICANT

VERSUS

THE REGISTRAR OF COMPANIES .....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

Date of the Last order: 22/07/2022
Delivery of the Ruling: 31/08/2022

RULING

NANGELA, J.,:

This is an application for judicial review brought under Section 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provision Act, Cap.310 R.E, 2019 and Rule 8 (1) (a), (b); (2), (3) and (4) of the Law Reform (Fatal Accidents and

Miscellaneous Provision (Judicial Review Procedure and Fees) Rules , 2014.

In this application, the Applicant is seeking for the following orders:

1. An order for certiorari to remove to remove into the High Court and quash the decisions of the Registrar of Companies (1st Respondent) to refuse to receive and file a special resolution of the Applicant to forfeit the shares of the members of the Company, namely: SAID B.SAID, HAMAD MASAUNI , SAID MASAUNI, JUMA MBAKILA, MASAUNI YUSU, ARTHUR MOSHA, YAHYA SUDI, RAMADHNINASIBU, GERALD JAMES, THABIT KATUNDA and WALTER CHIPETA (herein after the Minority Shareholders, dated on or about the 15th July 2021 and the attendant forms as well as the decision that the said Minority Shareholders had on the 15th December, 2010 paid for 21,480,000 shares being part of the share in cash and, further, 1,679,392

shares at a consideration for service rendered for setting up the company, lodging and pursuing licenses, negotiations with investors and drafting of legal documents.

2. An Order for mandamus compelling the 1st Respondent to comply with the law by accepting and file the said resolution forfeiture of shares and attendant forms reflecting the new shareholding structure of the Applicant's Company.
3. Respondents be ordered to pay costs of this Application.

On the 24th June 2022, the Respondents filed a joint counter affidavit and a Notice of Preliminary Objection, raising therein four grounds of objection, namely, that:

1. This application is untenable having been supported with an affidavit which contravenes Order XIX Rule 3 of the Civil Procedure Code, Cap.33 R.E 2019, as it contain hearsay and legal arguments.

2. This application is untenable having been supported with an affidavit which contain lies.
3. This application is untenable having been supported with an affidavit whose deponent has no sanction of the Company to either depone the facts on behalf of the Company or institute the present application.
4. This application is untenable for want of Statement as provided for under Rule 8 (1) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provision (Judicial Review Procedure and fees Rules, 2014.

On the 22nd July 2022, the parties appeared in Court for the hearing of the preliminary objections. In terms of that appearance, Mr Gabriel Simon Mnyele, learned advocate, appear in Court for the Applicant. The Respondents enjoyed the legal services of Ms Jacqueline Kinyasi and Grace Umoti, learned State Attorneys.

Submitting in support of the objections, Ms Kinyasi contended that, according to Order 19 rule 3 of the Civil

Procedure Code, Cap.33 R.E 2019, an affidavit should only contain factual statements with no arguments. She contended that, looking at paragraph 4 of the Applicant's supporting affidavit of Mr Mohamed Abdillah Nur, the same is loaded with legal arguments. She submitted that, if that paragraph is to be expunged, the remaining three paragraphs will only be merely introductory and cannot sustain the application.

The second salvo launched against the said supporting affidavit is that, as per its verification clause, the statements contained on paragraph 4 of the affidavit are based on information obtained from the deponent's legal counsel but the said legal counsel did not file any affidavit to that effect.

Relying on the Court of Appeal decision in the case of **Sabena Technics Dar Ltd vs. Michael J. Luwunzu**, Civil Application No.451/18 of 2020, she contended that, in the absence of the affidavit of the person from whom the information was obtained, the supporting affidavit cannot stand for it will be defective as it contains hearsay.

As regards the 2nd and 3rd grounds of objection, Ms Kinyasi submitted that, under section 220 of the Companies Act, Cap.212, R.E 2002, every Company is to keep its register of directors and any change has to be communicated to BRELA.

Ms Kinyasi submitted that, although the deponent's affidavit in support of the application indicates that the deponent is a Managing Director of the Applicant or Principal Officer, the truth of the matter is that he is not, given that, his appointment was terminated and the termination was communicated to BRELA (Business Registration and Licensing Authority) as per the requirements of the law sometimes on 23rd December 2020.

As such, she submitted that, the affidavit contains lies and cannot be relied upon. To support that contention, she relied on the decision of the Court of Appeal in the case of **Ignazio Messina vs. Willow Investment SPRL,** Civil Application No. 21 of 2001, and submitted that, an affidavit tainted with untruthful information cannot be relied upon.

Ms Kinyasi did also brought to the attention of this Court, the decision of the Court of Appeal in the case of **Moto Mabanga vs. Ophir Energy PLC and 6 Others**, Civil Appeal No.119 of 2021 arguing that, in determining an objection, the Court needs only to look at the pleadings and the annexures without any further facts or evidence.

As regards the last objection, it was Ms Kinyasi's submission that, in line with Rule 8 (1) (a) of **Law Reform (Fatal Accidents and Miscellaneous Provision (Judicial Review Procedure and Fees Rules, 2014, GN. 324 of 2014,** the current application is defective for want of a supporting statement. She submitted that, as per the rule, the chamber summons must be supported with an affidavit and a statement on which leave was granted.

She argued that, in this application, the application is only based on a chamber summons and an affidavit. She noted that, under paragraph 3 of the affidavit, the paragraph has an annexure which forms part of the affidavit and, that, such

annexure, even if it is a statement upon which leave was granted, is part of the affidavit and not a standalone document.

She submitted, therefore, that, the application lacks the requisite statement as per Rue 8(1) (a) of GN. 324 of 2014 and, in view of the other defects pointed out herein earlier; she has urged this Court to strike out this application as being fatally defective.

Mr Mnyele had a different view altogether. While he conceded that, on the basis of the decision of the Court of Appeal in the **Moto Mabanga's case** (supra) and also the decision of **Ali Shaaban and 48 Others vs. TANROADS,** Civil Appeal No.261 of 2020 (unreported), Courts, while deciding on a preliminary objection, may refer to the pleadings and their annexure, he urged this Court to overrule the Respondents' objections.

He reasoned that, the provision of Order XIX Rule 3 of the Civil Procedure Code ,which was relied upon by the Respondents' learned State Attorney, is inapplicable to the application at hand. He contended that, Order XIX Rule 1

applies when a Court requires that a particular matter be proved by way of an affidavit and for that reason Rule 3 insists that only facts are to be deponed.

For him, the applicable law on the affidavit assailed by the Respondents is the Judicial Oaths and Statutory Declarations Act and the Notary Public and Commissioner for Oaths Act. He argued that, assuming Order XIX of the CPC was applicable, still paragraph 4 (i) to (iv) of the supporting affidavit is not defective as what is stated therein are factual matters.

Mr Mnyele contended that, even if this Court proceeds to expunge the alleged defective paragraph from the record, still the remaining three paragraphs will suffice to make the affidavit remain intact. He argued that, the four grounds were lifted from the Statement annexed to paragraph 3(i) and shall remain in the said statement.

As regards the alleged hearsay, he submitted that, since hearsay is a rule of evidence it does not apply to affidavits by virtue of section 2 of the Evidence Act. He contended that, what is required in law and practice is for the deponent to disclose

the source of his information, a fact which was done under the verification clause.

While he fully conceded that the deponent of the affidavit in support of the application (Mr Nur) is not a director, he denies the averment that the affidavit contains lies because, the deponent is not a director in the meaning of the Companies Act but that, he is the Managing Director as an employee of the Applicant.

As regards the non-filing of a statement as per the requirements of Rule 8 (1) (a) of the GN NO.324 of 2014, Mr Mnyele was quite vociferous that, there has been no infringement of the said Rule. He contended that, his reading of the rule, since it requires the statement used to support the application to obtain leave; there is no need for a new statement.

He noted, as a problem, however, that, instead of filling an independent statement, he made it as annexure to the affidavit. He called upon the Court to rectify the matter by resorting to the Oxygen Principle under section 3A of the CPC

and relied also on Art.107 (A) (2) (e) of the Constitution of the United Republic of Tanzania, 1977 (as amended).

He also relied on the case of **Union of Tanzania Press Club and Another vs. Attorney General and Another**, Civil Appeal No. 89 of 2018 to back up his submissions and urged this Court to dismiss the preliminary objections. Ms Kinyasi made a rejoinder which basically insists on what she submitted in chief.

Having carefully looked at the rival submissions, the issue which I am called upon the resolve is whether the preliminary objections are meritorious. If any of them is found to be merited, the entire application may crumble.

I will thus consider them by starting to look at the last one in respect of Rule 8 (1) (a) of GN. 324 of 2014. The question I am about to address under that rule is whether its requirements have been complied with. For ease of reference, I will reproduce Rue 8 (1) (a) of GN 324 of 2014 here below. It reads:

> "8(1) Where a leave to apply for
> judicial review has been granted,
> the application shall be made-

(a) by way of a chamber summons supported by an affidavit and the statement in respect of which leave was granted."

As I stated here above, the fourth objection was anchored on the above provision, the argument being that, no Statement as per the requirements of Rule 8 (1) (a) cited here above accompanied the chamber summons. Instead, the statement was made an annex to the affidavit.

Essentially, an annexure to an affidavit forms part of it. It cannot be regarded as a standalone. The requirements for what constitutes a full-fledged judicial review application as pointed out in Rule 8 (1) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provision (Judicial Review Procedure and Fees) Rules, 2014 are that, the same must be by way of a chamber summons.

The chamber summons, however, must be supported by two things: (1) an affidavit and (2) a Statement in respect of which leave was granted. In my humble view, the Statement is

a standalone document and if annexed to the affidavit and forms part of it, one cannot be said to have complied with the mandatory requirements of the rule.

As such, I cannot agree with Mr Mnyele's submissions and his reliance on Section 3A of the Civil Procedure Code Cap.33 R.E 2019 cannot bail him out as well. In fact, the Court of Appeal made it clear, in the case of **Mondorosi Village Council & 2Others vs. Tanzania Breweries & 4 Others**, Civil Appeal No.66 of 2017 (unreported), that:

> "Regarding the overriding objective principle, ... **the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case**. (Emphasis added).

As I look at Rule 8 (1) (a), of GN. No. 324 of 2014, the rule is couched in mandatory terms. It will therefore mean that, a failure by a litigant to adhere to such mandatory requirements of that rule cannot be bailed out by the overriding objective

principle. If such a failure is occasioned, the application will be tainted with defects that are fatal to its survival in Court. It had to be axed out. This is exactly the fate which this current application should face as it is defective before the eyes of this Court. The fourth objection is therefore sound and I do hereby uphold it.

Since the fourth object is capable of disposing of this matter without further ado, I do not see the rationale of dealing with the remaining grounds of objection. This Court, therefore, settles for the following orders:

1. That, on the basis of the fourth objection raised by the Respondents herein, I find that, the current application is defective for having contravened the provisions of Rule 8 (1) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provision (Judicial Review Procedure and Fees) Rules, 2014, GN.No.324 of 2014.

2. That, in view of the underlying defects, the entire application is hereby struck out with costs.

It is so ordered.

DATED at DAR-ES-SALAAM, THIS 31ST DAY OF AUGUST 2022

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HON. DEO JOHN NANGELA

JUDGE