

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL 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 MUSHI.....1ST PETITIONER

ANDREW KITIGANDA MAGESA.....2ND PETITIONER

AND

LAFAYETTE INTERNATIONAL
CORPORATION (T) LIMITED.....RESPONDENT

Date of last order: 17/02/2022
Date of Ruling: 17/03/2022

RULING

NANGELA, J.

This ruling is in respect of a Notice of Preliminary Objection filled by the Petitioners. The relevant Notice came about following a Winding up Petition which the Applicants/Petitioners filed in this Court, under Section 275, 279 (i) (e), 282 (i) and 295 (i) of the Companies Act Cap 212 R.E 2002.

In their objection to the Respondent's Affidavit in opposition to the Petition the Petitioners contend that:

1. The Respondent's Affidavit in opposition to the Petition for the Winding Up is incurably defective for being signed by incompetent person.
2. The Respondent's Affidavit in opposition to the petition for Winding up is incurably defective for containing arguments, evidence and matter of laws.

When the learned advocate for the parties appeared before me on the 8th of December 2021, the Petitioners enjoyed the services of Mr. Hardson Mchau learned Advocate while the Respondent enjoyed the legal services of Mr. Erick Mwanri, learned Advocate. On the material date, this Court made an order that the Petitioners' preliminary objections should be disposed of by way of written submissions. A schedule of filing such submissions was issued and, the parties have duly complied with it.

Submitting in support of the first objection, Mr. Hadson Mchau submitted that, the opposing affidavit was deposed and signed by one Christine Christian Ndunguru as the Respondent's Attorney appointed by Mr Jeff Zhou, the Director of the Respondent as shown in Annexure **"JEFF-1."** According to Mr Mchau, the said Christine Ndunguru has no legal capacity to sign and depose an

affidavit in opposition to the Petition for the Winding Up because she was appointed illegally.

It was Mr Mchau's submission that, all powers and Duties of the Directors of the Respondent are provided for under the Memorandum and Article of Association annexed to the Respondent's supplementary affidavit as Annexure JEFF-9. He argued that, even the law under section **11 (2) of the Companies Act Cap 212, 2002**, provides for the applicability of the Regulations in Table A of the Act, whereby Table A shall be applicable *Mutatis Mutandis*, only if the Articles of the company do not exclude or modify regulations contained in Table A.

Mr Mchau submitted further that, the Respondent's Articles of Association excluded **Regulation 72** of the Table A of the Act, which empowers the Directors to appoint the Company's Attorney. He maintained that, since **Regulation 72** was excluded, the purported Donor (Mr Jeff Zhou) being a single Director of the Respondent, had no powers to appoint Ms Christine Christian Ndunguru as the Attorney of the Respondent as deposed under paragraph 2 of the affidavit filed to oppose this Petition.

Mr Mchau contended further that, even if the said **Regulation 72** was to be applicable, a single Director (**Mr Jeff Zhou**), who is named in the power of attorney, had no powers to appoint the Respondent's Attorney without involving other directors because Regulation 72 of

the Table A of the Act, vested the powers to do so on the directors and not on a single Director.

It was a further submission of Mr. Mchau that, the Respondent's affidavit in opposition is incompetent because the said Power of Attorney annexed to the affidavit filed in court does not bear the seal of the registration of documents to show the same was registered for it to be used as legal document which confers power and rights to the deponent.

Submitting on the 2nd ground of objection Mr. Mchau contended that, the Affidavit in opposition to the petition for winding up was offending the principles governing affidavits as it contains arguments and matter of laws. He contended that, an affidavit being a substitute for oral evidence shall only contain statements of facts, based on the deponent own knowledge or information which he believes to be true.

To support his submission, he cited the case of **Uganda vs. Commissioner of Prisons E-xparte Matovu (1966) EA 514**, which held that an affidavit should not contain extraneous matters by way of objection or prayers, legal argument or conclusions.

Mr. Mchau pointed out some paragraphs which he alleged to be containing arguments, matter of laws and evidence as being paragraphs 9(d) (f), paragraphs 10, 11, 13, 13(a) (b), 15(a), 16(a), 17(c) (d), 18, 18(a) (c), 19,

20(a) (b) (c) (d) and paragraph 6(b). He concluded, thereby, that, the affidavit be struck out.

Mr. Mwanri, the learned advocate for the Respondent, has equally and forcefully contested to the objection raised by the petitioner. As regard the first objection, he conceded, to the extent of the Petitioners' submission, that, the said power of attorney has not been dated and registered in accordance with law.

However, he contended that, the omission was a human error because, it was believed that the original power of attorney, which was signed and registered was the one filed in Court. Arguing in the alternative, Mr. Mwanri prayed for indulgence of this court that, in case the affidavit of the Respondent is to be struck out, then the Respondent be granted leave to file a fresh affidavit.

As for the second part of the first point in objection to this petition, Mr. Mwanri submitted that, the issue of violation of section 11 (2) of the Companies Act, No.12 of 2002 together with Regulation 72 of the Table A of the same Act should not be strictly relied upon because, as pleaded, the said directors are not in good terms and cannot meet, hence, one of the reasons for the filing of this petition for winding up. He referred this Court to paragraph 7 of the Petition to that effect.

As regard the second objection, Mr. Mwanri submitted that, the issue that the affidavit in opposition

contains arguments, evidence and matters of the law, is, if any; immaterial since even the Petitioners on their petition have scandalous paragraphs as the petitioners tend to make even conclusive arguments in their paragraphs.

He pointed out, as an example, paragraph 7(c) of the petition which alleges matters of, "active concealment of assets and liabilities of the company through a girlfriend, Handan and a friend, Amney Abdallah to wit, five (5) motor vehicles make Toyota IST.

In his view, Mr. Mwanri argued that those are scandalous arguments because the Company Director, Mr. Jeff Zhough is a married man. Besides, the information of regarding the whereabouts of Ms Ruiqin Zhang who is also a Director and shareholder, were untrue and unfounded. Mr Mwanri relied on the case of **Jamal S. Mkumba & another vs. Attorney General** Civil Application No.240/01 of 2019, (CAT) (DSM) where the Court of Appeal of Tanzania rejected information not on the knowledge of the person who wanted to rely on it.

Mr. Mwanri argued in the alternative, as well, that, on the circumstances where an affidavit is found to have offensive paragraphs or paragraphs which are inconsequential, the remedy is to expunge the same and leave out the substantive ones.

To support his submission on that point, he relied on the case of **Jamal S. Mkumba** (supra), where it was held that:

“Regarding the consequence, we are in total agreement with Mr. Rumisha that, the paragraphs with extraneous matters ought to be expunged from the record. It is now settled that, an offensive paragraph can be expunged or disregarded and the court can continue to determine the application based on the remaining paragraphs if the expunged paragraphs is inconsequential.”

In the above cited case, the Court of Appeal cited other numerous cases such as the case of **Chadha & company advocates vs. Arunaben Chaggan Chhita Mistry & 2 others**, Civil Application No. 25 of 2013 and **Phantom Modern Transport (1985) Ltd vs. DT Dobie (TZ) Ltd**, Civil Reference No. 15 of 2001 both of which had the offensive paragraphs expunged from the record and the Court proceeded to determine the matter before it on the basis of the remaining paragraphs.

To conclude his submission, Mr. Mwanri urged this Court to apply the oxygen principle or to give the

Respondent leave to file a fresh affidavit because the mistakes in that affidavit instead of rendering the whole affidavit as being defective. In his rejoinder submission, the Petitioners' counsel reiterated what he stated in his submission in chief.

He rejoined that, the fact that there is a conflict between Directors cannot make the appointment of Ms Christine to be lawful while the Article of Association of the Respondent excluded the applicability of Regulation 72 of Table A of the Companies Act, 2002. He likewise, rejoined, in respect of the second part of the first point of preliminary objection, that, the Respondent seems to agree that the Power of Attorney was not registered and seeks the indulgence of the Court to cure the defect.

On the basis of such observations, Mr Mchau urged this Court to strike out the entire Affidavit in opposition for winding up petition with costs. I have objectively considered the rival submissions of the learned counsel for both parties. The issue which I am confronted with is whether the Petitioners' preliminary objections are of any merit.

As regard the first point of objection, it is clear that the Respondent concedes that the Power of Attorney attached to the affidavit in opposition was not dated and registered as per the requirement of the law. Since there is no doubt that the learned counsel for the Respondent

concedes to that fact, does that omission create a fatal blow to the affidavit?

While Mr. Mchau contends that it does, and urged this Court to strike out the affidavit in opposition, Mr. Mwanri urged this Court to invoke the overriding objectives principle to strike out the attached power of attorney with leave to filed in court a new power of attorney which had been dully dated and registered so as to cure the observed defect.

However, in respect of the same objection there is also the issue incompetency of the person to sign and deposed to the affidavit. It is a well-known fact that the law requires powers and Duties of the Directors to be provided under the Memorandum and Article of Association of the Company.

According to section 11(2) of the Companies Act, No. 12 of 2002, read together with the regulation 72 of Table A of the same Act, it is possible for a Company to adopt and apply Table A of the same Act. The Regulation 72 of Table A provides as follows:

"The directors may **by power of attorney appoint any person to be the attorney or the agent of the company** for such purposes and on such conditions as they determine, **including the authority for the attorney**

or agent to delegate all or any of
his power.” (Emphasis added)

In this present Petition, there is a power of attorney donating powers upon one Christine Christian Ndunguru as a *donee* of such powers, to act as an attorney for the company. The Donor is said to be Mr. Jeff Zhou, who is the director and majority share holder.

As I pointed out here above, Mr. Mchau has argued that the Respondent Company did exclude in its Articles of Association, the applicability of Regulation 72 of Table A of the Companies Act, 2002. He argued, therefore, that, a single director was unable to appoint the attorney who deponed on the affidavit in opposition to the Petition.

On the contrary, however, Mr. Mwanri urged this Court not to follow the rules strictly because the said directors are not in good term and that was the ground for this petition for winding up this company. Even so, since Mr Mwanri has admitted that the Respondent excluded the applicability of Regulation 72 of Table A of the Companies Act, 2002, it means, therefore, that, in line with the Respondent’s Articles of Association, a single Director will have no powers to appoint an attorney to act for the Company.

Moreover, since the Donee had no powers to donate the Donor had no powers to depone, sign and file the affidavit in opposition. This means, therefore, that, the

purported Power of Attorney and affidavit filed in opposition to the Petition are incompetent. The deponent of the affidavit was thus incompetent to depose to the affidavit as well.

For the above reasons, I find that, the first preliminary objection raised has merit and I hereby sustain it. As regard the second preliminary objection, I see no reason why I should labour to deal with it since, even on the basis of the first objection alone, it is sufficient for me to strike out the opposing affidavit filed by the Respondent.

However, as I proceed to strike out the Respondent's affidavit in opposition for having been deposed by an incompetent person, I do take note of the prayers by Mr. Mwanri and make an order that a fresh counter affidavit be re-filed within 7 days from the date of this ruling.

In the circumstance of this case, however, I make no orders as to costs.

It is so ordered.

DATED at DAR ES SALAAM ON THIS 17TH DAY OF
MARCH, 2022




DEO JOHN NANGELA
JUDGE,

**The High Court of the United Republic of Tanzania
(COMMERCIAL DIVISION)**