

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM  
Misc. Commercial Cause  
No.28 of 2021**

**WINDING UP PETITION  
(Pursuant to Section 281(1) of the Companies Act,  
2002 (Cap.212 RE 2002))**

IN THE MATTER OF THE COMPANIES' ACT  
AND  
IN THE MATTER OF HAKAM INVESTMENT LIMITED  
BETWEEN  
RED DOT DISTRIBUTION LIMITED.....PETITIONER  
VERSUS  
HAKAM INVESTMENT LIMITED.....RESPONDENT

Last Order: 15<sup>TH</sup> December 2021  
RULING: 25<sup>TH</sup> MARCH 2022

**RULING**

**NANGELA, J.:**

This ruling results from a preliminary objection raised by the Respondent against this Petition for a winding up order of the Court. The objection raised by the Respondent was to the effect that:

"The Petitioner's counter affidavit filed on 1<sup>st</sup> July 2021 departs from the winding up petition and,

thus, violates the rules of pleading as it contains new allegation of fact and/or new ground of claim contrary to laws governing pleadings.”

On the 18<sup>th</sup> November 2021, the learned counsels for the parties appeared before me. The Petitioner enjoyed the services of learned advocates Mr Nicholas Kahoza and Ms Shakila Ally, while the learned advocate Mr Kamazima Iddi, appeared for the Respondent.

On that material date, it was agreed that the preliminary objection be disposed of by way of filing written submissions. A filing schedule was given and the parties duly filed their submissions on time. I will give such submissions a quick summary and finally analyse the merit or otherwise of the preliminary objection.

Submitting in support of the objection, Mr Kamazima submitted that, the Winding-up Petition filed before this Court arises from a claim of an outstanding amount of money, equal to **US\$ 92,745.28**. He submitted that, on 21<sup>st</sup> June 2021, the Respondent filed an affidavit in opposition as per Rule 106 (1) of the ***Companies (Insolvency) Rules 2005*** claiming to have paid a total of **US\$ 349,033.52** and not **US\$ 258,000.00** as alleged by the Petitioner and that, the

only outstanding amount is only **US\$ 9,033.52**, which, subject to proof, will be paid.

Mr Kamazima submitted that, the counter affidavit filed in response to the affidavit in opposition filed by the Respondent, failed to adhere to what was pleaded in the Winding up Petition and the verifying affidavit, because the Petitioner introduced new allegations of facts and /or new grounds of claim in paragraphs 4, 5, 7, 8, 9, 10 and 11 of that counter affidavit.

It was under those circumstances that, the Respondent raised an objection contending that, the Petitioner has adduced evidence which is inconsistent with the facts pleaded in the winding up petition and prejudiced the Respondent's defence because the latter is deprived of the opportunity to challenge those new facts.

Submitting on the status of a counter affidavit as part of the pleadings, Mr Kamazima contended that, it is trite law that parties are bound by their pleadings and no departure from them is permissible, except by way of amendments. He contended that, the pending proceedings in Court are insolvency proceedings governed by the **Companies (Insolvency) Rules 2005, GN.43 of 2005**. He observed that, under Rule 455 of the said **GN 43 of 2005**, it is provided that:

"The Civil Procedure Code applied to insolvency proceedings in the High Court and Resident Magistrate Court, in either case, with any necessary modifications."

Mr Kamazima submitted that, since the Civil Procedure Code, Cap.33 R.E 2019 applies in such proceedings; Order VI Rule 7 prohibits a departure in the pleadings by providing that:

"No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

He submitted, in view of what he raised in the notice of objection, i.e., the Petitioner's affidavit filed to counter the affidavit in opposition has raised new grounds and or is inconsistent with the previous pleading (winding up petition), then this Court should struck out such affidavit from its record.

To support that position, he relied on the decision of the Court of Appeal in the case of **James Funke Gwagilo vs. Attorney General** [2004] TLR 161 and the decision of this Court (Land Division) in the case of **Saleh Hamis Lufedha vs. TANESCO**, Land Case No.158 of 2017 (unreported).

Mr Kamazima submitted further that, the Petitioner's counter affidavit was a third pleading following the Petition for winding up, the Affidavit in opposition and, thus, the last pleading to be filed by the parties. He contended that, since the Respondent will not have an opportunity to controvert the said counter-affidavit, that fact will occasion a miscarriage of justice as the Respondent will not be able to marshal evidence in defence of his case.

Besides, Mr Kamazima submitted that, in all pleadings, parties are obliged to adhere to what is contained in the pleadings, this being a position reiterated by the Court of Appeal in the case of **Charles Richard Kombe t/a Building vs. Evarani Mutungi & 2 Others**, Civil App.No.38-of 2012 (CTA) (unreported). He contended that, the evidence adduced in Court should not be at variance with the pleadings as such inconsistency will not be tolerated.

To back up his position, he also relied on the decision of this Court (Mgonya, J) in **African Banking Corporation vs. Sekela Brown Mwakasege**, Civil Appeal No.127 of 2017, (HC) (unreported). With all such submission, Mr Kamazima urged this Court to struck off or expunge the counter-affidavit from the record.

Responding to the submission from the learned counsel for the Respondent, the learned counsel for the Petitioner submitted that, the provision of Order VI rule 7 of the CPC does not apply to this petition. He submitted that, a counter-affidavit is not a pleading. He acknowledges, however, the Civil Procedure Code, Cap.33 R.E 2019 does apply to insolvency proceedings.

He contended, however, that, according to Order VI rule 1, pleadings are defined to include those under Order VIII Rule 3, i.e., set-off, counter claim and reply to written statement of defence. He argued that, the counter affidavit is not among the pleadings referred to under Order VI Rule 7 of the CPC.

To support his position, he referred this Court to its own decision in the case of **M.A Kharafi & Sons Ltd vs. National Construction Council and Others**, Misc. Comm. Case No.221 of 2016 (unreported) where this Court stated that:

"It follows then, a petition filed under Rule 5 and 6 of the Arbitration Rules in order to set aside or remit an arbitral award is not a suit but rather an application. Therefore, Order VI Rule 14 of the Act is not applicable to Petitions filed under the arbitration Act. I therefore find

this preliminary objection to have no merit and I proceed to dismiss it."

Relying on the above, he contended that, the Petition for winding up of a Company is not a suit but rather an application, and this is supported by section 281 (1) of the Companies Act.

He argued that, the Petition filed under the Act is not a suit but rather an application and, as such, that fact ousts the applicability of the provisions of Order VI rule 7 of the Civil Procedure Code. He further relied on the case of **Tanzania Cotton Marketing Board vs. Cogecot Cotton Company S.A.** [2004] TLR 113 and distinguished the cases cited by the Respondent for the reasons that, the current matter is a Petition and not a suit /civil case. He contended that a petition is not a pleading.

The learned counsel for the Petitioner has made reference to other cases which I see no point in referring to them here. At the end, he urged this Court to overrule the objection with costs. In a swift rejoinder submission, the Respondent submitted that, the Petitioner has not disputed the fact that there are inconsistencies between the Petition and the counter affidavit.

Mr Kamazima contended that, the submission by the learned counsel for the Petitioner, that, a Petition is not a pleading, is a misconceived idea. He submitted that,

in practice, applications, like other civil proceedings, are instituted and defended by pleadings of various nature and form. He contended, and by analogy, referring to section 77 of the Law of Marriage Act, Cap.29 R.E 2019, that, proceedings under that law are instituted by way of Petitions and under the Law of Marriage (Matrimonial Proceedings) Rules, the terms "Pleadings" is defined to mean "a petition, an answer to petition or reply".

Besides, he reiterated his earlier submission that, Rule 455 of the Insolvency Rules, GN 43 of 2005 does allows the CPC to apply in insolvency proceedings. He contended, therefore, that, Order VI Rule 1 of the Code will apply with necessary modifications to include an affidavit as part of the pleadings provided that, their purpose is to be used for institution of proceedings or putting up a defence as per the law. He relied on the case of **Mbeya-Rukwa Auto Parts and Transport Ltd vs. Jestina George Mwakyoma** [2003] TLR, 251 at page 266 where the Court of Appeal stated that:

".... Pleadings by affidavits are supposed to be complete with the Applicant's reply, if any, to the Respondent's counter-affidavit. There should normally be no reply to a reply for the applicant, being entitled to the last word, would



then have to reply to the reply to the reply.... In the light of the foregoing, we make the following orders. First, the three affidavits just referred to are expunged from and cease to be part of the record."

Taking the cue from the above, Mr Kamazima urged this Court to make a finding that, the affidavit filed by the Petitioner violated the laws governing pleadings by departing from the Petition for winding up and deserves to be expunged and cease to be part of the record of this Court. He therefore urged this Court to uphold the objection with costs.

I have carefully considered the above rival submissions. The issue for determination is whether the preliminary objection has any merit in it.

In the first place, and from the look of things, it is clear to me, as observed by the Respondent's counsel in his submissions, that, the Petitioner's legal counsel does not dispute that the affidavit filed in reply to the one constituting the answer to the Petition by the Respondent, contains facts which were not contemplated in the Petition and, for which the Respondent will have no other room to make any response meant to controvert such facts.

Secondly, it is also a fact that, the learned counsel for the Petitioner does admit, according to Rule 455 of the **Companies (Insolvency) Rules 2005, GN.43 of 2005**, that, the rule does provide for the applicability of the Civil Procedure Code (CPC) Cap.33 R.E 2019 to insolvency proceedings. That, indeed, is a palpable fact observed from the Rules themselves.

That being the case, and taking into account that the affidavit filed by the Petitioner, the question that follows is: **whether such affidavit, is in contravention of Order VI Rule 7 of the CPC or not.** Alongside that issue, is the question regarding: **whether such affidavit and the petition in general, falls under what constitute "pleadings".**

In his submission, the learned counsel for the Petitioner has submitted that, the Petition is a mere "application" and is not a civil suit so to speak for which the CPC provisions would strictly apply and, as such, the affidavit filed by the Petitioner is not a "pleading" because Order VI rule 1 defines pleadings to mean a Complaint and a written statement of defence and all other subsequent pleadings filed under Order VIII Rule 13 which are "set-off, counter-claim and reply to written statement of defence".

According to the Black's Law Dictionary, 7<sup>th</sup> Edition, at page 1173, the term pleading is defined as:

"a formal document in which a party to a legal proceeding (especially a civil lawsuit) sets forth or responds to allegations, claims, denials or defences."

The definition also includes a supplementary pleading which refers to:

'a pleading that either corrects a defect or addresses facts arising since the earlier pleading was filed.'

From these definitions, I do not have any doubt in holding that even an affidavit or a counter affidavit, a petition or an answer to a petition, a plaint or a written statement of defence, a counter claim or a reply to, will all form what the law regards as pleadings. Having held as such, the next question is: **whether the affidavit which was filed by the Petitioner and which introduces new facts not contemplated earlier in the Petition is in contravention of Order VI Rule 7 of the CPC or not.**

In principle, parties are bound by their pleadings. There is a plethora of cases which have emphasized in that principle. See for instance the cases of **Blay vs. Pollard & Morris** [1930]1K.B.682; **Nkulabo vs.**

**Kibirige** [1973] EA, 112, **Peter Ng'omango vs. AG**, Civil. App. No.214 of 2011, **Sean Tan Tours Ltd vs. The Catholic Diocese of Mbulu**, Civil Appeal No.78 of 2012 (Unreported); **James Funge Gwagilo vs. the AG** [2004] TLR 161 and **Yara Tanzania Ltd vs. Aloyce Msemwa and 2 Others**, Commercial Case No.2 of 2013 (Unreported).

In the case of **James Funge Gwagilo vs. the AG** (supra), the Court of Appeal of Tanzania was of a clear view that:

"The function of the pleadings is to give notice of the case which has to be met. A party must so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which parties differ and points on which they agree, thereby to identify with clarity the issues on which the Court will be called upon to decide."

According to Order VI rule 7 of the Civil Procedure Code, Cap.33 R.E 2019, the law provides that,

"No pleading shall, except by way of amendment, **raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings** of

the party pleading the same.”

(Emphasis added).

As we noted herein and, as undisputed by the learned counsel for the Petitioner, Rule 455 of the **Companies (Insolvency) Rules 2005, GN.43 of 2005** does provide that the Civil Procedure Code (CPC) Cap.33 R.E 2019 will apply to insolvency proceedings. Since that is the position, and given that, the affidavit filed by the Petitioner falls within the definition of what constitute pleadings generally, and, considering the fact that the said affidavit is inconsistent with the facts disclosed in the Petition and has introduced new facts altogether, then, Order VI Rule 7 will come into play.

It is clear, as stated by Mr Kamazima that, the Respondent has no other room to respond to those facts. The case of **Mbeya-Rukwa Auto Parts and Transport Ltd vs. Jestina George Mwakyoma** [2003] TLR, 251, cited by Mr Kamazima is therefore quite relevant on that point.

And, if the Respondent does not have an opportunity to offer a response to those facts, continuing with a blind eye regarding what the Petitioner did will amount to perpetuating an injustice, a fact which this Court will not be ready to do.

In view of the above observations, to some extent the preliminary objection has merit. I say to some extent

because one has to determine what will remain of the affidavit if the offending paragraphs which seem to be introducing new facts which are inconsistent with those in the Petition are expunged. The relevant paragraphs according to Mr Kamazima's submissions are paragraphs 4 to 11. If these are expunged as submitted, will the affidavit still remain intact?

In my view, even if these paragraphs 4 to 11 of the counter affidavit are expunged from the affidavit as proposed, and the affidavit is left with paragraphs 1, 2, 3 and 12 and 13, it is my considered finding that, the affidavit can still stand and support the application as the rest of the remaining paragraphs stand intact.

This Court, therefore, settles for the following orders:

1. That, paragraphs 4 to 11 of the affidavit filed by the Petitioner in response to the affidavit filed in answer to the Petition are hereby expunged from the said affidavit.
2. That, although the said paragraphs 4 to 11 are expunged, still the remaining paragraphs 1, 2, 3, 12 and 13, can still make the affidavit to be relied upon without having it expunged in its entirety as the

Respondent would wish that this Court should do.

3. In view of what is stated herein (in paragraphs 1 and 2) the preliminary objection is partially upheld.
4. Parties are to proceed with the hearing of the Petition.

**It is so ordered.**

DATED AT DAR-ES-SALAAM, this 25<sup>th</sup> DAY OF MARCH  
2022



**HON. DEO JOHN NANGELA**  
**Judge**  
**High Court of the United Republic of Tanzania**  
**(Commercial Division)**

---