

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

MISC. COMMERCIAL CAUSE NO. 42 OF 2021

PETROFUEL (T) LIMITED.....PETITIONER

VERSUS

BAHDELA CO. LIMITEDRESPONDENT

RULING

Date of the Last order: 13/03/2022
Delivery of the Ruling: 22/04/2022

NANGELA, J:.,

On the 31st August 2021, the Petitioner filed a winding up petition in this Court seeking for the following orders of the Court, that:

1. Bahdela Co. Ltd (Reg. No.16514) be wound up by his Honourable Court under the provisions of section 279 (1) (d) of the Companies Act, Cap.212 R.E 2002 (as revised).
2. The appointment of an interim liquidator be made pursuant to section 295(1) of the Companies Act, Cap.212 R.E 2002 (as revised).

3. Such other orders or relief(s) be given by this Honourable Court as it deems just, equitable and convenient to grant; and
4. Costs of this Petition be provided for.

When this petition was called on for orders on the 18th October 2021, Mr Samson Mbamba, learned advocate appeared for the Respondent. On the material date, the Petitioner was unrepresented. Mr Mbamba prayed to file an answer to the Petition and an affidavit in opposition. I made the requisite orders and scheduled the matter for a mention date which was the 4th day of November 2021.

The Respondent filed its answer to the Petition as earlier prayed and on the 4th of November 2021, the parties appeared before this Court. It was noted, however, that, apart from filing the answer to the petition, the Respondent raised a preliminary objection. On the other hand, the Petitioner did also raise a preliminary point of law against the Respondent's answer to the Petition.

On the 22nd November 2021, this Court directed the parties to argue the cross objections together by way of written submissions starting with the preliminary objection filed by the Respondent's counsel and followed by the Petitioner's objection. A schedule of filing was issued. The Petitioner was to file its submission in support of its preliminary objection on or before the 29th November 2021.

However, when the matter was called on for orders on the 15th day of December 2021, the Petitioner's counsel, Mr Slanslaus Ishengoma, pleaded with this Court that he was unable to file his submission in support of the preliminary objection raised by the Petitioner and, thus, prayed for extension of time to do so. This Court granted the prayer and directed him to file the requisite submissions on or before 24th December 2021 and a reply by the Respondent was ordered to be filed on or before 16th January 2022. A rejoinder submission was to be filed on or before 23rd day of January 2022.

However, when this case was called on for mention on the 10th day of March 2022, it was noted that the Petitioner could not comply with the Orders of this Court dated 15th December 2021. This meant, therefore, that, the Petitioner had failed to prosecute its preliminary objection and this Court was left with the preliminary objection filed by the Respondent against the Petition. Since the parties had filed submission in respect of it, when the matter was called on for necessary orders on the 18th of March 2022, this Court set a date for this ruling.

In essence, the Respondent's preliminary objections were to the effect that:

1. The Petitioner being not a creditor in terms of the provisions of the Companies Act, Cap.212

R.E 2019, has no *locus standi* to petition for the winding up order against the Respondent.

2. The Petitioner has not complied with the mandatory provisions of the Companies (Insolvency Rules) for winding up proceedings.

Submitting in support of the preliminary objection, Mr Mbamba chose to submit only in respect of the 1st objection. He submitted that, the Petitioner has preferred the Petition alleging an indebtedness of **TZS 3,116,441,950/=** being a total of balance of debt and "*accrued interest from 2016 to date*".

Mr Mbamba submitted that, as a matter of law, the basis for any winding up petition is that the Petitioner is a creditor within section 279(1) (d) and 281 (1) of the Companies Act, R.E 2019. He submitted that, akin to a normal suit, wherein a court must see to it that a plaint discloses a cause of action and, whether the Plaintiff is legally entitled to commence such suit or not, so is the position in the winding up petition. He contended that, in a petition, the Petitioner, must establish and show, whether he, or, in case a petitioner is a company, she is legally entitled to Petition for the winding up proceedings.

In support of his submission on the issue of there being *locus standi* to file the petition, Mr Mbamba drew

analogy from the case of **Godbles Jonathan Lema vs. Mussa Hamis Mkanga & Others**, Civil Appeal No.47 of 2012 and argued that, the Court just looked at the election petition itself, together with the Voter's Registration Cards annexed to the petition and upheld the decision of the High Court which had struck out the petition on the ground that the Petitioners had no *locus standi* to petition to annul the decision.

He submitted that, for a person to be entitled to commence winding up proceedings under the earlier cited provisions, s/he must be a creditor. The position of "creditorship" and "indebtedness" must be self evident and the indebtedness should not be contentious or call for proof as in other trials, otherwise the Court will dismiss the petition, contended Mr Mbamba.

Mr Mbamba maintained that, in this Petition, the alleged interest which has been consolidated interest amounting to **TZS 3,161,441,950/=** is not based on a loan which is self proof and the rates of such interests' calculation are unknown. Mr Mbamba cited the case of **John M. Byombalirwa vs. Agency Maritime International (T) Ltd** [1983] T.L.R 1 where the Court of Appeal observed that:

"The expression "cause of action"
is not defined under the Code but
it may be taken to mean essential

facts which it is necessary for the Plaintiff to prove before he can succeed in a suit.”

On the basis of the above, he surmised that, there is no way this Court can avoid giving a cursory glance at the pleadings to see whether there is a proper matter portraying “essential facts ” before it as per the language of the Court in the **Byombalirwa’s case** (supra). He submitted that, the principal amount and the supply of fuel have been totally contested as per the annexure to the petition and that, the interests claimed of which its rates and calculations are unknown are not only totally unfounded but also unknown.

Mr Mbamba contended that, by reason of the foregoing submissions, the Petitioner being not a “creditor” lacks *locus standi* for the winding up of the Respondent Company and any of his grievances are amenable to a normal law suit.

To tighten the nooses of his submission, reliance was placed on the decision of this Court in the case of **East Africa Development Bank vs. Godes Limited [1989] TLR 122**; in **Re Tanganyika Produce Agency Ltd [1957] E.A 241**, in **Re Lypne Investments Ltd [1992] All ER 381**. He thus urged this Court to strike out the Petition with costs.

On the 6th December 2021, Mr Ishengoma filed his reply submissions. He contended that, in the first place the Court should ask itself if at all the preliminary objection can properly be called a preliminary objection based on "a pure point of law". In his view, it does not meet the standards set out in the famous **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] E.A 696** because it is one made of a mixture of facts and law. He contended, therefore, that, the same should be overruled.

To buttress his point, Mr. Ishengoma has relied on the decision of this Court in the case of **First National Bank (T) Ltd vs. Yohane Ibrahim Kadum & Another**, Commercial Case No. 128 of 2019. This case dealt with an issue of disclosure of a cause of action and that, as regards a plaint and its annexure, such are to be looked at as a whole and cannot be read in a piecemeal.

Mr Ishengoma further relied on the case of **Gautam Jaylam Chavda vs. Cowvelle Mathews Partnership Ltd**, Misc. Civil Appeal No.62 of 2000 whereby the Court of Appeal set aside the order made by the High Court upholding a preliminary objection and ordered the High Court to determine the Petition on merit. Mr Ishengoma submitted, therefore, that, the objection should be rejected as it does not meet the qualities of a preliminary objection. Unfortunately, the authority referred to by Mr Ishegoma was not attached for my easy of reference.

Mr Ishengoma has submitted in the alternative that, by referring to the 5th Paragraph to the Petition and its annexure, a cause of action is disclosed. He contended that, the sum claimed is a principal sum plus interest accrued and the Respondent cannot purport to be lacking knowledge of it. He referred to the Court Annexure P-1 and P-2 arguing that, these indicate that the Petitioner and the Respondent were in business.

Mr Ishengoma submitted that, this Court will not look into the mere fact that the debt is disputed but rather the Court should look into the merits of the presented defence and if found to be unmeritorious will grant its orders.

By way of a brief rejoinder, it was Mr Mbamba's submission and insistence that, the issue of locus stand is a pure point of law. He rejoined that, no Court is created to be a busy body as the law of procedure requires a pleading filed in Court to disclose a cause of action. He reiterated his earlier submissions and relied on the cases he had cited earlier on. He maintained that, the issue of *locus standi* is in dire need in a winding up petition. As such, he prayed that, this Petition be struck out since the claim of interest which compounds the so-called "outstanding amount" subject of the petition for winding up is not self proof to qualify commencing a winding up petition.

I have gone through the rival written submissions by the learned counsel for the parties. The issue I am called

upon to determine is whether the preliminary objection raised by Mr Mbamba has any merit. In his submissions Mr Ishengoma has attacked the objection based on **the Mukisa Biscuits' case (supra)**. In that famous case of **Mukisa Biscuit Manufacturing (supra)** New Bold P (as he then was) defined, on page 701, what Preliminary Objection is all about, noting that:-

"[A] preliminary objection is in the nature of what used to be a demurrer, it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of the judicial discretion."

A number of cases have cited with approval the **Mukisa's Biscuit case (supra)**. These include the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd vs. Mbeya Cement Company Ltd, and National Insurance Corporations Ltd [2005]TLR 49; Sykes Travel Agent Ltd vs. National Identification Authority (NIDA) and The Attorney General Civil Case No 27 of 2019 (Unreported);** to mention but a few.

If I understood Mr Ishengoma's submission, a fact which I believe I did, his contention is that, the issue of Petitioner's *locus standi* to file the Petition does not constitute a point of law as it will need to be resolved by ascertaining factual information regarding whether at all the Petitioner has a cause of action against the Respondent, hence a mixed point of law and facts. Mr Mbamba is contented that, there is no cause of action as the Respondent is not a creditor having contested the debt and thus, the matters at hand cannot be dealt with in the manner the Petitioner has opted for but should be dealt with as a normal suit.

Let me state here that, whether the issue of *locus standi* will amount to a pure point of law warranting to qualify as a preliminary objection or otherwise not a preliminary objection, is a matter which will depend on the circumstance of each case. If it is premised or attached to factual substantiations and deep analysis, it will be a mixed point of law and facts and, hence, one which could just be dealt with in the course of the hearing.

In the case of **Karata Ernest & Others vs. Attorney General**, Civil Revision No. 10 of 2010 (unreported), the Court of Appeal of Tanzania held that:

"Where a point taken in objection is premised on issues of mixed facts and law, that point does not

deserve consideration at all as a preliminary objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings."

However, if it can stand alone as a pure point of law, it will definitely be a determinant factor as it will have the ability to bring down the pillar upon which a suit or a petition for that matter, is hinged, and; that will qualify as a preliminary point of law. In the case of **Godbless Lema vs. Mussa Hamis Mkanga & Others** (supra) the Court of Appeal was of the view, citing the Malawian case of **The Attorney General vs. The Malawi Congress Party and Another**, Civil Appeal No.22 of 1996, that:

"*Locus standi* is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject matter of it, that is to say unless he stands in a sufficient close relation to it so as to give a right which requires prosecution or infringement of which he brings action."

Having so decided, the Court made a finding that the Respondents in the **Godbless Lema's** case lacked the sufficient standing to bring up the election petition.

Our case at hand and the objection in question, though premised on *locus standi* is, however, not an election petition but on a winding up petition. Nonetheless, that does not take away the basic principle which underlies the need to there being sufficient interest to warrant a claim being brought against the other party.

The issue of *locus standi* was discussed in the case of **East Africa Development Bank** (supra) which, in my view, is a closer case to look at as it was in relation to a winding up petition. In that case, while the counsel for the Petitioner argued that the Respondent had no *locus standi* because of failure to file an affidavit in opposition within the prescribed period and that, the Court lacked powers to enlarge that time, the counsel for the Respondent charged that the Petitioner lacked *locus standi* because the sole basis of the proceedings was a disputed debt which did not make the Petitioner qualify as a creditor.

The Court stated, relying on the cases of **Re Tanganyika Produce** (supra) and **Re Lympne Investments** (supra), and **Mann and Another vs. Goldstein and Another** [1968]2All ER 769 at 778c, that:

"since the petition is based solely on a disputed debt, the Petitioner has no *locus standi* in this matter since he is not a creditor within

the meaning of section 169 of the Companies Ordinance."

In the first place, it is worth noting that, the issue of having *locus standi* or not on the part of the Petitioner was raised in that Petition as a preliminary point of law calling for the immediate attention of the Court in those winding up proceedings. As such, unlike what Mr Ishengoma raised in his submission that such a point would not amount to a preliminary objection, the facts on the ground and the circumstance of the case, which are in a way similar to the case at hand, pointed to a different conclusion and the Court upheld the objection as valid.

In our case at hand, the submissions made by Mr Mbamba and the cases he has relied on to support them are, in my view, valid and have captured my attention. It is clear that, the Petitioner is not a debtor as such for the time being since whatever claims he might have against the Respondent are disputed claims upon which no sound petition for winding up can be mounted for the obvious reason of lack of *locus standi* which in the ordinary sense, only a creditor would possess it.

Thus, and taking into account what Bahati, J (as he then was) stated in the case of **The East Africa Development Bank** (supra), "since the petition is based solely on a disputed debt, the Petitioner has no *locus standi* in this matter since he is not a creditor within the meaning

of the Companies Act.” As such, the Petitioner can seek remedy through a normal suit and not by way of a petition as she has done herein.

In the upshot, this Court settles for the following orders, that:

1. The Preliminary Objection raised by the learned counsel for the Respondent has merit and I hereby uphold it. The petitioner has no *locus standi* as a creditor to file a winding up petition under the provisions of section 279 (1) (d) of the Companies Act, Cap.212 R.E 2019.
2. The Petition is hereby dismissed with costs to the Respondent.

It is so ordered

DATED AT DAR-ES-SALAAM ON THIS 22nd DAY OF
APRIL 2022



DEO JOHN NANGELA
JUDGE