

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

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 224 OF 2022

GOLD AFRICA LIMITEDAPPLICANT

VERSUS

EB-HANCE COMPANY LIMITED1ST RESPONDENT

MR. ELIAS RWEZAULA BULAYA2ND RESPONDENT

MR. GODFREY STEPHEN BITESIGIRWE.....3RD RESPONDENT

RULING

Date of last order:08/06/2022

Date of ruling:09/06/2023

AGATHO, J.:

This ruling was triggered by Preliminary Objections (POs) raised by the 2nd and 3rd respondents against the application. Upon being served with the applicant's application the respondents preferred to file the notice of POs and their joint counter affidavit. The POs are:

1. That this honourable court lacks jurisdiction to entertain and determine the application.
2. That the application does not contain the essential party whom the orders might be enforced.

Before examining the rival submissions of the parties on the POs, it is pertinent to sketch a background of the application. Briefly, the

applicant filed this application for temporary injunction orders against the 2nd and 3rd respondents:

- (a) to restrain them from making any decision or taking any measure that will affect the prevailing status of Mining Licences Numbers 502/2015, 503/2015, 504/2015, 505/2015, 506/2015 and 507/2015 in their capacities of or purporting to be acting as directors of Reef Gold Limited pending the hearing and determination of the petition, that is Misc. Commercial Case No. 44 of 2022.
- (b) An order of temporary injunction restraining the 2nd and 3rd respondents from communicating with the Mining Commission, the BRELA or with any Government institution in any form or manner whatsoever regarding the appointment of Mr Benjamin Mengi and Abdiel Mengi as directors of the company (Reef Gold Limited) and or from using the letterheads of the company not originating from or indicating its registered office on the 7th Floor Haidery Plaza, P.O. Box 163, Dar es salaam pending the hearing and determination of the petition.

- (c) Any other order the Hon. Court shall in the circumstance deem fit, just and proper to issue or grant for the conservation and or protection of the interests of the company and those of the applicants therein: and an order for the costs occasioned by institution of this application be borne by the respondents jointly and severally.

The application was supported by the affidavit deponed by Abdiel Reginald Mengi. The 2nd and 3rd respondents filed their joint counter affidavit sworn by Elias Rwezaula Bulaya and Godfrey Stephen Bitesigirwe. The 1st respondent filed counter affidavit deponed by its director Elias Rwezaula Bulaya.

The parties to the application were represented by learned advocates. The applicant enjoyed the services of learned counsel, Michael J.T. Ngalo. And while advocate Philemon Mutakyamirwa represented the first respondent, advocate Desiderius Ndibalema represented the 2nd and 3rd respondents. The POs raised were disposed by way of written submission.

Having depicted the background of the application albeit briefly, it is ideal to turn to the points of preliminary objections (POs). I will not reproduce in verbatim the submission of learned counsel. But where

necessary I will refer them. Indeed, the POs raised were two but if the first PO has enough substance to dispose the case there will be no need to examine the second one. For that reason, I will start to examine the PO that the court lacks jurisdiction.

But before making headway, as usual where PO is raised a starting point is **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** which stated conditions for determining a PO based on pure point of law. It is trite law that to substantiate the PO, evidence is not required. That however does not mean that the PO should not be substantiated by looking at pleadings and the law only. Therefore, examining and referring to the pleadings is permitted. What is not allowed is a PO that will require evidence beyond the pleadings. That becomes a factual issue rather than the PO based on purely point of law.

Back to the first PO that the court lacks jurisdiction, it is elementary that jurisdiction is a creature of law. It was held in **Leonard Raphael and Another v R, Criminal Appeal No. 4 of 1992 CAT** (unreported), and in **Makwizu Msuko and Others v R, Criminal Appeal No, 326 of 2007 CAT** (unreported) that a court entertaining a matter without jurisdiction its proceedings and decision become nullity.

There is no dispute that the application at hand emanates from Misc. Commercial Case No. 44 of 2022, a petition for unfair prejudice. Its genesis is the Joint Venture Agreement (JVA) between Gold Africa Limited (the applicant) and EB-Hance Company Limited (the 1st respondent) to form a company called Reef Gold Limited herein referred as a JV Company. See also paragraph 6 of Abdiel Reginald Mengi's affidavit referring to an annexure TAB – 4 Shareholders' Agreement between the applicant and the 1st respondent. As per clause 17 of the JVA, the JV company had two directors, namely, the late Dr Reginald Abraham Mengi and Mr Elias Bulaya. This is confirmed by the affidavit of Abdiel Reginald Mengi in support of the application. It states as follows:

"That immediately after its incorporation and as up to 2018 or 2019 the directors of the JV Company were the late Dr Reginald Abraham Mengi and Mr Bulaya."

It is averred in paragraphs 14 and 15 of the said affidavit that the applicant appointed Abdiel Reginald Mengi and Benjamin Mengi to be directors of the JV Company. However, it is not stated when exactly were they appointed as directors. But it is equally unclear whether Mr. Bulaya is still a director, or he has ceased to be a director of the JV Company. Nevertheless, be as it may the affidavit does not say if Mr Bulaya is not a director of the JV Company. Paragraph 15 of Abdiel

Mengi's affidavit avers that the 2nd and 3rd respondents from July 2021 to date have been objecting the directorship of Abdiel Mengi and Benjamin Mengi in the JV Company.

While it is apparent that the POs were raised by the 2nd and the 3rd respondents and that the 1st respondent did not raise any PO as per record, one of the central issues which is also echoed by the applicant is whether the 2nd and the 3rd respondents are privy to the JVA? It is clear that the JVA is between the applicant and the 1st respondent.

But before I proceed further to analyse this point, it should be borne in mind that as per **Mukisa Biscuits's case** a PO is a point of law that may dispose the case. In my view being the point of law, it does not matter who raises the said PO, be it the parties to the case themselves or the court suo motu. The claim that the 2nd and the 3rd respondents are not privy to JVA is point of law and so is jurisdiction. Even if we say the 2nd and 3rd respondents are not privy to the JVA, what about the 1st respondent? She is a party to the JVA despite not raising the POs. But again, jurisdiction being a point of law that has been raised the court is required to address it. While I agree that the issue of privity of contract is relevant, in the context of this case I doubt that it can be used to displace a vital point of law such as that of

jurisdiction. The court cannot turn a blind eye to such a fundamental legal point.

Moreover, it is conspicuous that the 2nd respondent is both the director of the 1st respondent and JV company. That said the issue of jurisdiction of this court to entertain the application at hand is critical. Since the JVA is central to the petition (Misc. Commercial Case No. 44 of 2022) and the application at hand, then the court is called upon to glance at the said JVA annexed as TAB-3 to the affidavit of Abdiel Reginald Mengi. According to **Mukisa Biscuits' case** it is not unlawful for the court to examine the pleadings to satisfy itself and determine the PO's merit or otherwise. This gives the court comfort to peruse the annexure TAB – 3, the JVA, which on its clause 14, and clause 12 of annexure TAB – 4, the Shareholders' Agreement between Gold Africa Limited and EB-Hance Company Limited clearly provides for Arbitration. I wish to reproduce what is provided for in the said clauses:

"In the event of any dispute occurring between the parties arising out of the terms of this Agreement or its interpretation, which cannot be resolved by negotiation, the parties shall submit such dispute for resolution by a single arbitrator under the rules of the International Court of Arbitration of the International Chamber of Commerce or such other non-judicial dispute resolution procedure as

may be mutually agreed, and the decision of such arbitrator shall be final and binding upon both parties, not subject to appeal to courts or any other tribunal. Such arbitration shall be conducted in Paris, or such other venue as agreed by the Parties, applying the laws of England as to contracts except where the subject matter of the dispute clearly dictates the applicability of Tanzanian laws."

One does not need a binocular to see what the parties intended. They wanted in case a dispute arises it should be resolved by arbitration.

It is in lieu of the foregoing that I find this court lacking jurisdiction to hear and determine the application at hand. As per **Simon Kichele Chacha v. Aveline M. Kilawe, Civil Appeal No. 160 of 2018 CAT at Mwanza**, the court is bound to respect sanctity of contract. In absence of proof of any vitiating factor(s) inducing consent of a party, the court should not interfere with what the parties have agreed upon in the contract. The best it can do is to enforce the parties' contract. Since the JVA is the agreement between the applicant and the 1st respondent and provided it contains arbitration clause, and because there is no evidence that arbitration was done, this court is bound to respect what the parties agreed in the JVA.

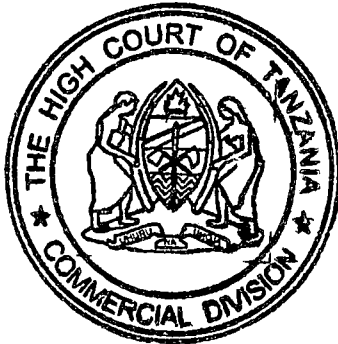
Therefore, the first PO is sustained. This court indeed lacks jurisdiction to entertain the present application. The parties ought to submit themselves to arbitration as per clause 14 of the JVA.

It will be academic endeavour to deal with the second PO. As rightly submitted by the applicant's counsel, and in accordance with Order I rule 9 of the Civil Procedure Code [Cap 33 R.E. 2019] a suit cannot be defeated by reason of misjoinder or non-joinder of a parties. It is common ground that the court may order joining or removing of a party wrongly joined in a case to deal with the matter in controversy and finally determining the rights of the parties.

In fine, the first PO is sustained. The application is consequently struck out for want of jurisdiction. The 2nd and 3rd respondents shall have their costs.

It is so ordered.

DATED at DAR ES SALAAM this 9th day of June, 2023.



A handwritten signature in black ink, appearing to read "U. J. Agatho".

U. J. AGATHO
JUDGE
09/09/2023

Date: 09/06/2023

Coram: Hon. U. J. Agatho, J.

For Applicant: Simon Barlow Lyimo, Advocate

For 1st Respondent: Philemon Mutakyamirwa, Advocate

For 2nd and 3rd Respondents: Desiderius Ndibalema, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered today, this 9th June, 2023 in the presence of Simon Barlow Lyimo, counsel for the Applicant, Philemon Mutakyamirwa, learned counsel for the 1st Respondent and Advocate Desiderius Ndibalema for the 2nd and 3rd Respondents.




U. J. AGATHO
JUDGE
09/06/2023