

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

**MISC.COMMERCIAL APPLICATION NO.62 OF 2020
(Arising from Commercial Cause No.2 of 2020)**

DHIRAJLAL WALJI LADWA..... 1st APPLICANT
CHANDULAL WALJI LADWA 2nd APPLICANT
NILESH JAYANTILAL LADWA3rd APPLICANT

VERSUS

JITESH JAYANTILAL LADWA..... 1st RESPONDENT
INDIAN OCEAN HOTEL LIMITED..... 2nd RESPONDENT

RULING

Date of the Last order: 8/2/2023
Delivering this Ruling: 8/3/2023

NANGELA, J.:

This is an application predicated on a Petition filed by the Applicants herein on the 20th of January 2020. In that Petition, the Applicants (as Petitioners therein) are complaining against the conduct of the 1st Respondent, a Managing Director of the affairs of the second Respondent, a company they claim to own shares therein and positions of directorship. The Applicants (Petitioners) castigate the conduct of the 1st Respondent and seeks for declaratory orders of this Court as follows:

1. An Order of this Court, declaring that, the conduct and operations of the 1st Respondent were unlawful and prejudicial to the interests of the company and the petitioners as shareholders, directors and members of the Company.
2. An Order of this Court, restraining the 1st Respondent permanently from taking part in the management of the affairs of the company and an order directing the management of the company to be placed in the hands of the petitioners.
3. An Order of this Court directing and authorizing civil proceedings to be brought for, and on behalf of, the company by any of the petitioners or the petitioners jointly to compel the 1st Respondent make good all losses and business distortions incurred as a result of misappropriation of the company's funds and mismanagement of the company by the 1st Respondent.

4. An Order compelling the 1st Respondent to vacate the office and business premises to be used by the company only and relocate his personal business ventures from the company's premises.
5. Payment of general damages to the Petitioners as the Court may assess.
6. Costs of the suit be borne by the 1st Respondent.
7. Any other relief or order the honourable Court shall deem fit and proper to grant.

The Petition is yet to be determined since then and has remained long pending in this Court since the time of its filing to-date, and for reasons best known to all parties herein. On the 6th of May 2020, the Applicants filed this application. The same was premised under section 68(e) and section 95 of the Civil Procedure Code, Cap.33 R.E 2019 and is supported by an affidavit of Chandulal Walji Ladwa. The Applicants are seeking for the following orders, that:

1. this Court may be pleased to issue an order restoring the status quo ante 16th April 2020 with regards to activation of update of information of Indian

Ocean Hotels Limited by the Registrar of Companies, pending the hearing and final disposal of Miscellaneous Commercial Cause No.2 of 2020.

2. May this Court issue temporary injunctive orders restraining the 1st Respondent, his agents, including his advocates and/or employees from taking any steps which may interfere in any way with the due process that is aimed at resolving the misunderstanding or disputes regarding the shareholding and directorship of the Indian Ocean Hotels Ltd, pending the hearing and final determination/disposal of the Petition.
3. May this Court be pleased to order that, costs of this application be borne and paid by the 1st Respondent.
4. May this Court grant such other interim preservatory orders or measures with regards to the shares of the Applicants in Indian Ocean Hotels Limited as it may deem fit, just and proper in the circumstance.

On the 27th day of May 2020, the Respondents filed their counter affidavit contesting the granting of the prayers sought hereabove. When this Court called on this application for its hearing on the 17th day of June 2020, the Applicants enjoyed the services of Mr. Robert Rutaihwa, learned Advocate while Mr. Sisty Bernard, learned Advocate, represented the Respondents.

On that material date this Court gave orders including an order which stayed the hearing of this application pending conclusion of another matter associated to this application, i.e., **Jitesh Jayantil Ladwa & Another vs. Dhirajlal Walji Ladwa & Others** (Civil Application 154 of 2020) [2020] TZCA and **Jitesh Jayantil Ladwa & Another vs Dhirajlal Walji Ladwa & Others** (Civil Application 41 of 2021) [2022] TZCA 290.

When those pending matters in the Court of Appeal got concluded, this application was called on for orders on the 19th October 2022 and, the Court noted that, there were several preliminary points of law which were raised by the Respondents which needed to be disposed first. On the material date, Mr. Jeremia Mtobesya and Sisty Bernard, learned advocates represented the Respondents and Mr. Robert Rutaihwa and Patrick Kaheshi, learned advocates appeared for the Applicants.

Although the Respondents had filed two sets of notices of objection, i.e., notice of objection filed on the 16th June 2020 and the other filed on the 21st September 2020, Mr. Mtobesya

informed the Court that, upon reflection, the Respondents wish to abandon the notice of objection filed on the 21st September 2020 in its entirety as well as grounds of objection numbers (a), (b) and (d) contained in the notice filed on the 16th June 2020 and argue ground number (c) alone which was: *'That the application is an abuse of court process, which intend to pre-judge and/or pre-empt the final decision of this Court.'*

With such understanding in mind, this Court directed the parties to dispose of the remaining point of law by way of written submission. I did issue a schedule of filing and the parties have duly complied with the given schedule of filing. I will, thus, consider those submissions.

Submitting in support of the objection, Mr. Mtobesya contended that, what the parties are at issue in the main Petition is the issue of shareholding and directorship in the 2nd Defendant, Indian Ocean Hotels Ltd. He submitted that, the same is the case in this application. He contended that, while the Respondents herein maintain that the 1st and 2nd Applicants legally authorized the 1st Respondent to transfer their shares, the Applicants hold otherwise, denying expressly to ever have given that authorization to the 1st Respondent.

He submitted that, it is that position which prompted the Applicants to knock at the doors of this Court seeking for orders of restoration of *status quo ante* as of 16th April 2020, when the Registrar of Companies at BRELA updated the status of the Indian Ocean Hotels Limited to reflect the position obtaining at

that particular time; showing the 1st and 2nd Applicants not being shareholders and/or directors of Indian Ocean Hotels Ltd, the 2nd Respondent herein.

He argued that, the Applicants have confessed themselves, at paragraph 10 of their supporting affidavit, that, the updated status they have taken issues with, "*form the subject matter of the Petition before this Honourable Court.*" In view, of that, Mr. Mtobesya submitted that, to ask this Court to grant orders which will affect that which is the subject matter of the min petition, will be tantamount to determining the main petition prematurely, something which the Court has once declined to do. To support his assertions, he relied on the case of **Car Truck Distributors Limited vs. MKB Security Company Ltd & Another**, Misc. Land Application No.688 of 2021 (unreported).

As regards prayers (b) and (c) in the application, Mr. Mtobesya contended that, the Applicants are also seeking orders that have a bearing to the shareholding that is subject of contention in the Petition that is yet to be heard on merit. These orders, he contended, will as well pre-determine the pending Petition if granted, a fact which the Court of Appeal has once abhorred as improper. He called to his aid the decision of the Court of Appeal in the case of **Abdi Ally Salehe vs. ASAC Care Unit & 2Others**, Civil Revision No.3 of 2012 (unreported).

In yet another of his contention, Mr. Mtobesya submitted that, the whole gist of bringing this application was to *abuse the process* of this Court as the Applicants are aware that, what is sought in their application is nothing but a way of circumventing the hearing and determination of the matters that form the bone of contention in the main Petition. For such a reason, he urged this Court to uphold the objection and dismiss the application with costs.

In their reply submission, the Applicants' legal counsel, Mr. Rutaiwa submitted that, the main Petition is premised under section 233 (1) and (3) of the Companies Act which allows any member of the Company to lodge a petition seeking for the reliefs provided therein. Mr. Rutaiwa contended that, the filing of the Petition was sanctioned by the Registrar of Companies who, having demonstrated the status of company and noted the dispute among the shareholders and directors of the company directed the matter to be resolved in Court.

He submitted that, in between the pendency of the Petition and after some preliminary stages had taken place, including parties arguing the preliminary objections, the 1st Respondent went ahead to update the status of the Company through the online registration system on account formulated on his own without the knowledge and/or approval of the Applicants who per the records and status given by the Registrar of Companies were all shareholders and directors of the company (the 2nd Respondent cum necessary party).

He contended that, the unilateral changes in the shareholding and management structure of the Company had great bearing on the pending Petition for unfair prejudice because had the effect of ceasing the 1st and 2nd Respondents' membership, hence unqualifying them from pursuing the Petition. Mr. Rutaihua submitted that, it is on that context that the Applicants, having noticed the unilateral changes in the ownership and management structure of the Company, filed this Application which essentially seeks to restore the *status quo* as it was at the time of presenting the main petition and maintaining such position pending determination of the main petition for unfair prejudice.

Mr. Rutaihua submitted that, the ground of objection which the Respondents have argued before this Court does not, in the first place, qualify as a preliminary objection on a pure point of law. He contended that, its determination cannot be made without the Court looking at the similarities and differences of the two applications, i.e., the main Petition and the current application.

He contended that, the Respondents have even invited the Court to cursorily examine the Petition and the Answer to the Petition in order to detect the alleged abuse of court process. He submitted that, when the Court is called upon to go to such extent, then the objection misses the test of what a preliminary objection should be. He relied on the case of

Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] E.A, 696 and the Court of Appeal Decision in **Karata Ernest & Others vs. AG**, Civil Revision No.10 of 2010 (unreported) to back up his position.

As regards the Respondents' contention that this present application is intended to pre-empt the Petition, Mr. Rutaihwa submitted that, such a contention is erroneous given that, the obtaining situation at the time of filing the Petition was quite different from what it stands to be currently having been changed by the 1st Respondent, since the changes took place during the pendency of the Petition which, in fact, has effects on the Applicants in their pursuit of their rights under the Petition. To that end, he distinguished the **Car Truck Distributors Ltd's Case** (supra).

Mr Rutaihwa submitted that, the Application for restoration of status quo cannot be said to amount to an abuse of court process so long as it seeks to restore the position as it was before. He contended that, at most, it is the 1st Respondent who is at fault trying to circumvent the due process after the matter had been brought to the attention of this Court which has the final decision in the dispensation of justice. He as well distinguished the case of **Abdi Ally Salehe** (supra) holding that, in that decision the main issue was allegations of fraud which intended to assail the mortgage

between the parties. At the end of his submission, he invited this Court to dismiss the objection with costs.

The learned counsels for the Respondents filed a brief rejoinder submission. In it, they have, more or so reiterated what they stated in their submission in chief aside from re-joining that the Applicants' first three paragraphs to the reply submissions are facts which ought to be discussed at the hearing of the main application and not at this time. Having duly considered the arguments made by the learned counsel for the parties herein, the only main question that I am confronted with is whether the objection raised by the Respondent has any merit.

It is undisputed fact that, the Applicants herein are seeking for orders of maintenance of *status quo ante* certain acts which took place during the pendency of the main Petition, (Misc. Commercial Cause No.2 of 2020 which, as I stated herein at the beginning, was filed in this Court on the 20th day of January 2020. In the case of **Car Truck Distributors Ltd** (*supra*) the Land Court (Mwenegoha, J) defined the phrase "*maintenance of status quo ante*" stating as follows:

"In plain language, the phrase *status quo ante* means the situation that existed before..."

The Respondents counsel have contended that, such a prayer by the Applicants is unwarranted since it takes this Court to pre-determine the main Petition and, for that matter it will

amount to an abuse of the Court process by the Applicants since they are well aware that the same issue forms the subject matter of the main Petition. The Respondents' counsel has contended otherwise, arguing that, if it is the matter of abusing the process of the Court, then the 1st Respondent should be the culprit of that. The Applicants have even queried whether the objection befits to be so called a preliminary objection.

Perhaps I should consider first what an abuse of court process is all about. Essentially, the issue regarding abuse of court's process by litigants is a problem which courts across common law jurisdictions have time and again confronted and uniformly understood or defined it. In the case of **UK - Attorney General vs. Baker** [2000] EWHC 453 (Admin), for instance, the Court defined it to mean the:

"use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

In other cases, from Nigeria, the case of **Central Bank of Nigeria vs. Saidu H. Ahmed & Ors (2001) 5 SC (Part 11) 146**; and the case of **Edjerode vs. Ikine (2001) 12 SC (Part 11) 125**, the Supreme Court of Nigeria, was of the view that, an abuse of Court process means that the process of the Court **has not been used *bona fide* and properly**. These cases were cited by this Court in the case of **Starpeco**

Limited and 40thres vs. Azania Bank Ltd & Another,
Misc. Commercial Application No.11 of 2021 (unreported).

In the Indian case of ***K.K.Modi vs. K.N.Modi and Others***, (1998) 3 SCC 573 the Indian Supreme Court, citing Sweet & Maxwell, ***The Supreme Court Practice (1995)*** at page 344, in relation to the phrase "abuse of the process of the Court", noted that:

"This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And, for this purpose, considerations of public policy and the interests of justice may be very material."

Further, in the Canadian case of **Scott Conway vs. Her Majesty, The Queen** [1989] 1RCS1659, the Court was of the view that:

“... the doctrine of abuse of process is not limited to prosecutorial misconduct or improper motive....”

In the case of **Staperco Ltd & Others (Supra)**, this Court made an observation that:

“As it may be observed in the above quoted Indian Case, the concept of abuse of Court process is imprecise and involves circumstances and situations of infinite variety and conditions. What is worth noting, however, is that, the concept has a common feature, which is: **an improper use of the judicial process by a party in litigation to interfere with the due administration of justice...but is not limited....**”

In view of the above observations, it is clear to me that, a litigant's action may, for instance, amount to abuse of court's process in situations where proceedings are frivolous, oppressive or vexatious, and violate the fundamental principles of justice underlying the community's sense of fair play and decency. See for instance the Canadian case of **R vs. Scott** [1990] 3 SCR 979 and the Solomon Islands case of **Samuel Saki and Others vs. Ross Mining (Solomon Islands) Ltd**

and Other (Unreported), High Court, Solomon Islands, Civ. Case 169/97, 19 December 1997 stated in **Jennifer Corrin Care, *Civil procedure and Courts in the South Pacific***, (London: Cavendish Pub, 2004) at 223.

It may as well involve, *acts or omissions* made by a party, which acts or omissions are "*unfair to the point that they are contrary to the interest of justice*,"-See for instance the Canadian case of ***R vs. Power*** [1994] 1 SCR 601; and Australian case of - ***D'Orta-Ekenaike vs. Victoria Legal Aid*** (2005) 223 CLR. Likewise, an "*oppressive treatment*" of a party has been considered to amount to an abuse of court process. See the Canadian case of - ***R vs. Conway*** (supra) and the Australian case of - ***Batistatos vs Roads and Traffic Authority of New South Wales*** (No S530/2005) (2006) 226 CLR 256.

Bringing the above discussion to the context of the current objection in the present application, the question which follows is whether the current application is an abuse of process to warrant that I uphold the objection and do away with the application once and for all.

In the first place, it must be noted that in his submissions, the learned advocate for the Applicants questioned as to whether the preliminary objection pegged on the alleged abuse of court process was in the first place warrantable as a preliminary objection in the sense of what a preliminary objection should be as per the **Mukisa Biscuits'**

case (supra) or **Karata Ernest's Case** (supra). He contended that, in this present application, one has to ascertain it by going an extra mile of perusing the Petition and the Answer to the Petition and do comparisons.

Essentially, under the **Mukisa Biscuits' case** (supra) and/or **Karata Ernest's Case** (supra) it was made clear 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 if what is sought is the exercise of judicial discretion . . ."

The above position while largely celebrated, has been further improved recently as well by the Court of Appeal in the case of **Ali Shabani & 48 others vs. Tanzania Roads Agency (TANROADS) & Another**, Civil Appeal No. 261 of 2020, CAT at Tanga, where the Court of Appeal held an authoritative view that:

" At any rate, we hold the view that no preliminary objection will be taken from abstracts without reference to some facts plain on the pleadings which must be looked at without reference

examination of any other
evidence. ..."

From the above understanding, the Court seized with a matter where a preliminary objection has been raised is not barred from referring to facts that may be plain on the pleadings without reference examination of any other evidence. Since the Chamber summons had attached the Petition and the Answer to the Petition, all those are part of the pleadings filed in the Court and can be looked at without further ado. As such, the learned counsel's submission that the test in **Mukisa Biscuits's case** (supra) and/or **Karata Ernest's case** (supra) would be violated cannot stand.

However, in an appropriate case an abuse of court process can indeed be raised and argued as a pure point law. For instance, in the English case of **Mcllkenny vs. Chief Constable of West Midlands Police Force** [1980] 2 All ER 227, the Appellate Court in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised an issue identical to that which had been finally determined at the plaintiffs' earlier criminal trial.

The Court was of the view that, even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an abuse for a party to re-litigate a question or issue which has already been decided against him even

though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels.

In our present scenario, however, what is pertinent to consider in light of what the doctrine of abuse of court process is all about, is whether the objection befits the matrix upon which the current application is premised. Put differently, does the current application fall within the categories in which the plea of abuse of court process will be justified for its striking out without much ado?

In my humble view, I do not think that the current application at hand falls within the categories of application for which the doctrine of abuse of court process will apply against the Applicants.

I hold so because as I look at the pleadings plainly as they are, I am contented that, the application at hand does not determine the merits of the pending main Petition (*the Misc. Commercial Cause No.2 of 2020*) because what it is seeking is only the maintenance of *status quo ante* the 16th April 2020, following acts which are alleged to have taken place on that particular material date touching on the Petition which was already pending in Court (and, which acts alleged to have been done cannot be examined at this stage of preliminary objection). It is from that general understanding I am fully convinced, therefore, that, the objection raised has no merit at all.

I have as well noted, however, that, in his submissions, the Applicant's counsel has argued that, if the doctrine is to apply is to apply against the 1st Respondent. In my view, I see no need why I should venture to all that extent, since, doing so will be determining the application itself. Since I am contented that the objection has not merit, I will hereby, proceed to make the following orders, that:

1. the Respondents' preliminary Objection is devoid of merits and I do hereby overrule it with costs;
2. the parties hereto are to proceed with the hearing of the application on the date, time and in the manner this Court will so directs.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 8th DAY OF MARCH
2023**



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DEO JOHN NANGELA
JUDGE