IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CAUSE NO. 54 OF 2022

IN THE MATTER OF THE COMPANIES ACT (CAP.212 R.E 2002)
AND
IN THE MATTER OF PROPERTY INVESTMENT LIMITED
AND
IN THE MATTER OF PRIME PROPERTIES (T) LIMITED
AND
IN THE MATTER OF PETITION FOR UNFAIR PREJUDICE BY

SABRI MUSLIM KARIM (Formerly known as
SABRI ALLY SAAD ……PETITIONER

VERSUS

MUSLIM SHIVJI KARIM……...1ST RESPONDENT
HBL BANK UK LTD (Formerly known as
HABIBSONS BANK LTD)……...2ND RESPONDENT
PROPERTY INVESTIMENT LIMITED…..3RD RESPONDENT
PRIME PROPERTIES (T) LIMITED……4TH RESPONDENT

RULING

Last order: 01/03/2023
Ruling: 27/03/2023

NANGELA, J.,:

This ruling is in respect of three preliminary objections raised by the 2nd Respondent which were, that:

1. The [Petition] is bad for misjoinder of parties as the 2nd Respondent is not a member of any of the two companies cited above, within the

meaning of section 233 (1) neither is it covered by the extension to non-members envisaged by subsection (2) of section 233 of the Companies Act, No.12 of 2002; nor is it permitted by an Order of the Court in subsection 2(c) previously had and obtained prior to filing the [petition].

2. The [petition] is not maintainable against the 2nd Respondent as it is bad in law for attempting to quash or set aside or limit the effect of the Judgement and Decree of the High Court of Tanzania Civil Case No.169 of 2020 (Mgonya, J.,) ….;

3. The Petitioner, as a Judgement Debtor in the decree …is estopped from challenging the Decree of the High Court for which the Petitioner as a majority shareholder of the decree debtor has at all material time been aware of, including Land Case No. 247 of 2021 and has acquiesced in its existence and which remains valid lawful and operative.

On the 02nd day of February 2023, the parties were directed the to dispose of the preliminary issues by way of filing written submissions. A schedule of filing was issued and the parties filed

their respective submissions as directed by the Court. I will consider their submission as I endeavor to address the points of objection raised by the 2nd Respondent, the main issue being whether such objections are of any merit.

The **first objection** is to the effect that:

> The [Petition] is bad for misjoinder of parties as the 2nd Respondent is not a member of any of the two companies cited above, within the meaning of section 233 (1) neither is it covered by the extension to non-members envisaged by subsection (2) of section 233 of the Companies Act, No.12 of 2002; nor is it permitted by an Order of the Court in subsection 2(c) previously had and obtained prior to filing the [petition].

In their submissions, Mr. Rugambwa Pesha and Mr. Richard Mchwampaka, the learned counsels who represented the 2nd Respondent set out their journey in support of the objection by narrating a background and delved on factual issues which I will neither recite nor contemplate them here because, if I will do so, some of the issues tend to pre-empty the main petition. I will,

therefore, strictly confine my considerations to the preliminary legal issues.

Essentially, the gist of their submission on the first point above is that, impleading the 2nd Respondent in this matter based on section 233 of the Companies Act is *ultra-vires* the enabling statute and the suit becomes incompetent and bad for misjoinder of parties. The reasons provided are, **firstly,** that, the 2nd Respondent is neither a member of the two Companies involved herein (3rd and 4th Respondents) nor is the 2nd Respondent covered by extension to non-members as per section 233 (2) or section 233 (3) (c) of the Act.

They learned counsels submitted that, the kernel to the allegations is that the affairs of the companies cited are being conducted in a manner that is prejudicial to the interests of some members. They contended that, even if the Petitioner was to be entitled to bring a petition regarding a review of how the affairs of the two companies are being carried out, the Petitioner does acknowledge that, the 2nd Respondent is a lending institution that has lent US$ 3,000,000.00 to the 3rd Respondent and US$ 3,500,000.00 to the 4th Respondent.

It was their submission, therefore, that, by virtue of that lending, the 2nd Respondent created security over assets of both the 3rd and 4th Respondents, hence, acquiring a status of a secured creditor who does not even fall within section 233 (2) of the Act.

Secondly, the 2nd Respondent's counsels have argued as well, that, even if section 233 (1) and (2) of the Companies Act were to be applicable to the 2nd Respondent, the purpose of that provision is to provide an avenue for the protection of the minority shareholders and moderate the tyranny of the majority on which exercise of voting powers in the limited liability company structure is based.

They submitted, however, that, the Petitioner is not a minority but a majority shareholder. Reliance was placed, for comparative reasoning, on the decision of this Court in the case of **Scholastica M. Ndyanabo vs. IPSOS (T) Ltd**, Commercial Case No.36 of 2021 (unreported).

As their **third** reason regarding why I should uphold the first ground, the 2nd Respondent's counsels contended that, section 233 of the Companies Act is clear on the grounds on which a petition of this kind can be pegged, i.e., the companies' affairs being or

have been conducted in a manner which is unfairly prejudicial to the interests of its members."

They submitted that; *ipso facto* the section makes persons vested with the management powers of the Company to be the Respondents. Relying on sections 181 to 185 of Chapter VII of the Companies Act, they submitted that, management powers of a company is vested on the directors and that, under the circumstance, section 133 and 134 of the Act provides for avenues which the Petitioner being a Director should have utilized. That much I can garner by way of a summary from their submission on the first ground.

Responding to the submissions made by the 2nd Respondent's counsels on that first ground, Mr. Shalom Samwel Msakyi, the counsel defending the Petitioner submitted that, the 2nd Respondent has misconceived and misconstrued section 233 of the Companies Act, Cap.212 R.E 2002. He submitted that, the provision provides for a mechanism and remedy for shareholders/members to bring a claim of unfair prejudice against the Company or its directors.

He contended that, though the provision is silent as regards the remedy for a shareholder to bring a claim against a person who

is not a director or shareholder of the company, that does not deprive a shareholder from joining any person as a party to such action. He argued that, the quoted provisions by the 2nd Respondent's counsels applies to suits by non-members. To strengthen his submission, he relied on the case of **Dutton vs. Bognor Regis USC Ltd** [1973] Ch.9 [1972]1All ER.462 arguing that, a shareholder my bring a claim of unfair prejudice against a third party in certain circumstances.

Mr. Msakyi submitted further that, the principle in the **Dutton's case** (supra) has been codified under the English Companies Act 2004, where section 994 allows for suing of a third party in some instances where it is shown that, the conduct of the other parties has caused or is likely to cause substantial harm to the company's affairs or to the shareholder's interests as a shareholder.

Mr. Msakyi relied as well on the case of **Primekings Holding Ltd and 3 Others vs. Anthony King and 2 Others** [2020] EWCH 1330 (Ch) (unreported) regarding the position that a third party's conduct may give rise to actionable unfair prejudice where they are combined with acts or omission or other conduct on the party of the company. He contended that, paragraphs 13,14, 15

and 16 of the Petition have established the requisite connectivity between the 2nd Respondent and the Company and the 1st Respondent.

Mr. Msakyi submitted further that, under the principles of natural justice, every individual should be heard as a matter of right whenever his/her interests are affected. He contended that, since it is alleged that the 2nd Respondent acted in a manner prejudicial to the interests of the Petitioner she should be heard and defend herself. Reliance was placed on the Court of Appeal's decision in the case of **Hussein Khai Bhai vs. Kodi Ralph Siara** [2016] TZCA 35 regarding the primacy of the rules on natural justice.

To cap it all, Mr. Msakyi submitted, as an alternative argument, that, as a matter of general principle, a mis-joinder or non-joinder should not defeat the present petition. Reliance was placed on what Order I rule 9 of the Civil Procedure, Cap.33 R.E 2019 provides as well as the case of **Money Bridge Properties (E.A) Ltd., vs. Meru District Council**, Land Case No. 24 of (2019) [2020] TZHC 3859 (06 November 2020).

The learned counsels for the 2nd Respondent rejoined on the first ground of objection by essentially reiterating what they had

stated in chief and principally, that, for the section 233 to apply to a third party there must be a causal connection between the person having the conduct of the affairs of the company and the third party.

As I stated earlier, the issue as far as the first ground of objection is concerned is whether there is merit in it. However, before I address that issue pertaining to the first ground of objection, I find it pertinent to express the purposes for which section 233 of the Companies Act stand for. As rightly submitted by the learned counsels for the Respondents, **one of the purposes** served by section 233 of the Companies Act, Cap.212 R.E 2002 is, **firstly**, to protect rights of the minority shareholders.

That is indeed a correct view which was clearly amplified in the case of **Ellen Nocos Mavroudis vs. Mihal Kalitzakis and 2 Others**, Misc. Commercial Case No.6 of 2020 (HC-CommDvn -at Arusha) (Unreported), where this Court had the following to say:

> "According to **Gower and Davis**, ***Principles of Company Law, Sweet & Maxwell,*** at page 687, the gist of any action preferred by way of a petition based on unfair prejudice claims, as the one at hand, is not the wrong done to the company

> but the disregard by those in control of the company, of the interests of the minority shareholder(s). An unfair prejudice petition, therefore, **is a form of statutory remedy available to the members of a company, especially the minorty ones, who may be the victims of 'unfairly prejudicial' conduct of the majority. Gower and Davis** (supra) have made a point that, a petition based on the claims of unfair prejudice is normally looked at based on the reliefs in respect of personal harm suffered by the minority shareholder." (Emphasis added).

However, the view that the section is meant to protect minority shareholders does not mean that the rest of the members of the Company, including majority shareholders, are not allowed to sue on the basis of section 233 (1). In essence, they can and the provision is very clear that it can be applied by "**ANY MEMBER**" of the Company. Section 233 (1) provides that:

> "**Any member** of a company may make an application to the court by petition…"

From that wording of the law, whilst it is usually expected that an unfair prejudice claim will be brought by a minority shareholder, the law does not bar the majority shareholder who feels the company's affairs are being driven in an awry manner to the detriment of the company and his interest in the company.

In the case of English case of **Macom GmbH vs. Bozeat and others** [2021] EWHC 1661 (Ch), for instance, a claim was made by a majority shareholder against the minority shareholder. In that case, the Court made a finding in favour of the petitioner, the majority shareholder, to the effect that, the conduct of the minority shareholder had been unfairly prejudicial. The Court stated, in particular, that, the majority shareholder had a right to be involved and consulted on the company's affairs under the Articles of Association and the Shareholders' Agreement.

Secondly, in the case of **Bhavesh Chandulal Ladwa and 4Others vs. Jitesh Jayantilal Ladwa,** Misc. Commercial Cause No.35 of 2020, (HC) Commercial Division at DSM (unreported), this Court noted and expressed as well, from a broader context, that:

> "The section deals with issues regarding conduct considered to be unfairly prejudicial to the interest

and well-being of the Company and its members. As a concept, unfair prejudice is a flexible one, and incapable of exhaustive definition. The list of conduct complained of under this provision is, therefore, not be closed. Of particular importance is that, this particular provision is one of effective tools meant to bring the control of a company to an order or ensure that its conduct is properly and beneficially regulated going forward."

The current Petition is premised on section 233 (1), (2) and (3) of Cap.212, R.E. [2002]. The section provides as hereunder:

"233.-(I) Any member of a company may make an application to the court by petition for an order on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. If the court is satisfied

that the petition is well founded, it may make such interim or final order as it sees fit for giving relief in respect of the matters complained of.

(2) This section shall apply to a person who is not a member of a company but to whom shares in the company have been transferred by operation of law, as those provisions apply to a member of a company; and references to a member or members are to be construed accordingly.

(3) Without prejudice to the generality of subsection (1), the court's order may:

(a) regulate the conduct of the company's affairs in the future,

(b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do,

(c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct,

(d) provide for the purchase of the shares of any members of the

> company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

Essentially, while section 233 (1) gives rights to any of the members of the Company to file a petition when the affairs of the Company are run in such a manner that seems to be prejudicial, subsection (2) applies to a non-member as well. Indeed, in the case of **Dutton's case (supra)** it was held that, a shareholder my bring a claim of unfair prejudice against a third party but the holding was not a pandora box but did put a caveat that, it can only be possible in certain circumstances. As correctly submitted, therefore, a non-member must have a causal link between the persons having the conduct of the affairs of the Company and the non-member.

Under our law, section 233(2) of the Companies Act, is very clear regarding the circumstances which will qualify a non-member to bring action under section 233 of the Act. Section 233 (2) provides as follows:

> "This section shall apply to a **person who is not a member of a company BUT to whom shares in the company have been**

> **transferred by operation of law**, as those provisions apply to a member of a company; and references to a member or members are to be construed accordingly." (Emphasis added).

As clearly seen, the non-member referred to is one **to whom shares in the company have been transferred by operation of law.** In the case of **Scholastica Ndyanabo vs. IPSOS (T) Ltd** (supra), the provision applied because the Petitioner had, by operation of the law been entitled to shares. In the case of **Atlasview Ltd vs. Brightview Ltd** [2004] EWHC 1056 (Ch), the Court was of the view that, even a nominee shareholder is also a legitimate petitioner for unfair prejudice.

Looking at the present objection at hand in light of the above, it has been the submissions by the learned counsels for the 2nd Respondent that, the 2nd Respondent is neither a member of the two Companies involved herein (3rd and 4th Respondents) nor is the 2nd Respondent covered by extension to non-members as per section 223 (2) or section 223(3) (c) of the Act. For that, reason, it has been contended that, it was wrong to join the 2nd Respondent in this Petition, worse still, such a respondent being a secured creditor.

In essence, I tend to agree with the submissions made by the 2nd Respondent's counsels, that, the 2nd Respondent was erroneously joined in this Petition since the applicable provision does not in any manner possible apply to her and no requisite causal link which I find to be reliable to bring her to the fold. The 2nd Respondent, therefore, was wrongfully joined as a party. I thus uphold the first ground.

However, with such a finding at hand, does it mean that the whole petition will crumble because of that fact? In other words, even if this Court has upheld the first ground can it completely dispose of the matter? I do not think so. As rightly stated by the learned counsel for the Petitioner, as a matter of general principle, a mis-joinder or non-joinder should not defeat the present petition.

In the upshot of that, the only effect to be registered here and which arises from the finding that the 2nd Respondent has been wrongly joined in this petition is that of extricating the name of the 2nd Respondent from the record as if she has never been made a party to this matter as it does not concern her. This Court can only go to that extent since going farther as the learned counsels for the 2nd Respondent had wanted that I should, would be going into the merits of the Petition and that is uncalled for at this stage.

The second ground of objection is already taken on board by the findings made in respect of the first ground of objection and, for that matter, I see no reasons why I should address it. I will however, look at the third ground of objection to see if it has any dispositive effect. The third ground was, that:

> 'The Petitioner, as a Judgement Debtor in the decree …is estopped from challenging the Decree of the High Court for which the Petitioner as a majority shareholder of the decree debtor has at all material time been aware of, including Land Case No. 247 of 2021 and has acquiesced in its existence and which remains validly lawful and operative.'

In their submissions, the learned counsels for the 2nd Respondent have contended that, in the year 2020, the 3rd and 4th Respondents herein instigated a Civil case No.169 of 2020 against the 2nd Respondent, a suit which was followed by a settlement which was registered under Order XXIII of the Civil Procedure Code, Cap.33 R.E 2019, and a consent judgement was entered bringing the suit to an end.

The learned counsels submitted that; the judgement debtors were denied permanent injunction against the 2nd Respondent.

They contended that, as such, they are estopped from applying for restraint orders against the 2nd Respondent. To bolster their submission, reliance was placed on section 5 (2) of the Appellate Jurisdiction Act, Cap.141 R.E 2019. They submitted that, the 3rd and 4th Respondents by their servants and agents are estopped from circumventing the effect of this Court's judgement on the ground of mismanaging their business.

Besides, they added that, to seek reliefs which were terminated by that judgement is acting contemptuously and that, when it comes to repayment of the loans extended by the 2nd Respondent, there has been a tendance of adopting a forum shopping tactics.

It was submitted further that; the Petitioner should use his majority shareholding power to instigate a review in the High Court or an appeal to the Court of Appeal. Finally, learned counsels for the 2nd Respondent did finally urge this Court to uphold the objection and dismiss this Petition.

In response to the above submissions in respect of the third ground of objection, it was the submission of Mr. Msakyi, the learned counsel for the Petitioner that, taking into account the provisions of section 233 of the Companies Act, nobody can deny

a member of a company from bringing a petition alleging unfair prejudice. He submitted that, the Petitioner has pleaded that she is a minority shareholder and for that matter, urged the Court to overrule the objection as well.

Responding to the Petitioner's submissions on the third ground, the Respondent's counsels submitted that, the petitioner has remained silent regarding the submissions of neglect, misdeed and wanton abandon of the Petitioner's statutory duty being one of the directors.

I have as well considered the parties' submissions concerning the third ground of objection. I should say that, some parts of their submissions are matters which should not be brought to the light at this preliminary stage and, for that matter, I have ignored them. That fact aside, it is a notable fact that, in this instant Petition, the Respondent's third ground of objection is premised on the doctrine of estoppel by acquiescence. This being a legal issue, what needs to be considered here, therefore, is whether the doctrine of estoppel by acquiescence will apply as contended by the Respondent's counsel.

I must confess, that, though the Respondent raised that issue of estoppel by acquiescence, both learned counsels for the parties

herein have not been able to expound it proficiently. Be that as it may, the point is that, the ground has been raised, and an attempt has been made to convince this Court that the doctrine is worth being looked at to see whether it will stand on the way of the Petitioner.

By definition, estoppel by acquiescence is a common law doctrine. It is applied in a situation where a party who is duly made aware of a fact or a claim by another party, fails to challenge that fact or refute that claim within a reasonable time. In the case of **Taylor Fashions Ltd. vs. Liverpool Victoria Trustees Co. Ltd**. [(Note) [1981] 2 W.L.R. 576, Oliver, L.J., had the following to say regarding the doctrine of estoppel:

> "Of course, estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding."

The above holding by Oliver, LJ, indicates that, in cases involving equity or justice, conduct of the parties has also been considered to be a ground for attracting the doctrine of estoppel by acquiescence. From the pleadings by the Petitioner, it is fully disclosed that, the Petitioner is a director and shareholder of the 3rd and 4th Respondents where in he holds a 30:50 % shareholding. It is also clear that, the Petitioner is well aware of the loans which the 3rd and 4th Respondents took from the 2nd Respondent, which were secured, and, thus, the 2nd Respondent stands as a secured creditor.

The pleadings do also reveal that the Petitioner was aware of the suit which the 2nd Respondent filed in attempt to recover the monies lent to the 3rd and 4th Respondent and that the suit ended up with a consent judgement. The only problem is the alleged fact that, the consent judgement was improperly procured.

While that is not an issue for consideration at this moment, the objection raised is pegged on the facts that the Petitioner had all along acquiesced with what transpired and now seeks to circumvent the consent judgment by filing this petition. In my humble view, taking into account such factual considerations, it does dawn on my mind that, since the Petitioner was at all times

well aware of the Consent judgement which was issued on the 08th day of October 2021 and took no steps of setting the consent judgment aside but waited until 15th December 2022 when he filed this Petition, one may rightly contend, as the 2nd Respondent who is the Decree holder does, that, the Petitioner, being a director of the 3rd and 4th Respondents should be estopped by acquiescence or rather inaction.

In the case of **Dr. Abdul Khair vs. Miss Sheilla Myrtla James and Another**, AIR 1957 Pat 308 the Court made a point that:

> "It is well established that parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them, and that, where acquiescence is relied on, it must be shown that **the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence**." (Emphasis added).

As I stated and, as the pleadings reveal, the Petitioner being a director of both the 3rd and 4th Respondents was fully aware of the loans and the fact that, a Consent decision was entered in Court. Under the circumstances, and taking into account as the 2nd

Respondent submits, that the loans that were the subject of the consent decision are yet to be settled, I do not find the principles of equity to be acting in favour of the petitioner since, he who comes to equity must come with clean hands. As Oliver, LJ stated in **Tylor Fashions case** (supra), estoppel:

> "is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding."

In the circumstance of all that, I find that the third objection is weighty enough to tear down the entire petition and I hereby uphold it. Having so stated, this Court settles for the following orders:

1. That, the 1st objection raised herein is upheld to the extent that, the 2nd Respondent was wrongly joined in this petition but, as a matter of general principle, such a mis-joinder does not on its own defeat the present petition.

2. That, the third objection is hereby upheld and since it has the potential to tear apart the entire petition, the petition is thus hereby dismissed with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 27TH MARCH 2023

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DEO JOHN NANGELA

JUDGE