

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 701 OF 2020

*(Arising from Misc. Land Application No. 47 of 2018 between Commercial
Bank of Africa (T) Ltd v Patrick Edward Moshi)*

NCBA BANK TANZANIA LIMITED 1ST APPLICANT

COMMERCIAL BANK OF AFRICA (TANZANIA) LTD 2ND APPLICANT

VERSUS

PATRICK EDWARD MOSHI RESPONDENT

RULING

Date of last order: 18.11.2021

Date of Ruling: 24.11.2021

A.Z. MGEYEKWA

The applicants' application is brought under Order XXII Rule 10 (1) of the Civil Procedure Code Cap.33 [R.E 2019]. The applicants are applying for leave that Miscellaneous Land Application No.47 of 2018 to continue against the 1st applicant in place of the 2nd applicant. The applicants also pray for an order

to place the 1st applicant's name appearing in the application and all applications arising from the application with the 2nd applicant.

The application has been viciously fought by the respondent, through counter-affidavit sworn by Patrick Edward Moshi, the respondent.

At the hearing of this application, the applicants enjoyed the legal service of Mr. Isaack Lupi, learned counsel whereas the respondents enjoyed the legal service of Mr. Benedict Bahati, learned counsel.

Submitting in support of the application, Mr. Lupi submitted that the instant application arises from Execution No. 47 of 2018. He urged this court to adopt the applicants' affidavit and form part of his submission. Mr. Lupi submitted that on 30th September, 2019, the parent companies of the 1st and 2nd applicants, NIC Group PLC and Commercial Bank of African merged and gave birth to NCBA Bank Kenya PLC. He submitted that following the merge of NIC Bank and Commercial Bank were affected and joined to form NCBA Bank Tanzania Ltd and the formation of these banks was advertised.

Mr. Lupi went on to submit that the BOT approved the merging of the two Banks from NCBA Tanzania Ltd. Mr. Lupi stated that the applicant ceased to exist and they transferred the business liability and obligation. It was his submission that it was important to notify this court and all other courts that

the names of the applicants have changed. Mr. Lupi further stated that the essence of changing names does not affect the rights of the respondents since the new name came on behalf of the various name which was pleaded. He insisted that the name is at the center in any litigation. Fortifying his submission he cited the case of **CRDB PLC (Former CRDB (1996) Ltd v George Methiew Kilindu**, Civil Appeal No. 110 of 2017. Stressing, Mr. Lupi stated that even the name of the applicants was published, still it was the duty of the bank to inform the parties. Supporting his submission, he cited the case of **TPB Bank PLC (Successor in Title to Tanzania Postal Bank v Rehema Alatunyamadza & 2 others**, Civil Appeal No. 155 of 2017.

On the strength of the above submission, the learned counsel for the applicants beckoned upon this court in the dispensation of justice to change names, the 1st applicant appears in place of the 2nd applicant. He added that the respondent will not be prejudiced.

The respondents' confutation was strenuous. The learned counsel for the respondent came out forcefully and claimed that the applicants' application was unfounded. Mr. Benedict urged this court to adopt the respondent's counter affidavit and form part of his submission. The learned counsel for the respondent submitted that it is not bad to notify the court of the change of the company's name. However, it was his position that for a new company

seeking an application of this kind to substitute the name of the company. He contended that there is no sufficient proof that a new company exists thus the court cannot assume that the old company is not existing. He went on to submit that a company is a legal entity, it is born and dies but the 1st applicant's existence is a mere assumption.

It was Mr. Benedict submission that a company has to acquire a legal personality therefore it has to be incorporated. He submitted that there is nowhere in the applicants' affidavit to show that a certificate of incorporation is attached or mentioned that such certificate exists. He added that the nonexistence of the 2nd applicant is not proven. He added that they expected that as long as the 2nd applicant is not existing then he could not appeal in the application. Insisting he stated that the 2nd applicant has no *locus standi* since it does not exist. He added that even the winding up or receivership documents are not attached.

Mr. Bahati continued to submit that they have proved that the merge is incomplete and the same is still an ongoing process. Mr. Benedict argued that the transfer of business is not done and the said BOT approval is just a letter to the applicant on how to undergo the intended measures. He valiantly argued that there is no proof from the BOT to show that they approved the merge after fulfilling the conditions. Mr. Benedict went on to submit that in

the counter affidavit the respondent has proved that the 2nd applicant instructed one Beatrice, learned counsel to go to court, and on 03rd November, 2020 the 2nd applicant instructed East Africa Law Chamber to appear in court before Hon. Maghimbi, J, and on 09th July, 2021 the applicant instructed Mr. Ngowi, learned counsel to appear in court. The learned counsel tendered the said documents and urged this court to take judicial notice that the 2nd applicant appeared in court.

The learned counsel for the respondent went on to submit that the application was not supposed to be before this court for being short of merit for not adhering to the legal procedure. He contended that he raised his concern as an objection but the same was overruled since it requires evidence to prove it. Mr. Benedict stated that the applicants were required to have the Board Resolution which authorized them to file the existing application. To fortify his position he cited the cases of **Eveline Stephen Swai & others v the Registered Trustees of Chama cha Mapinduzi**, Land Case No. 147 of 2018 and **Pita Kempap Ltd v Mohamed I. A. Abduhussein**, Civil Application No. 128 of 2004 c/f No.69 of 2005. He added that there is an exemption only if he is a defendant not from the beginning of the application tried to execute.

He went on to state that the application is also *res judicata* since the same reliefs are before the Court of Appeal of Tanzania to substitute the 2nd applicant's name and replace it with the 1st applicant's name. To bolster his submission he referred this court to the case of Civil Application No. 516/17 of 2929 pending before the Court of Appeal of Tanzania.

On the strength of the above, the learned counsel for the respondent beckoned upon this court to strike out the application for being *res sujudice* and for not obtaining the Board resolution approval to institute the instant case and the existence or nonexistence of the 2nd applicant is not proved.

In her rejoinder, the learned counsel for the applicants reiterated his submission in chief. He insisted that the companies were merged and the BOT approved the applicants' request. He insisted that the Commercial bank is transferred to NCBA Bank Tanzania Ltd, therefore, in his view the application is proper and both parties are existing subject to passing the tasks to one another.

Regarding the issue of Board resolution, Mr. Lupi valiantly argued that the respondent is using the back door to submit what was determined during the hearing of the preliminary objection. It was his view that that as long the same was determined then the same is an afterthought.

The learned counsel for the applicants states that the pending matter before the Court of Appeal of Tanzania is a because there is an appeal filed by the respondents in Civil Appeal No. 376 of 2019 and the same is a different case since the application at hand is related to Execution.

In conclusion, the learned counsel for the applicants urged this court to grant leave of this court for the 1st applicant to appear in place of the 2nd applicant in Misc. Land Application No. 47 of 2018 as prayed in the Chamber Summons.

Having heard the counsel's splendid but contending arguments, the Court's unenviable duty is determined as to *whether the instant application is meritorious*.

I have perused the applicants' affidavit, the respondent counter affidavit, and found that the applicants' reasons for obtaining leave for the 1st applicant to appear in place of the 2nd applicant in Misc. Land Application No. 47 of 2018, as prayed in the Chamber Summons is based on the reasons that, NIC Group PLC and Commercial Bank of Africa Ltd merged, following the receiving approval from the Central Bank of Kenya and the merged entity is known as NCBA Bank Kenya PLC. To prove his submission, Mr. Lupi referred this court to a Notice of transfer I have read the document which is attached as annexure NCBA1 and noted that the same states that:-

" Take Notice that Commercial Bank of Africa (TANZANIA) Limited intends to enter into a transfer of Business and Assets to transfer specific assets and all of its liabilities upon the expiry of this notice."

Reading the above context, it seems as the process of transfer was ongoing. Since the Commercial Bank of Africa (TANZANIA) Ltd intends to enter into a transfer. In order to prove that the transfer was complete, the applicants' Advocate was supposed to attach a winding-up document to prove that the 2nd applicant no longer existed. However, in the records, there is no any document to prove that the Commercial Bank of Africa (TANZANIA) Ltd was not existing.

Moreover, the learned counsel for the respondent has proved that the 2nd applicant is in existence and still appears in court by its name; Commercial Bank of Africa (TANZANIA) Ltd. The learned counsel for the respondent attached documents to prove their complaints. I have gone through the said documents and the same proves that the transfer of names from Commercial Bank of Africa (TANZANIA) Ltd to NBCA Bank Tanzania Limited was not finalized and if it was finalized how comes the Commercial Bank of Africa (TANZANIA) Ltd was operating as an existent company.

The applicants' Advocate is also claiming that the BOT approved the applicants' request for a change of names. The record reveals that the BOT

through its letter dated 14th February, 2020 approved the applicants' request to mention a few; for NIC Bank Tanzania Limited to change its name and brand identity into NCBA Bank Tanzania Ltd and reorganization of the NCBA Group business in Tanzania with a view to operating one entity through the transfer of the business assets and liabilities of Commercial Bank of Africa (TANZANIA) Ltd to NCBA Bank Tanzania Limited. It is my respectful view that the BOT approval was subject to certain conditions; among them being to ensure the winding up of Commercial Bank of Africa (TANZANIA) Ltd is undertaken. As I have pointed out earlier, there is no any proof from the applicants that the winding up of Commercial Bank of Africa (Tanzania) Ltd was undertaken and Mr. Lupi did not mention the same in his submission. Therefore, I do believe that the BOT approval was subject to the conditions which were yet to be fulfilled by the applicants.

Regarding the ground of Board Resolution, I have to say that being a legal person, its affairs are entrusted in the hands of directors who always perform all company's activities on behalf of all shareholders. Therefore, as rightly stated by Mr. Benedict's that whichever takes place or is performed on behalf of the company has to be blessed by the directors through the directors' meetings. In this application, it is not disputed by both parties that the applicants did not attach the minutes of the board of directors to exhibit its

resolution that the company through its directors authorized the institution of the suit, or the instant application as well as the advocate taking the conduct of this suit to represent it in court. Section 147 (1) of the Companies Act, provides that:-

*"147.-(1) Anything which in the case of a company may be done –
(a) by resolution of the company in general meeting, or
(b) by resolution of a meeting of any class of members of the company, maybe done, without a meeting and without any previous notice being required, by resolution in writing signed by or on behalf of all the members of the company who at the date of the resolution would be entitled to attend and vote at such meeting..."*

In the case of **Bugere Coffee Growers Ltd v Sebaduka & Another** (1970) EA 147 which was cited in the cases of **Pita Kempap Ltd v Mohamed I.A. Abdulhussein**, (supra) it was held that: -

"When companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors meeting and recorded in the minutes..."

Applying the above provision of the law and authority in the instant application, there is no dispute that the applicants ought to prove that the

Board of Directors' resolution approved or passed the matter to be lodged in the court of the law. I am in accord with Mr. Lupi's submission that this ground was determined by this court. As pointed out by my learned sister Hon. Makani, J in her ruling that this objection required evidence to prove whether the board meeting was conducted and the resolution was passed.

The learned counsel for the respondent in his submission raised this ground while addressing why the applicants' application is short of merit. I fully subscribe to Mr. Benedict's submission that anything done by the company has to be done by resolution of the company, general meeting or meeting of any class of members of the company as provided under section 147 (1) of the Company Act, Cap. 202 [R.E 2002]. Therefore in my view, the fact that there is a board resolution authorizing the institution of proceedings then the same was required to be reflected in the applicants' pleadings.

From the above deliberation, I hold that applicants ought to have complied with the requirement section 147 (1) (a) and (b) of the Companies Act, No. 12, Cap. 212 [R.E 2002] by proving that the company board of directors' resolution authorized the institution of the instant application and appointed the advocate to prosecute the case.

In the upshot and for the foresaid reasons, cited law and authorities, I do hereby hold the instant application is incompetent and the same is struck out.

Each party has to bear his own costs.

Order accordingly.

DATED at Dar es Salaam this 24th November, 2021.





A.Z.MGEYEKWA

JUDGE

24.11.2021

Ruling delivered on 24th November, 2021 in the presence of Mr. Isack Lupi, learned counsel for the applicants and the respondent in person.




A.Z.MGEYEKWA

JUDGE

24.10.2021