IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND CASE APPLICATION No.701 OF 2020

NCBA BANK TANZANIA LIMITED ....1ST APPLICANT
COMMERCIAL BANK OF AFRICA....................2ND APPLICANT

VERSUS

PARTICK EDWARD MOSHI................................RESPONDENT

Date of Last Order: 18.10.2021
Date of Ruling: 25.10.2021

RULING

V.L. MAKANI, J

This ruling is in respect of the preliminary objections on points of law raised by the respondent as follows:

1. *That the application No. 701 of 2020 is overtaken by event and an afterthought seeking to revive Execution No.47 of 2018 whose order of execution is already granted since 28/09/2020 by SIMFUKWE, DR. Warrant of attachment issued, and Court Broker appointed to execute the Order in favour of the 2nd applicant.*

2. *That the 1st applicant is not a legal person and has no locus standi to institute this application in Court in absence of a certificate of incorporation of the 1st applicant.*

3. *The application is bad in law and fatally defective for want of board resolution authorizing LILIAN MNDEME to institute this application.*

4. *The application is premature in absence of winding up instrument of the 2nd applicant.*

5. *The application is fatally defective for being supported by an affidavit which has defective verification clause which does not describe facts in the knowledge of the deponent and matters of beliefs such as para 8 and 9 which are matters of belief/opinion.*

With leave of the court the objections were argued by way of written submissions. Mr. Benedict Bahati, Advocate drew and filed submissions on behalf of the respondent; while Mr. Thomas Sipemba, Advocate drew and filed submissions in reply on behalf of the applicants.

Submitting in support of the application Mr. Bahati said that the prayers sought to be granted to the 1st applicant are overtaken by event since the execution proceedings sought to be continued in the name of the 1st applicant in the place of the 2nd applicant is no longer pending in court since 28/09/2020 and the court issued a warrant of attachment against respondent and one Mr. EL MALIK ABOUD t/s SANTANA INVESTMENT LIMITED was appointed a Court Broker to execute the order. That only the report of the Court Broker is being

awaited in court. He said in such a situation the 1st applicant has no role to pray at this stage where only the report is being awaited to be submitted in the name of the 2nd applicant. He invited the court to take judicial notice of the existence of the execution order dated 28/09/2020.

On the 2nd point of objection, he said paragraph 8 of the affidavit clearly confirms that the 1st applicant is not yet born and yet to be vested with banking business, assets and liabilities of the 2nd applicant who is still into existence. He said that annexures are not evidence rather part of the pleadings. That they are merely informative of the intended merger which is yet to be completed. He said that looking from Annex NCBA1 and NCBA3 talk of the intended transfer of business or intended merger and not a completed business. He said that NCBA2 gives conditions for the intended merger or transfer of business, that there is nowhere the annexure talk of the completed merger. He said that had the merger been completed the 2nd applicant would not have on 28/09/2020 given instruction to Advocate Beatrice Soka to appear in court to execute the decree in the name of the 2nd applicant. That on 03/11/2020 the 2nd applicant would not have instructed East African Law Chambers to file a counter affidavit in

Misc. Land application No.579/2020. He said that under those circumstances it is evident that the 1st applicant is not a legal person and has no locus standi to institute this application in absence of the certification of incorporation evidencing her birth and cannot replace the 2nd applicant who still exists as evidenced by the pleadings.

On the third limb of objection Advocate Bahati said that, it is a settled law since 1916 that a company being a legal person cannot institute a suit in court unless there is clear authority of the company directors authorizing the advocate to institute the suit on behalf of the company. He relied on the case of **Milo Construction Company Limited vs. May Florence Mtetemela & Another;** In **Re: Milo Company Limited** or **Acaste Corporation Limited [2016] TLR 254** where he said the court observed among other things that, only the Board of Directors of a Company has the authority to instruct an advocate to institute legal proceedings for and on behalf of the company. He said that the 2nd applicant in this application is allegedly said dead and sought to be replaced by also a non-existing company which has not shown its existence than a mere intended existence. All these, he said, is happening because the suits were allowed in court without the authority from the Board of Directors of the

Company. He cited the case of **Raymond D'Souza And Another Vs Jane Philomena Babsa & 3 Others, Civil Case No.28 Of 2011 (HC-Arusha)** (unreported). He insisted that the application should be struck out.

On the fourth point of preliminary objection, that the application is premature in absence of winding up instrument of the 2nd applicant, Mr. Bahati prayed to adopt the submissions in the 2nd limb of preliminary objection. That the 2nd applicant being in existence was not justified to seek leave to replace the 1st applicant who still exists.

On the fifth limb of preliminary objection, Counsel said that the supporting affidavit has a defective verification clause which does not describe facts in the knowledge of the deponent and matters of beliefs such as para 8 and 9 which are matters of opinion. He relied in the case of **Peter Rwebangira vs. The Principal Secretary, Ministry of Defence & National Service & Attorney General, Civil Application No.548/04 Of 2018 (CAT)**(unreported). He prayed for the application to be struck.

In reply, Mr. Sipemba said that, the objection is improper before the court as Counsel for respondent did not cite any provisions of the law which has been contravened. He sought assistance from the case of **Mathias Ndyuki & 15 Others vs. Attorney General, Civil Application No.144 Of 2015**. He insisted that the 1st ,2nd 3rd and 4th points of preliminary objection raised by the respondent do not meet the established tests under the cited authority under the case of **Mukisa Biskuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696.** He added that the 1st ,2nd, 3rd, and 4th preliminary objections require some other material facts and evidence to prove them and therefore they should be dismissed.

Without prejudice to the above, Mr. Sipemba submitted on the 1st point of objection that, the facts stated by the respondent that the application has been overtaken by events need to be ascertained by evidence and are the facts that can be argued in the main application and not on preliminary objection. He insisted that those are not matters of law to support preliminary objection.

On the 2nd point of preliminary objection, Mr. Sipemba said that the respondent has misdirected himself by arguing that the 1st applicant

is not a legal person and has no locus standi to institute the present application in absence of Certificate of Incorporation. He said that this is not a point of law but rather points of facts which need proof and can be argued in determination of the main suit.

Replying to the 3rd point of preliminary objection that there is no Board Resolution authorizing Lilian Mndeme to institute this application and depone affidavit, Mr. Sipemba said that these are also points of facts which need to be ascertained with evidence and do not qualify as points of law. That Lilian Mndeme is not the one who instituted the suit and there is no requirement that a deponent need a Board Resolution before deponing affidavit. That the suit was filed by East Africa Law Chambers a firm instructed to represent the applicants and represent the 2nd respondent in the main suit and therefore there were no need of Board Resolution to represent applicants in the applications.

Replying to the 4th point of preliminary objection, that the application is premature in absence of the winding up instrument of the 2nd applicant, Counsel reiterated his previous submission that it does not

qualify to be preliminary points of objection as it based on facts which needs ascertainment.

Mr. Sipemba on the 5th point of preliminary objection that the supporting affidavit have defective verification clause said that, the respondent has not stated what he considers matters of belief or opinion. That in the complained paragraphs 8 and 9 there is no matters which are not on the knowledge of the deponent. The deponent being the Senior officer, Legal Services, was able and competent to depone on the facts of her own knowledge. Mr. Sipemba thus prayed for the preliminary objections to be overruled with costs.

In rejoinder Counsel for the respondent reiterated the main submissions and added that the requirement to cite the enabling provision under which a notice of preliminary objection is filed is only applicable in the Court of Appeal not the High Court and subordinate courts.

Having gone through submissions by the parties, the main is for consideration is whether the preliminary points of objection raised by the respondent have merit.

From the outset I wish to agree with the applicant's counsel that the 1st ,2nd, 3rd and 4th points of preliminary objection as raised by the respondent does not qualify to be points of preliminary objection. I am so guided by the case of **Mukisa Biscuits** (supra) where at page 701 it was stated:-

> *"A preliminary objection is in the nature of what said 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 the exercise of judicial discretion."*

The above authority is to the effect that preliminary points of objection must be purely points of law which does not attract evidence to prove the same. Now applying the said principle to the case at hand, it is clear that the 1st, 2nd 3rd and 4th points of preliminary objection requires evidence for ascertainment of the facts.

Starting with the 1st point of preliminary objection that the application has been overtaken by events, one needs to go through the documents pertaining to execution to establish whether this application has been overtaken by events. Going through documents or annexures amounts to ascertainment of facts and it is contrary to

what was laid down in the case cited of **Mukisa Biscuits** (supra). This point therefore has no merit.

On the 2nd point of preliminary objection that the 1st applicant has no legality of instituting this application, I am of the settled mind that the merger between the 1st and 2nd applicants can be witnessed by instruments and certificates. Counsel for the respondents submitted that the annexures do not talk of a complete merger. But when such annexures are mentioned, it means that evidence must be given to ascertain whether the merger between the 1st and the 2nd applicant has been completed. And one cannot ascertain the said merger in consideration of two annexures alone without the other annexures. Such kind of ascertainment deprive the point of its validity as a preliminary objection. In that way the 2nd point of preliminary objection does not qualify.

The 3rd preliminary point of objection is that there is no authorization from directors of the company for an advocate to institute an application on behalf of the company. To establish whether there is authorization, obviously Board Resolution of the directors must be in place. To find the same, perusal must be made to the annexures to

see whether the same has been appended. To that extent the principles of the case of **Mukisa Biscuits** (supra) would have been already watered down since it requires no ascertainment of the facts or proof by evidence. This ground too is not fit as a preliminary objection.

The 4th point of preliminary objection advanced by Mr. Bahati is that the application is premature. Counsel stated that, a winding up instrument must be in place. A complete winding up of the 2nd applicant must be established through a winding up instrument. This at any rate cannot be stated to be a purely point of law. Without much waste of the time this point too does not qualify to be preliminary point of law.

On the final point of preliminary objection that the application is defective for being supported by an affidavit which has a defective verification clause, Mr. Bahati said that the deponent did not state matters in his knowledge and matters of beliefs. He referred to paragraphs 8 and 9 of the supporting affidavit, stating that the said paragraphs contains matters of opinion. To easily resolve this issue, I wish to re produce the two paragraphs:

8. *That as the 1st applicant will become vested with the banking business, all the assets and the liabilities, it will be in the interest of justice and prudent disposal of the application and any applications arising from the application to grant the leave for the 1st applicant to continue the same in place of the 2nd applicant.*

9. *That it is in the interest of the justice that leave is granted to amend the parties to the application and any applications arising from the same to reflect the 1st applicant in the place of the 2nd applicant.*

Now, who is the deponent? As per the 1st paragraph of the supporting affidavit, Lilian Mndeme, the deponent of the complained affidavit is a Senior Legal Officer, Legal Services responsible for handling legal matters at the Company and is also in custody of the documents pertaining to the matter at hand. In essence paragraph 8 contain legal knowledge of the consequences of merger between the 1st and 2nd applicant and paragraph 9 speaks of the rationale of joining the 1st applicant in the application. All these are legal issues ought to be in the knowledge of any Legal Officer of a Company. They are simply matters of knowledge and not opinion. I therefore find no defect as regard to the verification clause by the deponent.

Basing on the foregoing, I am of the settled view that the preliminary objections raised by the respondents have no merit and are hereby overruled. Costs shall be the cause.

It is so ordered.

V.L. MAKANI
JUDGE
25/10/2021