

IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL CAUSE NO. 24 OF 2020

IN THE MATTER OF THE COMPANIES ACT, CAP 212 R.E 2002
IN THE MATTER OF RESTORATION OF COMPANY

BETWEEN

VOCACOM TANZANIA
FOUNDATION..... PETITIONER

VERSUS

THE REGISTRAR OF COMPANIES.....RESPONDENT

RULING

Date of last order: 28/8/2020

Date of Ruling: 12 /11/2020

NANGELA, J.;

This ruling is in respect of Preliminary objection on points of law taken by Ms. Pauline Mdendemi, State Attorney for the Respondent, against the competence of the *Commercial Cause No. 24 of 2020*, a case filed by way of petition under the provision of Section 400 A (1) (d) ,(4) (5) and (6) of the companies Act Cap 212 read together with written Laws (Miscellaneous amendments) (No 3) Act of 2019 part 11 and other enabling provision of the law , seeking for a declaration and an order that the petitioner be restored in the register to wind up its affairs.

Upon being served with the instant petition, the respondent filed a reply to the Petition disputing the granting of the prayers sought in the petition. Simultaneously, the learned counsel for respondent, filed preliminary objections challenging the

competence of *Misc. Commercial application No 24 of 2020* on four grounds, to wit, that:-

- (1) The petition is bad in law for being brought by non-existing applicant.
- (2) The petition is unattainable and bad in law as it has been overtaken by event.
- (3) The petition is bad in law for being brought under wrong provisions of the law.
- (4) The petitioner has no Cause of action against the respondent with.

On the basis on the four grounds of objection, the learned State Attorney for Respondent implored this Court to dismiss this Petition with costs.

It is perhaps worth, before delving to the nitty-gritty of the points raised by the Respondent, to narrate the facts pertaining to this petition, albeit in brief. The petitioner herein was a company limited by guarantee registered on 29th day of October, 2007. The Petitioner was issued with a registration Certificate No. 62770, to carry on business as Non-governmental organization under the law of Tanzania.

It is established facts that, the petitioner was a sole operator established as non-profit organization to carry on interior relief poverty and through Public donor funding organized via Vodacom Group of South African and Vodafone of the United Kingdom. It is a further established fact that on 11th September, 2019, the Registrar of Companies issued a public notice to the effect that, all companies limited by guarantee, not having shares capital, were struck off the register of companies by operation by the law from 1st September, 2019.

Following the public notice by the Registrar of Companies, the petitioner was not happy with its deregistration and, hence, on 30th April, 2020 lodged this Petition in this Court seeking for an order for restoration of the company in the register of the companies, so that it could properly wind up its affairs, in

particular to close the projects, retrench its staff, provide a report and account for donor funds.

It was therefore against that background that the learned State Attorney for Respondent lodged a reply to the Petition on 23rd June 2020 and, on 26th August 2020 filed additional notice of preliminary objection, hence this ruling.

On 26th August 2020 when this petition was called for its hearing, the learned counsel for petitioner drew the attention of the Court to the fact that they have been served with addition point of preliminary objection and prayed for time to prepare himself and requested the matter be heard by way of written submission, a prayer which the Court granted and made the following orders, that:

- (i) the Preliminary Objection be argued by way of written submission to be filed in the following order:-
 - (a) The Respondent to file their written submissions on or before 8th September, 2020
 - (b) The petitioner to file its written submission on or before 22nd September, 2020.
 - (c) Respondent to file their rejoinder submission (if any) by 28th September 2020.
- (ii) Ruling on 6th November, 2020.

The counsel for parties herein dutifully adhered to the above scheduled order of filing written submission for and against, paving way for this ruling. Let me record my thanks for their industrious input on this matter. I honestly commend them for their brilliant arguments made.

Submitting in support of the Preliminary Objection, counsel for the respondent contended that he will argue objection No 1 and No 2 of preliminary objection filed on 24th June, 2020 together as first round while the 3rd and 4th filed on 26th August, 2020 in the additional Notice of preliminary objection as ground two and three respectively.

As regards the first and second grounds of objection the learned counsel for respondent submitted that, this petition has

been brought by non-existing entity. Expounding on that point, he submitted that it is on the record that at the time the petitioner filed this instant petition herein, the Petitioner did no longer exist in the companies' register following de-registration by operation of the law.

He went on to submit that, orders sought by the petitioner in this petition have been overtaken by event. To strengthen his point counsel for respondent referred this Court to section 4 of the *Written Laws (Miscellaneous Amendment) (No 3) Act of 2019* "the Act" which amended section 2 of the companies Act, Cap 212 and section 6 of the Act which amended section 3 of the companies Act, Cap 212 by Adding section 3 A. It was the counsel for respondent's argument that, following the automatic deregistration of the petitioner there is no company limited by guarantee existing by the name of Vodacom Tanzania foundation in the companies register now or by the time of filing this petition.

Submitting further on the point, he submitted that, the petitioner was given two month's period from 30th June, 2019 to 30th August, 2019 to comply with the law but opted to file this petition in this Court on 30th April, 2020, when time had lapsed and hence, he does not exist. To cement his position, the counsel for the respondent cited the case of **Singida Sisal Production and General Supply V Rofal General Trading Limited & 4 others, Commercial Review No. 17 of 2017, Masswa Primo Vs Moulders (U) Limited Misc Application No. 685 of 2017 (unreported) Fort Hall Barkery Supply Company Vs Fredick Mnigai Wangoe (1959) EA 47.**

In those cases, the principle emphasized is that, a non existing person cannot sue, and, once the Court is made aware that the plaintiff is non- existent, and therefore incapable of maintaining and action, it cannot allow the action to proceed.

Furthermore, he submitted that, the registrar of companies is prohibited to maintain companies limited by guarantee which does not fall within the meaning of the company he referred this Court to the provision of Section 8 of the Act which amended Section 14 of the Companies Act Cap 212 by adding Section 6 of the Act.

According to respondent, this matter has already been overtaken by events and the petitioner cannot sue through its non-existing incorporation name. Supporting their position, the case of **Change Tanzania Limited Vs Registrar, Burness Registration and Licensing Agency Misc Commercial Case No. 27 of 2019 High Court Commercial Division** (Unreported) where the Court held that, "*being automatically deregistered by operation of the law and the fact that the petitioner cannot sue through Vodacom Tanzania Foundation is a non-existing incorporation name and the petition is inevitably taken by event*".

It was argued, therefore, that, following the amendment of the Companies Act, Cap 212 by the *Written Laws (Miscellaneous Amendments) No 3 Act of 2019*, the petitioner is a non existing entity and what is asking the Court to perform in the petition has been overtaken by event. He prayed, therefore, that, this Court be pleased to uphold the 1st ground of preliminary objection and the petition be dismissed with costs.

Submitting on the second point of preliminary objection, the counsel for respondent submitted that, the petition is untenable in law for being brought under the wrong provisions of the law. Expounding his point, the counsel for respondent submitted that, Section 10 of the Act which amended Section 400 of the companies Act, Cap 212 by adding Section 400 A (1) (a) – (e) provides circumstance under which the registrar of companies shall issue notice of his intention to strike company off the register.

Section 400 A (d) provides circumstance under which the registrar of companies shall issue a notice, is where he has a reasonable Cause to believe that by operation of the law, all shareholder or directors have been prohibited from entering the country.

According to the learned counsel for the respondent, the circumstance of the petitioner does not fall under the circumstances mentioned in section 400 A (d), the only remedy available to petitioner was to make an application to minister concerned for extension of time so as the company be restore and clear provision

is section 6 of the Act which amended Section 3 of the Companies Act, Cap 212 by Adding section 3A (3). Further on that point, the learned counsel for respondent submitted that, by the mere act of petitioner to file petition in this Court, it means the petitioner opted for a wrong forum, and, as a result, moved the Court with the provision which is not applicable to the circumstance.

To cement his position, the learned counsel for the Respondent cited the case of **Edward Bachwa and three others Vs Attorney General and Another Civil application No. 128 of 2006** (unreported), where the Court held that, wrong citation of enabling provision in moving the Court renders the application incompetent and liable be struck out. He, therefore, prayed to this Court to strike out with costs the instant petition for reasons advanced above.

Submitting on the last point of preliminary objection, counsel for respondent submitted that, the petitioner has not cause of action against respondent. According to the respondent counsel, the Respondent did not enact the law which by its operation deregister the petitioner from the register of the companies or did not make any decision which aggrieved the petitioner.

It was argued, therefore, that, failure to fit under section 4 of the Act does not give the petitioner cause of action against the respondent who is only enforcing the law. Based on that ground, the learned counsel for respondent submitted that, the whole claim is frivolous, vexatious and an abuse of judicial process, and, for that matter, this matter be dismissed with costs.

To strengthen his position counsel for respondent cited the case of **Mashando Game Fishing Lodge and 2 others Vs Board of Trustees of TANAPA (TLR) 2000 at pg 319-320**, where the Court stated that, *"the person is said to have Cause of action against another where that person has that right and the other person infringed that right with the result that a person with the right suffers material loss of any loss."*

In conclusion, the learned counsel for the respondent urged the Court to dismiss the matter with costs simply because, a non-existing petitioner does not have any Cause of action against a

respondent and hence the whole claim vexatious and an abuse of judicial process.

Responding to the written submission by the learned State Attorney for the Respondent, as summarized herein, the learned counsel for petitioner commenced by giving out a historical background of the petition, the petitioner's grievances to the registrar of the companies, and what the Court is asked do according to the laws applicable in the instant matter.

He submitted, concerning the 1st ground of the preliminary objection, that, the preliminary objection filed in this Court is not a point of law and cannot dispose the matter without first calling for further evidence. To strengthen his position, he cited the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 969**. It was submitted that, for an argument to be considered as a preliminary objection, it should be point of law patent from the pleadings which required no evidence and if argued dispose the suit.

Extending his submission further, he submitted that, the purported preliminary objection is a matter of mixed fact and law as it requires evidence to ascertain whether the petitioner ever existed as a company and whether a company once declared as deregistered is bad under section 400 A (4) from making application as what the petitioner did. For that reason, the petitioner contended that the preliminary objection raised is not a pure point of law.

Submitting on the point that the petition is untenable in law for being brought under the wrong provision of the law, the Petitioner submitted that, section 400A (4) of the *Written Laws (Miscellaneous Amendment) Act (No 3) Act of 2019* which amended the companies Act (Cap 212) is to the effect that, a company member or creditors of the company may move the Court for restoration of the company by way of an application within five years before the registrar of the company grant such company name to another company.

The learned counsel for petitioner went on to submit that, the respondent has failed to interpret the provision of the law by raising preliminary objection to the application since the application has been brought under the law that permits the petitioner to apply for restoration of the company within prescribe time and even the name of the company has not given to another company hence his application has not taken by event.

Extending his submission on the point, the learned counsel for the Petitioner urged the Court to use its inherent powers to do away with the technicalities raised by the respondent, he pressed the Court to refer the *Written laws (Miscellaneous Amendments) (No. 3) Act No 8 of 2018*. It was argued that, the sole purpose of substantive justice is to ensure and facilitate expedition and proportionate and affordable resolution to all matters.

It was further argued that, the Court should find that the preliminary objection raised will only taint and preclude justice instead of facilitating expeditious disposed of the matter. To cement his position cited the case of **Visibly Heard Openco Vs Tanzania Telecommunications Company Ltd misc Commercial application No 201 of 2018 (unreported)**, where the Court noted that the sole purpose of substantive justice is to ensure and facilitate the fast expeditious, proportionate and affordable resolution of all matter before the Court.

Submitting, on the point that, the petitioner has no cause of action against the respondent, the learned counsel for the petitioner took off by defining what amount to cause of action, citing as reference, the case of **Stanbic Finance Tanzania Ltd Vs Giuseppe Trupia and Claria Malavis (2002) TLR 221**. In that case, the Court defined a cause of caution, to mean as fact which gives a person a right to judicial redress or relief against another as found on the plaint ad annexures as the case may be.

Extending his submission further, the learned counsel for the Petitioner submitted that, it is the respondent who issued the public notice and if the respondent had not issued the notice, then the Petitioner would not have brought a claim against respondent.

More so, he submitted that, the decision of respondent to deregister the petitioner, is objectionable and hence the petitioner has a cause of action founded on that act.

Concluding his submission, the learned counsel for respondent urged the Court to dismiss the preliminary objections on the above reasons, arguing, in alternative, however, that, should the Court deem it fit to dismiss the preliminary objection then, it should grant an application for the following reasons:

One Section 400 A (4) (5) and 400 B gives Court power to make orders of restoration;

Two, the petitioner was unable to finalize a number of affairs before its untimely deregistration. So she pressed the Court to restore the company in the register so that she can finalize her unfinished business in the following region Pwani, Tabora, Mwanza, Dodoma, Mbeya, Lindi Rufiji and Kigoma.

On the totality of the above reasons, he urged the Court to exercise its discretionary powers and take into consideration the prayers of the petitioner and grant orders for restoration for the company so as to allow it to properly wind up affairs of the company and close various projects wider her watch.

In rejoining submission, the counsel for respondent reiterated his formal submission in chief and draws attention to the Court that, the counsel for petitioner has made submission on the merit of the petition contrary to the order which was not directed by the Court and therefore pressed the Court to disregard the said submission.

The counsel for petitioner went on to submit that the 1st point of objection is pure point of law and does not need evidence to establish whether petitioner does not exist, the wording of Section 4 of the Act are clear and loud that petitioner does not fall under the category of companies and therefore she was automatically deregistered by the law under Section 3 A (2) of the Companies Act Cap 212 as amended by Section 6 of the written

laws (Miscellaneous Amendment) No 3 Act 2019 and therefore the case of **Mukisa Biscuit (Supra)** is not applicable.

On the argument that the Court was not properly moved, it was the brief rejoinder of the counsel for respondent that, companies Act, Cap 212 as amended by section 10 of the Act can be invoked by an entity which is a company within the meaning of section 4 of the Act, so long as the petitioner is not a company under section 3A (1) and (2) of the companies Act Cap 212 as amended by section 6 ceases to exist as a company so is non-existing entity not capable to sue.

To further fortify his submission, he argued that, the circumstance which allows restoration in section 400 A (1) (a) (b) (c) (d) and (e) did not occur, so it was wrong for petitioner to invoke that provisions. Contesting the issue of overriding objective principle, it was the respondent counsel's submission that, failure by the petitioner to properly invoke the jurisdiction of this Court cannot be rescued under the umbrella of the overriding objective principle and, that, the case of **Visibly Heard Open (Supra)** cited by the Petitioner should be disregarded.

It was a further submission of respondent's counsel that, deregistration of the petitioner from the register of companies was not by the public notice, therefore the petitioner cannot have cause of action against the respondent. In view of the above submission, the learned counsel for respondent urged the Court to uphold the preliminary objection.

I have given due consideration to the rival submissions by the legal counsel for the parties and their respective stance. Having analyzed the submission made by both counsels, I have noted that, both counsel are in agreement that on 30th June, 2019, the *Written Laws (Miscellaneous Amended) (No 3) Act, 2019* amended the Companies Act, Cap 212. It is also not disputed that, Non Government Organizations (NGOs) were given two month's from 30th August, 2019 to comply with the requirement of the Law.

That being said, in my view, the bone of contention is **whether the preliminary objections are meritorious.** To respond

to the above issue, however, one has to examine the first objection in line with what the case of **Mukisa Biscuits (supra)** stated regarding a preliminary objection. The question to ask is: does the first issue fit within the precincts of what a preliminary objection should be? In Mukisa Biscuits case, the Court made it 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 what is sought is the exercise of judicial discretion.”

I have looked at the 1st ground of preliminary objection and, in my view; I will side with what has been stated by the learned counsel for the Applicant, that the 1st ground of preliminary objections is not purely based on matters of law which can bring the petition to an end. It is rather a matter of mixed facts and law. I hold that view because, looking at the objection, it is clear that there will be a need for further evidence to establish the fact that indeed the Petitioner was registered as a company and, one has as well to find out in what description was it registered in light of the definition given under section 3 of Companies Act, Cap.212.

In the case of **Karata Ernest & Others v Attorney General**, Civil Revision No.10 of 2010 (CAT) (unreported), the Court of Appeal further stated that:

“Where a point taken in objection is premised on issues of mixed facts and law, that point does not deserve consideration at all as a preliminary objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings.”

In view of that, I find that the issues raised here should be matters that are subject of discussion, not as preliminary issues, but as issues on the merits or otherwise of the application before me. That being the case, I hereby dismiss the first grounds of objection as being one calling for evidence or further scrutiny thus not befitting the so –called preliminary objection in its strict sense.

As regards the second ground, on wrong citation of the law, I also think that ground will likewise fail. The argument advanced by the learned State Attorney for the Respondent is that the Petitioner has cited a wrong provision of the law. The case of **Edward Bachwa & 3 others v Attorney General & Another, Civil Appl. No.128 Of 2006** (unreported) was relied on by the Respondent. The Petitioner has strongly refuted that view.

I have looked carefully at the petition. I am satisfied, in my view that, since the application is intended to "*seek for restoration order*" and the provision upon which it is premised allows for an application of that nature to be brought before the Court, then, the provision upon which the application based is an appropriate provision. Whether the Applicant qualifies to benefit from what the provision states is not an issue to be adjudged at a preliminary stage of this petition because it will need other justifications to be placed before the Court. That means such an issue is a matter which could or should be argued in the course of determining the merits of the application and not as a preliminary objection.

In view of the above, the Case of **Edward Bachwa & 3 others v Attorney General & Another, Civil Appl. No.128 Of 2006** (unreported) which was cited and relied upon by the Respondent is not a relevant case in the circumstance of this petition. That being said, I also dismiss the second objection in its entirety.

The last objection is that the Petitioner has no cause of action against the Respondent. Reliance was placed on the decision of this Court in **Mashando Game Fishing Lodge and 2 Others vs Board of Trustees of TANAPA [2002] TLR 319, 320**. It was argued that the Registrar of the Company did not make any decision which aggrieved the Petitioner.

It was contended further that, what was done by the Registrar was to only inform the members of the public concerning the amendments of the Companies Act, Cap. 212 and, thus, all what happened were under the operation of the law. The Applicant has challenged the Respondent's views stating that, the notice which deregistered the Applicant is what the Applicant is aggrieved with; hence, the preliminary objection should be dismissed.

In my view, this last point of objection cannot stand a chance of winning a day in court because I am far from being convinced that the objection has any merit. The reason I hold so is simple. If section 400-A (4) of the *Companies Act, Cap.212* provides for a possibility to make applications to the Court even after an aggrieved person is no longer in the register provided that the application is made within a prescribed period, that will mean that, a Respondent to such application will definitely be the Registrar of Companies.

In view of that, an objection based on lack of cause of action cannot be entertained. There will be a cause of action but whether the Petitioner's cause of action will win a day in court or not, that is completely a different issue best resolved if the parties are given full audience to argue their case. As such, the last point of objection cannot stand.

In the upshot, I find that, the Respondent's preliminary objections have no legal merit and I hereby proceed to overrule them. The parties are hereby ordered to proceed with the hearing of the merits of the Petition. I make no orders as to costs.



DEO JOHN NANGELA
JUDGE,

High Court of the United Republic of Tanzania (Commercial
Division)
12/11/2020

Ruling delivered on this 12th day of November 2020, in the presence of the Advocates for the Applicant and the Advocate for the Respondent.

Ms M.N. NTANDU
DEPUTY REGISTRAR,

High Court of the United Republic of Tanzania (Commercial
Division)
12/11/2020