

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 50 OF 2021

(Arising From Winding Up Cause No.18 of 2021)

AYMAN M. ALKHARAF.....APPLICANT

VERSUS

AYMANOUF SAFARIS LIMITED.....1ST RESPONDENT

YUSUPH RASHID KAZI.....2ND RESPONDENT

RULING OF THE COURT

K.T.R, MTEULE J.

18th October 2021 & 12th December 2021.

This ruling is in respect of **Points of Preliminary Objections** raised by the advocate for the Respondents Mr. Dickson Matata that this Court has been wrongly moved for non-citation of the enabling provision of the law.

Under Section 68 (c) and (e) and Order XXXII Rule 1 (a) of the Civil Procedure Code, Cap 33 of R. E 2019, applicant **AYMAN M. ALKHARAF** filed this Chamber Summons under certificate of urgency seeking for an interim injunction to restrain the Respondents or their agents or her workmen from entering the company premises (offices) pending the



hearing and determination of this main cause inter-parties. I further seek for an Order for interim injunction to restrain the 2nd Respondent from dealing in any manner whatsoever or disposing the assets of company including Motor vehicles registered in the name of the IS Respondent T744 ACG, T 954 AJE, T 169 APA, T952 ATM, T 556 BCJ, T880 BSN, T 444 AQQ, 10 big camping Tents, 2 big generators. camping beds and mattresses, 1 small generator, catering vessels, 2 Solar systems and batteries pending the hearing and determination of this Application inter-parties. On 11th July 2021 a Notice of the Preliminary Objection was filed to challenge the citation of the provision under which the application is brought.

This preliminary objection was argued by a way of written submissions. The respondents' written submissions, the applicant's reply to submissions and the respondents' rejoinder were all filed accordingly. The applicant was enjoying the legal services of the learned advocate **Deus Richard**, while on the other side (Respondent) was represented by advocate **Dickson Matata**.

In the Respondents' submissions, **Mr. Dickson Matata** submitted that this application being preferred under **Section 68 (c) and (e) together with Order XXXVII Rule 1(a) of the Civil Procedure Code, Cap 33**



of 2019 R.E (CPC) the court is wrongly moved because petitions for winding up are governed by the Companies Act, Cap. 212 together with Companies Act (Insolvency) Rules. That section 282(1) of CAP 212 vests this court with powers to make the interim orders pending the hearing of the petition for winding up. That section 284 of cap 212 includes the list of actions and deeds in which such interim orders can be made pending determination of a winding petition.

To put more emphasizes on his argument Mr. **Dickson Matata** cited the Case of **Chongqing Lifan Industry (Group) Impo & Exp Co. Ltd vs. M/S I&M Bank Tanzania Limited, Miscellaneous Civil Application No. 386 of 2019** extensively quoting the words of the court which in summary addressed the application of **Section 281 of Cap 212**.

Mr. Dickson Matata continued to submit on the outcomes of the situation when the court is not moved properly. He referred the cases of **Pacific Diagnostics Limited Vs. Buraflex Limited Formely Known as Ametaa Limited & 3 Others Miscellaneous, High Court DSM, Civil Application No. 269 Of 2019**. He further referred to the case of **China Henan International Co-operation Group vs. Salvand K.A Rwegasira (2006) TLR 220** where it was held; -



"The omission in citing proper provision of the rule relating to reference or citing a wrong or in applicable rule in support of the application is not in our view fall in technicality falling within the scope and purview of Article 107a (2)(e) of the constitution it is matter which goes to a very root of the matter".

Mr. Dickson Matata concluded by submitting that this application has no leg to stand, it is supposed to be strike out.

In rebuttal Mr. **Deus Richard** submitted that by looking at the wording of section 68(c) and (e) and order XXXVII rule (1) (a) of the CPC, this court is moved properly. According to him, submission which were made by the respondent's advocate was based on the wrong perception that all suits related to companies are to be conducted under the companies Act.

Mr. Deus Richard continued to submit that the proceedings in this court are guided by the High Court (Commercial Division) Procedure Rules of 2012. That the court rules provide for a permission to use the **civil procedure code** in case of a lacuna according to rule 2(2). According to him, section 282 and 284 of the Companies Act do not fit the circumstances in this case. In his view the expression given by the respondent fits in the case of **Chongqing Lifan industries (supra)** though he was not served with the copy of the case.

Mr. Deus Richard admitted that section 282 and section 284 of the Company's act can be used as enabling provisions though he is of another view that there is no limitation to the use of section 68 (c) and (e) and order XXXVII rule 1 (a) of the CPC as enabling provisions. He supported his view by citing the decision of this court in **Maxcom Africa Limited Vs UDA Rapid Transport Plc Commercial Application No.97 Of 2018 (Un Reported)**.

The applicant concludes by submitting that a petition for winding up is a normal civil suit like other suits as provided under section 68(c) and (e) and order XXXVII rule 1 (a) of CPC. He was of the view that the preliminary point of objection by the respondent is misplaced and without merit. He therefore prayed for the preliminary Objection to be dismissed with costs.

In **rejoinder**, the respondent challenged the reply submission for being presented out of time and proposed that the same should be disregarded by the court.

On the other line of argument, assuming that the reply was filed timely, the respondent submitted that the application lacks the legal basis as the applicant notion that ***a winding up cause is a normal civil cause*** is unfounded.



The Respondent cited the case of **Abraham Paul Mawele vs. Khadija Godfrey Nkya, Misc. Land Application No.72 of 2018** where it was held thus: -

Since there is a specific provision of the law, the provision cited in Chamber summons does not suffice to be termed specific as far as the applicant's application for extension of time to lodge an appeal to the High court is concerned. Therefore, it was wrong for the applicant to use section 14(1) of the law of limitation while there is a specific provision granting the required reliefs under the land disputes courts act".

The respondent continues to reiterate his submission that it is a trite law that citing a wrong provision of the law has an effect of rendering the application before the court incompetent. He cited more **authorities** to wit namely; **TanESCO & 5 others vs. IPTL, Consolidated Civil Application Number 19 & 27 Of 1999- CAT- Dsm (Unreported), Aero Helicopters Limited (T) Ltd V Fn Jansen [1990] T.L.R. 142 and Aloyce Tesha V. Anitha Tesha, Civil Appeal No. 10 Of 2003 CAT (Unreported) and Tanza Coal East Africa Mining Limited Minister For Energy And Minerals [2016] TLR 152.**



The respondent submitted that the applications in the above cited cases were declared incompetent for want of proper citation of enabling provision of the law. He prayed for the court to strike out this application for the improper citation of the law.

In order to determine the Preliminary Points of Objections the court formulated following issues;

- (1) Whether reply submissions were filed out of time set out in the court scheduling order.
- (2) Whether the applicant cited wrong provision of Law to move the court.
- (3) What are the relief to the parties?

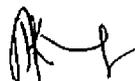
To start with issue number one as to whether reply submissions were filed out of time set out in the court scheduling order, I have gone through court record to find out on the status of Applicant's compliance to the scheduling orders. As per the court records, the Applicant was supposed to file his submission on 13 September 2021. Instead, the submissions were filed on 14 September 2021, one day after the due date without the leave of the court. This answers the issue that the applicant's reply submissions were filed out of time.

On issue number two as to **whether the applicant cited wrong provision of Law to move the court**, it is not disputed that the applicant used order XXXVII and Section 68 of the CPC to lodge this

 7

application. In respondent's view, while the subject matter in question was solely based on the issues of Companies Act there are specific provisions of the Companies Act which govern the matters. I could not agree with the Applicant that there is a lacuna allowable by Rule 2 (2) of the High Court Commercial Division Procedure Rules to the provision of the CPC. In our circumstances in my view, there is **no lacuna** because Sections 281 and 284 of the Companies Act provide specific procedure for matters covered under the Companies Act. I am inclined to the Respondent's position which is supported by the cited authorities that when there is a specific provision of law to guide a certain procedure, that provision must be complied with, and it leaves no room to apply other general procedure. The applicant cannot say that there is a lacuna for a matter which has a specific provision of law. From the foregoing, I am of the view that the applicant has not moved this court properly. Up to this juncture the second issue is answered in affirmative.

Having found both issues answered affirmatively, the last issue is on the reliefs to the parties. To start with noncompliance with court schedules, this renders the lately filed submission to be regarded as it has never been filed in court and it is supposed to be disregarded. There are several authorities to such effect one being the case of **Shaban Amuri Sudi (The**



Administrator of the Estate of the Late Amuri Sudi) vs. Kazumari Hamis Mpala, in Misc. Land Application Number 30 Of 2019.

Furthermore, it is a trite law that citing wrong provision of the law renders the application before the court incompetent. (See **Miscellaneous Civil Application No. 269 of 2019 Between Pacific Diagnostics Limited Vs. Buraflex Limited Known as Ametaa Limited & 3 Others** page 6.

Having found that citing the wrong provision of the law has an effect of rendering the application incompetent, and that late filing of reply submission renders the same as it has never been filed making the Preliminary objection as unopposed, I hereby uphold the Preliminary Objection. Consequently, this Application is struck out with costs.

Dated at Dar Es Salaam this 10th Day of December 2021



A handwritten signature in blue ink, appearing to be "K. Revocati Mteule".

KATARINA T. REVOCATI MTEULE

JUDGE

10/12/2021