IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. CIVIL APPLICATION NO. 14 OF 2023

(Arising from Taxation Cause No. 02 of 2020, Originating from Civil Appeal No. 54 of 2020 before the High Court of Tanzania at Musoma)

BETWEEN

KAYOLA GENERAL SUPPLY ..... APPLICANT

VERSUS

OLYMPUS EDUCARE LTD ..... 1ST RESPONDENT

VICTORIA KIHOGO ..... 2ND RESPONDENT

RULING

04th & 12th September, 2023

M. L. KOMBA, J.:

In brief, the applicant in this case is a company which dealing with, among other thing, selling of school equipment. And it appeared that, on behalf of the first respondent, the second respondent being the Director of the first respondent, lend and received the laboratory equipment from the appellant. The said laboratory equipment's loan was not paid to the applicant in due time as per their agreed terms.

Following the 1st respondent's loan default, it triggered the applicant to institute the Civil Suit against her before Musoma Urban Primary Court (Civil Case No. 492 of 2018). Subsequent to the Civil Case No. 492 of 2018, there emerged a sequence of different cases but it all ended up in

favor of the applicant. One among the cases filed in the cause, is Taxation Cause No. 2 of 2020 which ruled out the first respondent to pay the applicant a total sum of Tshs. 2,160,000/= as bill of costs the applicant incurred. The said ruling was delivered on 21st July, 2020.

Failure to obtain the said amount ordered from the respondents up to date, the applicant has now lodged the present application seeking for the following orders;

1. *The Honourable court be pleased to lift the veil of incorporation and see that the 2nd respondent being a Director of the 1st respondent, has refused or neglected to pay Tshs. 2,160,000/= taxed by the taxing master on 21/07/2020 in Taxation Cause No. 2/2020, and therefore the court find the 2nd respondent liable to be sent to prison as a civil prisoner.*
2. *The second respondent be ordered to pay costs incurred by the applicant in the process of this application.*

The applicant brought this application by way of a chamber summons premised under section 481 (1) of the Companies Act, No. 12 of 2002, section 95, Order XXI Rule 9 and 28 of the Civil Procedure Code, Cap 33 [R. E 2019]. The chamber summons is supported by an affidavit

deponed by Ching'oro Sambu Ching'oro, Executive Director of the applicant.

In contesting the application, the respondents filed a counter affidavit deponed by the second respondent. Together with, the respondents filed a notice of preliminary objection with four (4) points to the effect that;

1. *The application is incompetent for being preferred under wrong provisions of law.*
2. *The application is incompetent for being omnibus application.*
3. *The application is incompetent for being filed in the non-existing registry of the High Court of Tanzania.*
4. *The legality of the applicant to file this application is at stake as the applicant is not a legal entity capable of suing.*

As the matter of custom and procedure, the preliminary objection whenever filed, it has to be determined first before advancing into the merit of the case. See **Deonesia Onesmo Muyoga & 4 Others vs Emmanuel Jumanne Luhahula,** Civil Appeal No. 219 of 2020 CAT at Tabora.

When the case was placed for hearing of the preliminary objection, the applicant was represented by Mr. Amos Wilson while on the other hand

the respondents enjoyed the service of Mr. Daudi Mahemba, both learned advocates.

Mr. Mahemba when took the floor to expound on the points of the preliminary objection filed, he submitted that the provisions used to move this court in the present application are not relevant. He proceeded that, in chamber summons filed by the applicant she prayed to lift a corporate vail and find the second respondent guilty and commit her to a civil prisoner. The counsel argued that section 148 (1) of the Companies Act and section 95 read together with Order XXI Rule 28 of the Civil Procedure Code does not deal with lifting vail and committal to a civil prisoner. Mr. Mahemba prayed the court to find the application is incompetent on this point.

As regard to the second point of objection, the respondents' counsel submitted that the application is omnibus as it comprises two distinct prayers. The counsel proceeded that the application has the prayer of (i) lifting corporate vail and (ii) to convict the 2nd respondent as a civil prisoner. Mr. Mahemba argued that the two issues were not supposed to be filed on the same application bearing in mind that the second respondent is not a sole director of the first respondent. The counsel

was of the opinion that the applicant was supposed to file the application of lifting a corporate vail first.

As to the third point of objection, the respondents' counsel explained that the application has been filed in non-existing High Court Registry. The counsel averred that the applicant filed his application in High Court Musoma District Registry contrary to GN. No. 638 of 2021 which amended rule 5 which substituted rule 2 to read the first schedule does not have registry called District Registry but High Court has Sub Registry.

In last point of preliminary objection, the respondents' counsel submitted that there is nowhere in application the applicant has introduced himself as a natural person or a company which has mandate to sue and be sued. He added further, the application has not been supported by the document showing if the applicant is registered under the laws of the land and that the director who swear in affidavit does not explain further.

The counsel argued that parties are bound by their won pleading. He stated that the affidavit does show the deponent is the director of which company. He also added that there is no board of resolution which directed the matter to be filed in court. The counsel was of the views

that the court should not assume the capacity of the applicant unless he explains himself in the affidavit. Being submitted that, the respondents' counsel prayed the application to be dismissed with costs.

Responding, the applicant's counsel, Mr. Wilson started first to register his opinion that the position is that every point of objection the respondents filed, has to point section of law which has been contradicted, that's why it called objection on point of law. The counsel was of the views that even the court will not know which section has been violated. He bolstered his submission with the case of **Mathias Ndyuki & 15 Others vs. Attorney General,** Civil Appeal No. 144 of 2015 CAT at page 3.

Responding to the first point of preliminary objection, the applicant's counsel submitted that the provisions cited in the application is proper to move this court as it allow the court to grant what has been prayed. Mr. Wilson proceeded that, Mr. Mahemba did not mention which provisions are correct and supposed to be cited. He added that in our laws there is no specific section which provide the court with mandate to lift vail apart from section 95 of the Civil Procedure Code which gives this court inherent power. Referring to the decision of this court in the case of **Alliance Tobacco & Another vs. Mwajuma Hamis & Another,**

Misc. Civil Application No. 803 of 2018, the counsel was of the opinion that if the section is wrongly cited the same can be cured by the principle of Overriding Objective. He also cited the case of **Jaffari Mwangi Kamukulu vs. Innocent Thadeo,** Misc. Land Application No. 52 of 2022 at page 7.

Regarding the second point of objection, Mr. Wilson submitted that the prayer to lift vail and found the second respondent liable are related to each other and the position is that the interrelated application is allowed to be joined so far as they are related. Referring to the case of **Hassan Mohamed Matagalu vs Amina Nassoro,** Land Revision No. 20 of 2020, the counsel was of the opinion that prayers must be interrelated or interlinked and in the application at hand the prayers are interlinked.

The applicant's counsel prayed this court to be inspired by the decision of this court in the case of **Fah Construction Company Ltd vs. Atlas Mark (T) and Others,** Misc. Communication Application No. 154 of 2020 at page 11 where the court decided to lift vail and found the director liable to execute court decree and order him if failed to be a civil prisoner.

Concerning the third point of non-existing registry, Mr. Wilson submitted that the respondents' counsel misinterpreted the rules. He argued

further that although the rules that established High Court Registries has been amended but they as still party of the main rules of 1971. The counsel proceeded that the respondents' counsel cited the rules of 2021 but he has read the rules of 2022 and of 1971 and found that the law recognized main registry which is in Dar es salaam and other registries which are called with different names. He further argued that if the problem is the word District, he doesn't find the said word remove the court power. The counsel insist that the remedy can be to remove that word and insert the right word.

As to the fourth point about the applicant's legal capacity, Mr. Wilson submitted that the said point does not qualify to be a point of law. He proceeded that the said point need evidence and that he is supposed to bring the evidence to prove the same. Mr. Wilson contended that, although the preliminary objection can be raised at any stage, and the fact that the respondents failed to bring the issue at the previous stages of this case, this point is not qualified. The counsel argued that the preliminary objection has no any merit rather than to buy time of the court, he prayed the same to be dismissed without costs as the applicant claiming a lot of money to respondents and not yet paid.

In rejoinder, the respondents' counsel reiterated what is submitted in chief and added further that failure to cite proper provision of law cannot be corrected by hand.

Having heard the rivals' submissions of the counsel from both parties, now it is my time to determine whether the preliminary objection filed by the respondents has merit. I will analyze the points of preliminary objection advanced by the respondents in disarray.

I will start with the last point of preliminary objection that the applicant is not a legal entity capable of suing. Before I embark to analyze the said point into details, I would prefer first to explain what constitute to a Preliminary Objection.

In the Landmark case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696 it defines what a preliminary objection and prescribes when it can be raised. It is noteworthy that, the preliminary objection cannot be raised if any fact has to be ascertained. The relevant extract reads: -

> *'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 if what is sought is the exercise of judicial discretion'.*

In the case of **Selcom Gaming Limited vs. Gaming Management (T) Limited & Gaming Board of Tanzania,** Civil Application No. 175 of 2005, (unreported), the Court observed that: -

> *"A preliminary objection is in the nature of a legal objection* ***not based on the merits or facts of the case, but on stated legal, procedural or technical grounds. Any alleged Irregularity, defect or default must be apparent on the face of the application."***

In the case of **Shahida Abdul Hassanali Kasam vs. Mahed Mohamed Gulamali Kanji,** Civil Application. No. 42 of 1999 (unreported) the Court held as herein quoted: -

> *"The aim of a preliminary objection* ***is to save time of the court and of the parties by not going into the merit of an application because there is a point of law that will dispose of the matter summarily."***

Thus, a preliminary objection must first raise a point of law based on ascertained facts and not on evidence. Back to our present case, is this fourth point qualified to be a preliminary objection? My answer is no. As rightly argued by the applicant's counsel this point need evidence to prove that the applicant has no legal capacity to institute a case.

Nevertheless, I wonder if this is the case, why from the beginning since the parties' battle entered in the court's room the respondents did not raise this crucial issue. I find this point has no merit and I dismiss it.

I now moved to the third point of objection. The respondents contended that the applicant is incompetent for being filed in the non-existing registry of the High Court of Tanzania, that is **District registry**. The respondents' counsel was of the opinion that the correct registry is supposed to be titled **Sub – registry**. I am not disputing the respondents' counsel averment, neither I am not faulting the applicant's application.

It is correct as submitted by the respondents' counsel that rule 2 of GN. No 638 of 2021 (High Court Registries (Amendment) Rules) deleted rule 5 of the principal Rules and substitute it the following:

> *'In addition to the Main Registry at Dar es Salaam, there shall be a High Court sub-registry at such places and for such areas as are set out in the Schedule to these Rules.'*

Rule 5 of the High Court Registries Rules, 1971 (principal Rules) state that:

> *'In addition to the Registry at Dar es Salaam there shall be a District Registry at such places and for such areas as*

are set out in the Schedule to these Rules or as may hereafter be set out under the provisions of rule 6.'

Yet again, rule 1 of GN. No 638 of 2021 read as follows:

'These Rules may be cited as the High Court Registries (Amendment) Rules, 2021 and ***shall be read as one with the High Court Registries Rules, hereinafter referred to as the "principal Rules".'***

From the above cited provisions, it is my opinion that since rule 5 of the principal Rules was never repealed and rule 1 of GN. No. 638 of 2021 state that the rules shall be read as one with principal Rules, thus the person who decided to prefer rule 5 of the principal Rules might also be correct.

Rule 2 of GN. No. 638 of 2021 only provide for deletion of rule 5 of principal Rules not repealing. To my opinion, there is huge difference between deleting and repealing as it was held in Indian Case of **Navrangpura Gam Dharmada Milkat Trust vs. Rmtuji Ramaji,** AIR 1994 Guj 75 case, which it decided that

'... 'Repeal' of provision is different from 'deletion' of provision. 'Repeal' ordinarily brings about complete obliteration (abolition) of the provision as if it never existed, thereby affecting all incoherent rights and all causes of action related to the 'repealed' provision while

'deletion' ordinarily takes effect from the date of legislature affecting the said deletion, ***never to effect total*** *effecting or wiping out of the provision as if it never existed.'*

However, if the issue is persistence, I find it is minor to invoke section 3A of the Civil Procedure Code as it was rightly submitted by the applicant's counsel.

Now I jump to the first point of preliminary objection. The respondents' counsel argue that the present application is incompetent for being preferred under wrong provisions of the law. The applicant's counsel denied and contended that the preferred provisions are correct and if not, the respondents' counsel failed to mention the right one.

On this point, I joined hands with the applicant's counsel that since there is no specific provision regarding the kind of present application, the provisions he cited are correct ones, and if not, the respondents' counsel could have mentioned the right provisions not a merely words.

Lastly, am moving to the second point of preliminary objection which is to the effect that the present application is omnibus application. It is the respondents' counsel contention that the application at hand consisting of two distinct prayers, that are, **one**; lifting veil of incorporation and **two**; find the second respondent liable to be sent to prison as a civil

prisoner. The applicant's counsel contest and averred that the two prayers are interrelated and the High Court once allow the same application.

Hon. Mruma, J in **UDA Rapid Transit Public Limited Company and Shirika la Usafiri Dar es Salaam Limited vs. DAR Rapid Transit Agency,** Misc. Commercial Application Cause No. 81 of 2018, defined omnibus application as follows;

> *"Omnibus application entails two district applications which are made in one application".*

Further in the case of **Mohamed Salimin vs. Jumanne Omary Mapesa,** Civil Application No. 103 of 2014- CAT, it was held that:

> *'As it is, the application is omnibus for combining two or more unrelated applications. As this court has held for time(s) without numbers an Omnibus application, renders the application incompetent and is liable to be struck out'.*

In the present application the applicant sought this court to;

(a) *lift the veil of incorporation and see the 2nd respondent being the Director of the 1st respondent has refused or neglected pay Tshs. 2,160,000/= taxed in Taxation Cause No. 2 of 2020*

(b) *and find the 2nd respondent liable to be sent to prison as the civil prisoner.*

In my point of view, these are two applications though related, are not supposed to be in one application as is in the case at hand. Why am I saying so. After lifting the corporate veil, 2nd respondent has to be ordered to settle the debt first and upon failure, then she may be committed to prison if requested.

I am at per with the respondents' submission though in a different approach that the applicant was supposed to seek the order of lifting veil first and then she could have filed an application to commit the 2nd respondent to a civil prisoner if she failed to pay the claimed amount in anyhow. My point is, failure to settle the claimed amount must be vivid.

The case of **Fah Construction Company Limited (supra)** referred by the respondents' counsel is distinguishable with the application at hand. In the said case, the applicant prayed for the following orders; **first,** the court to lift a veil of incorporation and **second,** the **2nd and 3rd respondents to satisfy Tzs. 303,000,000 issued against the 1st respondent, failure of which be arrested and committed as civil prisoners.**

Unlike our present application, in the **Far Construction Case (supra)** the applicant prayed the civil prisoner order in alternative of failure by

the 2nd and 3rd respondents to satisfy the debt issued against the 1st respondent. And the court granted the same.

In the present application, the applicant seeks this court to lift the veil and find the 2nd respondent refused and neglected to satisfy the applicant debt and then commit her to civil prison. I find these prayers are not worthy to be entertained in the same application as the 2nd respondent will be infringed her rights to be heard on payment of existing debt before she is committed to prison.

That said, I find the second point of preliminary objection is meritorious. I consequently sustain it and struck out the application for being omnibus and therefore bad in law. I make no order as to costs.

It is accordingly ordered.

DATED at **MUSOMA** this 12th day of September 2023.

M. L. KOMBA

JUDGE