

TANZANIA / JUDGMENT

# 20110906 TZHC Dar es Salaam

COURT  
TZHCDECIDED  
6 September 2011

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM  
MISCELLANEOUS CIVIL CAUSE NO. 16 OF 2011 : ST

1. DHOW MERCANTILE EAST AFRICA LTD . ..... 1 PLAINTIFF
2. YOHANA H. NYAKIBARI ..... 2ND PLAINTIFF
3. GULAMALI SHAH BOKHARI ..... 3RD PLAINTIFF VERSUS
1. YUSUPH N. MULLA ..... 1 ~ DEFENDANT
2. NAWAB ABDULRAHIM MULLA ..... 2ND DEFENDANT Date of submissions:  
16/06/2011 Date of Ruling: 06/09/2011 ,

## RULING

F. Twaib, J: According to the Complaint, the Plaintiffs' principal claim against the Defendants jointly and severally is for "a permanent injunction restraining the 1st and 2nd Defendants, their agents and successors in title from\_ dealing in any way with the property known as Farm No. 4 Mlarigali Area, Njombe, Iringa, registered under Certificate of Title No. 4159." In their Written Statement of Defence, the defendants have raised three points of preliminary objection, on the basis of which they prayed that the suit be struck out with costs. They are:

- i) That to the extent that the main object by the Plaintiffs in this suit is to challenge the directorships of the Defendants in the 1st Plaintiff company whose 98% shares therein are owned by the defendants' company Lushoto Tea Company Ltd., the suit-is res Judicata. ii) That to the extent that the 1st Plaintiff company filed this suit without the resolution of the Board of Directors of the said company of whom the Defendants are Director and Chairman respectively, representing the majority shareholder, Lushoto Tea Company Ltd. with 98% of the shares, the suit is incompetent. iii) That the suit does not disclose any cause of action against the Defendants. By corisent of both parties, I ordered that the preliminary objections be disposed of by way of written submissions, which order Counsels duly complied with. This ruling is in respect of the said preliminary objections. Arguing in support of the first point of preliminary objection, Mr. George Kilindu, Counsel for the Defendants, submitted that the issue relating to the shareholding structure of the 1st Plaintiff company was finally and conclusively determined in Commercial Case No. 62 of 2003 between \_ Dhow Mercantile

(E.A.) Ltd., Yohana. Hilarius Nyakibari and Gulamali Shah Bokhari v. The Registrar of Companies, Lushoto Tea Company Ltd., Abdirazzak S. Tuke, Nawab Abudlrahim Mulla and Yusuf N. Mulla. The decision in that case is reported in Tanzania Commercial . r Courts Manual-Report Volume 1, 2003 at p. 39; Mr. Kilindu informed the Court that the first issue framed in that case was: • Page 2 of 12 "Whether the 3rd , 4th and 5th Defendants' directorships and 2nd and 3rd Defendant's shareholding in 1st Plaintiff company were obtained fraudulently." j The Commercial Division of this Court (per Kalegeya, J., as he then was) decided this issue as follows: "In conclusion ... the alleged fraud and illegality having not been established and there being evidence clearly proving the intention of the parties on 1st Plaintiff's directorships and shareholding by the Defendants, the first issue is answered negatively. The declaratory orders and damages sought cannot be awarded." The Plaintiffs in this case were also Plaintiffs in the previous case (hereinafter called the 2003 case), while the Defendants in this case were the 4th and 5th Defendants in that case. Mr. Kilindu argued that the principal parties in both cases are the same, notwithstanding the fact that in the earlier case there were three other Defendants. Indeed, " , all the parties in the present case were parties in that case. The thrust of Mr. Kilindu's argument, therefore, is that since the issue relating • to the. genuineness or otherwise of the shareholding structure of the 1st Plaintiff company was finally and conclusively determined in the 2003 case, raising those issues once again in this suit is barred by the principle of• res judicata. In addition, Mr. Kilindu referred the Court to Civil Case No. 8 of 2008 (High Court, Iringa). This suit was filed by the Plaintiffs herein against the 2nd Defendant. This Court (Mkuye, J.) dismissed the suit on grounds of res judicata, after finding that the issue raised therein (i.e., the genuineness or otherwise of the shareholding structure of the 1st Plaintiff company) had been finally and conclusively determined in the 2003 Case. Mr. Kilindu Page 3 of 12 further• cited the holding of the Court of Appeal in Lotta v Tanaki & Ors [2003]2 EA 556, where it was held: The doctrine of resjudicata is provided for in Order IX of the Civil Procedure Code of. 1966. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a Court of competent jurisdiction in the subject matter of the suit. The Court of Appeal thus reiterated the rule that five conditions must co- exist in order for res judicata to apply:

- i. The matter directly and substantially in issue. in the subsequent suit must have been directly and substantially in issue of the former suit; - ii. The former suit must have been .between the same parties or privies claiming under them; iii. The parties must have been litigating under the same title in the former suit; iv. The Court which decided the former suit must have been .competent to \_try it; and
- v. The matter in issue must have been heard and finally decided in• the former suit; It is Mr. .... Kilindu's contention that all • the above conditions have been satisfied in the present case. He further contends that• the . Plaintiffs' attempt in both Commercial Case No. 62 of 2003 as well as in Civil Case No. 8 of 2008 to appeal to the Court of Appeal did not succeed. Page 4 of 12 , ' ..1 In response to these submissions, Counsel Respicious Didace for the Plaintiffs argued that the Defendants' objection offends the rule in Mukisa ~iscuit

Manufacturing Co. Ltd. v West End Distributors Ltd. [1969] .... " . 1 EA 696. He argued that this is a matter concerning land, and does not seek to determine the shareholding structure of the 1st Plaintiff company as Mr. Kilindu argued. He submitted that the dispute herein centres on the Defendants' intended acts of disposing the suit property by way of sale or mortgage, something not acceptable to the Plaintiffs. Quoting paragraph 13 of the Complaint, Mr. Didace said that the allegations contained therein can only be resolved by evidence and they have never been subject to any previous litigation between the same parties. On the shareholding structure of the 1st Plaintiff company, Counsel Didace did not dispute the fact that that issue was dealt with in the 2003 Case. However, he quoted a statement appearing on page 117 of the case report and submitted that the Court in that case left so many issues open and advised the parties to try to resolve them. Those matters may be litigated upon and would need evidence to resolve. For these reasons, counsel argued, res judicata cannot apply to the present case. I partly agree with Mr. Didace on this point. It is true that the decision in the 2003 Case did leave a number of things open for discussion and agreement between the parties, and that these matters could form the bases for subsequent litigation. However, I think it is also true to say that the issues as to the legality of the shares of the 1st Plaintiff company and, consequently, the directorships of the Defendants in the 1st Plaintiff company, were at issue in the former case and were finally and conclusively determined. That much is not disputed by Counsel for the Plaintiffs. Page 5 of 12 It is also not disputed that the former case involved the same plaintiffs as in the present case. Those issues, which constitute disputable facts in this case, are contained in paragraphs 8, 9, 10 and 11 of the Complaint. The way they are raised in those paragraphs tends to question the decision of this Court in the 2003 case. However, in as much as those questions were, finally determined in that case, they are res Judicata and cannot form the subject of litigation herein, as the averments in the paragraphs I have mentioned seek to do. I now turn to consider the issues raised in paragraphs 12, 13, 14, 15 and 16 of the Complaint. The Plaintiffs allege in these paragraphs that the Defendants intend to use back door tactics, without the knowledge or consent of the plaintiffs and/or a valid Board resolution of the Plaintiff company, to sell and/or mortgage the suit property to the detriment of the interests of the Plaintiffs. The alleged acts, according to the Plaintiffs in paragraph 16 of the Complaint, are done covertly to conceal; fraud with the aim of diluting the interests of the Plaintiffs in the 1st Plaintiff company to the advantage of the Defendants, especially because the suit property is the major asset of the Plaintiff company. These matters are not res Judicata, since they arise out of acts or omissions that were non-existent at the time the former suit was pending. There are therefore two sets of issues arising from the Complaint. Those in paragraphs 8 to 11 and those in paragraphs 12 to 16. On a proper construction of Order IX of the CPC, it is not necessary that the whole suit should be res Judicata. A single issue in a suit can be held to be res Judicata. Consequently, I order that all that is alleged in paragraphs 8, 9, 10 and 11 of the Complaint be expunged from the Complaint for being resjudicata. The rest of the Complaint would remain intact. I will return to the consequences of this decision shortly. Page 6 of 12 On the second point of preliminary objection, Mr. Kilindu submitted that the suit cannot stand in the absence of a valid resolution of the Board of the 1st Plaintiff company deciding to commence this suit and

giving the 2nd and 3rd Defendants the authority to do so. Mr. Kilindu quoted a statement made by the 1st Defendant in his counter-affidavit filed in response to the Plaintiff's application for interlocutory orders; As Mr. Didace argued, I do not think that it is proper for me to consider the said averments at this stage for one major reason: They are matters of evidence and therefore not issues for preliminary determination (see Mukisa Biscuits' Case, *supra*). However, the thrust of Mr. Kilindu's argument can be discerned by considering the findings of this Court in the 2003 Case. These are decisions of the Court and do not require evidence. This Court is entitled to take judicial notice thereof. Since the shareholding structure of the first Plaintiff Company was finally and conclusively established in that case, and there being not even an allegation from any of the parties herein that there has been any subsequent change in that structure, then it is safe to say that the said company is still owned 98% by Lushoto Tea Co. Ltd., and that the Defendants herein are the representatives of the latter in the company's Board. Mr. Didace has argued, correctly, that there are three Plaintiffs herein and the whole suit cannot fail simply because there is no Board Resolution from the 1st Plaintiff authorizing the institution of the suit on its behalf. That is true. For, the 2nd and 3rd Plaintiffs have every right to sue in their individual capacities and not necessarily as representatives of the 1st Plaintiff company. Hence, the consequences of Mr. Kilindu's contention, if successful, would only be to remove the 1st Plaintiff as a party herein. The 2nd and 3rd Plaintiff's claim would survive. Page 7 of 12 What then is the position with regard to the 1st Plaintiff? The 2nd and 3rd Plaintiffs, despite being directors of the 1st Plaintiff company, are minority shareholders in the 1st Plaintiff company, owning only 2% of the shares. Those matters cannot be subject to litigation, as they were finally and conclusively determined in Commercial Case No. 62 of 2003. That much cannot be disputed in this case. In view of the above, therefore, Mr. Kilindu's argument can still stand, in that in order for the 2nd and 3rd Plaintiffs to sue on behalf of the 1st Plaintiff, they would need a Board resolution. That is especially pertinent because the 2nd and 3rd Plaintiffs are suing the representatives in the company's Board of the corporate person who holds of the overwhelming majority of the company. This set up is, to say the least, if I may borrow Mr. Kilindu's terminology, incomprehensible. By doing so, the minority shareholders are trying to subject the majority shareholders to their (the minorities') wishes, something that negates a fundamental principle of company law which grants decision-making powers in companies to holders of majority shares. As I have already observed, it cannot be disputed (and the Plaintiffs have made no attempt to do so herein) that the 1st Plaintiff is owned 98% by Lushoto Tea Co. Ltd. The 2nd and 3rd Plaintiffs own the remaining 2%. Needless to say, the 1st Plaintiff company cannot make an important decision as a corporate body that does not have the consent of at least one of the Defendants. Do the 2nd and 3rd Plaintiffs have a Board resolution to sue on the company's behalf? Mr. Didace contends that this issue needs evidence, and I agree. This is a question of fact and must be proved by evidence. c:- However, it is also true that it cannot be open for any shareholder or director of a corporate body to take it upon himself/herself to sue on Page 8 of 12 V behalf of the Company without express authority of the company. For that reason, it being not a matter of fact that could come for determination when the suit is called on for hearing on the merits, I would have

ordered, before going further, the 2nd and 3rd Plaintiffs to produce to this Court such evidence. That would at least determine the validity of the 1st Plaintiff's suit herein. However, I do not find it necessary to do so. My reasons for taking this position shall soon be clear, as I consider the third and last point of objection. Mr. Kilindu's third point of preliminary objection is that the plaint does not disclose a cause of action. It is trite law that a cause of action is established by the Plaint alone. The Court should not look at anything else in determining this question. Mr. Kilindu argues that since, according to the Plaint, the property in question was purchased by Lushoto Tea Company, which is represented in the 1st Plaintiff company by the Defendants, that the encumbrances that previously existed and which prevented the transfer in favour of the 1st Plaintiff company from being effected have now been removed, that all the parties agree that the 1st Plaintiff company is the only one entitled to be registered as the owner of the same, then it is surprising to suggest that the Defendants should forever be restrained from dealing with the Plaintiff's property and that an order can be issued prohibiting the transfer and registration in favour of the 1st Plaintiff company from being processed. Mr. Didace rightly countered this argument by saying that the Plaintiffs are not seeking an order to prohibit transfer, but to restrain the Defendants from dealing with the suit property. However, the essence of such an order is, in my view, to prohibit the Defendant and in effect the majority shareholder of the 1st Plaintiff company, from processing the registration of the property in the company's name. Though Mr. Didace tries to avoid this fact as irrelevant, he does not dispute it. In any case, the 2003 case has already made findings to that effect. Page 9 of 12 The question is: Do the facts as alleged in the Plaint constitute a cause of action to support the prayers therein? I have already expunged paragraphs 8, 9, 10 and 11 of the Plaint on grounds that they raise issues that are res Judicata. Do the remaining paragraphs make sufficient allegations to support the main prayer in this suit? The Plaintiffs are praying for "a permanent injunction restraining the 1st and 2nd Defendants, their agents and successors in title from dealing in any way" with the suit property. That property is owned by the 1st Plaintiff company, which in turn is owned 98% by Lushoto Tea Company Ltd. The grounds upon which the prayers are based are in paragraphs 12, 13, 15 and 16 of the plaint. The reasons why the transfer in favour of the 1st Plaintiff was not effected was, according to paragraph 7 of the Plaint, the existence of certain encumbrances in favour of Tanzania Tea Authority which have, however, been subsequently removed. As Mr. Kilindu submitted, the reasons why the plaintiffs are seeking the permanent order of injunction prayed for herein do not constitute a cause of action sufficient to entitle the Plaintiffs to the said prayer. Reading from the plaint and the plaint alone, and assuming that all the facts therein are proved to the satisfaction of the Court, can this Court grant the orders prayed for herein against the defendants? I am of the considered view that it cannot. It is indeed inconceivable that a Court of law can be called upon by the minority shareholders to prohibit in permanent terms, the directors of a company representing the majority shareholders, from dealing with the property of the company and even registering the same in the name of the company. If that is possible, somebody will have to take over those responsibilities-perhaps a receiver/manager or, as is now possible, an administrator. The Plaintiffs do Page 10 of 12 not suggest any. Without such an

arrangement, what will become of the company and the relevant property. Who will exercise powers over them? Would it be the Plaintiffs? Going through the Complaint, one does not find any answers to the above questions. Worse still, the order being sought in the Complaint is a permanent one, which means that if it is to be granted, the property will never be registered in the name of the 1st Plaintiff company. In the absence of an alternative person whom the Plaintiffs propose to deal with the assets of 1st Plaintiff company, one wonders what would be the Plaintiffs' ultimate aim for commencing this action. With respect, I must also admit by inability to understand how, and under what circumstances, can the facts as alleged in the Complaint be perceived to be a cause of action. As I cannot find any cause of action in the Complaint, I am constrained to agree with Mr. Kilindu that there is no cause of action disclosed. Mr. Kilindu's submission on this point has a second limb, which I find equally powerful: That it is trite that the 1st Plaintiff is a legal entity separate from its shareholders or directors. How can the company be bound (and therefore prevented) from dealing with its own property by an order which the Plaintiffs are seeking to be issued not against the company, but against the Defendants, who are being sued herein in their individual capacities? I would actually add that, if really the 1st Plaintiff company does not want the suit property (which it owns) to be transferred to the mortgagee, why the need to get a Court order when it can do so itself? I find that to be a contradiction in terms. It also sounds rather strange, and I again fail to comprehend why, that instead of simply resolving to prohibit the Defendants from acting in the manner it does not approve, the 1st Plaintiff would resolve to take the superfluous, risky and costly way (in terms of both time and costs), to sue them to obtain a Court order to that effect! It is no wonder that they have failed to establish, by their Complaint, a cause of action. In light of all this, I hold that there is no cause of action disclosed in this suit. The facts as alleged in the Complaint do not support the orders prayed for herein. I have no doubt in my mind that this action has been brought frivolously and vexatiously, and the Court cannot entertain it. Doing so would be to grant the Plaintiffs (especially the 2nd and 3rd Plaintiffs) the Court's grace in an action that is merely intended to subject the defendants to endless litigation for no legitimate reasons, something this Court should not encourage. In the final analysis, it is my respectful finding that the suit is not maintainable and must be dismissed, as I hereby do. The 2nd and 3rd Plaintiffs shall bear the Defendants' costs. Dated at Dar es Salaam this 6th day of September, 2011. F. Twaib · Judge 6th September, 2011. Page 12 of 12

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