

TANZANIA / JUDGMENT

ISMAIL SABLACK VS JARMO OJANEN

COURT
TANZLIIDECIDED
1 January 2019

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY AT ARUSHA MISCELLANEOUS CIVIL CAUSE NO. 5938 OF 2024 IN THE MATTER OF COMPANY ACT CAP 212 AND IN THE MATTER OF AFRICAN HOBBY TOURS AND SAFARIS AND IN THE MATTER OF PETITION OF UNFAIR PREJUDICE BY ISMAIL FADHIL SABLACK.....
PETITIONER VERSUS JARMO O JANEN..... .1st RESPONDENT AFRICAN HOBBY TOURS AND SAFARIS..... 2nd RESPONDENT

RULING

28/ 02/2025 & 04/ 03/2025 NDUMBARO, J It is the petitioner the shareholder and director of 2nd respondent who has brought this application before this Court claiming against the 1st respondent that he is conducting affairs of the company (2nd respondent) unfairly prejudicial to his interest. The petition was accompanied by an affidavit sworn by Ismail Fadhil Sablack and a counter affidavit of Jarmo Ojanen and Philip Elias Mmari to verify a reply to the petition. Principally, the petitioner claims that the 1st respondent's acts were contrary to the affairs of the company and contrary to the article of association, while the respondents strongly opposed the claims. When the matter was brought before the court, the parties prayed to dispose the application by way of written submissions, whereas the petitioner enjoyed the legal services of advocate John Masangwa, the 1st and 2nd respondents on the other hand enjoyed the service of Advocate Asubuhi Yoyo. Arguing in support of the petition, Mr. Masagwa submitted that, the 1st respondent was conducting affairs of the company (2nd defendant) without consulting members and board of directors contrary to articles of association and in a manner which undermine the interests of the petitioner including attempt to remove and replace shareholders and directors, allotting shares to new shareholder, transferring money amounted to Tshs. 84,000,000/= to one Anne Karoli Njau, reducing petitioner's shares, opening Bank Account at Danske Bank Finland under the name of Company in Finland to wit USD Account No. F16881189710049845, named African Hobby Tour, collecting money in the tourist business and retaining the said money abroad. The counsel further submitted that there has never been a division of dividends to the 2 directors since the company was established. In supporting the claim, the petitioner made Reference to section 184 of Company Act Cap 212, that the director should exercise his power for the proper purposes. Hence made prayer for this court that;-

1. The 1st and 2nd respondents' act, omission and conduct are contrary to and prejudicial to the interest of the petitioner.
2. The 1st respondent's act of conducting affairs of the company without consulting members or board resolution is contrary to the article of the company and prejudicial to the interest of the petitioner
3. An order of nullifying all acts, deeds and decisions made by the 1st respondent without prior consultation with the petitioner in order to protect the petitioner's interest
4. An order for payment of director fees from when the company started to tune 120,000 USD.
5. General damage to the tune of 50,000 USD
6. The cost of the case is born to the 1st and 2nd respondents. 3 In reply, Mr. Yoyo faulted the claims to the effect that the 2nd respondent does not operate any Bank account apart from NMB BANK Account in Tanzania, the claim that there is an existence of foreign bank account at Danske Bank Finland, to wit Account No. F16881189710049845 USD account named African Hobby Tour is unfounded. According to him, the bank at Danske Bank in Finland is owned by BUERNA SUERTE HOLDING OY, a Finland company established by the 1st respondent before the establishment of African Hobby Company, and has no connection with African Hobby. In fact, it was his argument that the 1st respondent used the said Account to offer a loan to African Hobby (2nd respondent). On the issue that no dividend and director fees were given to the petitioner, Mr. Yoyo argued that the company did not make any profit to issue director fees and dividends. The capital of the company was USD 120,000,000 while the total revenue was less than 20%, therefore, no profit has been generated. The alleged authorization by the 1st respondent of the payment of 84,000,000 to the alleged stranger Anne Karoli Njau was not proved and hence unconceivable. He also faulted that the petitioner is a sole signatory and managing director permanently stationed in a company with unlimited access to the Company Bank Account and company assets. Mr. Yoyo further went on to submit that the company was instituted in 2019, and due to COVID-19, it has not generated any profit. The recent audit report attached shows that the 2nd respondent is operating under a loan from the 1st respondent through his foreign company, BUERNA SUERTE HOLDING OY, holding account No. F16881189710049845. According to him, the account claimed by the petitioner existed even before the existence of the 2nd respondent and had no nexus with the African Hobby Tours and Safari Limited. The counsel went on to state that the prayers brought by the petitioner are unfounded and unproved. Actually, it was his view that it is the petitioner who is responsible for unfair prejudice based on his conduct. The petitioner is the one who acted contrary to the article of association to warrant unfair prejudice as he voted for the sale of the motor vehicle at the exclusion of the 1st respondent. It was the respondents' prayer that the matter be dismissed with costs for lack of merit. In a rejoinder, the petitioner retaliated his submission in chief and further argued that the 1st respondent attempted to remove the petitioner and allot shares of the company to one Anne Karoli Njau, who is the 1st respondent's current wife.

The petitioner went on to state that prior to the filing of this application, the petitioner filed the same unfair prejudice application before this court through Petition No. 30 of 2023, which was withdrawn with an order to amend. In the said petition, the 1st respondent admitted to having ordered the petitioner to transfer 84,000,000 to his wife, Anne Karoli Njau. After considering the submission of parties, it is time for the court to consider if the petition has merit. The petitioner is claiming against the 1st respondent conducting affairs of the company with exclusion of the petitioner and other members contrary to the articles of association unfairly prejudicial to their interests. Generally, unfair prejudice has been defined as conducting company affairs contrary to law or articles of association in a manner prejudicial to the petitioners or other members of the company's interest. In the case of Covell Mathews Partnership Limited and Velisas Elizabeth 6 Deflosse Ingleton (Petitioning as Legal Representative Under the Power of Attorney of Gordon McClymont) vs Joseph Ignatus Noronha, Gautam Jayram Chavda, and Covell Mathews Partnership Limited Misc. Commercial Cause No. 20 of 2021, HC DSM at page 25 shows what attracts the claim of unfair prejudice as follows; "Abuse of power or breaches of the articles of association or exclusion of a shareholder from the management or decision making over the affairs in instances where there is a legitimate expectation of being involved, all attract complaints based on unfair prejudice" Section 233(1), (2) and (3) of the Companies Act (Cap 212 R.E 2002) shows who can make a claim of unfair prejudice and grounds thereto and what circumstance court can make order thereto for easy of clarity the section is reproduced hereunder; "Any member of a company may make an application to the Court by petition for an order on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf is or would be so prejudicial. If the court is satisfied that the petition is well founded, it may make such interim or final order as it see fit for giving relief of the matters complained of". The test of such unfairness, however, is an objective, a Petitioner is required to prove three elements for the court to consider unfairness, these are; (1) the respondent conducted company's affairs; (2) unfairly; (3) the petitioner's interest as a member of the company has been prejudiced. Going through the parties' submissions, the petitioner claimed against the 1st respondent for conducting the affairs of the company with the exclusion of the director and other members, contrary to the articles of association by attempting to remove the director and shareholders, reducing petitioners' share and allotting shares to new member Anne Karoli Njau, instruct the petitioner to withdraw money and give non-member. On the other hand, the respondents faulted that the petitioner was the sole signatory and managing director permanently stationed in a company with unlimited access to the Company's Bank Account and company assets. The petitioner managed to sell company assets, including a motor vehicle, and he was charged before the Magistrate Court, through Economic Case No. 22/2023, a fact which was not countered by the petitioner. It is my view that the fact that he was able to withdraw company money and give to a non-member and the fact that he sold company motor vehicle speak louder that the petitioner had unlimited access to the Bank account and the assets of

the company. The petitioner did not dispute having full control of the company assets and NMB company Account to make a claim of unfair prejudice maintainable. I took time to go through the African Hobby Company audited report for the year 2022 to

2023. Item 16 (c) shows that the petitioner was the sole signatory of the African Hobby Company Bank Account and managed the account but failed to provide a receipt of expenditure despite being requested to do so. Further item 16 (f) and (g) shows Extra Ordinary General Meeting was conducted on 13th June 2024, in compliance with the order of this court in Misc Civil Case No 6 of 2023, made by Hon. Mwaseba Judge, the meeting ended up into removing the petitioner from his position as director due to his serious inaction against the company which were carried out for his personal gain. The report further revealed that the secretary, Hamis Mhango, resigned from his position at the said meeting. 9 The evidence speaks louder that the petitioner was in full control of the company, and at this juncture, he cannot claim to be excluded in conducting the affairs of the company or abuse of powers by 1st respondent to warrant unfair prejudice on transferring money from African Hobby Bank Account. It was the testimony of the petitioner that the 1st respondent attempted to allot shares and remove him from being the director. It is my view that the petitioner's claim was not backed up with proof that there was indeed an attempt to allot the said shares through the audit report of the company. On the issue that the petitioner did not reap the benefit as a director through fees and dividends. While the respondent faulted this claim on the basis that the company had not made any profit since its establishment, it is my view that the dividend is a matter of law, and it is given where the company makes a profit as per Section 180 (3) of the Companies Act. It is the duty of the Management of the Company (Directors) to ascertain whether the company has made any profits for the purpose of declaring dividends. Despite the fact that the petitioner did not give proof before the 10 court by bringing the audited account to show as to whether the company made a profit. The dividend is declared during the general annual meeting upon receiving a report from the board of directors of the company. Section 180 (1) and (2) of the Companies Act, CAP 212 provides: "180. -(1) Subject to this sectionf a company may, in a general meeting, declare dividends in respect o f any accounting period or other period.
- (2) Where the recommendation o f the directors o f a company with respect to the declaration o f a dividend is rejected or varied by the company in a general meeting, a statement to that effect shall be included in the relevant directors' annual report and in the relevant annual return."
- (3) o f the Companies Act CAP 212 provides that: (3) A company may pay a dividend: (a) out o f its realized profits less its realized losses, or (b) out o f its realized revenue profits less its revenue losses, whether realized or unrealized, provided the directors reasonably believe that immediately after the dividend has been paid the company w ill be able to discharge its liabilities as they fall due, and the realizable value o f the company's assets will not be less than the amount o f its liabilities." li Considering the claim at hand, the Petitioner did not say anything as to whether the dividend was declared in the general meeting for the member to

claim; declaration as to dividend is done by the director and not the court after having profit as the provision above states. The Court cannot step into the shoes of the board of directors and the annual general meeting of the company and order payment and or computation of petitioner's share of revenues and benefits generated by the respondent from 2019 to present without having revenues and benefits generated during such period. This matter is left to the discretion of the Board of Directors and the decision of the members in their annual general meeting in terms of section 180 of the Companies Act Cap 212 RE 2022.1 also went through the 2022/2023 report of the 2nd respondent. Items 9 and 11 show that the petitioner acquired 255 shares, which are not paid up. The position of law is clear to the effect that a shareholder cannot claim a dividend if his shares are not paid up. Therefore, it is my view that the petitioner's claim on the dividend has no legs to stand. Section 110 of the Evidence Act is clear to the effect that the one who asserts must prove the fact. The petitioner claimed that the company generated profit and the 1st respondent retained the said profit, but no tangible evidence was brought to prove the existence of profit for dividend and director fees. The issue that the 1st respondent opened a bank account in Finland to avoid tax and personal gain was counted against by the respondents who stated that it was not credible and lacked evidential strength, that the attached annexure IF2 did not comply with section 233(1) of the company Act to prove unfair prejudice. It was an unauthenticated slip; it was not proved to the required standard as per sections 110,111,112,113, and 115 of the Tanzania Evidence Act RE 2019 and in the case of Anthony Masanga Vs Penina (MAMA MGESI) & Lucia (MAMA LUCIA), Civil Appeal No. 118 of 2014 CAT Mwanza. I went into court record particularly on exhibit Jarmo Sita and IFS5, which was an email from Mandala Travel. This exhibit shows that he had paid for the service received from African Hobby through an invoice to Bank Account F16881189710049845, with name DANKE BANK in Finland. The said email was both attached by the petitioner as IFS5 and the 1st respondent as Jarmo Sita. For clarity, let me reproduce the wording. 13 % Mikka Ukkonen, co-founder of Mandala Travel, hereby prove that, till this date from the beginning of our cooperation with African Hobby, we have had a total of four different customers' cases and we have paid all of them. According to the invoice to bank Account F16881189710049845, with name DANKE BANK in Finland" Going through the submission by parties, it is not disputed that DANKE BANK in Finland" belonged to another company named BUERNA SUERTE HOLDING OY, which is owned by the 1st respondent. It was the petitioner's testimony that, African Hobby Customers effected payment to the 1st Respondent Bank Account and retained the said amount, analyzing the statement it might be probably true however it was not backed up with invoice or Bank Account statement on the service offered of handling customer cases, and it is not clear as to what kind of customers were handled by them, as to whether tourist customers for this court to connect dot with tourist service rendered by African Hobby company. The annexure Jarmo Moja, the petitioner, acknowledges the existence of foreign Bank Account F16881189710049845, in Finland, owned by African Hobby company, the petitioner in the said exhibit stated that the said account was not accessible as it was in Europe. In another Annexure Jarmo 7, it is also demonstrated that the holder of the said Account is BUERNA SUERTE HOLDING OY,

which is owned by the 1st respondent, and the bank statement is attached to that effect. Section 110 of the law of the Evidence Act is to the effect that one who asserts must proof the existence of facts. It is my view that the petitioner failed to establish any relationship between BUERNA SUERTE HOLDING OY and African Hobby Company to make the claim for unfair prejudice not proved on the required standard. At this juncture, this court is of the firm view that the claim of unfair not proved to warrant a grant of the petition by this court, petition is hereby dismissed with costs D.D NDUMBARO JUDGE 04/ 03/2025 15

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/341778/source_file/c6099e63cee02976/ISMAIL_SABLACK_VS_JARMO_OJANEN.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/UnfairPrejudice-tanzlii-2019--6a3ea5243b1caa912981a6c3>

Prepared on 14 October 2026 · Esheria