

TANZANIA / JUDGMENT

SOKOINE F OTONDE Vs

COURT
TANZLII

DECIDED
7 June 2024

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IN THE HIGH COURT OF TANZANIA (DODOMA SUB REGISTRY) AT DODOMA MISC. CIVIL CAUSE NO. 02 OF 2023 IN THE MATTER OF COMPANIES ACT, NO. 12 OF 2002 AND IN THE MATTER OF PETITION BY A MEMBER FOR AN UNFAIR PREJUDICE OF THE CO-MEMBER AGAINST COMPANIES BEST INTEREST BETWEEN SOKOINE FREDRICK OTONDE.....PETITIONER AND JOHN WAMBURA CHARLES.....1ST RESPONDENT JSP INTERGRATED LIMITED.....2ND RESPONDENT GAUDENCE VICENT LYIMO.....3RD RESPONDENT SPEED PESA FINANCE LIMITED.....4TH RESPONDENT

RULING

Date of last order: 07th June, 2024. Date of Ruling: 05th July, 2024. E.E. KAKOLAKI, J. This ruling seeks to answer the complaint raised by 1st respondent as an individual and member to the 2nd respondent vide a letter dated 25/04/2024 against 2nd respondent’s legal representation in Court by Ms. Luciana Nyondo, learned advocate who allegedly was instructed to represent the 2nd respondent without company’s board resolution. Briefly the petitioner and 1st respondent herein are sole members and co- directors to the 2nd respondent a company duly registered under Companies Act, with equal shares, dealing with among other objectives civil engineering projects and supply of building materials. The 3rd respondent is a natural 1 person, borrower and debtor to the 2nd respondent whereas the 4th respondent is a body corporate managed by the 1st respondent. It is petitioner’s claim in this petition that, the 1st respondent who is sued as an individual, member and co-director to the 2nd respondent was trusted to run the 2nd respondent’s daily business and affairs including management of financial accounts, breached the said trust by committing a series of malicious actions including wilful destruction of accounts records of day to day sales managed electronically with intent to conceal his dirty games, the acts which are prejudicial to petitioner’s interest and that of 2nd respondent. That, the 1st respondent refused to pay for the shares he had subscribed for something which affected the 2nd respondent’s capital and forced it to operate its affairs by borrowing from creditors using petitioner’s personal guarantee. And further that, the 1st respondent has totally distanced himself from the 2nd respondent but uses all the available opportunities to covert company’s money to himself. The most notable conversion its is claimed, is the 1st respondent’s collusion with a debtor, the 3rd respondent who owe the 2nd respondent a debt of Tshs. 96,248,600 from

the supply of building materials when secretly made arrangements with the said debtor to create fake and concocted guarantee showing that, the 4th respondent which is the 1st respondent's company has cleared the 3rd respondent's debt to the 2nd respondent, thus the 3rd respondent is enjoined to refund the 4th respondent by effecting payment through the 1st respondent. It is from that transaction and other malicious 2 actions by the 1st respondent allegedly prejudicial to the petitioner and 2nd respondent's interest, it said this petition is preferred praying for the following reliefs. One, a declaratory order that the 1st respondent has been conducting 2nd respondent's affairs in a manner which is prejudicial to the petitioner and 2nd and 3rd respondents' interest. Second, a declaration that, whatever arrangement made by the 1st, 3rd and 4th concerning 2nd respondent's debt against 3rd respondent to be paid to 4th respondent, is tantamount to unfair prejudice to interest of both petitioner and 2nd respondent and third, an order sanctioning the 3rd to withhold payment of Tshs. 96,248,600/- to the 1st and 4th respondent. The fourth relief is for an order authorizing the petitioner to prosecute the claim of Tshs. 96,248,600/- and retain the bank accounts by the 2nd respondent until when the affairs of 2nd respondent is fully audited by an independent auditor appointed by the Court and the report be used by the 1st respondent to seek for appropriate remedy against each other. Others are costs to be borne by the respondents and any other relief which this Court deem fit to grant. When the respondents were served with the petition the 1st and 4th respondents filed a joint reply and the 3rd respondent also did so. The 2nd respondent could not file hers for want of legal representation being a legal person until 14/03/2024 when Ms. Luciana Nyondo, learned advocate appeared in Court representing the her after Mr. Josephat Mbeba, learned advocate for the petitioner had informed the Court that the 2nd respondent 3 was served in the presence Ms. Catherine Wambura, learned advocate for the 1st and 4th respondents as the 3rd respondent failed appearance on that day. It was on that day and without any objection from Ms. Wambura, advocate for the 1st and 4th respondent the Court was informed by Ms. Nyondo that, the 2nd respondent was not intending to file her reply as she was conceding to petition, before the matter was set for hearing on 30/04/2024 following the prayer by Ms. Wambura. However, before the matter could proceed for hearing on the 30/04/2024 as agreed by the parties, the 1st respondent filed in Court a letter dated 25/04/2024, introducing himself as an individual and member of the 2nd respondent, questioning legal representation of the 2nd respondent without company's board resolution, thus inviting the court to address his concern first before going into the merit of the petition. On 07/06/2024 when the parties were invited to address the court on the 1st respondent's concern the petitioner appeared represented by Mr. Stephano P. James, Advocate holding brief for Advocate Asubuhi John Yoyo with instruction to proceed whereas the 1st and 4th respondents had the legal services of Mr. Elias Machibya. On the 2nd respondent Ms. Luciana Nyondo, learned advocate appeared for while also holding brief for Advocate Sylvester Samwel Kahunduka, for the 3rd respondent with an instruction to proceed. Addressing the Court on the concern raised by the 1st respondent in the letter dated 25/04/2024 Mr. James for the petitioner argued that, the concern was raised as an afterthought after the Court has ordered the matter to proceed 4 with hearing. He said the 1st respondent in terms of paragraphs 6, 26, 27 and 31 of the petition is sued as director following his conducts and acts which are prejudicial to the petitioner and company (2nd respondent) since there is no any other capacity in the company in which he

could have been sued. He challenged the assertion the 1st respondent that he was challenging 2nd representation in personal capacity submitting that, when the 2nd respondent through Ms. Nyondo, conceded to the petition the 1st and 4th respondents were represented and did not object to the said concession, thus bringing the said concern at the hour and after the Court has ordered the matter to proceed with hearing is an afterthought, something aiming at delayin the proceedings as the Court's order is biding to itself as well as the 1st respondent, hence this Court lacks jurisdiction to entertain it. In response Mr. Machibya made himself clear from the outset that, he or their law firm had not instruction to represent the 1st respondent in capacity as director to the 2nd respondent hence the submission by Mr. James that, the 1st respondent was represented in Court on 14/03/2024 as director to the 2nd respondent is misleading. He said what is before the Court is whether it was proper for the petitioner on his own to instruct Advocate Nyondo to represent the 2nd respondent without consent or sanction of the co-director who is now challenging that decision in his capacity as director. According to Mr. Machibya, the petitioner cannot bring his complaint before the Court and make a reply on his own as there is conflict of interest. He 5 contended, co-director's sanction ought to be sought first concerning 2nd respondent's representation in Court as it is a legal stance that, where there is internal conflict the must be a company resolution for any decision to sue or defend the company. In this matter he argued since there was no company board resolution to sanction representation of the 2nd respondent even the submission that the 1st respondent was sued in his capacity as director lacks legal legs to stand on. He thus invited the Court to consider the concern and find the representation is invalid. On the side of the 2nd and 3rd respondents Ms. Nyondo, adopted the submission by Mr. James and informed the Court that, the 2nd and 3rd respondents had no issue with 2nd respondent's representation in court. Lastly was the complainant in person who pleaded the Court to look into legality of 2nd respondent's representation and issue the necessary orders or directives since in his letter the main complaint is that, there was no directors' company resolution to instruct Ms. Nyondo to represent the company as what she is doing now is to further the interest of the petitioner and nothing more. I have dispassionately considered both parties submission regarding the 1st respondent's concern that Ms. Nyondo, learned advocate was instructed to represent the 2nd respondent supposedly by the petitioner without prior his prior consent as co-director to the 2nd respondent since there was no company's board resolution sanctioning that decision. Before I venture into determination of the issue as to whether sanction of company's board of 6 directors is mandatory for company's legal representation in Court, more so when the company is sued and there is conflicts amongst its directors, I find it imperative to address first the issue as to whether the raised concern is an afterthought for being raised allegedly after the 1st respondent had conceded to the legal representation of the 2nd respondent and the order for hearing of the petition issued by the Court as claimed by Mr. James, learned advocate. It is response to that issue Mr. Machibya is of the submission that, their law firm which is representing the 1st and 4th respondents had no instruction to represent the 1st respondent in his capacity as director to the 2nd respondent, meaning this Court should believe that, the 1st respondent's concern was raised by him as co-director to the 2nd respondent hence entertain it. As alluded to above Mr. James is of the contrary view in that, the 1st respondent was fully represented in Court as director to the 2nd

respondent and conceded to 2nd respondent's representation by Ms. Nyondo, when Ms. Wambura, learned counsel appeared in Court representing him on 14/03/2024, hence the concern remains an afterthought. It is settled law now supported by plethora of authorities that, parties are bound by their pleadings thus prevented from bringing in new issues unless amendment of pleadings are sought and granted by the Court as whichever goes against the pleadings must be disregarded by the Court. See the cases of Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others, Civil Appeal No. 38 of 2012, Astepro Investment Co. Ltd Vs. 7 Jawinga Company Limited, Civil Appeal No. 8 of 2015 (Both CAT- unreported) and Yara Tanzania Limited VS. Charles Aloyce Msemwa, Commercial Case No. 5 of 2013 (HC-unreported). In this matter there is no dispute as per paragraph 2 of the petition that the 1st respondent was sued as a natural person, member and director of the 2nd respondent (company) which as paragraph 9 of the petition is managed by the petitioner and 1st respondent as sole members and directors. Paragraph 2 of the petition reads:

2. THAT, the 1st respondents is a natural person, a member and director of JSP INTERGRATED LIMITED, his address of service for the purpose of petition shall be pointed out to the Court process server. In his joint reply by the 1st and 4th respondents to the petition filed in court on 26/10/2023 by Elias M. Machibya (Advocate) from Machibya Professional Attorney, noted the contents of paragraph 2 of the petition in respect of the status or capacity of 1st respondent in this petition when deposed in paragraph 2 that: 2. That, the contents of paragraph 2 and 5 are noted save for the fact that, the address of service for the purposes of this Petition for the 1st and 4th Respondents shall henceforth be in the care of: MACHIBYA PROFESSIONAL ATTORNEYS, 1ST FLOOR, ATIMAN BUILDING, PLOT NO. 6 BLOCK 'F' Mpwapwa Road/Jamhuri Street, P.O BOX 208, 8 DODOMA. Mobile No. 0784-700984/0759-840867/0712-505141 Email: machibya.attorneys@gmail.com. What is discerned from the contents of the two above quoted paragraphs of the petition and the joint reply by the 1st and 4th respondents is that, by taking note of the contents of paragraph 2 of the petition acknowledging to have been sued as a natural person, member and director to the 2nd respondent, this Court is satisfied that, when instructed advocate Machibya to file a reply to the petition did so as director to the 2nd respondent. I so view as he was full aware that was sued as director to the 2nd respondent. Since there was no any amendment to the reply to the petition sought by the 1st respondent and granted by the Court or formal correspondence to the Court disowning his instruction to Machibya advocate to represent him as director to the 2nd respondent, I disagree with Mr. Machibya's submission that, their firm had no instruction to represent the 1st respondent in his capacity as director to the 2nd respondent. Instead I find the 1st respondent did instruct Machibya Professional Attorneys and was fully represented in Court as the director to the 2nd respondent. Having so found I now move to determine the issue whether the raised concern by the 1st respondent is an afterthought or not as submitted by Mr. James. I think this issue need not detain this Court as the Court record speaks for itself. This is what transpired in Court on 14/03/2024 when the matter 9 came for mention and the petitioner appearing represented by Mr. Josephat Mbeba, while the 1st and 4th respondents enjoying legal services of Ms. Catherine Wambura

from Machibya Professional Attorneys and the 2nd respondent defended by Ms. Luciana Nyondo, all learned counsel, before the matter was scheduled to hearing. Mr. Josephat Mbeba Adv: My lord the matter is for mention and the 2nd respondent is served and today is represented. We wonder whether she has filed a reply to the petition. Ms. Catherine Wambura Adv: My lord we filed our reply to the petition but we are yet to receive the 2nd respondent's reply. Otherwise we pray for hearing date. Ms. Luciana Nyondo Adv for the 2nd Respondent: My lord we are conceding to the prayers by the petitioner and therefore not intending to file a reply to the petition. Order:

1. Hearing on 30/04/2024 at 09.00 am.
2. Parties to appear. It is so ordered. Sgd: 14/03/2024 It is noted from the Court proceedings that, Ms. Wambura, counsel for the 1st respondent was made aware by Mr. Mbeba of the service and representation of the 2nd respondent in this matter, before she prayed for hearing of the 10 matter after wondering as to whether the 2nd respondent had already filed her reply to the petition, only to be informed by Ms. Nyondo, that the 2nd respondent was conceding to the petition and therefore not intending to file her reply. Despite of being full aware no any concern was ever raised by the 1st respondent as the co-director to the 2nd respondent, through his counsel Ms. Wambura regarding 2nd respondent's representation on that day until 25/04/2024 when he purportedly lodge with this Court a letter questioned the legality of 2nd respondent's representation without his prior consent through board resolution. Since the 1st respondent and director to the 2nd respondent was fully represented in Court on 14/03/2024, notified and conceded to the representation of the 2nd respondent by Ms. Nyondo, before praying for the matter to proceed with hearing, the prayer which was granted and hearing fixed to proceed on 30/04/2024, I am satisfied and therefore embrace Mr. James' proposition that, his acting of challenging 2nd representation afterward was nothing but an afterthought. Consequently I find the 1st respondent's complaint against 2nd respondent's legal representation in Court by Ms. Luciana Nyondo, learned advocate who allegedly was instructed to represent her without company's board resolution, is wanting in merit for being afterthought hence dismiss it. It is hereby ordered that, hearing of the petition should proceed on merit. No orders as to costs. It is so ordered. 11 Dated at Dodoma this 12th day of July, 2024. E. E. KAKOLAKI JUGDE 12/07/2024. Court: The Ruling has been delivered at Dodoma today on 12th day of July, 2024, in the presence of Mr. Josephat Mbeba, advocate holding brief for Mr. John Yoyo advocate for the Petitioner, Mr. Elias Machibya, Advocate for the 1st and 4th Respondents, Ms. Luciana Nyondo, Advocate for the 2nd Respondent, who is also holding brief for Mr. Sylvester Kahuduka, advocate for the 3rd Respondent and Ms. Veradina Matikila, Court clerk. Right of appeal explained. E. E. KAKOLAKI JUGDE 12/07/2024. 12

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