

TANZANIA / JUDGMENT

erick james mlambo as liquidator of mutual developers ltd vs commissioner for tra and 17 others 2021 tzhccomd 3466 26 november 2021

COURT
TZHCCOMDDECIDED
26 November 2021

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM MISC. COMMERCIAL APPLICATION NO. 40 OF 2021 ERICK JAMES M LAM BO AS LIQUIDATOR OF MUTUAL DEVELOPERS LIMITED..... PETITIONER VERSUS COMMISSIONER FOR TANZANIA REVENUE AUTHORITY.....RESPONDENT SANURA HAMIS KONDO.....NECESSARY PARTY SHARIFF MIKIDADI MATONGO..... NECESSARY PARTY AMANI FREDRICK LYIMO..... NECESSARY PARTY EDWIN JOHN IWATO..... NECESAARY PARTY GLORIA EDWIN IWATO.....NECESSARY PARTY PENDO ABDON MALITI..... NECESSARY PARTY CHARLES THOMAS LYAMUYA..... NECESSARY PARTY LIGHTNESS HUBERTSON KIMAMBO..... NECESSARY PARTY REHEMA N. MIGAMBILE..... NECESSARY PARTY AISSIA MICHAEL NGADAYA..... NECESSARY PARTY ELINEEMA JOSE URASSA..... NECESSARY PARTY JUMA AHMED MKABAKULI..... NECESSARY PARTY MARY PETER KILEO..... NECESSARY PARTY TIMOTHY MARK KISAKA..... NECESSARY PARTY MAXINILLIAN JAMES MATALA..... NECESSARY PARTY JACKLINE BARNABAS SILAYO..... NECESSARY PARTY. 1 ALI JUMA KHAMIS..... NECESSARY PARTY Date of Last Order: 20/10/2021 Date of Ruling: 26/11/2021

RULING

MAGOIGA, J. This ruling is in respect of the preliminary objection on point of law raised by the respondent against the jurisdiction of this court to entertain this petition because in terms of section 7 of the Tax Revenue Appeals Act [Cap 408 R.E.2019] outs the jurisdiction of the court to entertain any matter that has been dealt by the respondent under taxation laws. On that note, the learned advocate for the respondent prayed that the instant petition be dismissed with costs. The facts albeit in brief of this petition as gathered from the petition are that, the necessary parties

herein are bona fide purchasers and owners of the properties formerly owned by the MUTUAL DEVELOPERS LIMITED a company under liquidation sold to them by the liquidator and administrator. The petitioner is a liquidator by members' voluntary special resolution of the company, hence, legally authorized to manage, control and sign on behalf of the company, receive, collect and pay debts, sale/dispose the properties of the company and dissolve the company. Further facts were that, upon being appointed, the liquidator followed all procedures and was handed over the 2 affairs of the company by the administrator together with list of properties of the company, of which the respondent is among the creditors. This petition is among other aiming to declare the respondent first preferential creditor and orders to discharge all charges against all properties of the necessary third parties. It was against the above background, the respondent, upon being served by this petition, raised a preliminary objection on point of law to the effect that this court is not seized with jurisdiction to entertain this petition, hence, this ruling after hearing parties' learned trained minds. When this petition was called on for hearing the petitioner was enjoying the legal services of Mr. Emmanuel Kessy, learned advocate. On the other hand, the respondent was enjoying the legal services of Mr. Brian Magoma, learned advocate. Mr. Magoma's point of preliminary objection was premised under the provision of section 7 of the Tax Revenue Appeals Tribunal Act [Cap 408 R.E.2019]. According to Mr. Magoma, the said section oust jurisdiction of the court in civil matters in respect of an action taken by Commissioner General of Tanzania Revenue Authority in administering revenue laws. In the premises, Mr. Magoma pointed out that, in 2017 the Commissioner General 3 of TRA in the recovery of the outstanding tax liability of the MUTUAL DEVELOPERS LIMITED under section 6(1) of [Cap 438 R.E. 2019] entered and created charge for the assets of the company with the Registrar of Titles in favour of the government. Mr. Magoma went on to submit that, according to section 7 of the Tax Revenue Appeals Tribunal Act, the jurisdiction to preside over the matter is vested to the Tax Revenue Appeals Board. To buttress his point the learned advocate for the respondent cited the cases of BRYSON BWIRE MBONDE vs. TRA, CIVIL APPEAL NO. 88 OF 2018 CAT (MWANZA) UNREPORTED) and COMMISSIONER GENERAL OF TRA vs. NEW MUSOMA TEXTILES LIMITED, CIVIL APPEAL NO. 93 OF 2009 CAT (DSM) (UNREPORTED) of which all underscored the point and urged this court not to travel beyond its jurisdiction. Further argument by Mr. Magoma was that section 7 of the Civil Procedure Code, [Cap 33 R.E. 2019] ousts certain cases such as the one we have here. As to the Companies law, it was brief submissions of Mr. Magoma that, it did not take away the jurisdiction of the Board. In support of this point, the learned advocate for the respondent cited the case of TRA vs. TANGO 4 TRANSPORT COMPANY LIMITED, CIVIL APPEAL NO. 84 OF 2008 CAT (ARUSHA) (UNREPORTED). On the totality of the above submissions coupled with cited authorities, Mr. Magoma urged this court to uphold the objection and dismiss the petition with costs. Mr. Kessy for the petitioner was unmoved with the submissions by Mr. Magoma and replied that, the whole objection is misconceived. According to Mr. Kessy, the circumstances of this petition differ and the cited cases are distinguishable. Mr. Kessy pointed out that MUTUAL DEVELOPERS LIMITED was under liquidation/administration since 2011 whereby the court through Commercial Cause No. 15 of 2011 by Makaramba, Judge (as he then was) appointed and put the company under administration whereby Mr. Chipeta advocate was appointed. According to Mr. Kessy, once a company is under administration the

powers of Commissioner General of TRA as stated under section 6 of [Cap 438 R.E. 2019] could not operate automatic without leave of the court. According to Mr. Kessy, sections 249(c) and 2 of the Companies Act, [Cap 212 R.E. 2002] stipulate that no proceedings can be entertained against a company. Kessy went on to submit that section 275 of the Cap 212 provides 5 that it is the High Court which has jurisdiction. On that charges that were entered in 2017, it was the argument of Mr. Kessy that same were entered while the company was under administration, hence, contrary to law and illegal for want of court's leave. Mr. Kessy insisted that under section 367(2) read together with section 371(1) and (2) of the Companies Act, High Court has jurisdiction. According to Mr. Kessy, the challenge here is on how the Commissioner General applied the law under Insolvency laws. The petitioner, according to Mr. Kessy, is not a going concern anymore. The application by Commissioner General was to apply the charges according to law and even when this application is granted still the respondent is the first beneficiary. The act of the Commissioner General has halted the liquidation process since 2017. Not only that but Mr. Kessy pointed out that the Board cannot grant the prayers as contained in the petition but the High Court alone. On the foregoing, the learned advocate for the petitioner urged this court to find and hold that this court is vested with jurisdiction to entertain this petition as there is no issue of tax at this stage and even if it is there, the respondent is a first preferential creditor to benefit any money to be realized after charges are lifted and prayed to overrule the objection. Ji 6 Mr. Magoma has nothing to rejoin. The task of this court now is to determine the merits or otherwise of this objection. Having heard the rivaling arguments of the legal trained minds for parties, I found out that the main contention between parties learned trained minds is the applicability of the section 7 of the Tax Revenue Appeals Act [Cap 408 R.E. 2019] and the Provision of section 249 (c) of the Companies Act, [Cap 212 R.E. 2019], in particular, when and how they apply in the circumstances we have? For easy of reference, section 7 of the Tax Revenue Appeals Act, provides as follows: Section 7-The Board shall have sole original jurisdiction in all proceedings of a civil nature in respect of disputes arising from revenue laws administered by the Tanzania Revenue Authority. No doubt from the above cited cases by Mr. Magoma, learned advocate, the Court of Appeal of Tanzania has on several occasions interpreted, found and hold that section 7 vests to the Board with sole original jurisdiction in all proceedings of a civil nature arising from the revenue laws administered by Tanzania Revenue authority. And this is the basis of the objection raised and argued by the respondent's counsel. Jki 7 On the other hand, Mr. Kessy had diametrical different arguments that section 7 cannot apply to a company that is under administration by virtue of section 249(1) (c) of the Companies Act 2002, which for easy of reference provides:- Section 249(1) During the period beginning with the presentation of a petition for administration order and the ending with the making of such an order or dismissal of the petition-

(a) NA

(b) NA

- (c) No other proceedings and no execution or other legal process may be commenced or continued, and or distress may be levied, against the company or its property except with leave of the court and subject to such terms as aforesaid. (Emphasis mine). What I gathered from the above provision of the Companies law under scrutiny is that the period under which the company under administration is fully protected is the 'period between' the presentation of a petition and the making of an order of either to put the company under administration or dismissal of the petition. In other words, I am entitled to the firm considered opinion that, after the order (either putting the company under administration or dismissal of the petition) the company cannot go on enjoying the legal protection any more. The above stance as such negate the arguments by Mr. Kessy that, once the disputed company was put under administration by the order of this court vide Commercial Cause No 15 of 2011 by Hon. Makaramba, J (as he then was) no one can touch it and the charges created by Commissioner General of Tanzania Revenue Authority in 2017 in applying the provisions of the revenue laws was wrong are highly misconceived and cannot convince this court otherwise. Also the argument by Mr. Kessy that, it is the respondent who is to benefit for being a preferential debt by itself do not clothe this court with jurisdiction on matter that has been dealt with by Commissioner General under the revenue laws. Equally the argument by Mr. Kessy that the instant application is not on tax dispute but is for challenging how Commissioner General of TRA applied the law under insolvency, sound good but is not the truth on the case at hand. The truth is that the charges in dispute were created by the Commissioner General of TRA out of tax dispute and were created while administering Revenue laws. 9 Lastly but not least, the arguments by Mr. Kessy that the cited cases by Mr. Magoma are distinguishable are seriously misconceived. This court find and hold that the cases cited are relevant. Since no dispute that the instant petition is a civil proceeding in nature and is on challenging Commissioner General of TRA conduct in applying revenue laws, then, I find any argument to convince the court has jurisdiction misconceived. On the totality of the above reasons, I find the arguments in support of the preliminary objection, case law cited sound and merited in the circumstances of the petition and without necessarily repeating them uphold the objection and proceed to dismiss this petition with costs. It is so ordered. 10

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