

TANZANIA / JUDGMENT

rajesh yoginder vohora vs rakesh yoginder kumar vohora and 3 others 2021 tzhccomd 3503 10 december 2021

COURT
TZHCCOMDDECIDED
10 December 2021

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM MISC. COMMERCIAL APPLICATION No. 65 OF 2021 IN THE MATTER OF COMPANIES ACT No. 12 OF 2002 AND IN THE MATTER OF BONDENI SEEDS LIMITED AND IN THE MATTER OF THE PETITION BY RAJESH YOGINDER VOHORA..... PETITIONER VERSUS RAKESH YOGINDER KUMAR VOHORA..... 1stRESPOND OMAR IDD OMAR..... 2nd RESPONDENT RAGHAV RAKESH VOHORA..... 3rdRESPON BONDENI SEED LIMITED..... 4th RESPONDENT (necessary party) Date of Last Order: 02.12.2021 Date of Ruling: 10.12.2021

RULING

MAGOIGA, J. The applicant, RAJESH YOGINDER VOHORA by certificate of urgency and under the provisions of sections 233(1) (2) (3) (a) and (b) and 121(1) (a) and (b), (2), (3) and (4) of the Companies Act, No. 12 of 2012 petitioned to this court against the above named respondents praying for several reliefs. U/l. 1 When this petition was called on for orders on 2nd day of December, 2021, Mr. Salim Juma Mushi, learned advocate appeared for the petitioner, whereas Messrs. Philip Mushi and Andrew China, learned advocates appeared for the 1st 3rd and 4th respondents and Mr. Erick Sikujua Ng'maryo, learned advocate appeared for the 2nd respondent. Mr. Mushi informed the court that he was able to serve all respondents and today their legal representative are here in court for orders and prayed for a date of hearing given the urgency of the matter. Mr. Philip Mushi prayed for time to file counter affidavit as they intend to file counter affidavit. On the part of Mr. Ng'maryo, learned advocate for the 2nd respondent hereinabove prayed to move the court under Order XLIII Rule 2 proviso thereto of the Civil Procedure Code for leave to make oral application. The learned advocate told the court that he had two prayers to make; one, for transfer of this petition to Arusha district registry and the second, was for struck out of this petition. As to the first prayer, it was Mr. Ng'maryo's submissions that the first prayer is made under Rule 7(1) of the High Registry Rules, 2005 and 2 section 18 of the Civil Procedure Code [Cap 33 R.E. 2019] which both insists that a party to file proceedings where a cause of action arose or the defendant resides. According to Mr. Ng'maryo, the petitioner and its pleadings were prepared in Arusha and all respondents and their respective advocates are living in Arusha.

Witnesses are likely to come from Arusha, and that, by virtue of section 3B of the CPC on overriding objective requires that the matter be determined timely and at low costs affordable by the parties and concluded that Arusha becomes more convenient than Dar es Salaam. On that note, Mr. Ng'maryo concluded that the transfer of these proceedings to Arusha will meet the requirement of the law. On the second point, Mr. Ng'maryo pointed out that, there is a similar matter in the High Court Arusha district registry on the same cause of action which is Misc. Cause No.11 of 2021 filed on 15/10/2021 between same parties. According to Mr. Ng'maryo, the only difference is that in Arusha, the petitioner is by 2nd respondent here and the petitioner here is the 3rd respondent in Arusha petition. The learned advocate for 2nd respondent provided a copy of the Arusha petition for easy of reference. The petitioner in Arusha, alleges that the respondents therein committed 3 fraud, stole company funds and illegally removed the 2nd respondent from the company while in this petition is unfair removal from the Board and mismanagement of company affairs. According to Mr. Ng'maryo, the petitioner was to bring cross petition if he had any issue but decided to run to Dar es Salaam despite being aware of the Arusha proceedings. Mr. Ng'maryo went on to argue that, in both petitions, Mr. Mushi represents the petitioner here but did not disclose the Arusha proceedings to this court, which act, according to Mr. Ng'maryo, is a serious professional failing on the part of Salim Juma Mushi as an advocate. Not only that but also he failed to inform the court of the order in Arusha district registry to preserve the status quo of the share ownership. Mr. Ng'maryo charged that this petition is aimed at making a diversion of the lawful and binding orders of the High Court at Arusha. Another point charged by Mr. Ng'maryo was that it seems there is collusion between Mr. Salim Juma Mushi and Mr. Philip Mushi in representing parties and same is aimed at creating embarrassment to court and tarnishes the images of the judges involved. 4 On that note, Mr. Ng'imaryo prayed that this petition be struck out because is contrary to the principle of law i.e res subjudice. In reply Mr. Mushi for the petitioner argued that no way this matter which has been filed in High Court (Commercial Division) be transferred to Arusha district registry. According to Mr. Mushi, this petition was filed under certificate of urgency in this registry because the Commercial sub registry in Arusha is on ad hoc basis and the only way to achieve the purpose of urgency was by filing it in Dar es Salaam main registry of the High Court (Commercial Division) as by the time was filed no sitting judge was at Arusha. According to Mr. Mushi, the petition is under certificate of urgency and is at home and dry with section 3B of the CPC because it is aimed at timely disposal of the disputes. The urgency, according to Mr. Mushi, was the letter from NBC Bank which was a response to 2nd respondent of ceasing the operations of the 4th respondent's bank accounts and other incidents carried by the 2nd respondent making it imperative to be dealt with in this registry, insisted Mr. Mushi. On the second point on pendency of the same matter in Arusha, it was the strong reply of Mr. Mushi that, these are two different petitions altogether. The differences, according to Mr. Mushi, are on reliefs claimed and the 5 purpose they intend to achieve. Mr. Mushi insisted that given the nature of this petition which is challenging directorship, shareholding and removal of the 2nd respondent from the 4th respondent whereas the Arusha petition is for the 2nd respondent exercising his rights as shareholder and as such this petition should be determined first. As to the argument that the Arusha petition was not disclosed, it was brief reply of Mr. Mushi that, disclosure was done at

paragraph 23 of the petition. As to the order of stay, it was reply by Mr. Mushi that is not a clear and do not touch what is in this petition. On that note, Mr. Mushi prayed that the oral application be rejected and or dismissed with costs. On the part of Mr. Philip Mushi for the 1st, 3rd, and 4th respondents was of the strong view that this petition causes no prejudice to the 2nd respondent and other parties if this petition is determined here. According to Mr. Phillip Mushi, this being a Commercial Cause, transferring it to Arusha District Registry will not be possible and these are two different registries dealing with different matters. As to costs, it was the reply of Mr. Phillip Mushi that, the 4th respondent is losing much because of the conduct of the 2nd respondent. Other submissions by Mr. Phillip Mushi were in support of what Mr. Mushi submitted. In conclusion, Mr. Phillip Mushi argued that it is only incompetent petitions which can be struck out but this one is not and no plausible reasons are given for court to strike out the instant petition and prayed that this matter be finalized here for the interest of justice. In rejoinder, Mr. Ng'maryo was briefs that the certificate of urgency lacks details, cross petition was the proper approach, these petitions are not different and is an abuse of the court process and continue to stand to his guns that let the alternative prayer be granted by either transferring this petition to Arusha District Registry or have it struck out for the reasons so far advanced. This marked the end of hearing of this oral prayer. The task of this court now is to determine the merits of the two alternative prayers or otherwise. This oral prayers by Mr. Ng'maryo were pegged under Order XLIII Rule 2 and proviso thereto which either parties to consent in writing or in such other mode as may be appropriate regard all circumstances under which the prayer was made. In this case I entertained the prayers in the manner preferred for this cause was under certificate of urgency. Having carefully and dutifully listened to the rivaling submissions by the learned trained minds of the parties, it is the considered view this court that, the instant oral application calls for determination of two competing issues, which are; one, whether the instant application should be transferred to Arusha district registry to be determined alongside with the pending Misc. Cause No. 11 of 2021 for being similar and between same parties, and two, whether the instant application is to be struck out on account being an abuse of the court process. The first prayer though seriously objected by the petitioner counsel and the rest of the respondents save 2nd respondent was pegged under Rule 7(1) of the High Court Registries Rules, 2005. For easy of reference, the said rule provides as follows: Rule 7(1) Original proceedings in the court may be instituted either in the Registry at Dar es Salaam or in the District Registry (if any) for the area in - 8 which the cause of action arose or where the defendant resides.(Emphasis mine). Going by the clear and literal wording of rule 7(1) above, in my considered view that, the place of institution of the original proceedings is optional to be instituted in the main registry or sub registry but consideration has to be where the defendant resides or where cause of action arose. Therefore, having dispassionately considered the rivaling arguments of the trained legal minds for parties, is my considered opinion that, I find no offence committed by the petitioner by filing the instant petition in the main registry of the High Court (Commercial Division) in Dar es Salaam much as no dispute that this is commercial significant case. My further reading of the Rules, I find the relevant rule for transfer of cases is Rule 7 (4) of the High Court Registries Rules. For the easy of reference, the said sub Rule provides as follows:

- (4) The court may at any time on application or of its own motion transfer any proceedings from one registry to another and any proceedings transferred, and all documents shall be filed accordingly. 9 Provided that where the original proceedings in commercial case are instituted in a District Registry or sub registry, such proceedings shall as soon as practicable be transferred to the Commercial Division before further steps are taken in the proceedings, except where all parties agree to have the commercial case determined by the High Court at such District or sub registry of the High Court. The above quoted rule, in my considered opinion, clearly allows transfer of cases from one Registry to another and the documents so transferred shall be filed. Further, the proviso to the above rule set condition that unless all parties agrees to have the commercial case be determined by the High Court at such District or sub registry of the High Court. In this petition, no doubt, parties are at variance as to the transfer of these proceedings to Arusha District registry. I have given due consideration of the prayer for transfer and the competing reasons why this matter should be determined here and not in Arusha and guided by the above provisions of the law, I find that the prayer for transfer this proceedings to Arusha for commercial significant matter to be not tenable. Not only that but I have as well considered why the commercial 10 significant matter pending in Arusha was opened in the normal District Registry despite there being a sub registry of the High Court (Commercial Division) with no definet answer. I guess is on the same convenient of the availability judges in our Commercial sub-registry in Arusha. So both petitions were looking for conveniences of being heard by all time available judges in the respective registries. Be as it may, if parties' agrees, the Arusha pending petition can be transferred to this registry and be heard along side with this one here because is a purely commercial significant matter that it was to be filed in this registry. That said and done, the first limb of prayer is rejected on the reasons given above. On the second prayer that this application be struck out because is the same as that of Arusha and is an abuse of the court process, I must admit it disturbed my mind a great deal. However, all argued for and against considered and take on board; with respect to Mr. Ng'maryo I find this prayer not accepted. The reasons, I declined to grant this prayer are abound. One, having an opportunity to be availed with the petition in 11 Arusha and the one in dispute here, I found that same are pegged on different provisions of the Company law and the prayers are different, hence, can be determined separately without necessarily joined together. Two, both petitions hinges on governance of business or company in dispute and as such guided by the Rule 2 of the High Court Registries Rules, 2005, I can't understand how the legal eyes of the 2nd respondent counsel escaped this Rule and decided to file a commercial significance matter in a district registry instead of commercial main registry or its sub registry in Arusha. Three, Rule 2 articulates matters of commercial significance which are replica of section 2 of the Magistrates Court Act [Cap 11 R.E.2019] which requires that the same be filed in Commercial Division of the High Court. Four, More so, the proviso to Rule 7 (4) of the High Court Registry Rules provides for transfer of cases from the district registry to Commercial Division of the High Court and not otherwise or where parties submit themselves to the District registry. In this parties do not agree that this petition be transferred. On the totality of the above reasons, with due respect to Mr. Ng'maryo, I declined to agree with the two oral

prayers by senior advocate Erick Sikujua 12 Ng'maryo with no order as to costs because parties relationship need to be amended rather being put apart on costs issues. It is so ordered. Dated at Dar es Salaam this 10th day of December, 2021. S. M. MAGOIGA JUDGE
10/12/2021 13

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