

TANZANIA / JUDGMENT

20070615 TZHC Dar es Salaam

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM MISC. COMM:~)~ AL CASE NO. 34 OF 2006 IN THE MATTER OF THE COMPANIES ACT, 2002 AND IN THE MATTER OF A PETITION FOR WINDING UP OF KILOMBERO LUGGS LIMITED BETWEEN RUFJI BASIN DEVELOPMENT AUTHORITY PETITIONER VERSUS KILOMBERO HOLDINGS LIMITED RESPONDENT :<. JLIKG

1. Date of Last Submission - 11/6/2007
2. Date of Hearing - 11/6/2007
MASSATI, J: There is before me, the application for leave of the court to serve interrogatories to the Respondent. The application is supported by the affidavit of BAHN/BAS JAMES KABUZYA and is presented by M/S LE:(GLOBL LLP (Advocates). 2 The application is resisted by the Respondent through a counter affidavit taken out by Dr. George Mlingwa and is represented by MS. F.K. LAW CHAMBERS. According to paragraphs 3, 4 and 5 of the affidavit, the purpose for which interrogatories are sought out is to elicit facts from the Respondent that would make the court decide on the Respondent's solvency status and thereby be able to decide whether the Respondent is able to pay its debts as they fall due. In his submission, Mr. Dindi, learned Counsel for the Petitioner has argued that the disclosure of the interrogatories was necessary in order to establish the petitioner's case that the Respondent was insolvent hence liable to be wound up. It would be cumbersome for the Petitioner to establish this fact if leave is not granted. Mr. Dindi referred the court to the dictates of O. XI of the Civil Procedure Code Act and the cases of AGGARWAL VS OFFICIAL RECEIVERS [1967] EA 585 and D'SOUZA VS FERRAU [1969] 1 E.J. 1000 as quoted by B.D. CHIPETA in his book "CIVIL PROCEDURE IN TANZANIA" A STUDENT'S MANUAL. In his counter affidavit, Dr. George Mlingwa, states that the questions raised in the intended interrogatories were irrelevant as the Respondent has consistently shown that he was ready and willing to pay the rent claimed. Besides, the answer to the petition has gone into such details as to render the proposed interrogatories unnecessary. Furthermore the Respondent has no intention of recovering the rent but has filed the petition merely as a gesture of his malicious intention to dispose of the farm to a third party despite the heavy investments undertaken by the Respondent in developing the farm. Arguing for the Respondent, Mr. Duncan learned Counsel submitted that the interrogatories are irrelevant and unnecessary. The facts elicited by the Petitioner would better be ascertained in the course of conducting the hearing of the winding up

petition and not otherwise. To seek to get those facts at this stage, however; nothing but malice, and would perpetrate the malice of the Petitioner in filing the winding up proceedings in the first place. It was the learned Counsel's view that by mere logic, the fact that the Respondent was continuing with the L.rrning activities at the farm was sufficient evidence to establish its financial soundness. In support, Mr. Duncan also relied on AGGRAWAL'S case. He therefore prayed for the dismissal of the application. By way of rejoinder the Petitioner/Applicant filed both a reply to the counter affidavit and a rejoinder submission. In the reply to the counter affidavit, Mr. Kabuzya has denied any knowledge of agreed points. He denied the payment of rent. It is further averred that the winding up proceedings followed the collapse of the discussion with the Respondent's shareholders and that it is not known why Dr. George Mlingwa should appear to oppose the winding up when the shareholders of the Respondent Company have not opposed it. They annexed a copy of the letter from the shareholders to ask the respondent not to deal with Dr. Mlingwa. Mr. Kabuzya further counters that if there is any investment, these would be expenses and not assets, capable of being seized to realize money. He insists that the interrogatories were necessary in order to ascertain the court to establish whether the Respondent is able to pay its debt. In his rejoinder submission, Mr. Dindiha, argued that according to

0. XI rule 1 of the Civil Procedure Code Act, interrogatories can be used in any type of suit and though they are not intended to preempt hearing of the suit, but only to shorten the trial. In his view, interrogatories are necessary where there is a deliberate concealment of facts; to obtain necessary information, and short trials. The learned Counsel also referred to several English authorities to the effect that interrogatories are said to be directed to facts when they are aimed at matters of opinion or for discovering the evidence available to the other side. The case of IC.NAPP VS HARVEY

- [1911] 2 KB. 725 and see also *CHAMBERLAIN* [1886] 17 QB. 154 were referred to as illustrations of those principles. In conclusion, Mr. Dindiha submitted that the interrogatories were necessary and not prolix and oppressive. He reiterated his prayers for leave to serve the Respondent with the interrogatories. 5. As to whether or not this court has power and discretion to grant leave to deliver interrogatories, there is no dispute between the parties. For purposes of emphasis and clarity of XI rule 1 of the Civil Procedure Code Act 1966 provides: - "(i) In any suit the Plaintiff or Defendant by leave of the court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such a person is required to answer. " As to what type of questions are allowed in the interrogatories, the proviso to XI rule 1 provides the answer: - "Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross examination of a witness." Under rule 5 of XI, objection can also be taken to interrogatories that are scandalous, irrelevant and not exhibited bona fide for the purpose of the suit, or that the

matters inquired are not sufficiently material at that stage, or, on any other ground that may be taken in the affidavit in answer. The above general principle was judicially reasserted in AGGARWAL VS OFFICIALS, RECEIVERS [1967] EA. 587, a case acknowledged by both the learned Counsel, as easily, the leading authority in East Africa on the subject. It was held in that case that: -- "The general principle followed is to allow such interrogatories as may be necessary either for disposing fairly or more expeditiously of the case or for the purposes of saving costs." In India, where this is a similar provision, it has also been held that interrogatories are admissible which go to support the applicant's case or to impeach or destroy the opponent's case, and the convenience of the validity of an interrogatory is not a consideration, the answer being relevant if given in chief? "The only question is: what are the issues in the case? The interrogatories should be directed to ascertain actual facts bearing upon the issues arising in the case, but not as to the conclusions of law or inference from the facts or construction of words or documents." SARKAR ON CODE OF CIVIL PROCEDURE 10th Ed. (2005) Vol. I p. 1145. It has also been held that in interlocutory proceedings in the nature of fishing enquiry cannot be allowed. (SARKAR - Supra - p. 1143). So, with the above principle in mind, I now turn to consider the present application in which the rival contentions are whether the interlocutory proceedings are relevant and necessary at this stage; and whether they would reduce costs of litigation or scandalize; and/or more importantly preferred? I have looked at the proposed interrogatories. They seek to elicit clarification of the Respondent's answers to paragraph 8 of the petition. Paragraph 8 of the petition asserts: - "8. The Respondent is insolvent and unable to pay its debts when they fall due. The Respondent retorts that according to paragraph 23 of the Answer: "23. That the contents of paragraph 8 of the petition are strongly discredited. And the Petitioner is put to strict proof thereof, the Respondent asserts that it is a financially sound business entity with assets that evidently exceed the liabilities stated in the petition, which is subject to indicate that they can discharge their financial liabilities including the payment of the rent in question. The questions raised by the Petitioner to ascertain the financial soundness of the Respondent are definitely relevant, but I think they do not fall into account the other contentions raised by the Respondent. For instance in the next paragraph (i.e. 24) the Respondent alleges, that it is "... Currently carrying out agricultural production at Mngeta Farm Complex with over 2000 acres, of land has been cleared and planted with sugarcane, irrigation channels of 2 kilometers long have been established... In carrying out these activities, the Respondent depends on finance and discharges all the liabilities and outgoings concerning the day to day operation..." the Petitioner in its Reply to the counter affidavit, and he

- positively asserts in paragraph 11 (b) of the Reply: "(b) The Respondent is hopelessly insolvent and a defacto dead entity. It has no assets, its bank account, is dormant, and its balance sheet is supporting the winding up petition. ..." It is a bit surprising to me, for the Petitioner to be positive that the Respondent is "hopelessly insolvent and a defacto dead

entity" on the one hand, and to seek further information by way of interrogatories to establish that fact, on the other. To be able to come to that conclusion the Petitioner must definitely have some evidence to support it. If that is so, then what is the purpose of the interrogatories? The Petitioner also disputes the contents of paragraph 24 of the Answer in which, as may be recalled, the Respondent alleges that it has developed 2000 acres of the farm and has planted paddy, and thereby also discharging its day to day operational expenses. Of course, the truth will have to be ascertained in the course of the hearing of the petition. To me, the determination of this issue would also be relevant to the determination of the issue in controversy between the parties - which is whether the Respondent is insolvent because in my view, Solvency is not determined by liquid assets held in financial institutions or otherwise. The above analysis leads me to conclude that, although the intended interrogatories may be relevant, they are neither necessary nor would they serve any useful purpose at this stage, because the Petitioner is already equipped with the answers that he is trying to get through interrogatories. On the premises I am also inclined to believe that the interrogatories are not bona fide, but just another fishing expedition, which would only increase costs and waste the precious time of this court and the parties involved. For the above reasons, I would dismiss the application with costs. Order accordingly. JUDGE 1,861 words

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