

TANZANIA / JUDGMENT

antony haji vs kingsway properties ltd another 2023 tzhccomd 325 11 september 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
PAR ES SALAAM MISC. COMMERCIAL CAUSE NO, 5 OF 2023 IN THE MATTER OF COMPANIES
ACT NO. 12 OF 2002 IN THE MATTER OF PETITION BY MEMBER FOR AN ORDER OF THE COURT
TO COMPELL STATUTORY MEETINGS AND IN THE MATTER OF THE PETITION BY MEMBER
FOR UNFAIR PREJUDICE ORDER AND IN THE MATTER OF SECTIONS 137(1) AND 233 (1) OF THE
COMPANIES ACT, NO. 12 OF 2002 BETWEEN ANTONY HAJI.....
PETITIONER VERSUS KINGSWAY PROPERTIES LTD..... 1st RESPONDENT YASMINE
HAJI..... 2nd RESPONDENT

RULING

A.A. MBAGWA J. This petition is premised on unfair prejudice to the petitioner and the 1st respondent allegedly committed by the 2nd respondent, Yasmine Haji. The petitioner contends that the 2nd respondent who is his blood sister has been running the company affairs in a manner prejudicial to the company and himself. He laments that the 2nd respondent has been using the company's properties to the detriment of the petition. He also states that the 2nd respondent has refused to recognise the petitioner as a shareholder and director of the 1st respondent company. As such, the petitioner has brought this petition under the provisions of sections 137(1) and 233 (1) and (3) of the Companies Act, No. 12 of 2002 against the respondents for the following orders, namely;

- (a) A court declaration that the affairs of the 1st respondent are being conducted in a manner that is unfairly prejudicial to the interests of the petitioner and non-compliance with Tanzania Tax Laws and the Companies Act 2002.
- (b) A court declaration that the petitioner is a lawful shareholder of the 1st respondent and any refusal to recognize the petitioner as the lawful shareholder of the 1st respondent is unlawful.

- (c) A court order compelling the petitioner, 1st and 2nd respondents to hold statutory meetings in accordance with the Memorandum and Articles of Association of the 1st respondent.
- (d) A court order compelling the 2nd respondent to submit the required documentation and credentials for the online updating of the 1st respondent in compliance with the directives of the Business Registration and Licencing Agency (BRELA). 2
- (e) Costs of this petition be borne by the 2nd respondent.
- (f) Any other reliefs) this Honourable Court may, in circumstances, deem fit and just to grant. The petition is verified by an affidavit affirmed by Anthony Haji, the petitioner. Upon service, the respondents filed a joint reply to the petition strongly contesting the petition and its consequential prayers. The reply is verified by an affidavit of Yasmine Haji. In the reply to petition, the respondents state that the 2nd respondent, Yasmine Haji is currently the only existing shareholder and director following the transfer of the petitioner's share to the 2nd respondent and the demise of other two directors Abdul Haji and Claude Haji. Briefly, the background leading to this petition may be narrated as follows; According to the pleadings, the petitioner and the 2nd respondent are siblings. It is undisputed that the 1st respondent, Kingsway Properties LTD was formed and incorporated as Private Company in the year 1992. It had four shareholders and directors namely, Abdul Haji Ladha, Claude Haji, Antony Haji and Yasimine Haji. Abdul Haji Ladha and Claude Haji were father and mother of the petitioner and 2nd respondent but they are now deceased. Unfortunately, the record is silent as to when the duo passed away. Initially, each of the four shareholders held a single share equivalent to 25% of the total issued shares of the company. However, on 15th November, 2010, the petitioner, through a share transfer form (annexure AH-6 to the petition), transferred his share to his sister, Yasmine Haji, the 2nd respondent on consideration of love and affection. As such, on 17th November, 2010, the board of directors of the 1st respondent including the petitioner passed a resolution to allow the transfer. The said board resolution is also attached to the petition and collectively marked annexure AH-6. Consequently, the petitioner ceased to be a shareholder and director of the 1st respondent company. The company thus, remained with three shareholders and directors until the demise of two shareholders namely, Abdul Haji Ladha and Claude Haji. As alluded to, the record is silent as to when the duo passed away. Surprisingly, the petitioner has filed this petition challenging the transfer of his shares done in 2010 and he is accusing the 2nd respondent Yasmine Haji for excluding him from the company's affairs. When the parties appeared before this Court on 25th April, 2023 the petitioner had the services of Mr. Rayson Luka, learned advocate while Mr. Jovinson Kagirwa, learned advocate appeared for the respondents. Upon consensus by both parties, this Court ordered the matter to be disposed of by way of written submission. I am grateful to both counsel as they duly complied with the court filing schedule. I will thus summarise their written submissions before I proceed to analyse them in light of the existing facts and the law applicable to this petition. Submitting in support of the petition, the learned counsel for petitioner started his submission by citing the provision under which the petition was made and asked this Court

to declare the petitioner a lawful shareholder, compel the respondents to hold statutory meeting in accordance with the provision of section 137 and an order of unfair prejudice under section 233(1), (2), (3) (b) and (a) of the Companies Act. It was the petitioner's submission that, the trigger of this petition was the 2nd respondent's refusal to recognise the petitioner as lawful shareholder and failure to convene statutory meetings, the acts which according to the petitioner, amount to unfair prejudice to the interest of the petitioner. Expounding on non- recognition of petitioner as lawful shareholder, the learned counsel for petitioner had it that, the transfer of shares to 2nd Respondent was illegal for want of written notice informing the board of directors the desire of the petitioner to transfer his shares. He stressed that it was against paragraph 8 of Articles of Association of the company which, in mandatory terms, restricts the transfer of shares unless all the conditions set out therein are 5 complied with. He reasoned that since there was no compliance of the conditions, there was no transfer of shares. The learned counsel contended that, shares were transferred on 15th November, 2010 before the approval by the board of directors. In his view, the board resolution which approved the transfer on 17th November, 2010 was held in contravention of the memarts. He contended further that, the board meeting was to be held before the execution of share transfer. The learned counsel added that, the board resolution, if any, was wrong and contrary to Memarts of the 1st respondent for want of proper endorsement of the board. He clarified that the purported board resolution was signed by chairperson only without the endorsement of secretary. According to Mr. Luka, the identified ailments constitute non-compliance with the procedures laid down in the memarts and articles of association and their effect renders the whole transaction null and void. He relied on the case of Shirin Mooseje vs Juzer Zakiuddin Mohamedali & 2 Others, Misc Commercial Application No. 2 of 2021 HC (Commercial Division) at Arusha. Based on the above decision and taking into account the conducts of 1st and 2nd respondents, the counsel urged this Court to grant the prayers as contained in the petition. 6 Submitting on the defect pertaining to share transfer, the learned counsel for petitioner had it that, there was no acceptance by 2nd respondent. Mr. Luka told the Court that, since the share transfer was signed by the petitioner only, in his view, there was no valid transfer of shares in terms section 10 of the Law of contract Act. According to him, failure by either party to sign renders the whole transaction a nullity. To cement his submission, the petitioner's counsel referred this Court to the case of Haji Kiruku vs Bagaile Kinuni, PC Civil Appeal No 80 of 2020 HC at Mwanza in which the court held that there was no valid agreement because the counterpart did not sign it. Regarding unfair prejudice, the learned counsel submitted that, the 2nd respondent has been conducting the affairs of 1st respondent in a manner which is unfair and prejudicial to the interest of petitioner. Clarifying his allegation, the learned counsel told the Court that the act of the 2nd respondent denying the petitioner of his right to participate in the affairs of the 1st respondent by relying on illegal transfer which was in contravention with memorandum and articles of association constitutes unfair prejudice to the interest of the petitioner. He placed reliance on the case of Velisas Elizabeth Deflosse Ingleton (petitioning as legal representative under the power of Attorney of Gordon McClymont) vs Joseph 7 7 Ignatius Noronha and Others, Misc. Commercial Cause No. 20 of

2021, HC (Commercial Division) at Dar es Salaam. The learned counsel said that in the case above, elements of unfair prejudice were defined to mean detriment of some kind which would strike a man business. He added that the 1st and 2nd respondents have been conducting the affairs of the 1st respondent to the detriment of the petitioner because they have never called or issued a notice to call for the extra ordinary general meeting. He lamented that, even the meeting of the board of directors purported to have approved the transfer was convened without the authority as such, the resolution passed for transfer of shares was without any authority. In reply, Mr. Jovinson Kagirwa, learned advocate commenced his submission by reiterating that, there is no dispute between the parties that petitioner transferred his shares to 2nd respondent but the petitioner is now challenging the legality of the transfer. According to Mr. Kagirwa, the shares were legally transferred to the 2nd respondent. The learned counsel told the Court that, the petitioner was the key prayer in the transfer of shares as both a transferor and director of the 1st respondent who also attended the board meeting which blessed the transfer of share. The respondents' counsel opined that, since there is no allegations of fraud or ~ 8 7 forgery on the transfer of shares and board resolution, the petitioner is estopped under the doctrine of estoppel to renounce his declaration. Replying on the argument that there was no complete transfer of shares on the ground that the 2nd respondent did not sign the transfer documents, the learned advocate told the Court that the assertion is an afterthought and cannot hold water because the 2nd respondent accepted it by acting on unsigned draft. He relied on the case of IBM Tanzania Limited vs Sunheralex Consulting Co. Ltd, Commercial Case No. 9 of 2020, HC (Commercial Division) at Dar es Salaam in which the Court held that in the circumstances where parties had acted in accordance with unsigned draft, it justifies that there was a contract on the basis of that draft and the case of Shirin Mooseje (supra) is distinguishable because in the matter at hand there was voluntary transfer of shares unlike in Shirin case where shares were forfeited without knowledge of the shareholder. Responding to the argument that, to date the petitioner is still recognised as a shareholder of the 1st respondent, the learned counsel for respondents had it that the last annual return was filed in 2010 before the execution of the deed of transfer of shares. He said that part 9 of the annual returns indicates that there was no annual return filed from 1997 as such, the office of Registrar of the companies is not aware of any changes which took place after 1997. According to Mr. Kagirwa, the petitioner cannot rely on annual returns as evidence to prove that he is still the shareholder of the 1st respondent while even the deceased shareholders are yet to be removed from the list as directors and shareholders. In his view, the appearance of the name of petitioner on the list of the directors does not mean that he is still a shareholder because the contents of annexure AH-6 was not disputed and it is the board of directors including the petitioner which authorized the transfer of shares. Submitting on the allegations of unfair prejudice, the learned counsel had it that, the provisions of section 233(1) of the Companies Act, was meant to protect the minority shareholders against the long-celebrated rule of majority whereby they can manage the company at the detriment of the minority. The counsel submitted that the petitioner has to state conditions which constituted unfair prejudice to the detriment of his interest in the 1st respondent. According

to Mr. Kagirwa, the allegation that there was no complete transfer, non-signing of the transfer deed by the 2nd respondent, execution of the transfer on 15th November, 2010 before the approval of the board on 17th November, 2010 and withdrawing the offer cannot be termed as unfair conduct. He insisted that elements of unfair prejudice were not met. The counsel was thus opined that the petitioner is looking for the back door to enter in 1st respondent after he had transferred his shares. On the strength of the above reasons, Mr. Kagirwa urged this Court to dismiss the petition with costs. In brief rejoinder, Mr. Luka, learned counsel for the petitioner reiterated his submission in chief and added that the assertion that the petitioner is looking for the back door to return in the 1st respondent is nothing but pointless because the petitioner has initiated his petition to seek rights following unfair conduct of the respondents. Rejoining further, the learned counsel submitted that since the agreement was not signed by both parties then it was contrary to Section 77 of the Companies Act and the case of IBM Tanzania Limited (supra) is distinguishable because transfer of share cannot be complete by conduct. Having gone through the pleadings and upon a thorough appraisal of the rivalling arguments, it is my considered opinion that this petition hinges on one key issue namely, whether the petition is meritorious. From the record, it is undisputed that the petitioner, on 15th November, 2010, voluntarily transferred his share in the 1st respondent's company to his sister Yasmine Haji, 2nd respondent on love and affection. The transfer was further approved by the board of directors through a board resolution dated 17th November, 2010 (annexure AH-6 to the petition). As such, the petitioner ceased to be shareholder and director of the 1st respondent company. From 2010 when he transferred his share to date, the petitioner has never attended any company's meetings nor has he claimed dividends. To crown it all, the petitioner has never complained until in 2021 when he issued a notice of agenda and extra ordinary general meeting (annexure AH-2 to the petition). Surprisingly, he has filed the present petition challenging the share transfer on technical grounds. Throughout the pleadings, the petitioner does not dispute consenting the transfer of his share to the 2nd respondent nor does he allege any kind of fraud in the board resolution or share transfer. This explains why the cases of Shirin Mooseje (supra) and Yasmin Haji vs Kenyatta Drive Properties Limited and Antony Amin Haji, Misc. Commercial Cause No. 14 of 2022, HC (Commercial Division) at Dar es Salaam are distinguishable to the present matter. I have carefully read and understood the authorities cited by the parties however, it is worth noting that each case is decided based on its own peculiar circumstances. From the foregoing above, it is my considered view that, the petitioner voluntarily and legally transferred his shares to the 2nd respondent but he is now striving to employ technicalities in order to reclaim the share. Sadly, the petitioner is doing all this after the demise of their parents, Abdul Haji 12 Ladha and Claude Haji. If the petitioner were genuine, why did he not complain of being excluded from company's affairs for the whole period of almost ten (10) years? On the basis of the overriding objective principle as enshrined in various pieces of legislation including sections 3A and 4A of the Civil Procedure Code, this Court is enjoined to focus on substantive justice than legal technicalities. Thus, applying the above principle in the matter at hand, it is my conviction that the petitioner's action in bringing this petition

is nothing but calculated to recover the transferred share in a disguise. On all the above account, I am of the considered findings that the petition is devoid of merits. I consequently dismiss it with costs. It is so ordered. The right of appeal is explained. 13

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