

TANZANIA / JUDGMENT

benard buhoma vs tanzanite one mining limited 2021 tzhc 9136 23 december 2021

COURT
TZHCDECIDED
23 December 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY OF ARUSHA) AT ARUSHA MISCELLANEOUS CIVIL APPLICATION NO. 10 OF 2021 IN THE MATTER OF PETITION FOR WINDING UP OF TANZANITEONE MINING LIMITED BENARD BUHOMA..... PETITIONER VERSUS TANZANITEONE MINING LIMITED..... RESPONDENT

RULING

23/11/2021 & 23/12/2021 GWAE, J The Petitioner, Bernard Buhoma filed this petition under section 275, 279

- (1) and 281 of the Companies Act, Cap 212 Revised Edition, 2002 and Rules 89 & 90 (1) (2) of the Companies (Insolvency) Rules, GN. 43 of 2005 for an order winding up the respondent, Tanzaniteone Mining Limited. The brief gist of this petition is follows, the petitioner was employed by the respondent as her legal and compliance manager. He had been rendering his legal services in consideration of US\$ 7,000. However, in the year 2017, the petitioner successfully instituted a suit in this court against the respondent on a i breach of contract vide Civil Case No. 1 of 2017. Through the judgment and decree of this court (Menyempazi, J) dated 16th October 2019 read together with a drawn order issued by the Court (Philip, J) Misc. Civil Application No. 57 of 2021 dated 3rd September 2021, the petitioner was accordingly awarded the following reliefs; Tshs. 289, 940,000/= for breach of the contract, payment of Tshs. 20,000,000/ being general damages, an interest of 12% at the court rate on the decretal sum from the date of judgment to the date of full satisfaction of the decree and costs of the case. Seemingly, the respondent was not able to satisfy the petitioner's decree till when this petition was preferred despite the notice of the judgment and decree to the respondent followed by a demand notice. Following the respondent's refusal or inability to pay the outstanding amount, the petitioner has now knocked the doors of this court praying for winding up the respondent and appointment of a liquidator. The petition is duly accompanied with a sworn affidavit of the petitioner pursuant to provisions of the Companies Act and the Rules (supra). The petitioner is therefore before this court praying for decree and orders against the respondent as follows; 2

- a) This court to intervene in the interest of justice to issue a winding up order of Tanzaniteone Mining Limited under the provisions of the Companies Act for being insolvent and unable to pay its debt
 - b) Liquidator be appointed
 - c) The assets of the respondent be realized to pay off its liabilities to the petitioner
 - d) Costs of the petition be borne by the respondent
 - e) Any other and further order this court may deem just and equitable to grant
- On the 23rd November 2021 when this matter was called on for hearing, the petitioner was represented by Mr. Henry Simion, the learned counsel whereas the respondent did not enter her appearance. Thus, the hearing proceeded ex-parte as there was a proof of service through Government Gazette dated 29th October, 2021 S.N ISSN0856-03-23 and Mwananchi local Newspaper dated 2nd November, 2021 and that the respondent had also filed a certificate of compliance pursuant to Rule 102 Rules (supra) on 16th November, 2021. Supporting this petition, Mr. Henry orally argued that, the petitioner has filed his petition against the respondent who was incorporated since 22nd October 1998 with legal certificate of registration based at Merelani-Block 'C' Simanjiro in 3 Manyara Region. He further reiterated what is contained in the petitioner's petition and its supporting affidavit adding that, on the 17th December 2019, the petitioner took initiatives to ensure that his decree is fully satisfied but all his effort went in ineffective. The petitioner's advocate went on arguing that, the respondent who was revealed by an official search that, her directors are; Ami Mpungwe (Tanzanian-1 share) and one Ian Timoth Harebottle (South African-49.999 shares) has been unable to settle the debt. Mr. Henry finally sought the grant of the reliefs contained in the petition on the ground that, the respondent had been unable to pay her debts justifying the court to windup the company. He cemented his argument by citing a judicial decision of this court (Fikirini, J as she then was now JA) in Miscellaneous Civil No. 10 of 2018 between Swissport Tanzania Pic vs. Fast Jet AirLines Limited (unreported) where it was held that, in the absence of any other remedy, the order of winding up the Company in the interest of justice after the company has become "insolvent and unable to pay its debts is the most viable. As this court is moved by the provisions of the Companies Act (supra), it is therefore apposite to ascertain circumstances or cases in which Company may be wound up by Court and determine whether the petitioner is eligible person to justify this court grant the petition "279.-(I) A company may be wound up by the court if;
- (a) the company has by special resolution resolved that the company be wound up by the court; which company may be wound up
 - (b) the company does not commence its business within a year from its incorporation or suspends its business for a whole year; by the court
 - (c) the number of members falls below two;

- (d) the company is unable to pay its debts;
- (e) the court is of the opinion that it is just and equitable that the company should be wound up (emphasis supplied); In our case, petitioner is the petitioning creditor who is a holder of the court's decree dated 16th October 20019. It follows that, he is the proper person to file a winding up of the respondent pursuant to section 281 (1) of the Act if it is proved that she is unable to pay her debts. In the case of *Matic General Contractors Ltd v Kenya Power and Lighting Co Ltd* [2001] 2 EA 440, where the Respondent filed a suit (the second suit) against the Appellant for a declaratory order that the Appellant was not entitled to file a winding-up petition 5 against the Respondent in respect of the disputed debt and for an order of an injunction restraining the Appellant from filing a winding-up petition until the earlier suit was determined. Simultaneously the Respondent applied for a temporary injunction against the Applicant for the same reliefs. The High Court of Kenya heard and considered the application and gave the temporary order against which the appellant appealed; the Court of Appeal of Kenya held; "The Respondent had substantial defences in the earlier suit and there existed a bona fide dispute. The debt in dispute could therefore not form the basis of a winding- up petition... Where a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it... "; (See also courts' decisions in the case of *Mann and another vs. Golstein and another* (1968) 2 All ER 769, and Kenyan judicial decision in the case of *Lighting Co Ltd v Matic General Contractors Ltd* (2000) LLR 720 (CCK). 6 In the instant petition, it is undisputedly clear that the respondent is the creditor to the respondent (debtor), more so, the petitioner had evidently served the respondent notifying her of the debt (court's decree) and requesting him to pay the debt through mutually and acceptable approach but the same went in vain taking into account that the demand notice was clearly received by the respondent's agency on the 17th December 2019. Basing on the proven facts that, the respondent had failed to pay its debt arising from the decree of the court via Civil Case No. 1 of 2017 read together the correctional order made through Miscellaneous Civil Application No. 57 of 2021, the respondent's indebtedness and its failure to take any action warrant this court to issue an order winding up the company in the interest of justice and being only workable course to be taken in favour of the petitioner. In the light of the above stated reasons, I hereby make the following orders;
1. That, the respondent, *Tanzaniteone Mining Limited* registered under the Companies Act, Chapter 212, Revised Edition, 2002 is hereby wound up for being insolvent and unable to pay its debt

2. That, one Mpaya Kamara, the learned advocate practicing as Kamara and Associate Advocates of P. Box 1441 Arusha is hereby appointed as an official liquidator in terms of section 294 of the 7 Companies Act (supra) for a period of six (6) months from the date of this order within which he shall, subject to the control and direction of the court, exercise all powers stipulated in the provisions of the Companies Act (section 299-306) and the Rules (supra).
3. That, the respondent's assets shall be realized to pay off its liabilities to the petitioner.
4. Costs of the petition shall be borne by the respondent. It is so ordered 23rd DECEMBER 2021
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