

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 40 OF 2020

*(Originating from Commercial Cause No. 217 of 2016 and Miscellaneous
Commercial Application No. 45 of 2019)*

IN THE MATTER OF THE COMPANIES ACT, CAP. 212 OF 2002

AND

IN THE MATTER OF DOVETEL (T) LIMITED T/A SASATEL
TANZANIA (IN ADMINISTRATION)

AND

GRATIAN BERNARD MALI (Administrator of Dovetel (T)

Limited T/A Sasatel Tanzania.....APPLICANT

Versus

DR. PETER JONAS CHITAMU.....1st RESPONDENT

MARY BUNDALA.....2nd RESPONDENT

FIRST SEAL COMPANY LIMITED.....3rd RESPONDENT

Last Order: 22nd June, 2020

Date of Ruling: 13th Aug, 2020

RULING

FIKIRINI, J.

Mr. Gratian Mali an advocate as well as appointed administrator of the Dovetel (T) Limited T/A Sasatel Tanzania, filed this application for variation of the administration order dated 25th July, 2019, pursuant to section 256 (2) (a) of the

Companies Act, Cap 212 of 2002 (the Companies Act) Order XLIII Rule (1) of the Civil Procedure Code Act, Cap. 33 R. E. 2019 (the CPC) and the Court order dated 24th March, 2020, for an extension of time within which the Administrator may exercise his functions. The application was supported by an affidavit deposed by Mr. Mali.

Mr. Mpaya Kamara advocate featuring for the 2nd respondent, Ms. Mary Bundala aside from contesting the application by filing a counter-affidavit deposed by Ms. Bundala, filed a notice of a preliminary point of objection that the application was time barred, since it was filed on 09th April, 2020 instead of being filed on 08th April, 2020, as ordered by the Court. Both applications were ordered be argued by filing written submissions in the following order: the submission in respect of the preliminary point of objection and the application itself to be simultaneously filed by or on 06th July, 2020; with exchanged reply submissions by or on 20th July, 2020 and rejoinder by each if any by or on 27th July, 2020. The ruling was set for 13th August, 2020. If the preliminary objection will be sustained the matter will then end there as the application will be struck out. If the preliminary point of objection is overruled, then the application will be considered on merits.

I will thus start with the submissions on the preliminary point of objection. Mr. Kamara submitted that the application that was intended and eventually ordered by the Court to be filed on 08th April, 2020 was filed one day late to wit on 09th April,

2020, without leave of the Court having been sought and granted. He further submitted that if at all the applicant had bothered he would have applied for an extension of time under 93 of the CPC, as long as sufficient grounds justified the delay to the satisfaction of the Court. Mr. Kamara thus submitted that since nothing has been adduced to justify on the delay the application was thus time barred and prayed for its dismissal with costs.

Mr. Mali premised his reply submission contending that the filing of pleadings and the registration process, especially in the High Court Registries of Dar es Salaam, were to be made electronically through the Judicial Statistics Dashboard System (JSDS), which means the manner and time of filing was governed by the Judicature and Application of Laws (Electronic Filing) Rules, GN. No. 148 of 2018 (Electronic Filing Rules). It was then his argument that due to this change the filing mode was affected, the party raising a preliminary point of objection in that regard must therefore check with either the Registrar's office or the opposite party, since it seems the electronic filing did not send information to the opposite party in relation to the matter in which the parties were involved. Hard copies were generated later and this, according to Mr. Mali, was for assessment and payment purposes. Specifically explaining on Miscellaneous Commercial Application No. 40 of 2020, it was his submission that it was filed on 06th April, 2020 at 13:31:31 hours and on same day the notification of admission was delivered to the

applicant's dashboard account by the Court at 14.59.13 hours, which was in compliance to Rule 21 (1) of the Electronic Filing Rules.

From a different stand point, Mr. Mali further submitted contesting that the preliminary point of objection raised did not fall squarely within the ambit of the principles established in the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd v West End Distribution Ltd (1969) EA 696**, which was cited with approval in the case of **National Insurance Corporation and Parastatal Sector Reform Commission v Shengena Limited, Civil Application No. 20 of 2007 (unreported)**, that a preliminary point of objection raised should not be raised if there would be ascertainment of facts. Since it will require production of evidence, the objection raised therefore did not qualify to be a preliminary point of objection on the point of law.

Admitting, that it was improper attaching of evidence to the submission as held in the case of **Bruno Wenceslaus Nyarifa v The Permanent Secretary Ministry of Home Affairs and Attorney General, Civil Appeal No. 82 of 2017**, Mr. Mali contended that he had no option other than attaching copies of electronic filing system reports in respect of Miscellaneous Commercial Application No. 40 of 2020.

On the strength of his submission he urged the Court to overrule the objection raised as the application was timely filed as ordered on 24th March, 2020.

Coming to the application itself, it was Mr. Mali's submission that his inability to complete the administration assignment after the appointment by this Court on 25th July, 2019, was based on the facts stated in paragraphs 6, 7, 8 and 9 of the affidavit in support of the application. From those paragraphs the reasons advanced were the extra ordinary meeting of shareholders could not take place twice as two shareholders namely Rev. Dr. Getrude Lwakatare who despite confirming receipt of the notice did not attend, and Ms. Mary Peter Bundala who avoided service also did not attend. And it was this situation that prompted him to write the Court on 07th October, 2019, vide a letter with reference number ALC/DOVETEL/18, updating the Court on the difficulties being faced and requesting for Court assistance to summon Ms. Bundala. He also submitted another shareholders' meeting which was called on 02nd November, 2019, also could not proceed. Since the administrator has not been able to fulfil the obligation assigned for the reason that Ms. Bundala has not yet handed over the company's office and its assets to the administrator, he was thus seeking for an extension of time so that he can carry out the administration task as ordered by this Court.

To fortify his position, he cited the case of **Hanspaul Automechs Limited v RSA Limited**, Civil Application No. 126/02 of 2018 (unreported) where the Court held:

“Extension of time is a matter of discretion of the Court and that the applicant must put material facts before the Court which will pursued it to exercise its discretion in favour of an extension of time.”

Based on the reasons advanced under paragraphs 6, 7, 8, 9 and 10 and for the sake of justice, the applicant prayed for the Court to vary the administration order and extend time for the administrator to carry out the administrative duties as ordered by the Court.

Mr. Kamara prefaced his reply by addressing the electronic filing of the application which he challenged as being out of time, the point which has already been dealt with. His assertion was premised on the fact that the 2nd respondent was served with hard copy or print copy, as he named it, which was dated 09th April, 2020. Illustrating more on his position, he submitted that the applicant has not given any explanation, as to why the application purportedly filed on 06th April, 2020, was subsequently endorsed as having been presented on 09th April, 2020. His conclusion was the applicant by indicating that the filing was done on 06th April,

2020 was trying to circumvent the 2nd respondent's point of objection that the application was filed out of time.

As for the rest of the application, it was his submission that the applicant has failed miserably to adduce sufficient reason for failing to perform his duties within the prescribed time and also has failed to account for each day of the delay in preferring this present application. This application has been preferred 75 (seventy five) days after the expiry date which was on 24th January, 2020. In support of his submission on the need of accounting for each day of the delay, Mr. Kamara referred this Court to the cases of **Chiku Harid Chionda v Getrude Nguge Mtinga (Administration of the Estate of the Late Yohane Claude Dugu) Civil Application No. 509/01 of 2018**; **Tanzania Fish Processors Ltd v Eusto K. Ntangalinda, Civil Application No. 41/08 of 2018, CAT, p.9-10**; and **Ramadhani J. Kihwani v TAZARA, Civil Application No. 401/18 of 2018, CAT, p. 8-9**. All cases unreported.

Besides his written submission, Mr. Kamara also prayed to this Court that the 2nd respondent's counter-affidavit filed which refuted the depositions in the applicant's affidavit be adopted and form part and parcel of the reply written submission. Specifically addressing paragraphs 5 and 6 of the affidavit, he denied any service being effected upon the 2nd respondent. Attacking annexures D-4 and D-5 to the affidavit that there was nothing suggesting that service was effected to the 2nd

respondent but avoided. And he argued that this became apparent as there was no affidavit of the one who effected the service or notice to the 2nd respondent. Mr. Kamara also challenged annexure D-6 a letter addressed to the Registrar Commercial Court, as actuated by malice and bad faith as it purported to level allegations that were adverse and prejudicial to the 2nd respondent without copying the same to her. It was his further submission that the meeting held on 02nd November, 2019 was held without the 2nd respondent's notice and disputed most of the contents in the affidavit including those in paragraph 9, 10 and 11 of the affidavit.

Submitting further it was Mr. Kamara's submission that the applicant's contention that neither of the parties will be prejudiced, was not sufficient as indeed the 2nd respondent will be prejudiced with the extension of tenure of the applicant who exhibited inefficiency and negligence in performing his duties as administrator and instead want to shift blame to the 2nd respondent.

On the strength of his submission he urged the Court to dismiss the application with costs.

As the practice requires that a preliminary point of objection must precede the hearing of an application on merits. See: **Shahida Abdul Hassanali Kassam v Mahedi Mohamed Gulamali Kani**, Civil Application No. 1999. In this

application, however, I decided submissions in respect of both be filed simultaneously. In the event the preliminary point of objection is sustained then the application will automatically die, if not then the Court will proceed to determine the application for extension of time.

Since the introduction of the Electronic Filing Rules, the manner of filing has changed. Now all the filings at High Court Registries in Dar es Salaam are electronically done, in particular at the High Court Commercial Division. According to Rule 21 (1) of the Electronic Filing Rules, which governed electronic filings, the filing is concluded timely once it has been submitted through before midnight. The provision is reproduced below for ease of reference:

“A document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is submitted, unless a specific time is set by the court or it is rejected.”

Coming to the application at hand, it was the applicant's submission contesting the point of objection, that the present application was filed electronically as per proof on the JSDS (e-filing) on 06th April, 2020 and notification of admission was relayed to the applicant's dashboard account on the very day. Mr. Kamara challenged the submission contending that the application was filed out of time as

he was served with a hard copy which indicated the date of filing being 09th April, 2020, which was a day later after the Court order that the application be filed by 08th April, 2020.

However, in the Tanzania Judicial System, the Court usually relies on the date of filing reflected on the exchequer receipt. See: **Msasani Peninsula Hotel & 6 Others v Barclays Bank (T) Ltd, Civil Application No. 192 of 2006, CAT, (unreported) p. 4.** According to the Court fees receipt issued with control number 991400190301, the date reflected thereon is that of 09th April, 2020, which confirms a delay of one day. That delay must be explained. This has been a position in a number of authorities but for the purposes of this ruling I will point out these few: **Bushfire Hassan v Latina Lucia Masanya, Civil Application No. 3 of 2007, CAT (unreported), Wambele Mtumwa Shaban v Mohamed Hamis, Civil Reference No. 8 of 2016 (unreported) and Lyamuya Construction Company Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010, CAT at Arusha (unreported),** where in all these decisions the Court underscored the importance of advancing sufficient reasons for the delay by stating that:

“delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.”

And the proper way of doing that would have been this application being preceded with an application for extension of time. In the would be application for extension of time the applicant would probably be in a position to highlight what transpired between the information retrieved from the JSDS (e-filing) dated 06th April, 2020 and notification of admission relayed to the applicant's dashboard account on the very day and the date on the receipt which is the one relied by the Court and hard copies filed in Court and served upon Mr. Kamara.

On the point as to whether the point of objection raised fits in the criteria set out in the celebrated case **Mukisa Biscuits**, since the objection called for adducing of evidence to substantiate that the application was timely filed, then it didn't fit. Though I can to an extent understand Mr. Mali's point but would not consider that in his favour as the receipt and hard copies filed in Court are both part of the Court record, which this Court would in one way or the another examine whether there was an objection on not to satisfy itself that the application was timely filed.

Although the delay is that of one day and considering the spirit of the overriding objective, yet I find my hands tied. In the case of **Martin Kumaliya & 117 Others v. Iron and Steel Ltd (Civil Application No. 70/18 of 2018) (at Dar)**, which came after the **Mondorosi Village Council and 2 Others v. TBL and 4 Others in Civil Appeal No. 66 of 2017 (at Arusha)**, whereby the Court of Appeal while appreciating focus on substantive justice, but discouraged skipping of mandatory

rules and procedures of the Court, which in this application was compliance to the Court order on when to file the application. The applicant as pointed out by Mr. Kamara could have applied for an extension of time under section 93 of the CPC, which he did not.

In conclusion, I find the preliminary point of objection raised with merit and sustain it and proceed to dismiss the application for extension of time under section 3 (1) of the Law of Limitation, Cap. 89 R.E. 2002.



A handwritten signature in black ink, appearing to read "P. S. Fikirini".

P. S. FIKIRINI

JUDGE

13th AUGUST, 2020