

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 36 OF 2020

IN THE MATTER OF THE COMPANIES ACT. CAP 212 R.E. 2002

AND

**IN THE MATTER OF M/S HERKIN BUILDERS LIMITED (COMPANY NO.
10829)**

**AND IN THE MATTER OF A PETITION FOR AN ORDER TO CALL, HOLD
AND CONDUCT AN EXTRA ORDINARY GENERAL MEETING BY:**

ESTHER SANYIEL KISHIMBO.....PETITIONER

RULING

B.K. PHILLIP, J

The petitioner herein lodged this petition under the provisions of section 137 (1), (2) and (3) of the Companies Act, Cap 212, R.E. 2002 praying for the following orders;

- (i). An order that a meeting may be called, held and conducted by the Petitioner and that her presence in person or proxy may be deemed to constitute a quorum; and
- (ii). Such other orders as the Court may deem fit to grant.

It is stated in the petition that the petitioner is a member and director of M/S Herkin Builders Limited (henceforth "the Company"), which was incorporated on 16th of April, 1985. The petitioner further states that on its incorporation the company had three directors namely, Sanyiel Isakari Kishimbo, Gren Judica Moshi and the petitioner. However, as time evolved one director was removed from the company, thus the company remained with two directors, namely Sanyiel Isakari Kishimbo and the petitioner, holding 287,500 shares worth Tshs 20,000/= each. On 18th December 2019, Sanyiel Isakari Kishimbo passed on, thus, the Company has remained with one director only.

Moreover, the petitioner stated as follows; That prior to the death of the late Kishimbo, the company had obtained a loan facility from NBC Bank and CBA Bank. The directors executed various documents such as Debenture Charge on fixed assets of the Company and personal guarantees to secure the loan. Following the death of the late Sanyiel Isakari Kishimbo it has been impossible to carry out the business and operations of the Company. Despite the fact that the company is a class one construction Company, for the time being it cannot secure new works due to lack of necessary Company resolutions since currently, there is only one member and one director. The loan granted to the Company has not been serviced. Now, the Banks are threatening to exercise their rights under the properties offered as security for the loan.

The petitioner attached to this petition a copy of the Memorandum and Articles of Association of the Company, Certificate of Incorporation of the Company, a copy of the death certificate of the late Sanyiel Isakari

Kishimbo and Copy of a report on the Company's status from the Business Registration and Licensing Agency (BRELA) dated 7th May 2020. The report shows that the Directors of the Company are Esther Sanyiel Kishimbo and Sanyiel Isakari Kishimbo and that Esther Sanyiel Kishimbo is also the secretary of the Company.

The hearing of this petition was done by way of written submissions. The learned advocate Rosan Mbwambo, filed the submission for the petitioner. In his submission Mr Mbwambo, summarized the background to this petition. He referred this court to the death certificate of the late Sanyiel Isakari Kishimbo and proceeded to submit that the petitioner is the only remaining director, thus the company cannot transact any business or convene any meeting. Mr Mbwambo cited Article 17 and 22 of the Articles of Association of the Company. Article 17 provides that no business shall be transacted at any General meeting unless members of the Company present personally at the time of the meeting are two members, whereas Article 22 provides that unless and until otherwise determined by the Company in a general meeting, the number of Directors shall not be less than two nor more than seven.

Furthermore, Mr. Mbwambo, submitted that the petitioner intends to make a resolution on appointment of directors and auditor, so that the Company can secure new business and execute the existing ones to rescue the properties of the directors which were offered as security for the loan granted to the Company by the Bank.

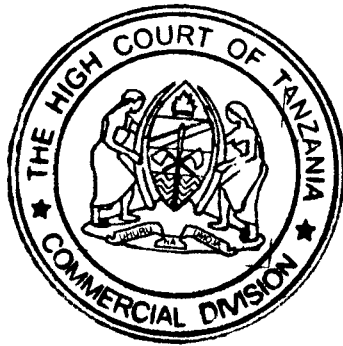
It was the contention of Mr Mbwambo that pursuant to the provisions of section 137 (1) (2) of the Companies Act, 2002, this Court has powers to issue an order for a meeting of any Company to be called, held and conducted in a manner it deems fit. He cited the matter **of M/s Corporate Advisory Services Limited and an application for an order to call, hold and conduct extra general Meeting, Misc. Commercial Application No.19 of 2011**, (unreported).

Having read the petition and all the documents annexed thereto, I have noted with concern the fact that the report from the Brela, dated 7th May 2020 indicates that the Company has two Directors, namely Esther Sanyiel Kishimbo and Sanyiel Isakari Kishimbo. On the other side, the death certificate attached to the petition shows that the late Sanyiel Isakari Kishimbo, died on 18th December 2019. The report from Brela which was issued after the death of Sanyiel Isakari Kishimbo, does not reflect what is alleged in the petition, that is the Company has remained with one director only, that is the petitioner. It has to be noted that any information about a status of a Company in terms of the number of Directors, their names and shares is obtained from Brela. I believe the petitioner's advocate attached the report from Brela for the purpose of substantiating before this court the status of the Company. Unfortunately, the contents of the report from Brela contradicts what is alleged by the petitioner, that is, the company has remained with one director only. In the absence of a report from Brela showing that now the Company has one director only, this court will have no any legal document on which it can rely upon to grant the prayers sought in this petition, since the death certificate attached to the petition

cannot be a substitute of a report from Brela regarding the status of the Company. The position of the law is that the proper body to give any information on the status of the Company is Brela. That is why any change in a Company has to be reported to Brela.

In the upshot the petition is struck out.

Dated at Dar es Salaam this 19th day of August, 2020.



A handwritten signature in black ink, appearing to read "B.K. Phillip", written over a horizontal line.

B.K. PHILLIP

JUDGE