IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 49 OF 2020

IN THE MATTER OF THE COMPANIES ACT NO. 12 OF 2002

IN THE MATTER OF THE PETITION FOR THE WINDING UP OF ACCESS MEDICAL & DIALYSIS CENTRE LIMITED

(Arising from Miscellaneous Commercial Cause No. 31 of 2019)

DR. CRISPIN SEMAKULA.....1st APPLICANT

ACCESS MEDICAL & DIALYSIS

CENTRE LIMITED.....2nd APPLICANT

Versus

HASHIM HASSAN MUSSA.....1st RESPONDENT

THE REGISTRAR OF COMPANIES.....2nd RESPONDENT

Last Order: 1st June, 2020

Date of Ruling: 8th July, 2020

RULING

FIKIRINI, J.

This application has been brought under section 282 (2) of the Companies Act No. 2 of 2002 and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC).The application is supported by the affidavit and the replies to the counter-affidavit filed by the Dr. Edward Gamaya Hoseah, learned counsel for the applicants

Mr. Deogratias J. Lyimo Kiritta learned counsel filed counter-affidavit on behalf of the 1st respondent contesting the application. The application is in the essence seeking for the following orders:

1. That this Honourable Court be pleased to dismiss the winding up petition registered as Miscellaneous Commercial Cause No. 31 of 2019 which was filed by the 1st respondent; and

2. Costs of this application be borne by the 1st respondent.

Hearing of this application was preceded with the filing of skeleton arguments pursuant to Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 (the Rules), followed by oral arguments held on 1st June, 2020 via virtual Court. Both counsels prayed to adopt their affidavits and skeleton arguments as part of their submissions. The Court consented and adopted the same.

It was Mr. Hoseah's submission that the 1st respondent's conduct and actions showed he was acting unreasonably in seeking for the company to be wound up instead of pursuing an alternative remedy as ordered by the Court. The Court made a specific order which was to be complied with in thirty (30) days, requiring each of the party to appoint an Arbitrator and/or Certified Public Accountant (CPA) firm. The 1st respondent as per paragraph 15 of the counter-affidavit says he failed

to appoint a Certified Public Accountant giving a reason that he was not able to pay fees of his appointee. This information came out a day before the deadline of 19th April, 2020, while it has already agreed during their joint meeting how to go about the exercise as exhibited in paragraphs 16, 17 & 18 of the affidavit. The applicants on their part proceeded to appoint M/S African Mark Services to undertake the valuation of the assets and determine shares of the 1st respondent as exhibited by annexture HAD-6 and paragraph 12 of the affidavit.

Countering the 1st respondent's submission as reflected in the skeleton arguments filed, in which the 1st respondent seemed to suggest that this Court has yet to determine whether there was an alternative remedy, with that the applicants controverted that the Court had already ruled out in its ruling that there was an alternative remedy and parties were given orders to pursue that. Submitting on the 1st respondent's shares, it was his submission that no shares were paid up for, so in actual fact, the 1st respondent cannot claim for compensation. It thus remains a mere invitation to treat for the 1st respondent and so lacks legal basis to pursue such claim. More to this, Mr. Hoseah submitted that the offer made depended on the valuation of the shares as ordered by the Court, the process which has been frustrated by the 1st respondent for his failure to back up ownership of the claimed

shares. Stressing on this point, Mr. Hoseah made reference to section 22 of the Tanzania Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act) on admissibility.

As for this application, it was his contention that the applicants' best interest was to prevent loss of life to renal patients who solely depend on the services of the 2nd applicant, and allow patients with kidney problems a chance to live another productive life. The 1st respondent did not care about stakeholders' interest such as that employees, patients, and of the government in terms of taxes and levies except only his self-interest. The case of **Re a Company [2003] All ER (D) 210**, was cited to fortify the submission. Extending his submission, he pointed out that the purpose of the Court order was to give room to parties to reach a point where the value of the company assets and shares of the 1st respondent were to be established. It was unfortunate the 1st respondent did not take the issue seriously, submitted Mr. Hoseah. Instead he opted to frustrate the process, he thus should not be allowed to come at the rescue of this Court, but blame it on himself.

On entering the premises, it was his submission that the 1st respondent purported that the Court has prohibited access to the 2nd applicant's premises, but there was no such order. He went on submitting that the issue was discussed during the 2nd joint consultative meeting held on 14th April, 2020 as averred in paragraphs 9 & 10 of the affidavit.

Submitting on abuse of Court process as raised by the 1st respondent, Mr. Hoseah maintained that the 1st respondent wanted to reap what he did not sow and benefit from his own wrong. And if at all there was any, then it was the 1st respondent's non-compliance to Court orders which were clear. On this aspect he referred this Court to the cases of **Tanzania Brewries Ltd v Edson Dhobe & 19 Others, Miscellaneous Civil Application No. 96 of 2000-HC (unreported)** and **Micky Gilead (a minor suing through Gilead Ndetura Lembai a next friend) v Exim Bank (T) Ltd, HC (unreported) p.3-4.** On the 2nd applicant's status, it was his submission that the company has its separate legal personality from shareholders as stated in the cases of **Solomon v Solomon & Co. Ltd (1897) AC 22**, and **Yusuf Manji v Edward Masanja & Abdallah Juma, Civil Appeal No. 78 (2008) T.L.R 127.**

Mr. Hoseah opposed the application for an extension of time of the 1st respondent so as to be able to comply with the Court order as an afterthought. He contended that had the 1st respondent wanted to do that, he would have appropriately moved this Court as opposed to the choice he made of disobeying the Court order.

He pressed the Court, that on the strength of his submission, to dismiss the petition for winding up and instead order the 2nd applicant to resume its practice without the 1st respondent's obstruction.

Mr. Kiritta reacting to the submission, starting with the issue of the 1st respondent's shares, he submitted that the admission in paragraph 4 of the counter-affidavit was an error which could be cured. Otherwise the shares of the 1st respondent were paid for as reflected in the winding up petition styled as Miscellaneous Application No. 31 of 2019, which a ruling was delivered on 24th March, 2020. In the ruling the Court ordered that the 2nd applicant's company be valued in order to establish the value of the shares of the 1st respondent. This would not have been ordered had the 1st respondent had no shares, submitted Mr. Kiritta. He went on stressing that the order was made in appreciation of the fact that the 1st respondent held 50% shares in the 2nd applicant's company and were paid for and the counter-affidavit in opposing this application has clearly shown that. Also the fact that the 1st applicant did offer to pay the 1st respondent USD 200,000.0 in consideration of the shares held in the 2nd applicant's company was proof that the shares were paid for. He thus prayed the error made in paragraph 4 of the counter-affidavit be ignored as it was typographical error and should not be used to deny the 1st respondent a fair compensation of his investment in the 2nd applicant's company.

Submitting on the 1st respondent's compliance to the Court order, it was his submission that the 1st respondent did not disobey the Court order instead he did everything possible and reasonable to obey the order. Narrating what transpired

after the ruling, Mr. Kiritta contended that after receiving copy of the ruling, immediately a consultative meeting was convened and parties fully participated. In the first meeting, after being asked by the 1st respondent, a proposal was made of requesting the 1st applicant to improve his purchase price of the shares from USD. 200,000.0, and bring it closer to USD 450,000.0, which was refused by the 1st applicant. The Counsel considered this was an easy way of settling the matter amicably as an alternative remedy. And that after this has failed parties agreed to comply with the Court order.

In the follow up of the consultative meeting decision it was agreed that each party to appoint a Certified Public Accountant as reflected in annexture HAD-5. The 1st respondent approached two accounting firms, but the prices were not affordable to him. He thus wrote the 2nd applicant to pay for the three (3) to be appointed accounting firms, as there was money in her account which could have covered them both since they were shareholders. The 1st applicant refused the suggestion, contending that by so doing they will be opening a Pandora's Box, without explaining to the Court what it meant by the statement.

Addressing the two cases cited that of **Solomon** and **Manji** (supra), it was Mr. Kiritta's submission that in both cases the directors were not parties to the cases unlike parties in the present application. But even in **Solomon's** case the Court did

not hesitate to state that where the circumstances allow the company can take responsibility of the directors. There was also special circumstance in the present case calling for the 2nd applicant to pay for the hiring of the accounting firms, submitted Mr. Kiritta. He further submitted that the 1st respondent has candidly expressed his situation that he has been unemployed since September, 2019.

Mr. Kiritta, maintaining his stance, went on submitting that the 1st respondent has since the ruling came out, been pursuing and complying to the orders reasonably. It was therefore wrong for the applicants' counsel to state that they only communicated to each other in 19th April 2020 which was towards the end of the order, and urging the Court to dismiss the petition.

Reacting to the 1st respondent's nationality, he submitted that it has nothing to do with his right to be paid for his shares in the 2nd applicant's company. And he was currently in Tanzania waiting to be paid his shares and not as stated by the applicants' counsel. At most the 1st respondent is ready to further comply if given more time to secure funds to hire an accounting firm. And since the 2nd applicant is a party, she was supposed to as well comply to the order. In essence Mr. Kiritta dismissed the submission made by Mr. Hoseah on the 1st respondent's trying to frustrate the process while in actual fact he was ready to comply with the Court order and his coming to Court was with clean hands seeking for equitable remedy.

As for the opening of the 2nd applicant's premises, it was his submission that the decision on bringing back the 2nd applicant operational, has to be agreed on by its directors and shareholders, her being a legal entity. Submitting on extension of time, Mr. Kiritta referred this Court to annexture HAD-5, it was resolved that parties appear before the Court so that an application for extension can be made. Filing of this application overtook the events, which was even before expiry of the compliance with the Court order.

It was thus his prayer that this application be dismissed and parties be guided on the best way to comply with the Court order including extension of time to make parties comply with Court order, this being a Court of justice.

Mr. Hoseah rejoining the reply submission, it was his submission that the fact pleaded under paragraph 4 of the counter-affidavit, was not a typographical error but an afterthought and mere statement from the bar, and that section123 of the Evidence Act, estops the 1st respondent's assertion. As for the shares, he argued that had the Court ascertained that the shares were paid, it would not have directed in its ruling that the value of the 2nd applicant and the shares of the 1st respondent be established. With respect to the reference of the **Manji** case it was his argument that Mr. Kiritta relied on *obiter dictum,* which usually the Court does not operate on, only on special circumstance. He then reiterated his submission that there was a

distinction between a company and shareholder and in this case there was no issue of special circumstances as submitted by Mr. Kiritta.

The account that the 1st respondent failed to secure an accounting firm and pay for their services, the Counsel countered the submission arguing that, the 2nd respondent was still operational Managing Director since he had not vacated office, thus had he therefore been true and honest to himself he could have initiated the process through the Memorandum and Articles of Association which allows him to convene a management meeting and table his request for approval Or in the alternative he could have requested this Court to issue an appropriate order along that line.

Touching on the issue of nationality and origins of the 1st respondent, it was his assertion that they were relevant for his behavior and attitude or in other words for the propensity he had displayed against the interest of the 2nd applicant, and also discouraged the financing idea by the 2nd respondent as that would have been contrary to the Court order. Since the 1st respondent has failed to comply with the Court order, he thus prayed, for the dismissal of the winding up petition with costs and to allow the applicant to resume its operations unhindered by the 1st respondent.

Section 282 (2) (b) of the Companies Act, allows the Court to act once it is satisfied that there are some other remedies available to the petitioner but the petitioner is acting unreasonably leaning towards winding up of the company rather than pursuing the other remedy available. This application will thus be examined in that context and find out if the 1st respondent indeed acted unreasonable which resulted into his failure to comply with the Court order as directed.

After the Court ruling on 24th April, 2020, as averred by both counsels and exhibited by HAD-3 and HAD-5, two consultative meetings were held but to no fruition. There were several reasons which had been given leading to this: **one,** the 1st applicant declined the request to reconsider the offer on the purchase price which on his side stood at USD. 200,000.0 as exhibited by HAD -7. Although the 1st respondent looked at the refusal as hindrance to amicably settle the matter, I however, have a different observation. In my view both parties were uncooperative. The 1st applicant instead of negotiating the purchase price, he came up with a suggestion which was out of context in the absence of the accounting firm's audit and valuation report. This means he was not even ready to purchase those shares at USD. 200,000.0 initially proposed and agreed as exhibited by HAD - 4. I would not completely disregard Mr. Kiritta's submission that the 1st applicant

attempt was to lower the value of the 2nd applicant's assets, the effect of which will be devaluation of the shares of the 1st respondent and possibly pay him close to nothing.

The 1st respondent is equally not exonerated from the blame, as there is no evidence that he indicated being ready to accept the USD. 200,000.0 initially proposed. By him sticking to his price of USD. 450,000.0, was not helping the situation either.

Two, compliance to Court order was also marred. While the 1st applicant was able to secure an accounting firm, the 1st respondent could not. This information was shared on a day before the 20th April, 2020 which was set as a deadline for the exercise. On that day the 1st respondent came with a suggestion that the money in the 2nd applicant's account be used to pay for the two accounting firms and the arbitrator who could arbitrate the two. The request or suggestion was refused by the 1st applicant. According to Mr. Kiritta the 1st applicant's refusal was without any reasonable justification and he was simply deterring cooperation. Mr. Hoseah contested Mr. Kiritta's assertion arguing that on 17th April, 2020 the 1st respondent through his counsel informed applicants' counsel that the 1st respondent can manage to pay costs of his appointee as per HAD-7 and annexture B to the counter-affidavit. The only concern which the 1st respondent raised at the time was

for the payment of the third accountant which was suggested by the 1st respondent to be shared by letting the 2nd applicant pay for the costs. The suggestion was rejected by the applicants' counsel, on ground, that it will open a Pandora's box without elaborating what that meant, submitted by Mr. Kirita. It is probably correct that Mr. Kiritta did know what opening of a Pandora's box meant, but he had a room of inquiring from the 1st applicant's counsel as to what he meant rather than expecting an answer from the Court.

The change of mind two days prior to the deadline stating that he had been out of work since September, 2019, cumbersome as it is, would still have been a valid reason had the following been observed: *first,* the 1st respondent being out of work since September, 2019 was a known fact to him as well as his financial position. If he truly wanted to be honest and true to himself, he would have raised that out right, despite knowing or not knowing the fees amount for hiring an accounting firm for the task. For him to not raise the concern until two days away from the deadline does not indicate seriousness on the part of the 1st respondent. *Second*, the 1st respondent had an option of coming back to Court so that further orders could be made. His failure to take that step or action and later complain that the 1st applicant's application has overtaken the event, and was filed before the expiry of

time given, is not disputed, but with all honesty it did not stop the 1st respondent from reacting.

Compliance to Court order is not optional but a must or else the orders will be ineffective and consequently this will breed laxity. Aside from the two cases cited that of **Tanzania Breweries** and **Micky Gilead Ndetura** (supra), the Court also in the case of **NIC (T) Ltd & PSRC v Shengena Ltd, Civil Application No. 20 of 2007, CAT-DSM (unreported)**, discussing on obeying Court orders had this to say:

> *"The applicant did not file submission on due date as ordered. Naturally,* ***the court could not be made impotent by a party's inaction. It had to act****.....It is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."*[Emphasis mine]

In the present case alike, the 1st respondent inaction after facing a hurdle cannot be interpreted in any other way except application of delaying tactic and disobedience of the Court order at its best. One cannot put it past the 1st respondent that his request at this juncture was simply an afterthought. I thus concur with Mr. Hoseah's submission that Court orders should be respected and complied with. To

grant the 1st respondent application will surely be condoning unwanted behavior in the administration of justice.

Three, the 1st respondent withdrawal of money in December, 2019, as referenced in both the affidavit and counter-affidavit, and not disputed indicate he had access to the accounts unless there was no more money. But this could have been addressed by calling a management meeting as he was still in office. Failure to attempt those options all down to this Court as unreadiness to see Court order complied with. Even Mr. Kiritta's submission that for the interest of justice, the Court to be able to follow up on its order issued on 24th March, 2020, whilst sounds plausible, but with the 1st respondent's inaction, this Court will be placed in an awkward position. As intimated earlier on, besides disobedience of the Court order but the inaction and then the prayer for extension of time in the opinion of the Court that could be a delaying tactic.

Four, while the interests of the 2nd applicant, are important overall and should be paramount, but the 1st respondent does not seem to exhibit that. From his action he displays a carefree attitude. This is concluded based on the fact that, if he did care for the interest of the 2nd applicant as well as himself, he would have exhibited keenness and fight for the 2nd applicant's wellbeing and all those having stakes in the operation of the hospital regardless of number of patients it attends rather than

insisting on winding up of the company, even when offered room and opportunity to salvage the situation. The 1st respondent's attitude in this regard made this Court to somehow agree to Mr. Hoseah's submission that he only cares for his interest and not of other stakeholders

Another point which needs to be addressed is on shares. The 1st respondent claimed 50% ownership of shares and directorship, the assertion disputed by the 1st applicant. Mr. Hoseah invited the Court to apply section 22 of the Evidence Act on admissibility, after the 1st respondent in paragraph 4 of the counter-affidavit admitted contents averred in paragraph 2 of the affidavit which was in relation to the 1st respondent's 5000 unpaid shares. This Court is actually not convinced with Mr. Hoseah's position that the account by Mr. Kiritta while I agree was from the bar, but not necessarily an afterthought. We are human, who are prone to commit unintended errors including slip of a pen. I thus concur to Mr. Kiritta's submission, that the omission was due to slip of a pen and should not be used to unfairly punish the 1st respondent. **See: Jackson Harrison Tesha v CRBD Bank Plc & 2 Others, Civil Appeal No. 167 of 2017.**

The issue of shares or rather compensation is in my opinion not seriously contested by the 1st applicant. This is concluded based on the fact that the 1st applicant's was willing to buy out the 1st respondent's shares at USD. 200,000.0 only that the 1st

respondent rejected the offer demanding purchase price of USD. 450,000.0 which was as well rejected by the 1st applicant. Therefore, the only way to determine what the 1st respondent deserves is through establishment of the 2nd applicant's assets and value of the shares. The auditing and valuation exercise by the competent organs is the only way forward. It is thus imperative to have the assets of the 2nd applicant valued, and paid up shares of the 1st respondent established, this information is which this Court can base its decision on. The suggestion that each party has to appoint its own accounting firm germinated from the fact that parties are no longer in good terms and trust must have been eroded under the circumstances. And to avoid further complication a third accounting firm or arbitrator who can arbitrate the two accounting firms was introduced. Through the third party, a fair and just position may be realized. It is after this exercise, this Court will be in a position to conclude one way or the other.

To this end, I can dare say the exercise has not been concluded as this Court has not been furnished with any report from the accounting firm or arbitrator appointed jointly by the parties. The present application which was filed on 22nd April, 2020 has in actual fact been filed before the expiration of the time given, but that did not deter the 1st respondent from moving the Court particularly through Miscellaneous Commercial Cause No. 31 of 2020, so that his application could be attended. Mr.

Kiritta's suggestion that the endeavor by the 1st applicant exhibited ill intention, but this Court has a different opinion, that the 1st applicant must have more attachment and interest to the existence of the 2nd applicant, he being a medical doctor and with a good part of the investment, the fact not disputed by the 1st respondent. For him to be more anxious than the 1st respondent should be expected and not undermined.

Turning to Mr. Hoseah's prayers that an extension of time and use of 2nd applicant's accounts should be declined, though sounds plausible as highlighted earlier on in this ruling, but, it will remain as a fact that without a valuation report of the 2nd applicant's assets and shares, it will be impossible for this Court to arrive at a fair and just conclusion. Likewise, the Court order dated 24th March, 2020, will not be said to have been complied with.

Under the circumstances and for the avoidance of further delay and complications, this Court orders the amount of money required for the exercise be drawn from the 2nd applicant's account. This will pay for the two accounting firm, picked by each party and the third accounting firm or arbitrator jointly picked to arbitrate the two accounting firms on assumption their reports will be contradicting each other or each firm will be siding with her client. The third party's report, be it of an accounting firm or arbitrator, will be the one to be relied on.

This application instead of being dismissed as urged by Mr. Kiritta is being consolidated into Miscellaneous Commercial Cause No. 31 of 2020 since it was essentially an extension if not part of it. The applicants in actual fact were supposed to move the Court through the very Miscellaneous Commercial Cause No. 31 of 2020.

In light of the above, it is hereby concluded that an application to dismiss the winding up petition filed by the 1st applicant is declined at the moment as it is premature. The winding up petition or not will be dealt with after the valuation report has been filed, which would correspond to the Court's order. Extension of time prayed by the 1st respondent is granted so as to see the exercise concluded as ordered. The time is extended for fourteen (14) days from 11th July, 2020 and parties report back to this Court on 27th July, 2020 at 8.00 a.m. with a valuation of the 2nd applicant's assets and value of the shares' report. It is so ordered.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

P. S. FIKIRINI

JUDGE

08th JULY, 2020