

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. APPLICATION NO. 14 OF 2021

IN THE MATTER OF COMPANY ACT, 2002, CAP 212

AND

**IN THE MATTER OF PETITION FOR WINDING UP OF KILWA
RESOURCES LIMITED AND KILWA RUINS LIMITED**

BETWEEN

AMIR RAMADHAN MPUNGWE PETITIONER

VERSUS

MICHAEL JOHN LANCASTER WARREN 1ST RESPONDENT

ANTHONY JOHN HAVELOCK DUNN..... 2ND RESPONDENT

GABRIEL DORETHREE DUNN 3RD RESPONDENT

JAMES GRANT TAYLOR 4TH RESPONDENT

DEPOSIT INSURANCE BOARD 5TH RESPONDENT

BETRAM EYAKUZE 6TH RESPONDENT

ANNISA AMI MPUNGWE 7TH RESPONDENT

KILWA RESOURCES LIMITED 8TH RESPONDENT

KILWA RUINS LIMITED 9TH RESPONDENT

REGISTRAR OF COMPANIES 10TH RESPONDENT

Date of Last Order: 13/09/2021.

Date of Ruling: 08/10/2021



JUDGEMENT.

MAGOIGA, J.

The petitioner, AMIR RAMADHAN MPUNGWE under the provisions of sections 279 (1) (b), (d), (e), 281 (1), 282, 286(2) and 294 of the Companies Act, [Cap 212 R.E. 2019] read together with Rule 95(1) and 100 of the Company (Insolvency) Rules, 2005 and any enabling provisions of the law (being a director, shareholder, creditor and contributor to both 8th and 9th respondents) petitioned to this court against the above named respondents praying the following orders namely:-

- (a) for winding up order against the 8th and 9th respondents;
- (b) assets of KILWA RUINS LIMITED be exposed to settle liability and legal obligations of KILWA RESOURCES LIMITED,
- (c) discharge of shareholder and directors freely from liability of KILWA RESOURCES LIMITED AND KILWA RUINS LIMITED
- (d) This court appoints a LIQUIDATOR of KILWA RESOURCES LIMITED AND KILWA RUINS LIMITED.
- (e) Any such other order or orders be made as this honourable court may deem to be just and fit to grant.

According to the winding up petition, the 8th and 9th respondents are a limited liability companies incorporated on 10th day of July, 2007 and 18th July 2001



respectively under the Companies laws of Tanzania Mainland. The share capital of Kilwa Resources Limited is Tshs.500,000,000.00 divided into 500,000 shares of Tshs.1,000.00 each and the share capital of Kilwa Ruins Limited are Tshs.5,520,000,000.00 divided into 5,520,000 shares of Tshs.1,000.00.

The 1st, 2nd, 3rd, and 4th respondents are shareholders and directors of KILWA RUINS LIMITED, the 6th respondent was the financial advisor of the KILWA RESOURCES LIMITED during the process of acquiring KILWA RUINS LIMITED by KILWA RESOURCES LIMITED through financial facility from FBME BANK LIMITED, the process which was not completed despite high costs incurred by the petitioner and KILWA RESOURCES LIMITED. The petitioner describes the 7th respondent shareholder and co-director of KILWA RESOURCES LIMITED and biological daughter of the petitioner. The 5th respondent was described as the Liquidator of FBME BANK LIMITED and the 10th respondent as the regulator of the company affairs in Tanzania Mainland.

The reasons for the petition for winding up order were that, the petitioner and respondents have failed to make decisions, resolutions or agree on anything on the undesirable affairs and conditions which both KILWA RESOURCES LIMITED AND KILWA RUINS LIMITED are undergoing. The petitioner went on to aver that sometimes in 2008 to 2011 KILWA



RESOURCES LIMITED was in the process to acquire KILWA RUINS LIMITED by financial facility from FBME BANK LIMITED which is under liquidation by the 5th respondent but by reasons adverse disputes and lack of communication between the directors and shareholders of the two companies were unable to hold statutory meetings as required by law and have not filed any reports, failure to maintain proper books of account nor audited accounts and as such the management of both companies have become de facto into non-compliance to the law which is contrary to law.

As to the acquisition process supervised by 6th respondent who was Financial Supervisor was not possible and due to underperformance of KILWA RUINS LIMITED was forced to close its business. Not only was that but the said KILWA RUINS LIMITED hit by force majeure making it difficult for petitioner to pay the debt in dispute. According to petitioner, there is no any other available remedy but to have the two companies wound up to allow the assets of KILWA RUINS LIMITED which are the only assets of KILWA RESOURCES LIMITED be disposed to settle liabilities and legal obligations of the two companies. Equally the petitioner prays that a liquidator be appointed to accomplish the legal process and eventually discharged the



directors and shareholder of the two companies or any other relief the court may deem to be just and fit to grant.

Upon filing the petition, pursuant to Rules 96 and 98 of the Companies (Insolvency) Rules G.N.43 of 2005 (to be referred hereinafter as the 'Rules') a direction and order was given to the petitioner that, he serve all respondents. The petitioner was able to serve the 5th and 10th respondent who filed an affidavit sworn by Mr. RASHID SHABAN MRUTU, principle officer of the 5th respondent who was not opposing this petition but prayed that, she be treated as secured creditor of to 8th respondent. The rest of the respondents were served by way of publication after normal way proved futile in Daily news dated 7th July, 2021 and Mwananchi newspaper dated 5th July 2021. None appeared to oppose this petition.

The petitioner complied with further directions and orders given under Rule 112(1) (c) to the petitioner that, the petition be advertised in Government Gazzete issue No. 1211 of 2021 dated 16th July 2021. The two newspapers of Daily News and Mwananchi Newspaper dated 7th July, 2021 and 5th July 2021 respectively and Government Gazette were delivered in court record as proof of complying with court's order. The learned advocate for the petitioner, filed a certificate to show that the all the procedure as outlined in the law have



been observed and the matter was set for hearing a notice of hearing was also served to the 1st respondent.

At the hearing of the petition, Mr. Lusajo Willy, the learned advocate for the petitioner, told the court that no objection has been filed to date since this petition was advertised as per the Rule 104 of the Rules. Not only that but also that both companies have not filed affidavit in opposition to the winding up proceedings as required in Rule 106 of the Rules. In the circumstances, the learned advocate prayed to proceed ex-parte against the 1-4th respondents and 6-9th respondents. His prayer was granted. According to the learned advocate for the petitioner, the 5th and 10th respondents who entered appearance basically are not opposing this petitioner save that are asking to be secured creditors in the winding up orders.

The learned advocate for the petitioner went on to submit by reciting the provision under which the petition was pegged, the reasons or grounds for petitioning this winding up process as stated petition.

As to the claims by the 5th and 10th respondent disputed the same on reasons that are time barred and therefore they cannot be entertained and secured creditors. According t the learned advocate for the petitioner, default started



in 31st January 2015 and up to the time this petition was filed is more than 6 years which one is legally allowed to claim from the facility.

The learned counsel reiterated the reasons as stated in the petition and pressed that they suffices for this court to make an order for winding up orders as prayed in the petition.

On the other hand, the learned State Attorney for the 5th and 10th told the court that basically they don't oppose the petition and prayed to adopt the contents of the affidavit filed. On the claims that, the 5th respondent's claims are time barred replied that what is before this court is not a suit founded on contract but winding up proceedings. According to the learned Attorney, what the Law of Limitation Act, [Cap 89 R.E.2019] provides and in particular cited item in the 1st Schedule is misconception on the part of the counsel for petition. The learned Attorney pressed that rights of 5th respondent be taken into account in winding up orders because the same was put under liquidation in 2017 which is four years and not as submitted by the learned advocate for petitioner.

In rejoinder, Mr. Willy reiterated what he earlier submitted and pressed for orders as itemized in the petition.



Having listened to the submissions made by the learned advocates for parties and perused the petition itself, the main prayer in this petition is for this court guided by the law and interest of justice to issue a winding up order of **KILWA RESOURCES LIMITED AND KILWA RUINS LIMITED and other consequential orders therein.**

Guided by Companies Act, Cap 212 R.E. 2002 which governs companies affairs in our jurisdiction, in particular, section 297(1) (d) and (e) in which this petition was preferred, provides that a company may be wound up if it is unable to pay its debts and if in the opinion of the court is just and equitable to be so wound up. Another section cited is section 281 which provides that application for winding up be presented by petition and it can be presented by the company, creditors, contributory, and administrator or by all or any of those parties together or separately. Section 281(1)(a) gives a proviso that a contributory cannot petition unless he hold the shares by him for more than six months before the commencement of the winding up.

From the foregoing, the petitioner has proved that, the two companies are run contrary to law by not holding statutory meetings and are characterized by disputes which makes it impossible to conduct its businesses. Further, the



petitioner has proved that he is a director of the both companies for more than six months, hence, qualifies to petition for winding up as in this petition.

The argument that the 5th respondent interests are time barred, I find the arguments not convincing in the circumstances of this petition. The cited time limit would apply only if the claims were based on contract but is not the case here. I associate myself with the arguments by Chikala, learned State Attorney.

Having considered and taken into account all these matters, I am satisfied that this is a proper petition to grant the prayers made as such the petition is hereby granted and the following orders are made:-

1. That both **KILWA RESOURCES AND KILWA RUINS LIMITED** are hereby wound up under the provisions of section 279(1) (d) and (e) of the Companies Act, 2002;
2. The shareholders and directors of **KILWA RESOURCES LIMITED** are freely discharged from any liability of **KILWA RESOURCES LIMITED** in connection with liabilities of **KILWA RUINS LIMITED**;
3. In terms of section 294 of the Companies Act, 2002, this court hereby appoints **Mr. Alex Gaithan Mgongolwa** to act as official liquidator of the companies for a period of six months within which he shall, subject

to the control of the court exercise all the powers enumerated under sections 299, 300,301,302,303,304, 305 and 306 of the Companies Act, 2002.

4. The official liquidator upon realizing all the properties of the company or if in his opinion there is no need of protracting liquidation, and has distributed a final dividend, if any, and adjusted the rights of the contributories, (5th respondent) who is secured creditor and make a final return, if any, to the contributories, shall cause and file in court a report on his accounts for his release according to the provisions of section 307 of the Companies Act, 2002.
5. No order as to costs is made because there was no objection filed.

It is so ordered.

Dated at Dar es Salaam this 8th day of October, 2021.



S.M. MAGOIGA

JUDGE

08/10/2021