

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC CIVIL CAUSE NO. 508 OF 2020

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

AND

**IN THE MATTER OF AN APPLCIATION FOR THE ORDERS OF THE
HIGH COURT FOR THE RECTIFICATIONOF THE REGISTER OF
MEMBERS OF BUYUNI COMAPANY LIMITED.**

BETWEEN

ASHURA SAIDI NDUNDU.....1ST PETITIONER

RASHID AHMED KILINDO.....2ND PETITIONER

AND

BUYUNI COMPANY LIMITED.....RESPONDENT

RULING

Date of last Order: 15/12/2020

Date of Ruling: 23/12/2020

MLYAMBINA, J.

This is one of the few cases in Court involving a Company whose shareholders and Directors have passed away and others are untraceable. The case is by way of petition made under *Section*

121 (1) (a) and (b), (2), (3) and 4 of the Companies Act, 2002 (Act No. 12 of 2002): Section 2 (3) of the Judicature and Application of Laws Act Cap 358 (R.E. 2002]; Article 108 (2) of the Constitution of the United Republic of Tanzania, 1997 Cap 2 (R.E 200) as amended from time.

Through representation of learned counsel Daimu Halfan, the Petitioners in this petition prayed for Judgement and Decree as follows:

- i. The Petitioners be registered as the Members of the Buyuni Company Limited and remove the name of the deceased Arnaldo Amadori from the register of members of the Buyuni Company Limited.
- ii. An order that the Petitioners themselves make the necessary entries on the Company register of members
- iii. An order directing the Petitioners to give the Registrar of companies a notice of rectification of the register of Buyuni Company Limited.
- iv. No order as to costs.
- v. Any other orders or relief which the Court shall deem fit and just to grant in the circumstances of the case.

The brief facts as can be gathered from the petition is that the Petitioners are the Administrators of the estate of the late Arnaldo Amadori, who died on 31st January, 2017. The 1st petitioner was the wife of the said deceased Arnaldo Amadori.

On 23rd April, 1990 the late Arnaldo Amadori registered a limited liability Company by the name of Buyuni Company Limited with Registration Number 17932 and up to 28th November, 2018 the shareholders are Arnaldo Amadori, Donatella Amadori and Andrea Amadori. Arnaldo Amadori was also the managing Director of the Company.

Regretably, Arnaldo Amadori is now deceased having died on 31st January, 2017 in Santa Lucia Hospital in Brazil and the Directors Donatella Amadori and Andrea Amadori are foreigners and have not been seen for long time before the death of Arnaldo Amadori. They cannot be contacted.

Following the afore state of affairs, currently the Buyuni Company Limited has no Resident Directors and shareholders and the Company cannot make decisions over its affairs, properties and business, and its employees.

It was Petitioners that the Petitioners are administrators and thus personal legal representatives of the late Arnaldo Amadori and

have title to the deceased shares and will become members of the Company upon approval of the Directors who are not there. Thus, the Company requires Directors to manage and control its affairs, make decision, make statutory and administrative compliances with Government agencies including Tanzania Revenue Authority and filing of returns with the Business Registration and Licensing Authority (BRELA).

According to the Petitioners, the Company has not filed annual returns from year 2017, the management and decisions on the Company properties have not been made since the demise of Arnaldo Amadori and the Company has not been able to update and upload the Company details on the Online Registration system (ORS) with the Business Registration and licensing Authority (BRELA) as required by BRELA. These require Directors, decisions, signatures and actions.

Moreso, the properties investments and business of Buyuni Company Ltd are in danger of being wasted lost and stolen, and the Company is likely to incur liabilities from Government agencies and private entities with which the Company has business arrangements and engagements.

Further, there is no alternative to the intervention of this Court available in the Articles of Association of the Buyuni Company Limited for obtaining members of the Company for purposes of appointing Directors as required by Articles of Association of the Buyuni Company Limited for obtaining members of the Company for purposes of appointing Directors as required by the Articles of association and constituting the Board of Directors of the Company. In terms of clause of Association of Buyuni Company, it is the shareholders who appoints the Directors of the Company.

In the premises of the above facts, there are three legal issues to be determined in this petition:

1. Whether the Petitioners being Probate Administrators of the estate of the late Arnaldo Amadori can be registered as the members of the Buyuni Company Limited and remove the name of the deceased Arnaldo Amadori from the register of the members of the Buyuni Co. Limited.
2. Whether the Court can grant the Petitioners themselves in absence of other shareholders and Directors who are untraceable to make the necessary entries on the Company register of members.

3. Whether the Court can issue an order directing the Petitioners in absence of other co- shareholders and Directors of the Company to give the Registrar of companies a notice of rectification of the Register of Buyuni Company Limited.

On the first issue, Counsel Daimu Halfan submitted *inter alia* that there is no provisions in the Articles of Association of Buyuni Company on transmission of shares of the deceased shareholder to his/her administrator or personal legal representatives. However, according to clause *I of Articles of Association of Buyuni Company*, it adopts the regulation which are under Table 'A' of the Company Act, Cap 212. *Clause I (supra)* provides:

In case of a death of a member the personal representative of the deceased shall be the only person recognized by the Company as having Title to his interests in the shares.

Regulation 27 provides:

Upon presenting providences as required by the Director the personal representative may elect by notice to the Company to be registered as holders of the shares.

Regulation 28 provides.

The holder has all rights of a members of the Company.

Counsel Daimu was of submission that the management of the Company is in the hands of the Directors pursuant to *Section 181 of the Companies Act and Regulation 71 of the Regulations*. He therefore prayed the two Petitioners be registered as members of Buyuni Co. Limited and remove Arnaldo Amadori from the Register of Members of the Company. Counsel Daimu cited *inter alia* the case of **Gursharan Randhawa and Another v. Andrew Turpin and Another** (2017) EWCA, Civil 1201, where by the Court of Appeal Civil Division stated:

The administrator of the deceased shareholders of the Company will only become members after being appointed so and not by merely being granted letters of administration.

In the premises of the foregoing facts and the law applicable, it is the findings of the Court that the administrators of the estate of the deceased, in terms of the provisions of *Section 99 of the Probate and Administration of estates Act Cap 352 (R.E 2002)* is the legal representative of the deceased for all purposes. It therefore follows that, in terms of *Section 99 of Cap 352 (supra)*

read together with *Regulation 26, 27, and 28 of the Company Act Regulations*, in the event of death of any member of the Company, the administrator or the executor, as the case may be, becomes the sole legal representative for the rights of the deceased in the Company.

I further do agree with the findings of the Court in **Gursharan Case** (*supra*) that the representation of the deceased in the Company does not flow automatic upon grant of the probate or of the letters of administration. It requires a further step of obtaining an order of the Court.

I therefore hold the first issue being answered in the affirmative. In furtherance to that finding, the Petitioners are authorized to act as shareholders for and on behalf of the deceased in Pollo Italia Tanzania Limited, a Company which Buyuni Co Limited is a Shareholder.

As regards the second and third issue, Counsel Daimu referred the Court to the decision of the High Court of Uganda in the case of **Seremba Mark v. Isanga Emmanuel and Three Others**, Companies Cause No. 0024 of 2005 at page 3. In that case, the Court took judicial notice that Private Companies are notorious for

not maintaining Company records like register of members. Thus, *de jure* and *de- facto* position will have to be looked at.

Counsel Daimu went further to cite the case of **Kings Court Trust Limited and Two Others v. Lancashire Cleaning Services Limited** (2017) EWHC 1094 (Ch). The High Court of Justice Chancery Division while interpreting Section 125 of the UK Companies Act which is *pari material* to *Section 121 of Tanzania Companies Act*, it observed:

I'm satisfied that on the evidence now before the Court, including in particular the oath in support of the application for a grant of probate, that the three named executors who are the claimant are the persons who should be registered as members of the Company in the register of members. I'm satisfied that the Court does have power under Section 125 to order such rectification and that it should exercise its discretion to do so by entering the names of the three claimants as the holders of the late Mr. Eric Pilling's 1000 E1 ordinary shares and removing his name from the register. I'm satisfied that under section 125 (2) the Court has the necessary power to order the claimants to make the necessary entries on the Company's register of members immediately, given that there is no officer of the Company

who is in a position to do so. Such a power is necessary inherent in the Court's power to order rectification of the register. Without including such an ancillary provision, the Court would not be fully performing the function conferred upon it under section 125 (2) of ordering rectification of the register. Notice will of course have to be given of the rectification to the registrar of companies under section 125 (4).

I have considerably gone through the authorities cited by Counsel Daimu. I'm aware our laws are silent on the way forward in case of untraceable shareholders. However, it provides for remedies such as liquidation of the Company. The question at this point therefore is; can liquidation be a remedy to cure challenges caused by failure to produce presence of a member of the Company whose shares have been paid up?

Winding up of a Company occurs under circumstances that, members of the Company want to seize operations under the name of that particular Company or the Company's liabilities are exceeding its assets (financial difficulties) or by order of the Court where; the Company, by special resolution resolves to be wound up by Court, the Company defaults holding a statutory meeting, or filling a statutory return, the number of shareholders falls

below the number prescribed as minimum in the Company law (two and seven for private and public Company respectively), the Company is unable to –pay its debts in any of the following circumstances:-

- i. Where a creditor for more than TZs 1,000/= serves on the Company a demand to pay and the Company fails, within three weeks thereof, to pay, or to secure or to compound the sum.
- ii. Where an execution or other legal process of a Court, is returned unsatisfied.
- iii. It is proved to the satisfaction of the Court that the Company is unable to pay its debts, taking into account for this purpose any contingent and prospective liabilities.
- iv. The Company fails to commence business within a year of its incorporation or suspends its business for a whole year.
- v. For any other reason the Court considers it just and equitable that the Company should be wound up (e.g. where there is a deadlock in management, where the business carried on by the Company was illegal,

personal antagonism between two directors who were the only directors etc.)

This remedy is only actionable when members or creditors or the Registrar of Companies approach the Court to seek it by way of petition; and once the Court has passed an order to that effect and the process of winding up is completed as per the Companies Act in line with the order of the Court, the Company will no longer exist.

Where a shareholder (s) is untraceable and the remaining members find out that they are no longer interested in continuing trading with the Company, winding up is the best solution. Any other reason, such as being out of operations in a period exceeding twelve months, would be a good and reasonable ground for winding up a Company. However, where a Company is of going concern and member still wish to continue with the business, winding up would not be a good option due to the consequences that come with winding up process.

Upon commencement of Winding Up, which is deemed to commence at the time of presenting the petition for winding up order, or on the date of passing the resolution for voluntary winding up; any disposition of property by the Company is void,

any transfer of shares or alteration in status of members is avoid, any attachment, distress or executions put into force against the Company are void. This means that all activities of the Company seize, the Board of Directors, which is the moving of the Company, will seize to act and operate therefore nothing will take place in the Company.

Further, winding up order will compel the official receiver appointed to commence liquidation process which is by consolidation of Company's assets and liabilities. Once consolidation is done he shall be bound to settle the outstanding debts and other liabilities. This is because once winding up of a Company is passed, it should be done in the interest of all the creditors and all the shareholders. Companies run on credit and other financial facilities from bank and other financial institution, winding up process compels the Company to repay back all outstanding credits and not to take fresh credits. A Company that is trading engaging a winding up process will kill its business.

For going concern the Company will not be able to settle its liabilities or inaction by failure to comply with statutory requirements but traceability of one or more of its members which solution would be to take him/ them out through a recognized, transparent and just process of selling his shares to

an interested person. Where this process fails and it leaves Company with no other choice than winding up then wind up shall have to take place. As it stands, Tanzania law does not offer a remedy to the existing shareholders where they are of the view that a certain member is untraceable neither does it prohibit the Company or existing shareholder from seeking remedy for the best interests of the Company where there is a good will to protect.

In the event the Company is a going concern and able to meet its liability, winding up May only happen by resolution or by order of the Court where it is evident that the number of shareholders in the Company falls below the number prescribed minimum.

There is also a requirement that no application/petition should be preferred if the shareholder is not traceable for a period of not less than six years. In this application, the Court is not strictly told as to when Donatella Amadori and Andre Amadori could not be traced. There is a general statement that Arnaldo Amadori died on 31st January, 2017 in Santa Lucia Hospital in Brazil and the Directors Donatella Amadori and Andrea Amadori are foreigners and have not been seen for long time before the death of Arnaldo Amadori. In the event, I declined to grant the second and third prayers.

In conclusion, in cases of this nature it is legally acceptable parties to the case should be the Petitioners against BRELA and the untraceable shareholders. For the foregoing reasons, the application is partly granted to the extent explained above. No order as to costs.

Y. J. MLYAMBINA
JUDGE
24/12/2020



Ruling delivered and dated 23rd December, 2020 in the presence of Ally Akida Tajiri, the Petitioner's Advocate and in the absence of the Respondent.

Y. J. MLYAMBINA
JUDGE
24/12/2020

