



**IN THE EAST AFRICAN COURT OF JUSTICE AT
ARUSHA FIRST INSTANCE DIVISION**



(Coram: Monica K. Mugenyi, Pj; Faustin Ntezilyayo, J; & Fakihi A. Jundu, J)

APPLICATION NO.9 OF 2014

(Arising from Reference No.10 of 2013)

UNION TRADE CENTER LIMITED (UTC)..... CLAIMANT

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF RWANDA..... RESPONDENT**

AND

**SUCCESSION MAKUZA DESIRE REPRESENTED BY
MAKUZA JEAN FRED..... 1ST APPLICANT/INTERVENER**

**SUCCESSION NKURUNZIZA GERARD REPRESENTED BY
NKURUNZIZA JANVIER 2ND APPLICANT/INTERVENER**

NGOFERO THARCISSE 3RD APPLICANT/INTERVENER

29TH March, 2017

Handwritten signature or initials in the bottom right corner.

RULING OF THE COURT

Introduction

1. This Application filed by the above named three Applicants/Interveners (“Applicants”) arises from **Reference No.10 of 2013** (“the Reference”). It has been instituted, brought and made under Article 40 of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rules 21 and 36 of the East African Court of Justice Rules of Procedure 2013 (“the Rules”).
2. Whereas the 3rd Applicant has made the Application himself, the 1st and the 2nd Applicants have purportedly appointed Makuza Jean Fred and Nkurunziza Janvier (“the Representatives”) to represent them in this Application respectively.
3. As to the orders being sought of from this Court, the Applicants in their Notice of Motion prayed as follows:

“i) The Applicants herein be granted leave by this Honorable Court to intervene in this Reference in opposition to arguments of the Claimant in so far as they affect the Applicants; and

ii) For an order that the costs of and incidental to this Application abide the results of the case.”
4. The said two Representatives for the 1st and 2nd Applicants respectively and the 3rd Applicant have each deponed an Affidavit in support of the Application.

Representation

5. Ms. Molly Rwigamba, Learned Counsel represented the Applicants. Mr. Francis Gimara and Mr. Isaac Bakayana, Learned Counsel represented the Claimant while Mr. Nicholas Ntarugera and Mr. George Karemera, Learned Counsel represented the Respondent.

The Applicants' Case

6. In their Affidavits, and as elaborated at the hearing, the Applicants contended firstly that as shareholders in UTC Ltd., they are not aware of any resolution of shareholders of UTC Ltd. or its Board in terms of Article 223 of the Company Act 2009 of Rwanda that authorized Mr. Rujugiro Tribert Ayabatwa, the majority shareholder in UTC Ltd. to file the aforesaid Reference or Claim against the Respondent in this Court. Secondly, they further contended that in the event the Claimant loses the Reference, it may be subjected to payment of legal fees and costs which as shareholders of UTC Ltd will affect them. Thirdly, they argued that the Reference or the Claim impedes potential investors from investing in UTC Ltd. Fourthly, if the Reference would be heard, they contended that they will be condemned unheard.

The Claimant's Case

7. On the other hand, the Claimant vide its Affidavit in Reply deponed by Mr. Rujugiro Tribert Ayabatwa as elaborated at the hearing opposed the Application vigorously.
8. Firstly, the Claimant contended that the Application falls outside the scope of Article 40 of the Treaty and Rule 35(5) of the Rules as there is lack of evidence on the part of the Applicants opposing or supporting the Respondent's arguments in the Reference save for the bare

allegation of lack of any resolution authorizing filing of the Reference, costs implication on the part of the Applicants in case the Claimant loses the Reference and impediment of potential investors from investing in UTC Ltd.

9. Secondly, the Claimant contended further that the Application does not meet the criteria for intervention in that the Applicants have unduly delayed to bring this Application as the Reference has been in Court since 2013 nor will its results affect them directly since the Claimant enjoys a veil of incorporation. In its view, the interests of the Applicants are fully protected in the Respondent's arguments hence the presence of the Applicants is not necessary in the Reference.
10. Thirdly, the Claimant alleged that under the Company Act of Rwanda it is the company, the Claimant herein, not shareholders such as the Applicants herein which is mandated or authorized to sue but a court has power to impose costs on any shareholder who risks taking a company to Court and loses thereof. The Claimant alleged further that the contention of the Applicants of being condemned unheard has no merit because the Reference is not against the shareholders but against the Respondent brought in accordance with the provisions of the Treaty.
11. Fourthly, the Claimant contended that Jean Fred Makuza and Nkurunziza Janvier who deponed Affidavits for the 1st and 2nd Applicants have no authority to file this Application as there is no mention of such authority in the undated Powers of Attorney annexed to their supporting Affidavits. Even the additional or complimentary Power of Attorney dated 25th November, 2016, and annexed to the Affidavit in Rejoinder filed on 28th November, 2016 by the Applicants

does not authorize or mandate the said two Representatives to represent the 1st and 2nd Applicants in this Application.

12. Lastly, the Claimant contended that the Affidavits of the Applicants contain deliberate lies in that on one hand it is contended that UTC Ltd. has not been taken over while there is evidence in the same Affidavit showing that the same has been taken over by the Abandoned Property Nyarugenge/UTC.

The Respondent's Case

13. The Respondent on his part had no objection to the Application. This was clear from the Affidavit in Reply deposed by one Kabibi Specioza the Division Manager of the Civil Ligation in the Respondent's Office as well as on what the Respondent stated at the hearing. In his view, in terms of Article 40 of the Treaty and Rule 36(4) and (5) of the Rules, this Court may grant the Application. He disputed the Claimant's arguments on the Powers of Attorney and said that the said Powers of Attorney were dated 3rd September, 2016.

The Applicants' Response

14. In reply to the Claimant, the Applicants firstly contended that this Application is within the scope of Article 40 of the Treaty in that they are only required to provide evidence in support of the opposing arguments, that is the Respondent's case. Secondly, they contended that the Powers of Attorney doned by the Applicants are dated. Thirdly, they furtherer contended that Mr. Rujugiro Tribert Ayabatwa filed the Reference contrary to the Company Act 2009 of Rwanda as no Resolution of shareholders or Board of Directors of UTC Ltd. exists mandating him to file the Reference. They also contended that in terms

of Rule 36 (5) of the Rules, they will accept the case as it is at the time of intervention.

15. However, upon being asked to show us compliance in the Application in terms of Rule 36(2)(d) as to which order they are seeking to intervene in the Reference, and to show whether they had provided a statement of interveners' interest as required under Rule 36(2)(e) of the Rules, Ms. Rwigamba did not answer in the affirmative claiming that this was her "**first time**" so she did not have answers to the said questions. She left the matter to the Court to decide though in her view, she thought that the grounds stated in the Notice of Motion were the same as Statement of Intervenors 'Interest mentioned under Rule 36(2)(e) of the Rules.

16. Upon being asked to explain whether the Powers of Attorney done by the 1st and 2nd Applicants gave mandate or authorized the two above mentioned Representatives to conduct this Application for intervening in **Reference No.10 of 2013** when there is no specific averment or mention to that effect in the said Powers of Attorney save that they should represent them in the shares or shareholding issues in UTC Ltd., Ms. Rwigamba replied that the said Powers of Attorney under Rwanda law were general in nature which mandated the donee to "**follow up everything without boundaries and limits**". She further argued that even in the Power of Attorney doned by Makuza Jean Fred dated 25th November, 2016, the matter was not corrected since it was not an issue that was raised by the Claimant in their Reply.

Determination

17. Upon close scrutiny of the pleadings filed by the Parties and having heard the rival arguments of the Parties at the hearing, it dwelt upon us

that the competency of this Application in terms of Rule 36(2)(d) and (e) and the Powers of Attorney, allegedly doned by the 1st and 2nd Applicants is in issue. In our considered view, we have to determine and settle the said issue first before considering the merits of this Application if it will be necessary.

18. In their Notice of Motion and at the hearing, the Applicants vide their Learned Counsel Ms. Rwigamba contended that the Application is brought under Article 40 of the Treaty and Rules 21 and 36 of the Rules. Mr. Ntarugera, Learned Counsel for the Respondent did not object to the Application contending that it was properly brought under Article 40 and Rules 36(4) and (5) of the Rules. However, Mr. Bakayana, Learned Counsel for the Claimant opposed the Application contending that it was outside the scope of Article 40 and Rule 36(5) of the Rules. Indeed, we agree that these mentioned provisions provide for how an application for intervention in a pending Reference before this Court should be made and the conditions it should comply with. However, for the purpose of this Ruling we shall examine the provisions in Rule 36(2) (d) and (e) only.

19. At the hearing, the Court asked Ms. Rwigamba as to whether the Applicants had complied with conditions stated in Rule 36(2)(d) and (e) of the Rules which are mandatory for an application seeking intervention in a reference pending in this Court. We hereby reproduce the said provisions for ease of reference:

***“36. (1) An application for leave to intervene under Article 40 of the Treaty and an application for leave to appear as amicus curiae shall be by notice of motion.*”**

(2) An application under sub-rule (1) shall contain:

(a)

(b)

(c)

(d) the order in respect of which the intervener or amicus curiae is applying for leave to intervene;

(e) a statement of the intervener's or amicus curiae's interest in the result of the case."

20. The word used in these provisions is "shall" meaning the aforesaid conditions are mandatory to an application seeking intervention in a pending reference before this Court.

21. It was vividly clear to the Court from the response of Ms. Rwigamba at the hearing that the Applicants had not complied with the aforesaid Rule 36(2) (d) and (e) in their Notice of Motion or supporting Affidavits in pursuance of this Application. There is no mention of the Order in **Reference No.10 of 2013** in respect of which the Applicants are seeking to intervene nor have they furnished or provided their Statement of Interveners' Interest in the results of the said Reference. Ms. Molly Rwigamba in her futile attempt to save a sinking boat argued that Rule 36(2) (e) had been complied with because grounds for the Application had been stated in the Notice of Motion. We think not.

22. In our considered view, stating grounds of an application in a Notice of Motion is a mandatory condition or requirement under Rule 21(1) of the Rules. It provides as follows:

"21. (1) Subject to sub-rule (4) of this Rule, all applications to the First Instance Division shall be by motion, which shall state

the grounds of the application.”

23. Providing “***Statement of Intervener’s Interest***” is a mandatory, condition or requirement under Rule 36(2)(e). Since an application for intervention is to be made by way of a Notice of Motion under Rule 21(1), it means that the Applicants had to comply with both conditions, that is, stating grounds of the Application as required under Rule 21(1) and furnishing a Statement of Interveners’ Interest as required under Rule 36(2)(e). Therefore, the position of Ms. Rwigamba that stating grounds of the Application under Rule 21(1) sufficed as providing “***Statement of Interveners’ Interest***” is incorrect. We have carefully looked at the Notice of Motion together with the supporting Affidavits filed by the Applicants in pursuance of this Application and we are satisfied that grounds of the Application as required under Rule 21(1) have been stated but no Statement of the Interveners’ Interest as required under Rule 36(2) (e) has been furnished. We so hold.

24. We now move to the Powers of Attorney doned by the 1st and 2nd Applicants contained in their supporting Affidavits purporting to mandate or authorize Makuza Jean Fred and Nkurunziza Janvier to represent them in this Application seeking intervention in **Reference No.10 of 2013** pending in this Court. Mr. Bakayana, Learned Counsel for the Claimant in his submission before this Court strongly disputed such appointments, authorization or mandate emanating from the said Powers of Attorney. He argued that the authority or mandate given to the said two Representatives of the 1st and 2nd Applicants is on issues of shares of the Applicants which they hold in UTC Ltd only. However, Ms. Rwigwamba, Learned Counsel for the Applicants in her response at the hearing submitted that the said Powers of Attorney were general in nature and “***without boundaries and limits***” hence they authorized

Recd

the said two Representatives to act in all issues emanating from the shares held by the 1st and 2nd Applicants in UTC Ltd. including representing them in this Application seeking intervention in **Reference No.10 of 2013** though it is not expressly so stated.

25. We have carefully read the two Powers of Attorney annexed to the Affidavits in support of the Application. As far as the given authorization is concerned, they are similarly worded as follows:

“His is mandated to take all decisions concerning my shares in UTC Ltd and handle any issue as may be deemed to do so by responsibility of shareholder in company including votes, and taking resolutions. He is mandated without boundaries and limits.”

26. It is vividly clear from the aforesaid wording of the said Powers of Attorney that the 1st and 2nd Applicants mandated or authorized their said two Representatives in matters of the shares they hold in UTC Ltd. There is no averment therein express or implied mandating or authorizing the said two Representatives to represent the 1st and 2nd Applicants in this Application seeking intervention in **Reference No.10 of 2013** pending in this Court. The words ***“mandated without boundaries and limits”*** do not confer such authority expressly or by implication contrary to the view held by Ms. Rwigamba at the hearing. In **Edward Bamugye vs. Tropical Africa Bank Limited, Civil Appeal No.48 of 2007**, the Court of Appeal of Uganda reiterated that, ***“a power of attorney must be construed strictly”*** (citing Fredick Zaabwe Case) and ***“the authority conferred by a power of attorney is that which is within the four corners of the instrument either in***

express terms or by necessary implication". (citing: Fridiman's Law of Agency at page 66).

27. We have also read the complementary Power of Attorney dated 25th November, 2016 and annexed to the Applicants' Affidavit in Rejoinder sworn by Nkurunziza Janvier on 28th November, 2016. It only confers the same authority or mandate conferred in the two previous Powers of Attorney that is to represent the said Applicants in matters of the shares they hold in UTC Ltd. It does not confer any authority or mandate whatsoever to represent the said Applicants in this Application seeking intervention in **Reference No.10 of 2013**.

Disposal

28. In conclusion, in our considered view, having adequately dwelt on shortfalls of this Application, in terms of Rule 36(2)(d) and (e) and the Powers of Attorney doned by the 1st and 2nd Applicants as shown in the foregoing paragraphs, we firmly conclude and hold that the Application is seriously and grossly incompetent. It has not complied with Rule 36(2)(d) and (e) of the Rules which ground alone would suffice to strike out this Application. However, as far as the Powers of Attorney doned by the 1st and 2nd Applicants are concerned, have not expressly or by implication granted any authority or mandate to the above named two Representatives to conduct this Application seeking intervention in **Reference No.10 of 2013** pending before this Court save to issues or matters of shares they hold in UTC Ltd. Having so concluded, we hereby strike out this Application with costs to the Claimant.

29. We so order.

Dated, Delivered and signed at Arusha this 29th Day of March 2017



Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE



Hon. Justice Faustin Ntezilyayo
JUDGE



Hon. Justice Fakihi A. Jundu
JUDGE