

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., NDIKA, J.A. And LEVIRA, J.A.)

CIVIL APPLICATION NO. 222 OF 2016

STANDARD CHARTERED BANK 1ST APPLICANT

STANDARD CHARTERED BANK (HONG KONG) LTD..... 2ND APPLICANT

VERSUS

VIP ENGINEERING & MARKETING LIMITED RESPONDENT

AND

**STANDARD CHARTERED BANK (TANZANIA) LTD..... 1ST NECESSARY PARTY
THE JOINT LIQUIDATORS OF MECHMAR CORPORATION**

(MALAYSIA) BERHAD 2ND NECESSARY PARTY

WARTSILA NEDERLAND B. V. 3RD NECESSARY PARTY

WARTSILA TANZANIA LTD. 4TH NECESSARY PARTY

**(Application arising out of Civil Application No. 76 of 2016, being an
Application for revision of the proceedings, rulings and orders of
the High Court of Tanzania, at Dar es Salaam)**

(Bongole, J.)

**dated the 16th to 18th day of February, 2016
in**

Civil Case No. 229 of 2013

.....

RULING OF THE COURT

15th March & 2nd August, 2021

MWARIJA, J.A.:

By a notice of motion taken under section 4 (3) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002, now R.E. 2019] and Rules 48 (1) and 50 (1) of the Tanzania Court of Appeal Rules, 2009, the applicants, Standard

Chartered Bank and Standard Chartered Bank (Hong Kong) Ltd. (the 1st and 2nd applicants respectively), instituted this application against the respondent, VIP Engineering & Marketing Limited together with Standard Chartered Bank (Tanzania) Ltd. [the Joint Liquidators of Mechmar Corporation (Malaysia) Berhad], Wartsila Nederland B.V. and Wartsila Tanzania Ltd (the 1st – 4th necessary parties respectively).

According to the notice of motion, the applicants are seeking the following:-

- "(a) the applicants be granted leave to amend Civil Application No. 76 of 2016 by filing a court certified record of proceedings from Civil Case No. 229 of 2013 and,*
- (b) any other reliefs that the Court/Justices of Appeal may deem just, fair and equitable to grant."*

In response to the application, the respondent countered it through a preliminary objection predicated on the following grounds:-

- (a) that the application is incompetent for non-citation of proper and relevant enabling provision of law for leave **'to amend Civil Application No. 76 of 2016 by filing a court certified record of proceedings from Civil Case No. 229 of 2013.'***
- (b) that the institution of the application by the applicants is unprocedural, irregular, improper and*

*an afterthought aimed at nothing but to preempt and or defeat the respondent's notice of preliminary objection lodged in this Hon. Court on **15th April, 2016** challenging the competence of **Civil Application No. 76/2016** whose record the applicants want to amend....*

- (c) that although the notice of motion and the supporting affidavit are shown to have been drawn and lodged by advocate Charles Morrison, the same is neither signed nor endorsed by him as the applicant's duly instructed advocate on record but is purportedly signed and or endorsed by an unidentifiable or rather undisclosed person rendering the application incompetent, and*
- (d) that the supporting affidavit is incurably defective for containing hearsay, arguments, opinions, speculations and conclusions. The affidavit is also improperly verified for non-disclosure of grounds of belief based on information believed by the deponent."*

At the hearing of the application, the applicants were represented by Mr. Gaspar Nyika, while the respondent was represented by Mr. Michael Ngalo, learned advocates respectively. As regards the necessary parties, Dr. Alex Nguluma, learned counsel appeared for them holding the briefs of Ms.

Samah Salah, learned advocate for the 1st and 2nd necessary parties and Mr. Daud Ramadhani, learned counsel for the 3rd and 4th necessary parties.

Since as stated above, the respondent had raised a preliminary objection challenging the competence of the application, the objection had to be determined first. Before the commencement of hearing of the preliminary objection however, Mr. Ngalo informed the Court that he had decided to abandon ground (a) thereof and thus remained with grounds (b), (c) and (d) thereof.

The filing of the preliminary objection by the respondent's counsel was followed by his written arguments and the list of authorities lodged on 15/9/2016. When he was called upon to make his submission in support of the objection, Mr. Ngalo adopted his written arguments and prayed that, on the basis of the cited authorities, the preliminary objection be upheld and consequently, the application be struck out with costs.

Mr. Ngalo's arguments on ground (b) of the preliminary objection are to the effect that the application is incompetent because the same was filed after an objection had been taken by the respondent against the application which is sought to be amended. According to the learned counsel, by filing this application, the applicants intend to pre-empt the respondent's

preliminary objection in Civil Application No. 76 of 2016. For this reason, Mr. Ngalo went on to argue, if the application is granted, the order granting it will have the effect of defeating the preliminary objection filed by the respondent in that application. To bolster his argument, the respondent's counsel cited *inter alia*, the cases of **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] T.L.R 437, **Jaluma General Supplies Ltd. v. Stanbic Bank (T) Ltd.**, Civil Appeal No. 34 of 2010 and **Method Kimomogoro v. Board of Trustees of TANAPA**, Civil Application No. 1 of 2005 (both unreported).

In reply, the applicants' counsel started by challenging the preliminary objection contending that the same does not raise a pure point of law. With particular reference to ground (b) of the objection, Mr. Nyika argued that the same is based on a preliminary objection filed in another application, the existence of which requires to be ascertained by perusing that other application. In the circumstances, he argued, that ground is based on an unascertained fact.

In the alternative, the learned counsel argued that, even if the preliminary objection is competent, the authorities cited by the respondent's counsel in support of his arguments are distinguishable in that, while in this case, the preliminary objection is based on another objection filed in a different case record, the contents of which are sought to be amended, in

the cited cases, the objections were based on the contents of the records within which the preliminary objections were filed.

On his part, responding to the arguments made by the respondent's counsel, Dr. Ngululma supported the arguments made by the applicants' counsel; that the preliminary objection is untenable because it is based on the objection raised in a different application. He contended that ground (b) of the preliminary objection cannot be decided without resorting to the record of Civil Application No. 76 of 2016 and for that reason, he said, this ground is based on a matter which is extraneous to the present application. Citing *inter alia* the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1 EA 696, the learned counsel urged us to overrule the preliminary objection for being incompetent.

In rejoinder, Mr. Ngalo opposed the arguments made by the learned Advocates for the applicants and the necessary parties. He submitted that, since his learned friends did not dispute existence of a preliminary objection in Civil Application No. 76 of 2016, the argument that the present preliminary objection is incompetent on account of failing to raise a pure point of law, is not sound. The respondent's counsel reiterated his submission that the application for amendment is intended to pre-empty the preliminary

objection filed in Civil Application No. 76 of 2016, the move which he said, is not permissible in law.

We have duly considered the arguments made by the learned counsel for the parties. It is an indisputable fact that in this application, the applicants seek to be granted leave to amend the record of Civil Application No. 76 of 2016. In the preliminary objection, the subject matter of this ruling, the respondent's counsel contends that this application is incompetent because they had, prior to the filing by the applicants, of this application, lodged a notice of preliminary objection against the said Civil Application No. 76 of 2016, the record of which the applicants want to amend. The respondent's contention is that in the preliminary objection filed in that application, they challenge the competence of the application on the basis of the defect which, by the present application, the applicants intend to rectify. The argument by the respondent's counsel in support of ground (b) of the preliminary objection is therefore, that the application is incompetent because it has the intention of pre-empting the objection filed in Civil Application No. 76 of 2016.

The first issue for our determination on this ground of the preliminary objection is whether the objection itself is incompetent on account of Mr. Nyika's contention that resorting to Civil Application No. 76 of 2016 will be

necessary to ascertain existence of the respondent's preliminary objection therein. We are, with respect, unable to agree with the learned counsel. The reason is that, as argued by Mr. Ngalo, existence of that preliminary objection is not disputed by the applicants. The fact that the respondents had raised a preliminary objection in Civil Application No. 76 of 2016 based on the defect which, by this application, the applicants seek to rectify is therefore, an ascertained fact.

Having so found, we now proceed to determine ground (b) of the preliminary objection. It is trite principle that where a party has raised a preliminary objection in a case, the other party cannot be allowed to rectify the defect complained of by the party who raised the objection. This is because, to do so would amount to pre-empting that preliminary objection. In the case of **Method Kimomogoro v. Board of Trustees of TANAPA** (supra) cited by Mr. Ngalo, the Court stated as follow:

*"This Court has said in a number of times that it will not tolerate the practice of an Advocate trying to pre-empt a preliminary objection either by raising another objection or **trying to rectify the error complained of**"*

[Emphasis added].

See also the cases of **DIT v. Deusdedit Mugasha**, Civil Reference No. 11 of 2016 (Unreported), **Almas Iddie Mwinyi v. NBC** [2001] T.L.R 83 and **Mary John Mitchell v. Sylvester Magembe Cheyo and Others**, Civil Application No. 161 of 2008 (unreported) to mention but a few.

On the basis of the position stated above, we find merit in ground (b) of the preliminary objection. Since the finding on that ground suffices to dispose of the objection, we do not find any pressing need to consider grounds (c) and (d) of the preliminary objection. In the event, we find the application incompetent and hereby strike it out with costs.

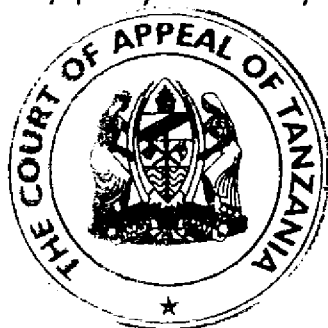
DATED at DAR ES SALAAM this 29th day of July, 2021.


A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 2nd day of August, 2021 in the presence of Ms. Caroline Ngailo, learned counsel for the Applicant, 1st and 2nd Necessary party and Mr. Michael Ngalo & Mr. Chuma, learned counsel for the Respondent and Mr. Daudi Ramadhani, learned counsel for the 3rd and 4th Necessary party is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL