

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL CAUSE NO. 276 OF 2015
(Originating from Commercial Case No. 119 of 2015)**

**PERCY BEDA MWIDADI
VICTOR JOSEPH PETER
MAKSIM CHALDYMOV
YURI VALENTINOVICH CHERNOMORCHENKO
RUPHINUS ANTHONY MLORERE
GOLD TREE TANZANIA LIMITED** } **APPLICANTS**

VERSUS

GASLAMP HOLDINGS CORP RESPONDENT

10th & 30th June, 2016

RULING

MWAMBEGELE, J.:

On 26.10.2015 an application was filed in this court under Sections 68 (e) and 95 and Order XXV Rule 1 (i) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002. It was filed seeking this court to be pleased and order the respondent to deposit in court the sum of the United States Dollars 2,000,000.00 being security for costs and provide for costs of the application. The application emanates from a suit which was instituted against the

applicants jointly and severally by the respondent for the declaratory order that

“the plaintiff is a majority shareholder of the 6th defendant/applicant herein, the allotment of shares to the 1st, 3rd, 4th and 5th defendants/applicants herein in the 6th defendant Company was wrongfully procured, the 2nd, 3rd, 4th and 5th Defendants be restrained from engaging in any activities within the 6th Defendant Company whether as shareholders or Directors of the 6th Defendant Company, an order restraining the defendants from dealing in any manner whatsoever with any properties of the 6th defendant company including Mining Licenses Number ML 426/2011 and ML 468/2012 held in the name of the 6th Defendant in any manner whatsoever, general damages, costs of the suit and any other relief this court may deem fit to grant...against the 6th defendant for payment of USD 5,100,000.00 advanced as loans to the 6th Defendant Company”

An affidavit in support thereof was sworn by one Percy Beda Mwidadi; the first applicant herein and the counter-affidavit thereof was sworn by Thomas Mihayo Sipemba. When this application was called for hearing on 24.05.2016, the 1st, 3rd, 4th and 6th applicants were duly represented by Mr. Chuwa assisted by Mr. Emesu, learned advocates, the 2nd respondent was represented by Mr. Brash, learned advocate and the respondent was

represented by Mr. Thomas Sipemba, learned advocate. The 5th respondent was neither present nor represented.

Mr. Brash told this court that he was instructed by his client, the 2nd defendant that he was not a party to the application and therefore sought his name to be struck off. There being no objection, his client's wishes were granted. Mr. Chuwa learned counsel thereafter proposed that since the 5th applicant was absent but with right to be heard then the application should be heard by way of written submissions. Once again, and by consent of learned counsel for the applicants and the respondent, I granted their wish and made a filing schedule thereof.

I note from the record of the court that the 5th respondent did not file any submissions in that respect despite, allegedly having been put to notice by Mr. Edward Peter Chuwa vide email per the letter he has filed in this court on 31.05.2016. I am, however, not surprised because the learned counsel for the 5th respondent has been indicating that he does not object the application. The rest of the learned counsel filed their written submissions in respect of the application. The ball is in my court to rule upon the said Application.

In the course of composing this ruling, I came across a disturbing feature on the affidavit sworn by Percy Beda Mwidadi to the extent that I was unable to proceed on the merits of the application. I shall demonstrate. First, let me reproduce some relevant paragraphs of the said affidavit which will form the basis of my decision:

"1. That I am the Director of the Applicants Company duly charged with managing operations

of the Company thus able to depone to the facts hereinafter;

2. That the Applicants have been sued jointly and severally for the sum of United states Dollars 5,100,000.00 and interest to the said moneys received as loan from the respondents;

3. That in defending the suit the six applicants shall incur costs including but not limited to legal fees, witness transport and accommodation, experts' consultant fees and all other associated costs with litigation calculated at USD 2,000,000.00".

Then, in the verification clause, it is stated thus:

"I, PERCY BEDA NWIDADI, being the Applicant herein ..."

Apparently, from the above averments, coupled with the withdrawal or rather striking off the 2nd applicant's name as not being part to the application, it is not clear as whether there is a single applicant (the 1st applicant), or the same is deponed and sworn on behalf of the 6th applicant Company or for all the applicants; that is, the 1st, 3rd, 4th, 5th, and 6th, for whom the deponent has deposed and sworn the said affidavit. That apart, despite the statement in the 2nd paragraph that the defendants have been sued jointly and severally for the said amount of monies, the plaint, particularly the last sentence of the 10th paragraph indicates that the said claim of monies is specifically made against the 6th applicant/defendant which was allegedly issued as loans to it. For avoidance of doubt, the same is couched thus:

“...The Plaintiff's claim against the 6th Defendant is for payment of US Dollars 5,100,000.00 advanced as loans to the 6th Defendant Company”

Further to the above, it is clear that the 5th applicant did not partake in the application and neither did he file any submissions in respect thereof. A further perusal of the record as contained in the entire case file reveals that the applicants are represented differently and all defendants save for the 1st and the 6th had entered separate written statements of defence to the said suit, namely Commercial Case No. 119 of 2015.

My considered and firm view with regard to an affidavit in support of the application is that it should have either indicated that the deponent thereof is making such affidavit for and on behalf of the rest of the applicants or otherwise, considering the legal tenet that the same is as good as evidence. To the contrary, the deponent states that he, being a director managing the operations of the 5th applicant company, is able to depose to the facts therein, without mention of his status as an applicant and his status to the rest of the applicants.

I am alive to the fact that the submissions thereof were made and filed jointly for the 1st, 3rd, 4th and 6th defendants. Yet, this in itself, cannot render the said deponent as having done so on behalf of the rest of the applicants. Thus, the patent contradictions on who the applicant is as gleaned from the said affidavit makes the same incompetent to support an application purportedly made in the name and for the said applicants.

It is for the above reasons I find the whole of the affidavit to be incompetent for want of specificity as to the status of the deponent and or the applicants in relation to both the rest of the applicants and the application itself. The

application thereof lacks the requisite support and consequently becomes incompetent.

Under the powers bestowed upon me by the provisions of rule 63 (b) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012, I proceed to strike out this application. Since the point which has disposed of this application has been raised by the court *suo motu*, I make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 30th day of June, 2016.

J. C. M. MWAMBEGELE

JUDGE