

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 146 OF 2020

BASHASHA MERCHANDISE DEALERS LIMITED.....1ST PLAINTIFF

GLOBAL AGENCY LIMITED.....2ND PLAINTIFF

Vs

EQUITY BANK TANZANIA COMPANY LIMITED.....1ST DEFENDANT

NISK CAPITAL LIMITED.....2ND DEFENDANT

RULING

Date of last order: 28-11-2023

Date of Ruling: 29-11-2023

B.K. PHILLIP, J

This ruling is in respect of the points of preliminary objections raised by the advocates for the plaintiffs; the same are couched as follows;

- i) This Honourable High Court has no Jurisdiction to proceed with this matter as per the current status of this case of forceful closure of the plaintiff's case contravened plaintiffs' right to be heard protected under Article 13(6) of the Constitution of the United Republic of Tanzania 1977 as amended from time to time.*
- ii) Her Ladyship Madam Phillip, Judge has no jurisdiction to proceed with this matter as per the current status of this case contravene Order XVIII Rule 10 (1) of the Civil Procedure Code and conflict of interests principle in relation to her decisions in Commercial **Case No 6 of 2021** in the High Court of Tanzania Commercial Division*

*of Dar es Salaam and Commercial **Case no. 8** of 2021 in the High Court of Tanzania Commercial Division.*

Wherefore, *the plaintiffs herein pray this Honourable court to depart from the Order of closure of the plaintiffs' case and proceed with the hearing of the plaintiffs' case.*

During the hearing of the points of preliminary objection, the learned Advocates Lusajo Willy, Obadia Kajungu, and Dickson Mtogesewa, appeared for the plaintiff whereas the learned Advocate Emmanuel Saghani appeared for the 1st defendant. The learned Advocates Paschal Kamala, Martha Renju and Erick Mark appeared for the 2nd defendant.

This case is partly heard. The plaintiff case was closed on 31st August 2021 by the order of this court, (Hon. Malata, J). The court's records reveal that the plaintiffs' case was closed following the plaintiffs' failure to bring in court their witnesses when the case was called for hearing. Subsequently, the case was fixed for the hearing of the defence case. However, Hon Malata J was not able to commence the hearing of the defence case as he recused himself from handling the case after three adjournments of the hearing of the defence case at the instance of the plaintiffs' advocates. Consequently, the case was reassignment to me. Before the commencement of the hearing of the defence case, the plaintiffs' advocates filed an application for review of the Ruling of this court on 31st August 2023 (Hon. Malata, J) in which it closed the plaintiffs' case. The same did not sail through. It was dismissed for being time-barred following the point of the preliminary objection raised by the 1st defendant's advocates. Thereafter the case was scheduled for

hearing of the defence case. On the day fixed for hearing of the defence case, the plaintiffs' advocates filed a notice on points of preliminary objection the subject of this ruling.

The points of preliminary objection were heard viva voce. Submitting in support of the 1st point of preliminary objection, Mr. Kajungu argued that this court has no jurisdiction to proceed with the hearing of this case because it forcefully closed the plaintiffs' case contrary to Article 13(6) of the Constitution of the United Republic of Tanzania. He went on to submit that the order of this court for the closure of the plaintiffs' case denied the plaintiffs their fundamental right to be heard in contravention of the Constitution of the United Republic of Tanzania. He contended that the subsequent proceedings after the closure of the plaintiffs' case by the order of this court are nullity and unconstitutional. To cement his arguments he referred this court to the case of **Suba Agro-Trading and Engineering Company Limited and Sarah Muya Vs Seedco Tanzania Limited, Civil Appeal No.184 of 2020**, and **David Mushi Vs Abdallah Msham Kitwanga, Civil Appeal No.286 of 2016** (both unreported). Mr. Lusajo joined hands with Mr. Kajungu. He argued that this court has no jurisdiction to proceed with the hearing of this case unless it vacates its order (Hon Malata, J) in which it closed the plaintiffs' case. He referred this court to the case of **Patricia Simeto Vs Uongozi wa CCM Tawi la Muungano, Miscellaneous Land Appeal No. 119 of 2021** (unreported) to cement his arguments.

About the 2nd point of preliminary objection, Mr. Lusajo submitted that the decision of this court (Hon. Malata, J) dated 31st August 2023, in which it

closed the plaintiffs' case denies the presiding judge the opportunity to observe the demeanor of at least one of the plaintiffs' witnesses. He contended that If the hearing of the defence case proceeds there is a likelihood of the presiding judge to be inclined to agree with the testimonies of the defence witnesses. He maintained that this court has power to vacate the order on the closure of the plaintiffs' case and rectify the errors it had committed. He cited section 97 of the Civil Procedure Code ("CPC") and referred this court to the case of **Kajoka Masanga Vs Attorney General and Principal Secretary establishment, Civil Appeal no.153 of 2016**, (unreported) to fortify his argument.

In addition to the above, Mr. Lusajo submitted that I have conflict of interests because previously I had made decisions in respect of cases that were at the Commercial Division of the High Court of Tanzania in which the 1st plaintiff was a party. Moreover, he argued that I denied the 1st plaintiff costs in one of the cases which I handled at the Commercial Court Division of High Court of Tanzania. Thus, he was of the view that there is a likelihood that I may not be fair to the plaintiffs in the determination of this case. He cited the case of **Equity Bank Tanzania Limited Vs Bashasha Merchandise Dealers Limited, Misc. Commercial Cause No.6 of 2021** and **Equity Bank Tanzania Limited Vs Bashasha Merchandise Dealers Limited, Misc. Commercial Cause No.18 of 2021**, (Both unreported), to cement his arguments.

Furthermore, the points of preliminary objection have been raised to make sure that the plaintiffs are accorded their right to be heard. Expounding on this point Mr. Lusajo submitted that if I vacate the order of this court (Hon,

Malata, J) made on 31st August 2023 and upon assessing myself on whether or not I have a conflict of interests, I will have the jurisdiction to proceed with the hearing of this case. In conclusion, he prayed both points of preliminary objection to be allowed.

In rebuttal, Mr. Saghani started his submission by pointing out the following; That the plaintiffs' advocates have failed to supply this court with the judgments in Commercial Case No. 6 of 2021 in the High Court of Tanzania Commercial Division and Commercial Case No. 8 of 2021, in the High Court of Tanzania Commercial Division, mentioned in the 2nd point of preliminary objection. The case of **Equity Bank Tanzania Limited** (supra) is distinguishable from the case at hand because that was a winding-up petition, the parties in that petition are not the same as the parties in the case at hand and the reliefs sought in that case are different from the reliefs sought in the case at hand.

About the merit of the points of preliminary objection Mr. Saghan argued that the provision of section 97 of the CPC relied upon by Advocate Lusajo in his submission cannot be applicable in this case because there is no application made by the plaintiffs to move this court to invoke its powers under section 97 of the CPC. He contended that if the plaintiffs' advocates wanted to rely on the provision of section 97 of the CPC, then, they would have made a formal application. He contended that the case of **Patricia Simeto** (supra) is not applicable in this case.

Furthermore, Mr. Saghan, argued that if this court has no jurisdiction to proceed with the hearing of this case, the consequence thereof is the

dismissal of the plaintiffs' case with costs. He was of the view that if this court finds that it has no jurisdiction to proceed with the hearing of this case as contended by the plaintiffs' advocate, then, case should be dismissed with costs. About Mr. Kajungu's prayer that this court be pleased to overturn the Ruling of this court (Hon Malata, J), Mr. Saghan argued that this court has no power to do so. To cement his arguments, he cited the case of **Maria Chrysostom Lwekamwa Vs Placid Richard Lwekamwa and another, Civil Application No.549/17 of 2019** (unreported). Moreover, Mr. Saghan argued that the decision of this court (Hon. Malata, J) cannot be challenged by way of points of preliminary objection. He contended that the cases of **Suba Agro-Trading (supra)** and **David Mushi (supra)** are irrelevant in this case because both of them were decided by the Court of Appeal not this court, thus, were decided at the appellate level. He insisted that the presiding judge has no powers to overturn the decision of her fellow judge sitting at the same level. The prayer made by the plaintiffs' advocate for this court to vacate its orders made on 31st August 2023 is contradictory to the points of the preliminary objection.

Furthermore, Mr. Saghan contended that it is a principle of law that parties to a case are not allowed to choose the Judge to preside over their matter/cases. He was of the view that the plaintiffs are technically choosing the Judge to preside over this case. He urged this court not to bless the plaintiffs' endeavors to choose the Judge to preside over this case.

About Mr. Lusajo's argument that if the hearing of the defence case proceeds the presiding judge will not have the opportunity to observe the demeanor of the plaintiff's witnesses, Mr. Saghan argued that it is a well-

established procedural law that basing on the principle of sanctity of the court's records a successor judge has to trust what is in court's records. He contended that this case has been handled by several Judges, thus, it is not realistic to argue that the current presiding Judge has to observe the demeanor of all witnesses. He insisted that this court should not set such a precedent as it will be in contravention of the laws.

Lastly, Mr. Saghan contended that the notice on points of preliminary objection is not proper on the reason that it contains prayers. He argued that prayers are contained in applications, not in a notice of preliminary objection. In addition, he contended that the points of the preliminary objection raised by the plaintiffs' advocate are not worthy of the name because they are concerned with issues that are under the court's discretionary powers. He was emphatic that points of preliminary objections are supposed to be pure points of law. To cement his arguments, he cited the case of **Salim. O. Kabora vs Tanesco Ltd and 2 others, Civil Appeal No.55 of 2014** (unreported). In conclusion, he prayed the points of preliminary objections be dismissed with costs and in the alternative, if this court finds that it has no jurisdiction to proceed with the hearing of this case, then dismiss the case with costs.

Mr. Kamala joined hands with Mr. Saghan. He argued that if this court has no jurisdiction to proceed with the hearing of this case as argued by the plaintiffs' advocates, then, it has to strike out it out with costs. He contended that Order XVII Rule 3 of the CPC guides the manner of hearing cases and provides for the consequences for failure to call witnesses. He was of the view that the order for closure of the plaintiffs' case was in line with

the law and that this court is *functus officio* to vacate its orders. He was of the view that the case of **Suba Agro-trading** (supra) and **David Mushi** (supra) cannot be applicable in this case because both of them were decided by an appellate court (the Court of Appeal of Tanzania), thus, they are distinguishable from this case.

Concerning the application of section 97 of the CPC in this case, Mr. Kamala contended that the same is applicable in regulating proceedings only. It cannot be invoked by this court to overturn its own decision.

Concerning the 2nd point of preliminary objection, Mr. Kamala contended that a presiding judge does not have a specific jurisdiction. The court are the ones with specific jurisdiction under the law. He pointed out that the fact that presiding Judge presided over other cases at the Commercial Division of the High Court of Tanzania, does not remove her power to handle this case. He was of the view that the plaintiffs' advocates failed to adduce any sufficient reason for the presiding Judge to recuse herself from the conduct of this case. He maintained that no conflict of interest against presiding Judge has been established by the plaintiffs' advocates. The commercial cases relied upon by the plaintiffs' advocates are different from the case at hand and do not create any conflict of interest against the presiding Judge. He was emphatic that the prayers made by the plaintiffs' advocates were not maintainable. He prayed for the dismissal of the points of preliminary objection with costs.

In rejoinder, Mr. Lusafo reiterated his submission in chief and went on to submit that the lack of jurisdiction does not always lead to the dismissal of

the case. The points of the preliminary objection raised by the plaintiffs' advocate are based on the current status of the case, to wit, forceful closure of the plaintiffs' case by this court. He insisted that this court has powers to rectify the errors in its order made on 31st August 2023 (Hon. Malata, J). In the alternative, this court has powers to seek directives from the Court of Appeal of Tanzania under section 4 (3) of the Appellate Jurisdiction Act, and Rule 48 (1) and 65 of the Tanzania Court of Appeal Rules, contended Mr. Lusajo.

Moreover, Mr. Lusajo, contended that according to Order 43 (2) of the CPC, this Court can entertain oral applications. The prayer made in the notice of points of preliminary objections can be equated to an oral application. He insisted that this court has to conduct the hearing of cases fairly. The decision of this court (Hon Malata, J) is an interlocutory decision and this court has the power to vacate it. He maintained that this court can only become *funtus officio* when it makes a final determination of the case/matter. He contended that the plaintiffs' case was closed under section 95 of the CPC not Order 18 Rule (3) of the CPC thus, not in conformity with the law. He insisted that whatever the case, even if the plaintiffs' case would have been closed under Order 18 Rule (3) of the CPC, the same cannot supersede the right to be heard. He was emphatic that the points of preliminary objection are not aimed at choosing the judge to preside over this case but to move this court to open the plaintiffs' case in the interests of justice. He contended that the cases of **Maria Chrysostom** (supra) and **Lwekamwa** (supra) are irrelevant and distinguishable from the facts of this

case. He was of the view that the of **Salim O. Kabora** (supra) is not binding to this court and distinguishable from the facts of this case.

In rejoinder, Mr. Mtogesewa submitted that this court has power to vacate its order made on 31st August 2023 even to recall witnesses. He insisted that Misc. Commercial Cause No.18 of 2021 and Misc Commercial Cause No.6 of 2021 are related to the case at hand even though the parties are different thus, the presiding Judge has conflict of interests. On his part Mr. Kajungu contended that Misc. Commercial Cause No. 18 of 2021 is the one mentioned in the notice on the points of preliminary objection as Misc. Commercial Cause No.8 of 2021 which is the correct number of that case. The copy of the decision supplied to this court has typographical error. He joined hands with Mr. Mtogesewa that in the interests of justice, this court has power to vacate its order issued on 31st August 2023 because it is an interlocutory order. To cement his arguments, he cited the case of **Juwata Vs Kiuta, (1998) T.L.R.147**. He insisted that this court can depart from its own decision if it discovers that the same is erroneous.

Advocate Saghan prayed for the leave of this court to respond to new issues raised by the plaintiffs' advocates in their rejoinder. Upon being granted the leave sought, he submitted as follows; that this court has no power to seek for directives from the Court of Appeal in the manner suggested by Mr. Lusango. He contended that the provision of section 4(3) of the Appellate Jurisdiction Act, does not support Mr. Lusango's arguments and Rule 48 (1) of the Court of Appeal Rules provides for modalities of preferring applications before the Court of Appeal whereas Rule 65 of the Court of Appeal Rules

provides for revisional powers of the Court of Appeal, it has nothing to do with seeking directives from the Court of Appeals.

Concerning the case of **Juwata** (supra) Mr. Saghan argued that the same cannot be applicable in this case because a point of preliminary objection is not an application to move this court to grant the orders sought by the plaintiffs.

Having dispassionately analyzed the competing arguments made by the learned advocates, I wish to start by pointing out the anomaly in the notice of a point of preliminary objection which can be seen on its face. I have already reproduced the notice of preliminary objection at the beginning of this Ruling thus, I do not need to reproduce it here again. The prayer made in the notice of points of preliminary objection specifically moves this court to vacate the order for closure of the plaintiffs' case and re-open the plaintiffs' case whereas the points of preliminary objection are to the effect that this court and the presiding judge has no jurisdiction to proceed with the hearing of this case. There is an obvious contradiction between the prayer and the points of preliminary objections raised by the plaintiffs' advocates. It is a well-known position of the law that if the court has no jurisdiction then, it cannot proceed to entertain the matter in question. There is nothing in between. It is either the court has jurisdiction or not. Jurisdiction is a creature of the statute since it is conferred by law. To avoid doubts, I have taken into consideration the concern raised by Mr. Saghan that the notice of preliminary objection cannot contain prayers because it is on pure points of law and that prayers are made in applications only. With due respect to Mr. Saghan, I do not agree with his stance. When a party raises

a point of preliminary objection is not strictly barred from indicating his/her wishes or consequential orders if at all the point of preliminary objection in question sails through.

In addition to the above, I join hands with Mr. Kamala, that the issue of jurisdiction is concerned with the courts of law not a judge as an individual. Thus, in my considered view, it is incorrect to raise a point of preliminary objection on jurisdiction of the presiding judge personally. To my understanding, a judge of the High of Tanzania can preside over any case filed in the High Court of Tanzania in any registry provided that it is assigned to him/her.

Without prejudice to my observations made herein above, concerning the merits of the 1st point of preliminary objection, the arguments raised by the plaintiffs' advocates have no merit as I shall elaborate hereunder;

All of the arguments raised by the plaintiffs' advocate are to the effect that the plaintiffs have been denied the right to be heard by the order of this court (Hon. Malata, J) dated 31st August 2023, in which it closed the plaintiffs' case and for that reason this court has no jurisdiction to proceed with the hearing of this case. The pertinent question here is; can the jurisdiction of this court be ousted by a mere fact that it has issued an order for closure of the plaintiffs' case? The answer to that question is in the negative because this court has power under the law to close the plaintiffs' case. It is noteworthy that the advocates for the plaintiffs failed to demonstrate that this court (Hon. Malata, J) had no power to close the plaintiffs' case. It is not in dispute that the plaintiffs have a right to be heard. The Court's record

shows that the plaintiffs had brought in court seven witnesses before this court rejected the prayer for adjournment of the plaintiffs' case and closed it. What happened is that this court exercised its discretionary power and refused to grant adjournment of the plaintiffs' case. Therefore, Article 13 (6) of the constitution of the United Republic of Tanzania, cannot be applicable in the circumstances of this case. All of the cases cited by the plaintiffs' Advocates cannot be applicable in this case because they have different sets of facts. Most importantly, the holdings in all of the cases cited by the plaintiffs' advocate are on the importance of the right to be heard. However, none of them has a holding to the effect that when a court closes the plaintiff's case it lacks jurisdiction to proceed with the hearing of that case.

Additionally, a point of preliminary objection on the jurisdiction of this court does not give a room for this court to discuss whether or not its order made on 31st August 2023 is erroneous or unconstitutional as argued by the plaintiffs' advocates. I think it is apposite to point out here that this court cannot be moved to consider its decision/order made on 31st August 2023 by way of raising a point of preliminary objection that it has no jurisdiction. I agree with Mr. Saghan and Kamala, that if at all the plaintiffs' advocate intended to move this court to invoke the provision of section 97 of the CPC then, they were supposed to make a proper application. I am not inclined to agree with the argument raised by Mr. Lusajo that the prayer made in the notice of preliminary objection can be equated to an oral application according to order 43 (2) of the CPC. That argument is totally raised out of context. How can a written prayer be equated to an oral application while it is obvious that an oral application is not a written one. On top of that

section 97 of the CPC cannot be applicable in this case because the same is concerned with the correction of defects or errors in the proceedings to determine the real question or issue raised. In this case, there is no error or defect in the proceedings which requires to be corrected. Having in mind the contradictions in the notice of preliminary objection pointed out earlier in this ruling and the fact that there is no application to move this court to indulge itself in dealing with its order made by this court on 31st August 2023, it is obvious that under the circumstances, I cannot deal with the lengthy arguments raised by the parties on whether or not this court has power to vacate its order made on 31st August 2023.

Concerning the 2nd point of preliminary objection, as I alluded to earlier in this ruling, the 1st limb of the 1st point of preliminary objection is misconceived. The arguments raised by the plaintiffs' advocates are related to the ones raised in the 1st point of preliminary objection which are to the effect that since this court closed the plaintiffs' case, then, I have no jurisdiction to continue with the hearing of this case, unless I vacate the order of this court dated 31st August 2023. Let me re-state my stance, to wit; The issue of jurisdiction is concerned with the courts and you cannot separate the court's jurisdiction from the presiding judge's power to determine the case assigned to him /her. Not only that, there is no "partial or conditional jurisdiction", as contended by the plaintiffs' advocates, in the sense that if I vacate the order of this court made on 31st August 2023 and re-open the plaintiffs' case, I will have "jurisdiction" to proceed with the hearing of the defence case, short of the I have no jurisdiction to proceed with the hearing of the defence case.

Coming to the 2nd limb of the 2nd point of preliminary objection, to wit; I, as a presiding Judge, I have conflict of interest in this case. I agree with Mr. Kamala and Saghan that the same has no merit. Upon perusing the copies of the decisions, I made in the two cases cited by the plaintiffs' advocates (Misc. Commercial cause No.6 of 2021 and Commercial Cause No. 18 of 2021) in support of their arguments, I noted that the same are quite different from the case at hand. They have different cause of action and parties as well as different reliefs. Similarly, Mr. Lusajo's arguments that since I did not grant costs for the respondent in one of the cases where the 1st plaintiff herein was the respondent, there is a likelihood that I will not decide the case at hand fairly is unfounded and does not establish any conflict of interests on my party. It is noteworthy that for Judge or Magistrate to recuse himself or herself from handling a case on the ground that he /she has a conflict of interests the alleged conflict of interests has to be established. Mere speculations like the ones shown by Mr. Lusajo in his submission cannot be a ground of recusal from handling this case. To say the least, the plaintiffs' advocates failed to substantiate their allegations. Therefore the 2nd limb of the 2nd point of preliminary has no merit.

In the upshot, all points of preliminary objection have no merit. However, by passing, plaintiffs' advocate raised these points of preliminary objection in order to challenge the order of this court made on 31st August 2023 in abuse of the court's process. The plaintiffs' advocates had already applied for review of the order of this court aforesaid which was dismissed. After dismissal of the application for review, they decided to take another route, which unfortunately is also contrary to the acceptable legal procedures by

raising points of preliminary objection, the subject of this ruling to push this court to vacate its order made on 31st of August 2023.[See the case of **Mic Tanzania Limited Vs Kijitonyama Lutheran Church Choir, Misc. Civil Appeal No. 46 of 2020**, and **Maxinsure (Tanzania) Limited Vs Simon W. Ngowi, Misc. Civil Application No. 46 of 2020**, (both unreported)]

Dated this 29th day of November 2023




B.K. PHILLIP

JUDGE.