

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT ARUSHA**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 3 OF 2013
(Arising From Commercial Case No. 4 of 2010)**

**ALLY HATIBU MSANGI
SAIDA ALLY HATIBU MSANGI** } **APPLICANTS**

VERSUS

**NURANI HATIBU
NUHU HATIBU
MWAJABU HATIBU
CRAFT SERVICES AND
TECHNOLOGY COMPANY LTD** } **RESPONDENTS**

21st August & 16th September, 2015

RULING

MWAMBEGELE, J.:

Mr. Boniface, learned counsel for the respondent has come up in arms against a preliminary objection raised by Mr. Jabir, learned counsel for the applicant against his preliminary objection. Briefly, the material facts giving rise to this ruling are that the parties to this application were plaintiffs and defendants in Civil Case No. 4 of 2010. The applicants were

plaintiffs and the respondents were defendants. That suit was decided for the defendants. Consequent upon that, the defendants; the respondents herein, filed taxation proceedings. The ruling in respect of the taxation was pronounced on 21.05.2013 taxing the Bill at 248,195,000/=. The applicants were aggrieved with that ruling and thus filed the present application to have it set aside. Mr. Boniface for the respondents filed a preliminary objection against the application. Before the preliminary objection could be heard, Mr. Jabir for the applicants filed a preliminary objection against Mr. Boniface's preliminary objection.

When the matter was called on for hearing before me on 21.08.2015, Mr. Boniface, learned counsel for the respondents, orally, raised an objection to the course taken by Mr. Jabir, learned counsel for the applicant; to raise a preliminary objection against his preliminary objection, stating that the course was not permissible at law. In support of his objection, Mr. Boniface, learned counsel for the applicant, cited and supplied ***Mary John Mitchell Vs Sylvester Magembe Cheyo & ors***, Civil Application No. 161 of 2008 (unreported), whose *ratio decidendi* is to the effect that a preliminary objection which intends to preempt another preliminary objection is prohibited by law.

Mr. Jabir for the applicant was of the view that the decision relied upon by the learned counsel for the respondent was distinguishable because what the applicant's preliminary objection sought to address in the present case was a procedural defect in the filing of documents in this court. He added that the second preliminary objection had nothing to do with preemption of

the respondent's preliminary objection but, rather, it intended to seek court redress on the application of laws which guides the filing of documents in this court. He cited the decision of this court of ***Ernest Nduta Nyororo Vs the National Bank of Commerce & anor***, Commercial Case No. 1 of 2015 (unreported) to support his proposition.

In a short rejoinder, Mr. Boniface for the respondent reiterated his earlier position that the gist of the Court of Appeal decision is that once there is a preliminary objection, there cannot be raised another preliminary objection against the preliminary objection already filed. The learned counsel told the court that ***Ernest Nduta Nyororo*** was distinguishable because that case dealt with a plaint, which is not the case in the present case.

This matter will not detain me. What this ruling is supposed to answer is the issue whether a preliminary objection is allowed on another preliminary objection. Mr. Boniface, learned counsel for the respondent, in support of his argument, has cited and supplied to me the Court of Appeal decision which disallows this practice. I am at one with the learned counsel for the respondent. That a preliminary objection on another preliminary is prohibited is the law in this jurisdiction. In ***Mary John Mitchell***, the Court of Appeal reiterated its earlier position it stated in ***Method Kimomogoro Vs Board of Trustees of TANAPA***, Civil Application No. 1 of 2005 (unreported) in which it stated:

“This court has said in a number of times that it will not tolerate the practice of an advocate

trying to preempt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of. See also ***Almas Iddie Mwinyi, Shadida Abdul Hassanali Kassam.***"

It is not the first time the Court of Appeal is discouraging the practice of preempting a preliminary objection. There is a string of cases on this point. Such cases include ***Shahida Abdul Hassanali Kassam Vs Mahedi Mohamed Gulamali Kanji*** Application No. 42 of 1999 (Unreported) and ***Almas iddie Mwinyi Vs National Bank of Commerce & Another*** [2001] TLR 83, the cases cited in the quote above. Others are: ***Alhaji Abdallah Talib Vs Eshakwe Ndoto Kiweni Mushi*** [1990] TLR 108, ***The Minister for Labour and Youth Development and Shirika la Usafiri DSM Vs Gaspa Swai & 67 Others*** Civil Appeal No. 101 of 1998 (unreported) and ***Frank Kibanga Vs ACCU Ltd***, Civil Appeal No. 24 of 2003 (unreported), to mention but a few.

In the present case, the applicants' counsel argues that the second preliminary objection he filed is not intended to preempt the respondents' preliminary objection. With utmost due respect to the learned counsel, I find difficulty in swimming his current. What the learned counsel for the applicants states in this regard is not backed by record. The preliminary objection Mr. Jabir filed, contrary to what he argues, has the following excerpt: