IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 24 OF 2016

(Arising from Commercial Case No. 185 of 2013)

MOTO MATIKO MABANGA ..... APPLICANT

VERSUS

OPHIR ENERGY PLC
OPHIR ENERGY PTY LTD } **.....RESPONDENTS**
BG (TANZANIA) LIMITED

14th June & 9th November, 2016

RULING

MWAMBEGELE, J.:

By an order of this court dated 11.12.2015 in Miscellaneous Commercial Application No. 123 of 2015 which was made under the provisions of Order XI rules 1, 2 and 4 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC"), the applicant was granted leave to administer interrogatories upon the respondents. As the respondents' claimed that their clients were not resident in the country, the court ordered that the affidavits in answer to the interrogatories be filed within thirty days after service. The respondents complied with the court order.

The applicant has come with yet another application seeking for further interrogatories in answers 1, 2, 3, 5, 6, 7, 10, and 21 on the ground that the details contained therein are insufficient. The application has been made under Order XI rule 9 of the CPC. It is supported by an affidavit of Moto Matiko Mabanga; the applicant. It is highly contested by the respondents; through the counter-affidavits of William Higgs for the first and second respondents and Conor Skinner for the third respondent. This is a ruling thereof.

The application was orally argued before me on 14.06.2016 prior to which, except for the applicant, the parties had earlier filed their respective skeleton written arguments as required by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter "the Rules"). Failure by the applicant to file the skeleton arguments did not bar the hearing of the application. Thus, in terms of the proviso to rule 64 of the Rules, hearing of the application proceeded, failure by the applicant to file the skeleton arguments notwithstanding.

At the oral hearing, both parties were represented. While the applicant had the representation of Mr. Gabriel Simon Mnyele and Mr. Jethro Turyamwesiga, learned counsel, the first second and respondents were advocated for by Dr. Wilbert Kapinga, learned counsel and Mr. Brian Mambosho and Mr. Joseph Ndazi, learned counsel joined forces to represent the third respondent.

Let me state at this juncture that the present ruling was initially slated to be delivered on 03.08.2016. However, I was assigned a special assignment in Morogoro which took two months to complete, the ruling could not be delivered as planned.

Now back to the arguments by the learned counsel for the parties. Mr Mnyele, learned counsel for the applicant submitted that the interrogatories attached with the affidavit of Moto Mabanga together with the answers to interrogatory 1, 2, 3, 5, 6, 7, 10, and 21 are insufficient. He argued that the answers complained of are embarrassing for being insufficient. Relying on **Mulla on the Code of Civil Procedure** (14th Edition) at p 1158, the learned counsel argues that an answer to an interrogatory is insufficient when it is made in such a manner that it is embarrassing. It is embarrassing if it presents the applicant to use the same without additional of other facts from elsewhere.

He submitted further that the identified answers are embarrassing because the respondents deliberately avoided providing answers to the interrogatories. He gave an example of interrogatory No. 1 that the 1st and 2nd respondents were asked about the relationship between them and the other companies under the name Ophir and that the answer provided is embarrassing. The same is the case in respect of the remaining interrogatories.

As for the 21st interrogatory which concerns the 3rd respondent, the learned counsel submits that the answer thereof is also insufficient and therefore embarrassing.

The applicant thus prays that the court grants the application and order that the respondents provide further answers in writing as the practice demands. The learned counsel was, however, alive to the fact that under the provisions Order XI rule 9 of the CPC under which the application has been made, the answers could also be provided by *viva voce* examination.

For the first respondent, Dr. Kapinga, learned counsel, having adopted the skeleton arguments earlier filed, submitted that the answers complained of were not embarrassing at all. He added that the original answers to all the interrogatories were that they were not bonafide. They were seeking to impose the views of the 1st and 2nd respondents. Also relying on **Mulla on the Code of Civil Procedure**, at p 1158, the learned counsel submitted that what the court is supposed to do is to see whether the answers are sufficient and not whether they are correct. If that process is allowed the court will be embarking on a fishing expedition in order to seek the opinion/admission of an adverse party, he argued. The learned counsel added that the answers may be embarrassing if they are irrelevant.

For the third respondent, Mr. Mambosho, learned counsel, having adopted the counter-affidavit of Mr. Connor Skinner and skeleton arguments earlier filed, submitted that the answer in respect of interrogatory 21 is quite sufficient. It was his argument that the interrogatory sought to answer the what, when and the how and that all these have been provided in the answer. The learned counsel argued that the applicant is attempting to fish details from the respondent which can be obtained at the trial during cross-examination.

In a short rejoinder, Mr. Mnyele, learned counsel submitted that the interrogatories were not filed malafide. He added that the purpose of interrogatories is to seek for admission in order to shorten the trial and avoid costs. On whether the interrogatories were irrelevant; the learned counsel stated that at this stage the respondents were duty-bound to answer them because the stage had passed during which they could challenge the relevance or otherwise of the interrogatories. He thus reiterated his prayer for the provision of further answers to the identified interrogatories.

Under Order XI rule 9 of the CPC under which the applicant has proffered the application, it is provided that:

> "Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court for an order requiring him to answer, or to answer further, as the case may be and an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the court may direct".

The question which this ruling must answer therefore is whether the answers provided by the respondents are insufficient as to grant the order sought by the applicant. The answers complained of are in respect of interrogatories 1, 2, 3, 5, 6, 7 and 10 which were supposed to be answered by the 1st and 2nd respondents and interrogatory 21 which was supposed to be answered by the 3rd respondent. In order to know if the answers to the identified interrogatories are sufficient or not, I find it expedient to quote each interrogatory and its answer.

The first interrogatory was:

> "What is the relationship between the first and second defendants, on the one part, and Ophir (Block 1) Limited, Ophir (Block 3) Limited, and Ophir (Block 4) Limited, if the named companies are not subsidiaries of the first or second defendants? Did Ophir declare Moto Mabanga's interest to the Government of Tanzania as

required in the three signed consultancy Agreements over Blocks 1, 3 and 4 at the relevant period?

- To be answered by the first and second defendant."

And the answer provided is:

"As regards paragraph 1, I object to answer the question of the relationship between the Defendants on the ground that it is not exhibited bona fide for the purpose of the suit as defendant had properly not admitted in their defence a relationship between these companies. Further, I object to answer the question whether Ophir did declare the Plaintiff's interest to the Government of Tanzania for being irrelevant or not sufficiently material at this stage."

The second question was:

"Does the first and/or the second defendants have any shares or interest (of whatever nature) in the above named three companies and who are the Directors and Shareholders.

- To be answered by the first and second defendants."

The answer to the second interrogatory is:

"With reference to paragraph 2, I object to answer the question whether the Defendants have any shares or interests in the above three companies named in paragraph 1 and as to directors and shareholders of those companies. The basis of the objection is that the question does not relate to any matters in question in the suit."

The third question was:

"Do you admit that the agreements referred to in paragraphs, 6 of the plaint and 8 of your written statement of defence cover the PSA rights, under ownership andor control by Ophir (Block 1) Limited and Ophir (Block 3) Limited and Ophir (Block 4) Limited?

To be answered by the first and second defendants"

The answer to it is:

"In connection with paragraph 3, I object to answer the question on the ground that it is not exhibited bona fide for the purpose of the suit as Defendants had provided a proper defence to paragraph 6 of the Plaintiff plaint."

The fifth question was:

"You admit that Ophir Block 1 Limited, Ophiri Block 3 and Ophir Block 4 limited were incorporated in Jersey

- To be answered by the first and second defendants."

The answer is:

"In relation to paragraph 5, I object to object to answer the question on the ground that it is irrelevant to the matters in question in the suit."

The sixth interrogatory was:

"What is the legal status of the three above mentioned companies in Tanzania?

- To be answered by the first and second defendant."

The answer to the sixth interrogatory is:

"As to paragraph 6, I object to answer the question on the ground that it is irrelevant to the matters in question in the suit."

The seventh interrogatory was:

"You admit that by 1st April, 2010 the above mentioned companies were already incorporated?

- To be answered by the first and second defendant."

The answer is:

> "I object to answer question in paragraph 7 on the ground that it is irrelevant to matters in question in the suit."

The tenth was:

> "You admit that under the consultancy agreements between Moto Mabanga and the 2nd defendant, the latter had a duty to disclose all transactions, such as the transaction with the 3rd defendant, that were to have impact on his interest as contained in the said agreements.
>
> - To be answered by the first, second and third defendants."

The answer to the tenth interrogatory is:

> "In relation to paragraph to paragraph 10, I object to answer the question for being irrelevant or not sufficiently material at his stage. In any case, I say that any alleged duty to disclose ended with the termination of the agreements."

The twenty-first interrogatory was:

> "When and how did you know about the plaintiff's interest in Tanzania Block 1, Block 3 and Block 4?
>
> - To be answered by the third defendants."

The answer by the third respondent is:

> "The question in Paragraph 21 of the Interrogatories is objected to on grounds that it is not a relevant question for the purpose of this suit. In addition, Pleadings of the parties filed as part of the present suit show clearly that the Plaintiff's consultancy and minority interest with the 1st and 2nd Defendant was terminated by Deed of Termination dated 19 March 2010. This fact is also reflected in the Farm Out Agreement dated 16 April 2010."

As can be noted, in the answers complained of, the first and second defendants have objected to answer the same on account that the details needed are either irrelevant, not exhibited bonafide or the question does not relate to any matters in question in the suit. So is the answer in respect of interrogatory 21 which was in respect of the third respondent.

The principles on which interrogatories may be allowed were stated in the case of ***Omar Vs Gordhanbhai and another*** [1974] EA 518. That was the decision of the High Court of Kenya by Harris, J. His Lordship, at p. 520, quoted with approval the following passage from Halsbury's Laws of England Volume 12 (3rd Edition) at 64:

> "The party interrogating may put questions for the purposes of extracting from his opponent information as to the facts material to the questions between them which he has to prove on

any issue raised, between them, or for the purposes of securing admissions as to those facts in order that expense and delay may be saved, or to find out whether particular statements of fact contained in the pleadings of the party interrogating as to which onus of proof is upon him are true or untrue, or to ascertain what case he has to meet or what really is in issue, so as to prevent his being taken by surprise at the trial, or to destroy his opponent's case, or to support his own case.

In accordance with the general rules as to discovery, interrogatories may not extend to the evidence wherewith the opposite party intends to support his case at the trial, or to the contents of his opponent's brief, or to the names of his witnesses (unless their names are in themselves relevant facts), or to the facts which merely support the case of the party interrogated; and the mere fact that the questions would be admissible in cross-examination of a witness does not make them good as interrogatories. Thus, interrogatories to credit only will not be allowed."

cision was followed in ***National Social Security Fund Board of e Vs Kerio Farms Limited and others***, [2006] 2 EA 240; the of the Commercial Court of Kenya.

The two cases are of persuasive authority to this court. I find them highly persuasive and propose to follow the set down principles in this ruling.

As shown above, the respondents have objected to answer the interrogatories on account of the reasons stated above. In so doing, so the interrogator claims, the answers sought have not been answered or have been insufficiently answered and therefore embarrassing.

I have examined the interrogatories and the corresponding answers thereof as reproduced above. The applicant has interrogated the respondents with a view to extracting from them some information to help him prove his case and discredit his opponents' case. However, the interrogatories the answers of which are complained of, the way I see them, have extended to seeking evidence which the respondents will need to support their cases at the trial. These kinds of interrogatories, in the light of ***Omar Vs Gordhanbhai and another*** and ***National Social Security Fund Board of Trustee Vs Kerio Farms Limited and others***, the cases cited above, are not permissible.

I am alive to the fact that on 11.12.2015, I granted the prayer by the applicant to administer interrogatories upon the respondent. I should perhaps have decided at that stage whether the said interrogatories were relevant for the determination of the issues in the suit. I did not do that then.

I have asked myself whether it will be permissible at this stage to decide otherwise. This question has exercised my mind greatly. Having adequately pondered on the point, I have reached the stance that it will be in the interest of justice to do now what I did not do then. I therefore hold that the interrogatories, for which the answers are complained of, are not good interrogatories as they seek to extract information from the respondents

which comprise the evidence they will rely on at the trial. No more answers on them will be needed. The suit will proceed to the next step on a date to be slated today.

Order accordingly.

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

J. C. M. MWAMBEGELE
JUDGE