IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 277 OF 2015

(Arising from Commercial Case No. 42 of 2012)

CRDB BANK PLC
LEONARD MUSUSA
RECEIVER MANAGER OF MOROGORO CANVASS MILLS (1998) LTD ..... APPLICANTS

VERSUS

AZIZ MOHAMED ABOUD
MOROGORO CANVASS MILLS (1998) LTD..... RESPONDENTS

8th December, 2015 & 18th February, 2016

RULING

MWAMBEGELE, J.:

Against an application filed by the applicants CRDB Bank PLC and Leonard Mususa [Receiver and Manager of Morogoro Canvass Mills (1998) Ltd], the respondents Aziz Mohamed Abood and Morogoro Canvass Mills (1998) Ltd have filed two sets of preliminary points of objection. The first set has been filed by the first respondent. It reads thus:

"Please take notice that the 1st Respondent shall raise [a] preliminary objection on the point of law that the Applicants' Chamber Application is bad in law for contravention of O. XXIII Rule 3 of the Civil Procedure Code Cap. 33 (R.E 2002). Consequently, the 1st Respondent shall pray [for] dismissal of the application with costs".

And the second set by the second respondent reads thus:

"1. The application is not maintainable since a similar application was instituted by the Applicant (sic) on **28th day of December, 2012** and on **15th day of July, 2013** at the instance of the Applicant (sic) it was marked by the Court as withdrawn unconditionally. Thus, the Applicant (sic) is (sic) precluded from bringing a fresh application on the same subject matter seeking the orders. **Annexed hereto is the Court order relied upon**; and

2. The application is incompetent for being accompanied by affidavits which have grossly violated mandatory provisions of **section 5 of the Oaths and Statutory Declarations Act [Cap. 34 R.E 2002]** read together with **Rule 2 of the Oaths and Affirmations**

Rules [Cap. 34 Subsidiary Legislation Revised Edition 2002]

WHEREOFRE the Counsel for the 2nd Respondent shall pray that the application be dismissed in its entirety with costs".

The preliminary objections (henceforth "the PO") were argued before me on 08.12.2015 during which Mr. Rweyongeza, learned counsel, appeared for the applicants and Mr. Kamala and Mr. Fungamtama, learned counsel, appeared for the first and second respondents respectively. The oral hearing was preceded by the parties filing skeleton written arguments in line with the dictates of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

I wish to point out at this juncture that the second respondent withdrew the second point of preliminary objection as, according to him, having carefully gone through the law, he thought he would not have successfully argued it, hence the withdrawal. He thus remained with the first point which was akin to that raised by counsel for the first respondent.

The gist of the PO by the respondents is that the present application is misconceived because the applicants had earlier filed a similar application on 28.12.2012 which they prayed to withdraw on 15.07.2013 and this court granted the prayer and marked the application as withdrawn at the instance of the applicants. It is the respondents' contention that the applicants having withdrawn the previous application, in terms of Order XXIII rule 1 (3) of the

CPC, and in the absence of an order of this court to re-file it, are precluded from re-fling the present application. The respondents have cited an unreported decision of this court of ***East African Development Bank Vs Blue Line Enterprises Limited***, Miscellaneous Civil Cause No. 177 of 2007 to buttress the proposition that of Order XXIII rule 1 (3) of the CPC is not only applicable to suits but to applications as well.

Basing on the doctrine of *stare decisis*, the learned counsel for the respondents have urged me to respect the ***EADB*** case (supra) despite not being bound by it as demonstrated by the Court of Appeal in ***Ally Linus And Others Vs Tanzania Harbours Authority*** [1998] TLR 5. This course, they argue, would foster uniformity of decisions as was held in ***Kiganga and Associates Gold Mining Company Limited Vs Universal Gold NL*** [2002] TLR 129 and ***ULC (Tanzania) Ltd Vs National Insurance Corporation & Another*** [2003] TLR 212.

The applicants' counsel has strenuously resisted the PO arguing that the same is grossly misconceived because the present application is different as it has been brought not that the applicants want the court to vacate its orders but because the respondents have refused to hand over the securities to the second applicant. The learned counsel for the applicants submitted that as this court ordered that "until further orders of this court", it is therefore not doubted that the present application was expected so as to put the court order into effect. The applicants' counsel has cited ***Afred Mtatiro Vs Shelter Construction Limited & others*** [2001] TLR 206 and ***Anwar Z. Mohamed Vs Said Seleman Masuka***, Civil Reference No. 18 of 1997 (unreported) in support of his arguments.

In rejoinder, the two learned counsel for the respondents stated that the present application is similar to the previous one. The previous application prayed for vacation of the order for maintenance of status quo while the present application seeks a direction that there no valid direction after expiry of six months. The modification of the words in the present application, they rejoined, does not change the nature of the application.

Before I proceed to deal with the merits or otherwise of the learned rival arguments by the learned counsel for the parties I have summarized above, I wish first to deal and perhaps decide on two matters. First, the learned counsel for the first respondent has cited the provisions of Order XXIII Rule 3 of the Civil Procedure Code Cap. 33 (R.E 2002) as the ones that have been offended and hence the anchor of his PO. The provisions of Order XXIII Rule 3 of the CPC are about compromise of suit which is not the case here. The relevant provision which was at the back of the mind of the learned counsel of the first respondent was, I think, Order XXIII Rule 1 (3) of the Civil Procedure Code Cap. 33 (R.E 2002) as correctly cited and quoted in the skeleton arguments. I think this; that is, reference to Order XXIII Rule 3 of the CPC is but a keyboard mistake. In the premises, I take reference to Order XXIII Rule 3 of the CPC was meant to refer to the provisions of Order XXIII Rule 1 (3) of the CPC.

Secondly, at the hearing, as alluded to above, the learned counsel for the second respondent sought to withdrawal the second point of preliminary objection. The course was not objected by the learned counsel for the applicants but he prayed for costs. The reasons given by the learned counsel

for the applicants was that they had spent time and resources in preparation of the arguments for the point which the learned counsel sought to withdraw. Mr. Fungamtama for the second respondent and who south to withdraw the second point of objection, resisted costs stating that he had saved the court's precious time by withdrawing the point. If anything, he submitted, costs should be in the cause. The contention that costs should be in the cause, was vehemently resisted by Mr. Rweyongeza for the applicants stating that "costs in the cause" simply means that whoever wins should have costs. The learned counsel's argument is that he is entitled to costs by whichever outcome.

I think Mr. Rweyongeza is right. The applicant's counsel must have spent time and resources in preparation of, *inter alia*, the second point of preliminary objection including entering appearance in this court twice; on 24.11.2015 and 08.12.2015 when the second respondent's counsel opted to withdraw the second point of preliminary objection. As the old adage goes: a lawyer's time and advice are his stock in trade. The applicants' counsel has, certainly, incurred costs despite the withdrawal of the second point of preliminary objection by Mr. Fungamtama, learned counsel for the second respondent. In the premises, I find no sufficient reason why counsel for the applicants should be deprived of the same. I thus order that the second respondent should pay the applicants three quarters (¾) of his costs for the withdrawal. I shall revert to the conclusion of this point at the end of this ruling.

It does not appear this matter will detain me, for the parties are at one on the applicability of the provisions of Order XXIII Rule 1 (3) of the CPC. Mr.

Rweyongeza, learned counsel for the applicants, does not deny the applicability of the provisions of Order XXIII Rule 1 (3) of the CPC to suits as well as to applications including the present application. Thus what is at issue is whether or not the present application is similar to the previous one.

The previous application prayed in prayer (a) of the Chamber Summons as follows:

> "The order for temporary injunction granted by this honourable Court on 28th June, 2012, has expired and be vacated."

And the main prayer in the present application, as can be gleaned in the Chamber Summons is:

> "The Court be please (sic) to direct that there is no valid injunction after the expiry of six months restraining the 2nd applicant from exercising her powers as the Receiver and Manager of Morogoro Canvass Mills (1998) Ltd."

I think Mr. Fungamtama, learned counsel is right to say that the prayer sought in the two applications is one and the same. The change of phrasing in the second application does not make it different from the previous one. While the present application seeks for a declaration that "there is no valid injunction after the expiry of six months", the previous one seeks for a declaration that "the order for temporary injunction granted by this court on

28th June, 2012, has expired and be vacated". The two applications, in my considered view, seem to be, by any stretch of mind, one and the same and the end result is the same.

The provisions of the law are quite clear and elaborate that the second application cannot be allowed to stay. Sub-rule (3) of rule 1 of Order XXIII of the CPC speaks it all. It provides:

> "Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in subrule (2), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim."

As was held by this court in ***Jennings-Bramly Vs A and F Contractors Ltd and another*** [2003] 2 EA 452:

> "A party who withdraws a suit without first securing leave to institute a fresh suit thereby bars himself from instituting a fresh suit. The Court's discretion to grant leave to institute a fresh suit as envisaged under Order XXIII, rule 1 (2) can only be exercised at the time when the withdrawal order is made and not after."

As rightly put by the learned counsel for the respondents, this position is applicable to suits as well as applications – see the ***EADB*** case (supra); a case cited to me by both learned counsel for the respondents.

This position of the law does not seem to be disputed by Mr. Rweyongeza, learned counsel for the applicants. What the learned counsel contends is that the present case is different because the order was given and was ordered to be in existence pending further orders of this court, which argument I have refused above.

I am not ready to buy Mr. Rweyongeza's argument to the effect that that the present application has been filed to effectuate the "pending further orders of this court" part of the order of His Lordship Nyangarika, J. made on 28.12.2102. I say so because it is an averment made from the bar. Nothing to that effect has been stated in the two affidavits supporting the application. Actually, in the present application, no reference whatsoever has been made by the learned counsel to that effect. It just surfaced from the bar and in my view, as an afterthought after the present PO had been raised. This statement from the bar cannot be acceptable. If the learned counsel was geared to effectuate the order of this court; that is, to seek further order of the court so as to walk the talk following the "pending further orders of this court" part of the order, he would not have hesitated to advice the deponents to so depone in the affidavits supporting the application.

The applicants did not pray for leave to re-institute the application the time they prayed for withdrawal of the former application and the court therefore did not make any order to the effect. In the absence of any order of this

court to have the withdrawn application re-instituted, if the applicant so wished, the present application cannot legally stand.

The foregoing said and done, I find merit in the PO raised by both counsel for the respondents and proceed to strike the application out. As regards costs, I condemn the applicants to pay the respondents costs. The same to be taxed. But, as I have held above that the applicants are entitled to ¾ of the costs for the abandonment of the second point of the preliminary objection by the second respondent, I order that costs awardable to the second respondent should exclude ¾ of the costs incurred by the applicants in respect of the abandoned preliminary point of objection.

Order accordingly.

DATED at DAR ES SALAAM this 18th day of February, 2016.

J. C. M. MWAMBEGELE
JUDGE