

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL COURT)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION No 265 of 2018

(Arising from Commercial case No. 154 of 2016)

SALUM ALLY SALUM.....APPLICANT

VRS

KABHETILE INVESTMENT COMPANY LIMITED.....1ST RESPONDENT

CRDB BANK LIMITED.....2ND RESPONDENT

MEM AUCTIONEERS & BROKERS LIMITED.....3RD RESPONDENT

RULING

B.K.PHILLIP, J

Before is an application made under the provisions of section 68(e), section 95 and Order 1 Rule 10(2) of the Civil Procedure Code, Cap 33 R.E 2002 (henceforth the " CPC"). The applicant prays for the following orders;

- (i) That this honourable Court may be pleased to make an order that the Applicant SALUM ALLY SALUM be joined as an interested party in Commercial case No 154 of 2016
- (ii) Costs of the application
- (iii) Any other order this Honourable Court shall deem fit.

The application is supported by an affidavit affirmed by Salum Ally Salum while Mr. Gebonce Kabhetile Mwanjokolo principal officer of the 1st respondent swore a counter affidavit in opposition to the application. The learned Advocate Makubi Kunju appeared for the applicant while the 1st

respondent was represented by the learned advocate Joseph Rutabingwa. The 2nd and 3rd respondents are not contesting the application.

Upon being served with the chamber summons, the learned advocate for the 1st respondent, Mr. Joseph Rutabingwa, raised a point of preliminary objection that the application is hopelessly time barred as per the averment in the affidavit affirmed by the applicant on 10th May 2017. Mr. Rutabingwa submitted that in paragraphs 9 and 10 of the said affidavit the applicant stated that he became aware of the main suit on 28th April 2017. A copy of the said affidavit was attached to the counter affidavit.

A brief background to the is that on2016 the 1st respondent filed a Commercial No 154 of 2016 against the 2nd and 3rd respondents. That case is not yet determined. In this application the applicant prays for leave to be joined in the aforementioned case as a necessary part.

In his skeleton arguments filed in support of the point of preliminary objection pursuant to the provisions of Rule 64 of the High Court (Commercial Division) Procedure Rule, 2012, Mr. Rutabingwa submitted that this application was filed in court on 30th November 2018 and the applicant relies on order 1 rule 10 (2) of the Civil Procedure Code, Cap 33,R.E 2002 (henceforth the "CPC") to move this court to grant the order sought. Mr. Rutabingwa submitted further that pertinent issue that has to be determined by this court is whether the application filed by the applicant is timeous. Mr. Rutabingwa contended that Order 1 rule 10(2) the CPC does not provide for time within which an application of this nature has to be made, thus the law of Limitation Act Cap 89,R.E 2002, Part III of the Schedule item 21 is the one applicable. He contended further that the time limit for filing the application of this nature is sixty (60) days. Mr. Rutabingwa submitted that the applicant became aware of the existence of Commercial Case No 154 of 2016 on June 2017, that is in according with paragraph ten of the affidavit affirmed by the applicant

on 29th November 2018, which he filed in court in support of this application. Furthermore, Mr. Rutabingwa submitted that in the counter affidavit filed by the first respondent in opposition to this application there is an affidavit affirmed by the applicant herein attached thereto, in which the applicant stated that he became aware of the existence of Commercial Case No 154 of 2016 on 28th April 2017. Mr. Rutabingwa argued that from 28th April 2017 to 30th November there are 18 months or 540 days. Mr. Rutabingwa concluded his submission by insisting that this application was filed hopelessly out of time without seeking extension of time. He invited this court to strike out the application for being filed out of time without leave of the court.

In rebuttal Mr. Makubi submitted that this application is made under Order 1 rule 10(2) of the CPC which allows a person to apply to be joined in a case anytime. Mr. Makubi contended that a party can only be barred to join a suit, when the proceedings are disposed of and there is nothing more to be done. Mr. Makubi was of the view that this court has to consider the interests of the parties. He submitted further that in this case the applicant is a registered owner of the disputed property. To cement his arguments he referred this court to the case of **Conrad Berege Vrs Registrar of Cooperatives Societies and Attorney General (1998) TLR 22** in which the court held that in accordance with the provisions of Order 1 rule 10(2) of the CPC, the court may at any stage of the proceedings either upon or without application of either party order the name of any person who ought to have been joined, be added.

In his rejoinder Mr. Rutabingwa submitted that Mr. Kunju's submission has gone to the merits of the application. He contended that the issue here is the time limit for filling an application of this nature, that is when should the application be made? Mr. Rutabingwa argued that the term 'any stage' in order 1 rule 10 (2) of the CPC also refers to the time a party becomes aware of the proceedings or the suit. Mr. Rutabingwa submitted that in this case the applicant became aware of the existence of Commercial case No

154/2016 on 28th April 2017. Furthermore, Mr. Rutabingwa submitted that the arguments that the court can suo motto order the applicant to be joined is not valid since there is already an application made by the applicant. On the case of **Conrad Berege**, (supra) Mr. Rutabingwa submitted that the case is not similar to the instant case and should not be relied upon in determination of this application. He prayed for the preliminary objection to be upheld

I have dispassionately analyzed the submissions made by the learned advocates. In this application is not in dispute that the applicant became aware of the existence of Commercial case 154/2016 on 28th April 2017, that is as per his own affidavit that has been filed court in support of this application. It is also not in dispute that Order 1 Rule 10(2) of the CPC under which this application is made does not stipulate the time for filing the application of this nature. Having said the above I am inclined to agree with the arguments raised by Mr Rutabingwa that the provisions of part III of the schedule item 21 of the Law of Limitation Act ,Cap 89, R.E 2002 is applicable. For easy of reference let me reproduce the same hereunder;

"PART III

Applications Period of Limitation

Application under the Civil Procedure Code,

The Magistrates' Courts Act or other written

Laws for which no period of limitation is

Provided in this Act or any other written law".....sixty days

Since this application is made under the CPC and no period of limitation is provided under Order 1 Rule 10(2), of the CPC, then above quoted provisions of the Law of Limitation Act , Cap 89, R.E 2002 are applicable. The applicant was supposed to file his application within sixty (60) days from the date he became aware of the existence of Commercial case No

154/2016. I am of a settle view that it imperative for an interested party in a suit to take action promptly as per the time limit prescribed by the laws, as such a party cannot opt to stay idle without taking any action and abruptly at his/her own will decides to apply to be joined in a case when he wishes. I think such a practice is not tenable as smooth administration of justices requires adhering to the procedures and time limit stipulated in the relevant laws, otherwise the whole administration of justices will be a chaos. The case of **Conrad Berege** (supra) involve the court's suo motto decision to add a party to a case, thus, that case is distinguishable from the instant application. Therefore this application is filed out of time without leave of the court. The same is hereby dismissed with costs.

Dated at Dar Es Salaam this 12th day of April, 2019



A handwritten signature in black ink, appearing to read "B.K. PHILLIP".

B.K. PHILLIP

JUDGE