**IN THE HIGH COURT OF TANZANIA**

**COMMERCIAL DIVISION**

**AT DAR ES SALAAM**

**COMMERCIAL CASE No. 119 OF 2015**

**GASLAMP HOLDINGS CORP..... PLAINTIFF**

**Versus**

**PERCY BEDA MWINDADI..... 1st DEFENDANT**

**VICTOR JOSEPH PETER..... 2nd DEFENDANT**

**MAKSIM CHALDYMOV..... 3rd DEFENDANT**

**YURI V. CHERMORCHENKO..... 4th DEFENDANT**

**ROPHINUS A. MLORERE..... 5th DEFENDANT**

**GOLD TREE (T) LTD..... 6th DEFENDANT**

**RULING**

**MRUMA, J.**

This ruling arises out of two preliminary objections raised few minutes before the trial of Commercial Case No. 119 of 2015 was commenced.

The 3rd, 4th, and 6th Defendants who preferred these preliminary objections are represented by M/S Mpoki &Associates Advocates whilst the Plaintiff is represented by M/S East Africa Law Chambers.

The back ground to these objections is that the Plaintiff had sued the Defendants on the loan agreements vide Commercial Case No. 119 of 2015 for several declaratory orders among others a declaration that the Plaintiff is majority share holder of the 6th Defendant's company and that the allotment of shares to the 1st, 3rd, and 4th Defendant in the 6th Defendant's company was wrongful procured and further that the 2nd, 3rd, 4th and 5th Defendants be restrained from engaging in any way in any activities of the 6th Defendant's company. The Plaintiff is also seeking to recover the sum of USD 5,100,000.00 being loan advanced to the 6th Defendant's company together with interest and other charges.

As is the practice the Defendants filed Written Statement of defence denying the plaintiff's claims. This was followed by a series of applications and objections from both sides. The objections and applications were determined and the matter was set for final pre-trial conference.

However, when it came up for that purpose on 8th February, 2018 Mr. Mpale Mpoki, learned advocate who together with Mr. Charles Tumaini advocate are representing the 3rd, 4th and 6th Defendants, rose up and informed the court that he has raised two preliminary objections against the Plaintiff's suit. He argued the court to hear and determine them because they were touching court's competency to try the matter.

According to Mr. Mpale Mpoki this court has no jurisdiction to handle this suit because of the following:-

1. By their agreement parties have ousted the jurisdiction of the court to hear and determine the case'

2. The court has no jurisdiction to hear and determine the case by virtue of Rule 32(2) of the High Court (Commercial Division) Procedure Rules, 2012.

At the hearing Mr. Mpoki started his preamble by submitting that because the two preliminary objections go to the jurisdiction and competency of the court to hear and determine the suit they can be raised at any stage of the proceedings and that there can be no estoppels against court proceeding to hear and determine them up front. To support his position he cited the decision of this Court (at Dar es Salaam registry) in Miscellaneous Civil Cause No. 14 of 1993 between **Malachi Majwala &84 Others Versus Dar Es Salaam City Council** where it was held that:-

***"The preliminary objection raises point of law which go to the competence of the application before the court. If the application is incompetent for any reason the court can reject or dismiss it even if no objection is raised by the opposite party. For this reason no waiver or estoppel can save an incompetent application as neither waiver nor estopple can apply to the court"***

The learned counsel also cited the case of **Richard Julius Rukambura Versus Isaac Ntwa Mwakajila & Another Civil Appeal No 2 of 1998** (unreported) where the court held that:-

***"The question of jurisdiction is paramount in any court proceedings. It is so fundamental that in any trial even if it is not raised by the parties at the initial stages, it can be raised and entertained at any other stage of the proceedings in order***

***to ensure that the Court is properly vested with jurisdiction to adjudicate the matter before it"***

Let me start by saying that I agree with Mr. Mpoki that it is the law in this country that a matter of law touching jurisdiction of the court can be brought to the court's attention at any time during the proceedings and that once the issue of jurisdiction is at stake, it has to be heard and determined first.

However, it would appear that under the provisions of Rule 4 of Order VIIIA of the Civil Procedure Code no departure from or amendment of a scheduling order could be allowed unless the court is satisfied that such departure or amendment is necessary in the interest of justice. Raising of a preliminary objection after the scheduling order has been made entails a departure from scheduling order and this means that there has to be a formal application before a departure is granted. None of the parties in this suit had applied for departure from the scheduling order. That notwithstanding, as the very competency of the court is questioned, I think the court is duty bound to satisfy itself that it has jurisdiction to adjudicate the matter before it can entertain any issue before it.

In his submissions Mr. Mpoki, referred the court to clause 11 of the various loan agreements entered between the Plaintiff's company and the 6th defendant's company wherein both parties expressly covenanted that they irrevocably submit themselves to the laws of Jersey. The counsel submitted that the relationship between the lender and the borrower is contractual one and therefore the loan agreements executed bind them. On this point the learned counsel cited the case of **Britania Biscuits**

**Versus National Bank of Commerce & 3 Others (Land Case No 41 of 2011 Dar Es Salaam Registry- unreported)** where this court (Ngwala, J) stated thus:-

> "*.....the ouster clause in the loan agreement didn't intend to deny the jurisdiction of the courts. It is my considered view that the Plaintiff's counsel is not aware that the parties to the loan agreement didn't wish to ouster the jurisdiction of all courts but had made their choice to one jurisdiction on the commercial Division of the High Court. This choice is not against public policy and the law"*

The learned counsel further referred me to the commentary of famous Authors Pollock and Mulla on India Contract and specific Reliefs where it is stated that:-

> ***"where two or more courts have concurrent jurisdiction to try the suit the agreement between the parties limiting the jurisdiction to one court is neither opposed to the public policy nor a contravention of Section 28 of the Contract Act"***

Mr. Mpoki contended that where parties to a contract agree to submit the dispute arising from it to a particular jurisdiction which would otherwise be a proper jurisdiction under the law, their agreement to the extent they agreed not to submit to other jurisdiction cannot be said to be void and against public policy. On this point he referred me to an Indian Case of **ABC Lambert Pit Ltd & Another Versus A.P. Agencies [1989] AIR 1239.**

Furthermore the learned counsel cited the Kenyan case of **United India Assurance Co Limited Versus East Africa Underwriters (Kenya) Limited (1985) KLR 898** where it was held that:-

> ***"the exclusive jurisdiction clause should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes, the courts should carry out the intention of the parties and enforce agreement made by them in accordance with the principle that contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement"***

The learned counsel contended that in the instant case the intention of the parties was that the loan agreement should be subject to the laws of jersey, therefore it was wrong for the plaintiff to institute a suit in this Division of the High Court of Tanzania.

Submitting in support of the second preliminary point, Mr. Mpoki contended that this court does not have jurisdiction to hear and determine the case by virtue of Rule 32 (2) of the High Court (Commercial Division) Procedure Rules, 2012. He said that under the rule the life span of Commercial Case is 10 months. He said that the present suit was instituted on the *1st October 2015* and calculation of days from the date it was instituted would reveal that the life span of the case *expired on 30th July 2015 and the 12 months period ended on 30th September 2015 [sic]!* On this point the learned counsel cited Commercial Case No. 166 of 2013 between **United Bank of Africa (T)**

**Ltd Versus Prisca Anyanga Raya t/a Chagunge Enterprises (Unreported)** where it was stated that:-

> ***"Since the speed track of the case had expired since six months ago, the court's jurisdiction to entertain the case has expired"***

The learned counsel argued this court to find that it has no jurisdiction to further continue to entertain the case on the ground that the life span of the case has expired. He accordingly prayed the court to dismiss the suit with costs.

In reply Mr. Thomas Sipemba, learned counsel for the Plaintiff submitted that parties cannot whether by agreement or otherwise confer or oust the jurisdiction of the court. According to the learned counsel jurisdiction of the court is inherent unless limited by a specific statute.

In the alternative to the above, it is the counsel's submission that this point does not pass the test of a preliminary objection as laid down in **Mukisa Biscuits Manufacturing Co Ltd Versus West End Distributors Ltd (1969) EA 696.**

Submitting against the second preliminary objection, Mr. Sipemba contended that the plaintiff shouldn't be denied the right to be heard simply because the speed track of the case has expired. He said that procedural law is handmaiden of justice and that they should not be used as a tyrant but a servant and aid to justice. On that note the learned counsel argued the court to dismiss the preliminary objection with costs.

I have carefully addressed the objections, the submissions of both counsel and the relevant law. There are two questions for determination. I will address each of them separately.

Beginning with the issue touching clauses in the loan agreements which purport to ouster the jurisdiction of the courts of this country and vest it on Jersey's courts the 1st question is whether parties did covenant to oust jurisdiction of the court of this country.

For the purposes of clarity I hereunder reproduce clause 11 of the said loan agreements which are annexed as GHC to the plaint. The said clause reads:-

***"This loan shall be governed and construed in accordance with the laws of jersey, without giving effect to the principles of conflict of laws thereof"***

Under clause 12 of the same loan agreements it is provided as follows:-

***"The borrower hereby submits to the exclusive jurisdiction of the courts of jersey with respect to any suit, action or proceedings"***

In view of the above quoted clauses it is Mr. Mpoki's submission that the said ouster clauses were intended to deny courts of this country jurisdiction over any disputes arising in relation to loan agreements. I do agree with Mr. Mpoki, that, that were the intention of the said clauses.

The essence of the said clauses in their face is to the effect that the parties undertook not to institute the matter in any court in

Tanzania. Thus the said clauses in the agreement barred parties thereto from bringing any action or suit in Tanzania courts.

The next logical question is whether it was right for the parties in a contract made in Tanzania, the performance of which is done in Tanzania and the securities of which are within Tanzania to agree to oust Tanzania court's jurisdiction.

**Section 28 of the Law of Contract Act [Cap 345 R.E. 2002]** provides that an agreement which restricts a party absolutely from enforcing her rights or in respect of a contract by legal proceedings is void to that extent. Paragraphs (a) (i) and (ii) of the same Section sets out exceptions which are that such agreement are not illegal if it is such that the dispute is to be referred to arbitration.

In the present case the loan agreements were made in Tanzania, the performance of the agreements are done in Tanzania, the business which are the subject of the said loan agreements are being carried out in Tanzania, and the debentures and all securities for the repayment loan advanced are within Tanzania, yet clause 11 restrict parties from enforcing their rights by legal proceedings in this country. This was wrong as it contravenes that provision of Section 28 of the Law of Contract Act and it does not fall with the ambit of the exceptions envisaged under paragraphs (a) (i) and (ii) of that Section.

In my opinion, if the contraction agreement is construed as purporting to oust the jurisdiction of the High Court of Tanzania then such clause in the agreement is illegal and therefore null and void. In **Thompson V. Charnock (1799) 8 Term Report 139** cited in

Cheshire, Fitfoot & Furmston's Law of Contract 11th Edition at page 376 and 139 it was held that parties by contract cannot oust the ordinary courts from their jurisdiction. That such contract would be contrary to the public policy and is pro tanto void. That even if foreign law was chosen as the law applicable it does not affect the jurisdiction of local or ordinary courts [See also **Tononoka Steels Ltd Vs Eastern and Southern Africa Trade and Development Bank (2000) 2 E.A. 532**].

Applying the foregoing principles to the case at hand I find that aspects of the said agreements which prohibits parties thereto from instituting a suit in Tanzania Courts is void. In that respect I agree with the submissions of the plaintiff's counsel that such clauses are intended to oust jurisdiction of the country courts and to that extent they are illegal and therefore null and void. If they were to be allowed, courts in this country would be denied to adjudicate on contracts involving strong foreign investors and their weaker Tanzanian partners. I hold the view that all contracts which are signed in Tanzania, the performance of which are done in Tanzania by residents of this country or a resident and non-resident and which the securities for their performance are within Tanzania have to be governed by Tanzania laws. Thus, it was irrational in this case to subject the loan agreements to the laws of jersey. Accordingly the preliminary objection premised on the ouster clause is bound to fail and it is hereby dismissed.

I now move to the next objection which is in respect of the life span of the case. Admittedly the life span of the case has expired and there is no application for its extension. This is not a virgin area in our

jurisdiction. However, there are myriads of authorities to the effect that **Rule 32 (2) of the High Court (Commercial Division) Procedure Rules** does not empower courts either to struck out or dismiss a suit for reason that its life span has expired. The said rule provides:-

> ***"All commercial Cases shall proceed and be determined within a period of ten months from the date of commencement, and not more than twelve months"***

Sub rule (3) of the same rule provides that:-

> ***"Thirty days before the expiry of the time prescribed under sub-rule (2), any party to the proceedings may orally apply to the court for extension of life span of the case, and the court may upon sufficient reasons adduced grant the application and the party in favour of whom the extension is made shall bear the costs of such extension, unless the court directs otherwise"***

Reading between the lines of the above quoted rules it is crystal clear that the most court can do is to award costs. In **Nazira Kamru Versus MIC Tanzania Limited (Civil Appeal No. 111 of 2015)** cited by the Plaintiff's counsel, the Court of Appeal directed that parties must be heard before trial courts impose any drastic legal consequences. In **Tanzania Harbours Authority Versus Mathew Mtalakule Civil Appeal No. 46 of 1999,** the Court of Appeal had an opportunity to deliberate on **Rule 5 of Order VIIIA of the Civil Procedure Code** which is similar both in import and intent with our Rule 32(2) of the High Court (Commercial Division) Procedure Rules 2012. The Court held that

the highest order the court can make (in a case where it finds that the life span or speed track of a case has expired is an order for costs.

In Misc. Commercial Case No. 21 of 2016 between **Game Stone Mining Versus Reliance Insurance Company (T) Ltd** this court (Mwambegele J, as he then was) observed that:-

***"I have no speck of doubt that jurisprudence under the provisions respecting speed track under the Civil Procedure Code and those respecting life span in the Rules is the same. In both instances, the time frames were put in place in order to expedite the hearing of cases in courts by fixing time frames within which they must be finalized"***

In Commercial Case No 76 of 2005 **Bata Limited Canada Versus Bora Industries Limited** discussing the same Rule 5 of Order VIIIA, this Court (Makaramba, J stated thus:-

"***Considering the fact that in the instant case the non-compliance with Rule 5 of Order VIII A of the Civil Procedure Code was occasioned at the instance of both parties and sometimes even by the court itself, this court is left with no option other to draw inspiration from the decision of the High court at Arusha in Civil Case No. 40 of 1996 between Mrs Asha Ramadhan Laseko Vs Ramadhani Ali Laseko and Another to find that all the times this court adjourned this case it was reasonable an justifiable grounds and therefore singling out the Plaintiff for blame may amount to injustice in its own right"***

All cases cited above were to the effect that courts should allow suit to proceed to their finalities on merits except in peculiar circumstances. As I recently held in **Commercial Case No. 29 of 2016 between Yara Tanzania Limited Versus Leonard Dominic Rubuye and Another**, all those decisions of this court and the Court of Appeal are in consonant with Article 107 (2) of the Constitution of Tanzania which requires courts in this country to dispense justice without being tied up with technicalities which may obstruct justice. This Article reflects the legal adage that rules of procedure are mere handmaids of justice. Like in Yara's case (supra), I cannot see how Rule 32(2) of the High Court (Commercial Division) Procedure Rules, can be deployed to terminate this case in Defendant's favour. Parties have been litigating this matter all along therefore it will be unfair to blame either party for the delay in completing it. It should also be noted that power of the court to dismiss the suit is only available under Rule 47 and can only be exercised where for a period of six months from the last adjournment a suit is lying idle in the registry.

In view of the above clear position of the law and inspired by various decisions of this court including my own decision in Yara's case (supra) and that of my brother, Mwambegele J, in Game Stone Mining (supra) that in a circumstances where neither party can be blamed for expiry of life span of the case the Plaintiff cannot be denied her right to prosecute her case to the finality. Accordingly, I dismiss the preliminary objection based on the life span of the Case and I order that the life span of the case be extended to another six months from today.

In summary therefore, I will uphold the submission by learned Counsel for the plaintiff and dismiss the preliminary objections with costs to the Plaintiff.

Order accordingly,

A.R. Mruma,

Judge.

Dated at Dar Es Salaam this 5th Day of April, 2018.