

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT ARUSHA**

**MISC. COMMERCIAL APPLICATION NO.5 OF 2020**

*(ARISING FROM COMMERCIAL CASE NO. 7 OF 2020)*

**DANGOTE CEMENT LIMITED.....APPLICANT**

**Vs**

**NSK OIL & GAS LIMITED.....RESPONDENT**

**RULING**

**B.K. PHILLIP, J.**

The applicant herein lodged this application under the provisions of Rule 2 (2) of the High Court (Commercial Division Procedure) Rules, G.N. No. 250 of 2012, Sections 68 (e) and 95 of the Civil Procedure Code (Cap 33 R.E. 2019) and section 2 (1) and (3) of the Judicature and Application of Laws Act (Cap 358 R.E. 2019) praying for the following orders;

- i. That this Honourable Court be pleased to issue preservative orders so that the current *status quo* as between the Applicant and the Respondent be maintained and/or preserved pending the hearing and final determination of the main suit between the parties herein.
- ii. That this Honourable Court be pleased to issue restraining orders against the Respondent, its servants, agents, assignees or any

person acting under its instructions from instituting any proceedings for winding up of the Applicant pending the hearing and final determination of the main suit.

- iii. Any other reliefs that this Honourable Court deems fit and just to grant.

This application is supported by an affidavit sworn by Ms Lilian Mwidunda, the principal officer of the applicant. Mr. Kamaljeet M. Aggrawal, the managing director of the respondent swore a counter affidavit in opposition to the application. The respondent's Advocate, the learned Advocate Gwakisa Sambo raised two points of preliminary objection to wit;

- i. That this application is bad in law as the court is not properly moved to grant the prayers made in the chamber summons.
- ii. That this application is bad in law for being irregular and contrary to the law.

This ruling is in respect of the above mentioned points of preliminary objection. At the hearing the learned advocate John Mushi and Gwakisa Sambo appeared for the applicant and the respondent respectively. Before proceeding with the determination of the points of Preliminary objection, let me give a background of this application albeit briefly.

On 24<sup>th</sup> March 2020, Standard Chartered Bank Tanzania Limited lodged in this court Commercial Case No.7 of 2020 (Henceforth "the main case") against the applicant and respondent herein. In the main case the applicant is the 2<sup>nd</sup> defendant whereas the respondent is the 1<sup>st</sup> defendant.

By virtue of the Receivable Purchase Agreement signed between the applicant and the respondent, dated 11<sup>th</sup> May 2018, whereby the respondent (1<sup>st</sup> defendant) agreed to supply Fuel/Diesel to the applicant (2<sup>nd</sup> defendant), the plaintiff granted to the respondent (1<sup>st</sup> defendant) a facility to be utilized by the respondent (1<sup>st</sup> defendant) as a working Capital to a limit of Tshs 11,100,000,000/= . In consideration of the Plaintiff issuing the aforesaid facility to the 1<sup>st</sup> defendant, pursuant to the Receivable Purchase Agreement, the respondent (1<sup>st</sup> defendant) assigned its debts incurred by, due and owing against the applicant (2<sup>nd</sup> defendant) to the plaintiff. The respondent (1<sup>st</sup> defendant) and the applicant (2<sup>nd</sup> defendant) signed a notice of assignment of debts. The respondent (1<sup>st</sup> defendant) instructed the applicant (2<sup>nd</sup> defendant) to pay all the respondent's (1<sup>st</sup>defendant's) invoices to the plaintiff only. However, in the course of implementation of the aforementioned agreements, there was a default in payment of the money to the plaintiff as per the terms of the agreement, consequently, the plaintiff lodged the main case in which it is claiming against the applicant and the respondent jointly and severally among other things for payment of Tshs. 5,838,231,353.58/= being amount due, owing and outstanding pursuant to the terms and conditions of the Receivables Purchase Agreement entered between the plaintiff and the respondent on 11<sup>th</sup> May 2018 and the Notice of Assignment of debt agreed between the plaintiff and, the respondent and the applicant herein.

Now, back to the application, submitting for the first point of preliminary objection, Mr. Sambo, said that this court is not properly moved as the

provisions of the law cited in the Chamber summons are not enabling provisions to move this court to grant the orders sought by the applicant. Mr. Sambo, contended that the provisions of Rule 2(2) of the High Court (Commercial Division) Procedure Rules, 2012, as amended by GN No. 107 of 2019, just permits the applicant to resort to the provisions of the Civil Procedure Code, Cap 33, R.E 2019, (Henceforth "the CPC"), in case there is a lacuna, thus it is not an enabling provision to grant the orders sought. He proceeded to submit that section 68 (e) of the CPC is used in supplemental proceedings for the Court to make interlocutory orders whereas section 95 of the CPC provides for the inherent powers of the Court. As regards the provisions of section 2(1) (3) of the Judicature and Application of Laws Act, (Henceforth "JALA") Mr. Sambo submitted that they just provide for the general powers of this Court, but they are not enabling provisions for this court to grant the orders sought in this application. To cement his arguments he cited the case of **Majura Magafu and Peter Swai Vs The Managing Editor, Majira Newspaper and Business Times Limited, Civil Application No. 203 of 2015** (unreported), in which the court held that non-citation of enabling provisions of the law renders the application incompetent and the case of **Robert Stephano Vs Vedastina Archard Msika, Land Application No. 43 of 2018**, (Unreported) which has a similar holding to the case of **Magafu Majura** (supra).

As regards the second point of preliminary objection, Mr. Sambo submitted that, the prayers sought by the applicant in this application are untenable because granting them will prevent the respondent from exercising its

rights provided under the Companies Act, 2002 Mr. Sambo insisted that granting the prayers sought will be irregular and contrary to the laws.

In rebuttal, Mr. Mushi submitted that this court is properly moved. That the provisions of the laws cited in the chamber summons are enabling provisions for this court to grant the orders sought in this application. Mr. Mushi went on to submit that the provisions of Rule 2(2) of the High Court (Commercial Division) Procedure Rules, 2012, allow a party to resort to the provisions of the CPC in case there is a lacuna. The applicant resorted to the provisions of sections 68(e) and 95 of the CPC because there is a lacuna in the High Court (Commercial Division) Procedure Rules, 2012, as there is no rule which could be cited to move this court to grant the reliefs sought in this application contended Mr. Mushi. It was the contention of Mr. Mushi that the provisions of sections 68 (e) and 95 vest powers to this court to entertain any application for meeting the ends of justice since the CPC is not exhaustive and it is not expected to cover all sorts of reliefs that a party may pray before the Court. Moreover, Mr. Mushi submitted that the provisions of section 2(1) (3) of JALA gives unlimited jurisdiction to this court, which covers the prayers sought in this application. To bolster his arguments, Mr. Mushi referred this Court to the case of **Tanesco Vs IPTL and two others, consolidated Civil Application No. 19 and 27 of 1997, (2000) TLR, 324** and the case of **Monaban Trading & Farming Company Ltd Vs The Cereals and other Produce Board of Tanzania, Misc Application No 61 of 2019** (unreported).

Mr. Mushi further submitted that the fact that Mr. Sambo failed to cite any other provisions of the laws which could be used by the applicant to move this court to grant the orders sought in this application, proves that the provisions cited by the applicant are proper and this court is therefore properly moved.

As regards the second point of preliminary objection, Mr. Mushi refuted Mr. Sambo's contention that granting the orders sought in this application will prevent the respondent from exercising its rights provided under the Companies Act, Cap 212. He contended that the applicant is just praying for an order restraining the respondent from filing an application for winding up of the applicant because there is a case pending in court and that order, if granted will expire upon the determination of the main case.

In conclusion of his submission, Mr. Mushi told this court that the respondent's threat to file a petition for winding up of the applicant is real and that it was necessary for the applicant to lodge this application because once the application for winding up is filed the applicant will have no room to lodge any application apart from filing an affidavit to oppose the petition for winding up. He insisted that this application is properly filed and invited this court to grant the orders sought in this application.

In rejoinder, Mr. Sambo reiterated his submission in chief. He further contended that he was not duty bound to cite the enabling provisions of laws after pointing out that the ones cited by the applicant are not enabling provisions of the law for this court to grant the relief sought. He distinguished the case of **Monaban** (supra) and **Tanesco** (Supra) from

this application on the ground that the prayers that were sought in those cases are different from the ones sought in this application. Mr. Sambo insisted that if at all the respondent will file the petition for winding up, the applicant will have an opportunity to raise its concerns/ complaints in the affidavit in opposition to the petition for winding up. Moreover, upon being probed by the court on how this application is related to the main case, Mr. Mushi told this court that the applicant has stated in its defence in the main case that it is just awaiting for the court's decision on who is the proper recipient of the money claimed by the respondent, as between Plaintiff and the respondent. He also told this court that he opted not to join the plaintiff in this case because the orders sought in this application will not affect the plaintiff.

Upon analyzing the competing arguments raised by the learned advocates and reading the cases referred to this court, I wish to start with the second point of preliminary objection, for obvious reasons that the same is concerned with the appropriateness of this application, that is, whether or not this application is properly filed in this court and /or tenable since this court cannot proceed with the hearing of an application which is not tenable.

I have taken into consideration Mr. Sambo's argument that if this application is entertained in effect it will prevent the respondent from exercising its rights to file a petition for winding up provided in the Companies Act. In my considered view, this argument is void of merit as any injunctive order for maintaining status quo or preventing a certain

action from being done to enable the ends of justice to be met, sometimes may prevent the other party from doing something which the laws allow him or her to do. As correctly submitted by Mr. Mushi, since such orders normally expire upon the determination of the main suit/ a matter pending in Court, cannot be termed as irregular or wrong in the manner presented by Mr. Sambo.

However, I have noted that in this application, the applicant and the respondent are all defendants in the main case. As it can be noted from the background of this matter narrated earlier in this ruling, the main case is all about the claims of money arising for the contracts entered between the plaintiff and the defendants. In fact, there is no any case between the applicant and the respondent. What we have in court is the plaintiff's case against the parties herein. So, the applicant's prayer that this court be pleased to issue an order for maintaining the *status quo* between the applicant and the respondent pending the hearing of the case between the parties in this application is misconceived and not tenable, since neither the applicant nor the respondent has instituted any case in this court which it can be relied upon to move this court to issue the orders sought in the chamber summons.

Secondly, the main case has nothing to do with the disputes between the applicant and the respondent as well as the alleged threat for filing an application for winding up the applicant made by the respondent. Mr. Mushi's contention that the applicant is awaiting for the court's order on who is the rightful recipient of the money claimed by the respondent is



based on the applicant's defence in the main case which cannot be taken to be the correct position as far as the dispute between the applicant and the respondent is concerned. After all, it has to be noted that a written statement of defence cannot be used to raise any claim for determination by the court. All in all, looking at the facts surrounding this application, it is evident that there is a dispute between the applicant and the respondent on the payment of some money. According to the demand notice that was served to the applicant in which the respondent intimated its intention to lodge a petition for winding up, the respondent demanded payment of a sum of Tshs. 3,729,216,275.86/= as per the deed of settlement which was signed between the applicant and the respondent.

The fact that the applicant has not joined the plaintiff in this application proves that the dispute between the applicant and the respondent which has led to the respondent's threat to file a petition for winding up of the applicant has nothing to do with the claims in the main case. The dispute between the applicant and the respondent, according to what is deposed in the affidavit in support of this application emanates from the deed of settlement which was entered into between the applicant and the respondent. The deed of settlement between the applicant and the respondent has nothing to do with the plaintiff's claims in the main case and the plaintiff is not a party to that deed of settlement. Good enough, the deed of settlement was attached to the affidavit in support of this application as an annexure, thus I had opportunity to read it.

From the foregoing, what I have explained herein above, shows that the cause of action in the main case is different from the cause of action in the dispute between the applicant and the respondent which has led to the respondent's threat to file a petition for winding up of the applicant. As indicated earlier in this ruling, in the main case the plaintiff claims against the applicant and the respondent jointly and severally for payment of Tshs 5,838,231,353.58/= whereas in the notice served to the applicant by the respondent in which the respondent intimated its intention to file a petition for winding up of the applicant, the respondent demanded to be paid a sum of Tshs 3,729,216,275.86/= only.

From the foregoing it is the finding of this court that this application is not tenable as, there is no any case pending in court between the applicant and the respondent in relation to the aforesaid dispute between the applicant and the respondent, and the respondent's threat to file a petition for winding up of the applicant. Thus, this application has no legs to stand on.

Having made the above findings, I do not see any plausible reasons to continue with determination of the 1<sup>st</sup> point of Preliminary objection.

By passing, I wish to point out that if at all the respondent will file a petition for winding up of the applicant as intimated in its demand notice then, the applicant will have opportunity to raise its defence to challenge

the same in a manner provided in the Companies Act, Cap 212 and Company (Insolvency) Rules, 2005.

In the upshot this application is hereby struck out. No order as to costs.

Dated at Arusha this 11<sup>th</sup> day of August, 2020.



  
**B.K. PHILLIP**  
**JUDGE**