IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 71 OF 2019

(Originating from Commercial Case No. 01 of 2018)

REGENT TANZANIA LIMITED.....APPLICANT

Versus

BG INTERNATIONAL LIMITED.....RESPONDENT

Last Order: 26th Feb, 2020

Date of Ruling: 10th Mar, 2020

RULING

FIKIRINI, J.

Mr. Gerald Nangi, counsel for the respondent contesting the application, instituted under Rule 24 (1) (3) (a) and (b) and (4) and Rule 49 (1) of the High Court (Commercial Division) Procedure Rules, GN. No. 250 of 2012 as amended (the Rules) and any other enabling provision of the law, filed a notice of preliminary point of objections, raising the following four (4) points: (4):

a) That the Court has no jurisdiction,

b) That the applicant has moved the Court under wrong provision,

c) That, the application is omnibus, and

d) That, the application is hopelessly time barred.

Mr. Jovin Kagirwa for the applicant as well raised a notice of preliminary objection that:

1. The respondent's counter affidavit is irreparable defective for contravening mandatory provisions of Order XIX Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC).

Parties filed skeleton arguments pursuant to Rule 64 of the Rules, and on 16th October, 2019, Mr. Jovison Kagirwa counsel for the applicant and Mr. Gerald Nangi advocating for the respondent besides adopting the affidavits and skeleton arguments filed as part of their submission, also had an opportunity of orally submitting on their respective positions.

Submitting on the 1st and 2nd points of objection together, Mr. Nangi submitted that the Court has not been properly moved. For the Court to be properly moved it requires citing of enabling provision and not prescribing a provision by citing the case of **Hassan Sunzu v Ahmedi Uledi, Civil Reference No. 8 of 2013.** He elaborated that in the application before this Court the cited provision was in respect of amendment of pleadings and not witness statement or list of

documents.Since the latter do not fall under pleadings The inherent powers of the Court cannot therefore be exercised, he submitted, referring the Court to the cases of **Elizabeth Gilead Ndetura & Ano v Exim Bank (T) Limited, High Court of Tanzania (Commercial Division) at Arusha (unreported)** and **Afriscan Group (T) Limited v Saidi Msangi, Commercial Case No. 87 of 2013**.

Illuminating on the 3rd point, Mr. Nangi submitted that for this objection he had three limbs which he addressed as follows: *first*, that the application was bad in law as it has been done while the scheduling order was still in place, which is in line with Order VIII Rule 4 of the CPC, which dictates that no application was allowed without seeking leave of the Court first and granted to depart from the order. Strengthening his position Mr. Nangi cited the case of **Anna Cocchi & Another v Sergio Stabile, Commercial Case No. 30 of 2001, High Court of Tanzania (Commercial Division) DSM – (unreported).** *Second,* the application is omnibus for seeking for two reliefs: (a) leave to amend witness statements, and (b) leave to amend list of additional documents. *Third,* that a witness statement cannot be amended because it is testimony. The application is therefore bound to fail, he stressed.

On the 4th point on limitation period, Mr. Nangi submitted that even though there was no time prescribed, and in that case the application falls under Part II Item 21

of the Law of Limitation, Cap. 89 R.E. 2002 (the Law of Limitation), which has set 60 day's time limit where no time period has been given. He, however, argued that this law could have salvaged the situation had the application was for the relief sought was for amendment of pleadings, and was within the prescribed time limit, and not for seeking relief for amendment of witness statement and list of documents.

In addition, to the above Mr. Nangi also submitted that the applicant failed to comply to the Court order dated 17th July, 2019 and instead served the respondent on 26th July, 2019. This according to Mr. Nangi did not exhibit diligent prosecution of the matter at hand.

In view of the submission Mr. Nangi prayed for the objection to be sustained where appropriate and struck it out and/or dismiss the application.

Mr. Kagirwa, disputing the submissions argued that witness statements were pleadings as long as the witness has not stood in Court to testify. In the absence of any enabling provision cited by the respondent's counsel, Mr. Kagirwa submitted that the provisions cited were correct and right provisions under which the applicant can bring their application to amend witness statement which is yet to be testified. Countering Mr. Nangi's submission and the case of Gilead cited, on the fact that since the witness statement cannot be amended they do not fall under Rule

24 of the Rules, Mr. Kagirwa took refuge in the case of **Mohans Oysterbay Drinks Limited v British American Tobacco Kenya Limited, Commercial Case No. 90 2014** (unreported), where the Court observed that witness statement can be amended as the Court has jurisdiction to order so. He thus maintained that the Court has been properly moved.

Taking up on the 2nd point departing from the scheduling order, it was his submission that Order VIII Rule 4 of the CPC was not applicable as the reliefs sought could be granted under Rule 29 (1) of the Rules. He further contended that this application was brought under Court's instruction. The 3rd point of objection was countered as follows that this application was not omnibus as it did not fit the description in the case of **Zaidi Baraka & 2 Others v Exim Bank (T) Limited, Miscellaneous Commercial Application No. 28 of 2015** (unreported) and **Rutagatina C.L. v The Advocates Committee, Civil Application No. 98 of 2010 –CAT-DSM** (unreported). For the application to be omnibus it has to be more than one distinctive prayers brought under different provisions and from different pieces of legislations and that there was different criteria to determine the application. The present application was different and did not fall within omnibus category of the applications. On the submission that this application was a none starter, it was

Mr. Kagirwa's submission that the point of objection did not qualify to be a pure point of law as it concerns main application.

Contesting the time limitation, it was his submission that despite citing the provision but the counsel never stated when times started to run. This application has been brought under Rule 34 of the Rules and time within which such application should be brought has been stated and therefore the Law of Limitation did not apply.

Admitting delay in serving the respondent, Mr. Kagirwa assigned the reason to be the admission process at the registry is which hindered the applicant to comply with the Court order. It was therefore not the applicant's fault but that of the registry office in the admission process. Based on the submission, Mr. Kagirwa prayed for the preliminary points of objection to be overruled and the Court to proceed to determine the application.

Rejoining the submission, Mr. Nangi picked, by submitting that Order VIII Rule 4 of the CPC was also applicable as per Rule 2 (2) of the Rules. He went on submitting that the inapplicability of Order VIII Rule 4 of the CPC was limited as far as Commercial cases were concerned pursuant to Rule 32 (2) of the Rules. Also that since the scheduling order was conducted under Rule 29 (3) then the consequence ought to have been dire.

Addressing the Court order dated 17th July, 2019, he contended that the adjournment was given so that the applicant can go and do the needful. No application to depart from the scheduling order or application for leave to do so was ever entertained. Acknowledging the principles in the cases cited by the applicant, but stated that they favoured the respondent's stance, that the application was omnibus.

Discussing the case of **Mohan's** (supra) it was Mr. Nangi's submission that the decision did not squarely fit in the application before the Court. In Mohan's the issue before the Court was in respect of objection to non-compliance of witness statement with the provisions of Rule 48 & 49 of the Rules. The decision never dealt with application to amend list of documents and/or witness statement, either as obiter or *ratio decidendi*. The issue of verification which was pressing, the Court ordered amendment but maintained that the statement remains as it was unless struck out. Extending his submission on that, he argued that nothing in the decision cited of **Mohan's** case (supra) allowed application in general, so he prayed for that thinking to be followed. But even if it were to be relied on, still it will not work as the respondent's argument was not on Court's discretion but on the fact that the Court was not properly moved and the decision was not binding upon this Court, he submitted.

The second set of the preliminary point of objection was briefly submitted on as follows, starting with Mr. Kagirwa, whose submission was that, the counter affidavit and in particular paragraphs 6, 7, 8 & 9 contravened the dictates of Order XIX Rule 3 of the CPC. He urged the Court and relying in the skeleton arguments filed in that regard, in particularly to the case of **Leighton Offshore Pte Tanzania Branch v D.P. Shapriya & Co Ltd, Miscellaneous Commercial Application No. 225 of 2015**, where the Court in discussing Order XIX Rule 3 of the CPC, stated that affidavit must represent true facts. He thus prayed for those paragraphs to be expunged from the counter affidavit.

Mr. Nangi, contesting the submission submitted that the objection raised did not fit to be a preliminary point of objection as it was not a demur citing the case of **Colgate Palmolive Co. Ltd v Chemi Cotex Industries Ltd, Civil Case No. 70 of 2004, High Court of Tanzania at DSM,** in support of his argument. According to Mr. Nangi the contents of paragraphs 6,7,8 & 9 were facts within the knowledge of the deponent by virtue of conducting the matter as trained lawyer, so they were not arguments as suggested by the applicant. It was his further submission that even if, the applicant's submission was to stand, still the remedy of striking out the affidavit was not the preferable one. And on this he submitted that there was a plethora of cases on that citing the case **of Msasani Peninsula Hotels Ltd & 6**

Others v Barclays Bank & 2 Others, Civil Application No. 192 of 2006, CAT – DSM (unreported), where the Court considered the defect as not fatal which can be cured by way of amendment. Based on that, he prayed for the objection be overruled.

In his rejoining submission, Mr. Kagirwa maintained his earlier submission that the mandatory requirement of the rule has been contravened.

I have carefully examined the rivalry submissions and in determining the preliminary points of objection raised, I would wish to commence with addressing the points of objection raised by the respondent. The points will be addressed seriatim. Starting with the 1st and 2nd points on Court's jurisdiction shall be addressed together. While Mr. Nangi contends the Court has no jurisdiction to grant the reliefs sought as it has not been properly moved under Rule 24 (1) (3) (a) and (b) and 49 (1) of the Rules, Mr. Kagirwa is content that the Court has been properly moved on one hand but on the other admitting that there is no specific provision catering for the reliefs sought, the Court has therefore to rely on general provisions.

Part of the general provision this application is nailed on is the provisions cited in the chamber summons and the applicant is seeking for the following orders:

(i) That the Court grant leave for the witness statement of Jamal H Ahmed dated 19th October, 2018 and filed in Court on the same day be amended so as to include omitted facts.

(ii)That the Court to grant leave to amend the plaintiff's list of additional documents.

I am undoubtedly in agreement with Mr. Nangi's submission that this Court has not been properly moved to grant the reliefs sought. The provisions cited are essentially for amendment of pleadings which do not comprise departure from the scheduling order dated 24th September, 2018 nor intended amendment of witness statement as well as filing of additional list of documents.

In that regard it is indeed correct that this Court is not conferred with jurisdiction to grant the reliefs sought as it was not properly moved in the first place, for citation of wrong, inapplicable provisions of the law.

Furthermore, the applicant's submission that the Court order dated 17th July, 2019 allowed them to proceed and make this application is misconceived. The records of proceedings dated 17th July, 2019 do not reflect so nor support the assertion. From the records there was no order vacating the scheduling order dated 24th September, 2018, nor any review order in that regard. Without a Court order vacating its

order something which is not reflected in the proceedings of 17th July, 2019, the applicant cannot safely say, the Court allowed his application that the present application be filed. The procedure is an application to depart from the scheduling order must precede the present application. Since there is no specific provision providing for that, the applicant had to resort to the CPC. And through Rule 2 (2) of the Rules the applicant can apply for departure from the scheduling order under Order VIII A Rule 4 of the CPC. This said, I however, do not quite agree with Mr. Nangi's position which is derived from the **Cocchi's** case (supra) the decision which not binding on this Court for the obvious reasons, that application for departure from the scheduling order should be made before mediation. The logic behind departure from the scheduling order can, in my view, be prompted by different reasons which might occur at different stages or phases of the case.

Basically, even application made under Rule 32 of the Rules, is logically a departure from the scheduling order. And more often than not applications of this nature surface when the suit has already passed mediation stage. Most of the suits would be at the hearing stage. Various valid reasons leading to departure from the scheduling order, is what would guide the Court to grant or not to grant the application. Interest of justice can also be considered as a factor in such application.

But even assuming, there was such order, which for sure there was none going by the records of proceedings dated 17th July, 2019, the provisions of Rule 24 (1) (3) (a) and (b) and Rule 49 (1) of the Rules do not support the application. Rule 24 (1) (3) (a) And (b) of the Rules, which according to Mr. Kagirwa is equivalent of Order VI Rule 17 of the CPC, the fact which I do not dispute, provide for the amendment of pleadings. While there is no dispute that the Court may at stage of the proceedings, allow amendments of pleadings, I nonetheless do not agree that witness statement fall within the ambit of pleadings.

The High Court (Commercial Division) Procedure Rules, 2012 (the Rules) the term pleadings has not been defined, even though Rule 24 (1) (2) (3) (4) (5) and (6) of the Rules have all been referring to the term. This led me to look for answers in the CPC through Rule 2 (2) of the Rules. Order VI of the CPC is the provision dealing with pleadings generally and the term has been specifically defined under Order VI Rule 1 of the CPC. For ease of reference the definition is reproduced below:

> ""***Pleadings***" *shall mean plaint or written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII*"

A plaint, written statement of defence or counter-claim and replies thereto, the collection in generality is what is termed as pleadings. Pleadings are the documents stating the claim or contesting the claim. And is what leads to institution of a suit, whereby a claim or claims is/are stated and controverted. Pleadings are usually accompanied with documents to be relied on termed annextures/attachments. Oral witness testimony or witness statement is what proves or disproves the claim put forward by a complaining party, which in this case would be a plaintiff. The later come into play at a hearing stage of the suit and not accompanying the pleadings. The witness statement is therefore not pleadings contrary to what was suggested by Mr. Kagirwa.

Whereas pleadings are accompanied by documents to be relied on, witness statement is witness testimony akin to examination in chief given under oath, reduced into writing. The statement though subject to scrutiny during its admission to be part of the proceedings as witness' examination in chief, they are not at all part of the pleadings. This can be easily understood from the normal conduct of proceedings where witness' testimony is oral. Such oral testimony is never part of the pleadings.

In the same way Rule 49 (1) of the Rules, has no reference at all to witness statement to be forming part of the pleadings. The provision squarely deals with

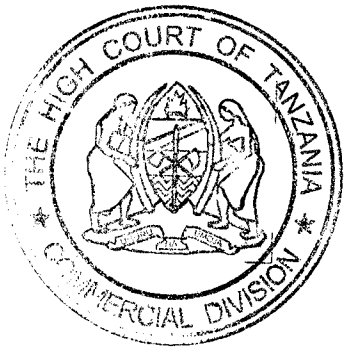
how witness statement which is mainly witness' examination in chief should be established, that they should be given on oath or affirmation. The provision does not contain anything in relation to amendment of the witness statement.

Neither Rule 24 (1) (3) (a) and (b) nor Rule 49 (1) of the Rules cited could move or confer this Court with jurisdiction to grant the reliefs sought. In short the application is incompetent for failure to cite enabling provision which could properly move the Court. There is a long list of decisions in respect of wrong citation, non-citation and the like which include: **Dero Investment Limited v Heykel Berete, Civil Appeal No. 92 of 2004, CAT-DSM; Tanesco & 5 Others v IPTL, Consolidated Civil Applications Nos. 19 and 27 of 1999-CAT-DSM; and Aloyce Tesha v Anita Tesha, Civil Appeal No. 10 of 2003-CAT (all unreported)** and **Aero Helicopters (T) Ltd v FN Jansen [1990] T.L.R. 142,** to cite a few.

The 1st and 2nd points of objections are thus sustained.

These two are in my view sufficient to dispose of the preliminary points of objection raised without examining the remaining two points.

In light of the above I proceed to sustain the objection that the application is incompetent for failure to properly move the Court. The application is thus struck out with costs. It is so ordered.



P. S. FIKIRINI

JUDGE

10th MARCH, 2020