IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 43 OF 2019

MOTO MATIKO MABANGA.....PLAINTIFF

Versus

OPHIR ENERGY PLC.....1st DEFENDANT

OPHIR SERVICES PTY LTD.....2nd DEFENDANT

B.G. INTERNATIONAL LIMITED.....3rd DEFENDANT

B.G. TANZANIA LIMITED.....4th DEFENDANT

PAVILLION ENERGY P.T.Y.....5th DEFENDANT

ROYAL DUTCH SHELL PLC.....6th DEFENDANT

MEDCO ENERGY GLOBAL PTE LIMITED.....7th DEFENDANT

Last Order: 02nd Sept, 2020

Date of Ruling: 12th Feb, 2021

RULING

FIKIRINI, J.

The plaintiff in her amended plaint claims against the defendants jointly, severally and together for declaratory orders that the purported acquisition of interest by the 3rd, 4th, 5th, 6th and 7th defendants from the 1st and 2nd defendants, in gas Blocks 1, 3 and 4 situated offshore southern coast of Tanzania, adjacent to Mtwara region, was wrongful, illegal and contrary to the law, and prejudicial to the plaintiff's 15% entitlements in the said blocks.

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This application is seeking for the following orders;

(i) A declaration that the acquisition of interests in Block 1, 2 and 3 belonging to the 1st and 2nd defendants by the 3rd, 4th, 5th, 6th and 7th were illegal, fraudulent and conspiratorial as they aim to pervert the ends of justice and injure the proprietary and in disregard of the plaintiff interests in the said blocks.

(ii) Permanent injunction restraining the defendants, their agents and associates present and future from exploiting, investing or engaging in production of gases and oils unless and until the plaintiff is paid all its due.

(iii) A declaration that the defendants are jointly and severally liable to compensate the plaintiff's 15% of the value of the blocks.

(iv) General damages, costs of this application be provided for, and any other reliefs that this honourable Court may deem it fit.

All the defendants filed their written statements of defence to the amended plaint denouncing the claim and at the same time each raising preliminary points of objection. Counsel for the 1st, 2nd and 7th defendants Mr. Audax Kameja, raised a preliminary objection on a point of law that the suit was

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incompetent for being filed out of time in violation of section 3 (1) of the Law of Limitation, Cap. 89 R.E. 2019.

Mr. Gerald Nangi, counsel appearing for the 3rd, 4th and 6th defendants raised the following preliminary points of objection:

(a) that this honourable Court has no jurisdiction to determine the suit;

(b) that the plaint contravened Order VII Rule 1 (i) and (f) of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC);

(c) that the suit contravened Rule 3 of the High Court of Tanzania (Commercial Division Fees) Rules, Government Notice No. 249 of 2012;

(d) that the suit was time barred; and

(e) that the suit is a non-starter for circumventing the laws governing the subject matters to wit the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 as well as the Petroleum Act, Act No. 21 of 2015; and

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(f) that the plaintiff has no cause of action against the 3rd, 4th and 6th defendants.

And for the 5th defendant, Mr. Gaspar Nyika and Ms. Samah Salah both learned counsels raised the following points of objection:

(a) that the suit is time barred in terms of section 3 (1) read together with item 7 of the Schedule to the Law of Limitation;

(b) that the plaintiff has no cause of action against the 5th defendant who was not privy to the Consultancy Agreement and Deed of Termination between the plaintiff and the 1st and 2nd defendants; and

(c) that the suit is not maintainable under section 11 of the CPC since the matter raised in the amended plaint has been adjudicated and determined by the High Court of Justice, Queens Bench Division under Commercial Case No. 2012 Folio 62 in a judgment dated 15th June 2012 issued by Mr. Justice Popplewell.

And for those reasons the 5th defendant sought for the dismissal of the suit.

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The preliminary points of objections were ordered be disposed of by way of written submissions. All counsels did a tremendous job in expounding on their respective position, which I will consider to the extent required in course to this ruling.

The question as to whether the preliminary points raised are to be sustained or not, is what will be answered in this ruling. In the **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696,** the Court has well enunciated what amounts to a preliminary point of objection when it stated that:

> *"....a preliminary objection consists of* ***a point of law*** *which has been pleaded or which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit.* ***Examples: are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

In our jurisdiction the position was echoed in a number of cases including the **Shahida Abdul Hassanali Kassam v Mahed Mohamed Gulamali**

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Kanji, Civil Application No. 42 of 1999, CAT and **21 Hotels and Lodges (T) Limited v The Attorney General (II) Chapwani Hotels Limited, Civil Appeal No.27 of 2013, CAT,** both unreported, that:

> *"Pure point of law must be elicited from what has been pleaded or must be implied from reading pleadings. The parameters for determination of pure points of law...are restricted within the confines of the pleadings."*

Going by the principle stated in the above cited cases, it means the pleadings and its annextures, on assumption they are correct, will be the determinant factor as to whether the preliminary point of objection raised can be sustained or not. And not as asserted by Mr. Mnyele, counsel for the plaintiff, that the preliminary points of objection if argued must be ascertained. Actually is the other way around, that the preliminary point of objection raised if it will require ascertaining of certain facts, then that is not on pure point of law. The pure point of law suffices by itself as it is governed by the specific provision of the law. Also, the raising and arguing a preliminary point of objection is essentially founded on the plaint and its annextures and not on what the defence has stated.

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Guided by the principle, the preliminary points of objection raised will thus be examined in that light.

In the present situation the preliminary points of objection raised essentially fall into three categories which the outcome is either rejection, striking out, or dismissal of the suit. Considering the position in **Mukisa Biscuits** (supra), that the intended point if argued as a preliminary point may dispose of the suit. I will thus first focus on points of objection, on jurisdiction, that plaintiff has circumvented the laws governing the subject matter which is the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 (Natural Wealth Act) and the Petroleum Act, Act No. 21 of 2015 (the Petroleum Act), which had been raised by 3rd, 4th and 6th defendants. That the suit is time barred as contemplated by all the defendants and that there was no cause of action against the 3rd, 4th and 6th defendants. Any one of this if answered in affirmative will lead to dismissal of the suit.

On the point of jurisdiction, it was Mr. Nangi's submission that the subject matter in this suit are gas blocks which form part of the natural resources which are governed by the Petroleum Act which oversees and provides for

regulation of upstream, midstream and downstream petroleum activities. And thus he argued that any involvement with legal implication is within the mandate of the Minister responsible with petroleum affairs as stipulated under section 5 (1) (b) of the Petroleum Act, and only the Minister can act upon being advised by the Petroleum Upstream Regulatory Authority (PURA). Adding to the submission it was also his concern as to why the Government of Tanzania through the Attorney General has not been joined in the proceedings in view of the proprietary interests of the government in the said gas blocks.

Persuaded that this Court has no jurisdiction Mr. Nangi cited a plethora of authorities including **DPP v Farid Hadi Ahmed & 9 Others, Criminal Appeal No. 96 of 2013, CAT, DSM (unreported) p.20**, where the Court insisted that jurisdiction to adjudicate must not be presumed or taken for granted. Instead it must be traced to the explicit statutory provisions and in some rare cases from the constitution. Other cases were **Azam Media Limited & 2 Others v TCRA & Another, Miscellaneous Civil Cause No. 56 of 2017**, where the Court stressed that jurisdiction must be exercised in accordance with the law and judiciously; **Smart Global Ltd v TCRA & Another, Commercial Case No. 77 of 2009,**

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High Court of Tanzania at DSM (unreported); Ricahrd Ndahalawe v Tanzania Harbours Authority & Another, High Court of Tanzania at DSM (unreported); Mohsin Somji v Commissioner for Customs & Excise and Commissioner for Tax Investigation [2004] T.L.R. 66; **Hussein Mages Ekingo v Dodsal Hydrocarbons & Power (T) Pvt Ltd, Land Case No. 97 of 2013, High Court of Tanzania (unreported);** and **Matayo H. Kiwayo v Vocational Education and Training Authority (VETA), Civil Case No. 249 of 2002 (unreported),** in all these cases the Court declined to assume jurisdiction on a matter which was reserved for different forum.

Relying on the case of **Shahida Abdul Hassanali Kasam** (supra) which was cited in the case of **Hezron M. Nyachia v Tanzania Union of Industrial and Commercial Workers, Civil Appeal No. 79 of 2001 (unreported),** Mr. Nangi prayed for the suit to be dismissed with costs.

Reacting to the submission, Mr. Mnyele, counsel for the plaintiff, contended that Mr. Nangi referred to section 12 (2) and 242 of Petroleum Act in his submission without clarifying its relationship to the facts of the suit at hand, in both provisions referred none fitted the circumstances. Section 12

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(2) provided for the functions of PURA, of which none gives it adjudicating powers. And that the section 242 also referred while it has given PURA powers, but those powers were limited to inquiring and deciding between a person engaged in exploration or development operations among themselves or with third parties covering specifically pointed out area, of which this suit did not fall in any one of them. It was imperative for the defendants to identify clearly the provision of section 242 (1) under which this disputes falls, stated Mr. Mnyele. Knowing the dispute did not fall under any of the provision, Mr. Nangi left it to the Court to guess, argued Mr. Mnyele. Stressing on his stance Mr. Mnyele stated that this suit has nothing to do with exploration of the gas field and the amended plaint as well as the amended written statements of defence and reply has said nothing to that effect. Even the compensation provision provided under section 111 (1) of the Petroleum Act, was not what the plaintiff was envisaging.

Dissecting on the cited cases in support of the submission by Mr. Nangi, Mr. Mnyele considered all the authorities distinguishable from the facts of the present suit, and made him conclude that they have been cited out of context.

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Examining the point on jurisdiction, I would wish to start by referring to the case of **James Burchard Rugemalira v R & Another, Criminal Application No. 59/19 of 2017, CAT-DSM (unreported),** the Court emphasized that it was necessary to state the nature of the preliminary point of objection. Translating the decision in reference to this point of objection raised by the 3rd, 4th and 6th defendants on jurisdiction, it is clear that the point was raised without offering any clarification or citing the provision of the law which was contravened as far as the pleadings were concerned. The presumed relevant provisions were referenced later in their submission, meaning the plaintiff was made aware of the nature of the preliminary point of objection at this stage when more information was shared. This is contrary to the requirement that the notice of preliminary point of objection ought to be clear from the beginning.

Notwithstanding the above, I still opted to focus on the scrutiny of the legal provisions cited from the Petroleum Act. The provisions of section 4 and 5 referred, though legally valid but were of no assistance to the point of objection raised. Nothing in the cited provision conferred the jurisdiction, the way the 3rd, 4th and 6th defendants had imagined PURA had. The adjudicatory mandate conferred to PURA, cannot take care the disputes of

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the nature involved in this suit. PURA is essentially a regulatory body providing regulations and given powers to deal with disputes involving upstream, midstream and downstream petroleum activities, as alluded by Mr. Nangi, the assertion which this Court does not dispute. However, these activities are not what is contested before this Court. The plaintiff's suit is by and large on breach of contract as one looks at the plaint and/or on compensation as claimed by the plaintiff and has nothing to do with the stated petroleum activities. Reading from the pleading nowhere the plaintiff is contesting licence of the gas blocks, which I agree is the matter of law and within the mandate of PURA. Since that is not what is before this Court, it cannot therefore be said this Court has no jurisdiction or that the plaintiff is in a wrong forum. The dispute before this Court is on agreements entered between the plaintiff and the 1st and 2nd defendants related to the gas blocks but not connected to exploration or development of the said gas blocks.

Reading from the pleadings, the dispute can be termed as purely commercial in nature as it stemmed from signed and terminated agreements and not procuring of gas blocks and that is why there was no single reference to the legal provisions from the Petroleum Act nor was

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there any reference to exploration or anything related to upstream, midstream or downstream which are all activities related to oil and gas activities. I fully agree to Mr. Mnyele's position on the jurisdiction issue that this suit is properly before this Court.

The preliminary point of objection is short of merit and is therefore overruled.

The next take is on the time limitation. All defendants asserted that the suit is founded on the validity of Consultancy Agreements and the Termination Agreement, which means is a suit founded on contract which in this instance is time barred. Mr. Kameja counsel for the 1st, 2nd and 7th, Mr. Nangi for the 3rd, 4th and 6th defendants and Mr. Nyika for the 5th defendant, all had more or less the same argument on time limitation. It was Mr. Kameja's submission that according to section 4 of the Law of Limitation the computation of the period commences from the date on which the right of action accrued, which in most cases than not, accrues on the date the cause of action arose. In this case the cause of action arose on 19th March, 2010 when the Agreement was terminated. As per item 7 of the Schedule to the Act, the time limitation for suits found on contract was

six (6) years. The present suit which was brought on 13th May, 2019 was essentially out of time for three (3) years, and hence deserves dismissal under section 3 (1) of the Law of Limitation.

Countering the reply made by the plaintiff to the 1st and 7th defendants' amended written statement of defence, that the time the plaintiff was litigating in other courts was to be excluded from computation, Mr. Kameja submitted that, the notion was misconceived. Referring to section 21 (1) of the Law of Limitation, he argued that since the litigations were taking place in courts of competent jurisdiction, the fact which had been admitted by the plaintiff, then such time cannot be excluded in computing the period of limitation.

Mr. Nangi as well argued that besides the plaintiff having no cause of action against the 3rd, 4th and 6th defendants, but even if there was, still the suit would have been time barred. Under paragraph 9 the claim against the 3rd and 4th defendants arouse in 2010, while for the 6th defendant and pursuant to paragraph 11 the cause of action arose in 2015. Based on the account that the suit was founded on compensation for breach or alleged rights/interest, the provisions of item 1 of Part 1 of the Schedule to the

Law of Limitation, was thus involved. For the suits for compensation for doing or omitting to do an act alleged, the time frame was one year, argued Mr. Nangi, and continued stating that the suit against all his clients was thus time barred and urged the Court to dismiss the suit.

Likewise, Mr Nyika and Ms. Samah were not far from their colleagues. In their case, they argued that the claim against the 5th defendant was based on Consultancy Agreements between the plaintiff and the 1st and 2nd defendants dated 01st May, 2006 and Deed of Termination dated 19th March, 2010. Aside from fact that the 5th defendant was not privy to the alleged agreements and thence the plaintiff had no cause of action against the 5th defendant, the suit was essentially time barred in terms of section 3 (1) read together with item 7 of Part 1 to the Schedule to the Law of Limitation, it was maintained by these counsels.

Mr. Mnyele resisted that the suit was not founded or did not relate to any agreement whatsoever. Instead the cause of action was defined or confirmed by prayers or reliefs sought. According to him the suit fell under item 24 of Part 1 of the 1st Schedule to the Law of Limitation, of which the limit is six (6) years. Establishing the plaintiff's six (6) years, he contended

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that there were series of events that culminated into filing of this suit, although they are not apparent in both the plaint and annextures as the defendants have not disclosed the actual dates of acquisition of interests, save for the 7th defendant whose merger clearance certificate was issued on 18th April, 2019 and therefore dismissing the submission on time limitation as six (6) years under item 24 of Part 1 of the Schedule has not lapsed. Upholding his position, he prompted the Court that the defendants have been sued jointly and severally and therefore the cause of action cannot be disintegrated.

In determining this point, and interpreting the provisions of the law resorted to, the Court has to consider the entire pleadings and not separately including the prayers and reliefs sought and find out if the cause of action as the plaintiff would want be defined or confirmed by the prayers or reliefs sought resembles, to avoid dismissing the suit based on one fact alone while others could have sustain.

Thorough scrutiny of the submissions brought the following undisputed facts that as collected from paragraphs 8 and 9 of the pleadings, it is without any shade of doubt that the plaintiff's suit is founded on the

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Consultancy Agreements and Termination Agreement, despite Mr. Mnyele's dismissal that the suit is not founded or does not relate to any agreement whatsoever. It was Mr. Mnyele's submission that the cause of action is at large which on one hand was defined by the prayers and reliefs sought and on the other by series of events that culminated into filing of this suit. This position was taken admittedly knowing that it was not apparent in both the plaint and annextures on the actual dates of acquisition of interests, as the defendants did not disclose the date of acquisition, save for the 7th defendant whose merger clearance certificate was issued on 18th April, 2019. The None-disclosure of the actual date when the cause of action arose would by and large render it impossible for the Court to compute as to when the time started running. This glitch would certainly require evidence.

However, reading from paragraph 8 and 9 of the plaint, what I gathered is that from the Consultancy Agreement the plaintiff acquired 15% interest in the 1st and 2nd defendants' 3 gas blocks. And upon termination and signing of the Deed of Termination on 19th March, 2010, which the plaintiff claimed was as a result of duress and coercion, the plaintiff was compensated Usd. 7,500,000. Going by these facts it is obvious that the plaintiff's cause of

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action to bring the suit on voidable contract arose on 19th March, 2010, after the Consultancy Agreements were terminated.

The plaintiff's claimed compensation therefore stemmed from the Consultancy Agreement and not on series of transactions to acquire interests in the blocks as submitted by Mr. Mnyele. The plaintiff by distancing her claims from the above mentioned agreements, there would otherwise be no basis for any claim against defendants, as her right to bring this suit is solely based on a cause of action which arose on 19th March, 2010, when the Consultancy Agreements were terminated, whether lawfully or not.

Mr. Mnyele's submission that falls under item 24 of Part 1 of the Schedule to the Law of Limitation, as a suit intended by the plaintiff is not provided for, is thus incorrect. And on this I agree to the defence counsels' submissions that it is on the basis of the Consultancy Agreements that the plaintiff acquired the 15% interest in the 1st and 2nd defendants' 3 gas blocks. The plaintiff's claim for compensation emanated from the Termination Agreement concluded on 19th March, 2010. It is therefore crystal clear that suit cannot stand independent of from the Consultancy

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Agreements and the Termination Agreement which had ensued almost thirteen (13) years later counting from May, 2006 to March, 2019 and almost nine (9) years after the termination of the agreement, counting from March, 2010 to May 2019 when this suit was instituted. This rendered Mr. Mnyele's submission in relation to the claim devoid of merit.

This suit is without a doubt found on contract and therefore governed by item 7 in Part 1 of the Schedule to the Law of Limitation, which requires such suits to be instituted within 6 (six) years from the date when the cause of action arose, which in this suit is the 19th March, 2010. This suit is clearly time barred and the remedy for such is dismissal of the suit under section 3 (1) of the Law of Limitation, Cap. 89 R.E. 2019.

Whereas this point of objection is sustained, makes the exercise of discussing the other points of objection particularly the one on cause of action in respect of the 3rd, 4th, 5th, 6th and 7th futile and therefore will not indulge in the undertaking.

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As a result of the sustained point of objection on time limitation suit is consequently dismissed pursuant to section 3 (1) of the Law of Limitation, Cap. 89 R. E, 2019 with costs. It is so ordered.

P. S. FIKIRINI

JUDGE

12th FEBRUARY, 2021