

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL CASE NO. 151 OF 2019**

**KILIMANJARO OIL COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**MOGAS TANZANIA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ELIEZER WILLIAM ..... 2<sup>ND</sup> RESPONDENT**

**UPENDO EDWARD ..... 3<sup>RD</sup> RESPONDENT**

**Date of Last Order: 04/05/2021**

**Date of Ruling: 18/06/2021**

**RULING**

**MAGOIGA, J.**


This ruling is on preliminary objection on points of law formerly raised and filed by Mr. Kasaize Andrew Kasaize, the learned advocate for the 1<sup>st</sup> and 2<sup>nd</sup> third parties to the effect that, Misc. Commercial Application No. 151 of 2019 for filing a third party notice was filed out of time contrary to item No. 21 of Part III of the Schedule to the Law of Limitation Act,[Cap 89 R.E. 2019], on reason of being time barred and as such this court lacks prerequisite jurisdiction to try an application filed out of time under section 3(1) and (2) of the Law Of Limitation Act,[Cap 89 R.E.2019], hence, prayed that the instant application be dismissed with costs.



The applicant is enjoying the legal services of Mr. Twarah Yusuph, learned advocate. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> third parties are enjoying the legal services of Mr. Kasaize Andrew Kasaize, learned advocate.

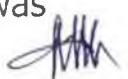
The facts pertaining to this application albeit in brief are that, the applicant, who is the defendant in Commercial Case No.87 of 2018, was served with plaint and managed to file amended written statement of defence on 11<sup>th</sup> day of September, 2018 and whereas the instant application was filed on 26<sup>th</sup> November, 2019, more than a year. It is against the above background, the learned advocate for the third parties raised and file a preliminary objection that the instant application was filed out of time for failure to be filed within 60 days from the date the amended written statement was filed, necessitating the preliminary objection to have the said application, on the above reasons, be dismissed with costs, hence, this ruling.

The application was ordered to be heard by way of written submissions. The learned advocates for parties' complied with the order of filing the same paving and making this ruling possible. I commend them for their input on this matter.



Mr. Kasaize argued that since the applicant filed his amended written statement of defence on 11<sup>th</sup> September, 2018, then, any application by the applicant was to be filed within 60 days and that sixty days elapsed on 11<sup>th</sup> November, 2018 and the instant application was filed on 26<sup>th</sup> November, 2019, hence, obviously filed out of time and deserve to be dismissed with costs in accordance to item 21 of Part III of the First Schedule to the Law of Limitation Act [Cap 89 R.E. 2019]. Further in support of the point, the learned advocate cited the case of MWANDU NGEKU AND ANOTHER vs. THE ATTORNEY GENERAL, MISC. CRIMINAL APPLICATION NO. 4 OF 2018 in which a revision filed out of 60 days was dismissed. On that note, the learned advocate for the 1<sup>st</sup> and 2<sup>nd</sup> third parties implored this court to dismiss this application with costs.

On the other hand, Mr. Yusuf brief to the point argued that the instant application was preferred under Order I rule 14(1) and (2) of the CPC and went on to argue that the phrase **"the defendant may apply to the court for leave to present to the court a third party notice"** presupposes that before one can file a third party notice must seek leave of the court, which, according to Mr. Yusuf same was sought and granted and any time limit, if any, has to reckoned from the date the leave was



granted. Since this was done, Mr. Yusuf pointed out that no way this application can be said to be out of time. Another point put forward was that the instant application is distinguishable from the holding in MWANDU CASE (supra) cited both in the circumstances and the substantive issue that was before the court. According to Mr. Yusuf, no time limit for filing third party notice as suggested by Mr. Kasaize. One that note, Mr. Yusuf implored the court to dismiss the objection with costs.

In rejoinder, Mr. Kasaize was not moved by the applicant's advocate submissions. He reiterated what he had earlier submitted and insisted that submission by Mr. Yusuf are misleading because no leave was granted before filing this application and as such was filed out of time. The learned counsel for 1<sup>st</sup> and 3<sup>rd</sup> parties cited other cases which this court will not consider because will amount to deny the applicant an opportunity to be heard on them because rejoinder has to be restricted to the reply to what has been submitted by the respondent.

Having carefully considered the rivaling submissions of the learned advocates for parties, the noble task of this court is to determine the merits or otherwise of the preliminary objections raised and argued for and against the instant application. However, I hasten to point out that, as

correctly argued by both counsel; one, the provisions of Order I rule 14(1) of the Civil Procedure Code are applicable in the instant application. Two, it should be equally noted that, before one files third party notice **must seek leave of the court.** And the two considerations are whether **the applicant claims any contribution or indemnity, or any relief or remedy relating or connected with the subject matter of the suit and substantially the same relief as relief claimed by the plaintiff.**

(Emphasis mine)

Further it should be noted that, under sub rule (2) of Order I, the application can be made ex-parte with affidavit stating the nature of the claim , **the stage the proceedings have reached** and the nature of the claim and how it relates to the plaintiff's claim against the applicant and the address of the third parties. (Emphasis mine).

From the above wording of the requirement to state the stage the suit has reached, is my firm considered opinion that, limitation to application for leave to file third party notice is not pegged on the time when the written statement of defence was done because the parliament in its wisdom intended that consideration is the relationship of the claim and the reliefs claimed. The argument that the limitation has to be gauged from when the

written statement of defence was filed is misconceived and certainly did not convince me otherwise. I am certainly sure that, that was not the intention of the parliament in enacting this provision. Had the parliament intended that the application was to be made within sixty days from the date of the filing the written statement of defence it could have stated so in clear and unambiguous terms. Therefore, this is not the kind of applications envisaged under item 21 of Part III of the 1<sup>st</sup> Schedule to the Law of Limitation.

With the above reasons, the two sets of preliminary objections are found to be of no useful merits and are hereby dismissed with costs.

It is so ordered

Dated at Dar es Salaam this 18<sup>th</sup> day of June, 2021.



  
**S.M.MAGOIGA**

**JUDGE**

**18/06/2021**