IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL APPL. NO. 117 OF 2020

(Arising from Commercial Case No. 150 of 2019)

1. GLOBAL AGENCY LIMITED
2. BASHASHA MERCHANDISE DEALERS LTD ..... APPLICANTS
3. FIDELIS CHRISTIAN BASHASHA

VERSUS

RABO RURAL FUND B.V (RRF)..... RESPONDENT

Last order: 25/10/2021
Judgment: 13/12/2021

RULING

NANGELA, J.,

This ruling comes as a result of an application filed by the applicants herein under section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2019; section 95, 93, and 68(e) and Order IX Rule 9 of the Civil Procedure Code, Cap.33 R.E 2019 and Rule 32(2) and 43 of the High Court (Commercial Division) Rules, GN No. 250 of 2012 (as amended).

The Application has been brought by way of a chamber summons supported by an affidavit of Mr Obadia Kajungu, who is also the Applicants' advocate. In particular, the

prayers sought were for *ex-parte* orders and orders *inter-partes* as well. The respective orders sought were as follows, that:

1. Ex-parte: This Court be pleased to:

"set aside an Order striking out the Defence in Commericial Case No.150 of 2019) and the order for ex parte hearing pronounced on the 24th June 2021 of time.

2. Inter-parties that, this Court be pleased to:-

(a) To set aside an order of striking out Defense and order of ex-parte hearing pronounced on 24th June 2021.

(b) Grant a leave to pay to the Respondent's Advocate the adjournment costs out of time;

(c) Grant a stay of proceeding in respect of Commercial case No. 150/2019 pending determination of this application.

(d) Payment of Costs of this case to follow the event.

(e) Any other relief as this Honourable Court may deem right to grant.

The Respondent elected to contest this application by filing a counter affidavit. As well, the Respondent raised a preliminary objection against the hearing and determination

of the application. In particular, the Respondent's objection is to the effect that:

> "In terms of Rule 32(2) of the High Court (Commercial Division) Procedure Rule, 2012, as amended by GN No.107 of 2019, this application is incompetent for being hopelessly time barred. "

Before going to the root of the Respondent's objection, I find it apposite to set out some few brief facts which gave rise to the present application. On the 18th day of December 2019, the Respondent filed a suit against all the Applicants seeking for the following reliefs:

(i) Declaration that the Applicants/ Defendants breached the loan agreement, joint and several liability Agreement and Deed of Surety ship Agreement (DSA) respectively.

(ii) Judgment in favour of the Plaintiff/ Respondent jointly and severally against all Defendants for payment of payment of USD 896,190.44/= or its equivalent in TZS 2,058,440.68/=

(iii) Interest at an agreed commercial rate of 17% on the outstanding amount stated above from the

date of filing this suit to the date of judgment

(iv)Interest on the decretal sum at the court rate of 12% from the date of judgment to the date of full satisfaction

(v) The Defendants/Applicants jointly and severally be ordered to pay the costs of this suit

(vi)General damages for the breach of contract to be assessed by this Honourable Court

(vii) Any other relief as the court may find just, convenient and equitable to grant

Upon service of the Plaint, the Applicants filed an amended Joint Written Statement of Defense (JWSD) and on 27th February 2020, the matter fixed for first Pre-trial conference (1st PTC). However, the first PTC could not take place because the Applicants (as Defendants) had an application to make. Eventually, an application for third party Notice (Misc. Commercial Application No.26 of 2020) was lodged, processed and determined.

Further still, the Applicants applied for security of costs, and the same was determined and the Respondent deposited the requisite amount ordered by this Court as security for costs. The case, thereafter, proceeded to its next stage of hearing.

On 16th July 2021, the matter was fixed for its final PTC. The Defendants' counsel did not enter appearance and nothing was filed in court regarding his absence. Owing to the failure on the part of the Defendants and their counsel to appear in Court, the Respondent (Plaintiff's) counsel prayed that the Defense filed by the Applicants to be struck out so as to allow the Respondent to proceed with the matter ex-parte. This Court granted the prayer, struck out the WSD and directed the Respondent (Plaintiff) to proceed ex-parte.

The Applicants (Defendants) were not happy with the decision of this Court, and decided to file the present application which was brought under the provisions of the laws I have cited herein above. The Respondent filed, as well the preliminary objection, which is now the subject of this ruling. The Respondent has asked this Court to strike out this application with costs.

When this Application was called on for the hearing on the Preliminary objection raised, before me on 25th October 2021, the Applicants were represented by Mr. Obadia Kajungu learned Advocate and Mr. Godwin Nyaisa learned Advocate represented the Respondent. I allowed these learned counsels to argue the application orally.

Submitting in support of the preliminary objection, it was Mr. Nyaisa's contention that, the Applicant's request to have the orders of this Court made on 24th June 2021 set aside, is already time barred. He submitted that, in order for

an application like this to be entertained it has to be made within 14 days of the time when the order was made.

Mr Nyaisa submitted that, instead, the Applicants lodged their Application on 24th August 2021, which is almost 60 days from the date when this Court made its orders and, that, no leave of this Court was even sought to bring this application out of time. Mr. Nyaisa contended further that, the law of limitation is a merciless sword and no sympathy or equity is to be entertained.

To cement that view, he relied on the case of **John Cornel vs. A. Grevo (T) Ltd** (1998) Civil Case No. 70 of 1998 HC at Dar es salaam,(unreported) and the case of **Union of Tanzania Press Clubs & Another vs. A.G,** Civil Appeal No. 89 of 2018, (CAT)(unreported). In view of that, Mr Nyaisa relied on Rule 32 (2) of the High Court (Commercial Division) Rules, GN No. 250 of 2012 (as amended) and submitted, that, this Application is incompetent as the orders of this Court could only be set aside within 14 days from the time they were made.

Responding to Mr Nyaisa's submissions, Mr Kajungu, who appeared for Applicants, submitted that, the Court should dismiss the objection and proceed with the hearing and determination of the Application as the Applicants' submission were misconceived. According to him, the Application was brought under Section 14 (1) of the Law of

Limitation Act of which the same allows the Court to set aside the orders out of time.

He submitted that, the Applicant brought the application in an omnibus manner by putting all prayers in one application to avoid multiplicity of the proceeding. He maintained that, the application being omnibus in nature, the Court has jurisdiction to both extend time and set aside its orders. He relied on the case of **Pride Tanzania Ltd vs. Mwanzani Kasatu Kasamia**, Misc. Commercial Cause No. 230 of 2015 (unreported).

Mr Kajungu submitted further that, the Preliminary Objection does not challenge the nature of the omnibus Application but only that the Application was time barred. He submitted that, apart from seeking an order setting aside the earlier orders, the Applicants are also seeking for an order that they be allowed to pay costs of adjournment out of time.

He concluded his submission by stating that, the preliminary objection should be overruled because it does not fit within the standard established in the **Mukisa Biscuit's case** often cited by Courts to the effect that a preliminary objection needs no proof of evidence. Besides, he held a view that, granting a prayer for extension of time is a matter which is purely within the discretion of the Court.

To support his submissions, he placed reliance on the case of **Investment House Ltd vs. Webb Technologies (T) Ltd and 2 others,** Commercial case No. 97 of

2015,(unreported) as well as the case of **Lycopodium Tz Ltd vs. Power Road (T) Ltd and 2 others** Misc. Commercial Application No. 47 of 2020 (unreported).

In a brief rejoinder, it was Mr. Nyaisa's submission that, much as the Application appeared to be an omnibus application, the fact remains that; there is nowhere a prayer for leave to set aside the order of the Court on 21/ June 2021 out of time has been made. He maintained that, the prayers for the leave to set aside was made from the bar and was not reflected in the chamber summons. He held, as a matter of principle that, the pleadings must speak for themselves and cannot be qualified by submissions from the bar.

Regarding section 14 of the Law of Limitation Act Cap 89 R.E 2019, it was Mr Nyaisa's submission that, the said provisions only deals with extension of time and is not meant to grant reliefs out of time. He contended that, leave has to be sought first as the Court cannot be made to jump the gun.

According to Mr Nyaisa, much as this is an omnibus application, there is a standard which the Court of Appeal set out in the case of **Pride Tanzania Ltd** (supra) that, omnibus application is possible where prayers are interrelated. He contended that, the prayers here are made under the Law of Limitation Act. He submitted that, since time limitation is purely a matter of law, the preliminary objection was appropriately brought.

Commenting on the applicability of the **Lycopodium's** case supra, Mr Nyaisa submitted that, even if granting of extension of time is a matter resting at the discretion of the Court, it can only be granted when a prayer for leave is made, and, hence, if no prayer for leave was made, then the Court cannot grant that which was not pleaded. Finally, Mr Nyaisa reiterated his submission in chief and urged thus Court to dismiss the application.

Having painstakingly considered the rival submissions of both parties as summed up here above, the issue I am confronted with is whether the Preliminary Objection is with any merit. In the said objection the argument of the Respondent's counsel is that, the Application is incompetent for being hopelessly time barred.

The Applicants' disputed this notion and maintained that, the application was brought under section 14 of the Law of Limitation, and, that, upon it, the Court can exercise jurisdiction to extend time, either before or after the expiration of the time sought to be extended.

Section 14 (1) of the Law of Limitation Act provides as follows:

> "Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application

> for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application."

As it might be noted, it is indeed true that, the above provision gives the Court discretionary powers to allow or reject an application based on that provision, and, if the application is to succeed, the Applicant must demonstrate reasonable or sufficient cause for the delay.

The gist of the preliminary objection, however, is that, the application at hand was already time barred because, under Rule 32 (2) of the High Court Commercial Division Procedure Rules of 2012 as amended by GN No. 107 of 2019, efforts to set aside the ex-parte order of this Court ought to have been made within 14 days from the date of the order.

The orders sought to be set aside in the current application were indeed given on the 24th June 2021 and the application was filed on 24th August 2021 almost 60 days after the orders were issued. According to Mr Nyaisa, the applicant ought to have first obtained leave of the Court extending time to bring the application.

As it may be seen in the submissions, the Applicants' counsel has argued that, this application has combined all that in one; hence it is an omnibus application, the reasons being to avoid multiplicity of applications. He has contended

that, that combination is not bad in law and placed reliance on the case of **Pride Tanzania Ltd** (supra).

The matter relating to omnibus applications and how they have been treated in our Courts is settled. Indeed, in the **Pride Tanzania Ltd's case**, this Court, citing the case of **Tanzania Knitwear Limited versus Shamsha Esmail (1989) TLR 48,** observed that:

> "The combination of two applications in one is not bad in law since courts of law abhor multiplicity of proceedings".

The above position was confirmed by the Court of Appeal in 2004 in the case of **MIC Tanzania Ltd vs. Minister for Labour and Youth Development,** Civil Appeal No.103 of 2004 (unreported). In this latter case, the Court of Appeal held that, the ruling of Mapigano, J (as he then was) in Tanzania Knitwear Ltd's case, "cannot be faulted." However, that does not mean that one can combine unrelated matters together and sail through. That will not flow since it is only the birds of the same feathers that can flock together.

In the case of **Mohamed Salmin vs. Jumanne Omary Mapesa**, Civil application No. 103 of 2014, CAT, (unreported), the Court of Appeal rejected an omnibus application for not being related. It held as follows:

> "As it is, the application is omnibus for combining two or more **unrelated** applications. As this Court has held for

> time (s) without number, an omnibus application renders the application incompetent and is liable to be struck out." (Emphasis added).

From the above, the question that needs to be asked and responded to is whether the omnibus orders sought in this application are unrelated as contended by Mr Nyaisa.

To be able to respond to that question, one has to look at the application itself and the kind of prayers sought. First, the Applicants sought ex-parte, orders to set aside the order which struck out the defense and the order which directed that the matter should proceed ex-parte and, all these were orders sought out of time.

Secondly, were prayers inter-partes, first to set aside orders setting aside the order which struck out the defense and the order, which directed that, the matter should proceed ex-parte. Third, is for leave to pay the Respondent's advocate adjournment costs which were ordered under the Rules and, the fourth is for stay of the proceedings in respect of Commercial Case No.150/2019 pending determination of this application and the fifth is a prayer for costs and any other relief.

The provisions supporting these prayers are section 14 of the Law of Limitation Act, which, as I stated above is related to the seeking for orders of extension of time. Others are section 95, 93 and 68(e) of the CPC as well as Order IX

rule 9 of the CPC, and Rule 32(2) and 43 of this Court's rules of procedure.

As noted in the **Mohamed Salmin's** case (supra) the settled rule as far as omnibus applications are concerned is that, for an omnibus application to stand, the prayers in the chamber summons must be interrelated or interlinked. See also the case of **Gervas Mwakafilwa & 5 others vs. The Registered Trustees of Moravian Church in Southern Tanganyika,** Land Case No 12 of 2013 (unreported).

That being the settled position, it is my view, looking at the prayers and the supporting provisions, that, all seems to be stemming from the same Commercial Case No.150/2019 and, for that matter, could be sought in an omnibus application as the one at hand, because of their interrelationship.

With such a finding, I do not see merit in the objection and I will proceed to, as I hereby do, overrule it. The parties are to proceed with the main application on the date to be scheduled by the Court.

It is so ordered.

DATED at DAR-ES-SALAAM ON THIS 13TH DAY OF DECEMBER, 2021.

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HON. DEO JOHN NANGELA
JUDG