

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**COMMERCIAL DIVISION**

**AT DAR ES SALAAM**

**COMMERCIAL APPLICATION NO. 143 OF 2023**

**TBC (1998) LIMITED..... APPLICANT**

**VERSUS**

**FRANCIS ALFRED.....1<sup>ST</sup> RESPONDENT**

**THE LIQUIDATOR ILULU COOPERATIVE UNION.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Date of Last Order: 4/12/2023**

**Date of Ruling 18/03/2024**

**GONZI, J.**

The applicant filed this application under Section 14 of the Law of Limitation Act, Cap 89 of the Laws of Tanzania (R.E 2019) praying for orders that:

**(a) *The Applicant be granted extension of time to serve Notice of Appeal to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein.***

**(b) *Costs of this application be costs in the case.***

In the affidavit in support of the application sworn by Mr. Mpale Kaba Mpoki, Learned Counsel for the Applicant, it was deponed that the parties herein, plus another party who is not joined in this application, were parties to

Commercial Case No. 67 of 2022 whereby a Ruling thereof was pronounced on 24<sup>th</sup> July 2023 when the suit was dismissed for being time-barred. The Applicant's counsel stated further that subsequent to the Ruling dismissing the suit, a notice of appeal was duly filed in the Court of Appeal but that the same was not timely served upon the 2 Respondents herein due to travel of the Applicant's lead counsel to Zanzibar to attend an international conference on arbitration representing Tanzania International Arbitration Center (TIAC) as the Vice Chairman of the center. He stated that service had been timely effected to only one of the 3 original defendants in Commercial Case No. 67/2022.

Upon being served with the application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents resisted it and filed counter affidavits. In addition, they both raised preliminary points of objection to the application. The 1<sup>st</sup> Respondent raised a preliminary objection that: **"the suit is incompetent and untenable in law for non-joinder of a party who was in the Commercial Case No. 67 of 2022."**

The second Respondent raised a preliminary objection that: **"The Applicant having filed Notice of Appeal to the Court of Appeal, the High Court lacks jurisdiction to entertain the Application".**

On 29<sup>th</sup> November 2023, the case was re-assigned to me as a successor Judge and a hearing of the preliminary objections was scheduled for 4<sup>th</sup> December 2023. However, on 4<sup>th</sup> December 2023, Mr. Peter Majanjara, learned advocate who appeared for the Applicant informed the Court that he was not ready to proceed with the hearing as he had been handed over the case file just a day before and thus he was not conversant enough with it to proceed with the hearing. He prayed for another hearing date. Ms. Lilian Mirumbe, Learned State Attorney who appeared for the 1<sup>st</sup> Respondent and Mr. Stephen Lekey learned Advocate for the 2<sup>nd</sup> Respondent told the Court that they were ready to proceed with hearing but in the circumstances disclosed by Mr. Majanjara, Learned Advocate, they were ready to argue the preliminary objections by way of written submissions. The Court directed the parties to proceed with the hearing by way of written submissions and scheduled a Ruling date on 16<sup>th</sup> February 2024 after the Court vacation. On 16<sup>th</sup> February 2024, Counsel for the Applicant and the 1<sup>st</sup> Respondent appeared in Court as scheduled, however the Court was on hearing of special backlog clearance sessions and hence the Ruling was reserved for 18<sup>th</sup> March 2024.

Both sides complied with the given schedules and duly filed their written submissions in respect of the Preliminary Objections. Briefly, the 1<sup>st</sup> Respondent, through Ms. Lilian Mirumbe, Learned State Attorney, argued that in Commercial Case No.67 of 2022 there were 3 Defendants namely the 2 Respondents herein and the Cashew Nuts Board of Tanzania. The learned counsel for the 1<sup>st</sup> Applicant submitted that there is a legal requirement to maintain the names of the original parties in a suit in subsequent proceedings. She referred the court to the cases of **CRDB PLC Ltd vs George Mathew Kilindu** (Civil Appeal No.110 of 2017 decided by the Court of Appeal of Tanzania at Dar es Salaam in 2020. Also she referred the court to the case of **Attorney General versus Maalim Kadau and 16 Others** (1997) TLR 69. She called upon the court to dismiss the application with costs.

Mr. Stephen Lekey, Learned Advocate for the 2<sup>nd</sup> Respondent submitted that upon the Applicant filing the Notice of Appeal in the Court of Appeal of Tanzania, this Court ceased to have jurisdiction to entertain the present application and that this kind of an application ought to have been filed in the Court of Appeal of Tanzania. Mr. Lekey relied on the cases of **Aero Helicopter (T) LTD versus F. N. Jansen** (1990) TLR 142; **Serenity**

**on the Lake Ltd versus Dorcas Martin Nyanda** (Civil Revision No.1 of 2019) TZCA 65. He submitted that the lodging of Notice of Appeal in the Court of Appeal commences proceedings in that court and therefore the High Court ceases to have jurisdiction over the matter. Mr. Lekey concluded that service of Notice of Appeal is regulated by Rule 84(1) of the Court of Appeal Rules, 2009 as amended and extension of time thereof is sought under Rule 10. He argued that section 14 (1) of the Law of Limitation Act caters for situation where the applicant seeks an extension of time to file an appeal or application and not to serve a notice of appeal. He prayed for the application at hand to be struck out with costs.

Mr. Malick Hamza, learned advocate filed reply submissions in response to the 2<sup>nd</sup> Respondent's submissions only. In his submissions Mr. Hamza was bold enough to outrightly concede to the preliminary objection raised by the 2<sup>nd</sup> Respondent. Mr. Hamza submitted that he concedes that the court has no jurisdiction to hear and determine this application but that his concession is based on different grounds apart from those advanced by the 2<sup>nd</sup> Respondent's counsel. He submitted that Rule 10 of the Court of Appeal Rules (GN. No. 368 of 2009) read together with Rule 84 (1) thereof shows

that upon good cause the Court of Appeal may extend time limited by the Rules or by decision of the High Court or Tribunal.

Mr. Malick Hamza, Learned Advocate for the Applicant prayed that the application should be struck out but without an order as to costs because the preliminary objections which were raised were not precise; that the Applicant readily conceded to the preliminary objections and helped the court by providing the correct Rule of the Court of Appeal Rules under the circumstances. It is on record that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not file rejoinder submissions.

The determination of the present application is straight forward. The learned counsel for the Applicant has conceded to the two preliminary objections raised by the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Although Mr. Hamza did not submit anything in response to the 1<sup>st</sup> Respondent's preliminary objection and submissions thereof, I take it that he has conceded to it too. I find the concession by Mr. Hamza to be fair and reasonable in the circumstances as both preliminary points of objection would have merits.

Mr. Lekey learned advocate for the 2<sup>nd</sup> Respondent and Mr. Hamza learned Advocate for the Applicant have prayed that the present application to be

struck out whereas Ms. Mirumbe learned State Attorney has prayed that the same be dismissed. On my part as I find that this Court has no jurisdiction to entertain the application at hand, the remedy is to dismiss it. Striking it out would entail the possibility of a similar application being filed by the Applicant in this court in the future whereas this court does not have jurisdiction to entertain the application in terms of Rule 10 of the Court of Appeal Rules (GN. No. 368 of 2009). The law in this aspect is long settled as it can be seen in the case of **Matsushita Electric Co. (E. A.) Limited versus Charles George t/a C. G. Traders**, Civil Application No. 71 of 2001 decided by the Court of appeal of Tanzania, at Dar es Salaam. The Court of Appeal held at page 4 of the Ruling that:

***"I am of the considered opinion that once a notice of appeal is filed under Rule 76, then this Court is seized of the matter in exclusion of the High Court except for applications specifically provided for, such as leave to appeal, provision of a certificate of point of law or execution where there is no order of stay of execution from this court".***

Therefore, in the present case, the position is that since a Notice of Appeal has been lodged by the Applicant in respect of the Commercial Case No.

67/2022, this court has no jurisdiction to entertain an application for extension of time for the applicant to serve the respondents with copies of the Notice of appeal. Rule 10 vests that power to the Court of Appeal of Tanzania. Section 14(1) of the Law of Limitation Act, relied upon by the Applicant does not apply to proceedings in the Court of Appeal nor to any proceedings in this court which are incidental to an impending matter in the Court of Appeal.

Mr. Malick Hamza learned advocate for the Applicant has prayed that the application be struck out without an order as to costs. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not filed rejoinder submissions to oppose this prayer and the arguments in its support. But in their submissions in chief they had asked for costs. Costs are granted at the discretion of the court. I would like to make reference to the decision of this court in the case of **Oryx Energies Tanzania Limited (formerly known as Oryx Oil Company Limited and Oryx Energies SA Versus Oil com Tanzania Limited, Misc. Commercial Cause No.72 Of 2023** (High Court, Commercial Division, at Dar Es Salaam) where this court held:

***"I am inclined to make recognition of the fact that by conceding to the first point of preliminary***



***objection, the Petitioners' counsel have shown great diligence and have saved precious time of this court which would otherwise be utilized to hear the arguments for and against the petition, and composing ruling thereon. Although that does not entirely exonerate the Petitioners from liability to pay costs, it should surely not go unrecognized and unappreciated and hence in my view it helps in reducing the extent of costs payable by the petitioners. I hold that the Petitioners should pay the Respondent one half of the costs of petition incurred by the Respondent as it shall be taxed by the taxing master".***

In the present case, I follow suit and maintain consistence by ordering the applicant to pay half of the costs of this application to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. I have some reasons to arrive at this conclusion and not to completely exonerate the Applicant from liability to pay costs. Contrary to what Mr. Hamza, learned advocate, has submitted, the Applicant did not readily concede to the preliminary objection in the present case. Upon being served with the preliminary objections, the matter was set for hearing whereby both sides had to engage in research and drafting exercise. The Applicant could have saved that precious time by conceding

to the preliminary objections even before hearing by way of written submissions were ordered by the Court. Learned counsel for 1<sup>st</sup> and 2<sup>nd</sup> Respondents therefore had to embark on research and writing exercise which inevitably consumed their vital energy and time. Equally, the court had to go through the submissions and prepare a Ruling. It should be remembered that after the preliminary objections were raised, the case was adjourned in at least three different occasions from December 2023 to March 2024, the Applicant could have saved the precious time of the fellow counsel and the court by making his concession at the very early moments when the matter was called before the court. Also the legal provisions which the Applicant's counsel contends to have unveiled to the Court which oust jurisdiction of this court are known the 2<sup>nd</sup> respondent's counsel who also raised them in his submissions. However, the fact that the applicant has conceded to the preliminary objections in his reply submissions, thereby saving his fellow counsel the trouble and effort to prepare rejoinder submissions, should not go un-noticed. I therefore apportion the costs to 50-50 ratio between the Applicant and the Respondents herein.

In fine, I uphold the preliminary objections raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. I hereby dismiss the application with half costs. The Applicant is liable to pay the Respondents half of the costs of the application incurred by the Respondents – an amount which shall be taxed by the Taxing Officer.

It is so ordered.



A handwritten signature in black ink, appearing to read "A. H. Gonzi", written over a horizontal line.

**A. H. GONZI**

**JUDGE**

**18/03/2024**

Ruling is delivered in Court this 18<sup>th</sup> day of March 2024 in the presence of Mr. Malick Hamza, learned advocate for the Applicant, Ms. Lilian Mirumbe learned State Attorney for the 1<sup>st</sup> Respondent and Mr. Stephen Lekey, learned advocate for the 2<sup>nd</sup> Respondent.



A handwritten signature in black ink, appearing to read "A. H. Gonzi", written over a horizontal line.

**A. H. GONZI**

**JUDGE**

**18/03/2024**