IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 41 OF 2011

PETROAFRICA (T) LIMITED.....PLAINTIFF

VERSUS

MARINE SERVICES COMPANY LIMITED.....DEFENDANT

RULING

BUKUKU, J.

On 12th day of May, 2011, the plaintiff filed a suit against the defendant praying for judgment and decree in its favour as follows:

(a) Payment of T.shs. 605,018,285.00 being principal sum.

(b) Payment of T.shs. 68,417,234.22 being interest at the rate of 18% per annum.

(c) Interest on (a) and (b) being interest at the rate of 18% per annum from date of filing to date of judgment.

(d) Interest on (a) and (b) at the Court rate of 12% per annum from the date of judgment to the date of payment in full.

(e) General damages.

(f) Costs of the suit.

(g) Any other reliefs deemed fit by the Court to grant.

The defendant has filed a written statement of defence but has raised two preliminary objections namely:

(i) That, the plaintiff has not sought and obtained leave of the High Court to sue the defendant company, a specified body in violation of section 9 of the Bankruptcy Act, (Cap 25) and section 43 of the Public Corporations Act, 1993 (as amended).

(ii) That, the suit is bad for non joinder of parties.

They are presented by Mr. Kilenzi, Advocate for the defendant, while Mr. Kobus, Advocate, represents the plaintiff. The preliminary objection was argued orally.

Submitting in support of the preliminary objection, Mr. Kilenzi submitted that, since 1997, Marine Services Company Limited is a specified company under section 43 of the Public Corporations Act, No. 16 of 1993. He argued that, once specified, the Consolidated Holding Corporation (Successor to the Presidential Parastatal Sector Reform Commission- "PSRC") becomes the official receiver of the specified corporation. Therefore, the provisions of section 9 of the Bankruptcy Act (Cap 25) applies for which, leave of the High Court is required before suing the defendant. It is his submission that, since the plaintiff commenced the suit on 24 May, 2011, without the pre requisite leave under section 9 of the Bankruptcy Act, and considering that this being the requirement of the law, then, this is a proper matter for objection before this Court.

Cementing his argument, Mr. Kilenzi submitted that, the issue to obtain leave to sue a specified public corporation has been decided by the Court of Appeal of Tanzania in several cases. One of the celebrated case is **Mathias Eusebia Soka V. Registered Trustees of Mama**

Clementina Foundation & others, Civil Appeal No. 40 of 2001 (Court of Appeal at Arusha). In this case The National Insurance Corporation who was the third respondent, was joined as a party to the suit while it had already been declared a specified corporation and as such, leave of the High Court was required under section 9 of the Ordinance. The Court of Appeal held that, since there was no leave to sue, then it was unlawful and the case was dismissed.

For whatever reasons, Mr. Kilenzi, Counsel for the defendant, did not make any submission regarding the second point.

In as far as the third point is concerned, Mr. Kilenzi submitted that, the plaintiff is stopped from denying his condonation for late payment on the ground of utilizing the defendants' storage facilities. The credit facility being 400.0 million, there was a consensus to exceed the ceiling and this was practiced for over ten months and therefore plaintiff cannot be heard to complain about the late payment. He had condoned the practice. It is in respect of the arguments and the authorities stated that Mr. Kilenzi considers this case fit for dismissal. He therefore prayed that it be dismissed with costs.

Mr. Kobus forcefully controverts defendant's submissions. To start with, he submitted that, the cause of action which gave rise to the suit before this Court emanates from a contract for the supply of gas oil. The contract was entered into by the parties on 23rd April, 2010. The contract had been entered long after the defendant had been specified. In that regard, he argued, the plaintiff is not a creditor in the preview of section 9 of the Bankruptcy Act, Cap 25. Submitting further, he said that, according to section 9 of the Bankruptcy Act, Cap 25, a creditor who should seek leave to sue a specified company is the one whose debt is proven in bankruptcy. In the case at hand the claim or debt is not the one

provable in bankruptcy and therefore no leave to sue the specified public corporation is required.

Arguing further, Mr. Kobus cited section 35 of the Bankruptcy Act and averred that this section, and more so, section 35(3), describes what amounts to a debt proven in bankruptcy. He emphasized that, all debts which are in existence at the time of making a receiving order, and those debts contracted before the receiving order but arising before the discharging of the receiving order, are debts provable in bankruptcy. He further argued that, in the case at hand, the contract which gave rise to the suit was entered on 23rd April, 2010. So, the debt did not exist at the time of making the receiving order and therefore, does not amount to a debt to be proved in bankruptcy, for which a creditor should seek leave to sue.

In support of his arguments he referred to the decision of this Court in **Commercial Case No. 105 of 2002 M/S Sanyou Service Station Limited V. BP (T) Limited.** In that case, Kalegeya, J. (as he then was) was faced with a similar situation in which a preliminary objection was raised as to the requirement to sue a public corporation, for a cause of action that has arisen after specification. His Lordship held that, not any action against a specified public corporation requires leave of the Court before it is instituted. He then went ahead and dismissed the preliminary objection. In another case, **Miscellaneous Application No. 18 of 2009, High Court, Land Division,** Madam Judge Moshi, while relying in the case of **Sanyou** (Supra) in an application for leave to sue a specified public Corporation, held that, leave to sue was not mandatory because the debt did not exist before specification. On the strength of these two decisions, Mr. Kobus called upon this Court to dismiss the first point of preliminary objection with costs for want of merit.

Arguing the second point that the suit is bad in law for non joinder of parties, Mr. Kobus submitted that, Order 1 Rule 13 of the CPC

provides for the manner in which an objection as to joinder or non joinder of parties should be taken to Court. The objection should be taken at the earliest stage of the procedures, otherwise it will be deemed waived. He further submitted that, joinder or non joinder of the defendant in this case Consolidated Holding Corporation is not fatal to the proceedings. Under Order 1 Rule IX of the CPC, no suit shall be defeated by joinder or non joinder of parties. In his opinion, it is the duty of this Court if it finds it necessary that a certain party should be joined in a suit as co defendant or co plaintiff as the case may be, order that particular person be joined and not otherwise. He further submits that, in this case at hand if the Court finds that it is imperative to join Consolidated Holding Corporation the receiver manager, then it may order that they be joined and pleadings be amended accordingly. To fortify his argument, he made reference to the decision of the Court of Appeal in the case of **Nuru Hussein V. Abdulghani Ismael Hussein 2000 TLR No.17,** where it was held that, where there is a non joinder in administrative suits the Court ought to proceed in terms of Order 1 Rule 10 of the CPC by asking the parties to amend the pleadings and join the interested parties. On the strength of the said submission and authority cited, Mr. Kobus requested the second point of objection be dismissed with costs for want of merit.

For the third and last point of objection, Mr. Kobus said that, the said point does not amount to a preliminary objection in that, the doctrine of estoppel by itself is a defence and cannot amount to a point in law which should be addressed without requiring parties to adduce evidence. He submitted further that, the submission made by the defendant with regard to allowing excess credits, requires evidence to be adduced and therefore does not amount to a preliminary objection as was stated in the case of **Mukisa Biscuits V. West End Distributors EALR 1969.** He therefore prayed this point to be dismissed with costs.

Learned Advocate for defendant made a short rejoinder. Distinguishing the case which plaintiff's Counsel cited, he submitted that, in the case of **M/S Sanyou Service Station Limited V. BP (T) Limited, (supra)** the said judgment was made in 2002 after the decision of the Court of Appeal of Tanzania was made, and therefore, it was made per incurium and since the decision of the Court of Appeal is binding it therefore supersedes decisions of this Court. In the other case of **Nuru Hussein (supra),** Counsel submitted that, that case related to administration of estate, whereas, the case at hand is a commercial case and so, it is irrelevant here. Mr. Kilenzi therefore prayed the Court to ignore the two cases relied upon by the plaintiff and thus the preliminary objection be withheld by the Court and the case be dismissed with costs.

I will start with the first preliminary point. It is not disputed that, the defendant Company was specified way back in 1997 and placed under the then Presidential Parastatal Sector Reform Commission (PSRC), (now Consolidated Holding Corporation-CHC).The crucial question to be asked here seems to be: what are the effects of placing the defendant company under the then PSRC. I think, relevant to this question is section 43(1) (a) and (b) of the Public Corporations (Amendment) Act, 1993 No. 16 of 1993. That provision of the law provides:

> *"43-(1) Notwithstanding any other law to the contrary, with effect from the effective date of publication of an Order declaring a public corporation to be a specified public corporation the Commission shall-*
>
> *(a) without further assurance on appointment have the power to act as the official receiver of the specified public corporation; and (emphasis mine)*

(b) *have the power and all rights of* a receiver *appointed in accordance with or pursuant to the Bankruptcy Ordinance.....".(emphasis mine).*

On a careful reading of this section, I am satisfied that, upon a public corporation being designated a specified public corporation, PSRC becomes an automatic official receiver of such corporation. This section has created a special official receiver in the form of PSRC under which all properties of specified public corporations are placed, and in terms of section 9 of the bankruptcy Ordinance Chapter 25, PSRC has been mandated to save the specified corporations from being proceeded against by creditors, and from the barrage against actions by such creditors that they cannot file an action without leave of the Court. It must be remembered that, the Amendments of Act No.16 of 1993 which created PSRC were geared at restructuring public corporations in which the Government controlled majority shares. It is therefore the Government which had an interest in the specified corporations and thus the need to have PSRC as receiver, in order to protect the specified corporations prior to restructuring them. Defined in the Blacks' Law Dictionary Ninth Edition, at page 1383, a receiver is:

> "a disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims (for example because it belongs to a bankrupt or is otherwise being litigated)....."

What the above exposition leads to is that, a receiver can be appointed even for ventures not under liquidation nor expected to be liquidated, the controlling purpose for such appointment being the collection or preservation of the relevant property for the benefits of the persons who have an interest in it. It is under this principle that PSRC was

given the powers of an official receiver in order to protect all properties and assets of specified corporations so designated. Not only that, Act. No. 16 cradled PSRC with much wider powers of that of a Court appointed receiver. This is evident under section 43 1(b) of the Public Corporations (Amendment) Act, 1993 No. 16 of 1993, by giving PSRC powers and all rights of a receiver appointed in accordance with or pursuant to the Bankruptcy Ordinance. An official receiver under the bankruptcy Ordinance has indeed wide powers all geared at the protection and preservation of both the debtor and the creditor's interest such as to ensure the that the properties of the debtor are not wasted or alienated to the detriment of the creditors etc. Of interest in this case is Section 9 (1) of the Bankruptcy Act, Cap 25, which reads:

> *" On the making of a receiving order the official receiver shall be thereby be constituted receiver of the property of the debtor, and thereafter, except as directed by this Ordinance, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt,* ***shall commence any action or other legal proceedings, unless with the leave of the Court*** *and on such terms as the Court may impose" (emphasis mine).*

My understanding of this section is that, by placing a specified company under PSRC as a receiver, it does not mean that the business of such company is dissolved or taken away by the receiver, rather the receiver supports the company in the conduct of the business and most important, this section is trying to protect the company by controlling creditors who would, if not properly controlled overwhelm the resources of the specified company by uncontrollably filing various suits against it and thus ending up stripping the specified company to the detriment of the good intentions of the legislature of protecting its assets. As already stated,

it was the intention of the legislature to ensure smooth restructuring of public corporations which the Government owned majority of its shares, in the wake of privatization and therefore there was a need for giving protection to these specified public corporations against debts and liabilities that may hinder the whole restructuring exercise. The whole idea is to protect the specified company, and/or to disable its creditors of the company to commence any legal proceedings against its properties, unless permission is given by the Court in accordance with section 9(1) of the Bankruptcy Act, Cap 25, and in terms of section 11(1) of the same Act, to make all legal proceedings against the properties of the company come to a rest unless their continuance is sanctioned by the Court.

The specified public corporation can continue to own property and that, its creditors or any debts provable in bankruptcy can, with the leave of the Court, proceed against such debts. My understanding of, section 43(1) of the Act read together with section 9(1) of Chapter 25 is that, these provisions do not prevent a specified corporation from suing or being sued in its own name. It would appear that, the only limitation imposed by these two provisions of the law in respect of debtors is the need for a court's leave prior to commencing legal proceedings. And that will be relevant only for debtors whose debts are provable in bankruptcy. While still on this point, I should respond to Mr. Kobus, Counsel for the plaintiff's contention that, the contract that gave rise to the suit was entered on 23rd April, 2010 and that this debt did not exist at the time of making the receiving order and therefore, to him, it does not amount to a debt provable in bankruptcy for which a creditor should seek leave to sue.

With all due respect to Counsel for the plaintiff, while possibly desirable, I fail to understand how the Learned Counsel missed the point that, according to section 43(1)(a)and (b) of the Public Corporations Act, 1993, PSRC was appointed both as an out of Court receiver and also has the capacity as a Court appointed receiver. These should go together.

An official receiver under the Bankruptcy Ordinance is so considered for a particular matter after the court has issued a receiving order for the protection of the estate or upon presentation of bankruptcy petition by either the creditor or the debtor. In other words, the receiving order would specifically mention who the official receiver is. However, this situation is not applicable in this case at hand because, PSRC, this special receiver, is not the creature of the court and in any case, Marine Services Company is not under bankruptcy, and therefore one can easily say that, there was no receiving order. That notwithstanding, Section 43(1) of the Act read with section 9(1) of Cap 25, confers the PSRC all the powers and rights of a receiver appointed in accordance with or pursuant to the Bankruptcy Ordinance. It is therefore under these provisions that, a specified company gets shelter and protection. One should not read section 9(1) if the Ordinance in isolation. It is for these reasons that, the issue that the debt arose after the receiving orders does not find purchase in this case.

For the foregoing reasons, I agree with Mr. Kilenzi that, this is a proper matter for preliminary objection. One has to obtain leave of the court prior to instituting a suit against a specified company. This is the legal position as stated by the highest court of the land and I see no reason whatsoever, to upset this position. Upholding the requirement for leave to be obtained first before a specified public corporation can be sued, this Court had this to say in a short ruling that was delivered by the Hon. Msumi, J.K (as he then was) in the case of **Shaduliy Khan Hospital V. Tanzania Tea Blenders, Civil case No. 292 of 1997:**

> *"Once a public Corporation is specified, its property is vested in the Presidential Parastatal Sector Reform Commission whose powers and rights over the property is like that of the official receiver appointed under the Bankruptcy Ordinance. Section 9(1) of the Ordinance prohibits any Court proceedings against such property vested in the Commission. This stand of the land*

(sic) has been propagated by this Court in a number of cases such as ***Civil Appeal No. 45 of 1997 Employees of Kilimanjaro Hotel V. Kilimanjaro Hotels Ltd".***

Admittedly, this decision is very clear. Once a public corporation has been declared a specified corporation, then the PSRC (now Consolidated Holding Corporation) automatically became its official receiver and the provisions of the Bankruptcy Act, Cap 25, are engaged. Functions of PSRC as official receiver have been amplified in various authorities including Kalegeya, J.A (in **Said Mnimbo & others V. State Travel Services Ltd. Civil Case No. 296 of 1997** (DSM Registry), **Ali Haji Damdusti V. B.P (T) Ltd. & BP Import and Export Co. LTD Civil Case No. 53 of 1999** (DSM Registry), Shangwa, J (in **Mukubaganyi V. Tanzania Railways Corporation Civil case No. 300 of 1995** (High Court)(unreported), Kisanga, J.A (in **Minister of Labour &UDA V. Gasper Swai & others, CA Civil Reference No. 3 of 1999-unreported)** and many others.

In view of what I have demonstrated and as correctly submitted by the defendant with regard to the first point of preliminary objection, to the extent the suit was filed against a specified public company, the plaintiff must first obtain leave of this Honorable Court. No leave was obtained. The suit cannot be entertained by this Court due to plaintiff's failure to follow the prescribed procedure under section 9(1) of Chapter 25 of the Law of Tanzania.

With the above findings, it would be a mere academic exercise to go into other arguments since this point alone, disposes the matter. I need not indulge myself into examining the remaining points of objection. I am therefore satisfied that I may safely end here.

For this reason, the preliminary point of objection is upheld. The suit is hereby struck out and plaintiff is condemned in costs.

It is accordingly ordered.

A. E. BUKUKU

JUDGE

25th October, 2011

Ruling delivered this 25th day of October, 2011 before Mr. Matunda, Learned Counsel for the Plaintiff and Mr. Mahyenga, Learned Counsel for the defendant.

A.E. BUKUKU

JUDGE

25th October, 2011

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