IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 527 OF 2015
(Arising from Civil Case No. 60 of 2014)

STANDARD CHARTERED BANK
(HONG KONG) LTD. ..... 1ST APPLICANT
MARTHA KAVENI RENJU ..... 2ND APPLICANT

Versus

INDEPENDENT POWER TANZANIA LIMITED ..... 1ST RESPONDENT
PAN AFRICA POWER SOLUTIONS LIMITED ..... 2ND RESPONDENT

Date of submissions: 23/10/2015
Date of Ruling: 18/12/2015

R U L I N G

F. Twaib, J:

This ruling is in respect of an application filed by Mr. Gasper Nyika, learned advocate of IMMMA Advocates, on behalf of the applicants, primarily for an order of stay of proceedings in Civil Case No. 60 of 2014 (hereinafter "Case No. 60 of 2014" or "the main case") until Civil Case No. 229 of 2013

(hereinafter "Case No. 229 of 2013") is finally determined. The affidavit of Martha Kaveni Renju, the 2nd applicant, accompanies the application.

The respondents have resisted the application. They have filed two counter affidavits, affirmed by one Parthban Chandrasakaran, director of the 1st respondent company, and one Manraj Singh Bharya, director of the 2nd respondent company. While the applicants have enjoyed the services of Mr. Nyika and at some earlier stages by Mr. Charles Morrison, the respondents have been represented by Mr. Joseph Makandege, Mr. Melchisedeck Lutema and Mr. Sungwa, learned advocates.

Apart from contesting the merits of the application, the respondents have also raised five points of preliminary objection. However, at the hearing of the application, their counsel abandoned one of the points and only argued the remaining four points. For convenience, I will discuss them in the following order:

1. The application is bad in law for want of *locus standi* on the part of the 2nd applicant to execute, file and depone an affidavit of the 1st applicant.

2. The application contravenes the mandatory provisions of paragraph 21 of Part III of the Schedule to the Law of Limitation Act. It is thus time-barred.

3. The application is legally untenable for offending the mandatory provisions of 8 section of the CPC.

4. The application is incompetent for non-joinder of the 3rd respondent in Civil Case No. 60 of 2014.

Arguing the first point that challenges Ms Renju's *locus standi*, Mr. Makendege submitted that it was wrong for her to swear the affidavit in support of the application and the reply affidavit on behalf of the 1st applicant and as Administrative Receiver of IPTL. Counsel's reasons are that Ms Renju's status as an Administrative Receiver of IPTL is contested in this case, and there is an order of the Court restraining her from interfering with the management of IPTL pending the determination of this case.

Hence, her statement that she is such Administrative Receiver is contemptuous of the court order, counsel argued, and allowing her to do that would be to condone an abuse of the court and legal process. For this contention, Mr. Makandege relied upon the case of *The Village Chairman K.C.U. Mateka v Anthony Hyera* [1988] TLR 188. I have read this case and, with due respect to learned counsel, it is no authority for the proposition he is putting forward. Indeed, that issue formed no part at all of the court's decision in the case.

Mr. Nyika's answer to the issue of *locus standi* was that Ms. Renju's status as Administrative Receiver of IPTL and whether or not she is in contempt of court do not qualify as preliminary points of law. I accept this contention as correct. These are contested issues in the main case, which will certainly require evidence: See *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.* [1969] EA 696, which is further discussed below. For that reason, I would dismiss the third point of objection for want of merit.

I will now move to determine the point on limitation. Mr. Lutema argued it on behalf of the respondents, and expressed the view that this application is time-barred. The application was filed on 3rd September 2015, while the case was filed one year and four months before. The applicants became aware of the institution of the case on 15th July 2014 at the latest, contended Mr. Lutema. Hence, being an application, it falls within the provisions of paragraph 21 of Part III of the Schedule to the Law of Limitation Act, which puts the limitation period at sixty days.

Mr. Nyika's response is that section 8 imposes a duty on the court not to exercise its jurisdiction whenever it is satisfied that the case pending before it was filed later than the other case, and that it falls within the rule as to *res sub judice*. That duty has no limit, he argued, and thus cannot be taken away by lapse of time. If I got him correctly, counsel seems to argue that where an application is made to the court, it also serves as a reminder to the court that it has a duty to stay proceedings due to the pendency of the other case.

Furthermore, Mr. Nyika opines that the effect of section 8 is to suspend the court's jurisdiction pending determination of the case earlier filed. He cited *Bagamoyo District Council v A.S. Noremco Construction & Anor*, Civil Appeal No. 106 of 2008 (unreported), where it was held that where there is a point of law touching upon the court's jurisdiction, it can be raised at any time, and cannot be affected by limitation of time. He concluded, therefore, that section 3 and paragraph 21 of Part III of the Law of Limitation Act does not apply in circumstances of this case.

In rejoinder, Mr. Lutema agreed that where the issue is a point of law touching on the court's jurisdiction, rules of limitation do not apply.

However, he reasoned, *res sub judice* is not a point of law that can be raised at any stage of the proceedings. It is, in his view, a point of fact that the law has permitted to be raised by way of an application, while points of law are raised by way of preliminary objections, not applications. He further submitted that the Law of Limitation Act provides for a sixty-day limit for all applications not elsewhere provided for, and has no categories of applications. The applicants should have applied for extension of time under section 14 of the Law of Limitation Act before filing their application, he concluded.

Mr. Makandege lent support to Mr. Lutema's submissions, saying that even if *res sub judice* were a matter of law, it cannot be invoked to defeat the Law of Limitation Act. The right afforded by section 8 of the CPC, where applicable, has to be pursued within the law, including the law of limitation. He added that what is before the court is not a suit, by which counsel probably wants to remind the court that this is an application, in which case the law of limitation would apply.

Is *res judicata* an issue of law? Is it the court's duty to observe the rule in section 8, or does the section only create a right that can be exercised by a party to a case who would apply to the court to have the proceedings stayed? I find with Mr. Nyika's argument, which would answer the first question in the affirmative, quite attractive. However, it does not appear to enjoy the express support of Mulla *(supra),* despite the obvious restriction that section 8 imposes upon the Court *not to try* such a case, which might be taken to mean, as Mr. Nyika says, that the court's jurisdiction is suspended whenever the situation arises.

Mulla has, in my view, been accorded perhaps the greatest respect that any author of civil procedure has enjoyed in this country. And, in a sense, I am inclined to agree with his opinion that tends to show that the section does not come into play automatically by suspending a subsequent suit once it is found that there is a previously instituted suit before a court of competent jurisdiction falling within section 8. I have reached this position upon considering three principles that Mulla asserts in regard to section 10 of the Indian Code of Civil Procedure, a statute in *pari materia* with our section 8 of the CPC. In the 18th edition of his treatise (2011), the learned author writes:

1. *(At p. 161): [section 10] enacts a rule of procedure and a decree passed in contravention of it is not a nullity and cannot be disregarded in execution proceedings [citing Sheopat Ravi v Warak Chand (1919) A.L 294]. It can be waived, although the section is so worded as not to leave any discretion in the court where its conditions are satisfied [citing Shanti Swaroop v Abdul Rehman, 1965 A.M.P. 55, 59.*

2. *(At p. 164): Though the heading of this section is "stay of suit", it does not operate as a bar to the institution of the subsequent suit that is not to be proceeded with [citing Maharastra State Corp. Mktg. Federation Ltd. v Indian Bank AIR 1997 Bom 189].*

3. *(At pp. 165 and 172): [Section 10] enacts merely a rule of procedure and a decree therefore passed in contravention of it is not a nullity [citing Sheopat Ravi, supra].*

However, Mulla, again, provides a conclusion on what a court should do where the circumstances for the section's application are in place. He says:

> *(At p. 161): Since however the provisions of the section are mandatory the court before which the subsequent suit is pending ought to stay it where all the conditions laid down in the section exist. [Mulla contrasts this position with the case of Sequeria v P. Francisco 1976 A Goa 48]*

Given the obligatory character of this statement, Mulla would, I think, place a duty on the court to stay proceedings of the subsequent suit in such situations—which would then offer credence to Mr. Nyika's view. However, with all due respect to the highly authoritative author Mulla, his statement last quoted appears rather contradictory when viewed in light of the case law positions he has himself identified.

Unfortunately, my efforts to find an answer to the specific problem posed by this issue (i.e., whether the law of limitation applies to an application under section 8 so as to render the present application time-barred) have been fruitless. Mulla apparently does not discuss it. Neither case law nor any of the other learned writings that I have been able to lay my hands on, have been of help in resolving this particular question.

Moreover, it seems to me that there is no difference of language between section 8 and section 9 of the CPC (on *res sub judice and res judicata*). I think that the common negative phrase "No Court shall" is significant. It contains an obvious prohibition. Hence, it would appear that the letter and spirit of the two doctrines is similar, if not identical. Both doctrines are prohibitive.

Furthermore, I am inspired by the decision of the Supreme Court of India in *Aspi Jal & Anr* v. *Khushroo Rustom Dadyburjor*, S.C. Civil Appeal No. 2908 of 2013, where it was held that:

> *The use of negative expression in Section 10, i.e. "no court shall proceed with the trial of any suit" makes the provision mandatory and the Court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied*.

I would thus hold that *res sub judice* is a mandatory rule and that a plea by a party for its invocation is not subject to the law of limitation, even though, as we have seen, a suit tried and determined without taking cognizance of a previously instituted suit pending in a court of competent jurisdiction may not necessarily be null and void.

Hence, I hold the settled view, based on what I consider the proper interpretation of section 8 of the CPC, that once the court is satisfied that there is a pending suit in a court of competent jurisdiction in Tanzania where the matters in issue are directly and substantially in issue in both suits, between the same parties, or between parties under whom they claim litigating under the same title, the court handling the subsequently instituted suit has the duty of staying the same pending determination of the earlier instituted suit.

With this finding, I would dismiss the second point of preliminary objection. The third point of preliminary objection has also brought up an argument as to whether it is a point of preliminary objection or simply one of fact.

While Mr. Makandege believes that this is a point of preliminary significance and does not need any consideration of evidence except undisputed evidence from the pleadings, Mr. Nyika thinks the issue is one of evidence which, on the authority of *Mukisa Biscuit Manufacturing Co. Ltd. (supra)*, cannot be decided purely on point of law.

The rule in *Mukisa Biscuits* was stated by Law, J.A. and Sir Charles Newbold, P. (at page 700). Law J.A. states:

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."*

Sir Newbold put it this way (at p. 701):

> *"A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

My understanding of the above statements is that the principle in *Mukisa Biscuits* did not rule out a consideration on the facts. Indeed, in my respectful view, a preliminary objection must be based facts, but facts that are not disputed by the party against whom the objection is raised. This is what Newbold, P. meant when he said a preliminary objection "*…raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.*"

Mr. Nyika did not say what matters argued by Mr. Makandege touched on evidence in the sense of disputed facts. Fortunately, however, in their submissions, learned counsel on both sides argued not only the preliminary points, but also the merits of the application. It is thus not necessary, in determining this issue, for this point to be determined as a preliminary point. Indeed, as is clear from the submissions of counsel, while arguing the preliminary point, they have gone further and argued the merits of the application. I would thus not attempt to answer the question as to whether this is a preliminary point. I will deal with it as an issue of merit since, either way, if the answer is that the parties are not the same or litigating under the same title, the application cannot succeed.

The parties are at one on the four conditions that must exist before the court can properly invoke section 8 of the CPC and obtain an order of stay. The court must be satisfied that:

1. There are two pending cases , one filed earlier than the other in point of time;

2. The two cases must involve the same parties or parties litigating under the same title;

3. The matter in issue must be directly and substantially in issue in both cases;

4. The two cases must be pending in courts of competent jurisdiction.

It is common ground that the first and fourth conditions are fulfilled in the present case: There are two cases pending, one filed earlier than the other, and that they are both in this court, which court is of competent jurisdiction. Hence, only two main issues need to be decided:

1. Whether the two cases involve the same parties or parties litigating under the same title; and

2. Whether the matter directly and substantially in issue in Case No. 229 of 2013 is also directly and substantially in issue in Case No. 60 of 2014.

The bottom line of Mr. Makandege's submission on this point is that the parties in the two cases are not the same, and neither do they litigate under the same title. Arguing the point before me, Mr. Makandege submitted that the application referred to section 8 of the Civil Procedure Code ("the CPC"), as the respondents maintain. The application itself has been brought under that section, which provides:

> *No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed.*

Further submitting, Mr. Makandege contended that the plaint in Civil Case No. 229 of 2013 (annexure "GN1" to the affidavit of Ms Renju) shows that the parties to the case are VIP Engineering & Marketing Co. Ltd. (as

plaintiffs) and Standard Chartered Bank PLC, Standard Chartered Bank (Hong Kong) Ltd., Standard Chartered Bank (Tanzania) Ltd., the Joint Liquidators of Mechmar Corporation (Malaysia) Ltd., and Watsila Netherlands BV and Watsila (Tanzania) Ltd. (as defendants). In Civil Case No. 60 of 2014, the parties are: IPTL and PAP (as plaintiffs) and Standard Chartered (Hong Kong) Ltd., Martha Renju and Tanzania Electric Supply Co. Ltd. (as defendants).

On the face of it, therefore, the parties in the two cases are not the same. But the applicants aver, through Ms Renju's affidavit, that in Civil Case No. 229 of 2013, VIP Engineering is litigating under IPTL's title because it is suing on the strength of its Agreement for Sale and Purchase of Shares in IPTL entered into with PAP on 19th August 2013 ("the Share Transfer Agreement"), and a Power of Attorney, signed pursuant to sub-article 16 of article 1 of the Share Transfer Agreement.

Mr. Makandege disputes this conclusion. He narrowed down the relevant provisions of the Share Transfer Agreement to article 1 (16) thereof, which provides for VIP's "residual interests" in IPTL. It is upon these residual interests, and only to their extent, argues counsel, that VIP's right to sue on behalf of IPTL in Civil Case No. 229 of 2013 arose. Sub-article (16) describes the residual interest as:

> *The rights and interests that VIP claims against Mechmar as of the date of this agreement and VIP's claims against Standard Chartered Bank of not less than US Dollars 485 Million as of the date of this agreement.*

These residual interests, explained Mr. Makandege, were reserved by VIP at the time it sold its shares in IPTL to PAP. In order to enable VIP Engineering to exercise its right over the residual interests, it executed the Power of Attorney which is annexed to Ms Renju's reply affidavit. The Power of Attorney, argues Mr. Makandege, is not indefinite. Rather, it is a specific Power of Attorney for a specific purpose. It is limited, as is stated in article 1 (16) quoted above, to claims "as of the date of this agreement". Mr. Makandege further contended that in Civil Case No. 229 of 2013, VIP acts for its own benefit. To quote him:

> *The power is known in law as a power of attorney with interest terminate, empowering the donee to act not for the benefit of the donor, but for the donee's own interest, which would be defined in the power of attorney and on the basis of which such power is given.*

Those interests were not factored into the pricing of the shares, counsel contends, which is why the respondents maintain that in suing the applicants in Civil Case No. 229 of 2013, VIP Engineering is not acting for IPTL but for herself. That may well be the case, but I think this statement is too general. In any case, as Mr. Nyika submitted, what is important is that in the previous suit, VIP is suing on behalf of IPTL. How they share the spoils is up to them and the applicants have nothing to do with it. I agree with his view that it would be the same cause of action and indeed, as far as the claims the subject matter of the residual interests are concerned, whatever is decided in Civil Case No. 229 of 2013 would be *res judicata* for any claim that IPLT may wish to bring against the applicants, which is covered by the power of attorney.

Having so found, the only remaining question in regard to this issue is the one raised by Mr. Makandege's contention that VIP's authority to claim on behalf of IPTL under article 1 sub-article 16 is limited in terms of time to the period before the date of the Agreement for Sale and Purchase of Shares, which is 19th August 2013. In other words, whether the outcome in Civil Case No. 229 of 2013 can operate as *res judicata* in respect of claims after 19th August 2013 against the 1st applicant.

This finding has to be tested against the principle stated by Mulla in his *The Code of Civil Procedure* (cited to me by Mr. Makandege), when discussing section 10 of the Indian Civil Procedure Code. Hence, before concluding on the point, it is pertinent to move to the third condition for the application of section 8 of the CPC, namely, that the matter in issue must be directly and substantially in issue in both suits.

In the 18th edition of his authoritative book, Mulla states that the phrase "directly and substantially in issue" means that the whole subject matter in both proceedings must be substantially the same. The cause of action in both suits must be the same. On page 163, Mulla writes:

> *The fundamental test to attract section 10 is whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. That has operated as a rule in common law jurisdictions.*

In Mr. Makandege's view, the list of proposed issues in Civil Case No. 229 of 2013, once decided, cannot operate as *res judicata* in Civil Case No, 60 of 2014 because "the issues are different and so are the causes of action". Mr. Nyika, on the other hand, has further submitted that it is not necessary

that the issues be identical. It is enough that they are substantially the same. It is not the identity of all the issues in the case, but the identity of the main issue. That main issue, in both cases, is whether the 1st applicant is a creditor of IPTL. All the other issues depend on this "fundamental issue". He thus concludes that, in this case, for the court to find in favour of IPTL, it must make a finding that the 1st applicant is not a creditor of IPTL.

Mr. Nyika argues, however, that since they are merely proposed issues, they are not yet on record as issues to be decided by the court and in any case, what he sees as the "fundamental" issue in both case is whether the 1st applicant, Standard Chartered Bank (Hong Kong) Ltd. is a creditor of IPTL. I think Mr. Nyika is partly rightly in this regard. He is right in the sense that as proposed issues, the list relied upon by Mr. Makandege cannot on its own, be taken to represent the issues that the court will have to determine. He is also right in that looking at the pleadings in Civil Case No. 229 of 2013 the fundamental issue is whether IPTL is indebted to the 1st applicant.

Again, however, it seems to me that, considering the limited scope of the documents that give VIP Engineering the right to claim and on behalf of IPTL, namely the Agreement for Sale and Purchase of Shares and Power of Attorney, the court's decision on the issue will still be limited to the date of the Agreement and not beyond that date. It seems clear to me, therefore, that the right to sue beyond that date (which is the cut-off point in this case) cannot be exercised by VIP Engineering in Civil Case No. 229 of 2013. Tested against Mulla's principle, which I accept, as the distinguished author has himself said, as the rule in common law jurisdictions and would apply

in our jurisdiction as well, such decision cannot operate as *res judicata* in Civil Case No. 60 of 2013.

In discussing this point, Mulla asserts (at p. 169):

> *Section 10 contemplates substantial identity of matter in issue in the two suits. It is not the identity of main or all issues but the identity of matter in issue which is the determining test. The decision in one suit must un-suit the other. This must be the phraseology of answer, to win the question whether the matter in issue in the two suits is directly and substantially the same [citing Arjies Aluminium Udyog v Sudir Bhatra, AIR 1990 Del 139]*

In addition, one of the strongest points which mitigates against the application of *res judicata* in this matter is, I think, the one relating to the issue as to whether IPLT is indebted to the 1st applicant Standard Chartered Bank Hong Kong. The applicants maintain, correctly in my view, that that issue would arise in both suits. However, I would respectfully beg to differ with their conclusion that that question is also the fundamental matter at issue in both cases. As it has been argued on behalf of the respondents, it is not.

While the issue is a fundamental one with regard to Civil Case No. 229 of 2013, it is not so in Civil Case No. 60 of 2014. The fundamental issue in the latter suit concerns the validity of the decision of the International Centre for the Settlement of Investment Disputes (ICSID) between the 1st applicant and the second respondent titled "Decision on Jurisdiction and Liability" issued in ICSID Case No. ARB/10/20 and dispatched to the parties on 12th February 2014. That issue cannot be resolved in Civil Case No. 229

of 2013. It thus cannot be correct to say that a decision in Civil Case No. 229 of 2013 would necessarily operate as *res judicata* in respect of Civil Case No. 60 of 2014.

Hence, in concluding on this point, it is my settled view that the issue that is directly and substantially in issue in Civil Case No, 60 of 2014 is not directly and substantially in issue in Civil Case No. 229 of 2013. For that reason, therefore, the applicants cannot invoke section 8 of the CPC to ground an application for stay of proceedings that they are seeking from this court in the application before me.

Having so held in respect of the third point of preliminary objection, the fourth and last point is rendered purely hypothetical. It puts forward the argument that the application is incompetent for non-joinder of the 3rd defendant in Civil Case No. 60 of 2014. While this is a point of law which can be raised at this stage, its effect, given the finding just entered would be inconsequential. And, even if it was sustained, it would still be curable by amendment, as Mr. Nyika has rightly stated, under Order I rule 9 of the CPC. I thus see no need of wasting any more time or energy on it.

In the final result, therefore, I would dismiss the application for stay of proceedings in Civil Case No. 60 of 2014 for want of merit, with costs.

DATED at Dar es Salaam this 18th day of December, 2015.

F.A. Twaib
Judge