IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 230 OF 2015

(Arising from Commercial Case No. 131 of 2015)

PRIDE TANZANIA LIMITED ..... APPLICANT

VERSUS

MWANZANI KASATU KASAMIA ..... RESPONDENT

30th May & 30th June, 2016

RULING

MWAMBEGELE, J.:

This ruling is in respect of a preliminary objection raised against an application for extension of time within which to apply for stay of execution of the decree of the Resident Magistrates' Court of Kisutu, and upon grant of extension, to issue an order staying execution of the said decree. This application has been made under Order XXXIX Rule 5 (1), (3) and (4) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 as well as section 14 (1) of the Law of Limitation Act, Cap. 89 of the Revised Edition 2002. Along with the counter affidavit, the applicant was put to notice that on the first day fixed for hearing of the said application the respondent would raise a preliminary point of law on ground that:

1. The application is bad in law and incompetent for being not supported by a valid and appropriate affidavit contrary to Order XLIII Rule 1 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002; and

2. The application is bad in law and incompetent for being omnibus.

The applicant is represented by Mr. Gaspar Nyika, learned counsel whereas the respondent is represented by Mr. John Mhozya, learned counsel. In terms of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (the Rules) both counsel had filed their skeleton written arguments prior to the oral hearing of this preliminary objection on 30.05.2016.

The anchor of Mr. Mhozya's argument on the first point is that the chamber summons stated that the application is supported by an affidavit of Peter Andrew Songoma while the flanking affidavit is that of one Rehema Myamba. The learned counsel is of the view that the application lacks the necessary support. On the other hand Mr. Nyika concedes that the name mentioned in the chamber summons is different from the deponent's. the learned counsel is however of the view that that fact does not make the application lacking the necessary support. He states that the anomaly can easily be amended by cancelling the names of Peter Andrew Songoma appearing in the chamber summons and putting the names of Rehema Myamba in their stead without causing any injustice. He states that the respondent filed a counter-affidavit countering what has been deponed by Rehema Myamba.

On the second point, Mr. Mhozya learned counsel submits that the application is omnibus as it has contained two applications namely for extension of time to apply for stay of execution and an application for stay of execution. He maintains that the applicant should have first applied for extension of time

after which, if successful would apply for stay of execution. It is his contention that since the same have different yardsticks, then each of them should have been fled separately. To hammer home his submissions, he cited to me the case of ***Rutagatina C.L Vs the Advocate Committee & Clavery Mtindo Ngalapa***, Civil Application No. 98 of 2010, ***Mohamed Salimin Vs Jumanne Omary Mapesa***, Civil Application No. 103 of 2014 and ***Jovin Mtagwaba & 85 Others Vs Geita Gold Mining Limited***, Civil Appeal No. 23 of 2014 (all Unreported cases of the Court of Appeal). He thus prayed for the application to be dismissed.

On the other hand, Mr. Nyika learned counsel for the applicant was brief on the point. He maintained that the cases relied on by the counsel for the respondent are not applicable. He seems to argue that the same were in respect of the Court of Appeal Rules by stating that the Court of Appeal stated in all cases that there was no way that an applicant could file more than one application under the Court of Appeal Rules. He cited to me the case of single justice of Appeal of ***Issack Sebegele Vs Tanzania Portland Cement Co. Ltd***, Civil Application No. 52 of 2002 (unreported) wherein the Court of Appeal entertained two applications in one. The learned counsel stressed that the two prayers are not distinct but related and therefore this court can grant the same. Thus to him, if the first prayer is granted, then the court can proceed to determine and grant the second one, but if the first fails then the court needs not determine the second one.

Mr. Mhozya in rejoinder reiterated that the application should have been brought separately.

I have subjected the learned rival arguments to great consideration. The first question which must be answered is whether failure to append the affidavit

sworn by Peter Andrew Songoma mentioned in the chamber summons and appending one sworn by another person in support of the application is a fatal ailment. Mr. Mhozya, learned counsel argues that because the affidavit is sworn by another person other than the one mentioned in the chamber summons, the application lacks the necessary support. On the other hand, Mr. Nyika learned counsel, argues that the ailment is not incurable as long as the affidavit of Rehema Myamba is in itself not defective. This question has exercised my mind greatly. Having pondered on the same for quite some time, I have found merits in the points raised by Mr. Nyika. This is because the affidavit sworn by Rehema Myamba is not defective and it is the very affidavit the facts of which the respondent has countered in the counter-affidavit of Mwazani Sakatu Kasamia. I find the omission to mention the name of Mwazani Sakatu Kasamia in the chamber summons and wrongly mentioning Peter Andrew Songoma is of trivial as to warrant striking out of the whole application. Taking that course will not only amount to wastage of anyone's precious time but also unnecessary wastage of resources because if the application will be struck out, the applicant will come back with only replacement of the names of Peter Andrew Songoma in the chamber summons with those of the deponent; Rehema Myamba.

I would agree with Mr. Nyika, learned counsel, that the ailment can be rectified without any injustice to the respondent. As was stated in ***VIP Engineering and Marketing Ltd Vs Said Salim Bakhresa Ltd***, Civil Application No. 47 of 1996 (unreported):

> "...There is danger of consumers of justice losing confidence in the courts if judicial officers are obsessed more with strict compliance with

procedural rules than what the merits for the disputes before them are ..."

I think the present situation is not incurable without causing any injustice to the respondent. Taking this course will be conforming to the letter and spirit of article 107A (2) (e) of the Constitution of the United Republic of Tanzania which urges the courts not to be tied up with unnecessary technicalities which may lead to injustice.

The foregoing conclusion takes me to the second point of the PO. Mr. Mhozya is of the view that the application must be struck out for being omnibus. He relies on the ***Rutagatina C.L***, ***Mohamed*** and ***Jovin Mtagwaba*** cases (supra) for this proposition. On the other hand, Mr. Nyika is of the view that the cases relied upon by the learned counsel are distinguishable because they were dealing with the Court of Appeal Rules which is not the case here.

I have had an opportunity to deal with this point ***Ruvu Gemstone Mining Co. Limited Vs Reliance Insurance Company (T) Ltd***, Miscellaneous Commercial Cause No. 21 of 2016 (unreported) which ruling I have just handed down. As I still hold the same position, I shall reiterate that discussion here.

This issue was well articulated by this court [Mapigano, J. (as he then was)] in ***Tanzania Knitwear*** (supra) in which, faced with a similar situation – the issue whether an application which unites two distinct applications in one application, namely an application for setting aside a temporary injunction and an application for injunction is bad at law. His Lordship observed at page 51:

"... the combination of the two applications is not bad at law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite."

The above quote was affirmed by the Court of Appeal in ***MIC Tanzania Limited Vs Minister for Labour and Youth Development***, Civil Appeal No. 103 of 2004 (unreported). In that case, the Court of Appeal appreciated the foregoing quote in ***Tanzania Knitwear*** as the correct position of the law. The Court of Appeal stated:

"In the TANZANIA KNITWEARLTD case (Supra), the application had united **two distinct applications,** namely one for setting aside a temporary injunction and another for issuance of a temporary injunction. Objection was taken against such a combination on the ground that it was bad in law. Mapigano, J. (as he then was) held:

In my opinion the combination of the two applications is not bad at law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite.

The learned Senior State Attorney in this appeal has invited us to disregard the holding of Mapigano, J. because we are not bound by it.

> Indeed we are not bound by it and there is no direct decision of this Court on the issue. However, that cannot be a hindrance to us in our endeavours to ensure that substantive justice always prevails. After all, judicial process is not a discovery process but a creation process. **Having so observed, we hold that the ruling of Mapigano, J. on the issue cannot be faulted, and we are respectfully in agreement with him.**"
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> [Bold supplied].

In the case at hand, the applicant has combined two applications in one: an application for, first, extension of time within which to apply to this court for stay of the decree of the Court of the Resident Magistrate of Dar es Salaam at Kisutu dated 04.05.2015 and secondly, upon grant of extension of time, for stay of execution of the said decree. I think the course taken by the applicant is, in the light of the ***Tanzania Knitwear*** and ***MIC Tanzania*** cases, quite in order. In the circumstances of Tanzania where the vision of the Judiciary is to administer justice effectively, efficiently and timely, it will not be inappropriate for courts of law to encourage multiplicity of proceedings because this course would defeat the very goal for which the Vision is intended to achieve.

This said, I am not prepared to buy the proposition of the respondent on this take. For the avoidance of doubt, I have read the ***Rutagatina***, ***Mohamed Salimin*** and ***Mtagwaba*** cases cited and supplied to me by the learned counsel for the respondent. I think they are distinguishable. In ***Rutagatina***

the Court of Appeal was grappling with the Court of Appeal Rules, 2009 and found that they do not provide for an omnibus application. In ***Mohamed Salimin*** the application was found to be omnibus and unacceptable "for combining two or more unrelated application". The Court of Appeal relied on its earlier decision of ***Bibie Hamad Khalid Vs Mohamed Enterprises (T) Ltd, J. A Kandonga and Hamis Khalid Othman***, Civil Application No. 6 of 2011 (unreported) to strike out the application which was found to be incompetent on account of its being omnibus. And in ***Mtagwaba***, the same court was dealing with the Court of Appeal Rules and wondered "why an application for leave in a land matter should be combined with an application to file a notice of appeal under the Appellate Jurisdiction Act".

To my mind, the cases can be distinguished from the present case for two main reasons. First, the present application has not been taken under the Court of Appeal Rules, 2009 and secondly, the applications in those cases were found to be omnibus and consequently struck out because they combined two or more applications which were unrelated. For the avoidance of doubt, the ***MIC Tanzania*** case was an appeal from this court which entertained two interrelated applications. As already stated above, the Court of Appeal relied on the decision of this court in ***Tanzania Knitwear*** to hold that that course was appropriate.

At this juncture, I find it irresistible to quote the observation of my brother at the Bench Dr. Ndika, J. in ***Gervas Mwakafwila & 5 Others Vs the Registered Trustees of Moravian Church in Southern Tanganyika***, Land Case No. 12 of 2013 (unreported), wherein, faced with an identical situation, held:

"I ... find the reasoning in *MIC Tanzania Limited* v *Minister for Labour and Youth Development* (*supra*) and *Knitwear Limited v Shamshu Esmail* (*supra*) highly persuasive. Compilation of several separate but interlinked and interdependent prayers into one chamber application, indeed, prevents multiplicity of proceedings. A combined application can still be supported by a single affidavit, which must, then, provide all necessary facts that will provide justification for granting each and every prayer in the Chamber Summons. The fear that a single affidavit cannot legally and properly support more than one prayer is over the top. On balance, an affidavit is not mystical or magical creature that cannot be crafted to fit the circumstances of a particular case. It is just a vessel through which evidence is presented in court.

I must hasten to say, however, that I am aware of the possibility of an application being defeated for being omnibus especially where it contains prayers which are not interlinked or interdependent. I think, where combined prayers are apparently incompatible or discordant, the omnibus application may inevitably be rendered irregular and incompetent."

In view of the reasoning of this court ***Tanzania Knitwear*** and ***Gervas Mwakafwila*** to which I subscribe and in further view of the binding authority of ***MIC Tanzania*** discussed above, I wish to recap that while an omnibus application which is composed of two or more unrelated applications may be labeled omnibus and consequently struck out for being incompetent, an application comprising two or more applications which are interrelated is allowable at law.

For these reasons, I would overrule the second point of objection as well.

In the final analysis, I overrule both points of objection by the respondent. I allow the applicant to substitute the names of Peter Andrew Songoma in the chamber summons with those of Rehema Myamba; the deponent of the affidavit supporting the application. I allow the applicant's counsel, if he so wishes, to rectify the trivial ailment by hand with an initial beside the handwritten alteration. The same should be done before the next hearing date.

Order accordingly.

DATED at DAR ES SALAAM this 30th day of June, 2016.

J. C. M. MWAMBEGELE

JUDGE