

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL CASE NO. 41 OF 2010

NELSON MSUYA 1ST PLAINTIFF

LEONARD MUSUSA 2ND PLAINTIFF

VERSUS

TANZANIA FISHERIES DEVELOPMENT

COMPANY LIMITED 1ST DEFENDANT

FELIX MOSHA 2ND DEFENDANT

GENEROSE BATEYUNGA 3RD DEFENDANT

CHILWA KILAKI 4TH DEFENDANT

GEORGE C. JOANNOU 5TH DEFENDANT

RULING

Mruma, J.

This is an old matter. It has been lingering in the shelves of this court since 2010. On 4th April, 2011 I sustained a preliminary objection raised by defendants which was to the effect that this case (**i.e Commercial Case No. 41 of 2010**) was subjudice to **Civil Case No. 47 of 2010** which was initially instituted in the High Court Dar es Salaam registry but later on was

transferred to this court and it was re-registered as **Commercial Case No. 36 of 2012**.

Following the institution of **Commercial Case No. 36 of 2012**, this court (**Nyangarika, J**), made another order to stay the proceedings in this case pending determination of **Commercial Case No. 36 of 2012** which was before my sister Bukuku J. Todate, though before a different Judge, but **Commercial Case No. 36 of 2012** is still pending in this court.

On 9/6/2014 this court (Nyangarika J), made an order to have the matter adjourned sine - die. For the next 17 Months no action was taken on the matter. The matter was left unattended as if it was a deposit fixed Bank account in a Commercial Bank.

On 24/2/2016, I directed parties to appear and address me on two points which in my opinion are crucial regarding the non-status of the matter and its pendency in the shelves of the court. The points are:-

1. Whether upon establishing that a case is subjudice the proper remedy is to struck out or to stay it as this court did on 4/4/2011.
2. Whether in view of the provision of **Rule 47 of the High Court (Commercial Division) Procedure Rules 2012**, and in absence of any application made within Six months of the last adjournment this matter can still legally be maintained in the registry as pending suit.

Counsels for the parties have submitted that in view of the provisions of **Section 8 of the Civil Procedure Code**, when a matter is found to be subjudice to a previous instituted case, the proper order to be made is an order for stay of the matter.

I will not deal much with this version because in the first place that is the order I made on 4/4/2011 and therefore I am functus officio in respect of that point and secondly as correctly observed by the learned counsels that is the remedy provided for **under section 8 of the Civil Procedure Code**.

Regarding the requirements under **Rule 47 of the High Court (Commercial Division) Procedure Rules, 2012**, counsels have diverging opinions. Ms Jackline Kapinga, counsel for the 1st plaintiff was of the view that the Rule is clear that if no application is made within a period of six months from the last adjournment, the matter should be dismissed. Her opinion notwithstanding she submitted that in the interest of justice, this matter shouldn't be dismissed.

On his part Mr. Herry Mwapachu, counsel for the second plaintiff was of the view that a matter can only be dismissed under **Rule 47** if it was adjourned for hearing. He said that since this matter was adjourned when it was called for orders and not for hearing then Rule 47 is not applicable.

On his part Mr. Nyange H. H. H. Counsel for the defendants was of the view that the strict requirements of **Rule 47** is a dismissal. He has however argued that when this matter was last adjourned the **High Court**

(Commercial Division), Rules, 2012 were not in force therefore they cannot be invoked to deal with an order made before they were enacted as that will make them to apply retrospectively.

Rule 47 of the High Court (Commercial Division) Procedure Rules, 2012.

"When the hearing of a suit had been adjourned generally, the court shall, if no application is made within six months of the last adjournment, dismiss the suit."

Mr. Herry Mwapachu has submitted that because when the suit was adjourned generally it was not called for "hearing" but for orders, then **Rule 47** does not apply.

I do not agree. The term "hearing" of a suit is neither defined in the Rules nor in the Civil Procedure Code. However in **Blacks Law Dictionary 7th Edition (By Bryan A. Gainer), at page 725**, the term hearing is defined as:

A judicial session open to the public, held for purpose of deciding issues of fact or law....."

I have no doubt that when a matter is called for orders there is an issue either of law or fact which has to be determined or decided and that is a judicial session and therefore "hearing" within the ambit of **Rule 47 of the High Court (Commercial Division) Procedure Rules 2012**. It

does not matter whether the matter is called on for mention, for necessary orders or for hearing whatsoever in any event there must be an issue either of fact or of law that will be determined on that day. For instance when this matter was called on before Nyangarika J on 9/6/2014 (which was the last day of adjournment), Mr. Mwandambo, the then learned advocate for the plaintiff is on record telling the court thus:-

“ The position has not changed as recorded on 21/5/2013”

This implies that the matter was called for hearing of the parties on the ‘position’ of **Commercial Case No. 36 of 2012**. Upon hearing that **Commercial Case No. 36 of 2012** was still pending, this court decided to adjourn the matter sine die [see the order of Nyangarika J of 9/6/2014].

Unfortunately, the term “hearing” is being used and is applied interchangeably with the term “trial” which has a different meaning altogether. **Black’s law Dictionary** [supra] defines the term trial as:-

“formal judicial examination of evidence and determination of legal claims in an adversary proceedings”.

Thus, hearing and trial are not the something.

From the above, it goes without saying that the term hearing in **Rule 47** covers any judicial session before a judge or Registrar.

Regarding the coming into force of the Rules, Mr. Nyange submitted that the impugned order was handed down before **GN No. 250 of 2012**

came into force. This cannot be true. The Rules came into force on 13/7/2012 while the last order of adjournment was made on 9/6/2014, over a period of one year after the rules had started to operate. Thus, they are applicable.

That said I find that because no application had been made within six months of the last adjournment as required by **Rule 47** of the **High Court (Commercial Division) Procedure Rules**, the suit is hereby dismissed. Each party shall bear own costs.



A. R. Mruma

JUDGE

19/4/2016