

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

CONSOLIDATED COMMERCIAL APPLICATIONS NO. 232  
OF 2017; 228 OF 2017; AND 229 OF 2017

- |                                  |       |                           |
|----------------------------------|-------|---------------------------|
| 1. PRIME CATCH (EXPORTS) LIMITED | ..... | 1 <sup>ST</sup> APPLICANT |
| 2. SALIM HAIDERALI JESSA         | ..... | 2 <sup>ND</sup> APPLICANT |
| 3. NASIR HAIDERALI JESSA         | ..... | 3 <sup>RD</sup> APPLICANT |
| 4. ZULFIKAR HAIDERALI JESSA      | ..... | 4 <sup>TH</sup> APPLICANT |
| 5. NADIR AZIZ HAIDERALI JESSA    | ..... | 5 <sup>TH</sup> APPLICANT |

Versus

DAIMOND TRUST BANK KENYA LIMITED ..... RESPONDENT

**RULING**

*09/04/2018*  
Date of the Last Order: ~~06/04/2018~~

*09/04/2018*  
Date of the Ruling 09/04/2018

**SEHEL, J.**

The 1<sup>st</sup> applicant filed Miscellaneous Commercial Application No. 232 of 2017 against the respondent seeking for leave to appear and defend a summary suit (Commercial Case No. 62 of 2017) filed by the respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> applicants also filed similar application Miscellaneous Commercial Application No. 228 of 2017

- against the respondent. Similarly the 4<sup>th</sup> and 5<sup>th</sup> applicants filed same application Miscellaneous Commercial Application No. 229 of 2017 against the respondent. The respondent having been served with the applicants' applications filed counter affidavit and notice of preliminary objection to the effect that the applications are time barred. Since similar objection was raised to all applications then the hearing and determination of the preliminary objection was consolidated for quick disposal of the objection. This is a ruling to such preliminary objection.

At the hearing of the preliminary objection, counsel Dilip Kesaria appeared to argue the objection raised while counsels Nyaisa Godwin appeared to represent the 1<sup>st</sup> ; 4<sup>th</sup> and 5<sup>th</sup> applicants and counsel Robert Ruben appeared to represent the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Counsel Kesaria told this Court that on 4<sup>th</sup> July, 2017 when the counsel for all parties in the main suit appeared, the Court ordered the respondents to file their respective applications for leave within 21 days. He submitted counting 21 days from 4<sup>th</sup> July, 2017 it ends on

- 24<sup>th</sup> July, 2017 whereas the application was filed on 26<sup>th</sup> July, 2017 without leave of the Court. The counsel was of the view that the application which was filed on 26<sup>th</sup> July, 2017 was out of time and should be dismissed. He supported his contention by referring the Court to this very Court's decision in **Stanbic Bank Tanzania Limited Vs Pride Com Limited; Upendo Assaph Kassama; Juma H. Selemani; and Hamis S. Alimas**, Commercial Case No. 142 of 2016 (Unreported –H.C) where an application for leave to appear and defend a summary suit was filed after the period granted by the Court without leave and such application was dismissed for being out of time.

Counsel Godwin said indeed parties appeared before this Court on 4<sup>th</sup> July, 2017. He contended that when they appeared, they requested to be served with the plaint so as they can make an application for leave to appear and defend the suit. He said the Court ordered that the applicants be served and the matter was fixed for necessary orders on 28<sup>th</sup> July, 2017. He strongly disputed the existence of any order for the applicants to present their application within 21 days as alleged by the counsel for respondent. He pointed

out that on 5<sup>th</sup> July, 2017 they were served with summons directing applicants to obtain leave to appear within 21 days as such 21 days expired on 26<sup>th</sup> July, 2017 the date when applicants presented their applications. To him the applications were timeously filed.

Counsel Ruben representing the 2<sup>nd</sup> and 4<sup>th</sup> respondents adopted the submissions made by counsel Godwin and added that the applicants were served with summons requiring them to obtain leave within 21 days from the date of service thus 21 days to them expired on 26<sup>th</sup> July, 2017. With these submission counsel prayed for the objection to be dismissed with costs.

In rejoinder Counsel Kesaria insisted that Court's records speak for themselves and invited this Court to revisits the records. He also pointed out that in the main suit there is proof that applicants were duly served through their advocate on 26<sup>th</sup> day of May, 2017 but on 2<sup>nd</sup> day of June, 2017 the counsel for applicants returned summons for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> applicants stating that they only agreed to receive summons for Fizer Haiderali Jesca only. Therefore to him, all applicants were duly served on 26<sup>th</sup> May, 2017.



From the counsels' submissions it is noted that they are in common understandings that all parties appeared on 4<sup>th</sup> July 2017 for the first time in the main suit, that is, commercial case no, 62 of 2017. Their contention is in respect of this Court's order made on that date. It is contended by counsel Kesaria that on that date the Court ordered applicants to make their application for leave within 21 days and it is from this alleged Court's order wherein the counsel for respondent hinges his preliminary objection on time limitation and not on any other ground. He has couched his preliminary objection on the following words:

*"...the application has been filed out of time without leave of the Court and should be dismissed with costs. Particulars: on 4<sup>th</sup> July, 2017 the Court (Hon. Sehel J) ordered the applicants to file their applications for leave to appear and defend within 21 days, i.e on or before 24<sup>th</sup> July, 2017, whereas the present application was filed on 26<sup>th</sup> July, 2017 without leave of the Court and is consequently out of time."*



For this Court to adequately determine the objection it has to revisit the Court's order made on 4<sup>th</sup> July, 2017 in Commercial Case No. 62 of 2017. The records of the Court are as follows:

**“4<sup>th</sup> July, 2017:**

**CORAM:** Hon. B.M.A Sehel, J

*For the Plaintiff: Dilip Kesaria, Adv*

*For the 2<sup>nd</sup> Defendant: Robert Ruben, Adv*

*For the 4<sup>th</sup> & 5<sup>th</sup> Defendants: Robert Ruben, Adv*

*For the 1<sup>st</sup> Defendant: Nyaisa Godwin, Adv*

*For the 3<sup>rd</sup> & 6<sup>th</sup> Defendants: Godwin, Adv H/b for Tesha Florence, Adv*

*B/C J.K.Bampikya, Mrs.*

**Kesaria, Adv:**

*MJ, since the other defendants have just appeared today then I pray for the matter to come for necessary orders after 21 days so as to allow defendants to file their application.*

**ORDER**

*Matter to come for orders on 28<sup>th</sup> July, 2017 at 0930Hrs.*

*Sgn*

*B.M.A. Sehel,*

*Judge*

*4<sup>th</sup> July, 2017"*

The above Court order is patently clear that it never made an order for the applicants to file their application within 21 days as alleged by the Counsel for respondent. It only fixed the matter to come for orders on 28<sup>th</sup> July, 2017 as correctly submitted by the counsels for applicants. Since the order is not in the manner presented by the Counsel for respondent then I find merit in the contention made by the counsels for the applicants that the preliminary objection is misconceived and vexatious. I therefore proceed to dismiss it with costs. It is so ordered.

DATED at Dar es Salaam this 6<sup>th</sup> day of April, 2018.





B.M.A Sehel

JUDGE

6<sup>th</sup> day of April, 2018.