IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

MISC. COMMERCIAL APPLICATION NO. 11 OF 2019

(ARISING FROM COMMERCIAL CASE NO 4 OF 2019)

GOMBA ESTATES (GEL) LIMITED .... APPLICANT

VERSUS

STANDARD CHARTERED BANK LIMITED .... RESPONDENT

Date of Last Order: 29/06/2020

Date of Ruling: 08/07/2020

RULING

MAGOIGA, J.

The applicant, GOMBE ESTATES (GEL) LIMITED by way of chamber summons made under the provisions of Order VIIIA Rule 4; Order XI Rule 1 and 10; and section 95 of the Civil Procedure Code [Cap 33 R.E 2002]; Rules 2(2) and 4 of the High Court (Commercial Division) Procedure Rules, 2012; section 2(1) of the Judicature and Application of the Laws Act[Cap 358 R.E.2002] and article 107A of the Constitution of the United Republic of Tanzania instituted the instant application against the respondent praying for the following orders, namely:

1. That the honourable Court be pleased to depart from its scheduling conference order made in Commercial Case No. 4 of 2019,

2. Corollary to prayer 1 above, before making an order as to filing of witness statements;

   (a) The honourable Court be pleased to grant leave to deliver interrogatories in writing for the examination of the respondent; and

   (b) The honourable court be pleased to issue an order directing the respondent to make discoveries on oath of documents relating to the matters in issue in the suit which are in possession and/or powers of the respondent concerning the applicant, namely:

      (i) Copy of the guarantee of the Bank of Tanzania on the original

      (ii) Copies of all correspondences between the respondent and the Bank of Tanzania in respect of the original Tanzania Shilling and US dollar loans and mortgages related thereto;

      (iii) Copies of all reports by the respondent to its regulators concerning the original loans and rescheduling agreement;

(iv) Copies of all accounting reports and statements concerning the original loans and the rescheduling agreements;

(v) Copies of all internal reports and emails concerning the loans and rescheduling agreement, repayment schedule thereunder and the Bank of Tanzania Guarantee, the respondent's call of the guarantee, the Bank of Tanzania denial of the guarantee, the respondent's renewed claim of the guarantee and the Bank of Tanzania reinstatement of the guarantee;

(vi) All records of disciplinary proceedings or termination actions taken by the bank in respect of the employees handling the loans and Rescheduling Agreement and citing the loan and Rescheduling Agreement negotiations and the disposition of those proceedings or actions;

(vii) Copies of all credit reports filed by the bank or credit inquiries made to the bank concerning the loans and the defendant's reports thereunder;

(viii) All reports and minutes of the meetings of the Board of Directors of the bank in which the Gomba Estate Limited loans, the Bank of Tanzania guarantee and the Rescheduling Agreement are cited;

(ix) All reports of the Group Special Assets Management Unit (hereinafter 'GSAM Unit) of the bank in Nairobi to the bank and its management and/or Board of Director concerning the negotiations of the Rescheduling Agreement itself and reporting on performance thereon;

(x) Any correspondence with or reports concerning inquiries made by the Commercial Bank of Africa concerning the Gomba Estate Limited loans and Rescheduling Agreement and the obligor's performance thereunder;

(xi) All accounting records of the bank and its GSAM unit in Nairobi concerning the original loans, the Rescheduling Agreement and performance thereon;

(xii) Costs of this application be provided for; and

(xiii) Any other relief(s) this honourable court may deem fit and just to grant.

The chamber summons as usual was accompanied with the affidavit deposed by Mr. Michael Sheehan, the Managing Director of the applicant, stating the reasons why this application should be granted.

Upon being served, the respondent filed a counter affidavit deposed by Mr. Wallack Nittu, Head Legal and Compliance of the respondent stating the reasons why this application should not be granted.

The brief facts of this application arises from the commercial case no. 4 of 2019, in which the respondent instituted a suit against the applicant, claiming several reliefs arising from loan agreement and Rescheduling Agreement entered between parties herein. The applicant, in her written statement of defence disputed all claims by the respondent and simultaneously raised a counter claim against the respondent herein claiming several reliefs as well. The matter went on smoothly from completion of proceedings, first pre trial conference, which paved way for mediation. Immediately, mediation failed, the applicant instituted this application for prayers as enlisted above, hence, this ruling.

The applicant at all material time has been enjoying the legal services of Mr. Mpaya Kamara, learned advocate from Crest Attorneys. The respondent, as

well at all material time has been enjoying the legal services of Mr. Gaspar Nyika and Madina Chenge, all from IMMMA advocates.

This court directed and ordered learned advocate to argue this application by way of written submissions. I have taken my time to read every bit of the argument raised. I will be ungrateful, if I do not record my sincere thanks to the learned counsel for the parties, for the well and brilliant research for and against this application. I strongly commend them and urge them to keep it up!. However, in the course of determining this application, I will not be able to repeat everything raised, but it suffices to say their written submissions are accorded the weight they deserve.

Mr. Kamara in his written submissions in support of this application pointed out that, they have two prayers they pray for; one, is for this court to be pleased to depart from the scheduling conference order dated 05/08/2019, and second, is for this court to grant leave to deliver interrogatories in writing to the respondent and discoveries on oath of documents relating to the matter in issue which are in possession of the respondent. In the affidavit, the only reasons advanced are as contained in paragraphs 6 and 9 of the affidavit, which I find it imperative to reproduce them in this ruling for easy of reference. Paragraph 6 was couched that:

"6. On 5th November, 2019 during discussion with the counsel, Mpaya Kamara, in readness of preparing my witness statement, it became apparent that we will require further information and data with respect to the respondent's accounting and treatment of the loans, their rescheduling, applicant's performance thereto and thereunder as well as the history of the Bank of Tanzania guarantee on which the respondent relies and the impact of that reliance on the respondent's approach to the rescheduling negotiations and respondent's accounting and intent.

And paragraph 9 was thus couched:

"9. the information that is sought by way of both discoveries and interrogatories is necessary and relevant to the issues that are central to the suit and the counter claim between the parties herein."

Mr. Kamara, argued that the departure from the scheduling conference order is aimed to grant the orders sought which will accord a fair and adequate hearing to the parties and as such achieve interest of justice. According to Mr. Kamara, if this application is not granted, the truth of and about the dispute between the parties will be suppressed. To bolt up his

prayers, the learned advocate for the applicant cited Rule 4 of Order VIIIA and the case of NAZRA KAMRU v. MIC TANZANIA, CIVIL APPEAL NO.111 OF 2015 (CAT) MWANZA (Unreported) in which it was held that where interest of justice demands rules should not be cast in iron. Also was the case of AFRISCAN GROUP LTD v. SAID MSANGI, MISC. COMMERCIAL APPLICATION NO. 299 OF 2017(HC) DSM (Unreported) which underscore the importance and the need of not elevating procedural rules to the extent of eclipsing substantial justice.

Mr.Kamara went on to argue that, following the amendment of the Civil Procedure Code by introduction of overriding objective principle which aims primarily to achieve substantial justice in each case, their prayers should be granted as they aim at achieving interest between parties. Further arguments were that, the provision of article 107A of the constitution of the United Republic of Tanzania should come into play by not being tied up with technicalities provisions which may obstruct dispensation of justice.

The learned counsel for applicant went on to argue that, by granting the prayers, the applicant will be able to prove at trial that, the case of the respondent is a sham, and that, the respondent is guilty of sharp practice designed to induce the applicant to sign Rescheduling Agreement, hence, in

breach of its fiduciary duty to the applicant, inducement, misrepresentation, breach of duty of good faith, fair dealing and negligence to cure its defaults and that it is impossible for the applicant to prove her case without those documents, as the said documents are intended to challenge, the validity of the Rescheduling Agreement, without which the applicant will be highly prejudiced by the ongoing proceedings.

It is on the totality of the above reasons; the learned counsel for the applicant invited this court to grant her prayers as in the chamber summons.

On the other hand of the respondent, Mr. Nyika started by narrating the relationship of the parties in this suit and went on to oppose the instant application which he considered scandalous, irrelevant and not exhibited *bona fide* for purpose of the suit and also for being unmaintainable under the law as the court is improperly moved to depart from its scheduling conference order by a non- existence provision of the law.

Mr. Nyika pointed out that, the required interrogatories and discoveries are unnecessary for disposing fairly of the suit or saving costs as envisaged in the law. The learned counsel for respondent pointed out that, questions 1, 2,3,4,5,6,7,8,9,11 13 and 14 concern internal arrangement affairs which are privileged and irrelevant to determine the real issues in the suit; questions

12 and 15 involve meeting with other stake holders which are confidential and again irrelevant to determine the real issues in the suit; questions 10 and 16 are questions relevant to cross examination.

On that note, therefore, Mr. Nyika concluded that the said questions exhibited are meant to serve an ultra object beyond the scope of the suit and prayed that, the instant application be dismissed with costs.

In the alternative, Mr. Nyika argued that, the said questions are contrary to Order XI rules 1 and 4 of the CPC, which mandatorily require that, same shall have a note at the foot thereof stating which of the interrogatories each person is required to answer. Mr. Nyika relied on the case of SEBASTIAN R. D'SOUZA AND OTHERS v. CHARLES CLEMENT FERRAO AND OTHERS [1959[EA 1000.

On discovery, it was the argument of Mr. Nyika that, the discoveries are neither necessary for disposal of the suit nor saving costs. According to Mr. Nyika, the discoveries intended to be used are irrelevant and unnecessary for failure of the applicant fully to describe them. In the absence of clarity and specificity and the existence of the documents sought to be discovered, the application should not be granted, insisted Mr. Nyika.

Further reply by Mr. Nyika was that the application was preferred under wrong provision of the law by citing provisions which do not give the court powers to depart from the scheduling conference order. According to Mr. Nyika, the proper provision of the law which was not cited was Order VIIIB Rule 23 of the Civil Procedure Code [Cap33 R.E 2002] as amended by Civil Procedure Code (Amendment of the First Schedule) Rules 2019. In the circumstances, the learned counsel for respondent prayed that since the application was made under a non-existing law, same should be strike out with costs.

In the totality of the above reasons; the learned advocate for the respondent urged this court to strike out this application with costs.

In rejoinder, Mr. Kamara, reiterated his earlier submissions and at lengthy went to insists that, the Rescheduling Agreement was procured by inducement, misrepresentation, fraud, and was not to facilitate internal account practices. In essence, the learned counsel for the applicant dismissed the written submissions by the learned advocate for the respondent as vague and misleading and is intended to mislead this court from knowing the truth.

This marked the end of hearing of these hotly contested arguments for and against the grant of this application.

From the written submissions made by the two rival learned counsel in this matter and from the totality of the prayers in the chamber summons, affidavit, counter affidavit, reply to counter affidavit, this court is enjoined to decided two issues, namely; one, whether departure from the scheduling conference can be entertain at this stage of the suit, and, second, whether this is a fit case to grant leave to deliver interrogatories and discoveries at this stage.

I hasten to point out that, in proper cases and where the interest of justice is intended to be achieved without prejudice to any of the parties in the suit, this court is clothed with powers to depart from the scheduling conference order. I further point out that, interest of justice is to be decided based on facts of each case and should not be used as shield, even where is not necessary or not the case to prejudice the other party to the proceedings.

Guided by the above noted position, I find it imperative to determine the second issue which is also closely interlinked with the first issue because upon deciding the second issue in the affirmative, then, the first issue will be granted without much ado.

Having dispassionately considered with a very keen legal eyes and minds the merits or demerits of the instant application, the prayers as contained in the chamber summons, both the reasons advanced for grant of the prayers and against the grant of the application and the law, I am of the firm considered opinion that this application has to fail. I will give reasons. **First,** plainly looking at the prayers in the chambers summons, in particular, prayers (ii) to (xi) inclusive, are too general and widely drafted with no specific date and time that may cause embarrassment to the respondents and as rightly argued by the learned counsel for respondent, and rightly so in the opinion of this court, that are not exhibited bona fide for the purposes of this suit and are irrelevant. A good example is asking for emails without specifying to whom were sent to, and if, it was to the applicant, then, she has them, so is matter of following laid down procedures to get them admitted in court. **Second,** the first prayer of delivering Bank of Tanzania guarantee can be taken care of before hearing by notice under Order XI Rule 13 of the Civil Procedure Code, [Cap 33 R.E.2002] to produce rather than interrogatories. Legally this prayer was misplaced and is irrelevant to be preferred and pegged as interrogatories. **Third,** when one reads, the reasons as contained in paragraph 6 of the affidavit in support of the application above, clearly

shows, this application was preferred as an afterthought and exhibited negligence of the highest degree on the part of the applicant and his learned counsel, because it is the very learned advocate for the applicant, who, on 05/08/2019 told the court that, there is no more applications, interrogatories and discoveries based on the pleadings, to allow this kind of conduct after elapse of one year is against the mission of this court to dispose of cases effectively, efficiently and speedy. Negligence of an advocate to the proceedings cannot be saved by the allegations of interest of justice even where there is a clear demonstration of such negligence. **Fourth,** the second reasons stated in paragraph 9 quoted above can be cured by filing of list of documents to be relied upon before filing of witness statements. **Fifth,** Much as this court is aware of and guided by the principle of overriding objective, exhibition of flexibility to allow such prayer is possible only if the interrogatories are relevant, precise, specific, and are costs saving. The manner the prayers in the chamber summons are drafted cannot be achieved without unnecessarily causing prejudice to the respondent. Quite correctly as submitted by the learned counsel for the respondent, and rightly so in my opinion, the applicant's prayers are not

maintainable without delaying justice of this case and justice is two way traffic to the parties in a suit.

Sixth, some of the questions intended to be raised in the so called interrogatories and discoveries can as well be answered through cross examination and the sought truth will be known.

Based on the above reasons, I am far from being convinced by the reasons advanced by the learned counsel for the applicant to hold otherwise.

That said and done and on the totality of the above reasons, this court is constrained to dismiss this application for being unmeritorious. The main suit should proceed from where it ended. In the event, this application is hereby dismissed with costs.

Order accordingly.

Dated at Arusha this 08th day of July, 2020.

S.M. MAGOIGA

JUDGE

08/07/2020