IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

MISC. COMMERCIAL APPLICATION NO. 08 OF 2020

(ARISING FROM MISC. COMMERCIAL CAUSE NO. 05 OF 2020)

DANGOTE CEMENT LIMITED ..... APPLICANT

VERSUS

NSK OIL AND GAS LIMITED ..... RESPONDENT

Date of Last Order: 28/09/2020

Date of Ruling: 05/10/2020

RULING

MAGOIGA,J.

The applicant, DANGOTE CEMENT LIMITED by chamber summons made under Rule 2(2) of the High Court (Commercial Division) Procedure Rules, G.N. 250 of 2012 , Rule 99 (1) of the Companies (Insolvency) Rules, G.N. 43 of 2005, section 95 of the Civil Procedure Code [Cap 33 R.E 2019] and section 2(1) and (3) of the Judicature and Application of Laws Act, [Cap 358 R.E. 2019] proceeded by certificate of urgency and accompanied by an affidavit of Mr. Isack Olomy is praying for the following orders:-

(a) EX-PARTE (at ad interim stage only)

(i) This court be pleased to find that sufficient reasons exist for dispensing with notice requirement.

(ii) That this Honourable court be pleased to stay further steps on Misc. Cause No. 05 of 2020 including publication of the petition for winding up of the applicant pending hearing and determination of this application inter parties as the petition is premature, preemptive, filed with mala fide in order to embarrass the applicant and its publication will cause the applicant irreparable reputational damage

(iii) Any other relief that this honourable court deems fit and just to grant

(b) INTER-PARTIES:

(i) That this honourable court be pleased to stay further steps on Commercial Cause No.05 of 2020 including publication of the petition for winding up of the applicant pending hearing and determination of Commercial Case No. 07 of 2020 filed in this court between Standard Chartered Bank Tanzania Limited against the parties herein jointly and severally on the grounds that:

(a) Misc. Commercial Cause No. 05 of 2020 is res sub-judice to Commercial Case No. 07 of 2020 pending in this court.

(b) Misc. Commercial Cause No. 05 of 2020 is vexatious and amount to an abuse of the court process in view of the pendency of Commercial Case No. 07 of 2020 pending in this court and intended to embarrass, ridicule and inflict irreparable reputational damage to the applicant.

(ii) Any other relief that this Honourable court deems fit and just to grant.

Upon being served with this application, the respondent filed a counter affidavit deposed by Mr. KAMALJEET M. AGGARWAL stating the reasons why this application should not be granted.

On 25th day of August 2020, this application, as noted above was preferred among others, under certificate of urgency, was brought to my attention and given the fact that there was no session for a judge to come to Arusha, I decided to hear it via video conference. On that date, I refused to entertain ex-parte prayers instead I ordered that, the applicant to immediately serve

the respondent, and if wishes, to file a counter affidavit. I, however, considering the petition and interest of justice, I ordered parties to maintain status quo pending the hearing of this application inter parties. The application by consensus was scheduled for hearing inter-parties on 28th September, 2020, hence, this ruling after hearing parties' trained legal minds on merits.

On 28th September, 2020 when the application was called for hearing, the applicant had the legal services of Mr. John Mushi, learned advocate, and the respondent had the legal services of Mr. Adam Jabir Ally Sikamkono, learned advocate.

The background relating to this application, albeit in brief, is imperative. On 11th May 2018 the applicant and the respondent entered into Receivable Purchase Agreement for the respondent to supply the applicant fuel/diesel. In order to facilitate smooth supply of the fuel, the respondent was obliged to secure and obtained overdraft from Standard Chartered Bank (not in this application) as working capital to a limit of Tshs.11,100,000,000/=. As security for the loan, the respondent assigned its debt in the performance of the Receivable Purchase Agreement to the bank by a notice of assignment dully signed by parties herein. Unfortunately, in the course, things did not go

well between the bank, the applicant and the respondent for some monies were not paid by the applicant as agreed both in the Receivable Purchase agreement and the Notice of Assignment. This necessitated the institution of Commercial Case No. 07 of 2020 by the Bank against the applicant and the respondent in this court. While the said suit is pending, the respondent filed winding up petition to this court vide Misc. Commercial Cause No. 05 of 2020 against the applicant on sole reason of inability to pay total amount of TZS.5,838,231,353.58 an amount which is the subject of claim in Commercial Case No. 07 of 2020. It was against this background, the applicant filed this application praying for orders as contained in the chamber summons.

Parties through their respective learned advocates filed skeleton written submissions in support and against this application. When this application was called on for hearing as scheduled on 28th September, 2020, Mr. Mushi adopted the affidavit of Mr. Isack Olomy, his skeleton written arguments. The bottom line of this application was that, whether the circumstances in this application call for urgently restraining orders against the respondent, its servants, agents, assignees, or any person acting under its instructions from proceeding with her petition for winding up of the applicant pending

determination of Commercial Case No. 07 of 2020. The learned counsel went on to expound his reasons by inviting this court, **one,** to take cognize that the contents of paragraph 6:1:11 of the respondent's counter affidavit acknowledging the assignment of debt between the applicant and the respondent in favour of the Standard Chartered Bank; **two**, the existence of Commercial Case No. 07 of 2020 which the applicant and respondent are being sued based on the assignment notice. According to Mr. Mushi, the interest of the respondent arises from the same debt in which Standard Chartered bank is claiming against the applicant; and **three,** that since Commercial Case No. 07 of 2020 was filed prior to the winding up petition, then, guided by the principle of res sub-judice this matter need to be stayed pending the determination of the Commercial Case No. 07 of 2020; **four,** that the applicant is not unable to pay the debt save for competing claims between Standard Chartered bank and the respondent all claiming interest on the outstanding amount; **five,** the applicant has so far paid a substantial amount of TZS.1,000,000,000/= which exhibit that is not a company unable to pay its debts.

In support of his respective stance, Mr. Mushi cited a string of cases. Just few to mention is the Kenyan case of WINDING UP CAUSE NO 32 OF 2015,

IN THE MATTER OF TURBO HIGHWAY ELDORET LIMITED, HIGH COURT OF KENYA, NAIROBI, in which it was held that, the common thread that runs through these cases is that where there is genuine disputed debt on substantial grounds, a petition will be struck out. Such a dispute must be based on sound grounds. The dispute should also not be raised in order to defeat the winding up proceedings. It is also clear that where there is insolvency and a genuine disputed debt, a petition for winding up will not stand.

Another case cited was the case of MANN v. GOLDSTEIN [1968]1 W.L.R 1091 AT 1092-1093 which was quoted with approval by the High Court of Tanzania in the case EAST AFRICAN DEVELOPEMNT BANK v. GODES LIMITED, HC OF TANZANIA [1989] TLR 129 in which Ungoed-Thomas, J (as he then was) has this to say, 'it is well established that this court has jurisdiction to restrain the presentation or advertising of a winding up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court's inherent jurisdiction to prevent an abuse of the process of the court. It will be exercised where a winding up application is presented or prosecuted otherwise than in accordance with the legitimate purpose of such process...'

The learned counsel for the applicant was of strong view that, this petition is intended to threaten the applicant and was filed with mala fide intended to embarrass, ridicule, and inflict irreparable reputational damage to the applicant. On the above reasons, the learned advocate for the applicant invited this court to grant the prayers as prayed in the chamber summons with costs.

Mr. Sikamkono learned advocate for the respondent started by adopting the counter affidavit filed in opposing this application and the skeleton written arguments filed to support his stance. Mr. Sikamkono went on to urge this court dismiss this application because of the following reasons; **one,** according to Mr. Sikamkono, the ruling of this court delivered by my learned sister Hon. Phillip Judge was clear as day light that no way one can stay proceedings in Commercial Case No. 07 of 2020 which is not between the parties herein was put to rest in that ruling. **Two,** according to Mr. Sikamkono, the pending of Commercial case No. 07 of 2020 has no bearing with this wing up petition; **three,** the court has not been properly moved for wrong citation of the provision of the law for the one cited do not confer this court's jurisdiction to entertain it; **four,** that the applicant has an opportunity to oppose the petition, if she so wishes, by filing an affidavit in

opposition as provided for under Rule 106 of the Companies (Insolvency) Rules,G.N. 43 of 2005. Mr. Sikamkono further argued that, the procedure taken by Mr. Mushi is for stay of the proceedings is very alien to the jurisprudence of insolvency in Tanzania for want of being prescribed anywhere in law; **five,** if the applicant was not satisfied with Hon. madam PHILLIP, Judge was to appeal to the proper forum to have it set aside. Mr. Sikamkono conclusively submitted that this court be pleased to find that the instant application is misconceived as such deserve to be dismissed with costs.

The learned advocate for the respondent neither cited any law nor case law in support of his stance.

In rejoinder, Mr. Mushi replied that the decision or rather ruling by Hon. Madam Phillip, Judge was so decided because by then there was no legal wrangle between the applicant and the respondent, as opposed now because of Misc. Commercial Cause No. 05 of 2020 for winding which has a direct bearing to Commercial Case no 07 of 2020, as explained above. Mr. Mushi drew the attention of the court that, by entertaining winding up petition will tantamount to turning this court into debt collection agent. Mr. Mushi conceded that, filing of affidavit in opposing the petition is one of the

recourse available to him. On the argument that the court was not properly moved, it was the brief reply of Ms. Mushi that, the court was properly moved and urged this court to grant the application as prayed.

From the parties' advocates rival arguments, I find that they lock horns on several issues; **one,** whether the ruling of Hon. Phillip, Judge was conclusive and bars the applicant from taking up a recourse in now present winding up petition against the applicant; **two,** whether the application is bad in law for wrong citation of the law and its effect; **three,** whether the winding up petition, has any, bearing to Commercial Case No.07 of 2020. **Four**, whether stay of proceedings in winding up is alien to jurisprudence of insolvency of companies in Tanzania.

On my part, I prefer to determine the issues raised one after the other starting with the ruling of my learned Sister Phillip Judge. I have take my time to read the impugned ruling and is my considered opinion that, by then, the learned judge was justified with all respect to decide as she did for there was no any matter pending between these two litigants. But as of now, since there is pending Misc. Commercial Cause No. 05 of 2020 between the respondent and the applicant, then, the applicant is justified to defend her interests as rightly concluded in the ruling in accordance with the law. So

the arguments by Mr. Sikamkono that, the ruling barred any subsequent action by the applicant are misplaced and misconceived, hence, rejected.

This takes me to the third issue whether the winding petition has any bearing to Commercial Case No. 07 of 2020. According to the learned counsel for parties' each had diametrical different view, while Mr. Mushi for applicant strongly submitted that it has a very big bearing to that case for it originates from the Receivable Purchase Agreement and the notice of assignment of debt, but Mr. Sikamkono was of the strong view that, this winding up petition has no bearing whatsoever with Commercial Case No. 07 of 2020 for the Ruling in Misc. Commercial Application No. 05 of 2020 had conclusively determined so. I have carefully considered the rival arguments of the learned trained minds for the parties and have re-read both the ruling and the pleadings in Commercial case No. 07 of 2020, and I am of the strong considered opinion that this winding up petition has a strong bearing to the Commercial case No. 07 of 2020. I will explain. **One,** in her petition, the respondent in the winding up petition had the following set out as ground on which a winding up order is sought. For easy of reference I will quote the entire paragraph:-

1. Inability to pay total amount of TZS.5,742,993,064.82 to his creditor, herein petitioner as hereunder stipulated:-

1.1 This debt arose from various fuel supply contracts to the Dangote Cement Limited from 6th day of April 2017 to date of this petition as result of the creditor claimed to the debtor for payment of unpaid TZS.3,729,216,275.86

1.2 Interest at 15% per annum for loss of opportunity, TZS.1,118,764,882.76 accrued from the principal amount of TZS.3,729,216 275.86 from 6th day of April 2017 to date of this demand. For avoidance of doubt, this interest will continue to accrue until the date of payment.

1.3 Interest at 7% per annum for the breach of contract and loss of anticipated profits TZS.522,090,278.62 accrued from the principal amount of TZS. 3,729,216,275.86. For avoidance of doubt, this interest will continue to accrue till the date of payment.

1.4 Costs incurred by the creditor to collect debt, which is TZS.372,921,627.58 (lawyer's collection fee).

From the foregoing above, it is unheard to say and argue that this winding up petition has no bearing with what is claimed in Commercial Case No. 07 of 2020. The contracts referred and annexed here are the same contracts of Receivable Purchase Agreement and the notice of assignment of debt, the subject matter of dispute in Commercial Case No. 7 of 2020. Therefore, it is the strong opinion of this court that, indeed and as a matter of fact, the instant petition for winding up, as correctly argued by Mr. Mushi and right so in the opinion of this court, has close bearing in Commercial Case No. 07 of 2020. Further, it should be reminded of Mr. Sikamkono that, it is a trite law in our jurisdiction that parties are bound by their pleadings. See the case of ASTEPRO INVESTMENT COMPANY LIMITED v. JAWINGA COMPANY LIMITED, CIVIL APPEAL NO. 08 OF 2015 (CAT) DSM (Unreported) underscore the point. Therefore, from the above quoted part of the petition shows how this winding up petition is connected to suit pending for the determination on the same contracts. In the fine, I hereby unhesitatingly hold that the winding up petition by the respondent cannot be severed from Commercial Case No. 7 of 2020, hence, a call to restrain is justifiable.

The fourth issue is whether the stay of proceedings in winding up petition is alien in our company jurisprudence. With due respect to the learned

advocate for the respondent, this issue was raised and argued out of ignorance. The provision of section 283 of the Companies Act, 2002 are loud and clear on this point. For easy of reference the section 283 provides the following:-

Section 283- At any time after the presentation of a winding-up petition and before a winding up order has been made, the company, or any creditor or contributory, may-

(a) **where any action or proceedings against the company is pending in the High Court or Court of Appeal apply to the court in which the action or proceedings pending for stay of proceedings therein; and**

(b) **where any other action or proceeding is pending against a company, apply to the court having jurisdiction to wind up the company to restrain further steps in the action or proceeding,**

and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it think fit.

In my considered opinion, therefore, the wording of the above provisions of the law, literally, as they are, is unheard to argue that restraining or staying of proceedings in winding up is alien and unknown to our jurisprudence. The winding up of a company amounts to legally killing and burying of the company and our parliament in its wisdom by incorporating the provisions of section 283 of the Companies Act was meant to protect the process where the circumstances are so demanding. In this application, I find this is one of the fit cases for this court to exercise its discretion.

The last issue is whether this application is bad in law for wrong citation of the law and its effect. According to Mr. Sikamkono, the provisions under which this application was preferred do not confer this court powers to grant the orders sought and its effect is to strike out this application with costs. On the other hand, Mr. Mushi had it the other way around. I have carefully gone through all the provisions cited in the chamber summons, without reciting them here, and as correctly argued by Mr. Sikamkono, indeed the provisions cited in the chamber summons are not the ones envisaged for the orders sought, in particular, as to what I have just been discussing above on the provisions of section 283 of the Companies Act. The question I have to ask myself is whether failure to cite the relevant provisions of the law has the

effect of striking out this application? I agree with the learned counsel for respondent that in the past this was fatal and incurable in all respects, even without citing any case law. However, with the introduction of overriding objective this is not the case both civil and criminal laws as amended requiring basically courts to focus on substantive justice. The immediate question now, is can I close my eyes and struck out this application? This point has disturbed my mind a great deal. But in my tiresome research, I have come across the decision of this court in the case of ALLIANCE TABACCO TANZANIA LIMITED AND ANOTHER v. MWAJUMA HAMISI AND ANOTHER, MISC. CIVIL APPLICATION NO. 803 OF 2018,(HC) DSM (Unreported) in which my learned brother Hon. Mlyambina, Judge, grappled with a similar objection and argument that the application before him was incompetent for being filed under wrong provisions of the law, but guided by the principle of overriding objective, to the obvious wrong citation of the law, the learned judge had this to say:

"needless the afore observation, though not disputed by the respondent, the afore wrong citation of the law cannot in any how affect the jurisdiction of this honourable court to grant the orders sought."

My learned brother Hon. Mlyambina, Judge, in his reasoned ruling put the scale of interest of justice visa vis the dismissal of the application on the predicament of wrong citation of the law and much guided Rule 9 as amended by G.N. 344 of 2019 which amended Rule 48 of the Court of Appeal Rules 2009 by adding sub rule 1, declined to struck out the application before him. The said provision now goes that:-

> **Rule 48(1) "Provided that where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the Court may order that the correct law be inserted." (emphasis mine).**

Therefore, guided by the above provision, and having having no reasons to differ with my fellow Judge's decision which I found very persuasive to me, I venture to take the cause taken by him as well in this application despite using a rule of the Court of Appeal Rules which are inapplicable to this court. The reason I am taking prepared to take this position is that underlying principal in the Rule, in my opinion, is to give effect to the overriding objective, which applies now to all grades of courts in this country. Whereas I entirely agree with the reasoning with my learned brother Hon. Mlyambina

Judge,in the above case, nevertheless, I wish to add that, **one,** in my opinion, the jurisdiction to grant orders in any application is not conferred by the chambers summons but by the law, and this being a court of law, in my opinion, is presumed to know the law, hence, I am enjoined to overrule the objection irrespective of the failure to cite the specific provision of the law in the chamber summons so long as the jurisdiction to grant the orders exist under section 283 of the Companies Act. **Two,** the argument that the court is not properly moved, in my opinion, is a technicality that we have engaged for years and yet in most cases we have failed to reach the yolk of the dispute between parties and miserably failed to determine the real controversy in issue at the expense of that technicality. Courts needs to be jealous of their jurisdiction granted by the Acts of Parliament or any law for that matter and deny any suggestion of undermining that jurisdiction. To expound this point and in the light of Holy Book, in particular, the **Bible,** in books of Luke 5:17-26 and Mark 2:1- 12 both gives same account where Jesus heals a paralytic who was brought to him through unusual way i.e **through the roof;** but the good news is that Jesus never questioned how he was brought to him but considered so long he had powers to attend him, he attended him accordingly. The man went home healed and blessed with

the justice of a son of God without technicality. But unfortunately for us in the judiciary and other stake holders in justice delivery, like Pharisees, we have employed technical provisions that we forget the yolk of justice in dispute. In my opinion, we need to change and do away with technicalities and this is the time. We need to strive for substantial justice bearing in mind that what we do by judging is God's business entrusted to us.

More so the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, in particular, under article 107A sub article (2) is another reminder to the judiciary that when deciding cases both civil and criminal to observe the following:

(a) NA
(b) NA
(c) NA
(d) NA
(e) to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice.

The above provisions of the Constitution, clearly reminds the judiciary of Tanzania through the supreme law of its paramount and noble duty in justice delivery not to be tied up with technicalities at the expenses of substantial justice. Therefore, with the introduction of the overriding

objective, then we need to give a liberal interpretation of any provision without obstructing justice on case basis.

Three, the introduction of Rule 48 (1) as amended by the Rule 9 of G.N. 344 of 2019, to start with, is another turn-around in the Rules of the highest court of the land to give effective and put into full application of overriding objective. I suggest a similar provision be inserted to all laws that were imperative to be amended to introduce overriding objective in our laws.

Guided by the above, therefore, there is no dispute that under the provisions of section 283 of the Companies Act, this court is blessed with jurisdiction to grant restrain or stay of proceedings. I am entitled to take this approach because what this court was given by the Act of parliament cannot be taken away by a mere omission in the chamber summons. In the fine, I find that despite omission to cite the specific provisions of the law, but still, this court has powers to grant the prayers as provided by the law as demonstrated above.

In the totality of the above reasons, I hereby find the arguments by Mr. Sikamkono wanting despite the fact that the specific law was not cited in the

chamber summons but so long as the law has given me the powers, I will proceed to determine the application if found with sound reasons.

Now having answered all the issue as shown above, I revert back to the instant application. Having considered the affidavit and the written arguments by the applicant and respondent altogether, I find this application merited and guided by the case laws cited by the learned advocate for the applicant, I am constrained to grant this application not as prayed but as will be demonstrated hereunder. It is the strong view of this court that the respondent can use this forum and proceed with winding up petition after the case which will determine precisely the amount of debt bearing that the agreements and assignment of debt notice subject of dispute in Commercial case No. 07 of 2020 are the same. This point alone suffices to grant the restrained orders or stay of the proceedings in Misc. Commercial Cause No. 5 of 2020. I, therefore, hereby grant the order for stay the proceedings in Misc. Commercial Cause No. 05 of 2020 pending the determination of full amount of debt in Commercial Case No. 07 of 2020. The prayers that the winding up petition is sub-judice and that is vexatious are not granted as those prayers can be determined during the hearing of the substantive winding up petition after the Commercial Case No. 07 of 2020 is finalized

and the respondent wishes to go on with winding up petition. Since the applicant never pressed for costs in his chamber summons, I hereby grant the prayer as demonstrated above with no order as to costs.

It is so ordered and directed.

Dated at Arusha this 05th day of October, 2020

S.M.MAGOIGA

JUDGE

05/10/2020