

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 2 OF 2021  
(Arising from Commercial Case No. 96 of 2020)**

**ADVENT CONSTRUCTION LTD.....APPLICANT**

**VERSUS**

**TANSINO QUARIES LTD.....1<sup>ST</sup> RESPONDENT**

**XINXIN QIU alias RADHA QIU.2<sup>ND</sup> RESPONDENT**

*Last Order: 7<sup>th</sup> JUNE 2021  
Ruling: 8<sup>th</sup> JULY 2021*

**RULING**

**NANGELA, J.:**

This is an inter parte third party application, made under Rule 2(2) of the High Court (Commercial Division) Procedure Rules G.N No. 250 of 2012, section 4 of the Judicature and Application of Laws Act Cap 1 (R.E 2019), Order, 1 Rule 14 (1) (a), (b),

(c) and (d) & section 95 of the Civil Procedure Code 1966, and any other enabling provision.

The Application originates from **Commercial Case No. 96 of 2020** in which the Applicant stands as a Defendant. In that case, the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent (who are Plaintiffs), have sued the Applicant (Defendant) and pray for the following orders and reliefs from this court:

- (1) Specific payment of **TZS 96,730,000/=** being the outstanding amount for the transportation services of aggregate rendered to the Defendant
- (2) Specific payment of **TZS 16,572,000/=** being the outstanding purchase price for the aggregate supplied to the Defendant.
- (3) Interest on item (a), (b) above at the Commercial rate of 15% per month from the date of 24<sup>th</sup>

August 2020 till the date of Judgment.

- (4) Interest on item (a), (b) and (c) above at the Commercial rate of 12% from the date of Judgment/Decree till the final payment.
- (5) General Damages to be assessed by the Honourable court
- (6) Costs of the suit; and
- (7) Any other relief this Honourable court deems just to grant.

When the main case was still at its preliminaries, the Applicant filed this *inter parte* Chamber Application, on 5<sup>th</sup> January, 2021. It was filed by way of chamber summons supported by an affidavit of the Applicant; Ashutosh Mukund Jog.

In the said chamber summons, the Applicant seeks for the following orders:

- (1) That the Honourable court be pleased to grant to the Applicant leave to present a Third Party Notice against Ms XINXIN QIU alias RADHA

QIU who is also a director and majority shareholder of the Respondents

- (2) Any other order(s) and relief(s) the court may deem fit to grant
- (3) That the costs of this Application be borne by the Respondent's/ Defendant's.

On 7<sup>th</sup> June 2021 when this application was called on for its hearing, the Applicant was represented by Mr Hassan Mussa, learned Advocate while the Respondents enjoyed the services of Mr Fraterine Munale, learned Advocate.

Mr Hassan rose to address the court. He submitted that, this Application, which is supported by an affidavit of Ashutosh Mukund Jog, was filed with a view to seek for an order to issue a Third Party Notice to Ms **XINXIN QIU** *alias* **Radha Qiu**.

The rationale for having the third party brought to the suit, he submitted, is to ensure that she

contributes or indemnifies the Respondents in respect of the claims made by the Respondents. Mr. Hassan argued that, the amount claimed by the Respondents was paid on 20<sup>th</sup> December, 2019 and 29<sup>th</sup> December, 2019.

Relying on paragraph 5 of the Applicant affidavit, he argued further, that, in law a third party may be joined in a suit if:

(a) the person to be joined is not a party to the matter;

(b) the Defendant who wishes to join such other person has a valid claim against that third party; and,

(c) the Defendant claims against the third party for any contribution or indemnity which is coming from the claim and, is related to or

connected with the subject matter of the suit and substantially the same as to relief or remedy claimed by the Plaintiff.

Mr Hassan argued that, the application at hand has met all the requirements as the intended third party is not a party to the suit and, that, the Defendant has a valid claim against the third party to whom a total of TZS 113,000,000/= was paid on 20<sup>th</sup> and 29<sup>th</sup> December, 2019.

He submitted further that, in the event the Defendant is found to be liable for the claim by the Plaintiff, the said third party is to be called upon to contribute or indemnify the Defendant and, this is because the payment is substantially the same to what is claimed by the plaintiff.

To strengthen his submission, reliance was placed on the case of **Metropolitan Tanzania Insurance Co. Ltd vs. Frank Hamad Pilla, Civil Appeal No.191 of 2018 CAT at Dodoma** (unreported). In view of that submission, Mr Hassan finally prayed to the court that, the Applicant's prayer to be granted.

In response thereto, Mr. Munale submitted that the Respondents contest the application. According to Mr Munale, the basis for their contention rests on Order 1 Rule 14 (3) of the Civil Procedure Code, which requires this court to be satisfied on the reasonability and propriety of the application.

He was of the view that, although the Applicant has attached receipt to the affidavit, the receipts did not show the distinction or description of the recipient or whether the receipts originates from the

Applicants. Moreover, the receipts are not signed by any of the authorized persons. He argued, therefore, that, they did not show any correlation with the claim or the substance they have stated in Court.

Mr Munale stated that, the amount paid does not tally with what is being claimed. He contended that, while the receipt is for TZS 155,000,000/- the claim is for TZS 113,302,500/-. He argued further that, the mode of payment was not accompanied by EFD receipts as proof of such payments.

In view of all that, Mr Munale was of the view that, the Applicants have not disclosed any reasonable cause as the reasons in their supporting affidavit are unreasonable. He further submitted that, as regard the propriety of the application, the



same is improper for having included the third party in the application.

In a brief rejoinder, Mr Hassan submitted that, the application is tenable before this court because the Applicant has satisfied the requirements of the law. He contended that, the alleged payments claimed were made to the intended third party for the purposes of settling the services rendered to the Defendants in the main case.

He contended further, that, the intended third party admitted to be a shareholder and director of the Respondent. He insisted to be the one who was paid.

As regard the insertion on the name of the third party in this application, he contended that, the same was only inserted for clarity purposes and, if

anything, the same can be removed under the oxygen principle.

I have heard the argument and submissions made by both parties. In my view, what has been raised by Mr Munale in his submission does not remove or take away the alleged fact by the Applicant in the affidavit of Ashutosh Mukund Jog.

In my view, what this Court is required to do is to look at whether the application meets the requirements of the law. Order 1 Rule 14 of the Civil Procedure Code, Cap.33 R.E 2019, is the relevant provision which set out the principles on which the third party procedure operates.

As it was stated in the case of **Metropolitan Tanzania Insurance Co. (supra)**, at page 16, the third party procedure is based on the principle of

contribution and/or indemnity upon the defendant being found liable to the Plaintiff. The third party is not to be treated as a party to the suit or supposed to be a defendant in the suit. Instead, he or she stands to be essentially a third party and a non-party to the suit.

In this application, the applicants have demonstrated that, the Respondent is not a party to the suit for which a third party notice is being preferred. They have as well stated that, what they are seeking from the third party is indemnity or contribution in case they are found to be liable to the Plaintiff. That, in my view is sufficient to allow the application.

In the upshot, this Court finds it reasonable and proper to grant leave to the Applicant/Defendant

to serve a Third Party Notice to the intended third party as prayed. Such a notice must be presented **within 14 days from** the date of this ruling.

As regards the prayer for costs, it is appropriate, as suggested, that, costs shall be **"costs in the cause"**.

**It is so ordered.**

DATED AT DAR-ES-SALAAM ON THIS 8<sup>TH</sup> JULY 2021



A handwritten signature in blue ink, appearing to read "Deo John Nangela".

**DEO JOHN NANGELA**  
**JUDGE,**  
**High Court of the United Republic of Tanzania**  
**(Commercial Division)**