IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 61 OF 2008

DUNIA WORLDWIDE TRADING COMPANY LIMITED ……. APPLICANT

VERSUS

CONSOLIDATED HOLDING CORPORATION ……. RESPONDENT

(From the Judgment/Decree/Order/Finding/Decision of the High Court of Tanzania at Dar es salaam)

(Luanda, J)

Dated 7th day of November, 2007
in
Comm. Case No. 43 of 2006

RULING

27 August, & 25 September 2008

OTHMAN, J.A.:

This is a preliminary objection agitated by the respondent, with due notice. The two points of objection raised are that:-

"1. The application is incompetent or premature since it seek orders against the respondent who was not a party in the proceedings before the High Court against which it is desired to appeal, without first taking essential steps to regularize formally the substitution of the respondent without leave of the judge.

2. The so called "rejoinder to the counter affidavit" is legally invalid for having been lodged in court in contravention of Rule 46(2) of the Court of Appeal

Rules, 1979, Subsidiary Legislation, Cap 141 RE 2002 (Rules)".

On the first point of objection, Mr. Fungamtama, learned counsel for the respondent submitted that the respondent, Consolidated Holdings Corporation (C.H.C.) was not a party in the proceedings in High Court Commercial Case No. 43 of 2006. That party was the Presidential Parastatal Sector Reform Commission (P.S.R.C.). That P.S.R.C. had also filed the notice of appeal on 16.11.2007. He pointed one that C.H.C. took over the functions, assets and liabilities of P.S.R.C. on 01.01.2008 vide the National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) (Amendment) (No. 2) Act, 2007 (Act No. 26 of 2007) (hereinafter referred to as the Act). That under Rule 98, the respondent C.H.C. had to be substituted in the place of P.S.R.C. before the applicant's application to strike out the notice of appeal by P.S.R.C., under Rule 82 could be determined. That in terms of Rule 98 it is the Court upon being properly moved that causes the substitution of parties. He argued that Rule 98 read together with section 4 of the Interpretation of Laws Act, Cap 1 RE 2002, which defines a person as including among others, a public body, the expressions **"death"** of the appellant or respond and **"any interested part"** in Rule 98 covers both the instant applicant and respondent.

Mr. Fungamtama furthermore submitted that the applicant had usurped the powers of the Court to cause the respondent to be made a party in the place of P.S.R.C. without first making a formal application under Rule 3(2)(a). He relied on ***Nangua Village Council V. Lugwew Irafay and 19 others,*** Civil Appeal No. 7 of 1993 (CA)(unreported) where the Court, *inter alia* stated:-

> *"Where any law provides that a matter can be done with the leave of Court, then leave has to be specifically applied for and has to be expressly given. Leave cannot be given by implication".*

Resisting, Dr. Lamwai, learned counsel for the applicant submitted that in paragraph 6 of the affidavit deponed by Murtaza Ali Hussein on 28.04.2008, the respondent conceded that by operation of law C.H.C. become P.S.R.C'S successor in title on 01.01.2008. That equally, paragraph 3 of the applicant's counter affidavit sworn by Elizabeth A. Mamba notes that the respondent is the transferee of the assets and liabilities of P.S.R.C. That a party which

becomes a successor in title enjoys all the rights and suffers all the liabilities of the predecessor. That there was no requirement under the law for the parties to make an application to the court for the substitution of parties as this was a matter of operating lf law. The Court, he said, could not be moved because it had been told so by the law that P.S.R.C. now C.H.C. That the applicant was only obeying section 7 of the Act where references to P.S.R.C. in the Public Corporation Act, Cap 257 RE 2002 now refer to C.H.C. He invited the Court to take judicial notice of the Act as the statutory substitution of P.S.R.C. with C.H.C. was not a question of being informed but one of taking judicial notice under section 59(1) of the Evidence Act, Cap 6 RE 2002 and section 31(c) of the Interpretation of Laws Act.

That apart, Dr. Lamwai submitted that Rule 98 was inapplicable as the literal meaning of the word **"death"** therein meant a physical person not a body corporate, a legal fiction and a not living legal entity. That the reference changes from P.S.R.C. to C.H.C. in Act No. 26 of 2007 cannot be interpreted as the **"death"** and succession of a corporation. That Rule 98 is applicable only where a natural person dies. There cannot, he urged, be a substitution of a corporation that has seized to exist under that rule.

It was learned counsel for the appellant's further contention that Rule 3(2)(a) was not applicable as the substitution of parties was not a matter for which no written law existed. It was provided for in section 7 of the Act which stated that P.S.R.C. is now C.H.C. That, therefore, there was no requirement for P.S.R.C. to be substituted by C.H.C. under Rule 3(2)(a) or Rule 98.

Resting his submissions, Dr. Lamwai informally prayed that should the court uphold the preliminary objection, it could regularize the application by an order with retrospective effect under Rule 3(2)(a) that P.S.R.C. be substituted by C.H.C. as of the date of the application. That the change, uncontentious, was what the law dictated.

In rejoinder, Mr. Fungamtama challenged the prayer as at this stage it preempted the preliminary objection, which seeks to strike out the application.

Counsel for the respondent also insisted that the word **"death"** in Rule 98 indicates the permanent end of either a corporate body or a

natural person. That the expiry of P.S.R.C. by operating law is the **"death"** of a corporate body. He submitted that in the alternative, if there is no particular provision in the Rules for the substitution of parties which are not natural persons, the court should be inspired by Rule 98 to have the legal representative of a corporate body substituted as a party under Rule 3(2) (a).

Now, the respondent reproaches the applicant for not invoking Rule 98 to substitute P.S.R.C. with C.H.C. That Rule provides.

> *"98. An appeal shall not abate on the death of the appellant or the respondent but the court shall, on the application of any interested person, cause the legal representative of in a deceased to be made a party in place of the deceased". [Emphasis added]*

It is an elementary rule of construction that were the meaning of the words in a statute in plain and unambiguous, the court is left with no choice but to give effect to its plain meaning **(Duport Steel Ltd V. Sirs** (1980) 1 All E.R. 529 at 541; **G.P. Singh, Statutory Interpretation,** 10th Ed. Pp. 80, 82).

With respect, on a contextual and fair reading of Rule 98 I am unpersuaded by learned counsel for the respondent that a case has been made out, let alone a convincing one that would make me depart from the natural and ordinary meaning of the word **"death"** therein or to give it any special or qualified meaning. The word **"death"** is neither defined in the Appellate Jurisdiction Act, Cap 141 R.E. 2002 nor the Rules. The Concise Oxford English Dictionary, 11th Ed. Has as its meaning:

> *"the action of dying or being killed, an instance of a person or an animal dying".*

Stroud's Judicial Dictionary of Words and Phrases, 2000 Ed., succinctly states:

> *"Where "death" is mentioned in a statute the work generally refers to the ceasing of a life of a natural person, it will require a strong context to make the word include the dissolution of an artificial entity (e.g. a partnership or a company (Stewart V. Brown, 35 S.L.R p. 28, cited Deceased)".*

Black's Law Dictionary, 7th Ed; stated as its meaning:

> *"the ending of life, cessation of all vital functions and signs. Also termed deceased; demise".*

I would, therefore, agree with Dr. Lamwai that the word **"death"** in Rule 98 refers to natural persons. Not to an artificial legal entity such as P.S.R.C. Rule 98 must be construed having regard to the ordinary meaning of the word **"death".** Furthermore, the cessation of or non existence of LART by operation of law, namely Act No. 26 of 2007 cannot be construed as its **"death"** within terms of Rule 98 thereof. With respect, the respondent's interpretation of that rule cannot possibly be correct.

That aside, I would agree with Mr. Fungamtama that the passing over and vesting on to C.H.C., by operating law, of the undischarged assets and liabilities of the LART under Act No. 26 of 2007 to it, requires the substitution of the former as the successor party in the ensuing litigation. Without prior substitution in the record it can neither prosecute an appeal nor resist one, until it has been formally put on record. True, there is no provision in the Rules for the substitution of artificial entities or corporate bodies, resort however can be had to Rule 3(2)(a) to cause the substitution of P.S.R.C. with C.H.C. as its successor in title in the pending litigation in Court.

In Sudhir P. Lakhanpal V. Delphis Bank (T), The Loans and Advances Realisation Trust (LART) and B.S. Kayira, Civil Appeal No. 72 of 2004, the Court on 11.04.2008 in dealing with the substitution of LART with C.H.C. pertinently observed that the amendment sought to have the parties substituted in the record was a substantial one which require a formal application to rectify the record by way of filing a supplementary record. Having been formally moved on application the Court, on 12.05.2008, substituted the defunct LART with C.H.C. under Rule 3(2)(a) **(Sadhir P. Lakhanpal V. C.H.C., FBMC Bank (T) Ltd and B.S. Kayira,** Civil Application No. 52 of 2008 (CA) (unreported).

The above considered, mere consent by the parties in their affidavits cannot automatically cause or confer the substitution of parties. Nor could it be in the circumstances a matter of the Court taking judicial notice. The Court has to be moved for the

substitution of a party to be properly brought on record and Rule 3(2)(a) can serve that purpose as it did in **Sudhir P. Lakhanpal's** case *(supra)*. Point one of the objection has merit.

On the second point of objection, Mr. Fungamtama submitted that both the applicant's rejoinder to the counter affidavit lodged on 08.07.2008 and its additional rejoinder to the counter affidavit filed on 26.08.2008 were not supplementary affidavits under Rule 46(2). That however, as they were submitted without leave of a judge or the respondent's consent, they contravened Rule 46(2) and ought to be struck out.

In reply, Mr. Lamwai relying on **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd.,** 1959 E.A 696 submitted that the second point of objection did not amount to a preliminary objection, which is one taken on a point of law having the effect of disposing of the matter in Court. He submitted that even if the two impugned affidavits were expunged from the record, it does not fatally effect the disposal of the application. A complaint on these affidavits, he proposed, could be taken up at the hearing of the application on merits. That the respondent was putting the cart before the horse by asking the court on the preliminary objection to expunge them. He also questioned why the respondent had complained under Rule 46(2) when he acknowledged that the two impugned affidavits were not supplementary affidavits under that Rule. He submitted that as a rule of natural justice the applicant was entitled to a right to answer the respondent's counter-affidavit by a rejoinder on which no leave of the Court is required.

Finally answering, Mr. Fungamtama maintained that the question of validity or invalidity of the applicants two affidavits on rejoinder and additional rejoinder to the respondent's counter-affidavit was a question of law. That it was not correct to say that it could not form a preliminary objection. That there was no specific provision in the Rules on them, leave of the Court should have formally or informally sought and granted under Rule 3(2)(a).

The threshold questioned to be determined is whether or not the second point raised amounts to a preliminary objection. In **Mukisa Biscuit Manufacturing Co.'s** Case *(supra)* (at p. 700) the Court stated:

> *"**a preliminary objection consists of a point of law,** which has been pleaded or which arises by clear implication out of the pleadings, and **which if argued as a preliminary objection, may dispose of the suit.** Examples are objection to the jurisdiction of the Court or a plea of (time) limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration". [Emphasis added].*

In **COTWUL (T), OTTU Union and another V. Hon. Iddi Simba,** Civil Appeal No. 40 of 2000 (CA) (unreported) this court stated that the test for a preliminary objection was:

> *(a) The preliminary objection must raise a point of law based on ascertained facts and,*
> (b) *The objection if sustained should dispose of the matter. [Emphasis added].*

The issue to be resolved at the outset is whether the second point of objection impugning the applicant's "rejoinder" and "additional rejoinder" affidavits to the respondent's counter-affidavit constitutes a proper and valid preliminary objection. With respect, in my considered opinion not. Even if I were inclined to uphold that objection and expunge them from the record as argued by Mr. Fungamtama, it would not result in the summary disposal of the application. As correctly indicated by Dr. Lamwai, an application can be heard and determined even without an affidavit in reply whose filing is discretionary under Rule 53(1). In the instant circumstances as a positive finding on the second point of objection would not result in the summarily disposal of the application the test laid down in **COTWU (T)'s** Case has not been squarely met. In the circumstances, the second purported objection, not amounting to a preliminary objection and raised prematurely, must fail.

As a final point on costs. Dr. Lamwai challenged Mr. Fundamtama's appearance as he had not featured in H.C. Commercial Case No. 43 of 2006. He submitted that it was Mr. Kilindu learned advocate who had deponed the respondent's counter affidavit lodged on 12.05.2008. That under Rule 30 as no notice of change of advocate has been filed or served on the applicant, his prayer for costs was unjustified as he had not told the court the basis of his appearance on the preliminary objection.

In reply, Mr. Fungamtama submitted that Rule 30 was inapplicable as there was no change of advocates. That the respondent had engaged two advocates which was a matter between a party and his advocates. There was no indication, he urged, that Mr. Kilingu was acting alone. That he was not appearing as a substitute but as a co-advocate with full instructions to proceed and defend his client's interests. That no prejudice had been occasioned to the applicant and he was entitled to costs.

The Court has full discretionary powers over costs. In general terms a successful party is justified in having a reasonable expectation that its proper costs would be compensated by the unsuccessful party, unless there is some disentitling conduct or impropriety. There is no basis, the above fully considered, to disentitled counsel for the respondent's costs appearing as one of the co-counsel with those instructions.

For the foregoing reasons and the first point of the preliminary objection upheld the application is hereby struck out with costs. Ordered accordingly.

DATED at DAR ES SALAAM this 18th day of September, 2008

M.C. OTHMAN
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S.S. MWANGESI
Ag. SENIOR DEPUTY REGISTRAR