

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

COMMERCIAL CASE NO. 29 OF 2012

PETROFUEL (T) LIMITED.....PLAINTIFF

VERSUS

POWER ROAD (T) LIMITED .....1<sup>st</sup> DEFENDANT

LYCOPODIUM TANZANIA LTD.....2<sup>nd</sup> DEFENDANT

PANGEA MINERALS LTD.....3<sup>rd</sup> DEFENDANT

**RULING**

Date of the Last order: 16/8/2021  
Delivery of the Ruling: 30/9/2021

**NANGELA, J.:**

This ruling is in respect of an issue which cropped out of the ruling of this Court issued on 30<sup>th</sup> June 2021 in **Misc. Comm. Appl. No.188 of 2020**. In that ruling, this Court made the following orders, that:

- (i) "The *ex-parte* Judgement and Decree dated 24<sup>th</sup> October 2014 (in respect of Commercial Case No. 29 of 2012) [be set aside] as

against all defendants in that suit.

- (ii) The suit, i.e., *Commercial Case No. 29 of 2012*, [be] restored for **it to proceed with its hearing, with the involvement of all parties there to** on such a date to be fixed by the Court.
- (iii) Costs of this application be in the cause." (Emphasis added).

On 16<sup>th</sup> August 2021, following the restoration of the suit by virtue of the orders of this Court, the parties appeared before me. Mr Abdul Nzori and Mr Killy Mwitassy, learned advocates, appeared for the Plaintiff while Ms Janeth Njombe and Ms Caroline Kivuyo appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' respectively. The 1<sup>st</sup> Defendant was absent and unrepresented.

Mr Mwitassy addressed this Court stating, that; he was being guided by the ruling of this Court issued on 30<sup>th</sup> June 2021 in **Misc. Comm. Appl. No.188 of 2020**. He submitted that, according to the Chamber summons filed by

the Applicant, the Applicant had prayed only to set aside the ex-parte judgement and decree of this Court dated 24<sup>th</sup> October 2014 and was granted only that which she had wanted. He submitted that, the ruling ordered that the matter be restored and the same to proceed to the hearing stage. However, he argued further that, the problem, and what the Court did, was to set aside the ex-parte judgment only.

He contended further that, the Court is to proceed at the point where the pleadings were for both parties, except the 2<sup>nd</sup> Defendant, meaning that, after the witness statements for the Plaintiff and the 3<sup>rd</sup> Defendant were filed. He maintained a position, therefore, that, since the 1<sup>st</sup> Defendant filed a written statement of defence only and did not file a witness statement, that position should remain so even at this point of restoration of the suit.

Ms Njombe's response to Mr Mwitassy was different. According to her, it was clear, in essence, that, the Orders of this Court dated 30<sup>th</sup> June 2021, were being misconstrued by

Mr Mwitassy. She was of the view that, the orders of this Court were issued in favour of the 2<sup>nd</sup> Applicant who filed the matter in Court because, the 2<sup>nd</sup> Defendant was denied an opportunity to file her defence since, and, in the first place, there was no service of the Plaint to the 2<sup>nd</sup> Defendant.

It was her contention, therefore, that, it would be erroneous to proceed on the assumption that the orders of this Court only ended with the setting aside of the *ex-parte* judgement and the decree. She maintained, and correctly so in my view, that, if we are to proceed with that notion, it will mean that the 2<sup>nd</sup> Defendant will not be able to file her defence even after the ruling.

She contended that, the aim of seeking for the orders of the Court setting aside of the *ex-parte* judgement and decree of this Court, was to allow the party who was condemned unheard to be heard, and, that, in this case, the 2<sup>nd</sup> defendant can only be heard if allowed to file her Written Statement of Defence (**WSD**).

Ms Njombe contended, and rightly so in my view, that, making for a prayer to file a WSD in the chamber application would have been acting prematurely as that could only be made after the ex-parte judgement and decree were set aside. She prayed, therefore, that, the Plaintiff and all other parties should serve the 2<sup>nd</sup> Defendant with the pleadings they filed in Court to allow the 2<sup>nd</sup> Defendant file her WSD timely.

As for Ms Kivuyo, who appeared for the 3<sup>rd</sup> Defendant, it was her submission that, while she does not support the submission made by Mr Mwitassy, the learned counsel for the Plaintiff, she does not as well agree with Ms Njombe's submissions. She was of the view that, as regard the particular Order of this Court, dated 30<sup>th</sup> June 2021, the Order puts back the parties to the position which was before the hearing of the case proceeded.

In her view, the position as per the existing record was that, the 2<sup>nd</sup> Defendant, who in the application proved that was not served with the Plaint, did not file WSD. That being

the case, it will mean that the pleadings were incomplete for want of the WSD of the 2<sup>nd</sup> Defendant and, for that matter, we are now to be taken us aback to ensure that the pleading are completed before we proceed interpartes with the 2<sup>nd</sup> Defendant aboard.

She, however, supported the view that, the 2<sup>nd</sup> Defendant is entitled to be availed with all the pleadings filed in Court by the rest of parties herein for her to file a WSD in respect of the case against her before the Court proceed with the normal trend of the case once pleadings are certified as having been complete.

In a quick rejoinder, Mr Mwitassy was of the view that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' counsels are trying to supplement the Chamber summons in respect of the Misc. Comm. Appl. No.188 of 2020. He contended that, in law, a party is granted what he had prayed and the 2<sup>nd</sup> Defendant never prayed to be served with the pleadings.

As such, Mr Mwitassy discarded the argument that such a prayer is made would have been premature and

maintained as it is a settled law that all prayers must be made in the same matter to avoid multiplicity of decisions.

In the alternative, he argued, that, if the Court is made to agree with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's submission, then, it must review its own Orders lest it becomes a culprit itself by infringing its own orders.

I have given careful considerations to the opposing submissions by the learned counsels for the parties. In my view, there is nothing like a need to review the previous orders of this Court given on the 30<sup>th</sup> June 2012 in respect of the **Misc. Comm. Appl. No. 188 of 2020**. The Orders of this Court were very clear and to the effect that the ex-parte judgment and decree issued on the 24<sup>th</sup> October 2014 was set aside and the hearing of the matter interpartes was restored.

In my view, what Mr Mwitassy seems to be battling with is the consequential effect of the order, in relation to the processes that should follow after the suit was restored for hearing. It should be borne in our mind that, that suit

was restored and the *ex-parte* judgment and decree set aside because of a fundamental error which denied the 2<sup>nd</sup> Defendant right to be heard.

That being the case, since the suit was restored all other necessary prayers pertaining to the rights of the parties *inter-se*, would follow, including prayers for service of pleadings which hitherto had not been served on any of the parties. Such prayers, as rightly stated by Ms Njombe, ought not to have been made in the chamber application since doing so before it was even granted, would have amounted to jumping the gun.

Besides, I also agree with Mr Kivuyo, that, since the Court had proceeded on an assumption that the pleadings were complete, while it was not the case, the effects of the ruling of this Court which set aside the *ex-d parte* judgment and decree in this suit, is also that, the necessary procedures/processes which apply to a suit before the commencement of its trial, are to be reverted to.



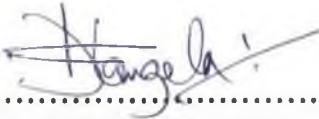
Such processes and procedures will include determination of any preliminary legal issues or applications, interrogatories, discoveries or other related matters, as well as conducting pre-trial conference, mediation and final pre-trial conference.

In the upshot I do not find the submissions of Mr Mwitassy to be of any merit and I will dismiss them forthwith ordering that the 2<sup>nd</sup> Defendant be availed with the Plaint and all other pleadings filed by the rest of the Defendants. The same should be availed to the 2<sup>nd</sup> Defendant by 8<sup>th</sup> of October 2021 and the 2<sup>nd</sup> Defendant is to file her WSD within 21 days from that date, i.e., on or before 1<sup>st</sup> of November 2021.

**It is so ordered**

DATED at DAR-ES-SALAAM, this 30<sup>TH</sup> SEPTEMBER 2021



  
.....  
**HON. DEO JOHN NANGELA**  
**JUDGE**

