

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

MISC COMMERCIAL APPLICATION NO 195 OF 2017
(Arising from Commercial Cause No 16 of 2009)

BETWEEN

THE BOARD OF TRUSTEES OF
THE PPF PENSION FUND-----APPLICANT

VERSUS

A CASTE CORPORATION -----RESPONDENT

RULING

SONGORO, J

The Board of Trustees of the Parastatal Pension Fund,(PPF) filed the application applying for leave to appeal to the Court of Appeal to challenge a decision of this court delivered by Hon Mansour J on 30th October, 2015 in the Misc. Commercial Cause No 16 of 2009. Other prayers made in the application are of costs and any other relief the court deems just and fit.

The application is made under Section 5 (1) (C) of the Appellate Jurisdiction Act Cap 141 [R.E 2002] and is supported by an affidavit sworn by Mr. Daniel Welwel, the applicant`s Counsel.

In response to the application, A Caste Corporation, the respondent opposed the application by filing a counter affidavit sworn by Mr. Hebert Herme Hezekia Nyange, the Learned Advocate of the Respondent.

Further, in paragraph 4 of the counter affidavit Mr Nyange opposed the application on the ground that, the applicant did not advance any ground which may enable the court to exercise its discretion and grant leave to appeal.

In the light of applicant`s application and respondent`s response, the court invited both parties to pursue the application. Therefore, Mr. Mponda Learned Advocate appeared for the applicant, and pursued the application. Whereas Mr. Hubert Nyange Learned Advocate appeared for the respondent and strongly opposed the application.

To start with Mr. Mponda stated that, he will be relying on his skeleton argument and then pointed out that, an appeal to the Court of Appeal is a matter of constitutional right. He then indicated that, the decision which they want to challenge was not properly made because it was made even before the parties framed the issues. Also, he pointed out that, the decision arises from the Award which was also not properly procured.

Further the counsel explained that, the court decision was based on the issue of jurisdiction were it was decided that, the court has no jurisdiction.

Next the counsel stated that the court first heard 3 witnesses and then made a U-Turn and decided that, it has no jurisdiction to hear the matter

and dismiss the matter. Mr. Mponda insisted that, it is the issue of jurisdiction which the applicant want to pursue in the Court of Appeal and that, is the reason leave to appeal is being sought. Another point which the applicant insisted that, also there is a public interest which is involved because the amount involved in the dispute is shs 1.7 billion which is huge amount of monies which are public funds The amount is coliseums it will be ideal if the matter may be fair if the applicant will be given an opportunity to contest it in the Court of Appeal. For reasons stated above, he prayed that, the court exercise its right and grant leave to appear to the Court of Appeal.

On his part Mr. Nyange for the respondent opposed the application and then the respondent counsel stated they are not opposing what took place during hearing of the petition in the sense the court framed issues for determination, witnesses were called and heard, and then the court decided that, it has no jurisdiction. The counsel then insisted that, even if that, is what took place in court that, does not turn a fact that, the court had jurisdiction to hear and determined the petition. He then indicated that the law allows the court decide the question of jurisdiction at any time. The contention is whether or not the court has a legal right to make U-Turn in the middle case and decides that, it has no jurisdiction because the preliminary objection on a point of law may be raised at any time. So that, explain better why the court may make a U-Turn when is satisfied that, it has no jurisdiction.

Responding to the applicant point that, the leave be granted because there are public interest involved, the respondent counsel argued that, the

applicant did not disclose what public interests is involved, and the applicant is not statutory corporation but a public corporation, who is a big investor and involved in commercial transactions and huge project therefore a decree is not paid from public funds but from its investment portfolio therefore there is no need to rely on the ground of public interest in determining leave to appeal. Mr. Nyange then insisted that, leave to appeal must not be used to protect public entity. Instead the court should only consider if the leave is legally justifiable. A fact that, the applicant is public corporation that, is sufficient ground for granting leave. Also, even if the amount involved is coliseum that, is not sufficient ground for granting leave.

Then relying on decision in the case of Saimon Kabaka Daniel Versus Mwita Marwa Nyegeya and 11 other (1999) TLR P.64 the respondent counsel stated that, in the application for leave to appeal, it is the applicant who must demonstrate that, there is point or points of law involved worth the attention of the Court of Appeal. But the applicant grounds of appeal does not show if there is a point of law worth to be determined by the Court of Appeal.

The counsel then relying on a decision in the case of DP Shapriya Versus Bish International (2003) EALR at p400 it was stated by Hon. Msumi JK (as he then was) that, " errors of facts" committed in arbitration by arbitrator or umpire which the applicant is relying upon may not be a basis of granting leave to appeal to the Court of Appeal .

Finally, the counsel submitted that, in the application for leave the court must assess if in the application there are justifiable reasons to warrant the granting of leave. So he prayed that, the application should not be granted.

The court has carefully assessed reasons advanced by both parties in the application, and find the Commercial Case No 16 of 2009 which was a petition to set aside the Arbitral Award was decided on the basis that, the Court has no jurisdiction to determine such petition. I find the issue of jurisdiction of this court on the decided petition surfaced during the hearing of the petition and a decision was made on it.

Next the court find since the applicant in the intended appeal wants to pursue a legal point of whether or not this court has jurisdiction to hear the Petition which was dismissed by this court for lack of jurisdiction on 30/10/2015, I find the issue of Jurisdiction is important point of law for any court and, in my view that, it is an important point law worth to be considered by the Court of Appeal of Tanzania.

For that, reasons I hereby pursuant to Section 5 (1)(C) of the Appellate Jurisdiction Act Cap 141 [R.E 2002 grant leave to the applicant to appeal to the Court of Appeal of Tanzania on a decision of this court in the Misc Commercial Cause No 16 of 2009. An appeal be filed in accordance with the laid down Rules. Each party to bear his own costs.

Dated and Delivered at Dar es Salaam this 5th April, 2018



H.T.SONGORO
JUDGE

The Ruling was delivered on the in the presence of Dr Lamwai, Learned Advocate of the applicant also holding a brief of Mr. Nasimire for Respondent.