

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

MISC COMMERCIAL APPLICATION NO 73 OF 2017  
(Arising from Commercial Application No 10 of 2016)

BETWEEN

MEXONS ENERGY LIMITED -----APPLICANT

VERSUS

MOGAS TANZANIA LIMITED-----RESPONDENT

RULING

SONGORO, J

This a Ruling on the application filed by Mexons Energy Limited the applicant for an order that, the court be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania. The applicant application is made under Section 5(c) of the Appellate Jurisdiction Act Cap 141 [R.E 2002] and is supported by an affidavit sworn by Mr. Daniel Wellwel, Learned Advocate of the applicant.

The Respondent in the application is Mogas Tanzania Limited who also filed the counter affidavit sworn by Mr. Deogratias Ringia Learned Advocate of the Respondent's company and opposed the application. Thus in the light of the application the court invited both parties to pursue the application by a way of written submissions. , Ms Angelista Nashon, Learned Advocate made submissions for the applicant and Deogratias Ringia, Learned Advocate, made submission on behalf for the Respondent.

On his part, the applicant's counsel submitted that, the applicant is seeking leave to appeal to the Court of Appeal of Tanzania against a decision of Hon Songoro J dated 2<sup>nd</sup> March 2017 in the Commercial Case No 10 of 2016.

The counsel then argued that, the reasons in support of the application are contained in the affidavit sworn by Mr. Daniel Wellwel and applicant's skeleton argument. Then he enlighten the court that, a decision of the trial court which is subject of the application and intended appeal originates from the Ruling in which the court decline to dismiss the suit when the

plaintiff/respondent failed to prosecute his own case by failing to file a witness statement within the requisite statutory time

Relying on decision in the case of Barclays Bank Tanzania Limited Versus Tanzania Pharmaceutical Industries Ltd & others, Commercial Causes No 147 of 2012 (Unreported), PUMA Energy Tanzania Ltd Versus Spec Check Enterprises Ltd Consolidated Miscellaneous Commercial Causes Nos. 233 & 252 of 2014 (Unreported) Afriscan Group (T) Versus Saidi Msangi Commercial Case No 87 of 2013, Unreported, and Athanasia T. Massinde T/A Abeti Primary School Versus National Bank of Commerce Ltd Commercial Case No 30 of 2014(Unreported) which decided that, failure to file a witness statement on time renders the suit liable for dismissal, he contested the trial court erred when it failed to dismiss the suit when Mogas Tanzania Limited failed to file a witness statement within requisite time.

The applicant counsel then informed the court that, from his legal point of view and other court decisions failure to file a witness statement is akin the failure to produce the witness. Further, the applicant counsel explained since the court made erroneous decision, they intend to appeal and challenge the court decision to the Court of Appeal. He also explained that, the intended appeal involves a point of law.

Furthermore the applicant counsel argued pursuant to Section 5(1) (c) of the Appellate Jurisdiction Act Cap 141 [R.E 2002] that, every decree, order, decision or finding are appealable with the leave of the court.

Next, the applicant's counsel indicated that, leave to appeal to the Court of Appeal under Section 5(1) of the Appellate Jurisdiction Act Cap 141 [R.E 2002] is usually granted at the discretion of the court. He then explained that, in the intended appeal applicant wants to raise a point of law of whether or not it was proper for court to refuse to dismiss the Commercial Case No 10 of 2016 for want of prosecution following a failure by Respondent to file witness statement on time, after the application for extension of time within to file an application to file a witness statement was rejected.

It was the views and submissions of the applicant that, a point of law of none filing of a witness statement and its legal consequences which they intend to raise in is an important point of



law worth to be considered by the court of appeal. So the applicant prayed for an order granting them of leave to appeal.

Responding to the application, Ms Angelista Nashon, Learned Advocate of the Respondent, she prayed to adopt what is contained in the affidavit of Deogratias Ringia. Next the applicant counsel stated that, the key issue in the application is whether or not interlocutory ruling made by the court on 22<sup>nd</sup> day of March, 2017 is appealable.

The counsel then submitting that, the ruling of the court which applicant seek to appeal is interlocutory by nature, meaning is not final and is not appealable pursuant to Section 5(2) (d) of the Appellate Jurisdiction Act Cap 141 [R.E 2002]. Relying on decision in the case between the Managing Director Souza Motors Ltd Versus Riaz Gulamali and another TLR [2001] made delivered by Hon Bwana J (as then was ) that, a decision or order of preliminary in nature or interlocutory nature is not appealable, unless it has effect of finally determining the suit. While on this point the respondent's counsel submitted that, there is no point of law worth to be determined by the Court of Appeal.

Likewise, relying on a decision in the case of Meatu District Council Versus Wesons Tanzania Ltd Commercial Case No 53 of 2008 (Unreported) where at pages 8 and 17 it was decided that, interlocutory order do not finally determined the issue or finally determine the rights of parties. So it is not appealable.

Finally, Respondent's counsel submitted that, all what the applicant what to do is to invoke delaying tactics in determination of the suit.

The court has subjected arguments of applicant as well as respondent submissions into close scrutiny and find as a matter of legal principle derived from Section 5(1) (c) of the Appellate Jurisdiction Act Cap 141. R.E 2002 that, appeal on interlocutory decisions or orders of the High Court are appealable to the Court of Appeal with the leave of the Court or Court of Appeal.

Next, I find the applicant has expressed themselves in their affidavit and submissions that, in the intended appeal, they want to raise a point of law of whether or not failure to file a witness statement within stipulate period on the part of the plaintiff that, may renders the suit liable for

dismissal, and if it's on the part of the defendant that, may render judgment be entered against the defendant.

I have carefully considered the above mentioned point of law, where any party fails to file witness statements within requisite prescribed period and find that, point of law is worthy to be determined by the Court of Appeal because it touches the on interpretation and intent of Rules 55 and 56 of the Commercial Court (Commercial Division) Procedure Rules GN 250 of 2012. In that, I find and decide that, is important points of worth to be considered by the Court of Appeal

Also it has been stated by courts on several occasion that, if there is important point of law to be raised in the intended appeal that, may be a ground of granting leave to appeal to the Court Appeal.

So pursuant to Section 5(c) of the Appellate Jurisdiction Act Cap 141 [R.E 2002] I hereby exercise the court discretion and grant applicant leave to appeal to file an appeal to the Court of Appeal subject to the laid down procedure. The application succeed and I make no order as to cost.

Dated and Delivered at Dar es Salaam this 25<sup>th</sup> day of June, 2018

  
H.T.SONGORO  
JUDGE



The Ruling was delivered in the absence of both parties.