IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 153 OF 2018

(Arising from Miscellaneous Commercial Application No. 225 of 2015)

LEIGHTON OFFSHORE PTE LTD

TANZANIA BRANCH.....APPLICANT

Versus

DB SHAPRIYA & CO LTD.....RESPONDENT

Last Order:23rd May, 2019

Date of Ruling: 12th Sept, 2019

RULING

FIKIRINI, J.

The brief history is, the respondent DB Shapriya & Co.Ltd sued the applicant, Leighton Offshore PTE Ltd (T) Branch in Commercial Case No. 22 of 2015. Default judgment was entered in favour of the respondent. The applicant vide Miscellaneous Commercial Application No. 225 of 2015 filed an application for an extension of time to file an application to set aside the default judgment, the application was dismissed on 23rd June, 2017.

Aggrieved the applicant envisaged an appeal to the Court of Appeal. By way of Chamber Summons, the applicant then sought from this court for leave pursuant to section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) to file an appeal.

Contesting the application, the respondent besides the counter affidavit also filed a notice of preliminary objection raising two points namely:

1. That the application is not maintainable and bad at law for wrong and non-citation of mandatory provisions of the law; and
2. That the application is not maintainable and bad in law for being supported by defective affidavit.

On 03rd September, 2018, my predecessor, Judge Sehel, (as then she was) ordered the preliminary points of objection and the application be disposed of by way of written submissions. Mr. Gerald Nangi learned Advocate appeared on behalf of the applicant while Mr. Roman Masumbuko learned Advocate represented the respondent. Immense work has been done by the counsels, the input which is highly appreciated.

For a convenient flow, the preliminary points of objection shall be dealt with first, subject to the outcome of the objection raised, the application shall follow.

Arguing on the 1st limb of the objection, it was Mr. Masumbuko's contention that this Court has not been properly moved by citing of section 5 (1) (c) of AJA which is a substantive provision and thus did not provide for procedural law. The applicant was supposed to cite Rule 45 (a) (b) of the Tanzania Court of Appeal Rules, 2009 (as Amended)(the Rules). Citing of the substantive provision of the law and ignoring citing of the procedural provision had the same effect as wrong citation or non-citation, he submitted. Buttressing his submission he referred this Court to the case of **Leighton Offshore PTE Ltd (Tanzania Branch) v DB Shapriya & Co. Ltd, Miscellaneous Commercial Application No. 229 of 2015 (unreported)**, where the Court stressed on citation of provisions conferring the Courts with the powers to grant the reliefs sought instead of provisions which were merely complimentary.

Maintaining his stance that the citing of section 5 (1) (c) of AJA was merely a complimentary provision as it did not provide specific powers to the Court in granting the reliefs sought, the applicant should have cited

Rule 45 (a) of the Rules, stressed the Counsel. In support of his assertion he cited the case of **Emmanuel Nyambi v Ramadhani Salim, Civil Appeal No. 84 of 2014, CAT at Arusha (unreported)**, where the Court clearly stated that the procedure for applying for leave to appeal to the Court of Appeal was governed by Rule 45 (a) of the Rules. He as well cited the case of **Pius Kuhangaika & 2 Other v COWI Consult (T) Ltd, Civil Application No. 191 of 2013, CAT at Dar es Salaam (unreported),** where the Court elucidated that it was the Rules which move the Court and not provisions of the AJA. The Court stressed that for one seeking extension of time or leave to appeal, the relevant provisions of the Court of Appeal Rules must be cited, lack of observing that rendered the application incompetent. Mr. Masumbuko again cited the cases of **Robert Leskar v Shibesh Abbe, Civil Application No. 4 of 2006, Court of Appeal (unreported)** and **Chama cha Walimu Tanzania v The Attorney General [2008] EALR 57.**

Maintaining his submission he contended that the application was misconceived and bad in law for being filed under wrong provision of the law and urged the Court to strike it out with costs.

On the 2nd limb of the objection that the application was supported by a defective affidavit, he stated that pages 6 and 7 of the affidavit of Gerald Shita Nangi had sub paragraphs (a), (b), (c), (d) and (e) but the verification clause has not included the sub paragraphs or stated that the deponent has verified paragraph 21 inclusive of the sub paragraphs. This according to him contravened Order VI Rule 15 (2) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC) and again prayed for the application to be struck out for being incompetent.

Reacting to the submission, Mr. Nangi vehemently controverted Mr. Masumbuko's assertion that the correct provision to be cited was Rule 45 (1) (a) and (b) of the Rules, 2009 as amended which deals with procedural aspect and not section 5 (1) (c) of the AJA which deals with substantive part. Expounding on application of Rule 45 (1) (a) and (b) of the Rules, 2009, it was his submission that the rule provides for the manner on which an application for leave can be made. Either informally orally or by way of Chamber summons as provided under Order XLIII R 2 of the CPC, the requirement which the applicant has complied with. He thus did not want to further engage on the debate regarding which provision was or was not, based on the definition provided under Rule 3 (1) of the Rules, 2009 which

defines the "Court" to mean the Court of Appeal of the United Republic of Tanzania established by the Constitution.

Apart from submitting as above, it was his submission that the Court of appeal has ruled that non citation of a provision prescribing the manner of drawing the applications and how they should be made was not fatal to render the application defective. To that effect he cited the case of **Williamson Diamond Limited v Salvatory Syridion & Ano, Civil Application No. 15 of 2015, CAT at Tabora (unreported) p. 6.** Hinging on the decision he thus contended that Rule 45 (1) (a) of the Rules, 2009, provides for the manner in which an application can be made but did not enable the Court with the jurisdiction to determine the application. Therefore according to him, non-citation which would have rendered the application for leave to the Court of Appeal fatal if section 5 (1) (c) of AJA which has been cited in the present application was not cited, and that the provision cited was not merely complimentary but an enabling provision, he argued.

Buttressing his position he referred this Court to yet other cases such as where the difference between enabling provision and prescribing provision was made in the case of **Hassan Sunzu v Ahmad Uledi, Civil**

Reference No. 8 of 2013 CAT, at Tabora (unreported) p. 3. In **Awiniel Mtui & Others v Stanley Ephata Kimambo, Civil Application No. 19 of 2014, CAT at Arusha (unreported) p. 5-6,** again addressing the issue of leave to appeal to the Court of Appeal, the Court concluded that under section 5 (1) (c) of AJA the Court of Appeal and the High Court have concurrent jurisdiction to hear and determine applications for leave, the stance taken by Mr. Nangi in countering Mr. Masumbuko's submission.

Distinguishing the cases cited by Mr. Masumbuko, he submitted that the counsel has misconceived and misinterpreted the cases cited to the extent that they did not support his contention or reasoning, and speak and deal with other matters neither raised nor contended in both the preliminary points of objection raised and the application. Citing the **Leighton** case (supra) he argued that the application in the cited case was for temporary injunction, maintenance of status quo and setting aside an order issued by the Court, whereby the applicant cited section 14 of the Law of Limitation Act, Cap. 89 R.E. 2002 (the Law of Limitation) and section 95 of the CPC and the Court stated that the provision of section 95 of the CPC can only

be resorted to where there was no specific provisions of the law dealing with a particular subject.

As for the case of **Emmanuel Nyambi** (supra), he argued that the issue was the High Court granting an application for leave to appeal to the Court of Appeal, without leave for extension of time to do so, as the application was filed out of time. The Court of Appeal again, in the case of **Pius Kuhangaika** (supra), the application before the Court of Appeal was for extension of time to lodge notice of appeal, whereby the Court concluded that section 11 of the AJA could not apply under the circumstances.

Reminding that each case has to be decided on its own merits, he asserted that the cases cited by the respondent's counsel did not apply to the present application due to their distinguishable characters against the present application. In conclusion he prayed for the preliminary point of objection raised be dismissed with costs for being devoid of merits.

Taking on the 2nd limb of the preliminary objection, Mr. Nangi started by reproducing Order VI Rule 15 (1) and (2) of the CPC, and argued that the provision referred dealt with pleadings which included plaint, written statement of defence, including that filed by the 3rd party and for those

pleadings falling under Order VII R 13 of the CPC. From the definition an affidavit did not amount to a pleading which should follow the mandatory procedure of pleadings under Order VI of the CPC. This was due to the fact that an affidavit has a unique nature and hence not regulated by the rules of pleadings. Affidavits are governed by Order XIX of the CPC, Notaries Public and Commissioner for Oaths Act, Cap. 12 and Oaths and Statutory Declarations Act, Cap. 34 R.E. 2002, he further submitted.

Citing the case of **DPP v Dodoii Kapufi & Another, Criminal Application No. 11 of 2008, CAT at DSM (unreported) at p. 3,** Mr. Nangi submitted that the affidavit must be verified to show the facts asserted by the deponent were true of his own knowledge. He further argued that paragraph 21 did not stand on its own, as matter spoken in the sub paragraphs cannot stand alone or did not have their own source of information, so all contents under paragraph 21 have been verified together.

Along the same line he argued that even if Order VI Rule 15 (1) and (20 of the CPC were applicable, the assertion he controverted, still the verification would have been by reference to numbered paragraphs of the pleadings, which did not include sub paragraphs. He thus concluded by stating that

the 2nd limb of objection has no merits. Moreso, the respondent has not been prejudiced in any way and the affidavit has been verified on every numbered paragraph to be true to the best of the deponent's knowledge and urge the Court to dismiss the 2nd limb of the preliminary objection with costs.

In rejoining the submission Mr. Masumbuko essentially reiterated his earlier submission that citing of a procedural or rather enabling provision was mandatory, and was missing in the present application and consequently the application should be struck out. Responding to the 2nd limb of objection, he contended that verification was a must, that it has to be done to all facts with reference to paragraphs and sub paragraphs, meaning the present affidavit was defective and must be struck out.

The issues for determination as far as the preliminary point of objection is concerned are:

(i) whether this Court has been properly moved for citing the provision of section 5 (1) (c) of the AJA, and

(ii) whether the affidavit in support was defective.

I have carefully read through the submissions. Let me start by pointing out that there is a distinction between an enabling and prescribing provision as elucidated in the Court of Appeal decision in the case of **Hassan Sunzu** (supra). Whilst Rule 45 (a) and (b) of the Court of Appeal Rules, 2009 as amended by Rule 6 of the Court of Appeal (Amendment) Rules, 2017, is undoubtedly a procedural law, section 5 (1) (c) of AJA, is the provision clothing the Court with the jurisdiction to entertain and determine a matter before it. Citing of the procedural law though important but its non-citation cannot result into rendering the matter before the Court incompetent. I thus subscribe to Mr. Nangi's submission that this Court has been properly moved by citing section 5 (1) (c) of AJA.

The 1st point of the preliminary objection is thus overruled.

Examining the 2nd point of objection, this being on affidavit, the law governing it are thus Order XIX of the CPC, Notaries Public and Commissioner for Oaths, Act. Cap. 12 and Oaths and Statutory Declarations Act, Cap. 34 R. E. 2002. The provision of Order VI, its rules and sub-rules of the CPC are essentially meant for regulating pleadings, of which an affidavit though can be part of under certain situations, but are not governed, by the provision of Order VI of the CPC. An affidavit as

submitted by Mr. Nangi, has a unique characteristic and contents which are distinct from ordinary pleadings. For relying on Order VI of the CPC, Mr. Masumbuko has in my view misconceived the application of the Order in relation by considering it as pleadings which are governed by Order VI of the CPC, while in actual fact the affidavit is specifically governed by Order XIX of the CPC.

Affidavit is basically facts deponed by the one swearing the affidavit. A valid affidavit is that which has been verified to show that the facts deponed are true to the deponent's knowledge and those based on information or beliefs, though with the later the deponent has to reveal the source. Reverting back to the contested affidavit it is uncontroverted that the deponent has verified as to the contents of the deponed which included paragraph 21. As argued by Mr. Nangi the argument which I subscribe to, that by verifying on paragraph 21 it means the sub-paragraphs included.

Even if assuming the contended defect indeed existed, I still do not think the only remedy was to struck out the affidavit. In the case of **Phantom Modern Transport (1985) Ltd v D.T. Dobie (T) Ltd, Reference No. 15 of 2001, 3 of 2002 and Civil Application No. 141 of 2001 CAT (unreported),** faced with the same situation the Court of Appeal observed

that if the defect was of no effect, then those offensive paragraphs can be expunged, overlooked or ignored as long as the left parts of the affidavit remain intact to allow the Court to do its work. In the present application, likewise, I want to believe expunging or severing of paragraph 21 would not have crippled the application completely to the extent of rendering it incompetent since the remaining part would in my considered view be sufficient to support the application before the Court.

In light of what I have examined, I find the preliminary points of objection raised devoid of merits and proceed to overrule them with costs.

This now brings me to the application itself. Again, I have thoroughly gone through the submissions. I highly appreciate the effort, I will however, not reproduce them in verbatim but will certainly consider them in course of this ruling. From the counsels submission it is evident that they both agree that leave to go to the Court of Appeal has to meet several conditions, amongst them being: (i) that the appeal would have a reasonable prospect of success; (ii) that there are compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; and (iii) that the decision sought to be appealed did not dispose of all the issues in the case; (iv) that the proceedings as a whole reveal disturbing

features requiring the Court of Appeal intervention and provision of guidance; (v) that there is a point of law or point of public importance detected from the appealed decision; and (vi) that the grounds of appeal show prima facie or arguable points on appeal.

Against the stated legal position, I shall examine this application, though not all the submissions made will be reproduced but certainly will be considered.

1. Whether the Court in dealing with an application for extension of time can also venture and decide on merits of the intended application without according the applicant right to be heard.

2. Whether existence of another allegedly similar suit filed by another party that may have similar interests with that of the applicant warrants a refusal for extension of time for the applicant to set aside a default judgment.

3. Whether the High Court's refusal to grant an extension of time on the ground of avoidance of multiplicity of suits was sound in law.

4. Whether the Court was legally correct to involve the principles of res judicata from the ruling of the Court of Appeal.

5. Whether the High Court was legally correct to assume the existence of a similar suit filed by another party that may have similar interests with that of te applicant and denying the applicant for an extension of time for applying to set aside a default judgment.

Mr. Masumbuko contested all the points arguing that they have no merits, as all have already been addressed by the trial Judge and nothing new point for the Court of Appeal interference and guidance.

The trial Judge ventured into assessing if there were arguable issues and chances of success, as envisioned in the case of **Mbogo v Shah (1968) E. A. 93**, argued Mr. Masumbuko. He as well submitted that the findings were upheld in the cases of **Tanzania Ports Authority v M/S. Pembe Flour Mills Ltd, Civil Application No. 49 of 2009, CAT at DSM (unreported)** and **The Registereed Trustees of the Archdiocese of Dar Es Salaam v The Chairman Bunju Village Government & Others, Civil Appeal No. 147 of 2006, CAT at DSM (unreported).**

This is contrary to what Mr. Nangi submitted. According to him the Court ventured and made decision without affording parties right to be heard on the merits of the application to set aside the default judgment. This

interfered with the applicant's right to be heard,and issues of multiplicity of suits an existence of another alleged similar suit were raised and answered *suo motu* by the trial judge. Referring to the cases of **Margwe Erron & Others v Moshi Bahalulu, Civil Appeal No. 111 of 2014 CAT at Arusha (unreported) p.4; Trojan & CO. V RM N.N. Nagappa Chettiar AIR 1953 SC 253, p. 2; Bharat Amratlal Khotari v Dosukhan S. Sindhi & Others AIR 2010 SC. 475 p. 8 and Ex-B.8356 S?SGT Sylivester S. Nyanda v The Inspector General of Police & Another, Civil Appeal No. 64 of 2014 CAT at Mwanza (unreported), p. 11-12.**

The issues of multiplicity of suits and the existence of another alleged similar suit were not before the Court for determination. Before the Court then was an application for extension of time. The Court raised the issues *suo motu* but without affording parties opportunity to be heard. With due respect to Mr. Masumbuko's submission, despite all the good reasons and intentions by the Court, but this needs Court of Appeal intervention. I subscribe to the decision in the case of **Margwe Erron & Other** (supra), which stressed on the right to be heard before any adverse action is taken against a party. This is what the Court stated:

"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions, that right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be breach of natural justice"

In view of the above, I find this application deserve granting as indeed the issues raised by the applicant if no intervention is made would have an adverse impact on the applicant's right to be heard.

I thus proceed to allow the application for leave to appeal to the Court of Appeal pursuant to section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002. Costs in due cause. It is so ordered.

P. S. FIKIRINI

JUDGE

12th SEPTEMBER, 2019