IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 251 OF 2018

(Arising from Miscellaneous Commercial Application No. 251 of 2017)

VODACOM TANZANIA PUBLIC

LIMITED COMPANY.....APPLICANT

And

PLANETEL COMMUNICATIONS LIMITED.....RESPONDENT

Last Order: 26th Feb,2020

Date of Ruling: 18th Mar, 2020

RULING

FIKIRINI, J.

This application for leave to appeal to the Court of Appeal has been made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) as amended by Act No. 3 of 2016, Rule 45 (a) and (b) of the Court of Appeal Rules, 2009 GN. No. 368 of 2009 as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017 GN. No. 362 of 2017 (the CAT Rules). Also prayed is any other relief deemed appropriate in the circumstances and costs of the

application. The application is supported by an affidavit of Mr. Sylivatus Sylivanus Mayenga. Contesting the application Mr. Michael Joachim Ngalo filed counter affidavit on behalf of the respondent.

On 23rd October, 2018 Mr. Sylivanus Mayenga and Mr. Sisty Bernard entered appearance on behalf of their respective parties. Mr. Bernard requested that the application be disposed of by way of written submissions, the consideration which was welcomed by Mr. Mayenga due to the fact that the application has been on since 2018 while it was a simple application for leave to appeal to the Court of Appeal. Leave was granted and written submissions were timely filed as agreed. In their written submissions both counsels prayed for the affidavit and counter affidavit filed be wholly adopted and made part of their written submissions.

For ease of understanding the task before the Court, the background culminating into this application is fundamental. The genesis of this application for leave goes way back to March 2017 when arbitral proceedings were instituted involving the applicant, Vodacom Tanzania Public Limited Company and the respondent, Planetel Communication Limited. The arbitral tribunal comprised of Professor Gamaliel Fimbo (umpire & chair), Honourable Willy Mutunga, retired Chief Justice of Kenya (arbitrator) and Mr. Jothan Lukwaro (arbitrator). In course of the proceedings and prior to actual hearing a preliminary point of objection was raised and overruled by the tribunal issuing an interim award on 17th July, 2017. The

applicant's aggrieved by the ruling filed a petition before this Court **Miscellaneous Commercial Cause No. 247 of 2017** (the 1st petition). The petition was later withdrawn with liberty to refile, the freedom which was exercised by instituting **Miscellaneous Commercial Cause No.251 of 2017** (the 2nd petition). This was before serving the respondent. The applicant also filed **Miscellaneous Commercial Application No. 251 of 2017** (the 1st application), seeking for orders restraining continuation of the arbitral proceedings. The application was struck out for being incompetent. Deterred the applicant filed **Miscellaneous Commercial Application No. 295 of 2017** (the 2nd application) seeking for temporary injunction. The application was heard on merits and dismissed in the ruling delivered on 16th October, 2017. Dissatisfied the applicant appealed and hence **Civil Appeal No. 43 of 2018** (the appeal). The Court of Appeal decision was pronounced on 26th June, 2019, upholding the respondent's preliminary point of objection that the High Court ruling subject of the appeal was neither appealable nor revisable since it was an interlocutory order and not final.

The 2nd petition which had all along been pending was ultimately heard on preliminary point of objection raised by the respondent and ruling delivered on 29th October, 2018, that the petition was not legally maintainable on the ground that the interim award sought to be challenged was a preliminary or interlocutory therefore not revisable or appealable in terms of The Written Laws (Miscellaneous

Amendments) Act, Act No. 25 of 2002 (the Act No. 25 of 2002). Once again aggrieved the applicant lodged a notice of appeal as well as this application for leave.

The arbitral proceedings which were scheduled to come to an end on 31st August, 2017 have not resumed as of the date of this ruling. This has been occasioned by the pendency of the proceedings instituted by the applicant both before the High Court and the Court of Appeal.

The application for leave subject of this ruling had raised five (5) grounds:

(i) That, in the absence of the definition of the term award and the nature of the award to be set aside under the Arbitration Act, Cap. 15 R.E. 2002 (the Arbitration Act), whether the High Court was justifiable to rule that, the impugned award subject of the petition was not maintainable.

(ii) That, the High Court upon holding that the petition subject of the impugned award was not maintainable at law, whether the Court was justifiable to dismiss the same with costs.

(iii) Whether the High Court was justifiable to import other provisions from other laws to fill the *lacuna* from the Arbitration contrary to the intention and intendment of the legislature in enacting the Arbitration Act.

(iv) Whether it was proper for the High Court Judge to render its decision by basing on the ruling of the Tribunal dated 17th July, 2018 without considering other grounds laid down in the petition.

(v) Upholding that the ruling of the Tribunal dated 17th July, 2018 was final, whether it was justifiable for the Court to proceed to hold that the said ruling did not finally determine the rights of the parties without considering the impact of such ruling in the arbitral proceedings.

The applicant argued the 1st, 4th and 5th grounds together, contending that the respondent's position that the Tribunal's interim award as well as the proceedings associated with the conduct of the Tribunal before and after issuance of the award was interlocutory hence not open for being set aside as it did not determine rights of the parties. The Court sustained the preliminary point of objection raised by the respondent. In the process, the Court ignored and did not consider the statutory provisions governing arbitration such as the definition provided by section 2 of the Law of Limitation Act, Cap. 89 R.E 2002 (the Law of Limitation) to mean an award of the arbitrator. Similarly, the provisions on ICC Rules which extended the definition of the term award by the arbitrator to include the interim award, was equally ignored. PSF

Import of various authors on the subject such as explanation from the book titled **Russel on Arbitration, 24th Ed, 2015** – Chapter 6 paragraphs 6-008-on awards, whose copy was attached to the skeleton arguments, which expressly defined various circumstances on how the award may be rendered and the definition of the term "final award" as defined in the book was not considered. And from the definitions given in the book, none of them restricted challenging the award obtained in any form regardless of whether it was final or interim. On that basis it was therefore not justified for the Court to bar interim award from being set aside, while there was no express provision in that regard, contended Mr. Mayenga.

While admitting that the laws governing arbitration did not prohibit decision made by the arbitrator or prejudiced resulting from the proceedings from being challenged, but heavy reliance on the respondent's arguments whereby Written Laws Miscellaneous Amendment Act. No. 25 of 2002 and various decision referred was what the applicant was contesting. Besides the Arbitration Act, Law of Limitation Act, and various International Instruments including ICC Rules on Alternative Dispute Resolution (ADR), the rest of the laws were inapplicable. Stressing on that, he submitted that had the Parliament intended for other laws were applicable it would have stated so.

On the basis of his submission, Mr. Mayenga prayed for the application for leave be granted with costs.

Contesting the application and the submission thereto, the respondent speaking through Mr. Sisty Bernard's written submission, first challenged the leave sought as not grantable. His argument was based on the fact that right to appeal was in place through the Constitution and the AJA and there was requirement to comply to certain procedural rules and timelines prescribed under the CAT Rules. The AJA has spelt out which decisions, decrees, rulings and orders of the High Court which were appealable with either the leave of the High Court or Court of Appeal.

According, to Mr. Bernard the question before this Court for determination is whether this Court's decision referred as TAB-3 was appealable with or without leave.

Contending the decision to be neither appealable nor revisable, he assigned the following reasons: one, the impugned decision stemmed from pending arbitral proceedings between the parties at the Arbitral Tribunal, and two, because of the reasons given by the Court in the impugned decision that petition was not maintainable at law. The petition whose decision is subject of this application was to challenge the interim award and the interlocutory proceedings of the Arbitral Tribunal, which was not ripe for challenge as the rights between the parties has not been finally and conclusively determined, submitted Mr. Bernard. In that regard the petition and the present application were a non-starter and exercise in futility. In support he referred this Court to the case of **Citibank Tanzania Limited v**

Tanzania Telecommunication Company Limited & 4 Others, Miscellaneous Commercial Cause No. 6 of 2003 (unreported) (a copy supplied as TAB-4). Mr. Bernard also referred this Court to the decision in the case of **Vodacom Tanzania Public Limited Company v Planetel Communications Limited, Civil Appeal No. 43 of 2018, CAT – DSM (unreported) (a copy supplied as TAB-2),** whereby the Court discussed the effect of Act No. 25 of 2002 as well as Article 107 A (2) of the Constitution and proceeded to enhance the observation of section 5 (2) (d) of the AJA.

Elaborating on the position taken, it was his submission the Court of Appeal has clearly stated what decisions, rulings, orders which can be appealed against. Mr. Bernard, submitted that none out of the listed five (5) grounds were worth referring to the Court of Appeal for determination. Submitting on the challenge that the decision was not interlocutory as concluded by the Judge but final, he avowed the submission as misleading. Even though the Arbitration Act, did not define or distinguish between interim award and final, but it was a fact that the contested award was and still interim, and hence interlocutory, submitted Mr. Bernard. And that it was due to the fact that the rights of the parties have not been determined finally and conclusively, submitted Mr. Bernard. The arbitration proceedings were still pending.

Discussing reliance on other laws, it was his submission there was nothing wrong for the Court to do that. After all, that was contained in the agreement between the applicant and the respondent, known as Super Dealer Agreement, referred as annexture Vodacom-1, and in particular Clause 17, which provided for the governing law and jurisdiction. Maintaining his stance, he contended that the laws of Tanzania were many which included the Arbitration Act. The Arbitration Act, alone could not have sufficed. And therefore, the respondent did not see how can the Court of Appeal be invited to fault or reverse the decision applying other laws, especially Act No. 25 of 2012, which bar appeal or revisions on interlocutory and preliminary decision to determine the preliminary point of objection raised against the petition.

Based on the Court of Appeal decision referenced in TAB-2, he was of the view that the applicant and its counsel should heed to Court of Appeal warning and withdraw from the intended appeal which will face the same consequences as the previous one. Moreover, pursuit of this application and the intended appeal keeps the pending arbitral proceedings undetermined.

Before concluding his submission, Mr. Bernard urged the Court to give stern warning to the applicant that the stalling of the arbitral proceedings for over two years amounted to abuse of the judicial proceedings, delaying tactic and was being made in bad faith. At most the applicant be directed to honour and comply with the

Agreement between the parties that their dispute or misunderstanding be referred to arbitration, which both parties duly submitted to, initiated and fully participated in those proceedings up to 4th August, 2017.

On the strength of his submission he prayed for the leave be refused based on the applicable laws and decided cases, that interlocutory and preliminary decisions were not appealable or revisable.

In rejoinder, Mr. Mayenga basically reiterated his earlier submission, but expressed confusions, contradictions and irrelevancies generated by the respondent when the quoted from a paragraph in Civil Appeal No. 43 of 2018. He submitted that the impugned decision and the one in the present application were two separate and distinct proceedings, the submission was thus out of order. Similarly, he submitted that the case of **Citibank** (supra), was distinguishable and did not go with the present circumstances.

He thus pressed the Court to grant leave sought with costs.

In determining whether this application deserves granting or not, a step back to understand the genesis will be of much assistance. It all started with applicant petitioning in the Miscellaneous Commercial Cause No. 251 of 2017, under sections 12 (1), 15(1) and (2), 16 and 18 of the Arbitration Act read together with the provisions of Rules 5, 6 and 11 of the Arbitration Rule, GN. No. 427 of 1957

(the Arbitration Rules) seeking for a declaratory order amongst others that the arbitral proceedings of 17th July, 2017 and 4th August, 2017 be declared null and void and removal of Professor Gamaliel Mgongo Fimbo as umpire. The respondent raised a preliminary point of objection that the preliminary or interim award and the arbitral proceedings have not been determined finally and conclusively.

The Court on 29th October, 2017, rendered its decision by dismissing the petition for being unmaintainable with costs. Aggrieved the applicant intends to appeal the decision. However, that desire cannot be achieved unless leave of this Court is sought and granted. While the applicant believes the order is appealable upon grant of leave, the respondent think otherwise. The respondent is of the stance that the decision is neither appealable nor revisable. Assigning the reason that the ruling and order intended to be appealed against emanate from a pending arbitral proceedings, the same way this Court considered the petition in Miscellaneous Commercial Cause No. 251 of 2017 unmaintainable. A right to appeal and appeals to the Court of Appeal are governed by the AJA, on one hand and on the other by the Constitution which advocates for right to be heard on the other. With the AJA, the applicant has correctly moved this Court under section 5 (1) (c) of AJA.

Leave to appeal despite being provided for yet it is not automatic. Grant or not to grant leave is at Court's discretion. The pertinent question in the application before this Court vested with discretion which it should however exercise judiciously, is

whether the ruling and order dated 29th October, 2017 is what was envisioned by the provision of section 5 (1) (c) of AJA. This comes with two more questions: *one*, if the ruling is appealable and *two,* if leave to do so is required. The provision provides as follows:

> *"With leave of the High Court or of the Court of Appeal, against every decree, order, judgment, decision or finding of the High Court"*

The impression one will get is the appeal can be lodged with the Court of Appeal without any limitation, something which is not correct. As pointed out earlier appeals is not an automatic right but one which leave must be sought. This said, however, not every decision or order is appealable. The applicant's intended appeal is against the matter which is not conclusively determined. This is due to the fact that the petition dismissed was actually a matter still pending at the arbitral tribunal, although in the impugned ruling the decision was on a preliminary point of objection which essentially did not determine the matter. The decision was thus interlocutory.

What amounts to an interlocutory order has been soundly illustrated in the case of **Bozson v Arteincham Urban District Council (1903) 1 KB 547, p.548,** the Court had this to say when faced with the scenario:

> *"It seems to me the real test for determining this question ought to be this: Does the judgment or order, as made finally dispose of the rights of the parties? If it does, then it ought to be treated as a final order, but if it does not, it is then in my opinion an interlocutory order"*

The **Bozson** (supra) decision has been echoed in the **Junaco & Another v Harel Mallac Tanzania Ltd, Civil Application No. 473/16 of 2016** and **Vodacom Tanzania Public Limited Company v Planetel Communications Limited, Civil Appeal No. 43 of 2018** to mention a few. From the decisions it is apparent that interlocutory orders are the orders which essentially do not finally and conclusively determine the matter. Section 5 (2) (d) of AJA which regulates appeals against interlocutory orders prohibits appeal or revision against such orders. The rule is provided below for ease of reference:

> *"No appeal shall lie against any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the matter"*

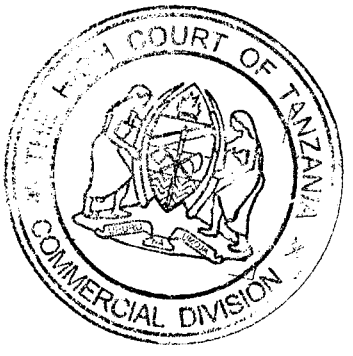
The ruling sought to be appealed against was from a preliminary point of objection which was sustained in the **Miscellaneous Commercial Cause No. 251 of 2017**. The order was undoubtedly an interlocutory, meaning it has not conclusively

determined the matter. Without much to say the intended appeal whether with leave or without leave, it offends the dictates of section 5 (2) (d) of the AJA, which forbids appeals of this nature.

Even though aggrieved by the decision which is interlocutory, the applicant has to wait until the matter has been finally and conclusively determined, that is when an appeal can be preferred. All the grounds including those in the interlocutory decision can be raised for the Court of Appeal determination.

In light of the above, I fully share the stance by the respondent that the leave sought does not deserve granting since the ruling and the order thereof are not appealable or revisable.

The application is thus declined and dismissed with costs. It is so ordered.



P. S. FIKIRINI

JUDGE

18th MARCH, 2020