

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 52 OF 2020

(Arising from Commercial Case No. 20 of 2012)

SUMRY HIGH CLASS LTD.....1st APPLICANT

SUMRY BUS SERVICES LTD.....2nd APPLICANT

Versus

MUSSA SHAIBU MSANGI.....RESPONDENT

Last Order: 2nd June, 2020

Date of Ruling: 1st July, 2020

RULING

FIKIRINI, J.

This application under certificate of urgency filed under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and any other enabling provisions of the law, the applicants Sumry High Class Limited and Sumry Bus Services Ltd, herein after referred as 1st and 2nd applicants. The applicants were praying for an extension of time to file a notice of appeal out of time to appeal the decision in Commercial Case No. 20 of 2012, dated 13th August, 2014.

This application was supported by the affidavit of Mr. Hamoud Mohamed Sumry, the applicants Managing Director, who averred that aggrieved by the decision in Commercial Case No. 20 of 2012, the applicants appealed the decision registered

as Civil Appeal No. 14 of 2015 on 22nd August, 2014, which was struck out for technical reasons. The Court of Appeal order striking out the appeal on 16th April, 2020 prompted this application. The applicants averred to still be aggrieved by the decision and want to pursue an appeal, which has to be preceded by this application for extension of time.

The respondent contested the application as well as filing a notice of preliminary points of objection. The preliminary points of objection were as follows:

- (a) That paragraphs 10, 11 and 12 of the affidavit filed in support of the application are incurable defective for raising arguments and conclusions contrary to the provisions of Order XIX R 3 of the Civil Procedure Code, Cap. 33 R.E. 2002;
- (b) That the application is bad in law, untenable and abuse of the Court process because the reasons or grounds taken by the Court of Appeal in striking out Civil Appeal No. 14 of 2015 after hearing the objection and grounds of appeal does not re-agitate another similar and fresh appeal from the same applicants regarding the same proceedings after extending time under section 11 (1) of AJA, as the circumstances regarding authenticity of the documents has not changed.

(c) That the application is misconceived because it is against the ruling delivered by the Full Bench of the Court of Appeal in Civil Appeal No. 14 of 2015 on 16th April 2020 as the grounds or reasons articulated and upheld in the objection raised cannot be cured in the circumstances of this matter.

The Court ordered both the application and the preliminary points of objection be argued by way of written submissions according to the following filing order: the respondent to file their written submissions in respect of the objection raised while the applicants were to file their submission in support of their application by or on 9th June, 2020; exchanged replies by or on 16th June, 2020 and rejoinder if any on either side by or on 23rd June, 2020. Ruling was reserved for 1st July, 2020 –14.00 hours. Unless this Court overrules the preliminary point of objection, that is when, the application for extension of time will be entertained.

The applicants enjoyed the services of Mr. Agustino Ndomba and the respondent of Mr. Deogratias Ogunde, both learned counsels. Submitting on the preliminary points of objection, Mr. Ogunde argued that paragraph 10, 11 and 12 of the applicants' affidavit were argumentative, with conclusions which was contrary to Order XIX R 3(1) of the CPC, which rendered the whole affidavit defective to deserve dismissal of the application with costs. Picking on paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the affidavit which he said contained brief history which was

known to this Court and Court of Appeal, thus leaving paragraphs 10,11, and 12 as the most important and in support of the application, as from those paragraphs the deponent was calling the Court to exercise its discretion in granting the extension of time so that they can lodge their notice of appeal out of time. The affidavit being the basic document to be relied on by this Court in arriving to its decision should therefore contain only facts known to the deponent and not extraneous matters by way of arguments, conclusions, hearsay or prayers, submitted Mr. Ogunde.

On the promptness and diligence in pursuing the dispute as averred by the deponent, it was Mr. Ogunde's query as to which dispute was being referred. Whether it was the Commercial Case No. 12 of 2012 decided on 13th August, 2014 or Civil Appeal No. 14 of 2015 which was struck out on 16th April, 2020, Since there was lack of clarity, it makes the contents vague, general and argumentative inviting legal arguments, which an affidavit should not. He went on submitting that the applicants were to account for each delayed day from 22nd August, 2014 when the notice of appeal was lodged up to 24th April, 2020.

The arguments and conclusive statement were as well experienced under paragraph 11 of the affidavit in support, pointed out Mr. Ogunde. Under the paragraph which has been verified by the deponent as to have been stated on the deponent's knowledge, the contents were argumentative as they try to purport that there was a

051-

point of law to be dealt with by the Court of Appeal, once the application is granted. The presumed point of law was “*whether this Court determined the liability of the applicants on the destroyed vehicle without joining the insurance company who was and still the necessary party to the determination of the liability.*” This point was neither pleaded nor an issue for determination in Commercial Case No. 20 of 2012. The framed issues for determination before the trial Court were as exhibited at page 3 of the typed judgment. Since that issue will be raised for the first time before the Court of Appeal, it could not be decided on. In support he cited the case of **Melita Naikiminjal & Loishilaari Nakiminjal v Sailevolobia Nguuti [1998] T.L.R. 120, CAT – Full Bench**, in which the Court of Appeal stated that what should be taken before them must be only what was decided in the High Court in the Commercial Case No. 20 of 2012.

It was Mr. Ogunde’s further submission that even if there was non-joinder still it could not defeat a suit. The cases of **Tanzania Cotton Marketing Board v Cogecot Cotton Company, SA [2004] T. L. R 132, p. 133-134, CAT Full Bench**, where it was stated that the High Court cannot be judged on an issue it never had an opportunity to consider and express opinion. While in **Juma v Manager PBZ Ltd & Others [2004] 1 EA 62 (CA)**, the Court held that parties were bound by their own pleadings. The alleged issue of the insurance company

not being joined in the suit was never before the Court for determination. Paragraph 11 was thus lacking in that way.

As for paragraph 12 it was Mr. Ogunde's submission that the statement that the respondent will not suffer any prejudice if extension of time was not granted was argumentative, as it posed a question "whether the respondent will be prejudiced or not." which was argumentative.

The three paragraphs were according to Mr. Ogunde core part to the affidavit filed in support the application, and if expunged, the remaining introductory and historical statements in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the affidavit did not have enough facts to support the application. The affidavit in support should not contain extraneous matters such as objections, legal arguments, prayers and conclusions.

Submitting on the 2nd and 3rd point together Mr. Ogunde had two questions which he considered were to be answered: *one*, whether this second appeal can be entertained by the Court of Appeal, and *two*, whether the status which led to the appeal being struck out has changed to warrant for the second appeal on the same subject matter. Canvassing on the grounds which led for the appeal to be struck out as reflected at pages 12, 23, 24 and 26 of the Court of Appeal ruling, were in relation to authenticity of the supplementary documents filed. Based on this fact it

was thus Mr. Ogunde's submission that nowhere in the affidavit averred it has been indicated that the status of the contradictory authenticity of the documents both in contents and substance has been changed prior to filing this application.

Furthering his submission, it was his contention that Mr. Sumry lied in reply to counter-affidavit when he mentioned that through the services of Tema Law Chambers Advocates, copy of proceedings were requested for preparing the record of appeal. The letter was alleged attached to the reply affidavit deponed, was nowhere to be found. Instead the letter found was that of 21st August, 2014 by BLC Advocates and received by the Court on 22nd August, 2014, which enabled the appeal to be lodged. Stressing on this point, he stated that the applicants counsel had unfettered duty to this Court to advise their clients, tell truth on oath regardless of their duty of representation of their client in this matter.

He as well contended that the reply affidavit to the counter affidavit without Court leave was in contravention to Order XIX Rules 1 and 2 read together with Order XLIII Rule 2 of the CPC and which contained many annextures, which were not properly marked or identified, as the one filed and therefore should be ignored. In support the case of **Solomon Soft Ware (E.A) Ltd & Another v Microsoft Corporation (2003) 1 EA 300 (HC-K)**, where it was not properly marked or

identified annexures were considered incomplete and hence ignored as they breach the laws of Oath and Statutory Declaration Act.

Mr. Ogunde maintaining his stance went on submitting that there was no proof that Tema Law Chambers Advocates wrote the Court, had again wrote the Court requesting for copy of the proceedings in Commercial Case No. 20 of 2012 in order to prepare the record of appeal after Civil Appeal No. 14 of 2015 was struck out with costs by the Court of Appeal on 16th April, 2020. Fortifying his position on truth of the facts in the affidavit sworn, he referred this Court to the case of **Gulam & Another v Jirongo [2007] 1 EA 87 [CCK]**. It was thus his submission that even if this application was to be granted still it will take forever for the appeal to be lodged as there was no proof that the defects found in the documents then had been cured or the status has changed, the facts which were to be displayed for this Court viewing and assessment so that this Court can exercise its discretion in granting the application. Buttressing his submission on discretion, he cited the case of **Yahaya Karisa v Attorney General & Another [SSCA] No. 7 of 1994**, that the Court should not be blind of the fact that discretion is the faculty of determining in accordance with the circumstances what seems just, fair, equitable and reasonable in the given set of circumstances.

Explaining on the decision in relation to the application before this Court he submitted that this Court should not act without making sure the status on the authenticity of the documents has changed or else this application was a waste of time and energy as well as abuse of the Court process. Fortifying his submission, the counsel contended that parties have been litigating in Courts of Laws for almost eight (8) years now, urging this Court to consider the importance principle of law or policy that in any credible judicial system litigation must come to an end. On the basis he prayed for the preliminary points of objection raised be sustained and the application be dismissed with costs.

In his brief reply submission Mr. Ndomba prefaced it with a preliminary point of objection that the written submission filed by the respondent contravened the mandatory provisions of rule 19 (1) of the High Court (Commercial Division) Procedure Rules, 2012 for being printed in 1.0 line spacing instead of 1.5 line spacing hence there was no proper submission before this Court by the respondent. He went on submitting that the rationale being if the submission could have been printed in 1.5 line spacing could have exceeded 10 pages allowed by the rules. It was further his submission that the rule also bound other documents including written submissions and urged the Court to reject the written submission filed as it contravened the rule.

Specifically reacting to the points of objection raised, particularly the first point of objection that the affidavit has contravened the provisions of Order XIX Rule 3 of the CPC, the counsel argued that Paragraphs 10, 11 and 12 claimed to be argumentative or with conclusions, were not experienced in those paragraphs. And even if they did, then the remedy was not to strike out or dismiss the application but expunge those paragraphs. Paragraph 9 read together with other remaining paragraphs were still competent and contained the reason as to why an extension of time sought should be granted. Giving explanation on paragraph 10, it was his submission that the dispute referred was in relation to appeal number 14 of 2015, which facts have also been narrated in other paragraphs. The counsel essentially controverted the submission that there were arguments in paragraph 10 of the affidavit.

Submitting on the second and third points, he discounted the respondent's submission as intended to mislead the Court as the ruling of the Court of Appeal struck out the appeal on technicalities. The applicants have therefore a right to bring a fresh appeal subject to the laws of limitation. Only by filing this application the applicants were in the right direction.

Summing up his submission, he highlighted to the Court that the respondent in his submission did raise new facts and objections which were not raised before.

However, all the objections raised were devoid of merits and should be disregarded entirely by this Court, by overruling the preliminary points of objection raised with costs.

Recapping his submission Mr. Ogunde raised a complaint on how Mr. Ndomba counsel for the applicants behaved by deliberately refusing and blocking services and phone calls so as to deny the respondent to effect or receive service as ordered by this Court on 2nd June, 2020. Mr. Ogunde specifically pointed out that Mr. Ndomba has moved offices without notification, which hindered smooth exchange of submissions as ordered by the Court. It was counsel's feeling that those were illegal tactics used and calculated to defeat the course of justice. He as well highlighted that though the submission was filed in time but were not timely served upon the respondent. The respondent had therefore to resort to the Court and make their own copies on 22nd June, 2020, which left them with only a day to file their written submissions. It was his further complaint that they no longer know where and how to trace the applicants' counsel. Based on the account of what transpired the respondent's counsel prayed to this Court to take action against the applicants' counsel for failing his duty as an officer of the Court for his deliberate actions, which impaired the course of justice.

Another issue picked up by Mr. Ogunde was on a preliminary point of objection raised by Mr. Ndomba that the written submission contravened the provisions of Rule 19 (1) of the Rules. Condemning the act, he referred this Court to the case of **Jared Nyakila & Another v Shanti Shah & 2 Others, Civil Appeal No. 87 of 2012, CAT-Full Bench-DSM (unreported)** and **Alhaj Talib v Kimen Mushi [1990] T.L.R 108 –CAT –Full Bench**, where the act of raising counter-preliminary point of objection was considered improper.

Despite the claim but there was no proof that the written submissions were in 1.0 line spacing instead of 1.5 line spacing, submitted Mr. Ogunde. He also contended that Mr. Ndomba misconceived and misapplied the marginal notes under Rule 19 (1) of the Rules, as written submission were not pleadings, citing the case of **Tanzania Union of Industries and Commercial Workers (TUICO) at Mbeya Cement Company Ltd v Mbeya Cement Company Ltd & National Insurance Corporation (T) Ltd [2005] T.L.R. 41–HC-DSM Registry**, where the Court considered submission as summary of arguments. It was also his submission that pleadings as defined under Order VI Rule 1 of CPC meant a “plaint or written statement of defence (including written statement of defence filed by a third party). Another place pleadings were covered was under Order VIII Rule 13 of CPC which deals with set-off and counter claim or addition defences, stated the counsel.

Extending his submission, he argued that the anomaly has in actual fact not gone to the root so may be ignored, citing the **Castelino v Rodrigues [1972] EA 233**, case in support.

Reverting to the preliminary points of objection raised by the respondent, it was his submission that after expunging of paragraphs 10, 11 and 12 of the affidavit the remaining paragraphs will have no effect as were merely introductory and historical statements on oath. To strengthen his position, he cited the case **Lalago Cotton Ginnery & Oil Mill Company Ltd v The Loans and Advancement Realization Trust (LART), Civil Application No. 80 of 2002-CAT-DSM-(unreported)**, where the Court stressed that paragraphs which were not factual but contain arguments and extraneous matters rendered the affidavit or counter affidavit substantially defective.

As for the rest of the submission Mr. Ogunde essentially reiterated his earlier submission but adding more cases to support his stance. He cited the case of **Deodat Dominic Kahanda & Another v Tropical Fisheries (T) Ltd & Two Others, Miscellaneous Commercial Application No. 200 of 2017-HC-DSM-Registry (unreported)**, where the Court held that where applicants were duly represented by able counsels at the appeal stage and there was laxity or lack of diligence on the part of the counsel or an oversight in handling the appeal, it was

devoid of merit to a plea for an extension of time. Urging this Court not to depart from the previous decision of the fellow judge, Mr. Ogunde cite the cases of **Ally Linus & Others v THA & Another [1998] T.L.R 5, CAT and ULC (T) Ltd v NIC & Another (2002) T.L.R. 212; Kiganga & Associates Gold Mines Company Ltd v University Gold WL [2002] T.L.R 129 and J.S. Mutung v University of DSM [2001] T.L.R. 261** (all these were High Court decisions). The counsel invited the Court to follow the decision in Kahanda (supra) and dismiss the application with costs after upholding the preliminary points of objection.

Let me start by sorting out these three points: **one**, on Mr. Ndomba's complain about behavior, the best approach should be for Mr. Ogunde to officially lodge a complaint with Advocates Ethics Committee so that the matter can be dealt with in a proper forum where parties will be afforded right to be heard.

Two, it is indeed correct that the Court discourages preemption of one set of preliminary points of objection by bringing another set of preliminary point of objection. Only when the point is new the Court can decide whether to entertain it or not, otherwise it is unprocedural and uncalled for in law. **See: African Marble Company Limited v Presidential Parastatal Sector Reform Commission, Civil Application No. 47 of 2007, CAT at DSM (unreported) p. 14.** The Nyakiha's

case referred by Mr. Ogunde is also relevant and supports the stance discouraging preemptive preliminary point of objections.

Three, unmarked and unreferenced to the paragraph of the affidavit, counter-affidavit or reply thereto of the annextures warrants no consideration at all of those annextures.

Coming to the rivalry submissions, I will attend the first point of objection separately and the second and third together. After thorough perusal of the applicants' affidavit deposed by Mr. Hamoud Mohamed Sumry, it is apparent that paragraphs 10, 11 and 12 contain extraneous matters. In paragraph 10 the deponent averred to have been pursuing the dispute, dutifully and diligently, the assertion which in my view calls for evidence and hence argumentative. Likewise, paragraph 11 is argumentative. As submitted by Mr. Ogunde, the averment purports that there is a point of law to be dealt with by the Court of Appeal assuming the application is granted. Affidavits or counter-affidavits are essentially required to only contain facts and not extraneous matters, which in this paragraph exists while paragraph 12 contains opinion and conclusions. The argument by Mr. Ndomba that those three paragraphs can if the Court finds it proper be expunged and the remaining part of the affidavit will still be intact. My reading of paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9, they all give background to the case and not evidence or facts which are required to

support the application for extension of time. Meaning if the three paragraphs are expunged which is the stance and a preferably option by the courts as exhibited in the case of **Phantom Modern Transport (1985) Ltd v D. T. Dobie & Company (T) Ltd**, Civil Reference No. 15 of 2001 and 3 of 2002 (unreported), which cited with approval the case of **Uganda v Commissioner of Prisons, Ex Parte Matovu**, [1966] EA 514 at 520. The position can however not be applied in the present application, because if those three paragraphs are expunged the remaining paragraphs will not sufficiently support the application for extension of time.

The first point is thus sustained.

On the second and third points, on authenticity of the documents and reasoning of the Court of Appeal in its decision which struck out the appeal, my first stop was in the ruling delivered. At page 26 of the ruling the Court of Appeal concluded by saying:

“In the event and on the account of the identified contradictions and uncertainty surrounding the supplementary record lodged by the appellants on 21st August, 2019, we find the same unreliable and cannot by any standard supplement the record of appeal. As such, the record of appeal before us

is incomplete, hence incompetent liable to be struck out.....”

From the Court of Appeal ruling it is obvious authenticated documents or papers are the core issue in order for this application to make sense, which nothing of the sort has been disclosed in the affidavit in support of the application. Without evidence of that the process will be futile exercise. This is concluded from the following: *first and foremost*, there is no indication that the applicants have written to this Court requesting for copies of the proceedings so as to initiate the process after the striking out of the Civil Appeal No. 14 of 2015, aside from this application. *Secondly*, nothing was averred regarding remedy sought to cure the irregularity pointed out by the Court of Appeal. It is indeed correct, and as submitted by Mr. Ogunde that change of status and display of the authenticated documents needs to be displayed for this Court to assess and make its findings before it grants the application. This is important as it was the basis of the Court of Appeal striking out the appeal. Therefore, without remedied situation, the exercise will be waste of time or it will delay the appeal process.

This is more so considering that the documents or record of appeal originated from this Court, so without assurance that the problem will not repeat itself, this Court will not be exercising its discretion justly, fairly, equitably and reasonably given

the set of circumstance. I thus agree to Mr. Ogunde presentation of those documents was not only necessary but vital, as those are the ones the second appeal will be based on. Ordinarily this is not a requirement in an application for extension of time but due to what transpired leading to striking out of the Civil Appeal No. 14 of 2015, this Court finds it was pertinent to clear that now.

Thirdly, I agree with Mr. Ndomba that the appeal was not heard and determined on merits but struck out on technicality. Therefore, the applicants if still interested have a right to pursue another appeal. The process is however, to be preceded by filing an application for extension of time to file a notice of appeal. But considering the reason the appeal was struck out, without first clearing or remedying the anomaly that was pointed out, this intended second appeal is bound to fail. All the annextures accompanying the reply to the counter-affidavit were in relation to the previous appeal which has already failed. In order for the anticipated fresh notice of appeal to make sense, the application for extension of time has to be accompanied with evidence that the defect on the documents both in contents and substance has been cleared. Short of that, this Court and even the Court of appeal will be being unnecessarily moved.

In light of the above I find the preliminary points of objection raised meritorious and proceed to sustain the notice and struck out the application with costs. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI".

P. S. FIKIRINI

JUDGE

1st JULY, 2020