

IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM  
MISC.COMMERCIAL APPLICATION NO. 79 OF 2020

DANGOTE INDUSTRIES LTD TANZANIA ....APPLICANT

VERSUS

WARNERCOM (T) LIMITED .....RESPONDENT

*Date of Last Order:* 14/7/2020

*Date of this Ruling:* 11/9/2020

**RULING**

**NANGELA, J.:**

This ruling is in respects of an application by Dangote Industries Ltd, (the Applicant) seeking for leave to appeal to the Court of Appeal. The Applicant also prays for costs of this Application. The Application was filed by way of a chamber summons under section 5 (1) (c) of *the Appellate Jurisdiction Act Cap 141 [R.E 2002]*, rule 45 (a) of the Court of Appeal Rules, 2009 and section 95 of the *Civil Procedure Code, Cap.33 [R.E.2002]*. It is supported by an affidavit of one Lilian Mwindunda, a legal officer of the Applicant authorized to swear the affidavit for and on behalf of the Applicant Company.

The Respondent (Warnercom (T) Ltd), a company registered and carrying out business in Tanzania, filed its counter affidavit on 29<sup>th</sup> June 2020. The Respondent's counter affidavit, sworn by John Buyamba

Lupemba, strongly resists the granting of the prayers or orders sought by the Applicant.

On 14<sup>th</sup> July, 2020, when this application was called on for hearing, Mr. Thomas Sipemba, learned counsel, appeared for the Applicant. On the other hand, Mr. Alex Balomi, learned counsel, appeared for the Respondent. Initially, Mr. Balomi had raised a preliminary objection to the hearing and determination of this application, but on the material date, he decided to abandon it. Although Mr. Sipemba pressed for costs, the Court ordered that costs will be in due course.

Submitting in support of the application, Mr. Sipemba commenced his submission by a prayer to adopt the affidavit filed by Ms. Lilian Mwindunda in support of the Application and a skeleton argument filed in this Court by Mr. Sipemba on the 9<sup>th</sup> of July 2020, with some few corrections to it. His prayers having been granted, Mr. Sipemba's brief submission ended with a request that the application for leave be granted with costs.

In his rebuttal submission, Mr. Balomi adopted the affidavit of John Buyamba Lupemba filed in opposition to the application. He submitted that, the Respondent opposes the application because, from paragraphs 1 to 13 of the affidavit of Lilian Mwindunda, do not provide any substantive point of law worth of labouring a Justice of Appeal. He argued that, the said paragraphs merely narrates historical events, with no tangible materials upon which this Court should settle and grant the Applicant leave to appeal to the Court of Appeal. In his view, and correctly so, leave to appeal to the Court of Appeal is always granted in the circumstances where there are reasonable chances of success. He insisted, however, that, in the present application, the Applicant is

seeking leave to challenge a well settled point of law, that an *ex-parte* judgement is not appealable, but rather, its remedy is to have it set aside by the same court.

In a further rebuttal, Mr. Balomi submitted that, the affidavit of Ms. Mwidunda does not disclose any disturbing feature to warrant an intervention of the Court of Appeal. In his view, while the Court of Appeal's time should be spared only for determination of meritorious issues or serious points of law, the affidavit of Ms. Mwidunda, as well as the skeleton arguments adopted by the learned counsel for the Applicant, do not contain meritorious points of law to persuade this Court to grant the applicant leave to appeal to the Court of Appeal. Referring to the skeleton arguments filed in this Court, Mr. Balomi contended, as well, that they contain irrelevant submissions and distinguishable authorities. He pointed at paragraph 2.10 of the skeleton argument, and noted that, the issue regarding revisional jurisdiction of this Court surfaces from nowhere given that the present application is only meant to ascertain whether there is a point of law warranting the attention of the Court of Appeal.

Since Mr. Balomi saw no persuasive materials which represent novel points of law or issues of general importance in this present application, he urged this Court to find that even the intended appeal has no chances of succeeding. He also urged this Court to make a finding that, the intended grounds of appeal are frivolous, vexatious, useless and hypothetical and leave cannot be granted under any of such circumstances. He concluded his submissions by asking this Court, in exercise of its discretion, to dismiss the Application with costs for a simple reason that it has not raised any point of law warranting the Court of Appeal's intervention.

In a quick rejoinder, Mr. Sipemba urged this Court to refuse the arguments raised by Mr. Balomi. He rejoined that, the affidavit in support of the Application, is laden with substantive grounds or materials sufficient for this Court to act upon and grant the leave sought by the Applicant. Referring this Court to paragraph 12 of the supporting affidavit, he argued that the same summarizes the points of law to be looked at by this Court when it makes its determination. That paragraph reads as hereunder:

"12. That, the intended appeal raises serious issues of law to be considered by the Court of Appeal, including the following:

- (a) whether it was correct for the appeal court to rule that the *ex-parte* judgement was not appealable whilst the Applicant was appealing against the *ex-parte* judgement on its merits.
- (b) Whether the appeal court was right in dismissing the appeal for the reason that the Applicant ought to have applied to set-aside *ex-parte* judgement without considering the fact that time for applying for extension of time to file written statement had expired and therefore such application would have no meaning in law;
- (c) whether it was correct for the appeal court to hold that the trial court had room to accommodate a belated time to file written statement of defence without considering the fact that there was a statutory time limit for the trial court to accommodate applications for extension of time to file written statement of defence;
- (d) whether the appeal court was right in holding that the Applicant had no *locus standi* to appeal while serious question of whether the trial court had jurisdiction to entertain the matter had not been determined on merits; and
- (e) whether it was proper for the appeal court to refuse to exercise its revisional jurisdiction and allow an *ex-parte* judgement entered by a court with no requisite pecuniary jurisdiction to stand."

While conceding to the submission that an application for leave should be granted only where there are disturbing features or a point of law which requires the guidance of the Court of Appeal, Mr. Sipemba was of the view that, one such point of law is the right of appeal and whether such right is extinguished simply because of an *ex-parte* judgement. He

contended, however, that, there is a crucial issue of jurisdiction which, as it was held in **Symbion Power LLC v Salem Construction Ltd, Misc. Commercial Cause No.26/2016, HC (Comm. Dvsn), DSM (unreported)**, the question of jurisdiction is the biggest of all deals at this stage.

Mr. Sipemba rejoined further that, as submitted in para 2.8 of the skeleton argument, the case of **Arunaben Chaggan Mistry v Naushan Mohamed Hussein and Another, Civil Application No 6 of 2016 (unreported)**, held that:

"the Legal position is settled. When there is an allegation of illegality, it is important to give opportunity to the party making such allegation to have the issue considered."

He submitted, therefore, that, the intervention of the Court of Appeal is required in order to give guidance to the question as to whether an appeal court can proceed to entertain other matters, including of *locus standi*, before deciding a question of jurisdiction, especially, where such question was raised in the trial court and the court decided to ignore it and proceed with the matter before it on merits. He further contended that, because the trial court proceeded without proper pecuniary jurisdiction, it proceeded illegally, and since this court did not address this point of law, the Court of Appeal should be invited to address it. He, therefore, prayed that this application be granted as it raises serious points of law.

I have carefully considered the rival submissions made by the learned counsel for the parties. As correctly stated by Mr. Balomi, in an application for leave, like the instant one, granting of such leave to appeal, is not automatic. It largely depends on the discretion of the Court, which, however, must be exercised judiciously. See for that matter, the case of **British Broadcasting Corporation v Eric Sikujua Ng'imaryo**,

**Civil Appl. No 133 of 2004 (unreported) and Mantrac (T) Limited v Raymond Costa, Civil Appl. No.9 of 2020, (unreported).**

In the case of **Rutatigana C.L v The Advocate Committee and Another, Civil Application No.98 of 2010 (unreported)**, the Court of Appeal was of the views that:

An application for leave is usually granted if there is good reason, normally a point of law or point of public importance, that calls for this Court's intervention. Indeed, on the aspect of leave to appeal, the underlying principle was well stated by this Court in *Harban Haji Mosi and Another v Omar Hilal Seif. and Another, Civil Ref.No.19 of 1997 (unreported)* thus: 'Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole, reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance.'

Guided by the above principles, let me now consider the merits of this instant application. The gist of the application is what paragraph 12 of the affidavit of the applicant discloses. In his submission, Mr. Sipemba has contended that, the points raised under paragraph 12 of the supporting affidavit are points of law which warrant the intervention of the Court of Appeal. In particular, he argues that one of the points raised is an issue of illegality, since the trial court proceeded without proper pecuniary jurisdiction. By so doing, he contended that the trial court proceeded illegally, and since this court did not address this point of law, the Court of Appeal should be invited to address it.

Without much ado, a point alleging illegality is a point that warrants the granting of an application like the one at hand. This position was also reiterated in the case of **Arunaben Chaggan Mistry v Naushan Mohamed Hussein and Another, (supra)**, wherein this Court held that:

"the legal position is settled. When there is an allegation of illegality, it is important to give opportunity to the party making such allegation to have the issue considered."

In view of the above, I find no merits in the Respondent's submission that the application at hand does not raise any point of law warranting the attention of the Court of Appeal. In my view, the issue of illegality among others, raised in para 12 of the affidavit warrants an attention of the Court of Appeal as an important point of law. Consequently, pursuant to section 5 (1) (c) of the *Appellate Jurisdiction Act Cap 141 [R.E 2019]*, in exercise of its discretion, this Court hereby grants the Applicant leave to appeal to the Court of Appeal subject to the laid down laws and procedure. In view of that, this Application succeeds. I make no order as to costs.

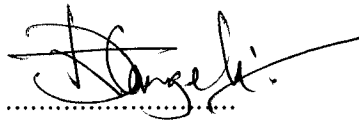
*It is so ordered.*



DEO JOHN NANGELA  
JUDGE,

High Court of the United Republic of Tanzania  
(Commercial Division)  
11 / 09 / 2020

Ruling delivered on this 11<sup>th</sup> day of September 2020, in the presence of Mr. Sweetbert Eligius the Advocate for the Appellant, also holding the briefs of Mr. Balomi, Advocate for the Respondent.



DEO JOHN NANGELA  
JUDGE,

High Court of the United Republic of Tanzania  
(Commercial Division)  
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