IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

MISCELLANEOUS COMMERCIAL APPLICATION NO. 09 OF 2020

(Arising from Miscellaneous Commercial Application No. 05 of 2019 and Miscellaneous Commercial Application No. 05 of 2020)

CAPITAL DRILLING (T) LIMITED .....1st APPLICANT

CAPITAL DRILLING LIMITED.....2nd APPLICANT

DAVID REGAN PAYNE.....3rd APPLICANT

JAMIE PHILLIP BOYTON.....4th APPLICANT

ADILI CORPORATE SERVICES (T) LIMITED.....5th APPLICANT

Versus

SIRILI ILETI MUSHI.....RESPONDENT

Last Order: 09th Nov, 2020

Date of Ruling: 13th Nov, 2020

RULING

FIKIRINI, J.

The applicants being aggrieved by the decision in Miscellaneous Commercial Cause No. 05 of 2019 dated the 29th October, 2019, expressed an intention to appeal the decision to the Court of Appeal. Given that it is a legal requirement the leave of the High Court has to be sought first, the applicants preferred this application for leave under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) and Rule 45 (a) of the Court of Appeal Rules, 2009

as amended by Court of Appeal (Amendment) Rules GN. No. 362 of 2017 and Court of Appeal (Amendment) Rules GN. No. 344 of 2019.

The application is supported by an affidavit of one Ernestilla Bahati counsel for the applicants and opposed by way of counter-affidavit of one Sirili Ileti Mushi, the respondent. Skeleton arguments in support and in opposition were filed on 05th November, 2020 and 06th November, 2020 respectively.

At the hearing the counsels for the parties, aside from praying to adopt their affidavits and skeleton arguments, also presented oral submissions for their respective positions and parties. The applicants were represented by Ms. Ernestilla Bahati, while Mr. Norbet Mlwale appeared for the respondent.

Ms. Bahati, relying on the case of **Harban Haji Mosi v Omar Seif [2001] T. L. R. 409,** submitted that leave was grantable where the intended appeal stood chances of success or where the proceedings revealed disturbing features requiring Court of appeal intervention, She further submitted that the applicants were aggrieved by the decision delivered on 29th October, 2019, as it contained disturbing features, as outlined under paragraph 12 of the applicants' affidavit, which in her opinion required Court of Appeal intervention. Highlighting her point, she referred this Court to the case of **BBC v Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004, CAT** (unreported) (copy supplied) in which the

Court emphasized that the appeal must reveal issues of general importance or novel point of law or grounds showing *prima facie* or arguable grounds of law.

Expounding on the grounds on declaration by the High court, as pointed out under paragraph 12 (a), of the affidavit in support of the application, that the meeting and resolution of the members of the 1st applicant's dated 14th December, 2004, was illegal and the resolution thereof null and void, if was proper. She banked this submission on the provision of section 148 (2) and (3) of the Companies Act, Cap. 212 R.E. 2002, which has illustrated on the point raised. Another point she discussed was as to whether it was proper for the Court to order the restoration of the shareholding structure of the 1st applicant to the way it was during the incorporation despite the respondent having signed shareholding agreements in November, 2010 and June, 2006 that recognized and ratified all the changes and the resolution passed in the meeting held on the 14th December, 2004. Bolstering her submission, she referred this Court to the case of **Afriscan Group (T) Ltd v Saidi Msangi, Commercial Case No. 87 of 2013, (unreported)** (copy supplied).

Based on the above submission it was Ms. Bahati's conclusion that the applicants have shown issues deserving Court of Appeal guidance and thus prayed for the grant of the application and reliefs sought in the chamber summons.

Mr. Mlwale, in his opposing submission submitted that although an application for leave was a right of the applicants' to apply for leave to appeal to the Court of Appeal, but that right was not automatic. Instead the applicants have to meet the test which is: "*Whether the impugned decision raised any issue to be determined by the Court of Appeal.*" Answering that question, it was his submission that the applicants have failed to establish any legal point deserving Court of Appeal attention. Enriching his submission, he referred this Court to the Court of Appeal decision in **National Bank of Commerce v Maisha Mussa Uledi, Civil Application No. 410/07 of 2019, (unreported), p. 9** (copy supplied), in which the Court stressed on there being a legal issue for it to determine.

Contesting the applicants' assertion that they have done that in paragraph 12 of the affidavit, it was his submission, that all points raised in that paragraph have already been determined by the High Court, making reference to annexture CDT-3. It was thus his finding that calling the Court of Appeal to give guidance was waste of its time and its best was to prejudice the interest of the respondent who is a shareholder and director of the 1st applicant. Countering the argument that the intended appeal has prospect of success, it was his submission that was not the test required in grant of the application, maintaining his position that the only test was whether there were legal issues or points requiring Court of Appeal interference.

Adding to his submission Mr. Mlwale submitted that the applicants' counsel in submitting on section 148 (2) & (3) of the Companies Act, in explaining that there were legal points, the counsel argued that, that assertion was made while it did not feature in the affidavit in support filed. He thus prayed for that part of the submission be ignored as it was from the bar.

Concluding his submission, he reiterated his earlier submission that the applicants have failed to pass the test elucidated in the **National Bank of Commerce** case (supra) and prayed for the application to be dismissed with costs for lack of merits.

Opposing the submission that all the issues raised under paragraph 12 of the affidavit have already been determined by this Court, Ms. Bahati submitted that was misconception. She argued that the applicants had raised about 5 (five) issues which they would want the Court of Appeal to determine, in particular on the aspect of whether the High Court appropriately dealt with the issues, which she has expounded in her skeleton arguments. On the chances of success of the intended appeal that was not a required test, disputing Mr. Mlwale's submission, Ms. Bahati reiterated her earlier submission that chances of success was one of the tests, and that Mr. Mlwale's submission was misleading going by the cases she cited in her submission in chief. Also she pointed out that the submission citing section 148 (2) and (3) of the Companies Act, made by Mr. Mlwale, that the provision was not reflected in the affidavit in support, was misleading, as the affidavit did show the

points subject of the intended appeal, and during oral submission what the counsel did was elaborating on the points in relation to the appropriateness of the High Court decision including citing the relevant provisions.

Admitting that leave to appeal though was of a right but she concurred that it was not automatically given. In conclusion, reiterating her earlier submission Ms. Bahati stressed that the applicants were aggrieved by the High Court decision and have shown that through the affidavit in support filed illustrating the issues for determination by the Court of Appeal.

I have carefully considered the submissions by the counsels, affidavits as well as the skeleton arguments filed and the cases cited. Let me start by pointing out that: (i) grant or not to grant any application is at the Court's discretion, and (ii) grant of leave to appeal, in particular is not automatic, but upon considering a number of factors.

A right to appeal is provided for by the law and justice demands that the said right should not be denied without any justifiable reason. In the case of **Roman Mkini v Republic [1980] T.L.R 148,** underscoring that point, the Court stated that a right to be heard is natural, even though must be exercised according to the principles of the law and subject to procedures in place.

Therefore, Court vested with discretionary powers to oversee the grant or refusal grant of the application, has to carefully weigh on one hand the right to appeal which should not be curtailed without any justifiable cause, and on the other be guided by the criteria set out through number of decisions by the Court of Appeal, including the fact that the right is not automatic as stated in the **BBC** (supra), **p.6**. Meaning that there are factors to be considered by the Court before it proceeds granting or refusing grant of the application. In all the three cases of **Harban, BBC** and **National Bank of Commerce** cited (supra) the Court based on the facts, I would say, which was presented before that particular Court, set out factors for consideration. Whereas in the **Harban** case (supra) the Court held that:

> *"Appeal is a right of an individual but although it is matter of right the same should be exercised judiciously, that is why the court is tasked to* ***look at the questions or grounds raised and usually it has to be on point of law or public importance that may be discerned in the proceedings or decision sought to be appealed by the applicant and see whether they warrant the grant of the leave for consideration by the higher court of the land.****"*[Emphasis mine]

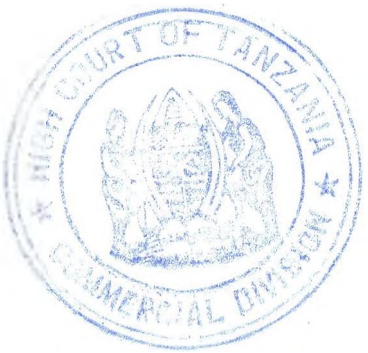
In BBC, the Court had this to say:

> *"It is within the discretion of the Court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the Court. As a matter of general principle, leave to appeal will be granted* ***where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal."*** {Emphasis mine]

And in **National Bank of Commerce** (supra), while the Court insisted on the existence of legal points worth consideration by the Court of Appeal, it however, did not thwart away other factors as decided upon by the very same Court regarding grant or refusal of the application for leave to appeal to the Court of Appeal, in its other decisions. Mr. Mlwale's position that all the grounds raised have already been determined by the trail Court, though respected but it does not mean they do not deserve the Court of Appeal attention. Considering ones right to appeal which as pointed out earlier that it should not be denied without justifiable reason, I find the principle in **National Bank of Commerce** (supra) though subscribed to, but in my view did not fit the situation before the Court presently.

I cannot dwell on discussing each of the enumerated factors or the grounds pointed in the affidavit filed in support of the application and the submission expounding on those grounds, as well as the case of **Afriscan Group (T) Ltd** (supra), cited by

Ms. Bahati, as it is not within my jurisdiction to do so. However, on the face of it I find the proposed grounds have raised a *prima facie* or arguable appeal worth consideration of the Court of Appeal. And for the interest of justice, I find that it will be highly prudent to let the leave sought be granted, so as to allow the Court of Appeal to determine the appeal. I have as well considered the fact that the High Court decision was that of original jurisdiction and the only way the aggrieved party can exercise her right of appeal is through this process, which I find deserving being legally provided for. To this end, I proceed to grant leave to appeal to the Court of Appeal, under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141. It is so ordered.



P. S. FIKIRINI

JUDGE

13th NOVEMBER, 2020