

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 116 OF 2020

(Arising from Miscellaneous Commercial Application No. 71 of 2018)

A. C. Gomez (1997) LIMITED.....APPLICANT

Versus

TREASURY REGISTRAR.....RESPONDENT

Last Order: 08th Oct, 2020

Date of Ruling: 31st Mar, 2021

RULING

FIKIRINI, J.

Aggrieved by the decision dated 26th September, 2019 in Miscellaneous Commercial Application No. 71 of 2018, the applicant filed a Notice of Intention to Appeal. This notice is however to be preceded by leave sought by the applicant and granted from this Court, which is the essence of this application which has been filed under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA), Rule 45 (a) of the Court of Appeal Rules, 2009 as amended by Tanzania Court of Appeal (Amendment) Rules, 2019 (the Rules). Costs to follow the outcome of the intended

appeal and any other relief(s) this Honourable Court deems fit to grant, were also prayers in the chamber summons. The application is supported by an affidavit of Zulfikar Ismail one of the applicant's directors, and is opposed by a counter affidavit of Ms. Kause K. Izina— a State Attorney. Both the affidavit and counter affidavit, upon request by the counsels, were adopted and formed part of the submissions that were ordered in arguing the application.

Mr. Gaspar Nyika advocate filed written submissions on behalf of the applicant and Kause Irina – State Attorney did so, on behalf of the respondent.

Mr. Nyika's submission that the principles governing determination of an application for leave have been stated in various cases such as **British Broadcasting Corporation v Eric Ng'imaryo, Civil Application No. 138 of 2004, CAT at DSM (unreported) p.6-7**, where among other things the Court was expected to assess if the grounds of appeal raises issues of general importance or a novel point of law or where the grounds show *prima facie* or arguable appeal. Whereas in the case of **Harbin Haji**

VSF

Mosi & Shauri Haji Mosi v Omar Hilal Seif & Seif Omar, Civil Reference No. 19 of 1997, in which the Court was asked to look into the possibility of success of the intended appeal or disturbing features that require Court of Appeal interference. Or that the grounds of appeal have raised contentious issues of law as pointed out in the case of **Saidi Ramadhani Mnyanga v Abdallah Saleh [1996] T. L. R 74**.

Persuading the Court that there were grounds calling for Court of Appeal intervention, Mr. Nyika referring to paragraph 5 of the affidavit in support of the application deponed by Zulfikar Ismail, brought up three grounds namely: one, that the Judge erred in holding that the applicant or the arbitrators were under the obligation to point out irregularity of the respondent's failure to notify the Attorney General of the impending Arbitration proceedings even after finding that in law it was the respondent who was tasked with the duty or obligation to notify the Attorney General; two, that the Judge erred in law for failing to order that at the time when the arbitration proceedings commenced, there was no legal obligation for the applicant to notify the Attorney General for the proceedings to be said to have been vitiated for lack of notice; and three, that the Judge erred in

law for failing to order that the amendment of Treasury Registrar Act through Written Laws (Miscellaneous Amendments) Act (N0o. 3) of 2016 requiring involvement of the Attorney General in any suit or claim against the Treasury Registrar did not act retrospectively as the Act came into force on 18th November, 2016 after the arbitration proceedings subject of the award had already commenced.

Based on the stated principles in the cited cases, it was Mr. Nyika's contention that the raised grounds of appeal have shown a *prima facie* case or arguable case stemming from the three stated grounds. And urged the Court in the circumstances, to grant the leave sought.

Responding opposing grant of the application, Ms. Izina and relying on the principles propounded in the case of **Rutagatina C.L. v The Advocate Committee and Another, Civil Application No. 98 of 2010, CAT at DSM**, submitted that grant or refusal to grant an application for leave was not automatic but discretionary and exercising those discretionary powers the Court had to act judiciously. The case of **British Broadcasting Corporation** (supra) was also referred to buttress the submission on the

PSF

point. And that more to the decision, the Court went on listing the things to be considered in granting or refusing grant of the application for leave which included: if there was a good reason normally on the point of law or point of public importance warranting Court of Appeal interference. Discouraging unnecessary grant of leave, Ms. Izina citing the case of **Harban Haji Mosi** (supra), submitted that the purpose of the provision was to spare the Court the flood of unmerited appeals on one hand and on the other to make the Court have ample time to give adequate attention to cases with true public importance.

In light of the above submission, Ms. Izina persuaded the Court not to grant the application as the applicant has failed to demonstrate good reasons to compel this Court to grant the application for leave to appeal to the Court of Appeal as required in law. Extending her submission on the point, she contended that the grounds reflected in paragraph 5 of the affidavit and later in the submission in support of the application were frivolous and vexatious intended to misled and waste of the Court's precious time.

Ms. Izina augmented her submission by submitting that after finding the Attorney General has not been involved, the Court rightly set aside the award the fact admitted by the applicant that absence of the Attorney General vitiated the proceedings as indicated in paragraph 3 of the applicant's reply to the counter affidavit. On the pointed admission it was thus her prayer that the application be declined as the applicant has failed to demonstrate legal points worth consideration by the Court of Appeal.

Deducing from the submissions, it is evident that both Mr. Nyika and Ms. Izina are in agreement on the following that leave to appeal to the Court of Appeal is not automatic but within the Court's discretion. The discretion which ought to be judiciously exercised based on the information placed before the Court. This stance is depicted in the **British Broadcasting Corporation** (supra), when the Court stated clearly when it held:

*"Needless to say, **leave to appeal is not automatic**. It is within the discretion of the Court to grant or refuse leave. The discretion must, however be judiciously exercised on the material before the Court."*

PSF

Other principles in agreement are that for the leave to be granted the Court has to examine if there are grounds of appeal raising issues of general importance or new point of law or where the grounds show prima facie or arguable appeal as well as chances of success or when the proceedings as a whole reveal such disturbing features compelling interference by way of giving guidance by the Court of Appeal, as illustrated in the cases of **British Broadcasting Corporation; Harban Haji Mosi** and **Rutagatina** (supra).

The two counsels' point of departure is, while Mr. Nyika considers the application deserved granting as the applicant has provided adequate material for this Court to act upon in exercising its discretion, Ms. Izina is of completely different position that the applicant has failed to demonstrate legal points which were worth Court of Appeal consideration, and have urged the Court to dismiss the application.

I have thoroughly scrutinized the submissions and find the application deserving as indeed there are issues needing Court of Appeal guidance. The three grounds of appeal raised are all inviting for intervention and

RSF

direction. More to the leaning towards considering the application favourably is the fact that the respondent will in no way be prejudiced if this application is granted.

Therefore in the interest of justice, I proceed to grant the application pursuant to section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA), Rule 45 (a) of the Court of Appeal Rules, 2009 as amended by Tanzania Court of Appeal (Amendment) Rules, 2019 (the Rules). It is so ordered.



P. S. FIKIRINI

JUDGE

31st MARCH, 2021