

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 101 OF 2020

(Arising out of Miscellaneous Commercial Application No. 6 of 2020)

BETWEEN

HIRJI ABDALLAH KAPIKULILA..... APPLICANT

Versus

NCBA BANK TANZANIA LIMITED (*as successor in title of the defunct NIC Bank Tanzania Limited*)RESPONDENT

Last Order: 16th Mar, 2021

Date of Ruling: 27th Apr, 2021

RULING

FIKIRINI, J.

The applicant aggrieved by the decision in Commercial Case No. 116 of 2016, dated 11th October, 2018 expressed an intention to appeal the decision to the Court of Appeal. Given that it is a legal requirement that leave of the High Court has to be sought, this application was thus preferred under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (AJA) and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009, as amended by Court of Appeal (Amendment) Rules GN No. 362 of 2017.

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Rules, 2009, as amended by Court of Appeal (Amendment) Rules GN No. 362 of 2017.

The application is supported by an amended affidavit of the applicant - Hirji Abdallah Kapikulila while the amended counter affidavit of Stanley Nyamle, Principal Officer of the Respondent opposed the application.

Parties were ordered to file their written submissions. The filling schedule was as follows: The applicant to file their written submission by or on 25th March 2021, reply written submission by or on 2nd April 2021, and rejoinder if any by or on 6th April 2021. This was to be followed with a ruling set for 15th April 2021.

During the hearing, the respondent was represented by Mr. Makarios Tairo learned counsel while the applicant enjoyed the legal services of Mr. Octavianus Mushukuma learned counsel.

The background to this application rests in Commercial Case No. 116 of 2016 in which the respondent, NCBA Bank Tanzania Limited sued the applicant for the payment of outstanding amount of Tzs. 160,562,539.53 in respect of a loan facility which the respondent had advanced to the applicant. Alternatively, the respondent sought an order for sale of motor vehicles with registration no. T988 CRB make Yutong bus, no. T662 DBV

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make Yutong bus, and no. T278 DFA make Dragon, the properties of the applicant which were pledged as security.

The counsel for the respondent submitted that after several adjournments, on 11th October, 2018, when the matter came for hearing, while the respondent's witness was not there, the Court proceeded to struck out the witness statement under Rule 56 (2) of the High Court (Commercial Division) Procedure Rules, 2012 as amended by GN. No. 107 of 2019 and eventually the suit was dismissed for want of prosecution under Order XVII Rule 3 of the CPC for failure to produce evidence.

He further submitted that in spite of the dismissal order, the respondent nonetheless proceeded to dispose of the said three motor vehicles, the applicant's properties which were pledged as security. The respondent never disclosed the amount realized from the disposal of the three motor vehicles, but apportioned herself the amount she was claiming from the applicant. This exercise of disposing of the applicant's properties was carried out while the suit has been dismissed and without Court order or involving the applicant in the whole process of selling the said motor vehicles.

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He further submitted that, the fact that the respondent has already sold the motor vehicles which were the subject matter in the main suit, without an order of Court having been sought and obtained allowing the sale of the said motor vehicles, and whereas the respondent was still pursuing an appeal to the Court of Appeal in Miscellaneous Commercial Application No. 102 of 2020, was what aggrieved the applicant to seek leave to appeal against the ruling of this honorable Court that allowed the respondent to appeal to the Court of Appeal.

Extending his submission, he submitted that, since the respondent has no clean hands, she cannot take her rights by one hand and claim to have her rights by another hand. To buttress his position, he cited the case of **British Broadcasting Corporation v Eric Ng'imaryo, Civil Application No. 138 of 2004** and **Buckle v Holmes (1926) All ER Rep. 90 at P 91**, whereby both decisions held that leave to appeal was not automatic and it was within the jurisdiction of the Court to grant or refuse.

In addition to that, it was Mr. Mshukuma submission that, leave to appeal can be allowed where the intended appeal stand reasonable chances of success. Where the grounds of appeal were frivolous vexatious or useless or hypothetical no leave should be granted.

this application for leave and prayed the same to be dismissed with costs.

He further submitted that the applicant was seeking for leave to appeal to the Court of Appeal against the decision of this Court after the respondent was granted extension of time to process an appeal to the Court of Appeal. He further urged that, extension of time was the question of the Court exercising its discretionary powers which was in all senses required to be exercised judiciously and upon furnishing of sufficient ground. The applicant was thus required to demonstrate strong grounds calling for Court of Appeal of Tanzania to intervene. In the case of **Benedicto Mumelo v Bank of Tanzania, Civil Appeal No.12 of 2002** Court of Appeal of Tanzania observed that:

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or to refuse it, and that extension of time may only be granted where it has been sufficient established that the delay was with sufficient cause."

In addition, Mr. Tairo cited the case of **Chawe Transport Import & Export Co. Ltd v Pan Construction Co. Limited & Three Others, Civil Application No. 146 of 2005**, in which the Court cited its decision in the case of **Tanga Cement Company Ltd v Jumanne D.**

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Masangwa & Amosi A. Mwalwanda, Civil Application No. 6 of 2001 p.7, in which the Court stated that:

"This unfettered discretion however has to be exercised judicially and the overriding consideration is that there must be sufficient cause for so doing. What amounts to sufficient cause has not be defined."

Contesting the ground of appeal raised by the applicant as the basis of the application, it was the counsel's submission that, they were not matters emanating from Miscellaneous Commercial Application No. 6 of 2020, which was decided on 27th May, 2020 in which the applicant was seeking for leave to appeal; to the contrary the content was matters from the main suit, that is, the Commercial Case No. 116 of 2016, which was dismissed on 11th October 2018. These were exhibited in paragraphs 1, 2, and the last paragraph on page 4, and conclusion on page 5 of the applicant's amended affidavit.

The amended affidavit in support of this application indicated that this application originated from Miscellaneous Commercial Application No. 6 of 2020, however the applicant appeared to mix up the matters and hence failed to draw demarcation between the source of his application and other matters, submitted Mr. Tairo. He went on stating that the applicant completely failed to comply with the requirement in order to

justify his application. In both the amended affidavit and submission in chief, nowhere the applicant even mentioned improper exercise of discretionary powers by this Court in determining the application for extension of time. That being the position, this application remains baseless warranting this Court to refuse to granting it.

Mr. Tairo made reference to the case of **National Bank of Commerce v Maisha Musa Uledi (Life Business Centre), Civil Application No. 410/07 of 2019 at p.9** when the Court of Appeal of Tanzania held that:

"in any application for leave to appeal, what is required by the court hearing such an application is to determine whether or not the decision sought to be appealed against raises legal points which are worth consideration by the Court of Appeal."

When submitting on whether the applicant has fulfilled the tests warranting grant of leave to appeal to the Court of Appeal of Tanzania. He as well referred this Court to the case of **British Broadcasting Corporation** (supra), which provided test to be considered in the application for leave to appeal which were listed as follows: **one**, affidavit in support of application should be subjected to analysis if they merit reconsideration by the Court of Appeal. **Two**, leave to appeal is

not automatic it is within the discretion of the Court to grant or to refuse. **Three**, leave to appeal will be granted where grounds of appeal raise issues of general importance and **Four**, no leave will be granted where the grounds of appeal are frivolous, vexatious or useless.

On the strength of the submission, he prayed that, the application for leave be dismissed with costs for the applicant failure to demonstrate sufficient ground based on the principles stated from the above authorities.

Close scrutiny of the Court records, revealed that there was no rejoining submission filed before this honorable Court. The reply submission was filed on 6th April, 2021 instead of 2nd April, 2021, which was out of time. However, due the fact there was Easter holidays, this Court has opted to accept the submissions as timely filed.

I given due consideration to the rival submissions and the most pertinent question for determination is **whether this application deserves Court of Appeal attention.**

Examining the whole application, it is evident that the following facts are undisputed that Miscellaneous Commercial Application No. 6 of 2020, originated from Commercial Case No. 116 of 2016 in which the applicant was the defendant. **In that particular suit the respondent was claiming**

for payment of Tzs 160, 562, 593.53 as outstanding amount from the loan advanced to the applicant. As an alternative the respondent sought an order to sell motor vehicles which secured the loan. On the contrary the applicant filed herwritten statement of defence as well as a counter-claim. The suit was dismissed for want of prosecution and the counter claim remained unprosecuted, as the respondent preferred a revision to the Court of Appeal. The Court of Appeal resolved by returning the records of proceedings back, with explanation that the order was fit case for appeal rather than revision preferred. This compelled the respondent to apply and was granted an extension of time to file appeal out of time by this honorable Court on 27th May 2020.

Having canvassed on undisputed facts, let me now examine the merits of the application before this Court, knowing that it is settled legal position that grant or refuse to grant the application of this nature is entirely at the Court's discretion. The only caution to be made is, the discretion must be exercised judiciously and according to the rules of reasons and justice. In the case of **The Attorney- General v Anyang' Anyang' Nyong'o & Others [2017]1 EA 12** it was held that:

"Judicial impartiality is the bedrock of every civilized and democratic judicial system. The system requires the Judge to adjudicate dispute

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before him impartially without bias in favor of or against any party to the dispute."

Right to appeal is provided for by the law, however the exercise of that right is not automatic, even though justice demand that the said right should not be denied without any justifiable reasons. 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 law and procedures in place.

In the present application both counsels subscribed to the principle that the Court is vested with discretionary powers as far as granting or refusal to grant the application is concerned. Only that in exercising those unfettered powers the Court has to carefully weigh on one hand the right to appeal which should not be curtailed without any justifiable cause, and on the other side be guided by the criteria set out through number of decisions by the Court of Appeal. In the case of **Harban Haji Mosi** (supra) the Court held that:

"Appeal is a right of individual although it is a matter of right the same should be exercised judiciously, that is why the court is tasked to look at the questions or ground raised and usually it has to be on point of law or public

importance that may be discerned in the pleadings or decision sought to be appealed by the applicant and see whether they warrant the grant of leave for consideration by the higher court of the land."

What aggrieved the applicant is the fact that the respondent has already sold the motor vehicles the subject matter in Commercial Case No. 116 of 2016, yet she sought for an order from this honourable Court to sell those motor vehicles which had already been sold by the respondent. She could not obtain such order and still was pursuing appeal to Court of Appeal in Miscellaneous Commercial Application No. 102 of 2020 between parties. That is what aggrieved the applicant and prompting him to appeal the decision and hence this application.

As pointed out above even though right of appeal is not automatic, but denying exercise of that right without justifiable cause is against the principles of justice and the Court discretion will come to disrepute and can be termed as to have been arbitrarily exercised. In the instant application I can reason with the applicant entirely and find the proposed ground has raised a *prima facie* or arguable appeal worth consideration of the Court of Appeal.

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Appeal under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141.

It is so ordered.



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

P.S FIKIRINI

JUDGE

27th APRIL, 2021