IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 102 OF 2020

(*Arising from Commercial Case No. 116 of 2016*)

BETWEEN

NCBA BANK TANZANIA LIMITED.....APPLICANT

Versus

HIRJI ABDALLAH KAPIKULILA.....RESPONDENT

Last Order: 18th Mar, 2021

Date of Ruling: 27th April, 2021

RULING

FIKIRINI, J.

The Applicant, moved this Court by way of chamber summons supported by an affidavit of Stanley Nyamle, the applicant's Principal Officer, seeking for leave to appeal to the Court of Appeal under section 5 (1) (c) of the Court 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 the Tanzania Court of Appeal (Amendment) Rules, 2017, GN. No. 362 of 2017 (the Rules).

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On 23rd September, 2020 when the matter came for orders, the counsel for the applicant Ms. Hamisa Nkya, told the Court that her client's bank – NIC Bank Tanzania Limited had merged with Commercial Bank of Africa (CBA) and have formed a new bank in the name of NCBA Bank Tanzania Limited, and thus, her client was praying to be allowed to amend the application so as to reflect merger and the new name on the records

The respondent, through her counsel, Mr. Octavian Mshukuma who was assisted by the learned counsel Ms. Leticia Msechu, did not object to the prayer, and thus the Court proceeded to grant the application and also ordered the matter to come for orders on 1st December, 2020.

On that day the trial Judge was indisposed and thus parties had to appear before the Deputy Registrar. Mr. Mshukuma moved the Court to struck out the amended application giving the reason that it was filed out of time in contravention of the dictates of Order VI Rule 18 of the Civil Procedure Code, Cap. 33 R. E. 2019 (the CPC).

This submission as well as the prayer was contested by Ms. Mariam Ismail, who was also a counsel representing the applicant.

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The Deputy Registrar made no decision; instead she ordered the matter to come for orders on the date to be fixed for the trial Judge who was indisposed to determine the matter.

On 16th March, 2021, the subject was brought up again and consequently a ruling delivered on 18thMarch, 2021. Admitting that there was delay in filing the amended application, nevertheless, rather than striking out the application, for the interest of justice the Court proceeded to allow the filing. With the said ruling in place, the respondent on 23rdMarch, 2021 proceeded to file a counter-affidavit which was deponed by the respondent Hirji Abdallah Kapikulila.

In her 16 paragraphs the applicant essentially described what transpired leading to the present amended chamber summons for application for leave. Annextures **NCBA-A1** collectively, referred in paragraphs 3 and 4 are in reference to the merger of two bank, NIC Bank Tanzania Limited and Commercial Bank of Africa, which led to change of name to NCBA Bank Tanzania Limited.

The remaining annextures were essentially revealing what happened triggering to this application for leave to appeal to the Court of Appeal. It

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all started with an institution of the Commercial Case No. 116 of 2016 of which after the initial processes were completed and the case ripe for hearing, the applicant's witness absconded from work and hence could not appear in Court as a witness. The applicant made an oral application to substitute witness, but the Court ordered for formal application to be made. Complying to the order the applicant filed Miscellaneous Commercial Application No. 253 of 2017, seeking for leave to substitute witness. The application was dismissed on 2nd March, 2018 as shown in annextures **NCBA–A2** and **NCBA-3.** Hearing of the case could not proceed despite several adjournments for the applicant's failure to secure her witness. The Court struck out the statement of the only witness for both main suit and counter - claim under Rule 56 (2) of the Rules and dismissed the suit on 18th October, 2018 under Order XVII Rule 3 of the CPC as reflected in annextures **NCBA-4,** which are the copies of ruling and decree thereof**.**

Dissatisfied with the ruling dated 18 October, 2018, the applicant preferred a revision to the Court of Appeal registered as Civil Application No. 561/16 of 2018 which was struck out by the Court of Appeal on a ground raised *suo motu* that the issue referred to the Court of Appeal is fit for an appeal and not revision. Copies of the ruling and order were attached as reflected

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in **NCBA-A5**. Since the application for revision was struck out and time to file for leave has already elapsed, the applicant had no option but to move this Court seeking for an extension of time which was granted on 27th May, 2020. See annexture **NCBA-A6**. From there a notice of appeal was lodged on 12th June, 2020 stating three (3) grounds of the intended appeal and request for copies of necessary documents made as shown in annexture **NCBA-A7.** Miscellaneous Commercial Application No. 102 of 2020 seeking for leave to appeal was therefrom filed.

Countering the application, the respondent in his 23 paragraphs counter-affidavit, aside from contesting the application the respondent also challenged this Court ruling overruling the respondent's objection that the amended application was time barred as it was filed after expiry of forty-eight (48) days. The counter-affidavit also challenged the averment on dismissal of the Miscellaneous Commercial Application No. 253 since that was not challenged during the trial. The respondent further challenged the validity of the leave sought as the applicant has already sold the motor vehicles pledged as security and therefore she had no remedies to pursue before the Court of Appeal.

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Parties were ordered to file written submissions in disposing of the application and the following filing timeline put in place: that the applicant file her submissions by or on 25th March, 2021; reply submissions by the respondent by or on 01st April, 2021 and rejoinder if any by or on 9th April, 2021. The ruling was reserved for 27th April, 2021.

From the records and submissions in support of the application and opposition, it is evident that the filing dates were not adhered to. I will thus look into this component first to see why it was not followed before examining the submissions filed.

The respondent was served on 29th March, 2021 after 26th March, 2021 was unexpectedly declared a public holiday as it was the day His Excellency the late Dr. John Joseph Pombe Magufuli, who passed on 17th March, 2021 was to be buried. The following day happened to be Saturday and Sunday. Thus serving the respondent on Monday, 29th March, 2021 was under the circumstances appropriate under section 60 (1) (e) and (2) of the Interpretation of Laws Act, Cap. 1 R.E. 2019 (the Act), referred by the applicant's counsel. Counting seven (7) days from 29th March, 2021, the respondent's submission was supposed to be filed on 5th April, 2021, but it

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being Easter Monday which was a public holiday, then the filing ought to have been on 6th April, 2021, as provided by section 60 (1) (e) of the Act and not 8th April, 2021 as was done. Rejoinder was filed seven days later counting from 8th April, 2021 the date of service to wit the 16th April, 2021. The reply submission filed by the respondent counsel and applicant's rejoinder both were filed out of time and without leave of the Court. The applicant's insistence that the respondent's submissions was time barred as it was filed contrary to the permitted time frame, while holds water but her's equally was filed without leave of the Court.

However, considering that the dates between 26th March, 2021 and 7th April, 2021 were public days; the 26th March, 2021 was unexpectedly pronounced a public holiday and those that followed were intermittently other public holidays, namely Good Friday on 2nd April, 2021; Easter Monday on 5th April, 2021; and the Karume day on 7th April, 2021, and with the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (Act No. 8 of 2018) which now requires the courts to deal with cases justly, and to have regard to substantive justice, the High Court (Commercial Division) Procedure Rules, 2019 (GN. No. 107 of 2019), which amended the High Court

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(Commercial Division) Procedure Rules, 2012 (the Rules), amended Rule 4 to give effect to the overriding objective as stipulated for under sections 3A and 3B of the Civil Procedure Code, Cap. 33 R. E. 2019, I will ignore the fact that the respondent's submissions and rejoinder were filed out of time and without the Court leave. The two submissions will thus be duly considered.

Turning to the rest of the submissions, although, I will not reproduce them verbatim but will certainly examine them thoroughly. The first issue I will address is the counter affidavit deponed by the respondent Hirji Abdallah Kapikulila. According to Mr. Makarious Tairo's submission on behalf of the applicant the counter-affidavit filed was marred with irregularities namely: *one*, in paragraphs 3, 4, 5, 6 and 7 the respondent challenged the ruling delivered on 18th March, 2021. This sort of preliminary point of objection was viewed by the applicant as serious abuse of the Court process as no law was permitting that and also the respondent had a counsel who was aware of what to do in case of dissatisfaction. The respondent has in his submission acknowledged that the concerns averred under paragraphs 3, 4, 5, 6, and 7 were termed as interlocutory and not appealable under

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section 74 (2) of the CPC. This Court cannot therefore deal with paragraphs 3, 4, 5, 6 and 7 of the counter-affidavit.

Two, that the counter-affidavit responded to non-existent affidavit giving out few examples. I completely agree to Mr. Tairo, that this Court is *functus officio* after it has made its decision on 18th March, 2021, and the case of **Zee Hotel Management Group and Others v Minister of Finance and Others [1997] T.L.R. 265,** becomes relevant as so long no review has been preferred, the decision stands unchallenged and hence legally valid. *Three,* the respondent also challenged the applicant's submission on the omission of the word "*Amended Counter-Affidavit*", arguing that there was no such formation in law and that was why the respondent maintained the words counter-affidavit as the proper practice. According to Mr. Mshukuma there was no such thing as "*Amended Counter-Affidavit*" instead "Supplementary Affidavit" would have been an appropriate and applicable. Mr. Mshukuma referred this Court to the case of **J.S. Mutungi v The University of Dar Es Salaam, Miscellaneous Civil Case No. 17 of 1994 (unreported) pgs.5-6,** in which the Court had this to say:

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".....generally affidavits being evidence, legally it sounds odd to say that the witness has amended his evidence. ....."

The Judge proceeded to struck off the words "*Amended*". Whilst I am in agreement with Mr. Mshukuma's submission and the decision which essentially has only persuasive effect upon this Court, that it sounded odd to say the witness has amended his evidence, and that the counter-affidavit filed is legally valid and should be considered by this Court, I, nonetheless have been having issues with the counter-affidavit filed as it did not correlate to the paragraphs in the affidavit. From the looks of it, it seems the counter-affidavit in some instances referred to the paragraphs in the first affidavit before the amendment of the chamber summons and in some cases to the affidavit filed after amendment of the chamber summons "Amended Affidavit". This has made it difficult for the Court to know exactly which counter-affidavit to rely on. The applicant's affidavit is as submitted by Mr. Tairo basically remained unchallenged. This however, does not mean the application for leave to appeal to the Court of Appeal can automatically be granted.

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The second issue is now on the application whether is meritorious or not. The appeal to the Court of Appeal as matter of legal requirement has to be preceded by a leave sought and granted by the High Court as stipulated under section 5 (1) (c) of AJA and Rule 45 of the Rules, 2009. In examining the application before, such as this one the Court ceased with jurisdiction has to be guided by the principles demonstrating ingredients as elaborated in a number of Court of Appeal decisions. Both the applicant and the respondent subscribed to the decision in the case of **British Broadcasting Corporation v Eric Ng'imaryo, Civil Application No. 183 of 2004 (unreported) CAT, p. 6-7,** in which the decision in **Buckle v Holmes (1926) All ER Rep. 90 at p.91** was cited with approval. In the **BBC's** case (supra) the Court gave out the following guidelines that: **one**, appeal to the Court of Appeal was not automatic, but is within the Court's discretion which ought to be exercised judiciously based on the material facts before the Court. **Two,** some of those ingredients as a matter of general principle is that there should be an issue or issues of general importance or novel point of law or prima facie and/or arguable appeal. **Three,** where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave should be granted. The case of **Harban**

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Haji Mosi & Another v Omar Hilal Seif and Another, Civil Reference No. 19 of 1997, well illustrated that.

The applicant also referred to the case of **National Bank of Commerce v Maisha Musa Uledi (Life Business Centre) Civil Application No. 410/07 of 2019, CAT – Mtwara (unreported),** which restated on importance of legal point to be raised as ground for determination.

Despite being in agreement on the principles, but the two had different opinion. Whereas the applicant considered has the justification and granting of the leave deserving, the respondent was of a different view. According to the respondent all three grounds of the intended appeal were not justified. Those grounds were: on change of judges without giving any reasons; it was Mr. Mshukuma's submission that the matter when transferred to another Judge after transfer to Dodoma of the previous Judge did not occasion any injustice as the matter was not heard or partly heard or at the trial stage.

And on the legitimacy on subjecting the applicant's constitutional rights to prosecute the main case fully, it was his submission that since the suit was dismissed and during the pendency of the revision preferred, the applicant

sold the motor vehicles pledged as security and thus had nothing she is owed by the respondent nor to appeal against the respondent to the Court of Appeal. His submission came with the question as to what would be reliefs sought by the applicant and which the Court of Appeal could grant under the circumstances. More so the applicant has abandoned her claim under Order XXIII Rules 1 and 3 of the CPC and thus cannot have an opportunity to be heard as she has already sold the motor vehicles which were the subject matter in the dismissed main suit on 11th October, 2018 and also the subject matter of the intended appeal to the Court of Appeal.

The main suit was dismissed under Order XVII Rule 3 of the CPC, and witness statement struck out in terms of Rule 56 (2) of the High Court (Commercial Division) Procedure Rules, 2012 (the Commercial Court Rules) after several adjournments namely on 19th June, 2017, 26th February, 2018, 22nd June, 2018, 21st August, 2018 and 11th October, 2018. And therefore not true that the applicant was not heard. The claim that the applicant was denied the right to defend the counter-claim was her own creation after she failed to bring her witness in Court to testify.

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It was also revealed in the submission that the suit's life span has been extended twice as it has gone beyond contrary to Rule 32 (2) of the Commercial Court Rules. Stressing on the fact that the applicant was accorded right to be heard Mr. Mshukuma argued that the right to be heard was not absolute or unfettered, a person who failed to cope with the requirements of the law as the applicant did, on how to exercise the right to be heard, cannot with legitimacy complain that she was denied that right. The case of **Mabibo Beer Wines and Spirits Ltd v Luca Mallya aka Baraka Store and Commissioner for Customs Tanzania Revenue Authority, Civil Application No. 160 of 2006, CAT at DSM (unreported) at p. 11**, was cited to buttress the point on right to be heard and the obligations it came with.

On the other hand, the applicant strongly believed she had justification to appeal to the Court of Appeal. The applicant's submission, when examined did not reveal any facts or evidence necessitating Court of Appeal interference either on irregularity or that the applicant prejudiced. The scenario like this has been dealt with by the Court of Appeal in numerous occasion such as in the cases of **Leopold Mutembei v Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban**

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Development and Another, Civil Appeal No. 57 of 2017, in which the Court disagreed that the transfer of the case from the predecessor Judge to the learned trial Judge irregular or unexplained. The case was in that instance duly reassigned to the trial Judge by the Judge Incharge who conducted final pre-trial conference and presided over the entire trial. In the case **Charles Bode v R, Criminal Appeal No. 46 of 2016, CAT at DSM (unreported) p. 12**, the Court was concerned with whether there was any injustice occasioned and concluded based on the facts that there was not. In the case of **Mirage Lite Ltd v Best Tigra Industries Ltd, Civil Appeal No. 78 of 2016 CAT at DSM (unreported) p. 20 -23,** in this case there was succession of several judges in a row, which the Court of Appeal find was irregular and unexplained.

In the present case although there was no reason assigned for transfer of the record from one Judge to another, Whilst that assertion must be correct but since parties were duly represented, they must have known or were under the obligation to find out what happened. However, this might have not really bothered the parties as by the time the record was transferred from the first trial Judge to the succeeding Judge, the last Court order granted was for leave to amend the written statement of

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Mr. Mshukuma contested the grant but without really addressing the issues to show that they did not need the Court of Appeal attention in one way or the other.

In light of the second and third issues, I find the application is warranted and leave is accordingly granted under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019. It is so ordered.

P. S. FIKIRINI

JUDGE

27th APRIL, 2021