

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 148 OF 2020

**(Coming from Consolidated Misc. Commercial Cause No. 67 of 2017 and
75 of 2017)**

BETWEEN

STANDARD CHARTERED BANK

(HONG KONG) LIMITED.....1ST APPLICANT

STANDARD CHARTERED BANK

MALAYSIA BERHAD.....2ND APPLICANT

AND

INDEPENDENT POWER TANZANIA LIMITED1ST RESPONDENT

PAN AFRICAN POWER SOLUTIONS

(T) LIMITED2ND RESPONDENT

VIP ENGINEERING AND MARKETING

LIMITED3RD RESPONDENT

RULING

B.K. PHILLIP, J

The applicant herein lodged this application under the provisions of section 5(i)(c) of the appellate jurisdictions Act ,Cap 141 R.E. 2019, (herein after to be referred to as "Cap 141") and Rule 45(a) of the Court of Appeal Rules,

2019, (hereinafter to be referred to as " the Court of Appeal Rules"). The applicants pray for the following orders:-

- i. This honourable court be pleased to grant the applicants leave to appeal to the Court of Appeal of Tanzania against the ruling of the High Court of Tanzania (commercial Division) at Dar es Salaam (Hon. Phillip, J) delivered on 26th August 2020, in Consolidated Misc. Commercial Cause No. 67 of 2017 and 75 of 2017.
- ii. Costs of this application abide the outcome of the intended appeal.
- iii. Any other relief(s) this honourable court may deem fit and just to grant.

This application is supported by an affidavit sworn by the learned advocate Gaspar Nyika. On the other hand, the learned Advocate Michael Joachim Tumaini Ngalo filed a counter affidavit in opposition to the application on behalf of the 3rd respondent together with points of preliminary objection couched as follows;

- i. That under section 45(1) and 47(1) of the United Republic of Tanzania Stamp Duty Act, Cap 189, standard Chartered Bank (Hong Kong) Limited and Standard Chartered Bank (Malaysia) Berhad shall not be heard by any court on their purported rights in IPTL unless and until they pay to the Tanzania Revenue Authority more than USD 678,267,929.78 of the 4% Stamp Duty evaded on the USD 105 million IPTL loan facility agreement dated 28th June 1997.
- ii. That since under section 73(2)(a) of the Tanzania Stamp Duty Act [Cap 189 R.E. 2002) evasion of Stamp Duty is a criminal offence

Standard Chartered Bank Tanzania Ltd is hereby put on notice to advise the Applicants to withdraw the incompetent application for leave to appeal against the ruling of Hon. Phillip, J dated 26th August 2020 that set aside the illegal ex-parte orders of Hon. Sehel, J (as she then was) dated 9th February 2020 registering the illegal Foreign judgment otherwise VIP shall apply for permission of the Resident Magistrate at Kisutu to be allowed under section 99(1) of the Criminal Procedure Act Cap 20 read together with section 41(1) of the Magistrates' Court Act Cap 11 to conduct private criminal prosecution against the standard Chartered Bank Group, for knowingly continuing to violate sections 45(1) and 47(1) of the Tanzania Stamp Duty Act [Cap 189 R.E. 2002].

- iii. That the Application for leave to appeal is incompetent because a copy of the ruling of Hon. Phillip, J dated 26th August 2020 sought to be appealed against was not attached to the application for leave.
- iv. That Hon. Sehel, J (as she then was) had no jurisdiction to grant the ex-parte order for registration of the ex-parte Judgment High Court of Justice Queen's Bench Division Commercial Court of England Judgment dated 16th November 2016 since claim No. CL 2013-000411 was commenced on 23rd December, 2013 after Standard Chartered Bank (Hong Kong) Ltd had already entered appearance in Civil Case No.229 of 2013 at the High Court of Tanzania Dar es Salaam District Registry and filed written statements of defence on 13th December, 2013 which are still pending determination by the High Court of Tanzania and the Court of Appeal of Tanzania as

admitted in paragraph 7 of Advocate Gasper Nyika's Affidavit verified on 24th September, 2020.

- v. That pursuant to rule 107(1) and 107(3) of the Tanzania Court of Appeal (Amendments) Rules 2017 and the Authority of the Court of appeal of Tanzania (Hon. Luanda, J.A. Hon. Mmilla, JA and Hon. Ndika, JA) in Criminal Application No, 59/19 of 2017 between James Burchard Rugemalira Vs. The Republic And Harbinder Singh Seth dated 10th April 2018 it is now mandatory that a respondent intending to rely upon a preliminary objection to the hearing of an appeal or application shall give the appellant or the applicant three clear days notice before hearing setting out the grounds of objection such as the specific law or decision relied upon and shall provide such necessary particulars to enable the court and the other party to grasp the nature and scope of the objection on points of law or undisputed facts in order to do away with surprises to the court as well as the adversary party and to promote a fair and conclusive hearing.
- vi. That in the case of Joseph L. K. Lugaimukamu v. Father Conute J. Muzuwanda [1986] TLR 69 the respondent sued the appellant for recovery of loan plus interest relying on an unstamped document. The district court gave judgment in the respondent's favour and the Appellant Appealed. Bahati J. in the High Court of Tanzania permitted the appeal holding that; (1) section 46 of the Stamp Duty Act, 1972 (which was in the same terms as the current section 47 of the Stamp duty Act) stipulated that under no circumstances should a chargeable

but unstamped document be admissible in evidence, but that (2) with reference to the case of Sunderji Nanji Limited Vs Mohamedali Kassam Bhaloo [1958 762] the respondent could now pay the stamp duty plus the penalty so that the agreement could form part of the evidence. The court of appeal of Tanzania in its Decision in the case of Transport Equipment Ltd Vs. D.P. Valambhia [1993] T.L.R. 91 it was held that an unstamped document cannot be admitted in court or acted upon unless it is duly stamped as required by section 46(1) of the Stamp duty Act 1972 which is the same as section 47(1) of the current stamp duty act, Cap 189.

- vii. That in 2005, when standard chartered Bank (Hong Kong) Ltd (SCBHK) purchased the illegal IPTL Debt SCBHK specifically committed to assume full responsibility for the consequences of purporting to purchase the illegal IPTL debt.

Upon receipt of the counter affidavit, Mr. Nyika filed an affidavit in reply to the counter affidavit in opposition to this application.

The learned advocate Gaspar Nyika represents the applicants whereas the learned advocates Michael J.T. Ngalo, Cuthbert Tenga and John chuma represent the third respondent. The 1st and 2nd respondents are represented by the learned advocate Alex Balomi. This court ordered that the points of preliminary objection aforementioned be disposed of by way of written submission and pronounced the schedule for filing the written submission as follows;

- (i) The 3rd respondent's submission in support of the points of preliminary objection was ordered to be filed on or before 4th March 2021.
- (ii) The applicants' submission reply to the respondent's submission was ordered to be filed on or before 22nd March 2021.
- (iii) Rejoinder if any by the 3rd respondent was ordered to be filed on or before 30 March 2021.

Mr. Nyika started his submission by raising a concern to wit; That Mr. Ngalo did not file his submission within the time ordered by this court. Expounding his contention, Mr. Nyika submitted that this court ordered the 3rd respondent's advocate to file his submission in support of the points of preliminary objection on or before 4th March 2021, but he filed the same on 5th March 2021 and served him on 10th March 2021. Therefore, the respondent's submission was filed out of time without the leave of the court, contended Mr. Nyika. He further submitted that written submissions are filed in lieu of oral submissions, so failure to file a written submission in time it is tantamount to failure to enter appearance during the hearing. To cement his arguments he referred this court to the case of **Godfrey Kimbe Vs. Peter Ngonyani, Civil Appeal No. 41 of 2014 (CAT)**(unreported), in which Mwambegele JA said the following;

'Up to the moment we were composing this ruling, well after the expiry of the time fixed within which the applicant could have filed his written submissions against the preliminary objection, (the applicant) has not filed them.

In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because failure to lodge written submissions after being so ordered by the court, is tantamount to failure to prosecute or defend one's case... "

Relying on the provisions of Rule 43(1) of the High Court (Commercial Division) Procedure Rules, 2012 and order IX Rule 3 and 6 of the Civil Procedure Code, Cap 33 R.E. 2019, as amended by the Civil Procedure code (amendment of the first schedule) rule, 2019, Mr Nyika invited this court to overrule the point of preliminary objection.

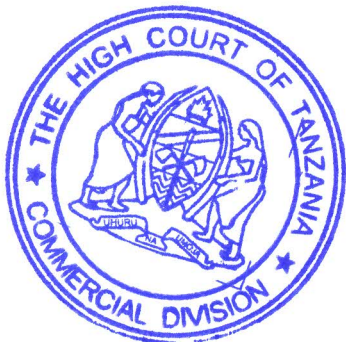
I have been constrained to start with the above concern raised by Mr. Nyika as I am in agreement with him that failure to file the submission in time as ordered by the Court is tantamount to failure to enter appearance to argue the points of preliminary objection. Not only that, court orders are supposed to be adhered to. Short of that the administration of justice will be chaotic.

Upon checking the court's records, I noted that 3rd respondent's written submission indicates that it was presented for filing on 5th March 2021. However, upon careful perusal of the court's records, I noted that the filing fees for the 3rd respondent's written submission was paid on 10th March 2021, the date on which Mr. Nyika claims that he was served with the same. So, from the court's records, it is evident that in actual fact, the advocate for the 3rd respondent filed the submission in support of the points of preliminary objection on 10th March 2021 instead of 4th March

2021 as ordered by this court. It has to be noted that a document is deemed to be filed in court upon payment of the court fees. Any document which is subject to the payment of court fees is not supposed to be filed in the court's file before payment of the prerequisite filing fees.

From the forgoing I hereby expunge the submission filed by Mr. Ngalo from the Court's record as it was filed out of time without leave of the court. Since the advocate for the 3rd respondent failed to file the submission in support of the points of preliminary objection, the same are hereby dismissed. Costs will be in course.

Dated at Dar es Salaam this 7th day May of 2021.




B.K.PHILLIP

JUDGE