IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 193 OF 2020

(Arising from miscellaneous Commercial Case No. 31 of 2019)

HASHIM HASSAN MUSSA.....APPLICANT

VERSUS

DR . CRISPIN SEMAKULA .....1ST RESPONDENT

ACCESS MEDICAL & DIALYSIS
CENTRE LIMITED .....2ND RESPONDENT

REGISTRAR OF COMPANIES .....3RD RESPONDENT

B.K.PHILLIP, J

RULING

This ruling is in respect of an application for leave to appeal to the Court of Appeal against the ruling and order of this court dated 15th December, 2020, in Miscellaneous Commercial Cause No. 31 of 2019. The application is made under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2019, supported by an affidavit sworn by the applicant, Mr. Hashim Hassan Musa.

A brief background to this application is that, in the year 2019, the applicant herein lodged a petition for winding up of the 2nd respondent. In its ruling this court declined to grant the prayer for winding up the 2nd respondent, instead it ordered the applicant herein (petitioner in the aforesaid Misc Commercial Cause No.31/2019) to be paid a sum of USD 170,000/= by the 1st respondent as a purchase price of 5000 shares which he owns in the 2nd respondent, ("the Company")

The applicant being aggrieved by the order of this court aforesaid, he intends to appeal to the Court of Appeal. Thus, he initiated the process for his appeal by lodging this application.

This application is contested by Mr. Walarick Nittu and he swore a counter affidavit in opposition to the application. At the hearing of this application the learned Advocates Gabriel Mnyele and Joseph Kipeche appeared for the applicant and, the 1st and 2nd respondents respectively. The application proceeded ex-parte against the 3rd respondent. In his submission in support of this application Mr. Mnyele contended that the points of complaints stated in the affidavit in support of this application are worthy to be considered by the Court of Appeal as they contain important legal issues concerning the interpretation and application of Section 282 (2) of the Companies Act, 2002. He went on to submit that, the trial Judge decided to resort to an order for an alternative remedy which is not provided in Section 282 (2) of the Companies Act and was not prayed for by the parties, therefore she applied and interpreted the aforesaid provision of the law wrongly. He insisted that under the circumstances, it is vital for the Court of Appeal to determine among other things, whether

or not it was proper for the Honorable Judge to decline to grant the order for winding up of the company and ordered an alternative remedy for the applicant to be paid USD 170,000/= being the value of his shares in the Company. Mr Mnyele was of the view that in any case where there is a dead lock as observed by the Honorable Judge in the petition in question, the court is supposed to order winding up of the Company.

Citing the case of **Simon Kabaka Daniel Vs Mwita Marwa Nyang'anyi and two Others (1989) TLR 64**, Mr Mnyele submitted that what is required to be demonstrated in an application for leave to appeal to the Court of Appeal is the existence of points of law worthy the attention of the Court of Appeal. He also referred this court to the following cases; **Wambele Mtumwa Chamte Vs. Asha Jume, Civil Application No. 45 OF 1999**, (unreported) **and Gaudencia Mzungu Vs. The IDM Mzumbe, Civil Application No. 94 of 1999 (CA)** (unreported)

Moreover, Mr. Mnyele submitted that the orders for valuation of the Company's assets and the subsequent order that the applicant be paid a sum of USD 170, 000/= was beyond the powers of the Judge provided in Section 282 (2) of the Companies Act.

In rebuttal the learned Advocate Kipeche was of the view that the decision of this Court aforesaid was properly made and there are no grounds worthy to be considered by the Court of Appeal. Relying on the case of **Barban Haji Mosi and Shauri Haji Mosirs Amar Hilal and Seif Omar, Civil Reference No. 19 of 1997** (unreported) , he submitted that where the grounds of appeal are frivolous, Vexatious, useless or

hypothetical, no leave to appeal can be granted. Mr. Kipeche contended that the grounds stated in the affidavit in support of this application are only hear say. The court could rely upon those grounds if the affidavit in support of his application would have been sworn by the learned Advocate Mnyele. He contended that it is an established principle of the law that an affidavit which mentions another person is a hearsay unless that other person swears an affidavit as well. To bolster his arguments he cited the case of **Sabena Technics Dar Limited Vs Michael J. Luwunzu, Civil Application No. 451/18 of 2020** (Unreported).

In addition to the above, Mr. Kipeche submitted that even if this courts finds the points stated in the affidavit are not hearsay, the same ought to be dismissed as they are hypothetical, useless, frivolous and Vexatious and the intended appeal stands no chance of success. He maintained that under the provisions of Section 282 (2) of the Companies Act, the trial Judge was justified to grant the alternative remedy as the applicant (petitioner) acted unreasonably to seek for an order for winding up of the company. Relying on the case of **Yusufuali and Another Versus Bhardwaji and other (2008) 2 EA 380**, Mr Kipeche submitted that if there is an alternative remedy to the winding up order, the court is ought to strike out the petition as that amounts to abuse of the court process. He was of the view that in the instant matter the court resorted to the alternative remedy correctly, as the respondent made an offer to buy the petitioner's shares which was spurned by the applicant. In rejoinder Mr. Mnyele reiterated his submission in chief.

I have carefully analyzed the submission made by the learned Advocates, read the pleadings and the impugned decision between the lines as well as the case laws referred to this court by the learned Advocates. With due respect to Mr. Kipeche, I wish to start by pointing out that his contention that the grounds of complaints stated in paragraph four of the affidavit in support of this application are hear say is misconceived. The deponent has properly verified the contents of paragraph four in the verification clause, that he was advised by his advocate on the requirement for an order for leave to appeal to the Court of Appeal. Then, he proceeded to state his grounds of complaints that he beliefs are worthy the attention of the Court of Appeal .From the foregoing, I do not see any scintilla of a hearsay in paragraph four of the affidavit in support this application.

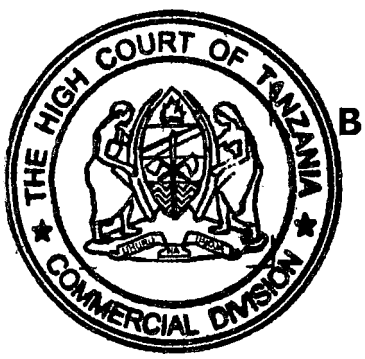
In this application it is a common ground that this court has discretionary powers to grant or not to grant the order for the leave to appeal to the Court of Appeal. The factors that are normally applied in determination of an application for leave to appeal to the Court of Appeal are existence of points of law which need the attention of the Court of Appeal, existence of a *prima facie* grounds meriting an appeal to the Court of Appeal or disturbing features which need the attention of the Court of Appeal among others. In the case of **Abubakari Ali Hamid Vs Edward Nyelusye, Application No 51 of 2007** (unreported) the court said the following;

> *"Leave to appeal is granted where the proposed appeal stands reasonable chances of success or where but not necessary the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal"*

In the instant application the arguments raised by the learned advocates raises important points of laws and/ or disturbing features regarding the decision of this court in the aforesaid Miscellaneous Commercial Cause No. 31/2019 which need the attention of the Court of Appeal. One of the point of law is the interpretation and application of the provisions of Section 282 (2) of the Companies Act as far as granting of alternative remedy is concerned. One of the arguments raised by Mr. Mnyele against the alternative remedy was that the Court imposed into the parties the orders for the alternative remedy which they had not prayed for. I am of a settled opinion that it is important for the Court of Appeal to make a determination on how should the court go about resorting to an alternative remedy if available. Also, under the circumstances of this case, the Court of Appeal will have opportunity to determine whether or not the "alternative" remedy granted by this court to the applicant was appropriate.

In the upshot, this application is granted. I give no order as to costs.

Dated at Dar es Salaam this 9th day of July, 2021.



B.K. PHILLIP

JUDGE