IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

MISC.CIVIL APPL. NO.124 OF 2020

(Arising from Commercial Case No.20 of 2020)

SUMRY HIGH CLASS LTD.....1st APPLICANT

SUMRY BUS SERVICES LTD.....2ND APPLICANT

VERSUS

MUSSA SHAIBU MSANGI.....RESPONDENT

Date of last Order: 15/02/2021
Date of Ruling : 30/03/2021

RULING

NANGELA, J.:,

The Applicants in this application have approached this Court by way of filing a Chamber Summons supported by a joint affidavit deponed by one Amour Mohamed Sumry. They are seeking for the following orders of the Court; that:

1. This Court be pleased to extend time within which to file a notice of appeal against the decision of this honourable court in Commercial Case No. 20 of 2020 out of time.

2. Any other reliefs as this Court shall deem fair and just to grant.

On the 1st day of September 2020, the Respondent filed his counter affidavit and a number of preliminary legal issues in objection to the application. As the practice of this Court warrants, when a party raises preliminary objections such objections must be dealt with before dealing with the main application.

Briefly, the preliminary points of law raised by the Respondent are as follows:

1. That, paragraphs 12,18,19 and 25 of the Applicants' affidavit filed in support of the Application are incurably defective for raising extraneous matters by way of legal arguments, conclusions and prayers, contrary to the mandatory provisions of Order XIX rule 3 (1) of the Civil Procedure Code, Cap.33 R.E. 2002.
2. The application is bad in law, untenable and is an abuse of the court process as reasons and /or grounds articulated in the Ruling of the Court of Appeal in striking out the Civil Appeal No.14 of 2015, with costs, as well as the ruling of this Court in *Misc. Comm. Application No 52 of 2020*, which strike out the application with cost after hearing preliminary objection on points of law,

does not re-agitate another fresh application to this Court as well as another appeal to the Court of Appeal from the same applicants regarding the same proceedings after extending time under section 11 (1) of Cap.141 R.E 2002, as the circumstances regarding the authenticity of the documents found to be wanting and contradictory in the record has not changed to date.

3. That, the application is misconceived because it is against the Ruling delivered by the full bench of the Court of Appeal in Civil Appeal No.14 of 2015 on 16th day of April 2020, as well as the Ruling of this Court [Hon. Fikirini, J.] of 1st July 2020, as grounds or reasons articulated and upheld in the Rulings following the objection raised cannot be cured in the circumstances and would make the intended appeal indefinite.

On the basis of the above grounds, the Respondent prayed that, this Court should proceed and dismiss the application with costs.

On 15th February 2021, a day when the parties appeared before me, it was agreed that, the preliminary points of law which the Respondent raised in opposition to this application will be disposed of by way of written

submissions. A schedule of filing was issued and later a date for this ruling. I will now proceed and sum up the rival submissions filed in this Court before analysing the arguments of the parties therein and render my verdict.

In his submission in support of the preliminary objections, the Respondent submitted, starting by consolidating the second and third grounds as one. Submitting on the new consolidated ground, the Respondent contended that, section 11 (1) of the Appellate Jurisdiction Act, **Cap 141, RE 2002** is a dead law as the correct citation should have been **Cap.141, RE 2019.** Consequently, he argued that this Court should be pleased to strike out the application for having been based on a non-existing law.

Secondly, it was the Respondent's contention that, one of the reasons which prompted the Court of Appeal to strike out the Civil Appeal No.14 of 2015, the two set of records placed before the Court of Appeal were contradictory and there was no certificate of correctness filed to safeguard the authenticity of the two records. The Respondent argued that, without remedying the situation, it will be a waste of time in the intended appeal.

It was argued further that, this Court should be persuaded by its own decision in the **Misc. Comm.**

Application No.52 of 2020 (Fikirini J.) and hold as she did.

The Respondent's counsel urged this Court to follow the what the Court of Appeal stated in the case of **Ally Linus & Others v Tanzania Harbours Authority and Another [1998] TLR 5.** In that case, the Court of Appeal reiterated its views to the effect that:

> *"It is not a matter of courtesy but a matter of duty to act judicially that require a judge not to lightly dissent from the considered opinion of his brethren ...."*

Mr Ogunde, who reprented the Respondent, placed a further reliance on the cases of **ULC (Tanzania) Ltd vs National Insurance Corporation and Another [2002] TLR 122; Kiganga and Associates Gold Mines Co. Ltd vs University Gold WL [2002]TLR** and **J.S. Mutungi vs Univetisty of Dare-es-Salaam [2001]TLR 261**.

Mr Ogunde contended further that, since there has been no changes of position from the time when the Court of Appeal made its decision in the Civil Appeal No.14 of 2015 to date, then this Court should take note of that this application is frivolous and vexatious. He further emphasized that, even the undertakings made by the Applicants on paragraph 16 of the joint affidavit are

mere conjectures or wishful thinking which cannot be relied upon by this Court.

In a further submission, the Respondent's counsel submitted that, this application has also been overtaken by events since the Respondent has been paid the decretal amount which was ordered by the Court in **Commercial Case No. 20 of 2020**, and , that, no grounds have been advanced to show that the decision will be reversed in the intended appeal. Citing the case of **In Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12** regarding a completed execution of decree. He argued, therefore, that, continuing with this application is to engage in a mere academic exercise as there must be an end to litigation.

As regards the 2nd ground of objection (the first in the listing), Mr Ogunde submitted that, the affidavit supporting the application was defective, incompetent or invalid. Relying on Order XIX rule 3 (1) of the Civil Procedure Code, Cap.33 R.E, Mr Ogunde submitted that the affidavit filed ought to have confined itself to matters of facts which the deponents are able of their own knowledge to prove.

Citing paragraph 12 of the supporting affidavit, Mr Ogunde submitted that the facts disclosed in it are arguments which calls upon the court to adjudge

regarding their intentional or non-intentional nature. In the like manner, he cited **paragraphs 18, 19, 24 and 25** which he argued are either argumentative or contain conclusions, hence, in contravening the provisions of Order IX rule 3 (1) of the CPC, Cap.33 R.E, 2019.

He submitted that these paragraphs are core to the affidavit filed in support of the application and, that, once expunged from the affidavit, the remaining paragraphs **1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 20, 21, 22, and 23** merely gives historical matters and lack facts to support this application for extension of time.

Mr Ogunde cited in support the famous case of **Uganda vs Commissioner of Prisons, Exparte Matovu [1969]1EA 514, 520**, and that of case of **Lalago Cotton Ginnery and Oil Mill Co. Ltd vs The Loans and Advance Realization Trust (LART), Civil Application No.80 of 2002 (CAT) (unreported).**

In those cases cited herein above, it was held that, paragraphs of an affidavit which are not factual in nature but contain extraneous matters by way of arguments, prayers, hearsays and conclusions render the affidavit to be substantially defective, hence unreliable.

In their reply submission, the Applicants contended that, having read between the lines of the Respondent's submission, they arrived at a conclusion that, the same is devoid of merit and ought to be disregarded by this Court. The Applicants' conclusions were based on the ground that paragraphs **12, 18, 19, 24 and 25** of the supporting affidavit, which the Respondent alleges to be contravening Order XIX rule 3 (1) of the CPC, Cap.33 R.E 2019, are not what they are alleged to be.

The Applicants contended further that, even if the said paragraphs were to be found to be defective, the remedy would be to order an amendment of the affidavit but not to have it struck out. They argued that, if expunged, still the remaining paragraphs will support the application.

As regards the second (third ground in the list) object, the Applicants were adamant that the same should be overruled on the ground that it lacks merit. They argued that, the Court of Appeal decision which the Respondent has referred to this Court was decided on technical grounds and did not bar the Applicant from bringing a fresh appeal to the Court.

In a further submission, the Applicants argued that, all anomalies which made Madam Fikirini, J., to strike out their **Miscellaneous Commercial Application No.52**

of 2020 have as well be rectified and incorporated in an affidavit supporting an application to the Court. Consequently, the Applicants requested this Court to overrule the objections with costs.

By way of rejoinder submissions, the Respondent was of the view that, the Applicants are trying to pervade the cause of justice by deliberately failing to heed to the orders of this Court dated 25th November 2020. The Respondent lamented that, although the orders of this Court were that the Applicants should serve the Respondent with their written submissions on 18th December 2020, this was not done, hence forcing the Respondent to visit the Court premises on his own and make copies from what was filed in Court. He then reiterated what he earlier stated in his submission in chief, and, prayed that I dismiss the application.

I have given due considerations to the above rival submissions by the learned counsel for the parties herein. The key issue which I will address is whether the preliminary objections have any merit to warrant them to be upheld by this Court. However, there are other auxiliary matters which the Respondent has raised, and which warrants my attention as well.

Essentially, as it was stated in the often cited case of to **Mukisa Biscuits Manufacturing Company Ltd v**

West End Distributors Ltd [1969] EA 696, the Court held that:

> *"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

In this instant application, the contention is that the Applicants have contravened Order XIX rule 3(1) of the CPC, Cap.33 R.E 2019. The argument advanced is that, the affidavit in support of the application is grossly defective as it contains arguments and conclusions. Reliance was placed on the case of **Exparte Matovu (supra)** and that of case of **Lalago Cotton Ginnery (supra).** Indeed, in those decisions, the position was made clear that, no arguments or conclusions or other extraneous matters should form part of an affidavit.

Even so, can it be said that the affidavit supporting the application contain such extraneous matters? If it does, and if the offending paragraphs are expunged from it, will it still be above to support the application? I think these are pertinent questions that flow from the main issue and they demand that I attend them before making conclusions regarding the main issue.

As it may be observed from the Respondents submissions, the contention regarding the defectiveness of the supporting affidavit revolves around paragraphs **12, 18, 19, 24 and 25**. I will briefly reproduce them here below:

> *"**Paragraph 12:** That, the omission of important document cum the certificate of correctness of the supplementary record as filed in the Court of Appeal was not intentionally made.*
>
> ***Paragraph 18:** That, the anomalies, as pointed out by the Court of Appeal when striking out the Civil Appeal No.14 of 2015, are curable and, can be rectified.*
>
> ***Paragraph 19:** That, following the strike out (sic) of the Civil Appeal No.14 of 2015 by the honourable Court of Appeal of Tanzania as stated herein above, and following the strike out (sic) of Commercial Application No.52 of 2020, the Applicants are out of time to file another notice of intention to appeal against the decision of the High Court of Tanzania, Commercial Division, (Nyangarika J.,) delivered on 13th Day of August, 2014.*
>
> ***Paragraph 24:** That, if orders per the Chamber Summons will not be granted,*

the Applicants will stand to suffer an irreparable loss for their constitutional right to file an appeal would have been barred.

Paragraph 25: *That, I believe it is the interest of justice orders sought in the Chamber summons be granted."*

From the outset of the above quoted paragraphs, it is clear that paragraph 19 is not defective. It states a fact which is palpable that the Applicants are now out of time if they are to file notice of intention to appeal to the Court of Appeal. They cannot do so without first applying for an extension of time within which they can do so, if granted extension. Further, paragraph 24 is also not defective in my view. It states a fact that, if not allowed, the Applicants will not have any other recourse to the Court by means of an appeal. That is a fact. As such stating that that paragraph is defective is, in my view, erroneous.

On the other hand, the remaining paragraphs 12, 18, and 25 are, in my view defective. In the first place, paragraphs 12 and 18 are in my view open to arguments. The phrases I have underlined are contentious. I would hold that they make the paragraphs defective and I proceed to expunge them from the affidavit.

Paragraph 25 is also defective in the sense that it is based on a belief, the source of which is not stated. In

Kubach & Saybook Ltd vs Hasham Kassam & Sons Ltd [1972] HCD 228 (HC) this Court held that, "A court will not act upon an affidavit which does not distinguish between matters stated on information and belief and matters deposed to from the deponent's own knowledge or as regards the former which does not set out the deponent's means of knowledge or **his grounds or belief**."

In the case of **Omary Ally v Idd Mohamed & Others**, **Civil Revision No. 90 of 2003** (unreported), this Court, Massati, J., (as he then was) further sets out an extension to that stated in the Kubach case (supra) as well. According to that decision:

> *"[A] defective affidavit should not be acted upon by a court of law, **but in appropriate cases**, where the defects are minor, the court can order an amendment by way of filing a fresh affidavit or striking out the affidavit. But if the defects are of substantial or substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to a nothing." (Emphasis added).*

Further still, where the court does not order an amendment to an affidavit containing paragraphs that are

found to be defective, there is yet another avenue that can be explored. The Court has discretion to expunge such offending paragraphs from an affidavit, especially where doing so does not affecting the rest of the paragraphs.

The following cases of: **Sanyou Service Station Ltd v BP Tanzania Ltd (now Puma Energy (T), Civil Appl. No. 185/17 of 2018 (unreported); Invest International Ltd v Tanzania Harbour Authority &2 Others, Civil Appl. No.8 of 2001 (Unreported);** and **University of Dar-es-salaam v Mwenge Gas and Lub Oil Ltd, Civil Appl. No.76 of 1999 (unreported)**, support that position, which I am inclined to apply in this case. Consequently, I will proceed to have paragraphs 12, 18 and 25 expunged from the affidavit.

Having expunged the said paragraphs from the affidavit, one question still remains unanswered: **can the affidavit still be relied upon to support the application?** The answer, in my view, is in the affirmative. The remaining paragraphs can still support the applicants' application.

In view of that, the first ground of objection succeeds but only partially. Its partial success, however, does not affect the affidavit to the extent of making it substantially defective or useless. Despite the expunging

of the offending paragraphs, the remaining paragraphs leaves it intact and can still be relied upon to support the application.

The second and the 3rd objections need to be addressed jointly. Briefly, they attack the application as being bad in law, untenable, amounting to an abuse of the court process and thus misconceived in law. The reasons advanced by the Respondent are that its underlying grounds were earlier articulated by the Court of Appeal in the Civil Appeal No.14 of 2015, which ended up with an order to have the appeal struck out with costs. The Respondent argues that, nothing has changed so far in this application considering what was stated in the Civil Appeal No.14 of 2015, which was struck out.

It is the Respondent's further contention that, in a similar manner, this Court also struck out an application (*Misc. Comm. Application No 52 of 2020*, with cost after hearing preliminary objection on points of law, does not re-agitate another fresh application to this Court as well as another appeal to the Court of Appeal from the same applicants regarding the same proceedings after extending time under section 11 (1) of Cap.141 R.E 2002, as the circumstances regarding the authenticity of the documents found to be wanting and contradictory in the record has not changed to date.

I have looked at the affidavit and the decisions of the two courts, i.e., the Court of Appeal decision in **Civil Appeal No.14 of 2015** and this Court's ruling in the **Misc. Commercial Application No.52 of 2020**.

In my view, I tend to agree with Mr. Ogunda on this ground. In the first place, although paragraph 16 of the affidavit contains an undertaking that, what the anomalies which the Court Appeal had pointed out leading to the striking out of the *Civil Appeal No.14 of 2015* would be rectified, there is no any demonstrable evidential materials attached to the affidavit which signify to what extent that has been rectified.

The need to demonstrate such rectifications was emphasized in the ruling by Hon. Fikirini, J., in the **Misc. Commercial Application No.52 of 2020**. At page 17 to 18 the Court had this to say:

> *"It is indeed correct, and as submitted by Mr. Ogunde, that change of status and display of authenticated documents needs to be displayed for this Court to assess and make findings...This was important because it was the basis of the Court of Appeal striking out of the appeal. Therefore, without remedied situation, the exercise will be a waste of time or it will delay the process. This is more, considering that the documents or record of appeal originated from this Court, so without*

assurance that the problem will not repeat itself, the Court will not be exercising its discretion justly, fairly, equitably and reasonably, given the set of circumstances. I thus agree with Mr. Ogunde that presentation of those documents was not only necessary but vital, as those are the ones the second appeal will be based on. Ordinarily, this is not a requirement for extension of time but due to what transpired leading to striking out the Civil Appeal No.14 of 2015, this Court finds it was pertinent to clear that now."

Unfortunately, the Applicants have not demonstrated how they took heed and acted on what this Court pointed out. As I indicated earlier, the Applicants' affidavit has a paragraph that contains an undertaking only, but what the Court stated was a clear demonstration of the evidence which ought to have been attached to the affidavit supporting this application for extension of time to file notice.

In the absence of that, the ***status quo ante*** seems to be the same. This fact was made out clear in page 18 of the ruling of this Court in **Misc. Comm. Case No.52 of 2020**. The Court said, even at the time of filing an application like this one, that:

"But considering the reason the appeal was struck out, without first clearing or remedying

the anomaly pointed out, [the] intended second appeal is bound to fail...."

In my view, such an observation by this Court has not been worked out as it should have been and, the same weakness pointed out by this Court, still remains on the side of the Applicants. That being said, I will uphold the 2nd and 3rd objection raised by Mr Ogunde.

In passing, there is yet another factor which has not been addressed by the Applicants but was considered by the Respondent. This is the contention that the current application is a moot as the decree in Commercial case No.20 of 2012 has been fully satisfied as the Applicants have already paid the decretal sum to the Respondent. The Applicants never made a reply on this submission, a fact which, in my view, demonstrates that they have admitted what was raised by the Respondent.

In my view, therefore, since the decree has been satisfied, entertaining further applications on the same now settled issue will mean that litigations never come to an end, a fact which is contrary to the true principle of litigation. It is a cardinal principle of law that litigation must come to an end.

In the upshot, I uphold the 2nd and 3rd preliminary point of law and, proceed to state that, since the Applicants have already satisfied the decree arising from the **Commercial Case No.20 of 2012,** the case is now

laid to rest. Entertaining any further application on the basis of reviving it is a waste of time and energy.

It should be well understood that, one of the cardinal principles of law relating to litigants is that, everything must come to an end, including for that matter, litigations. This was a fact was emphasized by this Court in the case of **Juma B. Kadala vs Laurent Mnkande 1983 TLR 103 (HC)**. In that case, the Court, Sisya, J., (as he then was) observed that: "*It must be the aim of every Court of Law to ensure that there is an end to litigation.*"

In view of the above, I hereby **dismiss** the application with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM**, this 30TH of **MARCH** 2021

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

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HON. DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania,
(Commercial Division)