

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO.74 OF 2021

(ORIGINATING FROM COMMERCIAL REVIEW NO 06 OF 2020)

PUMA ENERGY TANZANIA LIMITED APPLICANT

VERSUS

DIAMOND TRUST BANK TANZANIA LIMITED RESPONDENT

Date of Last Order: 22/11/2021

Date of Ruling: 10/12/2021

RULING

MAGOIGA, J.

The applicant, PUMA ENERGY TANZANIA LIMITED by chamber summons filed under the provisions of section 5(1) (c) of the Appellate Jurisdiction Act, [Cap 141 R.E.2019], rule 45 (a) of the Court of Appeal Rules, 2009 and any other enabling provisions of the law is moving this to be pleased to grant the following orders, namely:-

1. Leave to the applicant to appeal to the Court of Appeal of Tanzania against the decision of this Court in Commercial Reference No.06 of 2020 between parties herein;
2. Costs of this application abide the result of the intended appeal;
3. Any other order as this court shall deem fit and just to grant.



The chamber summons as usual was accompanied by the affidavit in support of the application deposed by Mr. Abdallah Hussein, learned advocate for the applicant stating the reasons why this application should be granted.

Upon being served with the chamber summons and affidavit in support of the application, the respondent, filed a counter affidavit deposed by Mr. Zacharia Nyaruhucha Daudi, learned advocate for the respondent stating the reasons why this application should not be granted.

In this application, Mr. Abdallah Hussein, learned counsel, represented the applicant and on the other hand Mr. Zacharia Nyaruhucha Daudi, learned counsel, appeared for the respondent. Both counsel appeared for their respective parties at the hearing of this application.

The facts of this application are imperative to be stated. The applicant herein above was a plaintiff in Commercial Case No.39 of 2014 against the respondent claiming Tshs.2,448,160.87 being amount due and owing to plaintiff cumulatively in the two bank guarantees provided by the respondent. Before the said suit was heard inter parties, same was dismissed for want of prosecution with costs. The respondent, as usual filed bill of costs which upon being heard ex-parte by the taxing Officer was taxed at Tshs.1,170,000/= and the rest of the claims were taxed off. Aggrieved with

the Taxing Officer's ruling, the respondent successfully made a reference to this court where the reference was allowed. Aggrieved, the applicant has made this application for leave to appeal to the Court of Appeal of Tanzania, hence this ruling.

Mr. Hussein orally arguing in support of this application reiterated the provisions under which this application was pegged and readily prayed that his affidavit in support of the application and skeleton written arguments be adopted in the determination of this application.

In the skeleton written arguments, Mr. Hussein told the court that he has complied with the procedure of appealing to the Court of Appeal, firstly, by filing a notice of appeal, and secondly, by filing this application for leave because the order of this court allowing the reference is appealable subject to grant of the leave. According to Mr. Hussein, in paragraph 6 of the affidavit stated that the intended appeal involves serious points of law for consideration by the Court of Appeal because the court did not take into account the fact that Commercial Case No.39 of 2014 was dismissed for want of prosecution in assessing instructions fees and an order for applicant to pay VAT was at the highest stage.



Expounding further in the skeleton written arguments the learned advocate for applicant correctly pointed out that the issue for determination is whether or not the intended appeal raises serious points of law warranting grant of leave to be determined by the Court of Appeal.

Guided by the holdings in the cases of, one, COCA COLA KWANZA LIMITED vs. CHARLES MPUNGA AND 103 OTHERS, CIVIL APPLICATION No. 393/01 OF 2017 (CAT) DSM (UNREPORTED) whether or not the decision sought to be appealed against raises legal points which are worth consideration of the Court of Appeal; two, PAUL JUMA vs. DIESEL AND AUTO ELECTRICAL SERVICES AND 2 OTHERS, CIVIL APPLICATION NO. 183 OF 2007, (CAT) DSM (UNREPORTED) where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal and the case of TANZANIA RENT A CAR LIMITED vs. PETER KIMUHU, CIVIL REFERENCE NO.09 OF 2020, (CAT) DSM (UNREPORTED) quoting with approval the decision in the of PREMCHAND RAICHAND LTD AND ANOTHER vs. QUARRY SERVICES OF EAST AFRICA LTD AND OTHERS,[1972]1 E. A. 162, in which the Court of Appeal set four grounds for grant of the leave as one, costs shall not be allowed to rise such a level as to confine access to

courts to only wealthy, two, the successful litigant ought to be fairly reimbursed for the costs he reasonably incurred; thirdly, the general level of the remuneration of advocates must be such as to attract worthy recruits to honourable profession and fourthly, there must be, so far as practicable, be consistency in the award made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocate very approximately, for the kind of case contemplated, is a likely to be his liability costs.

On the above guidance, the learned advocate argued that the amount of Tshs.73,443,304/ was against the above principles and urged this court to find so and proceed to grant leave.

On the other hand of the respondent, Mr. Daudi prayed to adopt the contents of the counter affidavit in opposing this application and prayed that this application be dismissed for want of merits. According to Mr. Daudi, paragraph 6 is the only paragraph which states that the applicant is challenging the discretionary powers of this court while in fact the decision of the court was not on discretion but was on prescribed scale established under the Advocates Remuneration Order, 2015, hence barred under section 5(2) (ii) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019]. Mr. Daudi

pointed out and insisted that, once the decision is not discretion same is not appealable with or without leave and urged this court to dismiss this application with costs.

In rejoinder Mr. Hussein strongly argued that Mr. Daudi is misleading this court because the application was made under section 5(1) (c) of the Appellate Jurisdiction Act which allows application for leave for every other decree or order or judgement, decision or finding of the High Court. In support of his stance cited the case of D.P. SHAPRIYA AND COMPANY LTD vs. STEFANUTTI STOCK TANZANIA LTD, CIVIL APPLICATION NO.205/16 OF 2018.

Mr. Hussein went on to rejoin that yet in another case of D.P. SHAPRIYA AND COMPANY LIMITED vs. REGIONAL MANAGER, TANROADS LINDI, CIVIL REFERENCE NO. 1 OF 2018 in which the Court of Appeal held that allocation of costs to one party against other grants a benefit to the former and correspondingly imposes a liability on the latter, such an award must be made specifically and explicitly in the final disposal order, upon the basis of principles for grant of costs.

In the foregoing, Mr. Hussein concluded that since the point of amount in dispute was granted in the taxation proceedings, then, the ruling is



appealable with leave of this court and urged this court to grant leave as prayed.

Having heard the rivaling submissions by learned advocates for parties', I noted that, the main contentions lies on two issues, one, whether the order of this court is appealable in the circumstances of this application, and two, whether the applicant has demonstrated arguable legal issue(s) for grant of the leave to go to the Court of Appeal. I will start with the first issue of whether the ruling of this court is appealable with leave or not? All taken on board and considered this issue will not take much of this court's time. The provisions of section 5 (1) (c) subject of this argument for easy of reference provides as follows:

Section 5(1) In civil proceedings, except where any written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal –

(c) with leave of the High Court or the Court of Appeal, against every other decree, order, judgement, decision or finding of the High Court.



The wording of section 5(1) (c) above, is obvious do not make any distinction of the kind of decree, orders, judgement or finding of the High Court to be appealed with leave or not to the Court of Appeal. Not only that but also, in the case of D.P.SHAPRIYA AND COMPANY LIMITED vs. STEFANUTTI STOCKS TANZANIA LIMITED (supra) the Court of Appeal made it clear that the provisions of section 5(1) (c) by all standards are unambiguous and covers every decree, order, judgement, decision or finding as was in this case.

Therefore, the first issue is without much ado, to be answered that the decision in Reference No. 06 of 2020 is among the decision envisaged under section 5 (1) (c) of Cap 141 R.E.2019 of which leave is mandatory.

This takes me to the second issue that, if the applicant apart from complying with other procedural issue for grant of leave has demonstrated any arguable issue for consideration by the Court of Appeal. I will start with the affidavit of the applicant. As rightly pointed by the learned advocate for the respondent, and rightly so in my own view, any arguable legal issues are as contained in paragraph 6 of the affidavit is in two folds: one, that the High Court did not take into account the fact that Commercial Case No. 39 of 2014 was dismissed for want of prosecution in assessing instructions fees payable to the respondent; and two, that the order for the applicant to pay VAT on the

instruction fees on the ground that Commercial Case No. 39 of 2014 was at the highest stage.

All rivaling arguments take on board and considered, I find this point not worthy for consideration by the Court of Appeal. Yes, the suit was dismissed for want of prosecution at the stage of the hearing which means the issue of charging instruction fees to an advocate was not an issue anymore. At Commercial Court Division it means hearing has started because parties have already filed witness statements which amounts to testimony in chief and actually what remained was adoption of the witness statements, tendering of exhibits, cross examination and re-examination.

Besides, I am entitled to hold that this argument is not a point of law worthy consideration by the Court of Appeal because had it been that the applicant is challenging the rate of fees allowed that it was pegged on wrong principle it could make point. But a mere amount on liquidated claim which is charged on correct prescribed fees under Schedule 9 of the Advocate Remuneration Order, 1991, cannot alone be a point arguable before the Court of Appeal.

On that note, the first limb of arguable point of law has to fail and is dismissed.



On the second limb of arguable point of law was that the amount was to be paid subject to VAT because the suit has reached the highest stage. All rivaling arguments taken on board and considered, therefore, this point has to fail as well. What the court meant was the amount of TShs.73,448,304/= was to be paid to the respondent after VAT deductions and not the applicant paying VAT. So this point raises no arguable point of law for Court of Appeal consideration.

The four and other factors considered and the circumstances of this application, I find none befitting the grant of leave to the Court of Appeal.

In the foregoing, therefore, leave to appeal is not granted and the instant application must be and is hereby dismissed with no order as to costs to bring an end to this litigation.

It is so ordered.

Dated at Dar es Salaam this 10th day of December, 2021.



A handwritten signature in blue ink, appearing to read "S. M. Magoiga". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

S. M. MAGOIGA

JUDGE

10/12/2021