Library

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL CASE APPEAL NO.62 OF 2000

GAUTAM JAYRAM CHAVDA ..... APPELLANT

VERSUS

COVELL MATTHEWS PARTNERSHIP LTD.... RESPONDENT

Date of last Order: 13/02/2008
Date of Ruling : 25/4/2008

RULING

MLAY, J.

This ruling is on an application for leave to appeal to the Court of Appeal of Tanzania. According to the copy of the Notice of Appeal attached to the chamber summons, the intended appeal is against the ruling of this court, (MIHAYO, J), in High Court Miscellaneous Civil Cause No. 62 of 2000, which was delivered on 24/2/2005.

The application which has also been brought under a certificate of urgency, has been made under section 5 (1) © of the Appellate Jurisdiction Act, No.15 of 1979, Rules 43 (a) and 44 of the Tanzania Court of Appeal Rules, 1997 and Order 43 Rule 2 of the Civil Procedure Code, 1966, and it is supported

by the affidavit of HAMIDA HASSAN SHEIKH, the advocate for the applicant. In the said affidavit, the learned advocate has stated in part, as follows:

"1. .....

2. .....

3. That the Applicant being aggrieved with the decision of the Honourable High Court lodged a Notice of Appeal on 2nd day of March, 2005.....

4. That there are many issues involved, including:-

i. Whether service of the Compulsory winding up Petition had been properly affected by the Respondent/ petitioner.

ii. Whether the following causes are sufficient to justify the delay of filing affidavit in opposition, that is:

a) The summons and Petition were affixed in office premises or served to the staff a neighbour of the Applicant while the Applicant Company was officially closed and all the staff on compulsory paid leave and the Management and Directors out of the country.

b) Whether service of the Petition to an advocate before she received instructions to represent the Applicant in the Compulsory Winding up Petition, is effective service.

iii. Whether the Applicants/ Respondent had been given a fair chance of filing Affidavit in opposition and defending itself under the present circumstances.

iv. Whether being prevented by submission to arbitration can justify delay filing the affidavit in opposition or any other pleading (such as application for enlargement of time) during that period. And whether the time when the parties had submitted to arbitrations should be omitted in computation of the period of limitation.

v. Equity, Fairness and Justice.

5. *That there are several points of law for determination by the Court of Appeal of Tanzania. The copy of the proposed Memorandum of Appeal which forms part of this affidavit is annexed hereto and marked "D".*
6. *That this affidavit is in support for leave to appeal to the Court of Appeal of Tanzania.*

   The memorandum of appeal marked annexture "D", contains the following grounds of appeal, namely:

   "1. That Honourable Judge erred in law and fact in dismissing the Appellant's application for enlargement to file affidavit in opposition of the compulsory winding – up petition.

   2. The ruling of the Honourable High Court was problematic.

   3. The Appellants were not property served

   4. The Honourable Judge erred in fact and in law in failing to take into account the fact that (?).

5. The Honourable Judge erred in law in ruling that the causes for delay given by the appellant were not sufficient cause to warrant enlargement of time to file the affidavit in opposition.

6. That there are many important issues involved, including:-

i. Whether service of the Compulsory Winding – up Petition had property effected by the Respondent / Petitioner.

ii. Whether the following causes are sufficient cause to justify the delay of filing Affidavit in opposition, that is:

a) The summons and Petition were affixed in office premises or served to the staff a neighbour of the Applicant while the Applicant Company was officially closed and all the staff on compulsory paid leave and the management and Directors out of the country.

b) Whether service of the Petition to an advocate before she received instructions to represent the Applicant in the compulsory Winding – Up Petition, is effective service.

iii) Whether the Applicant/ Respondent had been given a fair chance of filing the affidavit in opposition or any other pleading (such as an application for enlargement of time) during that period. And whether the time when

the parties had submitted to arbitration should be omitted in computation of the period of limitation.

iv) Equity, Fairness and Justice"

At the hearing of this application, Ms. HAMIDA SHEIKH appeared and argued the same on behalf of the Applicant, while Mr. Marando, advocated for the Respondent. In her oral submissions, Ms. HAMIDA SHEIKH contended that the appeal is of paramount importance because there are many issues involved, including whether service was properly effected by the Respondent to the Applicants. She stated further that all the other grounds have been enumerated in the affidavit in support of the application and in the annexed memorandum of the intended appeal. She submitted that the appeal has a lot of merit and that it is going to be a landmark case. She also submitted that it is in the interests of justice that leave be granted.

Mr. Marando for the respondent submitted that the application has no merit at all. He contended that in the first place, the application which was refused is an interlocutory matter which, under section 5 (2) of the Appellant Jurisdiction Act, 1979 as amended by Act 35 of 2002, is not appealable. Secondly, Mr. Marando continued, all the issues raised in the affidavit of the Applicants advocate, including those raised in the intended memorandum of Appeal, were fully dealt with by

the Court of Appeal in Civil Appeal No. 106 of 2002 between the same parties. Mr. Marando singled out pages 9-13 of the judgment of the Court of Appeal, to buttress this point. He submitted that for this reason, there is no point of law that is to be adjudicated upon by the Court of Appeal.

As an alternative, Mr. Marando submitted that, even if this court finds that the matter is appealable, this court should still refuse to grant the application. For reasons, Mr. Marando referred to the memorandum of the proposed appeal, Annexture "D". He pointed out paragraph 2 thereof which states: "***The ruling of the High Court is problematic***". Mr. Marando argued that there is no such thing which the Court of Appeal can consider.

He further referred to paragraph 4 of the said annexture, where it is stated:

> *"The Hounarable Judge erred in fact and in law in failing to take into account the fact that".*

Mr. Marando argued that it has not been stated what the Judge failed to take into account. Mr. Marando further referred to ground 5 in the Plaint and submitted that it does not contain a legal issue but a challenge to the use of the Court's discreation. Referring to grounds 1 and 6 in

annexture D, Mr. Marando submitted that they are merely a repetition of the contents of the supporting affidavit and that these grounds were dealt with by the Court of Appeal.

Mr. Marando finally, invited this court to look at the last paragraph of the judgment of the Court of Appeal, in which the Court directed this Court to proceed from the stage reached before the preliminary objection was raised. Mr. Marando submitted that, if the opposing affidavit is to be allowed, this court would be sitting in judgment of the decision of that Court.

In reply to Mr. Marando's submissions Ms. Hamida Sheikh submitted that the ruling of this Court was not on an interlocutory matter. She said an affidavit in opposition, is like a Written Statement of Defence in a suit. She contended that the petitioner is applying to wind up the company while her client the applicant, is trying to save it and so has to file an affidavit in apposition to the Winding up Petition. She contended that the decision of the Court of Appeal was for the High Court to hear the matter on its merit and she applied to file an opposing affidavit, which was required to be filed within 7 days but she gave reasons for delay. She contended that if the applicant is not given time to file an opposing affidavit, the matter will proceed **exparte**, and to that extent, the matter is final in so far as her client is concerned. She submitted that

the matter is for this reason not an interlocutory matter. She further argued matter that, since she applied for extension of time in which to file an opposing affidavit and this was rejected, she has to go to the Court of Appeal. She contended that to hear the matter on its merit it means she had to be allowed to file an affidavit in opposition.

On ground 4 of the intended appeal, Ms. Sheikh conceded that it had no meaning but argued that there were the other grounds. As for ground 2 of the intended appeal which states that "***the ruling of the Honourable High Court was problematic",*** Ms Sheikh contended that it is a "***standard Statement***" and that it is for her to show the problem to the Court of Appeal.

Ms Sheikh further submitted that in ground 4 it is a matter of law if service was not effected and also that, in the memorandum of appeal there are matters of equity, fairness and justice, which are a serious ground of appeal.

Lastly, and like Mr. Marando did, Ms Sheikh invited this Court to revert to the direction of the Court of Appeal that the matter should go back to the High Court to be heard on its merit. She submitted that this meant that hearing on merit is ***inter parties*** and not ***exparte.*** She contended that a one sided hearing is not normally considered to be a hearing on its

merits. She contended that if the applicant is denied the extension of time to file an opposing affidavit, the matter will be heard not on merit, but on one side and this would not be equitable and contrary to natural justice.

Briefly, the Respondent / petitioner GAUTAMA JAYRAM CHAVDA petitioned for the winding up of the Applicant/ Respondent company. At the hearing of the petition, counsel for the Respondent / Petitioner raised a preliminary objection that the Petitioner/Respondent had no ***locus standi*** to file the petition. The trial Judge Chipeta J, sustained the preliminary objection, on the ground that the petitioner was neither a shareholder nor a creditor in terms of the provisions of section 167 of the Company Ordinance, Cap 212 of the Laws. Aggrieved by the decision, the petitioner appealed to the Court of Appeal of Tanzania, on the fallowing grounds:

1. *That learned Judge erred in dismissing the appeal.*
2. *The learned Judge erred in considering and relying on annexture/ documents attached to the Answer which as filed out of time.*
3. *The learned judge erred in making findings of facts without evidence having been given.*

In the course of hearing the appeal, an issue arose whether the respondent to the Petition who was also the Respondent in the appeal and the present applicant, had filed an affidavit in opposition to the petition for winding up in time, in accordance with rule 35 (1) of the Companies winding – up Rules. The Court of Appeal stated, and I quote:

> *"There is no gainsaying that once a petition for winding up of a Company is filed, under the provisions of rule 35 of the Companies (Winding up) Rules, it is mandatory for the respondent to file an affidavit in opposition within seven days of filing the petition and the verifying affidavit. In this case, the petition was filed on 29/3/2000 and the record shows that no affidavit in opposition was filed".*
> (See P.9 of typed judgment).

The Court of Appeal went on to consider the consequences of failing to file an affidavit in opposition to the petition for winding up, and stated at page 10 of the judgment:

> *"Where the law clearly provides for an affidavit in opposition to be filed, a reply to*

> *the petition cannot in any way be a substitute for the Affidavit ..... we are therefore in agreement with Mr. Marando that no proper legal reply was furnished to the petition by the appellant.* ***The averment in the pleadings by the appellant remained as it were, uncontroverted".***

On the specific issue of whether the present Respondent/ Appellant had ***locus standi*** to file the petition for winding up, the Court of Appeal stated at page 12 of the typed judgment:

> *"For these reasons, the learned trial Judge should have come to the conclusion that* ***the appellant had locus standi to present the petition for winding up of the respondent company.*** *It was an error to hold otherwise".*

At the and of it all, the Court of Appeal allowed the appeal, and set aside the order of this Court of 18/10/2002 (Chipeta, J) sustaining the preliminary objection. The Court of Appeal ordered as follows:

"It is further ordered that that the case is to be remitted to the High Court with direction to proceed with the hearing on merit before another judge from the stage reached before the preliminary objection was raised".

When the record was received in the High Court the Respondent in the Petition for winding up made an application by Chamber Summons under Section 348 of the Companies Ordinance, Cap 221 and Rule 35 (1) of the Companies (Winding up Rules and section 14 of the Law of Limitation Act 1971, for an order that:

"The Hon. Court grant extension of time and/ or grant leave to the respondent to file an affidavit in opposition of the compulsory winding –up Petition out of time".

The said application came up before my brother Mihayo J, who dismissed it on grounds that the applicant had not advanced sufficient reason to grant the extension of time to file an affidavit in opposition, out of time. Being aggrieved by the ruling of Mihayo, J, the applicant brought the present

application, to seek leave to appeal to the Court of Appeal, against the said ruling.

Having given due consideration to the spirited oral submissions made by both counsels, notwithstanding that there may be many points of law for consideration of the Court of Appeal, and with due regard to the prophesy of Ms. Hamida Sheikh, Counsel for the Applicant that, the matter will be a landmark case, I am of the firm view that the dismissal of the application for extension of time to file an affidavit in reply, as made by Mihayo J, is an interlocutory decision which is not appealable, at this stage.

Section 5 (2) (d) of the Appellate Jurisdiction Act, Cap 141 RE 2002, provides:

> *"(2) Notwithstanding the provisions of subsection (1) –*
>
> *a) .....*
>
> *b) .....*
>
> *c) .....*
>
> *d)* ***No appeal*** *or application for revision* ***shall lie*** *against or be made* ***in respect of any preliminary or interlocutory decision*** *or order of the* ***High Court unless such decision has the effect*** *of*

finally determining the criminal charge or

suit"

In the present case, the matter before this court is the Petition for Winding up a Company, which the Court of Appeal of Tanzania in its judgment in Civil appeal No. 106 of 2002, remitted to this court, with an order for hearing on merit before another judge. It was in the course of hearing that petition on its merit, that the Applicant who is the Respondent in the Petition, filed an application for extension of time in which to file an affidavit in opposition, which application was dismissed by Mihayo J. For the purpose of section 5 (2) (d) of the Appellate Jurisdiction Act, and in the proceedings before this Court, the word "suit" refers to the Petition for winding up, which has been ordered to be heard on its merits, from the stage before the preliminary objection was made before Chipeta, J. The decision of Mihayo J, dismissing the application for extension of time in which to file an affidavit in opposition to the Winding up Petition, does not findly determine the Petition itself. I would therefore uphold Mr. Marando submission that the ruling is not appealable for being an interlocutory matter, as provided by section 5 (2) (b) of the Appellants Jurisdiction Act.

Ms. Hamida Sheikh has strongly argued that, the order of the Court of Appeal that the matter be heard by the High

Court on its merits, means hearing the matter ***inter partes***. With respect, the direction of the Court of Appeal is very clear. The High Court was directed "***to proceed with the hearing on merit before another Judge from the stage reached before the preliminary objection was raised***". At that stage and as the Court of Appeal found, "***the petition was filed on 29/3/2000 and the record shows that no affidavit in opposition was filed***".

The Court of Appeal further found that, "***no proper legal reply was furnished to the petition by the appellant. The averments by the appellant, remained, as it were, uncontroverted***".

This direction cannot, by any stretch of imagination be interpreted to be a direction to hear the matter inter partes, on matters which the Court of Appeal have determined that they are uncontroverted.

In the upshot, the application is incompetent and it is accordingly struck out, with costs.

J. I. Mlay,

JUDGE

Delivered in the presence of the Respondent/ Petitioner and in the absence of the Applicant, this 25th day of April, 2008.

J. I. Mlay,

JUDGE

25/04/2008.

Words: 2,934