IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

MISC. COMMERCIAL APPLICATION NO. 7 OF 2020

(Application for leave to appeal against the decision (ruling and order) of the High Court of Tanzania(Commercial Division) at Arusha (Hon. Justice S.M. Magoiga, J) dated 08th July, 2020 in Misc. Commercial Application no 11 of 2019, arising from Commercial Case No.4 of 2019).

GOMBA ESTATE (GEL) LIMITED ..... APPLICANT

VERSUS

STANDARD CHARTERED BANK LIMITED .....RESPONDENT

Date of Last order:06/10/2020

Date of Ruling:09/10/2020

RULING

MAGOIGA, J.

The applicant, GOMBA ESTATE (GEL) LIMITED by chamber summons made under section 5(1) (c) of the Appellate Jurisdiction Act [Cap 341 R.E. 2019] and Rules 45(a) and 47 of the Tanzania Court of Appeal Rules, 2009 as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017 instituted the instant application against the respondent praying that this court be pleased to grant the following orders, namely:

1. An order granting leave to the applicant to appeal to the Court of Appeal of Tanzania against the decision (Ruling and Order) of the High Court of Tanzania (Commercial Division) at Arusha (Hon. S.M.Magoiga, J) in Misc. Commercial Appeal No. 11 of 2019 dated 8th July, 2020.
2. Cost of this application be borne by the respondent; and
3. Any other orders the honourable court may deem just and fit to grant.

The chamber summons was accompanied by affidavit of Mr. Mpaya Kamara, learned advocate for the applicant stating the reasons why this application should be granted.

Upon being served, the respondent filed a counter affidavit deposed by Mr. Walarrick Nittu stating the reasons why this application should not be granted.

The facts to this application are simple and straight forward that, on 08/07/2020 this court delivered a ruling in which it dismissed Misc. Commercial Application No. 11 of 2019 preferred by the instant applicant seeking for this court to depart from scheduling conference in Commercial case No. 04 of 2019 and grant leave to deliver interrogatories and discoveries in writing. Aggrieved and dissatisfied with that ruling, the

applicant immediately filed notice of appeal, drafted a letter requesting for supply of the proceedings and instituted the instant application praying, among others, leave to appeal to the Court of Appeal, hence, this ruling.

When this application was called on for hearing, the applicant had the legal representation of Mr. Mpaya Kamara, learned advocate. On the other hand, the respondent had the legal services of Mr. Jonathan Wangubo, learned advocate.

Mr. Kamara in support of the application submitted on the purpose and sections which this application was pegged and prayed to adopt the contents of the affidavit in support of the application. Orally, the learned counsel for the applicant went on to highlight that, in the impugned ruling and the draft of the memorandum of appeal intended to be filed in the Court of Appeal, they have raised six grounds of appeal worth for consideration by the Court of Appeal. According to Mr. Kamara, the grounds of appeal demonstrated that, this application is not frivolous and vexatious. In particular, the learned advocate for the applicant pointed out that, in grounds 4 and 6 are about the options provided by the court to the so called interrogatories that same can be taken care of by way of cross examination and filing a list of documents which options are impractible in the circumstances for all the

documents are with the respondent. This options as stated in the ruling, in the view of Mr. Kamara, are disturbing features because they cannot give the applicant an opportunity to exercise and assert effectively his right to be heard. This is so because under Rule 49 of the High Court (Commercial Division) as amended by G.N. 107 of 2019 witness statement is to be filed within 14 days of the completion of the Final Pre Trial conference and that under Rule 50 as amended witness statement is supposed to efficiently identify any document that the witness statement refers.

Therefore, by the ruling denying the documents, is disturbing and any possible options suggested is an exercise in futility. Any cross examination cannot be panacea because this will be post filing witness statements.

In support of his respective stance, the learned counsel cited the case of BRITISH BROADCASTING CORPORATION v. ERICK SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004 which at page 7 where the Court quoted the holding in the case of HARBAN HAJI MOSI AND SHAURI HAJI MOSI v. OMAR HILAL SEIF AND SEIF OMAR (Unreported) where it was held that:

"Leave is granted where the proposed appeal stand reasonable chances of success or where but not necessarily, the proceedings as a whole reveal such disturbing features as require the guidance of the Court of Appeal. The purpose of the provision is, therefore, to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

Mr.Kamara further pointed out that, the respondent in her counter affidavit rose a fact that the decision of the court was interlocutory, hence, not appealable under section 5 (2) (d) of the Appellate Jurisdiction Act, [Cap 341 R.E.2019]. But, according to Mr.Kamara, the decision when read for all purposes is interlocutory in the name but not in its spirit or effect. The effect of the order was to stifle the applicant's venue to present its case meaningfully and efficiently, insisted Mr. Kamara. Mr.Kamara was of the strong submission that much as it remains to be the applicant's avenue is as good as closed and is like a fate accompli.

Further it was the considered submissions of Mr. Kamara that the law that bars interlocutory orders not being appealable or revisable is not absolute for as long as the court of justice reads in it injustices it will always give an interpretation to a fair and full hearing. To support this stance the learned

advocate cited the case of STANBIC BANK TANZANIA LIMITED v. KAGERA SUGAR LIMITED, CIVIL APPLICATION NO. 57 OF 2007 in which it was held that a distinction has to be drawn and be clear between interlocutory orders and confusion, illegality or impropriety in the proceedings generally the latter can sail through to an appeal and not the former one.

On that note, Mr. Kamara argued that in this court's ruling there are disturbing features which, in his view, are more or less to synonymous to confusing.

In the end, the learned advocate for the plaintiff prayed that this application be granted as prayed with costs.

In response, Mr. Wangubo started by praying that their counter affidavit in opposition of this application be adopted to form part of what he is going to submit. According to Mr. Wangubo, the principle governing determination of application to appeal by leave to the Court of Appeal was stated in the case of BBC v, ERICK SIKUJUA NG'MARYO (supra) at pages 6-7 where the Court held that, leave to appeal is not automatic but discretionary and is granted where raises issue of general importance or novel point of law or arguable appeal. Another case relied by the leaned advocate for the respondent was

the case of TANZACOAL EAST AFRICA LIMITED v. THE MINISTER FOR ENERGY AND MINERALS, MISC. COMMERCIAL APPLICATION NO.331 OF 2016.

According to Mr. Wangubo, the affidavit in support of the application does not meet the two conditions as set out in the two cases cited above. Further arguments by Mr. Wangubo were that, in their affidavit they have shown that, the ruling of the court was an interlocutory decision, hence, barred from being appealed for the order did not finally determine the suit nor determined the rights of the parties as held in the case of TANZANIA MOTORS SERVICES LTD AND PPSRC v. MEHAR SINGH t/a THANKER SINGH , CIVIL APPEAL NO 115 OF 2005(CAT) DSM(Unreported) quoting the case of BOZSON v. ARTRINCHAM URBAN DISTRICT COUNCIL (1903)1KB 547 in which it was held that:

> **"It seems to me that the real test for determining this question ought to be this: does the judgement or order, as made, finally dispose of the rights of the parties? If it does, then, I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."**

On the disturbing features as alleged it was the reply of Mr. Wangubo that, none was shown to be disturbing features. Even what is stated in paragraphs 4 and 6 are not disturbing features and concluded that the instant application is frivolous and vexatious intended to delay the delivery of justice in this main case.

On the allegations that the order curtailed their rights to be heard is not true because by prosecuting the case through cross examination and bringing evidence is right to be heard in the circumstances, replied Mr. Wangubo.

On the allegations that the order is interlocutory by name but in spirit is not, it was the brief and to the point reply of Mr. Wangubo that arguments that the doors for the applicant to prosecute their case is closed is misconceived because the order do not prevent them from participating in the proceedings.

On the case of STANBIC BANK TANZANIA LIMITED v. KAGERA SUGAR LIMITED(supra) it was the reply of Mr. Wangubo that same is distinguishable because the orders sought in that case were not interlocutory in nature but it was based on application based to revise the inconsistency,

impropriety of the proceedings generally following the high court giving two contradictory orders which was on the face of it disturbing.

In the fine, Mr. Wangubo prayed that this court be pleased to dismiss this application for being an application against the order which was interlocutory and for not meeting tests of the orders appealable with leave.

In rejoinder, Mr. Kamara reiterated his submissions in chief. On the disturbing features, according to Mr. Kamara, were as captured in paragraphs 4 and 6 in the draft of memorandum of appeal. It was the strong submissions of Mr. Kamara that cross examination is not substitute of interrogatories and discoveries. On the case of STANBIC TANZANIA LIMITED (supra) Mr. Kamara admitted that they cited that case to draw analogy to support their submissions that the bar under section 5(2) (d) of [Cap 341 R.E.2019 is not absolute.

In the fine the learned advocate for the applicant reiterated his earlier prayers.

This marked the end of oral hearing of this application. The task of this court is to determine the merits or demerits of the instant application. Having careful listened to the oral rival arguments of the trained learned minds of

the parties, quickly I agree with the learned advocate for the applicant that, the provisions of section 5(2)(d) of AJA are not absolute but will depend on the issue at hand and the circumstances of each case. In a fit and proper case the Court of appeal can intervened, in particular, if the proceedings are tainted with irregularities, improprietory, illegality and when are confusing as rightly held in the case of **BBC v. Ng'maryo (Supra)**. Equally, important to note is that the provisions section 5 (2) (d) of [Cap 341 R.E 2019] have purpose to serve as rightly held in the same case of **BBC (supra)** that is to spare the Court of unmeriting matters and to enable it to give adequate attention to cases of true public importance. That purpose cannot be undermined by mere whims of the parties to the proceedings.

Also it should be noted that, in law, interrogatories (also known as request for further information) are a formal set of written questions propounded by one litigant and required to be answered by an adversary in order to clarify matters of facts and help to determine in advance what facts will be presented at any trial in the case. Therefore, in my opinion discovery by interrogatories have never been a way of getting documents from the adversary party and where documents are needed they must be precisely

identified and be limited to classes of documents and not any document not well identified.

Now back to the instant application, in my respective opinion, the following issues are crucial in the determination of this application. First, is whether the ruling of this court dated 8th day of July, 2020 was an interlocutory in name but not in spirit and effect not? Second, is whether the said ruling was tainted with disturbing features as alleged worth intervention of the Court of Appeal? And third, is whether the said ruling shut the door and denied the applicant an opportunity to exercise effectively and assert his rights to be heard. Fourth, whether the ruling of was only based on the reasons of cross examination and filing of list of documents as alleged.

To starting with the first issue, that whether the ruling of this court dated 08th July, 2020 was interlocutory in name but not in spirit and effect. I have **carefully** followed and considered the oral rival arguments of the learned advocates on this point and I am of the considered opinion that this issue has to fail. I will explain. **One,** the spirit and effect, according to Mr. Kamara, were that the ruling stifled the applicant avenue to present its case meaningfully and efficiently and as such it closed her avenue. These arguments are far from the truth and are misconceived on his part, unless

he argues that the grant of the application was absolute and not discretionary. **Two,** the learned counsel for the applicant is reminded that, the presentation of discoveries and interrogatories is not an open-ended cheque that a party can enjoy as he wishes in a case. The grant of the orders as prayed were at the discretion of the court and the court upon considering the reason advanced was justified and gave several reasons for rejection the application. Nevertheless, even the right to be heard is not absolute in all respect, but same must be exercised in accordance with the law and limitations. The denial, if any, in my opinion, was caused by the applicant and his advocates who sat on the rights of the applicant but only to come to court so late and without any cogent reasons so convince the court otherwise. **Three,** the applicant filed written statement of defence and still is participating in the proceedings, is unheard to argue that the ruling denied him right to be heard. Lastly, courts have rights to make decisions, whether right or wrong, one cannot pick the order in peace-meals in order to justify it not be interlocutory. The order of the court was in all intents interlocutory.

That said and done, I find the first issue in the negative and as rightly argued by Mr. Wangubo, and rightly so in the opinion of this court, the

ruling of the court was an interlocutory in name, spirit and effect, hence, not appealable as provided under section 5(2) (d) of the Appellate Jurisdiction Act, [Cap 341 R.E. 2019].

The second issue is whether the ruling of the court was tainted with disturbing features worthy intervention of the Court of Appeal. This issue will not detain this court much. Having carefully considered this point and having re-read the ruling no disturbing features was pointed in the proceedings and even in the ruling. In the ruling as decided, the court gave six reasons why it rejected the application. In the first reason, the court was of the holding that the documents sought in prayer (ii) to (xi) were to generally asked and widely drafted with no specific date and time that cannot be allowed without causing embarrassment to the respondent and that **some of the documents such as emails** were not as well specific to be precise for orders sought. The court, then, observed that such emails, if any, were sent to him and has them, so on that note were the one to be filed as list of documents so to speak. There is no where the court held that cross examination is substitute of the interrogatories and discoveries as alleged by the learned advocate for the applicant. This is an indication that the learned advocate misread the holding of the court, hence, the whole arguments that

there were disturbing feature is misplaced and misconceived. Therefore, in circumstances, there is neither improprietory, irregularities pointed out nor confusion in the proceeding generally noted worth of Court of Appeal intervention. In the case of BBC v Ng'maryo (supra) the Court held that proceedings generally were disturbing for having more than two orders which were in conflict of one another as what really transpired in the court, while in this application no such Distending orders were pointed out at all, hence distinguishable.

In the end, I find this issue equally devoid of any useful merits and is hereby answered in the negative.

On the third issue that whether the ruling of the court shut the door and denied the applicant an opportunity to exercise effectively and assert his rights to be heard. This point after hearing parties' learned advocates is misplaced, and at best what I gathered from the applicant's counsel is that the court was enjoined at any costs even without any sound reason and at the expenses of interest of justice to grant the application. To him their case was not based on the written statement defence filed but an interrogatories and discoveries. This is wrong. The learned advocate for the applicant arguments suggests that, the grant of the application of filing of the

interrogatories and discoveries were above and paramount to the written statement of defence filed. That said, the applicant, as rightly held in the ruling, the opportunity to be heard, if any, was denied by himself and not the court. This issue has to be answered as well in the negative.

The last issue is whether the ruling of the court was only based on the reasons of cross examination and filing of list of documents as alleged. This issue like the other issues as held above is to be answered in the negative. The two issues on cross examination and filing of the list of documents is a serious misconception on the applicant learned advocate to be argued as appoint that was to move this court to grant leave to appeal. Had the counsel read the ruling of the court and the reasons for rejecting their application, he would have seen why the court gave these reasons. Cross examination and filing of list of documents is another way of putting the opponent into task is way of disproving the respondent's claims. It is evident from the ruling of the court that cross examination and filing list of documents was based on the finding of the court that **some of the documents** and questions can be taken care of during cross examination. That by itself cannot be said to be problematic and disturbing.

In the totality of the issues as answered above, this court find the instant application misconceived, misplaced, frivolous and vexatious in all intent and same is calculated and intended to delay the administration of justice in this suit. That said and done the instant application is hereby dismissed with costs in its entirety.

Order accordingly.

Dated at Arusha this 9th day of October, 2020.

S.M. MAGOIGA

JUDGE

09/01/2020