IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES SALAAM
MISC. COMMERCIAL APPLICATION NO. 187 OF 2022[
(Arising from Misc. Commercial Case No. 37 of 2022)

I & M BANK (T) LTD .....APPLICANT

VERSUS

HERBERT ELIAZER LIWALI.....1ST RESPONDENT

BAYVIEW PROPERTIES LIMITED .....2ND RESPONDENT

RULING

Last Order: 3/4/2023
Ruling: 31/5/2023

NANGELA, J:,

The Applicant herein brought this application by way of a chamber summons supported by an affidavit of Mr. Abbas Kermall. The application has been brought under section 5(1)(c) of the Appellate Jurisdiction Act, Cap.141 R.E 2002. The Applicant seeks for leave to appeal to the Court of Appeal of Tanzania against the decision of this Court (**Hon. Dr. Nangela, J.)** dated 12th days of September 2022 in **Misc. Commercial Cause No. 27 of 2021**; and for an order that costs be provided for and any other relief as this Court may consider appropriate to grant.

Upon service, the Respondents filed their respective counter affidavits. In terms of representation in Court, the Applicant enjoyed the services of Mr. Casmir F. Nkuba, learned advocate, while Mr. Shehzadha Walli and Ms. Madelaine Kimei, learned Advocates represented the 2nd and 1st Respondents respectively.

The application was argued by way of written submissions. Supporting the application, it was Mr. Nkuba's submission that, in the first place, the 2nd Respondent has not contested the application. That is a correct view since the counter affidavit filed by one Hussein Ladha does not counter the facts deposed in the supporting affidavit of Mr. Kermall.

As regards the 1st Respondent's counter affidavit, Mr. Nkuba has submitted that, the same is defective as it has relied on information from passed from the 1st Respondent which information is verified by the 1st Respondent's advocate as being true to the best of her knowledge. Because of that, Mr. Nkuba has contended that, the affidavit is bad in law, incurably defective and should be expunged from the record.

To support his submission on that point, he relied on the case of **Anatol Peter Rwebangira vs. The Principal**

Secretary, Ministry of Defence and National Service &Another, Civil Appl. No.548/04 of 2018 (CAT) (at Bukoba) (unreported).

In that case, the Court of Appeal was of the view that:

> "As a general rule of practice and procedure, an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of own personal knowledge or from information which believes to be true."

The Court stated further, citing the case of **DPP vs. Dodoli Kapufi and Patson Tusalile**, Criminal Application No.11 of 2008 (CAT) (unreported) defined an affidavit to mean:

> "a statement in the name of a person, called deponent, by whom it is voluntarily signed or sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove but in certain cases may contain statements of information and belief with grounds thereon.

It was a further view of the Court of Appeal that:

> 'a verification clause is one of the essential ingredients of any valid affidavit and what amounts to a verification clause simply shows the facts the deponent asserts to be true of his own knowledge and/or those based on information or beliefs…where an averment is not based on personal knowledge, the source of information should be disclosed."

In his submission, Mr. Nkuba has assailed the 1st Respondent's affidavit which was verified by her advocate, Ms. Kimei. Except its paragraph number 4, the rest of paragraphs 1, 2, 3, 5, 6, 7, 8 and 9 were verified by Ms. Kimei as being true to the best of her own knowledge.

Mr. Nkuba has contended that, what is stated in paragraphs 2, 4, 7, 8 and 8 of 1st Respondent's the supporting affidavit, are matters based on information passed to the Advocate by the 1st Respondent. As such, he has assailed those paragraphs as being bad in law and call upon this Court to expunge them from the record.

For her part, Ms. Kimei has contended otherwise, stating that, paragraph is fully acknowledged as being based on information while the rest are responded to as matters within the knowledge of the advocate having been involved in both the arbitral proceedings and the court proceedings. Perhaps I should address this point of law first.

Legally, it is trite that, an advocate can swear and file an affidavit for his or her client. This was clearly stated in the case of **Lalago Cotton Ginnery and Oil Mills Co. Ltd vs. Loans and Advances Realization Trust (LART)**, Civil Application No.80 of 2002(unreported). In that case the Court stated:

> "An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and, that, he personally knew what transpired during those proceedings."

However, in the case of **Hon. Zitto Zuberi Kabwe vs. The Board of Trustees, Chama cha Demokrasia na Maendeleo and Another,** Civil Case No.270 of 2013, this Court (Hon. Utamwa, J. (as he then was) stated that:

> "in interpreting the decision in the Lalago **Case** is that, though it is undisputed that our justice system recognises an advocate as an authorised agent of the party he represents in court, the precedent Lalago's case) did not give a blank cheque authority to an advocate when swearing affidavits for his clients in respect all facts that he had personal knowledge. The authority is only limited to facts that came into the advocate's personal knowledge by virtue of him acting in such capacity for his client. That mandate does not extend to substantive evidence for establishing a right or denying liability for his client in any court proceedings. Otherwise, an advocate will be both a witness and a counsel in the same case because,

> affidavits in law take place of oral evidence ...."

I have looked at the counter affidavit of Ms. Kimei. In my view, what she has stated is correct and I do not think that it is a defective affidavit as Mr. Nkuba has contended. The verification clause is clear that the contents in paragraph number 4 of that counter affidavit are based information obtained from the 1st Respondent.

The rest of information, even if are stated to be responses of the 1st Respondent, those are matters which are within Ms. Kimei's knowledge because of her status as the counsel for the 1st Respondent with first-hand information of what transpired in the proceedings, she took part in from the beginning. Consequently, I do not share the views of Mr. Nkuba.

Even if this Court was to share the views and expunge paragraphs 2, 6, 7, 8 and 9 from the record, still what is left of the remaining paragraphs (i.e., paragraphs 1, 3, 4, and 5) would stand as an affidavit given what paragraph 4 of the 1st Respondent's affidavit states. That paragraph reads as follows:

> "That, the contents of paragraph 7 and 8 of the Applicant's Affidavit are partially noted. The 1st Respondent states that, the interest assigned to the Applicant was $^{2}/_{3}$ of the 2nd Respondent's leasehold interest for the purposes of only the initial loans for purposes of development of the suit property obtained by the 2nd Respondent from the Applicant. The 1st Respondent further states that, it had not consented to any other financing arrangements and as per the records reflect, it was not privy to the dealings between the Applicant and the 2nd Respondent."

Concerning the substantive grounds upon which the present application is premised, it has been Mr. Nkuba's submission that, the following the decision of this Court in Misc. Commercial Application No.110 od 2021, the Applicant is still aggrieved and wish to approach the Court of Appeal on the basis that:

1. The Court Erred in law and in fact after failing to consider the effects of a judicial decision arrived at without hearing a

party affected by that decision, notwithstanding the fact that the parties were in agreement that, the Applicant has leasehold interest in the suit property.

2. The Court erred in law and fact in holding that the escrow account may be opened with the Applicant and from there an assurance will be had that at the end of the day the loans will be fully be repaid to her, but at the same time the Order directed that the escrow account be managed by an outsider party with a view to hold valuable until specified conditions are met.
3. The Court erred in law and in facts by declining to vacate its orders dated 15th day of February 2022 in Misc. Commercial Application No. 110of 2021 which directed the 2nd Respondent to deposit into the escrow account the monies from rentals, notwithstanding the fact that the Applicant has interest on

the rentals up to at least 2/3 of the rental proceeds.

Based on those grounds which are stated in the affidavit of Mr. Kermall in support of the application, Mr. Nkuba has urged this Court to grant this application. Mr. Walli's submission was unnecessary so to speak taking into account that the 2nd Respondent did categorically support the application in her counter affidavit.

However, for her part, Ms. Kimei has urged this Court to dismiss it on the ground that, the Applicant has not been able to disclose grounds which warrant this Court grant leave to appeal to the Court of Appeal. She relied on the decisions of the Court of appeal which require leave to be granted only if the proposed appeal raises contentious issues and stands chances of success.

The various decision relied upon by Ms. Kimei are: **Said Ramadhani Mnyanga vs. Abdallah Salehe** [1996] TLR 74; **Hamis Mdida and Siad Mbogo vs. Registered Trustees of Islamic Foundation,** Civil Appeal No.232 of 2018 (CAT) (at Tabora) (unreported) and **BBC vs. Eric Sikujua Ng'imaryo**, Civil Appl.No.138 of 2004 (unreported).

From the above submissions, the issue I need to look at is whether the Applicant has managed to disclose grounds which would warrant this Court to grant her leave to appeal to the Court of Appeal.

Essentially, it is indeed an established legal position that, an application for leave to appeal is not an automatic right and will be determined on the basis of the materials placed before the Court. In the case of **Harban Haji Moshi and Another vs. Omari Hilal Seif and Another**, [2001] TLR 409, it was held that:

> "Leave is grantable where the proposed appeal stands chances of success or where, but not necessarily, the proceedings … reveal disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is, to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

In the case of **BBC vs. Eric Sikujua Ng'imaryo** (supra) the Court of Appeal reiterated a similar view adding that:

> "leave will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a *prima facie* or arguable appeal…"

In my considered view, as I look at the grounds disclosed in the affidavit of Mr. Kermall in support of the application and the submissions filed by Mr. Nkuba, I am inclined to agree that they do raise an arguable appeal worth being brought to the attention of the Court of Appeal of Tanzania for its consideration regarding the correctness or otherwise of the decision complained of.

In view of the above, I find that, this Court should exercise its discretion and grant the prayers sought. In the upshot, therefore, this Court settles for the following orders:

1. That, the Applicant is hereby granted leave to appeal to the Court of Appeal.
2. That, the granting of this Application is with costs as prayed.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 31ST DAY OF MAY 2023

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DEO JOHN NANGELA
JUDGE