

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 103 OF 2003
In the Matter of an Intended Appeal**

BETWEEN

BLUELINE ENTERPRISES LIMITED APPLICANT

AND

EAST AFRICAN DEVELOPMENT BANK RESPONDENT

**(Application for striking out Notice of Appeal
from the Decision of the High Court of Tanzania
at Dar es Salaam)**

(Luanda, J.)

**dated the 30th day of July, 2003
in**

Misc. Civil Application No. 307 of 2002

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R U L I N G**

MROSO, J.A.:

In a notice of motion under Rule 82 of the Court Rules the applicant has moved the Court to strike out a notice of appeal and the appeal which the respondent filed in this Court. It is contended by the applicant who was represented by Mr. Bwahama, learned advocate, that the respondent failed to take an essential step in its appeal, that is to say, the respondent failed to obtain leave of the High Court or of this Court in filing the appeal. The applicant explains that the decision of the High Court against which the appeal

is intended was given on 30th July, 2003 and the appeal was lodged on 27th October, 2003. Until the 5th of November, 2003 when the application was filed the respondent had not applied for and obtained leave to appeal as required under Section 5 (1) (c) of the Appellate Jurisdiction Act, 1979 and Rule 43 (a) of the Court Rules. It was submitted for the applicant that the appeal is consequently incompetent and should be struck out. The notice of appeal should as well be struck out for the same reason.

The respondent, through its advocates Dr. Nguluma and Ms Makani, replied that the appeal was competent because it did not need leave. It was lodged under S. 5 (1) (a) of the Appellate Jurisdiction Act, 1979 as an appeal from a decision of the High Court sitting in original jurisdiction. So, the question at issue is whether the respondent's pending appeal needed leave of the High Court. To appreciate the question it will be necessary to be clear about the nature of the proceedings in the High Court which led to the decision against which the appeal was preferred.

From the material available before me it appears that the applicant had petitioned the High Court under section 7 (2) of the

Arbitration Ordinance, Cap. 15 and Rule 10 of the Arbitration rules, 1957, G.N. No. 427 of 1957 and Order 23 rule 2 of the Civil Procedure Code, 1966 for the appointment of a sole arbitrator from a list submitted by the then petitioner to the respondent.

The High Court appointed late Francis L. Nyalali to be sole arbitrator with like powers to act in the reference and to make an award, as if he had been appointed by consent of the parties. A Mr. A.T.H. Mwakyusa of NEDCO was to be substitute sole arbitrator in the event Francis L. Nyalali neglected, refused or was unable to act. The High Court having made that order it marked the petition settled.

Late Hon. Nyalali arbitrated the dispute between the parties and rendered an award. Subsequently, however, the applicant again petitioned the High Court, this time to ask the Court to set aside the award by late Hon. Nyalali. The High Court, Luanda, J., acting under section 15 of the Arbitration Ordinance, on 30th September, 2002 quashed the proceedings which were before late Hon. Nyalali and set aside his award. It was ordered that proceedings should start afresh before the alternate sole arbitrator, Mr. Mwakyusa. It is against that

order that the respondent seeks to impugn in an appeal to this Court.

Does such an appeal need leave of the High Court?

Section 5 of the Appellate Jurisdiction Act, 1979 henceforth to be referred to as the Act, provides for appeals to the Court of Appeal. Sub-section (1) of the section is relevant and I intend to quote it up to paragraph (c) thereof:-

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

- (a) against every decree, including an *ex parte* or preliminary decree made by the High Court in a suit under the Civil Procedure Code, 1966, in the exercise of its original jurisdiction;
- (b) against the following orders of the High Court made under its original jurisdiction, that is to say -
 - (i) an order superseding an arbitration where the award has not been completed within

the period allowed by the High Court;

- (ii) an order on an award stated in the form of a special case;
- (iii) an order modifying or correcting an award;
- (iv) an order filing or refusing to file an agreement to refer to arbitration;
- (v) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (vi) an order filing or refusing to file an award in an arbitration without the intervention of the High Court;
- (vii) an order under section 95 of the Civil Procedure Code, 1966, which relates to the award of compensation where

- an arrest or temporary injunction is granted;
- (viii) an order under any of the provisions of the Civil Procedure Code, 1966, imposing a fine or directing the arrest or detention in a civil prison, of any person, except where the arrest or detention is in execution of a decree;
- (ix) any order specified in rule 1 of Order XLIII in the Civil Procedure Code, 1966, or in any rule of the High Court amending, or in substitution for, the rule;
- (c) with the leave of the High Court or of the Court of Appeal, against every other decree, order judgment, decision or finding of the High Court.

Neither party considered that paragraph (b) of sub-section (1) of section 5 of the Act was applicable. The controversy is whether the

appeal came under paragraph (a) or paragraph (c) of sub-section (1) of Section 5 of the Act.

The crucial words in paragraph (a) of sub-section (1) of Section 5 of the Act are – “a suit under the Civil Procedure Code, 1966, in the exercise of its original jurisdiction.” I think there is no dispute that Luanda, J. in Misc. Civil Cause No. 307 of 2002 was exercising original jurisdiction. It is also possible to construe a suit to include a petition, bearing in mind the wide definition ascribed to the term ‘suit’. A Concise Law Dictionary by P.G. Osborn, 5th Edition defines ‘suit’ as “any legal proceeding of a civil kind brought by one person against another”. Chambers Twentieth Century Dictionary also defines ‘suit’ to include “an action at law, ... a petition”. So, the proceedings before Luanda, J., though a petition, were also in the broad sense a suit. But were they under the Civil Procedure Code, 1966 so that an appeal against them would be made under S. 5 (1) (a) of the Appellate Jurisdiction Act, 1979 as contended by Dr. Nguluma?

It is worthy to note that those proceedings were entitled –

In The Matter of Arbitration Ordinance Cap. 15

And

In the Matter of Arbitration

Between

Blue Line Enterprises Ltd. Petitioner

And

East African Development BANK ... Respondent

The record of proceedings before Luanda, J. is not before me but going by the Ruling the Judge said –

Basically this is an application to set aside an award of the Sole Arbitrator, the later (sic) Hon. F.N. (sic) Nyalali, the retired Chief Justice.

The Court is clothed with such powers. The same are provided under Section 15 of the Arbitration Ordinance, Cap. 15.

The judge also said the petitioner had inadvertently cited section 14 instead of section 15 of the Ordinance as the relevant provision under which the petition was made.

Judging from the manner the proceedings were entitled, it is obvious that Rule 6 of the Arbitration Rules, 1951, was followed. The Rule reads –

6. All petitions, affidavits and other proceedings under the Ordinance shall be entitled in the matter of the arbitration and in the matter of the Ordinance and reference shall be made therein to the relevant section of such Ordinance.

Now, the Arbitration Rules, 1957 are the Rules of Court which were made under section 20 of the Arbitration Ordinance. Section 20 of the Ordinance itself reads –

20. the High Court may make rules as to –

- (a) the filing of awards and all proceedings consequent thereon or incidental thereto;
- (b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto;

- (c) the staying of any suit or proceeding in contravention of a submission to arbitration; and
- (d) the general conduct of all proceedings in court under this Ordinance.

It seems to me, therefore, that proceedings under the Arbitration Ordinance are governed by Rules of Court which were made under section 20 of the Ordinance and not by the Civil Procedure Code, 1966. It follows that where an appeal is preferred against a decision of the High Court given under the provisions of the Arbitration Ordinance as was the case in the matter which is the subject for this application, paragraph (a) of sub-section (1) of Section 5 of the Appellate Jurisdiction Act, 1979 is inapplicable. I am satisfied that the relevant provision would be paragraph (c) of sub-section (1) of Section 5 of the Act. This means that respondent, in its appeal to this Court against the decision of Luanda, J. should have obtained leave of the High Court.

The ruling of the High Court was given on 30th July, 2003. Rule 43 (a) of the Court Rules requires that application for such leave

must be made in fourteen days after the decision sought to be impugned in the appeal. But until 5th November, 2003 when the present application was lodged no leave to appeal had been sought and obtained.

Mr. Bwahama has cited to this Court four decisions which he submitted were authority that where an appeal requires leave and such leave had not been obtained, the appeal was incompetent and should be struck out. The cases cited are **Shinyanga Region Cooperative Union (1984) Ltd. v. Pan African Corporation Ltd., Civil Appeal No. 70 of 1999** (unreported); **Asmin Rashid v. Boko Omari** [1997] TLR 146; **Willow Investment v. Mbombo Ntumba and Two others** [1997] TLR 93 and **Ludovick K. Mbona v. National Bank of Commerce** [1997] TLR 26.

Dr. Nguluma argued that the cases cited by Mr. Bwahama were distinguishable from the appeal which was filed by the respondent. For example, he said, in the **Shinyanga Region Cooperative Union (1984) Ltd** case this Court was not invited to consider if Section 5 (1) (a) of the Appellate Jurisdiction Act, 1979 was the relevant provision under which the appeal had been preferred.

Besides, he said, the decision of the High Court in that case was not on proceedings which originated in the High Court and the rights of the parties had not been conclusively decided and no decree had issued. On the other hand, Luanda, J. had sat in original jurisdiction and conclusively determined the rights of the parties in his decision resulting in a decree. Therefore, no leave was required in appealing against the orders given by the High Court.

In the appeal to this Court by **Shinyanga Region Cooperative Union (1984 Ltd. v. Pan African Corporation Ltd.**

a dispute had arisen between the parties and the High Court referred the dispute to arbitration. An award by the arbitrators was in favour of the appellants who filed it in the High Court. The respondents were dissatisfied and petitioned the High Court to remit the award to the arbitrators for reconsideration. The High Court agreed and ordered remittance. The appellants sought to appeal against that order. But the respondent in that appeal raised a preliminary objection to the effect that the appeal was incompetent as no leave to appeal had been sought and obtained under Section 5 (1) (c) of the Appellate Jurisdiction Act, 1979.

It is true, therefore, that indeed, in that appeal paragraph (a) of sub-section (1) of Section 5 of the Act was not considered. But what was of relevance there was that this Court found the appeal against the High Court Order came under S. 5 (1) (c) and that in such a case leave was necessary. What was of relevance was not that the decision was a decree or an order. In some decrees given by the High Court in its original jurisdiction, an appeal may need leave of the High Court. That is the import of Section 5 (1) (c). On the other hand some High Court Orders given in original jurisdiction can be appealed against without the need for leave. That is what is provided for in paragraph (b) of sub-section (1) of Section 5 of the Act. The thrust of Section 5 (1) of the Act, therefore, can be said to be this. Unless some other law provides differently, all decrees of the High Court in its original jurisdiction, given under the Civil Procedure Code, 1966, are appellable as of right, without the need for leave. Secondly, certain specified orders of the High Court in its original jurisdiction, whether or not under the Civil Procedure Code, 1966, are appellable as of right, without the need for leave. Thirdly, unless some other law provides differently, decisions of the High Court,

whether or not in its original jurisdiction, are appellable only with leave either of the High Court or of the Court of Appeal.

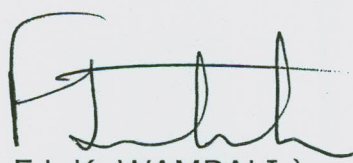
Once it is found, as is the case in the present application, that the respondent's appeal came under S. 5 (1) (c) of the Act, such appeal is incompetent because no leave was sought and granted and the cases cited by Mr. Bwahama, including the **Shinyanga Region Cooperative Union (1984) Ltd.** decision, are relevant.

The application is allowed and the respondent's Civil Appeal No. 83 of 2003 is incompetent and struck out. The notice of appeal in that appeal is also struck out for failure to take an essential step. The applicant will have its costs.

DATED AT DAR ES SALAAM this 21st day of November, 2003.

J. A. MROSO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(F.L.K. WAMBALI)
DEPUTY REGISTRAR