

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATIONS NO. 158 & 159 OF 2011**

**STANDARD CHARTERED BANK (HONG KONG) LTD.....APPLICANT**

**VERSUS**

**VIP ENGINEERING AND MARKETING LTD .....RESPONDENT**

**(Application for leave to amend the Notice of Appeal from  
the decision of the High Court of Tanzania**

**AND**

**Application for Extension of Time to apply for Stay  
of Execution)**

**(Kaijage, J.)**

**dated the 15<sup>th</sup> day of July, 2011**

**in**

**Consolidated Misc. Cause No. 49/2002 & 254/2003**  
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**RULING**

19 February & 22 February, 2012

**ORIYO, J.A.:**

On the 19<sup>th</sup> day of July, 2011, the law firm of ADEPT Chambers, under instructions of the **Standard Chartered Bank (Hong Kong) Limited**, (the Applicant herein), lodged in this Court a Notice of Appeal against a decision of the High Court in Miscellaneous Civil Cause No. 49 of 2002 and No. 254 of 2003 (Consolidated).

"In the matter of the Companies Ordinance Cap 212

**AND**

In the matter of the Arbitration Act, Cap 15

**BETWEEN**

VIP Engineering and Marketing Co. Ltd ..... Petitioner

**AND**

Independent Power Tanzania Ltd	}	..... Respondents"
Mechmar Corporation (Malaysia) Berhard		
Administrator General/Official Receiver		

The impugned decision of the High Court dated 15<sup>th</sup> July, 2011 was to the effect that the order sought by VIP Engineering Company Ltd, the respondent herein, that the Independent Power Tanzania Ltd (IPTL) be wound up, was granted. Subsequent thereto, an application for Stay of Execution by way of Notice of Motion was lodged under a Certificate of Urgency in this Court, in **Civil Application No. 91 of 2011** between **Standard Chartered Bank (Hong Kong) Ltd.** and **1. The Provisional Liquidator Independent Power (T) Ltd. 2. VIP Engineering Company Ltd.** The application was duly heard and determined by the Court in its ruling delivered on 21<sup>st</sup> November, 2011 whereby the application was struck out. Without going into the detailed ruling, suffice it to reproduce here the relevant part which is couched in the following words:-

*"In the totality of the foregoing we are satisfied that the application in its present form is both confused and confusing. It cannot therefore, be allowed to stand."*

On 30<sup>th</sup> November 2011, the same firm of Advocates, ADEPT Chambers acting for the applicant, filed two applications by way of Notices of Motion. In the first one the learned counsel applied for Leave to Amend the Notice of Appeal (i.e Civil Application No. 158/2011) and in the second one, (Civil Application No. 159/2011), sought an Extension of Time to lodge an Application for Stay of Execution. As with the former application in Civil Application No. 91 of 2011, both applications were accompanied by Certificates of Urgency.

On 16<sup>th</sup> January, 2012, the Court issued summons to parties that both applications were set down for hearing on 20<sup>th</sup> February, 2012. At the hearing, Mr. Nyika, learned counsel appeared for the applicant

and the respondent was jointly represented by Mr. Michael Ngalo and Mr. Respius Didace, learned counsel.

As stated, the applications by the bank were against VIP Engineering and Marketing Limited only. Though the name of Mr. Donald Chidowu, Principal State Attorney, is reflected in the **Coram** as appearing for the Liquidator of IPTL, however, the Liquidator was not cited as a party in the applications. The learned counsel for the applicant, Mr. Nyika, was not in a position to explain at such short notice, the omission to join the Liquidator of IPTL as an interested party. As a result, the Liquidator of IPTL was not heard.

On my part, due to the nature and importance of the subject matter and in view of my having taken part in the High Court Proceedings in Miscellaneous Civil Cause No. 49 of 2002 and Miscellaneous Civil Cause No. 254 of 2003 (consolidated) between **VIP Engineering Co. Ltd** on one part and 1. **IPTL** 2. **Mechmar Corporation (Malaysia) Berhard** on the other, I thought it

prudent to invite parties' opinion on whether they would be comfortable if I presided over these proceedings.

I prepared only a single ruling to cover both applications number 158 of 2011 and 159 of 2011 for the simple reason that the subject matter in controversy in the proceedings was the same – **whether there existed legal basis for the presiding justice of appeal to adjourn the matter for reassignment to another justice of appeal.**

Learned counsel for the applicant, Mr. Nyika, was given the first opportunity to express his opinion. He was frank enough to state that as I had taken part in the High Court proceedings, he was actually under instructions from his client to seek an adjournment so that the matter proceeds before another justice of appeal on the adjourned date. The respondent's counsel disagreed. They gave three reasons why they disagreed with the applicant. One, was that the applications were merely on procedural matters. Two, any orders to be made by the Court, were not substantive. Three, it was

not disclosed how the applicant was going to be prejudiced if the matter proceeded as shown in the Cause List.

As to the objection by Mr. Ngalo and Mr. Didace, learned counsel, that the applicant has failed to advance relevant reasons why the applicant will be more comfortable to proceed before another justice of appeal, I am inclined to agree with them. It is common knowledge that there must be sufficiently convincing reasons before a judicial officer disqualifies oneself from a suit. Otherwise the court will find itself in the position stated by this Court in the case of **The Registered Trustees of Social Action Trust Fund and Another Vs Happy Sausages Limited and Others** [2004] TLR 264:-

*"It is our considered view that it would be an abdication of judicial function and an encouragement of spurious applications for judicial officer to adopt the approach that he/she should disqualify himself/herself whenever requested to do so on application of one of the parties."*

In the above cited case, the Court adopted the following test which should be applied before a judicial officer disqualifies oneself. This test which was taken from the English Case of **Porter and Another Vs Magill** [2002] I A11 ER 465, states:-

*"The test for apparent bias is **whether the alleged circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the Court was biased.**" [Emphasis supplied]*

In the instant case, neither the circumstances in **Magill's** case nor in **Happy Sausages** case is applicable.

However, the above notwithstanding, I feel convinced that having taken part in the cited High Court proceedings, **justice will not only be done but will be seen to be done** if the applications were to proceed before another justice of appeal.

Accordingly, the applicant's application for adjournment is granted. Both applications are adjourned to another date to be fixed. I

have taken note of the complaint raised by the respondent that any further adjournment in the matter is in the interest of the applicant but conversely, detrimental to the respondent.

Looked at objectively, I think the complaint of the respondent may be meritorious. I am saying so because as earlier pointed out the summons for the hearing was issued on 16<sup>th</sup> January, 2012, after the Cause List for this Court Sessions which began from 13<sup>th</sup> February to 2<sup>nd</sup> March, 2012, had been available since January 6<sup>th</sup>, 2012. At page 3 of the Cause List, it is clearly shown that Civil Applications Nos 158/2011 and 159/2012 between the parties, were scheduled for hearing before **Oriyo, J.A.**, in Chambers at 8:45 a.m. on 20<sup>th</sup> February, 2012.

The applicant had ample time to have the hearing reassigned to another justice of appeal well before 20<sup>th</sup> February, 2012. Alternatively, the applicant had time to notify the respondent in advance that it would seek an adjournment of the hearing on 20<sup>th</sup> February, 2012. As the applicant failed to notify the respondent in advance of its intention to have the hearing adjourned, the respondent was misled that the



hearing was to proceed as scheduled on 20<sup>th</sup> February, 2012. The respondent, consequently, engaged two senior counsel to prepare and appear in court as scheduled to argue the applications, which was never to be.

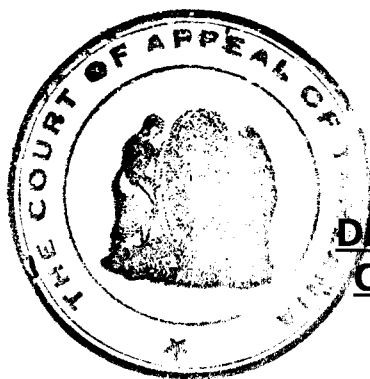
In the circumstances, I am constrained to grant costs of the adjournment to the respondent for two counsel.

Let the records in Civil Applications Number 158 of 2011 and 159 of 2011 be placed before the Honourable Chief Justice for reassignment to another justice of appeal.

DATED at DAR ES SALAAM this 22<sup>nd</sup> day of February, 2012.

K.K. ORIYO  
**JUSTICE OF APPEAL**

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



  
Z.A. MARUMA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**