IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A. And MWANGESI, J.A.)

CIVIL APPLICATION NO. 1/16 OF 2017

1. **MIC TANZANIA LIMITED**
2. **MILLCOM (TANZANIA) N.V.** ..... **APPLICANTS**
3. **MILLCOM INTERNATIONAL CELLULAR S.A.**
4. **SHAI HOLDINGS S.A.**

VERSUS

GOLDEN GLOBE INTERNATIONAL SERVICES LIMITED .....RESPONDENT

(Application from the Ruling and Order of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Mruma, J.)

dated the 2nd day of November, 2016

in

Misc. Commercial Cause No. 118 of 2016

RULING OF THE COURT

22nd June, & 24th July, 2017

MUSSA, J.A.:

On the 13th June, 2016 the respondent herein instituted a petition against the applicants in the High Court of Tanzania (Commercial Division), at Dar es Salaam. The petition, which was registered as Miscellaneous Commercial Case No. 118 of 2016, is predicated under the companies Act, No. 12 of 2002 and seeks a litany of prayers which are not quite of relevance

in the matter at hand. Going by the record of proceedings, upon institution, the petition was placed before Mruma, J. for hearing.

Before the commencement of the hearing, a certain Mr. Tumaini Sekwa Shija, who introduced himself as the Principal Officer of the first applicant, posted an affidavit on behalf of all the applicants who are respondents below. In the affidavit, the deponent expressed that the applicants have lost confidence in the presiding officer and, accordingly, urged Mruma, J. to recuse himself from the conduct of the hearing. In response, the presiding Judge invited counsel from either side to address him on the complaint and, having heard them, he retreated to compile a lengthy Ruling through which he declined the invitation to disqualify himself from the conduct of the matter. The Ruling was handed down on the 2nd November, 2016 and, apparently discontented, the applicants lodged the application at hand.

In the application, the Court is being moved to invoke its revisional jurisdiction and call for the proceedings as well as the impugned Ruling and drawn Order with a view to satisfy itself as to its correctness, legality, proprieties or otherwise and, where appropriate, quash and set it aside.

The application is by way of a Notice of Motion which is taken out under the provisions of sections 4(1), (2) and (3) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (AJA). The same is accompanied by an affidavit of the already mentioned Mr. Tumaini Sekwa Shija which was sworn on the 31st December, 2016. In addition, on the 2nd March, 2017 the applicants jointly enjoined written submissions to buttress their quest.

The application is being resisted by the respondent through an affidavit in reply which was sworn by Ms. Josephine Safiel on the 19th June, 2017. The respondent has just as well lodged written submissions to counter the applicants' contentions. Furthermore, the respondent greets the application with a Notice of preliminary points of objection to the following effect:-

> *"1. The Application is incompetent and bad in law for wrong citation of the enabling provisions of the law.*
>
> *2. The application is incompetent and unmaintanable as it seeks to revise a preliminary and or interlocutory decision of the High Court of Tanzania contrary to the provisions of section 5(2) (d) of the Appellate Jurisdiction act."*

When the application was called before us for hearing, the first applicant entered appearance through Mr. Cuthbert Tenga, learned Advocate who said he was holding brief for Mr. Rosan Mbwambo, learned Advocate, who happens to be his fellow partner at the Law Associates firm of Advocates. The second applicant was represented by another learned Advocate, namely, Mr. Wilbert Kapinga, whereas the third and fourth applicants had the services of Mr. Gaudiosus Ishengoma, also learned Advocate. On the adversary side, the respondent had the services of a consortium of learned Advocates, namely, Messrs Alex Mgongolwa, Semi Malima, Joseph Ndazi and Daniel Welwel.

At the commencement of the hearing, Mr. Tenga rose to inform the Court that Mr. Mbwambo who had the conduct of this matter travelled abroad and could not make it back yesterday as promised. While conceding that he is also a partner at the Law Associates firm, he, nevertheless, contended that it was his first time to appear in the matter at hand to which he was not fully versed. Thus, on the premise of unpreparedness, the learned counsel for the first applicant urged us to defer the hearing of the application to a future date. On their part, both Mr. Kapinga and Mr. Ishengoma supported and went along with the prayer.

In response, the respondent's team of advocates vigorously resisted the bid for an adjournment. Mr. Mgongolwa who addressed us on behalf of his colleagues argued that the prayer for an adjournment is not an open prayer. Rather, he said, in terms of Rules 59 of the Court Rules, it only avails upon the showing of good cause. Counsel further submitted that, while appreciating that it is common practice for law firms to assign each case to an individual lawyer, but the absence of such an assignee should not constitute an excuse for an adjournment, the more so as a firm of the like Law Associates has a number of Advocates. Furthermore, Mr. Mgongolwa reminded that the application at hand was jointly filed by three firms of lawyers who should be expected to jointly participate in reply to the preliminary points of objection just as they jointly lodged their submissions in support of the application.

Having heard counsel from either side, we were agreed that Mr. Tenga had not shown good cause to deserve an adjournment and, accordingly, we declined the prayer for adjournment and ordered the hearing of the preliminary points of objection to proceed. We, however, reserved the reasons for our refusal which we now briefly give.

As hinted upon by Mr. Mgongolwa, where the Court is called upon to adjourn an application, the instructive provisions are comprised in Rule 59 of the Tanzania Court of Appeal Rules, 2009 (the Rules) which stipulates:-

> " *The Court may,* ***upon good cause shown,*** *adjourn the hearing of an application upon such terms and conditions as to costs as it may think fit."*
>
> [Emphasis supplied]

To cull from the extracted provision, an adjournment does not avail to a party as a matter of course; rather, it may only be granted upon the showing of good cause by the party praying for an adjournment. What is more, from the wording of the provision, it is entirely upon the discretion of the Court to either grant or refuse a prayer for an adjournment, regard being had to the showing of good cause. The expression "good cause" is not defined by the Rules but, we should suppose, the same denotes adequate or substantial grounds or reasons to take action, or to fail to take any action prescribed by a due process. Thus, where, for instance, a cause is scheduled for hearing, as is the situation at hand, the burden is placed in the party seeking an adjournment to show adequate or substantial grounds to deserve a Court order departing from the prescribed schedule.

Again, we should suppose, such adequate or substantial grounds would not include a conduct constituting negligence, apathy or inadequacy on the part of the party seeking an adjournment. That is to say, for one to deserve an adjournment upon good cause, the desirous party must show that he/she diligently braced himself/herself towards a hearing and the disability to proceed was not a result of his/her sloppiness; rather, it resulted from an intervening event to which he/she was not blameworthy. We should caution though, that what constitutes good cause in the exercise of the Court's discretion to grant or refuse an adjournment varies from case to case depending on the particular circumstances of any given case. In any event, the overriding consideration is that a grant or refusal should not work to the prejudice of either party in the cause.

All said, in the matter at hand, it is beyond question that both Messrs Tenga and Mbwambo are partners on the Law Associates firm of Lawyers which jointly instituted this application with Wilbert B. Kapinga, Advocates and FB Attorneys. It is noteworthy that the Notice of Hearing was taken out on the 2nd May, 2017 and duly served on the Law Associates firm on 5th May, 2017, that is, more than a period of a month ahead of the scheduled hearing date. If, for whatever cause, Mr. Mbwambo was disabled

to attend on the scheduled date one would have expected him to promptly inform his law firm just as it was, indeed, in the best interests of the firm to arrange for an alternative counsel. To this end, we so find, counsel for the first applicant sloped around in dealing with this matter and, as impressively advised by Mr. Mgongolwa, his disorganization should not work to the prejudice of the adversary party. The application was jointly filed and it is our firm view that the first applicant will not be prejudiced as Mr. Tenga stands to immensely benefit from the other counsel from the joint applicants. So much for our reasons behind the refusal of an adjournment.

Addressing us on the respondent's preliminary points of objection, Mr. Ndazi who argued the points was very brief in his submissions in support of the first ground of objection. In a nutshell, his contention was that the application is incompetent on account of the fact that the inapplicable sections 4(1) and (2) of AJA which relate to appeals are wrongly cited along with the enabling section 4(3) of the Act.

As regard the second point of Preliminary Objection Mr. Ndazi submitted that it is beyond question that the impugned Ruling dated the 2nd day of November, 2016 is interlocutory in that it did not have the effect of finally determining the suit. Counsel further submitted that by the mere

fact that the impugned decision was preliminary, the application is expressly barred by the provisions of section 5(2) (d) of AJA and, in the result, the matter at hand is misconceived and incompetent.

In reply whilst conceding, with respect to the first ground of objection, that sections 4(1) and (2) are inapplicable, Mr. Kapinga contended on behalf of the applicants that the application is securely cured by the citation of section 4(3) which is the enabling provision. The learned counsel for the applicant urged us to simply ignore as innocuous the reference to the inapplicable sections 4(1) and (2). To fortify his position, Mr. Kapinga referred us to the unreported **Civil Application No. 151 of 2008 – Chama Cha Walimu Tanzania vs The Attorney General**. On the second point of preliminary objection Mr. Kapinga argued that the impugned order was not interlocutory since it dismissed and conclusively determined the applicants' complaint on the issue of the recusal of the presiding officer.

On our part, we have dispassionately weighed and considered the learned rival positions taken by counsel from either side. The first point of objection is, to us, easily disposable and, for that matter, it need not unnecessarily detain us. Granted that sections 4(1) (2) are inapplicable to the situation at hand but, as correctly formulated by Mr. Kapinga, the same

are mere *surplusage* which should simply be ignored so long as the enabling provision has been cited. We are, therefore, fully satisfied that the Court is properly seized of the matter with the citation of the enabling section 4(3) of AJA. The first point of preliminary objection is, thus, berefit of merits and, accordingly, the same is overruled.

As regards the second point of preliminary objection, the issue is whether or not the application before us is barred by the provisions of section 5(2) (d) of AJA as recently amended by Act No. 3 of 2016. For a better appreciation of the issue of contention, we think it is instructive to extract the relevant provision in full:-

> " *No appeal or application for revision shall he or be made in respect of any preliminary or interlocutory decision or order of the High Court* ***unless such decision or order has the effect of finally determining the suit."***
>
> [Emphasis supplied.]

We have purposely supplied emphasis on the foregoing extract to demonstrate that the proper test for determining whether or not an impugned order of the High Court is preliminary or interlocutory is patently

discernible from the language of the provision itself. That is to say, the test is whether or not the order desired to be revised had the effect of *finally determining the suit*. In this regard, we are minded to express at once that the impugned decision under our consideration did not have such effect, the more so as, despite the presiding officer's refusal to recuse himself, the suit was not extinguished and remains pending to date. In the result, we find merits in the second point of preliminary objection which is, accordingly, upheld and, in the final event, the application is inevitably struck out with costs.

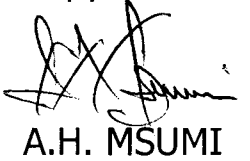
DATED at **DAR ES SALAAM** this 19th day of July, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL