IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPLICATION NO. 364/16 OF 2017

BETWEEN

BULYANHULU GOLD MINE LIMITED .....1ST APPLICANT
NORTH MARA GOLD MINE LIMITED .....2ND APPLICANT
PANGEA MINERALS LIMITED .....3RD APPLICANT

VERSUS

PETROLUBE (T) LIMITED ..... 1ST RESPONDENT
ISA LIMITED .....2ND RESPONDENT

(Application for leave to appeal against the Ruling and Order of the High Court of Tanzania (Commercial Division) at Dar es Salaam.)

(Mansoor, J.)

Dated 20th day of December, 2016
in
Consolidated Misc. Commercial Applications No. 269 and 270 of 2016
.....

RULING OF THE COURT

16th Oct, & 11th Nov, 2020

LILA, J.A.:

This is the second time the applicants are seeking leave to appeal to this Court. The High Court, vide Misc. Commercial Application No. 4 of 2017, refused leave to the applicants to appeal to this Court on the 4th August, 2017, hence this application termed in legal arena as a *second bite*. The motion is predicated on section 5(1)(c) of the Appellate

Jurisdiction Act Cap. 141 of the Revised Edition 2002 (the AJA) and Rules 45(a) and 47 of the Tanzania Court of Appeal Rules (the Rules) and is supported by an affidavit sworn by Abdon Rwegasira, the learned advocate for the applicants.

The following brief background facts will serve the purpose of appreciating the essence of the present application. It all started with Misc. Commercial Application No. 232 of 2016 before the High Court in which the applicants sought an order for stay of proceedings pending arbitration. As the lucky would have it to the respondents, when the application was called on for hearing on 26th October 2016, the applicants did not enter appearance hence the application was dismissed for want of prosecution. Being aggrieved, the applicants filed Consolidated Misc. Commercial Application No. 269 and 270 of 2016 seeking an order setting aside the dismissal order. Unfortunately, on 20th December, 2016 the application was dismissed. Still aggrieved, the applicants lodged a notice of appeal and later applied for leave to appeal to this Court vide Misc. Commercial Application No. 4 of 2017. As it were, the High Court was not inclined to grant leave to appeal on the ground that no sufficient reasons were advanced by the applicants. The application was accordingly dismissed for lack of merit. Following that refusal, the applicants have accessed the

Court, again, seeking leave.

The applicants' quest for leave is founded on five grounds which, in their view, call for the Court's adjudication. They are easily discernable in paragraph 11 (i)-(v) which reads:-

(i) Whether or not it was proper for the High Court (Mansoor J.) to hold that the innocent non-appearance of the applicants on the date set for hearing was/is due to the carelessness of the advocates, whom the applicants engaged to defend the suits filed against them and to pursue the application made on their behalf, in the absence of particulars and /or evidence of the carelessness of the said advocate.

(ii) Whether or not mishearing of the date of the case by the advocate or any party to a suit leading to non-appearance on the next hearing date of the case amounts to negligence and inaction of the advocate or a party.

(iii) Whether or not mishearing or misapprehension of the date of hearing of the case could not in the circumstance of the present application constitute sufficient reason within the purview of Order IX, Rule 9 of the Civil Procedure Code (Cap. 33 R.E. 2002)

(iv) Whether or not in deciding the application to set aside a dismissal

order, it was proper for the High Court to base its decision on extraneous matter instead of the applicable factors.

(v) Whether or not based on the affidavital evidence on record, the applicants' application to set aside a dismissal order did not contain sufficient materials upon which a Court could exercise its judicial discretion in favour of the applicants.

In contesting the application, the respondents filed an affidavit in reply which was sworn by Walter Boxton Chipeta, learned counsel for the respondents, and their main contention is that the applicants' counsel was present when the court scheduled the hearing date of the application hence his non-appearance was out of being careless.

At the hearing of the application before us, Mr. Timon Vitalis, learned counsel, appeared for the applicants whereas Mr. Jovinson Kagirwa, learned counsel, appeared for the respondents.

The applicants, in compliance with the provisions of Rules 106(1) and 34 of the Rules, lodged in Court written submission and a list of authorities in support of the application, respectively. On the rival side, the respondents lodged a list of authorities in opposition to the application and a notice of preliminary objection. They did not lodge written submission in reply to oppose the application.

The above notwithstanding, upon the Court's engagement of the learned counsel for the parties, it was agreed that it is not the duty of the Court, at this stage to determine the merits or demerits of the grounds for the grant of leave raised by the applicant but to determine whether they raise arguable issues before the Court. On that accord, Mr. Vitalis adopted the contents of the affidavit in support of the application, the list of authorities and only that part of the written submission not touching on the merits of the grounds for the grant of leave. He, accordingly, abandoned the rest of the written submission in support of the application.

Mr. Kagirwa, cognizant of the inclusion of the principle of overriding objective in the AJA vide Act No. 8 of 2018 under sections 3A and 3B and also the provisions of proviso to rule 48(1) of the Rules, he prayed to abandone the point of objection a notice of which he had earlier on 13/10/2020 lodged which touched on the applicants' non-citation of Rule 45(b) of the Rules as an enabling provision in the present application which is a *second bite*. That course paved way for Mr. Vitalis to urge the Court to invoke its powers under the proviso to Rule 48(1) of the Rules so as to insert Rule 45(b) of the Rules as being one of the enabling provisions which prayer was not objected by Mr. Kagirwa. We granted the prayer and accordingly effected the insertion sought.

Now reverting to the merits of the present application, the learned counsel for the parties were very brief and focused in their respective submissions for and against the grant of leave to appeal.

Amplifying the grounds for grant of leave to appeal, Mr. Vitalis started by pointing out a legal position that this Court has powers to determine the merits and demerits of this application on its own perspective without resort to what was said by the High Court by considering the principles governing the grant of leave to appeal. He went further to state that although grant of such leave is discretionary but the same must be exercised judiciously based on material facts availed to the Court. He argued that leave is granted if the proposed issues for consideration and determination by the Court raise points of law, facts or mixed law and facts. To cement his argument he referred the Court to the decisions in the case of **Rutagatina C. L. vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 and **British Broadcasting Corporation vs Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (both unreported). He insisted that the major point raised in this application is whether the mishearing of a date of hearing fixed by the High Court amounts to a good cause for setting aside the dismissal order for non-appearance of the applicants. That, according

to him, on the face of it, is a point of law worth of being considered by the Court on appeal. The determination of the merits or demerits of that issue is the exclusive domain of the Court after leave is granted and the appeal is lodged, he added. In conclusion, he argued that the issue disclosed is not frivolous, vexatious or imaginary. He prayed that the application be granted with costs.

In opposing the application, Mr. Kagirwa first adopted the contents of the affidavit in reply and made a very brief oral submission. Relying on the Court's decision in **British Broadcasting Corporation v. Eric Sikujua Ng'maryo** (supra), he argued that the grounds raised by the applicants for the grant of leave in the present application are not embraced in the test set in the cited case. He attributed the mishearing of the date by the applicants' counsel to negligence. He stressed that since the purpose of seeking leave to appeal as expounded by the Court in the case of **(i) Harban Haji Mosi (ii) shauri Haji Mosi vs (i) Omar Hilal Seif (ii) Seif Omar**, Civil Reference No 19 of 1997 (unreported) cited in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra) is to spare the Court the specter of unmerited matters and to enable it to give adequate attention to cases of true public importance, then the Court should not grant the application it being frivolous and vexatious. He

impressed upon us to dismiss the application with costs.

In his short rejoinder, Mr. Vitalis maintained that the grounds for the grant of leave in terms of the Court's decision in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra) are very wide in that the applicant has only the duty to raise an arguable issue either of law or fact for the Court's consideration. He insisted that the issue whether the mishearing of the date of hearing by the counsel amounts to good cause to set aside the dismissal order is an issue worth the Court's consideration on appeal. He stuck to his guns that such an issue was raised before the High Court and is real, not imaginary, not frivolous or vexatious as Mr. Kagirwa sought to convince us.

Having seriously considered both the record and the submissions made by the counsel for the parties, we wish to make a general observation that the order dismissing the application for setting aside the dismissal order for want of appearance which the applicants intend to assail if leave is granted was rendered by the High Court. The requirement to seek and be granted leave to appeal to the Court before lodging an appeal against decree, order, judgment decision or finding of the High Court other than those outlined under section 5(a) and (b) of the AJA is entrenched in section 5(1) (c) of the AJA. And, from the supporting

affidavit, affidavit in reply, the applicant's written submission as well as the arguments by the counsel for the parties before us, it is plain and certain that the counsel for the parties agree on the conditions upon which leave to appeal to the Court is grantable. Such conditions were, with lucidity, expounded by the Court in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra). In that case, as cited in the case of **Rutagatina C. L. vs The Advocates Committee and Another** (supra), the Court stated that;

> *"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal 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 (see:* ***Buckle v Holmes*** *(1926) ALL E. R. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

On the foregoing authority, there is no doubt that grant of leave is not automatic, but conditional in that it can only be granted where the

grounds of the intended appeal raise arguable issues in the appeal before the Court. The grounds raised should merit a serious judicial consideration by the Court. The rationale for this condition was well stated by the Court in the case of **(i) Harban Haji Mosi (ii) shauri Haji Mosi vs (i) Omar Hilal Seif (ii) Seif Omar** (supra) cited in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra) that is to spare the Court from unmerited matters.

In the instant application, the central issue for our determination is whether the grounds raised by the applicants are embraced in the conditions set out in the above decisions of the Court for the grant of leave to appeal. From the factual setting in this application, the applicants intends to challenge the decision of the High Court dismissing the application to set aside the dismissal order for want of prosecution of their application for stay of the proceedings pending the arbitration. In dismissing the application, the High Court was not ready to accept as good cause for non-appearance of the applicants and/or their advocate on the date set for hearing of the application that the learned counsel misheard the date of hearing and he recorded the date wrongly as a result of which he did not appear in court on the date of hearing. As demonstrated above, the applicants now seek leave of the Court to appeal so as to assail the

High Court order of dismissal. The major issue on which the applicants have anchored their request for leave is whether mishearing of the date of hearing by the learned counsel amounts to good cause for setting aside a dismissal order. While Mr. Vitalis was insistent that the issue raised qualifies to be an arguable issue worth determination by the Court, Mr. Kagirwa was of a different view and adamantly refuted the contention arguing that the issue is frivolous and vexatious.

At the outset we wish to state, as conceded by counsel for the parties and in particular Mr. Vitalis, that the application before the High Court was for leave to appeal to the Court and not for determination whether the proposed issues had merit or not. In that accord, we are not expected to consider whether the learned judge was justified to refuse to grant leave to the applicants. Instead, this being a *second bite,* as rightly argued by Mr Vitalis, we are entitled to examine the very grounds raised before the High Court on our own perspective and come up with a finding we consider just. It follows therefore that, closely examined, the greater part of the applicants' submissions appear to have been aligned to fault the finding of the learned judge. Suffice it to say that we are not sitting on appeal against the learned judge's findings. And, in line with that, we shall consider the grounds for seeking leave in isolation of the submissions

seeming to challenge the findings of the learned High Court Judge.

We have, before we proceed to determine the merits or otherwise of this application, found ourselves compelled to consult dictionaries so as to appraise ourselves with the meaning of the terms frivolous and vexatious. The **Academic's LEGAL DICTIONARY,** 22nd Edition by S. L. Silwan defines the terms, at page 155, thus:

(i) **Frivolous and vexatious complaint** to mean: A complaint put in against any person for the purpose of annoyance.

(ii) **Frivolous** to mean: Clearly lacking in substance, clearly insufficient as a matter of law.

In almost similar words, the **CONCISE OXFORD DICTIONARY**, Tenth Edition defines the term:

> **Vexatious** to mean: causing annoyance or worry, and brought without sufficient grounds purely to cause annoyance, and

Although the counsel for the parties agree to the principles applicable in considering and grant of leave to appeal to the Court, they have parted ways on whether the issues raised by the applicants constitute good cause for grant of leave to appeal. It is our view, having carefully considered the meaning of the terms frivolous and vexatious; nothing suggests that the

issues raised by the applicants fall under any of those classifications. To the contrary, the issues were raised before the High Court as reflected at pages 5 and 6 of the ruling but did not find purchase with the presiding judge. The applicants' application was dismissed because those grounds were not accepted by the learned judge to be good causes to warrant setting aside the dismissal order. The grounds cannot, by any stretch of imagination, be said to be frivolous and vexatious. Unfortunately too, even Mr. Kagirwa did not offer any explanation supporting his contentions. Instead, from the wide range of grounds for grant of leave explicit in the wording of the above quoted excerpt from the Court's decision in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra), we are firm that the grounds brought to the fore by the applicants raise important issues meriting judicial consideration by the Court on appeal.

Just as a matter of guidance, we wish to emphasize that the duty of a court in applications of this nature is not to determine the merits or demerits of the grounds of appeal raised when seeking leave to appeal. Instead, a court has only to consider whether the proposed issues are embraced in conditions set in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra). For clarity, we wish to

borrow the words of the presiding High Court judge which we find to be a proper stance of the law at page 15 of the typed judgment where she stated that:-

> *"Another principle which I think is worth consideration is that at this stage the court is not supposed to look at nor make a finding on the merits or demerits of the intended appeal. It is not the duty of this court to examine the details of the proposed issues."*

The foregoing learned judge's expression accords with the well-established principle of law that in applications of this nature courts should avoid making decisions on the substantive issues before the appeal itself is heard. That stance was pronounced by the Court in the case of **The Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (unreported) in which it stated that:-

> *"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..."*

Certainly, deciding at the stage of applying for leave whether the grounds raised have merits or not is to travel beyond the mandate of the court faced with such an application. Such a court should confine itself to the determination whether the proposed grounds raise an arguable issue(s) before the Court and leave it for the Court, in the event leave is granted, to determine the merits or otherwise of such proposed issues. This accounts for the reason why the Court did away with the requirement to consider whether "*the appeal stands chances of success*" on appeal as a ground for granting leave to appeal or extension of time to appeal.[See **Murtaza Mohamed Raza Virani vs Mehboob Hassanali Versi**, Civil application No. 168 of 2014 and **Victoria Real Estate Development Limited vs Tanzania Investiment Bank and Three Others**, Civil Application No. 225 of 2014 (both unreported)].

The above said, we are satisfied that the grounds raised by the applicants raise serious issues of law and facts worth consideration by the Court. We accordingly allow the application and hereby grant leave to appeal to the applicants to appeal to the Court against the ruling and order of the High Court of Tanzania (Commercial Division) in Consolidated Misc. Commercial Applications No. 269 and 270 of 2016 dated 20/12/2016. The appeal shall be lodged within sixty (60) days of the delivery of this ruling.

Costs shall abide by the outcome of the intended appeal.

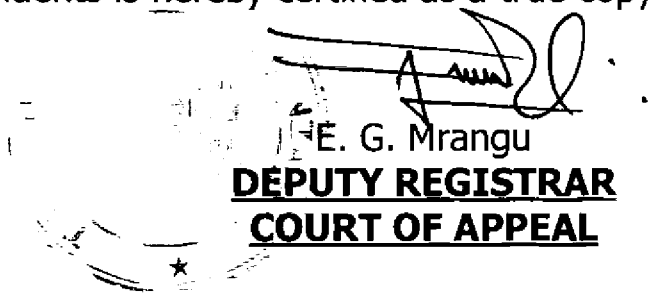
DATED at **DAR ES SALAAM** this 9th day of November, 2020

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 11th day of November, 2020, in the presence of Mr. Timon Vitalis Counsel for the Applicants and Mr. Jovinson Kagirwa Counsel for the Respondents is hereby certified as a true copy of the original.



E. G. Mrangu
DEPUTY REGISTRAR
COURT OF APPEAL