IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMPASHI, J.A. And MDEMU, J.A.)

CIVIL APPLICATION NO. 647/01 OF 2023

THE ATTORNEY GENERAL... APPLICANT

VERSUS

MIRAGE LITE LTD..1ST RESPONDENT

AIRTEL TANZANIA LIMITED..................................2ND RESPONDENT

(An application to intervene/join as an interested party in the application pending in the Court of Appeal of Tanzania, at Dar es Salaam)

Civil Application No. 265/01 of 2023

RULING OF THE COURT

10th & 21st November, 2023

MDEMU, J.A.:

In this application, the applicant moved this Court under the provisions of rule 48 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and section 17 (1) and (2) of the Office of the Attorney General (Discharge of Duties) Act, Cap. 268 (hereinafter referred to as the Discharge of Duties Act) and rule 4 (1) (h) of the Office of the Solicitor General (Establishment) Order, GN. No. 50 of 2018, for it to intervene in Civil Application No. 265/01 of 2023 between Airtel Tanzania Limited and Mirage Lite

Limited as a party having interest. The application is by way of notice of motion and is supported by the affidavit of one Lukelo Samwel, Principal State Attorney.

This application came first for hearing on 7th November, 2023. At the instance of the first respondent through Mr. Joseph Rutabingwa, learned Advocate, who represented the first respondent, an order was made to the effect that the applicant herein should submit in Court a copy of the application which is intended to be intervened (referred to as "the application" or "the document") for the Court to satisfy itself of its existence. Hearing of the application was thus adjourned to 10th November, 2023 to pave way for the applicant to comply with the Court's order.

At the inception of the hearing of the application on the appointed date, that is on 10th November, 2023, the applicant through Mr. Stanley Kalokola assisted by Ms. Luciana Kikala, both learned State Attorneys, informed the Court to have filed a supplementary record to which a copy of the said application is annexed as ordered by the Court. Mr. Joseph Rutabingwa, as was on 7th November, 2023, represented the first respondent whereas

the second respondent had the services of Mr. Libent Rwazo, also learned Advocate.

This time, Mr. Rutabingwa rose and resisted a copy of the document to be received by the Court on account that it was not filed in Court in the form of filing a supplementary affidavit in terms of rule 49 (2) of the Rules. As per the record, the resisted copy of the document was filed by way of supplementary record. Amplifying on his stance, Mr. Rutabingwa submitted that, as the instant application is by way of the notice of motion supported by an affidavit, the only procedure available to submit a copy of the application to be intervened is through filing a supplementary affidavit. His second understanding in resisting the reception of the document is that, section 17 (1) of Cap. 268 prescribes certain types of proceedings to be intervened, thus assessment of such a document by the Court require certain procedures to follow for that document to have its way in Court. He therefore urged us not to receive the document on that account.

Mr. Rwazo on his part could not find substance in the objection. His was that, first, had Mr. Rutabingwa prior conceived

the relevance of physical availability of the document in Court, then he would have deposed so in an affidavit in reply. Second, on the date the applicant was ordered to submit the document in Court, both the applicant and the second respondent's counsel as well as the Court were ready to take judicial notice regarding its existence guided by, among others, the concession of Mr. Rutabingwa to have knowledge on the pendency of the application to be intervened. His third observation in resisting the objection was that, the Court did not prescribe the modality of submitting the said document in Court.

On his part, in resisting the objection, Mr. Kalokola submitted first that, as the Court did not prescribe modality of submitting that document, then the procedure taken to have it in Court through supplementary record may not be faulted. Second, according to the learned State Attorney, rule 49 (2) of the Rules insisted by Mr. Rutabingwa to be the enabling provisions, cannot apply in the instant scenario because the applicant never applied formally or informally to file a supplementary affidavit. Third, it is premature, in Mr. Kalokola's mind, to rely on section 17 (2) of Cap. 268 because whether or not there is competent proceedings in Court for

intervention, then that is the subject of discussion, and in fact, is what have to be determined at the hearing of the instant application.

His Fourth concern was that, Mr. Rutabingwa in an affidavit in reply never contested on the existence of the application to be intervened deposed under paragraphs 4 and 5 of the supporting affidavit and fifth, as the application is in the office of the Registrar, then the Court may take judicial notice regarding its existence.

In his brief rejoinder, Mr. Rutabingwa's stance was that, since the Court did not prescribe modalities for filing the document as conceded by the learned State Attorney, it was up to the applicant to follow the procedure stipulated in rule 49 of the Rules. Rejoining on the import of section 17 (1) of Cap. 268, the learned counsel submitted that, the Court needs to satisfy itself on the nature of the application to be intervened, hence its existence may not be ignored. He finally alluded that, this Court may neither take judicial notice of the existence of the document because the evidence does not fall within the meaning of section 59 of the Evidence Act, Cap.6 nor may it reopen what was discussed prior leading to the issuance

of an order of this Court for the applicant to submit the said application in Court.

We have heard and carefully considered submissions of all learned counsel for and against the raised objection. As observed in the foregoing, all through, Mr. Rutabingwa's objection is paged on the understanding that, the available procedure for applicant to have a copy of the application in Court is through a supplementary affidavit, no more no less. In the circumstances of this objection, with respect to the learned counsel, we are unable to take that stance. We have reasons for the position we have taken, but for ease of reference, we are reproducing verbatim rule 49 (2) of the Rules as follows:

> *49 (2). An applicant may, with the leave of the Court or with the consent of the other party, lodge one or more supplementary affidavits and an application for such leave may be made informally.*

In the foregoing reproduced rule, and as observed by the learned State Attorney, there was no any application initiated by the applicant formally or informally to lodge a supplementary affidavit

within which this Court may base in importing the application of rule 49 (2) of the Rules. This is our **first** reason in not sustaining the objection.

Second, much as our order dated 7th November, 2023 did not prescribe the modality of submitting the document in Court, that in itself did not mean the applicant should, by all standard, rely on rule 49 (2) of the Rules in absence of leave of the Court to do so or with consent of the first respondent herein, preceded by formal or informal application by the applicant. **Third**, Mr. Rutabingwa all through conceded not only to have requisite knowledge on the existence of the document and its contents thereof of which the intervention is sought for but also was served with the said document and in fact it is in his possession. **Fourth**, according to the observation of the learned State Attorney, which Mr. Rwazo for the second respondent conceded and which we entirely associate with, the contents of paragraphs 4 and 5 of the supporting affidavit contain information regarding existence of the application, and therefore, there was nothing to incorporate in the supplementary affidavit, if at all it was necessary in law to have any.

Fifth, as we alluded to, Mr. Rutabingwa have the requisite knowledge on the existence of the application and its contents thereof. The depositions in the affidavit in reply sworn by himself on 7th September, 2023 in paragraphs 4 and 5 proves this assertion but it contains nothing regarding physical availability of the application to be intervened. If at all it was relevant to have it physically in Court, the reason for remaining silent in the depositions are not apparent in the record. It was only averred by Mr. Rutabingwa in his oral submission, which, being a mere statement from the bar, in our view, is not evidence. See **The Director of Public Prosecutions v. Josephat Joseph Mushi & Another**, Criminal Appeal No. 471 of 2019 (unreported). Let the two paragraphs in an affidavit in reply speak by itself as follows:

> *4. That, the matters stated under paragraph 4 of the affidavit of the applicant are within the knowledge of the deponent.*
>
> *5. That as regards to paragraph 5 of the affidavit of the applicant, save for the letter annexture OSG-3, the contents of that paragraph 5 are disputed. The Solicitor General had by then entered appearance on behalf of the applicant*

in an application involving the parties namely, execution No.22 of 2023 at the High Court of Tanzania, Dar es Salaam District Registry and was therefore aware of the proceedings.

Sixth, absence of the copy of the application at the hearing of the instant application for joining an interested party, in the circumstance of this application where Mr. Rutabingwa is fully aware of its existence, its contents and in fact it is in his possession, in our view, will not prejudice the first respondent. Therefore, we made our order for the applicant to bring the document in Court just for the interest of justice and not that the hearing of the application could not have proceeded unless the document is in Court. In it therefore, we are not offended with the modality deployed by the applicant to have the document in Court in the form of filling a supplementary record.

Having said it all and as observed by the learned State Attorney and Mr. Rwazo for the second respondent, we find the objection raised by Mr. Rutabingwa resisting the Court to receive a copy of the application to be intervened is without substance and we accordingly overrule it. In the meantime, we adjourn hearing of

the application to the next convenient session of the Court as it will be fixed by the Registrar. The first respondent to bear costs of the hearing of this preliminary objection.

It is so ordered.

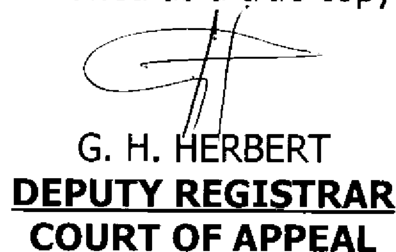
DATED at **DAR ES SALAAM** this 20th day of November, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 21st day of November, 2023 in the presence of Ms. Mariam Allen Matovolwa, State Attorney for the Applicant while Ms. Evodius Rutabingwa, learned counsel for the 1st Respondent and Mr. Gaspar Nyika, learned counsel for the 2nd Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL