

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

MISC. CIVIL APPLICATION NO. 35 OF 2019

THE PERMANENT SECRETARY MINISTRY

OF WATER & IRRIGATION.....1ST PLAINTIFF

THE ATTORNEY GENERAL2ND PLAINTIFF

VERSUS

OVERSEAS INFRASTRUCTURE ALLIANCES

(INDIA) PVT LTD1ST DEFENDANT

RULING

Hearing date on: 07/02/2020

Ruling date on: 14/2/2020

NGWEMBE, J:

This application is the second bite of the applicants after failure of the first application for review. The applicant in this time is seeking leave of this

court to appeal to the Court of Appeal against the ruling on Misc. Civil Application No. 32 of 2019 delivered on 8th November, 2019. The review was born out of the ruling in Misc. Civil Application No. 02 of 2019 delivered on 25th July, 2019. To justify this application, the applicants moved this court under certificate of extreme urgency and by citing section 5 (1) (c) (2) (d) of the Appellate Jurisdiction Act Cap 141 R.E. 2002 and section 95 of Civil Procedure Code Cap 33 R.E. 2002. Further the application was supported by an affidavit of Nunu Twalib Mangu, senior State Attorney in the office of the Attorney General, stationed at Mtwara. The State Attorney in her affidavit, narrated the story, which put the parties in assander, in 19 paragraphs of the affidavit, in support to the chamber summons.

In turn, the respondent counted the application by filing a Counter Affidavit affirmed by Yassi Maka, identified as a resident of India and advocate in Tanzania. Together with his counter affidavit, he filed a Notice of Preliminary Objection comprising two grounds to wit; *(a) Application is misconceived; and (b) Paragraphs 18 and 19 of the affidavit have not been verified.*

On the hearing date of those grounds of objection, the respondent/objector, abandoned ground one and proceeded to argue the second ground of objection. However, before commencement of hearing of the ground of objection, the learned State Attorney, Mr. Benson Hosea who was assisted by Stanley Mahenge a co-State Attorney, conceded to the objection and prayed paragraphs 18 & 19 be expunged. Consequently, this

court granted the prayer made by the learned State Attorney and proceeded to expunge paragraphs 18 & 19 of the applicant's affidavit. In turn both parties agreed to proceed with hearing of the main application.

Having disposed of the preliminary objection, the learned State Attorney Benson Hosea, was invited to argue the main application. In his argument, he submitted that the gist of the application is to seek leave of this court to appeal to the Court of Appeal against the ruling of this court delivered on 8th November, 2019. Further raised an acceptable cardinal principle of law that in application like this, the applicant should establish and justify that the intended appeal has likelihood of success. He referred this court to the case of **Haji Mosi & Another Vs. Omar Hilary Sif & Another [2001] TLR 409**. Argued further that, there are disturbing features in both rulings of this court, which need to be considered and corrected by the Court of Appeal. The disturbing features are disclosed in paragraphs 14 to 17 of the affidavit, in support to the Chamber Summons.

He expounded that paragraph 15 of the affidavit is related to the right to be heard. That the applicants were condemned unheard, and in paragraph 16 the applicant alleges to have observed serious irregularities in the ruling of the court, specifically, in pages 17 & 18 of the ruling which requires to draw the attention of the Court of Appeal. Lastly, paragraph 17 is on jurisdiction of the court itself to determine rights of the parties. To justify his arguments, he referred this court to the case of **Univeler Tanzania Ltd Vs. Benedict Mkasa t/a BEMA Enterprises, Civil Appeal No. 41 of 2009**. He rested his submission by advancing a prayer to the effect that

the application be granted so as to allow the applicants to exercise their rights to be heard by the court of last instance in our jurisdiction (Court of Appeal).

In turn the respondent procured the legal services of learned advocate Yassin Maka, who strongly resisted the application by narrating the genesis of the dispute holding them in loggerhead, that is a termination of contract for water supply project at Lindi region. This court granted maintenance of status quo ante, pending final determination of the arbitration.

Further, argued that, the application for leave to appeal to the Court of Appeal is misconceived for the applicants have no justifiable reasons to appeal. The alleged grounds as contained in paragraphs 14 to 17 are misplaced and are contrary to Order XLII Rule 7 (1) of Civil Procedure Code Cap 33 R.E. 2002. He referred this court to **Mulla Code of Civil Procedure (8th Edition)** at pages 3686 rule 7 to the effect that rejection of review is not appealable, but does not bar the appellate court to hear against the original decree. As such, the applicants ought to appeal against the original order not the review order. To justify his argument, he referred this court to the judgement of **Paul Kweka & Another Vs. Ngorika Bus Service & Another, Civil Appeal No. 129 of 2002.**

More so, he argued on validity of the application itself, that the applicant intends to appeal against an interlocutory order, since the alleged offending ruling of this court did not determine parties' rights. Therefore, the ruling for review is neither appealable nor did it revive their contract.

Finally, he rested his submission by inviting this court to dismiss the application and each party to bear his own costs.

In brief rejoinder, the learned State Attorneys rejoined that the original ruling revived the contract and the review supported the revival of the terminated contract. On whether a ruling on review is appealable or not, he answered in affirmative by referring this court to the Ruling of the Court of Appeal in **Mariam Ismail Vs. Salum H. Machwiko, Civil Application No. 6 of 2007**. Thus, he reiterated his submission in chief.

Having summarized the well-researched submissions of learned counsels, first I would like to point out one legal issue apparent on the pleadings of the parties, which I noted in the cause of composing this ruling. That the counter affidavit was affirmed by the learned advocate Yassin Maka who is identified as an advocate but a resident of India. Partly of his counter affidavit is quoted hereunder:-

*"I, Yassin Maka, adult, Male, Moslem, of sound mind,
a resident of India, do hereby affirm and state as follows"*

An immediate issue which came to my mind, is to verify the particulars of the advocate, if it is true, that he is an advocate, registered in the rolls of advocates in this country. If so, whether he has a working permit to work as an advocate in this country from India. Technology helped me to access his particulars in the roll of advocates. Indeed Mr. Yassin Maka is in the roll of advocates registered as No. 6534, his full name is Yassin Mwaitenda Maka an active advocate. The question remained, if at all, he is from India,

whether he has a working permit to work as an advocate in this country? To answer this question, I think, the reference of being a "resident of India," must be a slip of a pen or unconscious mistakes or is purely out of rushing hours, copy and past without verification of its correctness. I therefore, find no harm to the contents of his affidavit in opposition hence I need not to build mountain out of it.

The second legal issue is related to validity of the application itself. The applicants are seeking leave of this court to appeal to the Court of Appeal against the ruling, which rejected the application for review. An immediate question is whether the rejection of review is appealable and what does the law provide? To answer this question, the learned advocate Yassin Maka was firm in his submission, that it is not appealable as per Order XLII Rule 7 of CPC. In the contrary, the learned State Attorney, argued quite convincingly, that it is appealable as per the ruling of the Court of Appeal in **Mariam's case (Supra)**. For easy of reference and for clarity, Rule 7 of Order XLII is quoted hereunder:

*"An order of the court **rejecting the application shall not be appealable**; but an order granting an application may be objected to, on the ground that the application was:-*

- (a) In contravention of the provisions of rule 2;*
- (b) In contravention of the provisions of rule 4; and*
- (c) After the expiration of the period of limitation prescribed therefor and without sufficient cause.*

And such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit"

This rule is so clear that does not require an intellectual legal interpretation. It is clear that rejection of review is not appealable. In the contrary, as rightly submitted by learned State Attorney backed by the contents of the ruling of the Court of Appeal in **Mariam Ismail** (Supra) it is appellable, Justice of Appeal Msoffe, J.A: at page 4 had this to say:-

"As already observed, the High Court dismissed the application for review. It occurs to me that since the application was dismissed the remedy was to appeal against the said decision"

Justice of Appeal Msoffe, allowed the dismissed application for review to be appealed because the High Court judge used the term dismissal in its decision. However, Judge Dyansobera in his ruling dated 8.11.2019 used the term rejection instead of dismissal as quoted hereunder:

"On the account, the application is rejected under Order XLII Rule 4.(1) of Civil Procedure Code"

The question is whether there is any difference between rejection and dismissal of an application? Whether the effect is the same when an application is rejected or dismissed? **Black's Law Dictionary** (8th Edition) at page 502, defines the term dismissal to mean *"termination of an action or claim without further hearing especially before the trial of the issue*

involved” On the other hand, rejection is a *refusal to accept*. The question is whether the two terms have different consequences? Following the doctrine of the court Precedents and its hierarch that the decision of the Court of Appeal in our jurisdiction is binding upon all subordinate courts, including the decision of **Mariam’s case**, as quoted above. On this ground alone I would grant leave to appeal to the Court of Appeal with a view to allow the Court of Appeal to provide the right perspective in respect to this issue. However, I intend to discuss further on the alleged revival of a terminated contract, as argued by the learned counsels before I arrive to the conclusion.

In this court, the applicants are seeking leave to exercise their constitutional right to appeal to the Court of Appeal. The personal rights to appeal to the superior court is guaranteed by the constitution under Article 13 (6); such right is accompanied with right to be granted leave to appeal, if there is a real legal issue to draw the attention of the Court of Appeal. To deny leave is equal to denying an aggrieved person/party, a right to exercise that constitutional right of appeal. In the circumstances, I am reminded with the reasoning of Judges of the East African Court of Appeal in the case of **Essaji Vs. Sollank [1968] EA 201** at page 224 when they held:-

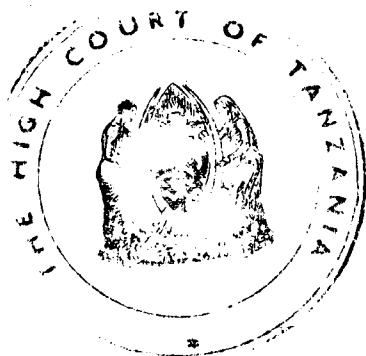
“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessary debar a litigant from the pursuit of his rights”

In this application, the applicants have raised the issue of termination of contract, which was entered between the two disputants. In paragraph 15 of the affidavit, the applicants have vehemently lamented that when the court ordered maintenance of *status quo ante*, touched the merits of the arbitration case, with the effect of vacating the termination of contract effected from 2nd October, 2018. This issue alone raises another serious legal issue, if at all, the Contract was already terminated, whether such order had the effect of reviving it or otherwise? If the court order revived the terminated contract, the question is whether the court was seized with jurisdiction to revive the already terminated contract? Whether the alleged contract was indeed revived by this court's order? These questions and others asked prior, are quite important to draw the attention of the Court of Appeal with a view of providing guidance to the subordinate courts.

In totality, I am convinced that there are valid reasons to grant leave to the applicants to appeal to the Court of Appeal, thus the application is meritorious, same is granted. The applicants may commence the process of appeal to the Court of Appeal within twenty (20) days from the date of this ruling.

I Accordingly Order.

DATED at Mtwara this 14th February, 2020



A handwritten signature in black ink, appearing to be "P. J. Ngwembe", is written over a horizontal line.

P. J. NGWEMBE

JUDGE

14/02/2020

Court: Ruling delivered at Mtwara in Chambers on this 14th day of February, 2020 in the presence of Ms. Nunu Mangu, Senior State Attorney for the Applicant and in the presence of Ms. Lightness M. Rwehumbiza, Advocate for the Respondent.

Right to appeal to the Court of Appeal explained.



A handwritten signature in black ink, appearing to be "P.J. NGWEMBE", is written above the printed name.

P.J. NGWEMBE

JUDGE

14/02/2020