

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 242 OF 2020

(Arising from ruling Misc. Application No. 82 of 2020, Hon. Mlyambina J,
dated 25th September 2020, Original Civil Case No. 165 of 2019)

PANGEA MINERALS LIMITED.....1st APPLICANT
ACACIA MINING PLC 2nd APPLICANT
BARRICK GOLD CORPORATION..... 3rd APPLICANT

VERSUS

BISMARCK HOTEL MINING COMPANY LIMITED RESPONDENT

RULING

11th May, 2021.

E. E. KAKOLAKI J

By way of chamber summons supported by affidavits of the Sinare Zaharan advocate for the applicants and pursuant to the provisions of section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2002] (AJA) the applicants have moved this Court for the following orders:

- (1) The Hon. Court be pleased to grant leave to the Applicants to appeal to the Court of Appeal of Tanzania against the decision of the

Honourable Court made on 25/09/2020 in Misc. Application No. 82 of 2020 between the parties herein.

- (2) Costs of this application abide the result of the intended appeal; and.
- (3) Any other order as the Hon. Court shall deem fit to grant.

Briefly the application before the court emanates from the decision of this court in Misc. Application No. 82 of 2020 whereby the applicant's application for security for costs against the respondent was dismissed by this court on 25/09/2020 before my brother Mlyambina J. Discontented and intending to challenge the said decision the applicant lodged a Notice of Appeal to the Court of Appeal hence the present application for leave to appeal to the Court of Appeal as a mandatory requirement of the law brought under section 5(1)(c) of AJA. The application is vehemently resisted by the respondent through counter affidavit and both parties with leave of the court agreed to have the application argued by way of written submission in which filing schedule orders were set and complied with. To that effect the ruling date was also set. It transpired however that, before the applicants could file their submissions in chief in support of the application without leave of the court filed a supplementary affidavit in support of the application, the result of which moved the respondent too to respond by filing a counter affidavit to the supplementary affidavit. Both parties proceeded adopt the wrongly filed affidavits and premise their respective arguments therein.

In view of that confusion and before composing this ruling the court summoned parties to explain on what happened and its consequences. Both parties appeared on the 11/05/2020 ready to address the court represented

by Mr. Sinare Zahran for the Applicants and Mr. Seni Malimi for the Respondent, both learned counsels. On being prompted by the court remark on the competence of the application Mr. Zahran for the applicant informed the Court that after going through the respondent's submission was conceding to the fact raised therein that the order sought to be appealed against is not appealable under the provisions of section 5(2)(d) of AJA. He therefore pressed the court to strike out the application for want of competence but without costs. Mr. for the Respondent gentle as he was commended Mr. Zahran for his early concession to the point raised and did not object the applicants' prayer for waiver of costs.

It is true as raised by the Respondent and conceded by Mr. Zahran for the applicants that the law under section 5(2)(d) of AJA prohibits appeal arising from the orders that do not determine the charge or suit conclusively. The provision provides thus:

"No appeal or application for revision shall lie against 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 charge or suit."

The above cited provision was tested in a number of cases some of which are **Tanzania Motor Services Ltd & Another v. Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2006; **Murtazar Ally Mangungu v. The Returning Officer for Kilwa North Constituency & 2 Others**, Civil Application No. 80 of 2016, **JUNACO (T) Ltd & Another v. Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 and **Vodacom Tanzania Public Limited Company v. Planetel**

Communications Limited, Civil Appeal No. 43 of 2018(all Court of Appeal decisions unreported). In **Vodacom Tanzania Limited Public Company** (supra), the Court of Appeal sustained a preliminary objection in an application for revision predicated under section 5((2) (d) of the AJA and stated:

"... We are of the opinion that the Ruling and Order of the High Court sought to be revised is an interlocutory order... because in that order nowhere it has been indicated that the suit has been finally determined..."

In the present matter the application for security for costs which was dismissed was preferred in pendency of Civil Case No. 165 of 2019, thus making the dismissal order an interlocutory one whose appeal is prohibited under the cited provision. In the light of the above position and the existing facts this application is incompetent and is hereby struck out without costs.

It is so ordered.

DATED at DAR ES SALAAM this 11th day of May, 2021.




E. E. KAKOLAKI

JUDGE

11/05/2021

Delivered at Dar es Salaam today on 11th day of May 2021 in the presence of Mr. Zahran Sinare advocate for the applicants, Mr. Seni Malimi for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.




E. E. Kakolaki

JUDGE

07/05/2021