IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. LAND APPLICATION NO. 45 OF 2021

(C/F Land Revision No. 7 of 2020)

ORYX OIL COMPANY LIMITED..... APPLICANT

VERSUS

COMMUNITY PETROLEUM LIMITED.....1ST RESPONDENT

ALPHONCE JOSEPH MWACHA.....2ND RESPONDENT

KILICRAALS AUCTIONEERS.....3RD RESPONDENT

RULING

18/8/2022 & 20/9/2022

SIMFUKWE, J.

The applicant herein after being aggrieved by the decision of this court delivered on 30th day of September, 2021 before Hon. Mwenempazi, J intends to appeal to the Court of Appeal of Tanzania against the said decision. As per the requirement of the law, the appellant is required to apply for leave before the High Court. Thus, the applicant accordingly lodged the instant application.

The application has been filed under **section 5(1) (c) of the Appellate Jurisdiction Act (Cap 141 R.E 2019)** and **Rule 45(a) of the Tanzania Court of Appeal Rules, 2009** as amended by **GN No.362 of 2017.** The applicant prayed for the following orders:

1. *That the applicant be given leave to appeal to the Court of Appeal of Tanzania against whole (sic) of the ruling of the High Court of Tanzania, Hon. T. Mwenempazi, J in Land Revision No. 07 of 2020 between the parties herein.*
2. *That, costs of this application be in the cause.*

Briefly, the gist of this application is to the effect that; on 16/8/2020 the applicant and the 2nd respondent signed the deed of settlement which was later on filed before the DLHT and the consent decree was extracted from it. Thereafter, several applications were filed including the application for execution which was filed before the same tribunal which was Misc. Land Application No. 258 of 2020. The execution was granted. Consequently, the applicant filed Land Revision No. 7 of 2020 before this court challenging the said execution. This court directed that parties should appear before the executing tribunal and be heard on the points for the time line to be endorsed by the tribunal.

Aggrieved, the applicant wishes to refer the matter to the Court of Appeal. Thus, he filed the instant application.

The application was argued through written submissions. The applicant was represented by Mr. Wilbard Massawe, learned advocate while the 1st respondent was represented by Mr. Edwin Silayo, learned advocate. The 2nd and 3rd respondent did not enter appearance, hence the matter proceeded in their absence.

In support of the application, the learned advocate for the applicant submitted that paragraph 5 through annexure ORS-3 which contains 17 grounds which the applicant desires the Court of Appeal to determine;

contain sufficient legal importance. The grounds are as reproduced hereunder:

1. *Whether the Tribunal had jurisdiction to entertain the purported Execution Application Misc. Application No. 258 of 2020 filed by the 2nd Respondent for the benefit of the 1st Respondent in light of the Ruling and drawn orders of the same tribunal by Hon. Chairman P.J. Makwandi, in Misc. Application Number 150 of 2019 (Annexure ORX-7A of supplementary affidavit) which ruled that, the 1st Respondent not being privy and part of the original Land Application Number 157 of 2017 could not apply for execution but should seek other remedies under the law.*

2. *Whether the Tribunal had jurisdiction to entertain the execution application, Misc. Application No. 258 of 2020 in light of the final order in an appeal in Land Appeal No. 5 of 2020 Hon. B.T. Maziku, RM (Ext.Jurisdcition) where the 1st Respondent was appealing against the above-mentioned ruling and abandoned the said appeal (Annexure ORX-10A) of supplementary affidavit.*

3. *Whether the 1st respondent, who was neither a party to the Decree in the Original Application nor the execution proceedings in Execution Application Misc. Application 258 of 2020 and execution order in Misc. Application No. 258 of 2020 could be made a beneficiary of the resultant execution order resulting into a franchise agreement being*

executed in his favour and imposed on the Applicant herein.

4. *Whether the 1st respondent who was doing operations at the disputed premises before and after the conclusion of the original Application, Land Application Number 157 of 2017 can be held as not to have been granted Franchise Agreement by conduct of the 1st Respondent and the Applicant herein. Considering the Deed of Settlement was concluded on 20th August, 2018 while the execution was first filed at the tribunal on May, 2019. If the 1st Respondent did not have the agreement, why did he delay up to 2019?*
5. *Whether the Tribunal was justified to proceed with ex parte hearing of the execution application, Misc. Application No. 258 of 2020 under Regulations 13 (4) of The Land Dispute Courts (the District Land and Housing Tribunal Regulations), of 2003 in absence of Applicants' counsel or the Applicant in person in which the matter was coming for first time in light of the decision of the Court of Appeal in* ***Adam Mohamed Zuberi versus Kulwa Mashaka, Civil Appeal Number 175 of 2018, CAT, Dar es Salaam (Unreported)*** *which clearly set out four conditions which the Tribunal may proceed ex parte under page 9 of the typed judgment, which are:- ONE, party's advocate must have failed to enter appearance for two consecutive days. TWO; that non-appearance was without cause. THREE, there should be no proof that the said Advocate is*

appearing in superior court. FOUR, the party must have been requested to fend for himself and unreasonably refused. ***Annexure ORX-13A*** *contain excerpt of proceedings of that date where Applicants' counsel was appearing before the High Court, Hon. Massara, J.*

6. *Whether the withdrawal Order in the Original Application. Land Application Number 57 of 2017 was executable or correctly vacated by the tribunal or was capable of forming ground for execution.*
7. *Whether the Tribunal was justified to proceed as it did in absence of the applicant's counsel as ruled by Hon. Judge T. Mwenempazi, J under page 14 of the typed ruling in the application subject of the intended appeal.*
8. *Whether the issue of jurisdiction in the original application in view of Section 34 to 38 of the EWURA Act could be raised at the revision stage.*
9. *Whether the 2nd and 1st Respondents were correct to proceed with filing of execution application as opposed to Civil Suit which was and still pending in this Honourable Court being* ***Civil Case Number 10 of 2021.*** *In this suit they are alleging breach of franchise agreement, while at the tribunal they filed execution because they were never given by the Applicant, a franchise agreement as promised. The 1st Respondent, is therefore, trying to eat his cake and have it, assisted by the Tribunal.*

10. *Whether in light of* ***section 73 (1) of the Law of Contract Act, Cap 345 R.E 2019,*** *a deed of settlement*

executed between the Applicant and the 2nd respondent herein on 16th August 2018 and filed on 20th August. 2018 containing of a promise for a two-year franchise agreement, being a promise could be enforced as a Decree of a Court or form basis for an executable decree.

11. *Whether the revisional court, Hon. T. Mwenempazi, J considered the supplementary Affidavit of one Fredy Abdul Mpili filed on 26th November 2020 in respect of Revision Application No. 7 of 2020 and the consequences thereof. The non-consideration raises the question as to whether the Applicant was truly heard.*

12. *Whether the Revisional Court, Hon. T. Mwenempazi, J was properly constituted in the manner under* ***section 39 (1) read in tandem with section 43 (2) of the Land Disputes Courts Act [CAP. 216 R.E. 2019].***

13. *Whether the executing trial tribunal was properly constituted in light of* ***Regulation 19 (2) of The Land Dispute Courts (the District Land and Housing Tribunal Regulations), of 2003.***

14. *Whether taking into the account the nature of business, namely Franchise Relationship of dealership and licensing, the Applicant can be* ***COMPELLED TO TRADE*** *with the 1st Respondent, as the Tribunal did and endorsed by this Honourable Court.*

15. *What is the status of the Decree in the Original Application in light of* ***Clause 3.4 of the Deed of Settlement (Annexure ORX-2A of my Supplementary affidavit)*** *which made reference to a* ***DRAFT OF FRANCHISE AGREEMENT*** *which was not filed along the Deed of Settlement and neither featured in the adopted, corrected decree of the original Tribunal?*

16. *Whether the Honorable Judge was justified to ignore the supplementary affidavit of Fred Mpili which was lodged in support of the Revision Application, and lastly;*

17. *Whether the counsel for the Applicant was dully represented in light of the communication by text message* ***(Annexure ORX-14A of my supplementary affidavit)*** *which had clearly indicated that he was appearing before Hon. Masara. J in Arusha on the material date.*

From the above grounds Mr. Wilbard posed the question as to whether the Applicant has attained the threshold for obtaining leave of this Honourable Court. In answering this question, the learned advocate referred to **Black's Law Dictionary, Bryan Gardner** which defines 'seek leave' to mean *ask permission of the court. Allow*. He thus argued that leave of the court is permission obtained from the court to take some action, without such permission will not be allowed. He continued to state that leave is not automatic as it was held in the case of **BBC vs Eric Sikujua Ng'maryo** (supra).

Also, the learned advocate referred to **Halsbury's Laws of England, 14th edition**, at paragraph 568 where while commenting on leave it observed that:

> *"...leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious. "*

From the above quotation, the learned advocate for the applicant summarized three justifications for seeking leave; ***One,*** there should be issues of general importance or novel point(s) of law as held in the case of **Nurbhan N. Rattansi vs Ministry of Water Construction Energy, Land and Environment and Hussein Rajabali Hilji [2005] TLR 220**; ***Two,*** to examine the existence of prima facie or arguable appeal as held in the case of **Harban Haji and Another vs Omari Hilal Seif and Another [2001] TLR 409**; ***Three;*** an opportunity to reject frivolous, vexatious or useless or hypothetical appeals as it was in the case of **Sudi Khamis Sudi and 3 Others vs Maureen Mbowe Juliwa and Others, Civil Application8 No.362 of 2018** (CAT).

Having established as such, the learned advocate argued that there are numerous disturbing grounds which require the attention of the Court of

Appeal. Including the following issues; whether a party who was not party to the original case can lodge an application for execution or can become beneficiary of application for execution as was the case by the 1st respondent. That is, the jurisdiction of the District Land and Housing Tribunal in accommodating the 1st respondent after he was ordered to seek remedies elsewhere as he was not party to Land Application No. 147 of 2017 but was inserted thereon by deed of settlement.

It was further submitted that the intended appeal may lead into development of various principles by the Court of Appeal, on the proper modality of execution where what is to be executed is an agreement and also whether a party added at settlement stage without amending the pleadings can be executor of the resultant order. Also, whether after an application is withdrawn, the Tribunal can go back and reopen it and reduce a decree from deed of settlement which was adopted some three years ago.

Moreover, the learned advocate stated that; does the deed of settlement override the pleadings? Does the tribunal have powers to proceed ex parte in light of circumstances at hand where the Judgment Debtor's counsel was appearing before the Superior Court as evidenced under paragraph 38 of the supplementary affidavit and annexure ORX-13 being proceedings of that date.

On the strength of above submissions, the learned advocate invited the court to allow the application, granting the Applicant leave to appeal to the Court of Appeal so that his grievances can be addressed.

In replying the above submissions, the learned advocate for the 1st respondent before opposing the application said that initially they opted

not to oppose the application. However, following the false statements which were being given by the applicant's representative and the evidential fact that it is not the applicant who is prosecuting this case but rather the learned advocate who purports to represent the applicant, he decided to oppose the application so that he assists this court in delivering justice. The learned advocate continued to narrate the historical background of this application which I will not reproduce since the same has been covered from the beginning.

Advancing the reasons for opposing this application, it was stated that the instant application is an application which is either not under the directives of the applicant and or not known by the applicant's management. He referred to page 2 last paragraph of the Drawn Order (Annexure ORX-18A) which reads:

> *"IT IS HEREBY ORDERED THAT: The Application has no merit and is not allowed. It is however, further ordered that, since the execution was for a consent decree parties should be heard by the tribunal on the time line for operation."*

The learned advocate for the 1st respondent continued to submit that, following such order, on 27th April,2022 while this case was on progress, the Applicant through her Managing Director one, Mr. Kalpesh Mehta while replying to the 1st respondent's demand note of complying with the order of this court as seen under paragraph 30 (annexture CP5) he stated that they were aware with the directives of this court (High court) revision No. 7/2020 and that they are waiting the matter to be presented to the tribunal so that the standard terms and condition be set as directed by

Mwenempazi, J in his ruling. Emphasizing on that, the learned counsel for the respondent referred to paragraph 2 of the said letter (annexure CP5 of the counter affidavit of the supplementary affidavit) which reads:

> *"We would like to emphasise that; we are aware of the directives of the High court revision number 07/2020 and the company shall remain keen to be guided and set terms and conditions as per our standard operating procedure of the retail stations as would be presented before the tribunal when required."*

From the above submissions, Mr. Silayo argued that it is interesting that the alleged applicant was satisfied with the ruling of this court (application for Revision No. 7 of 2020) and thus want to comply with the same and yet the counsel for the applicant filed an application and in the supplementary affidavit sworn by himself opposing the ruling which has been accepted and been complied with by the applicant and the rest of the parties.

It was the opinion of Mr. Silayo that any reasonable mind can conclude that the application before the court was rather filed by a person with his/her personal interest than the applicant who is waiting the matter to be presented before the tribunal so that she can comply with the impugned ruling sought to be appealed against. He formed an opinion that this application for leave is devoid of merit.

Mr. Silayo continued to state that this application contains irrelevant points and annexures which have an intention of confusing the court and complicate the matter. The learned advocate opted to reply each ground of intended seventeen grounds of appeal.

Replying on the first ground that the tribunal had no jurisdiction to entertain Misc. Application No. 258 of 2020, it was submitted that in the said application, the parties were Alphonce Joseph Mwacha and Oryx Oil Company Limited and it was before Hon. J. Sillas. That, the said application was revised in this court and confirmed by Honourable Mwenempazi, J. Thus, all other facts involving other Chairman are irrelevant and are of no assistance at this stage.

On the second ground of intended appeal that the tribunal had no jurisdiction to entertain the execution application Misc. Application No. 258 of 2020 in light of final order in Land Appeal No. 5 of 2020, Mr. Silayo argued that this ground is irrelevant since the said appeal has nothing to do with this case and it is not part of Misc. Application No. 258 of 2020 and Land Revision No. 7 of 2020 which is sought to be appealed against. The parties are not even the same. Thus, the same is irrational and a mere confusion.

Responding to the 3rd ground of intended appeal that the 1st Respondent was neither a party to the original application nor party to the execution proceedings Misc. Application No. 258 of 2020 thus, he could not be made beneficiary of the resultant execution; it was stated that the execution was subject to consent judgment which resulted from the deed of settlement. That, through the said deed of settlement, the Applicant and the 2nd Respondent agreed that the 1st Respondent should take the operation of the disputed Petrol Station. That, the applicant through his letter (annexed as annexure CP5 in the Counter affidavit) said that he was waiting for the file to be remitted to the District Land and Housing Tribunal in order to comply with the decision of this court, which the Counsel for

the Applicant intends to appeal against. Thus, such point deserves no attention of the Court of Appeal.

Answering the 4th contention that the 1st Respondent was doing operation on the disputed premises before and after conclusion of the original application and so cannot be held as not to have been granted franchise agreement, Mr. Silayo was of the view that the same does not deserve the attention of the Court of Appeal because the relevant issue was compliance of consent judgment and not otherwise. Since the Applicant did not comply then execution took place. The learned counsel added that had it not been this application by the Counsel for the Applicant, then the parties would have resolved their dispute and much more comply with the ruling of Hon. Mwenempazi, J in Land Revision No. 7 of 2020 as the applicant's management through their letter (annexure CP5) had demanded the matter to be taken to the tribunal as ordered by the court.

On the question as to whether the trial tribunal was justified to proceed exparte in the absence of the applicant's Counsel, it was argued that it is not true that execution took place in the absence of the applicant's Counsel but the applicant was then represented by Advocate Tumaini Materu, who disrespectfully left the court room while the matter was in progress and so the court proceeded in his absence after he had entered appearance. Therefore, the applicant was well represented and she does not dispute that fact.

Responding to the 6th ground of intended appeal as to whether the withdrawal order in the original Application No. 57 of 2017 was executable or correctly vacated; the learned counsel for the 1st respondent argued that no withdrawal order was vacated. That, the same was well resolved

by this court in Land Revision No. 04 of 2020 between the Applicant and the 2nd Respondent and the Applicant or her Counsel did not appeal or challenge the said decision. Thus, challenging it at this stage is totally misleading and abuse of court process.

On the 7th ground of appeal, the learned advocate reiterated what had been explained in ground number five.

Regarding the issue as to whether the issue of original jurisdiction in the original application in view of **section 34 to 38 of the EWURA Act** could be raised at the revision stage, it was the submission of Mr. Silayo that the said section has no relevancy in this case since there is no court which have determined the case (original case) on merit but consent judgment which was entered upon by the parties having signed deed of settlement and the same being adopted by the tribunal. It was his opinion that, going to Court of Appeal for this point will amount to abuse of the Court process and delay parties who are ready and willing to conduct the business.

Responding to the issue as to whether the 2nd and 1st Respondents were correct to proceed with filing execution as opposed to Civil Case No. 10 of 2021; Mr. Silayo submitted to the effect that, the Counsel for the Applicant is telling a lie since Misc. Application No. 258 of 2020 was not filed by the 2nd and 1st Respondent but by the 2nd Respondent alone against the applicant. Likewise, Civil Case No. 10 of 2021 which is pending in this court was filed by the 1st Respondent alone against the applicant and the same does not any how allege breach of franchise agreement. Thus, adding such point at this stage is a mere confusion, misleading and abuse of the court process.

Responding to the issue as to whether in light of **section 73(1) of the Law of Contract Act**, a deed of settlement signed by the Applicant and the 2nd Respondent can be executed as decree of the court; it was stated that, the deed of settlement (annexture ORX 2A) as attached in the supplementary affidavit speaks of itself. That, paragraph 6.1 of the said deed of settlement provides that the effect of the said deed of settlement is to mark the dispute settled and the agreement will have the effect as if it was a decree of the court made after full trial and delivery of judgment. Thus, the counsel for the applicant cannot question execution of the said decree issued out of the said deed of settlement and thus attention of the Court of Appeal is of no necessity.

Countering the 11th ground as to whether the revisional court considered supplementary affidavit of one Fredy Abdul Mpili filed on 26th November 2020 as non-consideration of the same will question whether the applicant was heard; it was stated that after completion of pleadings parties are moved to the hearing of the case. That, the same was done in Land Application No. 07 of 2020. After filing all pleadings including the supplementary affidavit of the said Abdul Mpili, followed the hearing and submission by the applicant's counsel. The said application did involve the said affidavit and so the ruling was delivered basing on pleadings and submissions of parties. Therefore, the Court of Appeal cannot be moved to determine whether the said supplementary affidavit was considered.

On the ground as to whether revisional court was properly constituted under **section 39 (1)** which reads together with **section 43 (2) of the Land. Disputes Courts Act [Cap 216 R.E 2019]** it was submitted that **section 39 (1)** of the said Act provides for a requirement of the court to sit with two assessors when hearing an appeal. However, the instant

matter was not an appeal but application for revision which **section 39(1)** of the Act is inapplicable. Likewise, **section 43 (2)** is all about the revisional powers of the court. Thus, the court was properly presided while determining an application.

Also, the issue as to whether the executing tribunal was properly constituted in light of **regulation 19(2) of the Land Disputes Courts (the District Land and Housing Tribunal Regulations) 2003** as the Chairman was not required before making judgment to require every assessor present at the hearing to give his opinion in writing. It was the opinion of the learned advocate that execution was resolved by way of amicable settlement, which means it did not go to the hearing stage in which case assessors could not give their opinion in writing. Thus, this issue does not need the attention of the Court.

Replying the 14th issue, it was stated that there was no any compulsion done by the trial tribunal or this court. What was done by the tribunal was execution of the decree which emanated from consent judgment endorsed by the applicant herself and her lawyer. The signing of the deed of settlement and thus consent judgment cannot be interpreted to amount to compel. (sic)

As on the issue of the status of the decree in the original application in light of Clause 3.4 of the deed of settlement which made reference to a draft of franchise agreement which was not filed along with the deed of settlement; the learned advocate for the 1st respondent submitted that the said franchise agreement was filed and endorsed in the trial tribunal in the absence of signature of the applicant who refused to appear before the court and or sign it. Thus, this court directed the matter to be remitted

to the trial tribunal in order that the time line and the like be set, which the applicant is ready and willing to comply with.

On the issue as to whether the counsel for the applicant was duly represented in the light of the communication by text message; the learned advocate for the 1st respondent argued that it is the party to a case who is represented and not the counsel for the particular client. Thus, the applicant who was the respondent in an application for execution was well represented by Advocate Tumaini Materu who left the court room in the mid of submissions by the parties.

As far as justification for seeking leave is concerned, as endorsed by the Applicant's Counsel in the cases of **Nurbhan N. Rattans** (Supra); **Harban Haji and another** (supra) and **Sudi Khamis Sudi & 3 others;** Mr. Silayo was of the view that this application does not meet the said threshold since there is no issue of general importance or points of law. Also, there is no arguable appeal and the application itself is frivolous, vexatious and it is useless since the parties (applicant in particular) are ready and willing to comply with the directives given by this court in Land Revision No. 07 of 2020.

Moreover, the learned advocate contended that all the explanations that have been submitted by the Counsel for the applicant are nugatory and cannot any how lead to development of various principles by the Court of Appeal as alleged by the Counsel for the applicant.

Mr. Silayo concluded that, this application is devoid of merit and so it should be dismissed in its entirety with costs.

In rejoinder, the learned advocate for the applicant condemned the learned advocate for the 1st respondent for arguing this application as if

he was arguing the appeal. He reiterated his submission in chief and the principles which guide the court in applications for leave.

I have considered the submissions by the parties and their respective affidavits. I have posed one issue for determination; ***whether there are sufficient reasons to grant the instant application.***

Leave is usually granted if there is a point of law or point of public importance. This was held in the case of **British Broadcasting Corporation v Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004,** CAT, (Unreported) 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 be judiciously exercised 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. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

Having established as such, I now turn to the merit or otherwise of this application. I have noted that, the learned advocate for 1st respondent submitted as if he was arguing the appeal. With due respect to the learned advocate, in applications of this nature, the applicant as well as the respondent are supposed to state why leave should or shouldn't be granted. The same position was emphasized by the Court of Appeal in the case of **Jireys Nestory Mutalemwa vs Ngorongoro**

Conservation Area Authority (Civil Application 154 of 2016) [2021] TZCA 9; in which at page 6 it was held that:

> *"...Similarly, in applications of this nature, it is a well-established principle of law that the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard..."*

Looking at paragraph 51 of the supplementary affidavit, the learned advocate for the applicant has advanced several issues from which he called upon intervention of the Court of Appeal. Having considered all that and the grounds of the intended appeal, I am of considered opinion that the same raise arguable issues which warrant judicial consideration.

In the event, I grant leave to the applicant to appeal to the Court of Appeal as prayed. Considering the circumstances of the case, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 20th day of September, 2022.

S. H. SIMFUKWE

JUDGE

20/9/2022