IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 313 OF 2022

(Originating from High Court Misc. Civil Application No. 56 of 2022)

HI BROS CANVAS & TENTS LIMITED..... APPLICANT

VERSUS

I &M BANK (T) LIMITED.....RESPONDENT

RULING

Date of last order: 11th September, 2022

Date of Ruling: 18th November, 2022

E.E. KAKOLAKI, J.

The applicant here in filed an application under Rule 45 (a) of the Court of Appeal Rules, 2009 (the Rules) and section 5 (1) (c) of the Appellate Jurisdiction Act, [CAP 141 R.E 2019] (the AJA), praying for the leave to appeal to the Court of Appeal, the application which is supported by an affidavit of one Parvez Abdul Hussein Hirji, Managing director of the applicant. When served with the application, Respondent filed an affidavit in reply whereby strenuously challenged the application. Subsequent to that, she raised a notice of preliminary objection to the effect that:-

(1) The application is misconceived and untenable in law for seeking to challenge and appeal against an interlocutory decision as the bill of cost in Taxation Cause No. 59 of 2022 is still pending in court.

(2) The chamber application is defective and untenable in law because the prayer No. 1 for leave to appeal does not state exactly which ruling or order the leave to appeal is sought for, does not cite or give the particulars of the application on which the ruling/order are based and has omitted the name of the relevant Honourable Judge who gave the Ruling /Order and the date on which the ruling and order were made /issued.

At the hearing of Preliminary objection, both parties had representation. Applicant hired legal services of Mr. Sylvanus Chingota learned Advocate, while respondent enjoyed the services of Ms. Hamida Sheikh both learned advocates. The hearing proceeded by way of written submissions and both parties complied with the scheduled orders.

Submitting in support of the first point of objection, Ms. sheikh argued that, the respondent was granted extension of time to file its bill of costs in Misc. Civil Application No.56 of 2022 arising from the High Court Civil Case No. 144 of 2017, and upon being granted extension of time she filled the bill of

costs, which is taxation Cause No. 69 of 2022, which is still pending in this court. According to her, the leave that the applicant has applied for is for appealing against interlocutory order, which makes this application for leave to appeal too precipitate, improper and incompetent for contravening section 5 (2) (d) of the AJA. She said, even if the applicant is aggrieved by the decision of the High Court granting extension of time to the respondent, the said decision did not finally determine the matter under litigation between the parties, which is the bill of cost. In her view, section 5 (2) (d) of AJA bars appeals against decisions and orders given by the High Court which do not finally determine the matter in dispute between litigating parties. In further view of Ms. Sheikh, since the bill of cost is still pending before the court, the application for leave to appeal against the decision to grant extension of time for the bill of cost is unsustainable in law. To her, the applicant would still have the right to appeal on this ground if the taxation of the bill of costs ruling is granted. She relied in the case of **MIC Tanzania Limited and 3 others Vs. Golden Globe International Services Limited** (2017) TLR and the case of **Dennis Ngowi Vs. Asteria Morris Ambrose** (2014) TLR 153.

On the second point of objection, it was Ms. Sheikh's submission that, the chamber summons has a prayer which is vague and incomplete, since the prayer for leave to appeal has omitted to state against which decision the applicant is seeking leave to appeal, in which matter/case, it was made, the name of the honourable judge and on what date the decision was made. In her view, failure by the applicant to state in the prayer the essential particulars of the decision for which leave to appeal is being sought is a fatal mistake and makes the chamber application defective incomplete and unmaintainable in law. She finally prayed the Court to strike out the application with costs.

In rebuttal, Mr. Muganyizi who drafted applicant's submission submitted that, the respondent's preliminary objection is misconceived as the order which the applicant is seeking leave to appeal against is not an interlocutory order. According to him, an order for extension of time cannot be an interlocutory order as the same is final in itself. Mr. Muganyizi placed reliance in the case of **Rajab John Mwimi Vs. Mantract Tanzania Ltd,** Civil Application No. 367/01 of 2020 (CAT-unreported).

Concerning the second point of preliminary objection, Mr. Muganyizi was of the view that, the same does not qualify to be the point of preliminary

objection under the leading case of **Mukisa Biscuit**. He said, the application for leave is attached with the affidavit in support of the chamber application, thus the second point of objection does not qualify to be preliminary point of objection. He contended further that, what the respondent is trying to adopt is not supported by any law and has never been the practice in our courts of law. He fortified his stance by the case of **Justice Njunwa Majula Vs. Eustidia Lwikiza Majula**, Civil Application No. 01 of 2022 (HC-unreported). He finally pray the court to dismiss the appeal with costs.

In a short rejoinder, Ms. Sheikh reiterated her submission in chief and maintained that, the applicant is wrongly seeking leave to appeal against interlocutory order. She contended that, what was in issue in application No. 56 of 2022 is the bill of cost, thus the order in that application did not constitute final judgment on merit and did not constitute final resolution of the whole controversy. She argued that, since the bill of cost in Taxation Cause No. 69 of 2022, which is still pending in court and yet to be taxed, it cannot be said the order issued constituted a final resolution of the whole controversy. She then attacked the case of **Rajab John Mwimi** cited by the applicant in his submission and argued that, the same is not applicable in the present situation.

Concerning the second point of objection she contended that, the applicant has ignored to submit on the same.

I have dispassionately considered the contending submissions by the learned counsels from both sides with keen interest. In determining the merit or other wise of this Preliminary Objection, I will address each point of objection as raised by the respondent if need be. However for the reasons to be disclosed soon I have decided to start with the second ground of objection.

Ms. Sheikh is of the submission that, the application is defective and untenable in law for failure to state exactly which ruling or order the leave to appeal is sought for as well as none citation of the honorable judge who issued the said order or ruling as well as the date in which it was issued. Mr. Muganyizi is of the contrary view in that, the alleged ground of objection does not qualify to be a preliminary objection on point of law as per celebrated case of **Mukisa Biscuit Manufacturing Company Ltd. Vs. West End Distributors Ltd.** (1969) EA 696. The principle in the **Mukisa Biscuits** (supra) at page 701, no doubt defines what a preliminary objection is, and also recommends when it can be raised and when it should not. It states that;

> *A preliminary objection is in the nature of what used to be a demurrer. It raises a* ***pure point of law*** *which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion.*

In the same case at page 700 it was stated further that: -

> *So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or* ***which arises by clear implication out of the pleadings****, and which, if argued as a preliminary objection,* ***may dispose of the suit****. Examples are an objection to the jurisdiction of the court, or a plea of (time) limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration.*

From the above excerpt of the decision in **Mukisa Biscuits** case (supra) it is evident to me that a preliminary objection consists of the point of law pleaded in the pleadings or which arises by clear implication from the pleadings. A preliminary objection is not therefore restricted to pleaded points of law as Mr. Muganyizi would like this court to believe as it can as well be deduced or implied from the pleadings.

In this matter no doubt the application has been preferred under section 5(1)(c) of AJA as the Rules does not apply to this Court. Section 5(1)(c) of AJA provides thus:

5.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(c) ***with the leave of the High Court*** *or of the Court of Appeal,* ***against every other decree, order, judgment, decision or finding of the High Court****. (Emphasis supplied)*

Looking at the above cited provision of the law, it is unambiguously stated that an appeal to the Court of Appeal shall lie with the leave of this Court against every decree, order, judgment, decision or finding of this Court. It is undisputed fact and existing practice that all civil application including the application for the leave to appeal to the Court of Appeal made before this Court are preferred by way of chamber summons supported by affidavit in which the governing law is the provisions of Order XLIII Rule 2 of the Civil Procedure Code, [Cap. 33 R.E 2019]. Order XLIII Rule 2 of the CPC reads:

2. Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit:

As it goes the chamber summons carries the prayers sought by the applicant the said application. It goes without saying therefore that this Court will grant or refuse to grant only the prayers indicated in the chamber summons. In so doing the applicant has to specify the prayer sought with sufficient

particulars so as to enable to Court to appreciate whether the same are grantable under the law or not and if the application itself is tenable before the Court or not. I so view as an application is founded in what is sought in the chamber summons. This Court had once in the case of **Selina David Kuboja and Another Vs. Helena Geni Lucas**, Misc. Civil Application No. 186 of 2018, stressed on the need of the Court to grant or refuse to do what is officially sought in the chamber summons. In so doing had this to say:

> *"…**This Court is in law expected to grant or not what is officially sought in the chamber summons supported by an affidavit**. In the same token, the submissions in support of an application must be founded on what is sought in the chamber summons and deposed in the affidavit. That is an elementary position of law and I need not necessarily cite an authority therefore." (Emphasis supplied)*

In light of the above position of the law it is the rule of law now that, an application will be granted basing on what is prayed in the chamber summons supported by the affidavit. It follows therefore that it is the prayer officially sought in the chamber summons that will be granted or not by the Court and not otherwise, hence the same must be specifically stated with sufficient particulars to enable the Court appreciate whether the application is meritorious or not.

As alluded to above the preliminary point of objection can be implied from the pleadings. As the law stand under section 5(1)(c) of AJA, leave to appeal to the Court of Appeal can be preferred against every decree, order, judgment, decision or finding of this Court. A glance of an eye to the applicant's prayer subject of attack by the respondent leads me to the conclusion that the same does not specify which decree, order, judgment, decision or finding of this Court, is the applicant seeking to challenge, leave alone the date in which it was delivered as well as the judge who issued the same. For clarity I find it imperative to quote the same as I do hereunder:

> *1. That this Honourable Court be pleased to grant leave to the Applicant to Appeal to the Court of Appeal.*

As the application for leave is founded on what is prayed in the chamber summons, in this matter since the prayer sought by the applicant does not specify which decision or order or decree of the court is sought to be challenged leave alone the date it was issued and well as the judge who issued it as submitted by Ms. Sheikh, I am satisfied that the application is defective and untenable in law. I so find as the law under section 5(1)(c) of AJA requires the applicant for leave to appeal to the Court of Appeal to do so when challenging either the decree, order, judgment, decision or finding of this Court, in which the applicant in this matter has failed to do by

specifying to the Court in the chamber summons the exact decision sought to be challenged. The assertion by Mr. Mganyizi that the said decision is mentioned in the affidavit in my considered opinion does find any legal justification as if the law had intended that the same be specified in the affidavit there would be no meaning of the requirement for the same to be stated in the chamber summons. What is to be stated in the affidavit in support of the chamber summons is the evidence supporting the prayer made in the said chamber summons and not otherwise.

In the premises I find the preliminary objection raised by the respondent is meritorious and sustains it. That being the position I need not venture into determination of the first ground of objection as that will serve academic purposes in which I am not prepared to enter into.

In the circumstances and for the fore stated reasons I sustain the 2nd ground of objection and proceed find that this application is defective and untenable in law hence the same is struck out.

Given the nature of the case I order each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 18th November 2022.

E. E. KAKOLAKI

JUDGE

18/11/2022.

The Ruling has been delivered at Dar es Salaam today 18th day of November, 2022 in the presence of Mr. Slvanus Chingota, advocate for the applicant , Mr. Yusuph Sheikh advocate holding brief for Ms. Hamida Sheikh, advocate for the respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

18/11/2022.