

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

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 529 OF 2022**

(Originating from the High Court of Tanzania, Dar Es Salaam District Registry in  
Miscellaneous Civil Cause No. 138 of 2022)

**ORYX OIL COMPANY LIMITED ..... 1<sup>ST</sup> APPLICANT**

**ORYX ENERGIES SA ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**OILCOM TANZANIA LIMITED ..... RESPONDENT**

**RULING**

*08/03/2023 & 28/03/2023*

***BWEGOGGE, J.***

The applicants herein above mentioned have filed an application praying this court to grant leave to appeal to the Court of Appeal against the ruling and drawn order of this court in Miscellaneous Civil Cause No. 138 of 2022. The

application herein is brought under section 5 (1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019], among others.

In substance, the affidavit deposed by the principal officer of the 1<sup>st</sup> applicant bears facts as thus: That by agreement in writing dated 18<sup>th</sup> November, 2016 and 5<sup>th</sup> December, 2016 made by the parties herein it is provided that in case of differences between the parties herein, the same shall be referred to and finally resolved in a binding arbitration under the Arbitration Act whereas the agreement provides that the arbitral tribunal shall consist of three arbitrators whereas one arbitrator shall be appointed by the applicants, one arbitrator shall be appointed by the respondent and the third arbitrator, who shall act as chairman of the tribunal, shall be appointed by the two arbitrators appointed by the parties. That, as the parties were carrying out their obligations under the agreement differences arose within the meaning of the agreement concerning breaches or allegations of breaches of obligations and conditions under the agreements. Accordingly, the respondent referred the matter to arbitration and the parties' appointed arbitrators. Several appointed arbitrators recused themselves on successive applications by parties herein. Finally, on 04<sup>th</sup> March, 2022 the respondent appointed

another arbitrator Mr. Mussa Juma Assad (the Arbitrator) to replace the previously appointed arbitrator who had recused himself.

It is further deponed that after the appointment, the applicants filed a motion requesting recusal of Mr. Mussa Juma Assad having raised concerns as to his impartiality in acting as the arbitrator considering the fact that the arbitrator previously worked for the respondent and that the arbitrator never disclosed facts as to his impartiality and connection with the respondent. The said motion was refused by the arbitrator vide a decision signed and dated 16<sup>th</sup> March 2022. That the applicants were aggrieved by the arbitrator's decision on refusal to recuse himself from acting as arbitrator in the arbitral proceedings thus filed a petition in the High Court of Tanzania at Dar es Salaam District Registry at Dar es Salaam vide Misc. Civil Cause No. 138 of 2022. Upon hearing the parties of the petition, the High Court issued its decision to dismiss the petition with costs (the Ruling).

Now, the applicants intend to appeal from the orders of this court in Miscellaneous Civil Cause No. 138 of 2022 as it involves very serious triable legal issues to be determined by the Court of Appeal to wit:

- (a) Whether the High Court was correct to hold that the applicant's allegation of the existence of bias/lack of impartiality on the arbitrator was more of perception than a reality despite the existence of proof.
- (b) Whether the High Court was correct not to consider the applicants' concern regarding the Arbitrator's breach of a legal duty in terms of Section 28 (1) (a) of the Arbitration Act and left this concern undetermined.
- (c) Whether the High Court was correct to believe and accept the arbitrator's explanations on his nexus of professional undertakings and/or financial gains with the respondent which contradicted express indication in the Arbitrator's curriculum vitae.
- (d) Whether the High Court was correct to hold that the act of the arbitrator of inflating his credentials is in bad taste and border misrepresentation but still contradicted itself when it made a finding that the effect of the said inaccuracy could not bring any sense of feeling that the Arbitrator may be biased.
- (e) Whether the High Court was correct to order that so long as the arbitrator is one of the three-bench team, with an umpire, as a

single arbitrator, the arbitrator, will not, however influential he may be sway the decision of the panel thus ending up dismissing the petition for removal and the arbitrator for lack of impartiality.

- (f) Whether the High Court was correct to import the provision of Regulation 14 and 15 of the Arbitration (Rules of Procedure) Regulations, 2021 GN. No. 146 of 2021 as relevant in the petition and hold that the arbitrator's past association with the respondent, if any, would not prejudice the interest of the parties specifically the applicants'
- (g) Whether the High Court was correct to rely on the decision in **Issack Mwamasika & 2 others versus CRDB Bank Limited**, CAT Civil Revision No. 6 of 2016 (unreported) as a relevant decision on the petition.
- (h) Whether the High Court was correct to regard a persuasive decision in **Halliburton Company versus Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd** [2020] UKSC 48 interpreting section 24(1) (d)(1) of the 1996 Arbitration Act of the UK which is pari material provision to Section 28 (1) (a) of the Arbitration Act.

- (i) Whether the High Court was correct to rely on facts submitted from the bar as opposed to what was in pleadings and consequently ending up dismissing the petition.

The applicants were represented by Mr. Timon Vitalis and Mr. Gerald Nangi, learned advocates, whereas the respondent was represented by Mr. Thobias Laizer and Oliver Mark, learned advocates. When this matter was scheduled for necessary orders on 08 March, 2023 Mr. Thobias Laizer, counsel for the respondent informed this court that having gone through the pleading filed herein they didn't intend to file counter affidavit. And, Mr. Vitalis prayed this court to grant the application as it was not contested by the respondent.

It is the legal requirement that the applicant must demonstrate that there is a point of law involved for the attention of the superior court for grant of leave and certificate on point(s) of law to issue [**Kabaka Daniel vs Mwita Marwa Nyang'anyi and 11 Others**, [1989] TLR 64 HC]. The principle is elaborated in the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, (Misc. Civil Application 138 of 2004) [2005] TZCA 93 as thus:

*"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 judiciously exercised and 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 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 hypothetically no leave will be granted."*

Based on the above guidance, the applicants herein were obliged to show the points of law that are worth consideration by the superior court and, or raise issues of general importance or otherwise establish that he has an arguable case on appeal.

Having gone through the affidavit supporting the application herein and proposed legal issues to be attended by the superior court, I hereby certify that the following legal issues and, or arguable grounds of appeal hereunder mentioned are worth consideration by the superior Court:

1. Whether the High Court was correct to hold that the Applicant's allegation of the existence of bias/lack of impartiality on the Arbitrator was more of a perception than a reality despite the existence of proof.

2. Whether the High Court was correct not to consider the applicant's concern regarding the Arbitrator's breach of a legal duty in terms of Section 28(1) (a) of the Arbitration Act and left this concern undetermined.
3. Whether the High Court was correct to believe and accept the arbitrator's explanations on his nexus of professional undertakings and/or financial gains with the Respondent which contradicted the express indication in the Arbitrator's curriculum vitae.

That said, this court finds the application herein with substance. The application is hereby allowed. No order as for costs.

Order accordingly.

**Dated at Dar es Salaam** this 28<sup>th</sup> March, 2023.

   
O.F. Bwego  
**JUDGE**