

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM**

(MISCELLANEOUS CIVIL APPLICATION NO. 45 OF 2023)

(Originating from the ruling of the Arbitral Tribunal Constituted by Hon. Engera A. Kileo (Retired Justice of Appeal, Chairperson), Hon. Sophia A.N. Wambura (Retired Judge, Arbitrator) and Prof. Mussa J. Assad (Arbitrator) dated 5th January, 2023)

ORYX OIL COMPANY LIMITED1st APPLICANT

ORYX ENERGIES S.A.....2nd APPLICANT

VERSUS

OILCOM TANZANIA LIMITED..... RESPONDENT

RULING

S.M. MAGHIMBI, J.

The ruling follows two preliminary points of objection raised by the respondent herein. The two objections were attacking the competence on this application in that,

- a) This Application is misconceived and bad in law for having been filed under the wrong provisions of the law; and

- b) The nature of orders sought being interlocutory, the Applicants ought to have cited the specific enabling order and rule under which this Court can grant for such an order.
- c) The Application is res judicata in view of the decision of the Arbitral Tribunal delivered on the 05th January, 2023 on the same application involving the same parties and same cause of action.

In addition to the points of objections raised, I also asked the parties to address the court on whether this court has jurisdiction to entertain the matter. The concern is in relation to the fact that there is a notice of appeal already lodged at the court of appeal to challenge the decision of this court which dismissed a petition to remove Prof. Mussa Juma Assad from serving as arbitrator in the arbitral proceedings that are pending between the parties herein.

In his submissions on this point raised by the court, Mr. Gerald Nangi admitted to be aware of the rule that once a notice of appeal is lodged, the High Court ceases to have jurisdiction over the matter save for the incidental applications like the application for leave to appeal or an application for certificate that there is a point of law for determination of the Court of Appeal. He cited the case of **Aero Helicopter (T) Limited Vs. F.N.**

Jensen, (1990) TLR 142 where the same position was held. He then argued that the principle set therein does not apply in our case for reasons that the proceedings beforehand emanate from arbitration proceedings.

He then argued that the rule in the case of *Aero Helicopter (T) Ltd* does not apply to the facts of this case due to the reasons that One; the Application is an application for stay of the arbitral proceedings pending in the Arbitral Tribunal. It is not an application for stay of the High Court proceedings or stay of the execution of the High Court decree/order. The rule in the case of *Aero Helicopter (T) Ltd* above would be relevant if the Applicants were asking for stay of execution of the order of the High Court or stay of the proceedings in the High Court which is not the case here. That the proceedings sought to be stayed are the arbitral proceedings pending in the Arbitral Tribunal and the Court of Appeal has no power to order stay of the arbitral proceedings because the proceedings that are deemed to have moved to the Court of Appeal after institution of notice of appeal are the High Court proceedings and not the arbitral proceedings. Accordingly, it is axiomatic that it is the High Court (this Court) that is still vested with power to grant stay of the arbitral proceedings pending the determination of the appeal to the Court of Appeal.

In reply, Mr. Laizer submitted that it is trite law that once a notice of appeal has been filed in the Court of Appeal against a decision of this Court, the effect of it is to remove the proceedings from this Court to the Court of Appeal. That from the court records, the Notice of Appeal filed by the Applicants on the 28th October, 2022, is against the ruling and drawn order of the High of Tanzania, Dar es Salaam District Registry (sub-registry of Dar es Salaam) (Hon. Mr. Justice M. K. Ismail) dated 18th October, 2022 in Miscellaneous Civil Cause No.138 of 2022. He went on submitting that the court proceedings which will have to be removed from this Court to the Court of Appeal following the Notice of Appeal, are the ones in Miscellaneous Civil Cause No.138 of 2022. It follows therefore, he submitted, from the circumstances of this matter that, following the commencement of the appeal process to the Court of Appeal, this Court ceases to have any source of authority for it to be seized of the matter save for an application for leave to appeal or provision of a certificate of law. He supported his submissions by citing **Miscellaneous Commercial Application No.255 of 2014 (originating from Commercial Case No.137 of 2012), Festo Mkuta Mbunzu Versus Farm Equip Company Limited** where, at page 5 of the typed ruling this Court held as follows:

'In conclusion, I find that this Court lacks jurisdiction because of existence of a notice of appeal filed by the respondent, the effect of which was to remove the proceedings from this Court to the Court of Appeal. in the event, hearing of this application is stayed pending determination of the intended appeal.'

He further cited the case of **Awiniel Mtui and 3 Others Versus Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimambo), Civil Application No.19 of 2014** (Unreported) where the Court of Appeal of Tanzania quoted in approval its decision in **Civil Application No.71 of 2001 Between Matsushita Electric Co. Ltd Vs Charles George t/a C.G. Travers** where at page 7 of the typed ruling, it held as follows; that

"Once a Notice of Appeal is filed under Rule 76 [now Rule 83(i)] then this Court is seized of the matter in exclusion of the High Court except for applications specifically provided for, such as leave to appeal or provision of a certificate of law"

He concluded that once a notice of appeal has been filed, this Court ceases to have jurisdiction to entertain any matter in that regard save for as provided for under the above cited authorities. On whether under the

circumstances of this matter, the above position of law also apply to the matter before this Court where the Notice of Appeal and the intended appeal do not have any bearing with the decision of the Arbitral Tribunal whose proceedings are sought to be stayed; he submitted that first and foremost, the said Notice of Appeal has the effect of removing the proceedings of this

Court in Miscellaneous Cause No.138 of 2022 to the Court of Appeal for appeal purposes. Further that there are no pending or ongoing proceedings before this Court relating to and or arising from High Court Miscellaneous Civil Cause No.138 of 2022 which are required to be halted to allow for the appeal process to take effect as required under the above cited authorities. He further cited the case of **Arcado Ntagazwa Vs. Buyagera Bunyambo (1997) TLR 242** where the position was held. He concluded that since the said Notice of Appeal and the decision appealed against do not arise from the decision of the Arbitral Tribunal, there are no proceedings before this Court, which by necessity, will be required to be halted following the said Notice of Appeal.

Having heard the parties' submissions, I should not be detained much by this issue. It is obvious that the petition that was filed before this court shifted the records and jurisdiction of the arbitral proceedings to this Court.

The petition was dismissed by this court and the applicant herein, being dissatisfied by the decision of this court, has lodged a notice of appeal to the court of appeal showing her intention to appeal against the said decision. As per the cited cases of **Arcado Ntagazwa, Awiniel Mtui & 3 Others** and **Festo Mkuta Mbunzu** (Supra), it means this court is no longer seized with the records of neither the arbitral tribunal nor this court because all those are already shifted to the Court of Appeal. The argued inapplicability of the Aero Helicopter case to the case at hand is without merits. The Arbitral Tribunal proceedings are not a domain of this court and that is why the applicant could not cite any provisions under the Arbitration Act which confers powers to this court to stay proceedings of Arbitration upon appeal to the Court of Appeal. Since our jurisdiction in relation to the Arbitration only existed during the pendency of the Miscellaneous Civil Cause No.138 of 2022. Once the application has been determined, and a notice of appeal having been filed, we are no longer in possession of the proceedings so as to make an order for stay.

On those findings, I have no jurisdiction to entertain the current application as a notice has already been filed to the Court of Appeal. That being the case, this application is hereby dismissed. Given the fact that the respondent

has already raised his objection which were to be argued in line with this issue, she shall have her costs.

Dated at Dar es Salaam this 15th day of May, 2023



S.M. MAGHIMBI

JUDGE