

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. APPLICATION NO 16 OF 2011

**(ORIGINATING FROM DECISION OF HIGH COURT COMMERCIAL
DIVISION IN MISC COMMERCIAL CASE NO.56 OF 2009)**

MBEMBETU NDIKWEGE.....APPLICANT

VERSUS

FRAMBE COMPANY LIMITED.....RESPONDENT

RULING

BUKUKU,J

This is a ruling on a preliminary objection raised by the applicant opposing the chamber application in Commercial case No. 16 of 2011, filed under Order XXXIX Rule 5(1) and Section 95 of the Civil Procedure Act, Cap 33 RE 2002. The respondent filed a chamber application seeking for the following Orders;

- a) That this Honourable Court may be pleased to stay the execution of the decree/orders in Miscellaneous Commercial Case No. 56 of 2009, pending the final determination of intended appeal to the Court of Appeal of Tanzania to grant leave to file an appeal against the decision of High Court of Tanzania, Commercial Division in Miscellaneous Commercial Case No. 56 of 2009.

- b) Costs of this application be provided for.
- c) Any other orders /reliefs that this Honourable Court deems fit and just to grant.

Mr Msebo, Learned Advocate appearing for the respondent has raised a preliminary objection as follows;

"That the entire application is premature, as it does not comply with the requirements of Rule 84(1) of the Court of Appeal Rules 2009 vide Government Notice No 368 published on 6th day of November 2009".

The matter came for hearing of the preliminary objection on 30.11.2011, and the parties argued orally. Submitting in support of the preliminary objection Mr. Msebo, Learned Counsel for the respondent submitted that, the application is premature since the intended appeal to the Court of Appeal requires appellant to serve notice to the respondent or any other party to the application within 14 days. That, the procedure is stipulated under Rule 84(1), but the applicant /appellant has not served notice to the respondent.

Mr. Msebo cited a ruling of the Court of Appeal, in **Kantibhai M. Patel v Dahyadhai F. Mistri TLR (2003) Pg 437** where it was held that, omission to serve a copy of notice of appeal to the person who is affected by the appeal is fatal to an appeal. The learned counsel thus prayed the application be dismissed with costs for non compliance with the procedure.

Learned Counsel for the applicant/appellant one Mr Kiondo in reply submitted that, the submission and authority cited by Mr Msebo has no leg to stand on as far as the application is concerned because the law cited (Tanzania Court of Appeal Rules) is not applicable to the High Court but the same is applicable to the Court of Appeal. Furthermore, Mr. Kiondo submitted that, it is not true that the Respondent has not been served with a Notice of Appeal, it is his averment that the respondent was served by a public servant a police officer one Mr. Rashid of Bagamoyo Police Station.

The applicant's counsel went on to submit that, the provision of the law as cited by Mr Msebo is irrelevant to the application and it is misconceived as the application is for stay of execution and not determination of an appeal and hence all submissions relating to the appeal in relation to the cited provision is irrelevant. Concluding, the applicant's/appellant's counsel submitted that the submission by Mr Msebo be dismissed for being irrelevant.

In rejoinder, Mr. Msebo submitted that, he does not dispute what Mr Kiondo has submitted with regard to the matter being not an appeal or application, but there are procedures to appeal to the Court of Appeal and once they are not complied with, they render the whole application defective. Since the applicant/appellant skipped the procedure on an intended appeal, it makes the whole application premature, hence the counsel insisted the application be dismissed with costs.

It seems to me the issue in the preliminary objection is straight forward. The submission made by Mr. Msebo, Learned Counsel for the respondent is based on a matter of fact. While Mr. Msebo avers that the applicant/appellant has not served a notice of Appeal to the respondent, it is the submission of Mr. Kiondo that Notice has been served on the respondent by one police officer of Bagamoyo. Under such circumstances, it is obvious that, evidence is required to prove whether the Notice of Appeal was served on the respondent or not. In the case of **Mukisa Biscuits Manufacturing Co. Ltd. V. West End Distributors Ltd. 1969 EA** Law, J.A said:

" 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 pleadings, and if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

Sir Charles Newbold,P added:

"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 facts has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but

*unnecessarily increase costs and, on occasions, confuse the issue.
This improper practice should stop.*

As demonstrated above, I am satisfied that, the submission made by the Advocate for the respondent is a matter of facts which must be proved by evidence. No evidence has been led to prove what the Advocates are contending. As correctly submitted by Mr. Kiondo, the provision of the law as cited by Mr. Msebo is irrelevant to the application and it is misconceived as the application is for stay of execution and not determination of an appeal. In other words, what Mr. Kiondo is arguing is that, the issue of issuance of Notice of Appeal cannot be argued now. What is before the court is an application for stay.

I fully subscribe to what Mr. Kiondo has submitted. Mr. Msebo should take note of the observations made by Sir Charles Newbold in the case of **Mukisa Biscuits** (Supra) on improper raising of points by preliminary objections.

On the basis of my findings above, the preliminary objection is hereby dismissed. Each party to bear own costs.


A.E. BUKUKU

JUDGE

29 DECEMBER, 2011

Words:1,084