IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 56 OF 2014

MITRAS INTERNATIONAL TRADING LLC .....APPLICANT

VERSUS

DODSAL HYDROCARBONS AND POWER (T) PVT LTD- 1ST RESPONDENT

RAJEN ARVIND KILACHAND ..... 2ND RESPONDENT

HASMUKH BHAGWANJI MASRANI ..... 3RD RESPONDENT

R U L I N G

25/4/2014 & 8/5/2014

A.A. NCHIMBI, J

On 18/3/2014 Mr. D. Kesaria, learned counsel, acting on behalf of MUTRAS INTERNATIONAL TRADING LLC, the applicant and the 3rd respondent herein, presented for filing an application made under S. 5(1) (c) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002 and rules 45(a) and 47 of the Tanzania Court of Appeal Rules, 2009, (Cap. 141 R.E. 2002). The chamber summons seeks for an order of this court granting the applicant have to appeal to the court of appeal of Tanzania against the whole of the decision of my brother Makaramba, J dated 5th March, 2014 in Miscellaneous Commercial Application No. 20/2014 (arising from consolidated commercial cases No. 42 of 2011 and 157 of 2012) and for an

order that costs of the application abide of the outcome of the intended appeal to the court of Appeal.

It may not be irrelevant to point out here that this matter has a long and rather interesting historical background. It is tied up with consolidated Commercial Cases No. 42/2011 and 157 of 2012 in which at some stage proceedings were stalled as well as the latest developments in Miscellaneous Commercial Application No. 9/2014 and 20/2014. In the latter application the applicant had filed an application under sections 68 (e), 95 and order 1 rules 1 and 10(2) seeking to be joined as a necessary party in the consolidated cases referred to above or alternatively as an intervener in the counter claim. A similar attempt had been unsuccessfully made before. Following that state of affairs Dr. Lamwai and Mr. Amour Khamis, learned counsel for the first and second respondents, took an objection to the application by way of notice. Apparently my brother judge gave a directory order that in the interest of justice and in order to save time counsel were required to address the court on both the preliminary objection raised and the main application filed by the applicant one of the essential points of objection raised for consideration and determination by the court for the purpose of this ruling is that the application was brought after the court dismissed the oral application for joining the same applicant in consolidated case No. 42 of 2011 and 157 of 2012 for the same reasons that were stated in the affidavit in support of the subsequent application and since the court had already ruled on the question whether the applicant should be joined in the suit the court was functus officio on the basis of a plea of res judicata.

This court ordered upheld that point of preliminary objection. It inter alia, found at pages 11 and 12 of the Ruling "..... *That in the previous*

application which this court in its ruling dated 04/02/2014 dismissed, the applicant, ***Mr. Hasmukh Bhangwanji Masrani****, who apparently is also the 3rd respondent in the present application. Sought to have* ***Mitras International Trading LLC*** *joined as a necessary party which if allowed was to heave litigated under the same title as company jointly with its bonaficial owner,* ***Mr. Hasmukh Bwangwanji Masrani****, the third respondent in the present application. However, seemingly* ***Mr. Hasmukh Bhangwanji Masmukh****, the 3rd respondent herein, having failed in his previous, attempt to have* ***Mitras Internationa Trading LLC*** *joined as a proper or necessary party in the consolidated suit has now affirmed affidavit in support of the present application in which the same attempt* ***Mitras international Trading LLC*** *now seeks in its own right to be joined as a necessary or proper party in the consolidated commercial cases no. 42 of 2011 and 157 of 2012 as a plaintiff, or alternatively as intervener in the counter claim." In its earlier ruling in miscellaneous commercial application No. 9/2014 dated 04/02/2014 this court (Makaramba, J) stated the following, among other things;*

> *"In any event apart from the Applicant's counsel confidently telling this court that he has instructions from* ***Mistras International Trading LLC*** *to bring the prayer for it to be joined as a necessary party in the present consolidated suit, he has not told this court the kind of the relief in respect of or arising out of the same act or transaction or services of transactions in the present suit, or if* ***Mitras International Trading LLC*** *or the so called " brought separate suits, any common question of law of fact would arise. In any event as I stated earlier the applicant's counsel had failed even to identify the nature of the so called "a Dosal entity" or its identity or if it exists as a legal person capable of suing and being sued, and who its directors and*

shareholders are, and whether the learned counsel for the Applicant also has instruction from the said a Dodsal entity to make the present prayer."

In the main, that is a reflection of the basis on which this court found that the matter was re judicata.

With a view to expressing deep resentment at the decision of this court, the applicant came up with the instant application premised on seven (7) grounds as follows:

1. *The learned judge in deciding that S.9 of the civil Procedure Code applied and accordingly in holding the matter was res judicata by reason of his Ruling dated 4th February, 2014 in Miscellaneous Civil Application No. 9 of 2014 did so despite the fact that the earlier ruling was made between different parties upon a different application in which different forms of relief were sought and has thereby created a new precedent in the jurisprudence of the limited Republic of Tanzania which needs to be examined and tested for its correctness by the court of Appeal of Tanzania.*
2. *The learned judge erred in his consideration of the issue of re judicata in failing to distinguish clearly the fundamental difference between the identity of the applicant in Miscellaneous commercial Application No. 20 of 2014 and erred in stating that the applicant herein was the applicant in both applications aforesaid while at the same time acknowledging that the applicants in the two applications were different legal persons.*
3. *The learned judge erred in his consideration of the issue of res judicata in failing to distinguish the fundamental different between the application by a counter claimant counter claim made in*

Miscellaneous commercial application No. 9 of 2014 and the application by a non party to join as a party to the counter claim made in Miscellaneous application No. 20 0f 2014.

4. *The learned judge erred in failing to have regard to and distinguish between the different forms of substantive relief prayed for by the applicant in Miscellaneous Civil Application No. 9 of 2014 and that sought to be pursued by the applicant in Miscellaneous Commercial Application No. 20 of 2014.*
5. *The learned judge erred by treating as determinative of the issue of res judicata that the issue in the application in Miscellaneous commercial Application No. 20 of 2014, namely whether the applicant herein should be joined as a party to the counter claim in consolidated commercial cases No. 42 of 2011 and no 157 of 2012 had been directly and substantially in issue in Miscellaneous commercial Application No. 9 of 2014 while failing to address all necessary requires of res judicata including that concerning the identity of the parties and the nature of the relief claimed in the separate applications.*
6. *The learned judge erred by treating the issue of amendment of the counter claim by the third respondent hereto in Miscellaneous commercial Application No. 9 of 2014 as satisfaction of the requirement of litigating under the same title within the meaning of S.9 of the Civil Procedure Code for the purpose of the subsequent application by the applicant to join made as aforesaid in Miscellaneous Commercial Application No. 20 of 2014 on the ground that if the applicant in Miscellaneous commercial application No. 9 of 2014 had been allowed the Applicant and the third respondent would then be litigating under the same title.*

7. *That the learned judge has issued rulings which are mutually inconsistent and which serve to deny the applicant a fair trial contrary to Article 13 of the Constitution of the united Republic of Tanzania and /or contrary to the rule of natural justice "andi alteram partem" in that buy the learned judge's ruling dated 4th February 2014 the court proceeded upon the express premise that the applicant herein was at liberty to enforce its legal rights which remained at large while the effect of the ruling dated 5th March, 2014 would by parity of reasoning leave the Applicant vulnerable to plea of res judicata without having been heard in respect of any findings in the consolidated suit as presently constituted.*

On the whole, Mr. Kesaria, counsel for the applicant, submitted quite vehemently and " at langum and latum" that the chamber summons and his affidavit in support of the application demonstrate that there are serious and contentious issues of law and fact which require to be gone into by the court of appeal. He went on to state that the legal test in deciding an application of leave to appeal has been outlined in a range of case some of which he made reference to are:

(1) **Jangwani Sea breeze Lodge limited** V. Commercial case No. 93 of 2002.

(2) **Citibank Tanzania Limited V. Tanzania Telecommunications Company Ltd. & 4 others ,** Miscellaneous Commercial Cause No, 6/2003 and

(3) **Citibank Tanzania Limited V. Tanzania Telecommunications Company Ltd. & 3 , others,** Miscellaneous Civil Case No, 6/2003.

In sum, from the authorities cited, counsel mentioned three central pillars of the test to be:

(i) Demonstration of prima facie grounds to merit the appeal,

(ii) Serious judicial consideration on points of law or fact and

(iii) Matters of public importance.

He, however, urged the court to refrain from stepping into the shoes of the Court of Appeal in deciding the application because that is not within the ambit of its duty.

Applying the test above to the grounds of the intended appeal, Mr. Kesaria, in the main contended that this court did not properly analyze the requirements of res judicata as provided for under S.9 of the Civil Procedure Code, Cap. 33 R.E. 2002. In the first place he argued that the parties in the two applications were different with different forms of reliefs. That in Miscellaneous Commercial application No.9/2014 the 3rd respondent prayed for leave to amend counter claim whereas in Miscellaneous commercial application No. 20/2014 the present applicant prayed for leave to join as a necessary party to the existing of suit. On the view of Mr. Kesaria treating the issue of amendment of pleading made by a different applicant in the first application to satisfy the requirement of S.9 was erroneous because that was a misconception of the principle of litigating under the same title. He expounded litigating under the same title does not mean litigating under the same case. Counsel pointed out that the confusion on the ingredients of the doctrine of res judicata is exhibited in the ruling of the court at pages 10,11 and 12. Further to that the two rulings of the court are inconsistent because in the first ruling it was found that the applicant was at abeyance to enforce its legal rights, which remain

at large, against the first and second respondents whereas in the second ruling of 5/3/2014 in Miscellaneous Commercial Application No. 20/2014 the court denies the very same applicant the very right to be joined in the suit to enforce its legal rights as held in the first ruling in Miscellenous Commercial Application No. 9/2014. In that regard he referred me to the case of **21st Century Food and Packing Ltd. V. Tanzania Sugar Producers & 2 others** Civil Appeal No. 91 of 2003 to cement the argument that on the applicant should accord an opportunity to be heard in a matter which directly effects it as was denied in the case referred to.

Mr. Kesaria also raised the issue of finality of the decision as another ingredient of res judicata. He argued the substantive suit has not been heard and finally determined because it is still at the stage of trial. As trial has not begun and no decision has been taken on the matter its commonality has not been heard and decided upon. To reinforce his argument he made reference to the case of **REGISTERED TRUSTEES OF CHAMA CHA MAPINDUZI V. VERSI & SONS.**[2009] EA 412.

Furthermore, Mr. Kesaria raised concern that the decision sought to be appealed against has the effect of preventing the applicant from independently filing a suit to enforce its rights while the judgment in the substantive suit would bind it. He maintained in effect what it means is to deny the applicant fair trial in total disregard of Article 13 of the Constitution of the United Republic of Tanzania or in Contravention of the rule of natural justice on fair hearing.

The counter affidavit of Dr. Lamwai was also under attack. Citing the case of **LALAGO COTTON GINNERY & ANOTHER V. THE LOANS AND ADVANCES REALIZATION TRUST (LART),** Civil Application No. 80 of 2002 in which the famous case of **UGANDA V. COMMISSIONER OF**

PRISONS, EXPARTE MATOVU [1966] E.A. 514 was cited Mr. Kesaria singled out paragraphs 3 (iii), (iv), (v), (vi), (vii), (x), (xi), (xvi), (xvii) and (xviii), 5,6, and 7 of Dr. Lamwa's counter affidavit arguing that those paragraphs offend the law relating to affidavit in that they contain legal arguments, speculations, prayers and extraneous matters. For paragraphs 5, 6 and 7 of Dr. Lamwai's counter affidavit arguing that those paragraphs offend the law relating to affidavit in that they contain legal arguments, speculations prayers and extremeous matters. For paragraphs 5,6, and 7 in particular Mr. Kesaria accused Dr. Lamwai of making reference to an application for extension of time for filing revision in the Court of Appeal in respect of the ruling in Miscellaneous commercial application No. 9/2014 which in his view is not relevant to the instant application which has been confined to the decision of 5/3/2014 in Miscellaneous commercial case No. 20/2014 only because in the former application the applicant was not a party. And whether or not the appeal is competent is for the court of appeal to decide as per the decision in **William Mugurusi V. Stella Chamba** [2004] TLR 406 wherein it was held that:

(i) *Once the proceedings of appeal to the court of appeal have been commenced, the High Court properly apply the Civil Procedure Code and so the whole Civil Procedure is disapplied.*

(ii) *It is not for the High Court to decide whether the intended appeal was competent or not. That was for the appellate court to say. The High Court had no jurisdiction in the matter.....*

In the light of this authority Mr. Kesaria insisted the because of the existence of notice of appeal these proceedings are no longer in this court.

The court cannot revisit the proceedings which are not currently before it until such time the Court of Appeal will decide otherwise.

Another aspect which Mr. Kesaria raised in his submissions concerns what was referred to as confusion of identity of the parties by the court and the correction made by the court at the instance of Dr. Lamwai after notice of appeal had already been lodged to the court of Appeal. In his view that was not correct because the notice related to the intention to appeal against the whole decision including those parts of the decision where the judge confused the identity of the applicant as exhibited at pages 11, 12 and 13 that is something that also needs to be examined by the court of Appeal for it wrong to make those corrections under the slip rule.

Mr. Kasaria concluded that the applicant has demonstrated contentions issues and likelihood of serious misdirection of the judge analyzing S.9 of the CPC. He pontificated that whether the intended appeal is competent or not is not for this court to decide drawing strength from the authority in the case of **William Mugurusi V. Stella Chamba** [2004] TLR 406 (supra).

In response to the submissions fostered by Mr. Kesaria, Dr. Lamwai submitted that the application has no merit at all. He observed as the application emanates from candidate commercial cases No. 42/2011 and 157/2012 the orders of this court are essentially inter locutory in nature. They are not final orders as per definition given in the case of **University of Dar Es Salaam V. Silvester Cyprian and 210 others.** [1998] TLR 176 alongside the case of **KARIBU TEXTILE MILLS V. NEW MBEYA TEXTILE MILLS LTD. & 4 OTHERS**, Civil Application No. 27/2006 which interpretated S. 5(2) (d) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002. The learned counsel underscored that the purpose of seeking leave

to appeal is to enable the High Court to decide in the first place whether the appeal is appealable and, therefore, the court cannot allow a person to go to the Court of Appeal where the law prohibits the right of appeal.

On the substance of the matter Dr. Lamwai submitted that the record bears out that in Miscelleneous commercial case No. 9/2014 the applicant's counsel informed the court that he was making an oral application on behalf of the applicant the court ruled that the learned counsel had not told the court the kind of relief the applicant was seeking from the court and that decision had not been challenged.

Dr. Lamwai concluded that the issue had been the one in both applications i.e. to join the applicant as a party as the court had made it clear that it did not see how the applicant would be of any assistance in eventually determining the issues between the parties actually before it the applicant be allowed to come again to ask to be joined in the suit. Counsel referred to paragraphs 13, 14,15,and 16 of the written statement of defence which ..... To a verbal agreement between the 3rd respondent and the applicant has not been mentioned. Likewise the whole of the plaint, annexture A8 to Dr. Lamwai's counter affidavit, does not mention the applicant. Counsel concluded in view of that there is no demonstration of existence of common interest, between the applicant and the 3rd respondent and the court clearly observed that in its making in Miscelleneous commercial application no. 9/2014. Counsel observed in his submissions that the main claim is between individuals as but not companies. A matter of practice the applicant did not even make draft pleadings to slow the relationship between the existing suits and the party which was sought to be added. Dr. Lamwai also accused the Applicant of

basing its application on the witness statement contrary to Rule 57 of the High Court (Commercial Division) Procedure Rules, 2012.

He also submitted what Mr. Kesaria was trying to do was to point out mistakes of my brother Judge in his ruling and therefore, should be referred to the court of Appeal something which is not in consonance with the principles governing an application for leave to appeal as enunciated in the cases cited. Counsel added in any event the observations made by the court in its rulings when referring to grant the applicant's application are not worthy taking them to the court of Appeal because what the court said is the that it had already dismissed the oral application made on behalf of the Applicant in Miscelleneous Commercial Application No. 9/2014 where in that application it was not cited as an applicant but came in on the shoulders of the 3rd respondent such that it could come again in the case through Miscelleneous commercial case No. 20/2014 because it would completely change the nature of the claim in the consolidated suits. That means the applicant was driving pig back on the third respondent and therefore, the issue or different parties does not arise.

Dr. Lamwai also responded to the submissions of Mr. Kesaria on the clerical errors in the Ruling of the court.

He submitted the intended appeal is against the decision of the court, it not against clerical or arithmetical errors. He reinforced his argument that S. 86 of the Civil Procedure Code, Cap. 33 R.E. 2002, provides clerical errors or arithmetical mistakes in judgments, decree or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court even after there is notice of appeal the request was to correct the ruling at page 13 line 50 to have **Mitras International Trading LLC** be aparty instead of **Mr, Hasmukh Bagwanji** and the word

by which had been omitted was requested to be put 16 etc. the corrections were made in order to follow the logic of the ruling and that was not wrong for the court to do.

As to the affidavit sought to be impugned, Dr. Lamwai submitted the affidavit answers paragraph by paragraph what is stated in the affidavit in support of the chamber summons. The affidavit contains statements of fact from a professional lawyer which must be different from statements of fact from a lay person.

Dr. Lamwai made yet another preliminary observation in respect of thechamber summons filed by the applicant. He posed a question as to whether the application in question is according to the paractive of the High court because under Rule 45 of the court of Appeal rules where leave to appeal must be obtained that leave must first be sought in the High court according to its practice. He expounded under order 43 (2) of the Civil Procedure Code all applications must be by way of chamber summons supported by affidavit. Counsel pointed out as there is no prescribed form of a chamber summons the procedure to be adopted is as it was on 22/7/1920 in England as per reception clause as enacted under S. 2(3) of the judicature and application of laws Act.

He contended going by that position a chamber summons does not contain reasons because it presupposes a way of initiating an application and once it is signed by the Registrar it is court document. As a process of the court it cannot have reasons unlike the procedure obtaining in the court of appeal where applications are made by way of a notice of motion signed by an advocate and not realed by court ,seal. He maintained the seven grounds of the intended appeal should have been drafted into the

affidavit. As the affidavit does not support the grounds in the chamber summons Dr. Lamwai contended that there is no chamber summons at all.

Like in the submissions in chief Mr. Kesaria was insistent there are serious and contentious issues of law for consideration by the Court of Appeal. In the main he restated what was in his earlier submissions. He bolstered his arguments by referring to the **21st Century Case** (supra) stressing that the decision is on all fours with the current application because the applicant wants to go to the court of Appeal to challenge the refusal to join in the suit to claim its legal interests because by that refusal has actually chosed and finally determined its right to pursue and protect them. He laid emphasis on the element of suing under the same title as explained in the cases of (1) **Salehe Bin Kombo Bin Fakhi V. Administrator General, Zanzibar**[1957] EA 191 and (2) **Registered Trustees of Chama cha Mapinduzi V. Versi Sons.** [2009] EA 412.

On the question of interlocutory application and the attendant order Mr. Kesaria was of the view that as that point was not raised as a preliminary objection, it is baseless. In any case it is not for this court to determine whether the intended appeal is properly before it. That is also in respect of the contention that the chamber summons is not competent or valid.

Mr. Kesaria further responded to Dr. Lamwai's defence of his affidavit which was also in issue. He contended that an affidavit by an advocate cannot be treated differently. Citing **Lalago case** (supra) counsel submitted an advocate can swear and file an affidavit in proceedings in which he appears for his client but only in relation to the matters which are in the advocate's personal knowledge and that such an affidavit is not privileged.

As said the submissions by Mr. Kesaria on the other aspects, was in essence a reputation of his submissions in chief.

I have given the rival submissions of the respective counsel the necessary weight. I am very much grateful to their endeovour to assist me in this matter. In the first place, I think, I should state at this juncture that I have no quarrel with the authorities cited by both counsel with regard to the principles to be applied in the application for leave to appeal to the Court of Appeal. However, it occurs to me having deligently gone through the entire record of the matter as well submissions of the learned counsel the first question which cannot escape my mind relates to the maintainability of the application before me. Mr. Kesaria had suggested in his submissions that the issue of competence of the intended appeal is not within the province of this court. He sounded the duty of the court at this stage is only to look at whether or not the application and supporting affidavits have revealed or demonstrated contentious issues examinable by the Court of Appeal.

With all the deserving respect, that stance cannot be taken to bear the correct import of an application for leave to appeal. To the contrary the court must be satisfied that there is right of appeal in existence so that it can exercise its judicial mind to see whether on the basis of that right there are any issues which may require to be looked into by the Court of Appeal. Such an application, therefore, cannot be granted offhandedly.

The legality of the application must be gone into even where the parties have not taken it into account. That duty cannot be left to the Court of Appeal. On this note I keep in view the Court of Appeal decisions and other authorities which I find them to be relevant to this aspect of the matter. The

court of Appeal had this to say in **Ruragina V. The Advocates Committee & Clavery Mtindo Ngalapa,** Civil Application no. 98 of 2010;

> *"Indeed, on the aspect of leave to appeal the underlying principle was well stated by this court in* ***Harban Haji Moso and another V. Omar Hilal Seif and Another,*** *Civil Reference No. 19 of 1997 (unreported) thus:-*
>
> *"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance.*
>
> *The same principle was restated in the subsequent decision of this court in* ***British Broadcasting Corporation V. Eric Sikujua Ng'omaryo,*** *Civil Application No. 133 of 2004 as follows:-*
>
> *"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 raised issues of general importance or a novel point of law or where the grounds of appeal show a prima facie or arguable appeal (see:* ***Buckle V. Holmes*** *(1926) ALL E. R. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexations or useless or hypothetical, no leave will be granted".*

In the treatise in **Mulla Code of Civil Procedure** Vol. 1 at page 756 a similar position is stated as follows:-

"An appeal shall lie to the supreme court from any judgment, decree or ***final order*** *in a civil proceeding of a High Court ..... if the high Court certifies.*

(a) That the case involves a substantial question of law of general importance and

(b) That in the opinion of the High Court the said question needs to be decided by the supreme court".

And at pages 757 – 758 the author further comments as follows in order to elaborate the two grounds:-

"The two conditions are thus cumulative..... therefore the mere circumstance that the proposed appeal involves a substantial question of law of general importance is not by itself sufficient. Even where such a question is involved the ***High Court is required to come to an opinion that it is such as needs to be decided*** *by the Supreme Court. The meaning of the expression. "substantial question of law" was given by the supreme court in* ***Sir Chunilal V. Metha & Centaury Spinning and Manufacturing Co. Ltd*****.....** *in the following terms:-*

"The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general importance or ***whether it directly and substantially affects the rights of the parties*** *and if so whether it is either an open question in the sense that it is not finally settled by this court ..... or it is not free from difficult or calls for discussions of altenative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea is palpably absurd, the question would not be substantial question."*

It is not difficult to see that the point of substance here is that there is no automatic right of appeal where leave to appeal must be sought and obtained. The court must exercise its discretionary power, of course judiciously, to see if the intended appeal is really one that needs to be brought to the attention of the Court of Appeal for it to labour on it and not for it to just throw it out for lack of competence or validity. This court should not accept to be led to abdicate its duty.

Now, apart from SS. 68 and 95, Miscellaneous Commercial Application No. 25/2014 was anchored in order 1 rule 1 and 10(2) of the Civil Procedure code, Cap 33 R,E. 2002.

For convenience sake, or 1 rule 1 provides as follows.

> *All persons may join in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if such persons brought separate suits, any common question of law or fact would arise.*

And 10(2) the court **may**, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completed to adjudicate upon and settle all the questions involved in the suit, be added.

The primary meaning of a party is a litigant/person who has a part to play in the proceedings. There are two categories of parties to a suit as clearly envisaged by the law order 1 (supra), namely; necessary and proper parties. Sub rule 2 of rule 10 (supra) permits addition of both plaintiff and

defendants in certain circumstances. It provides for addition of proper or necessary parties and the stricking out of improper or unnecessary parties.

I am aware that a necessary party is one without whom no order can be completety and effectively made whereas a proper party is one who ought to be joined. His presence is merely a matter of convenience to enable the court to adjudicate more effectively and completely. It is, therefore, obvious that the only reason which makes it necessary to make a person a party to a suit is to bind him by the decision of the court in the action and the question to be settled, therefore, must be one which cannot be effectively and completely resolved unless he is a party. That is the import of order 1 rule 10(2) (supra).

Be that as it may, under the law the court is given discretionary powers to grant or refuse an application to make a person a party to a suit as the word **may** is used. Mr. Kesaria was emphatic in his submission that it is necessary to join the applicant because the outcome of the case will obviously bind it and therefore, it is necessary to join it so as to protect its interest that are at risk the centre of the issue being the oral agreement and the joint venture agreement in which the applicant is said to have been involved. He relied on the case of **21st Centaury Food and Packing Ltd. V. Tanzania Sugar Products Association & 2 others** to cement his point.

In his ruling my brother judge considered the circumstances then obtaining in the application that was before him. He dwelt at length on the doctrine of res juducata and the requirements or circumstances to be considered under order 1 rule 10(2) (supra). Furthermore, he could not loose sight of what he found in Miscellaneous Commercial Application No. 9/2014. At page 15 of the ruling this is what the court said:-

"All in all having its ruling of 04/02/2014 dismissed Miscellaneous Commercial Application No.9/2014 which among other things sought to have ***Mitras International Trading LLC*** *joined as a necessary party in consolidated suit, any attempt now to reopen the matter, albeit under the* ***guise*** *of a different party, in my considered view amounts to asking this court to reopen and re-litigate afresh on an issue in which the matter directly and substantially in issue has been directly and substantially in issue in the former oral application, and which issue has been subsequently raised and has been heard and finally decided by this court. That having the case therefore this court has already become functus officio ..... [****Corrections made by the court under S. 96 of the CPC on the identity of the parties noted and adopted in this ruling].***

My task in this application is not to go into the merits or demerits of the application which were heard and finally decided upon by this court. The recourse to what my brother judge decided in the two applications is only meant to assist me on what should be the outcome of the application at hand. The sticking issue at this juncture is whether by refusing the application to make the applicant a party to the consolidated cases had the effect of deciding the matter in controversy between the parties. It is plainly clear that the applicant is not a party to the consolidated cases referred to. It follows that so far there is no matter in controversy as regards its rights and interest with any of the parties in the two cases. In the two rulings referred to above the court had merely decided on an intervening matter at the instance of the applicant who was not a party.

What is more, the court did not deny its right to be heard to persue its rights if any. The court considered all the circumstances with regard to its

rights. What finally came to the mind of the court is that the applicant had failed to tell the court the kind of relief it was seeking.

That is clearly echoed at page 12 of the ruling that:

> *.....he has not told this court the kind of relief in respect of or arising out of the same transaction or series of acts or transactions in the present suit.....*

The court did not end there. It further proceeded to say that the applicant was at abeyance to pursue its rights, if any, independently meaning, in my view, by filing a separate suit. That has not been done.

All in all, the decisions of this court are, therefore, interlocutory in nature. They do not provide a final resolution to the substantive case. According to **Black's Law Dictionary**, Eight Edition interlocutory is defined as:-

> *(Of an order,) judgment, appeal etc. interim or temporary, not constituting a final resolution of the whole controversy.*

It is the settled position of law that an interlocutory decision or order which does not finally determine a matter is not appealable. Mr. Kesaria did not see otherwise. He, however, took the view that it is not for this court to look into that aspect of legality of the intended appeal. From the authorities I have cited in this ruling I am unable to agree with him because right of appeal cannot be presupposed. Where leave must be obtained, the court must be satisfied that there are disturbing features in the decision sought to be appealed against which merit an appeal including chances of success, and whether allowable by law, even where the application for leave is heard exparte or conceded by the opposite party. In **Rajabu Kadimwa**

Ng'emi & Another V. Iddi Adam [1991] TLR 38 (HC) the court was mindful of the precious time of the Court of Appeal when it held:

> ..... *"Since the intended appeal had no chance of success, this application must fail. It will be a waste of time to all it. In the event, the application is dismissed with costs".*

Since the decision sought to be appealed against was founded on an intervening matter and that it did not give final resolution of the case the same is interlocutory in nature.

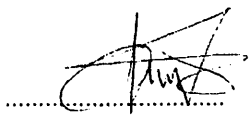
In **University of Dar es Salaam V. Silvester Cyprian** [1998] TLR the court held:

> *(i) Interlocutory proceedings are proceeding that do not decide the rights of the parties but seek to keep things in status pending determination of those rights, or enable the court to give direction as to how the cause is to be concluded or what is to be done in the progress of the case so as to enable the court to decide on the rights of the parties.*

That is what the court did having a bearing on the record including pleadings. The trial of the case is yet to begin. The intervention of the applicant in the progress of the consolidated cases cannot be said to have decided the rights of the parties therein. As earlier said, the court had advised the applicant to pursue its rights independently upon finding that there was no basis for joining it in the case. The suit cannot be defeated by the non joinder of the applicant because the court can deal with the matter in so far as regards the right and interests of the parties actually before it. It follows that as the decision and attendant orders of this court were/are merely interlocutory not disposing of the matter, right of appeal does not

exist. See S.5(2) (d) of the Appellate Jurisdiction Act and **Karibu Textile Mills case (supra). 21st Centuary** case (supra), therefore, distinguished.

Since I have found that right of appeal does not legally exist in this matter, I will not labour on the other limbs of submissions because that alone disposes of the application. Consequently, the applicant's application is dismissed with costs.



A. A. Nchimbi

Judge

08th May, 2014