

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC COMMERCIAL APPLICATION NO 8 OF 2015
(*Arising from the Miscellaneous Commercial Cause No 145 of 2014*)

BETWEEN

KILIMANJARO BLANKET CORPORATION LTD -----APPLICANT

VERSUS

FLAMINGO AUCTION MART CO LTD-----1ST RESPONDENT
DIAMONG TRUST BANK (T)-----2ND RESPONDENT
POLYTEX AFRICA LIMITED -----3RD RESPONDENT

RULING

Date of the Last Order: 13/7/2015
Date of the Ruling; 28/7/2015

SONGORO, J

On the 14/1/2015, Kilimanjaro Blanket Corporation, the applicant filed an application applying for leave to appeal to the Court of Appeal.

The application was made under Section 5(1) (c) of the Appellate Jurisdiction Act Cap 141, R.E [2002] and Rule 45(a) of the Tanzania Court of Appeal, Rules, 2009, it was supported by an affidavit affirmed by Alaudin Gulamali Hirji , the Managing Director of the Applicant's company.

The Respondents in the Application are; Flamingo Auction Mart Co Ltd, the 1st Respondent, Diamond Trust Bank (T) Limited, the 2nd Respondent, and Polytex Africa Limited the 3rd Respondent.

On the 13/7/2015 when the application was called for hearing, Mr Kituturu, the Learned Advocate appeared for the Applicant and pursued the application, Dr. Lamwai Learned Advocate Represented the 2nd Respondent, Mr. Kesaria the Learned Advocate appeared for the 3rd Respondent.

In pursuing the application, Mr Kituturu, the Learned Advocate for the Applicant first, informed the court that the Applicant intends to appeal to the Court of Appeal against the decision of the High Court in Commercial Case No 17 of 2014.

He then informed the court that the gist of intended appeal is to challenge a decision which led to the auctioning, of his landed properties on Plots No 96-102, held under the Certificate of Title No 16326, Golf Industry Area, Tanga Township. Further, the Applicant elaborated that there were irregularities which were committed during the auction of his landed properties which requires the attention of the Court of Appeal.

On the points which requires an attention of the Court of Appeal, are that the trial court did not give due weight to statement annexed to the supplementary affidavit of Alaudin Gulamali Hirji which was annexed as Annexure KBL 4.

Secondly, the Applicant pointed out another point worth consideration of the Court of Appeal, is whether the court gave a due weight to the Applicant submission to set aside the sale by auction.

The third point worth to be considered is, whether the trial court decision on tools, equipment, and stock forms part of the landed properties.

Fourthly, whether an order of proclamation of sale of landed properties, and sale of landed properties, includes sale of machineries, and equipments which were at place of sale.

The fifth point which the Applicant wants the Court of Appeal to consider is whether the court appreciated the fact that the second round of bidding which was conducted vitiated the first round of bidding and the sale of properties to the 3rd Respondent was irregular.

To support his argument that the issue whether there was valid sale is a weight issue the Applicant draw the attention of the Court to the decision of the Court of Appeal in Civil Application No 45 of 2003 between Mwajuma S. Kinza Versus Semeni Omari Kibaya (Unreported) which the court considered that the issue whether or not there was a Valid Sale is important.

In view of the above-mentioned points raised in the affidavit in support of the application, the Applicant prayed that he be given leave to appeal to the Court of Appeal.

In response to the Application and submissions of the Applicant, Mr. Kesaria, Learned Advocate for Diamond Trust Bank (T) Ltd, the 2nd Respondent called the Court to disallow the application for reasons that, the application did not disclose any matter worth to be considered by the Court of Appeal

Then relying on paragraph 2(1) of the Counter Affidavit of Dr, Lamwai, Mr. Kesaria submitted that the application and in particular an affidavit in support of the application, does not disclose or raises, matters which were decided by this court . In other words the Learned Advocate for 2nd Respondent was stating that the application was raising new matters.

On the Applicant Chamber Summon filed on the 14/1/2015 Mr. Kesaria submitted that, it does not disclose a decision of the Commercial Court which the intended appeal is being sought to appeal against.

He then insisted that, the omission of the Applicant to cite a decision which is likely to be subject of appeal turns the application to be defective..

For, reasons which he stated, Mr. Kesaria prayed to the Court to dismiss the application with costs in favour of the application.

In his brief Rejoinder, Mr. Kituturu clarified that at page 1 of the Chamber Summon, it clearly states that the application originates from Misc Commercial Cause No 17 of 2014. while on this point, the Counsel for the applicant submitted that the Chamber summon always has to be read with an affidavit, also the Affidavit states that the application originated from Misc Commercial Cause No 17 of 2014.

I have carefully considered the Applicant's application, counter affidavits of respondent, submissions and matters of law raised, and find there are basically two key issues which need to be determined in the application.

The first issue is if the application for leave discloses the decision of Commercial Court which Applicant sought to appeal against and the chamber summons is proper.

And the Second issue is, if the Applicant in his application has demonstrated in his application if there are important legal or any issue worth to be considered by the Court of Appeal.

Turning to the first issue, Mr. Kesaria in his submission has firmly stated that the application does not disclose the commercial decision. I have revisited the chamber summons and find at the top of the Chamber summon there are statements on top of the chamber summons which states that this application originates from Misc Commercial Cause No 17 of 2014, and Original Commercial Case NO 64 of 2013.

Next, I revisited paragraph 2, 3, and 4 of Affidavit of Alaudin Gulamali Hirji in support of the application and find he made reference to Misc Commercial Cause No 17 of 2014, and the auction which took place as matters which offended the Applicant.

So as explained above, reading the Chamber Summons together with the an affidavit of the Applicant, the court is satisfied that there is a disclosure of the Commercial Court decision which Applicant wants to appeal against.

As explained above in both Chamber Summons, and affidavit the Applicant has stated that, is dissatisfied with the decision of Misc Commercial Cause No 17 of 2014 and the auction and sale which took place.

So, I find Mr. Kesaria concern that, the Applicant did not disclose a decision which he intends to appeal against has no merit at all.

Instead the court is satisfied that, the Applicant in his application has disclosed a Commercial Court decision which he wants to challenge in the Court of Appeal.

Moving to the second issues, the court find as correctly decided by courts in several decisions like in cases of British Broadcasting Corporation Versus Eric Sikujua Ng'anyo Civil Application No 133 of 2004, the case of Rutagatina C.L Versus The Advocates Committee, Clabery Mtingo Ngala Civil Application No 133 of 2007, and the case of William Remigus B Mapesa Versus Chausiku Manyasi Mtani Civil Application No 27 of 2000 Mwanza Registry (unreported) it is emphasized that, in granting leave to appeal to the Court of Appeal, one of the important factors to be considered is if in the intended appeal there is a point of law or points of law worth to be considered by the Court of Appeal.

The above -mentioned legal position has also been re-instated by parties in this application. Mr. Kesaria for the 3rd Respondent has maintained that the application does not disclose if there are important matters of law worth to be considered by the Court of Appeal.

Guided by legal positions stated in the above mentioned cases of British Broadcasting Corporation Versus Eric Sikujua Ng'anyo (Supra), the case of Rutagatina C.L Versus The Advocates Committee, Clabery Mtingo Ngala (Supra), and the case of William Remigus B Mapesa Versus Chausiku Manyasi Mtani (Supra) I carefully revisited paragraphs 2, 3 and 4 of the Applicant affidavit and find the Applicant stated that he filed Misc Commercial Case No 17 of 2014, to challenge the sale and auction of the landed properties but he was not successful.

He then complained at paragraph 3 of his affidavit, that there are matters which he raised while pursuing Misc Commercial Cause No 17 of 2014 but were not accorded due weight and wants to pursue them in the Court of Appeal. The points and grounds which he wants to pursue in the intended appeal are (1) that the sale was not advertised for 14 days as required by law, (2) there was no 30 days notice of auctioning the landed property which was issued, (3) the properties were sold to the 3rd Respondent who was not declared the winner at the auction. (4) the sale by auction was not advertised in the prominent newspaper, (5) the 1st Respondent who is the Court Broker on his own motion put into possession of the 3rd Respondent, plant, machinery and equipments which were not landed properties.

The court has perused the above-mentioned points and intended grounds raised in the Applicant affidavit, and is satisfied that

they are matters of law relating, or connected to *execution of court decree*, order of *proclamation of sale* and sale, and time of sale, as envisaged by Order XXI, Rule 65, 66, and 67 of the Civil Procedure Code, Cap 33 [R,E 2002] the court finds they have legal inclination.

Thus bearing in mind Dr. Lamwai in paragraph 2(1) of the counter affidavit of 3rd Respondent has indicated that, the Commercial Court in its ruling in the Misc Commercial Case No 17 of 2014 made specific findings that, there was irregularities on the sale, which did not render the sale voidable, I am persuaded that the grounds and points raised by the applicant originates from Misc. Commercial Case No 17 of 2014 are well supported by a counter affidavit of the 3rd Respondent .

Honestly, I find the above mentioned matters raises points of law emanating from ORDER XXI, Rule 65, 66, and 67 of the Civil Procedure Code, Cap 33 [R,E 2002] which in my view were in one way or another subject of the decision of this Court in the Miscellaneous Commercial Case No 17 of 2014.

So it is my view that, the points, determination of issues; whether the sale was not advertised for 14 days as required by law, whether there was no 30 days notice of auctioning the landed property, (3) whether the properties were sold to the 3rd Respondent who was not declared the winner at the auction was proper, (4) whether the

sale by auction was not advertised in the prominent newspaper if was proper, (5) whether it was proper for 1st Respondent who is the Court Broker on his own motion to put into possession of the 3rd Respondent plant machinery and equipments are legal issues and matters worth to be considered by the Court of Appeal.

Another point which I found, leave to appeal should be granted is a fact this court in making its decision, in the Miscellaneous Commercial Case No 17 of 2014, it was exercising its original jurisdiction.

So, I find it is fair to allow the Applicant to exercise their right of appeal, and appeal on matters and points of law stated above, and appeal to the court of Appeal.

Therefore on the foregoing reasons, I find that, the Applicant in his application has furnished the court with points of law and matters which warrant this court to exercise its discretion and grant leave to appeal to the Court of Appeal. Thus pursuant to Section 5 (1) (C) of the Appellate Jurisdiction Act Cap 141, I hereby grant the Applicant leave to appeal to the Court of Appeal. I make no order as to costs.

Dated at Dar es Salaam this 28th day of July, 2015

H.T.SONGORO
JUDGE

Delivered at Dar es Salaam this 28th July, 2015

H.T.SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Kitururu, Advocate for the Applicant and Mr. Kesaria for the 2nd Respondent and holding brief of Dr. Lamwai, Advocate for the 3rd Respondent.