IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 281 OF 2015

(Arising from Miscellaneous Commercial Cause No. 328 of 2014)

LEILA MEGHJI t/a LE HOUSE ENTERPRISE ..... APPLICANT

VERSUS

INTERNATIONAL COMMERCIAL BANK (TANZANIA) LIMITED ..... RESPONDENT

15th November & 16th December, 2016

RULING

MWAMBEGELE, J.:

On 15.10.2015, this court struck out Miscellaneous Commercial Cause No. 328 of 2014 which the applicant had filed seeking leave of this court to appear and defend Commercial Case No. 144 of 2014 which the respondent had filed against her claiming under summary procedure, *inter alia*, a total of Tshs. 164,607,000/=. The court order irked the applicant. She has thus filed the present application seeking leave of this court to appeal to the Court of Appeal against it. The application has been made under section 5 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 and rules 45 (a) and 47 of the Court of Appeal Rules, 2009. It is supported by an affidavit

of Leila Meghji; the applicant and resisted by a counter-affidavit of Marie Mang'enya; principal officer of the respondent bank.

The application was argued before me on 15.11.2016 during which both parties were represented. The applicant had the services of Mr. Casmir Nkuba, learned counsel and the respondent was advocated for by Mr. Stanslaus Ishengoma, also learned counsel. Both parties had earlier filed their respective skeleton written arguments as dictated by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

At the oral hearing, it was Mr. Nkuba, learned counsel who started the ball rolling. He submitted that the court struck out that application because it was brought under Order XXXV rule 3 (1) (b), instead of Order XXXV rule 3 (1) (c), of the Civil Procedure Code, Cap. 33 of Revised Edition, 2002 (henceforth "the CPC"). The applicant's stance is that both sub-rules (1) (b) and (1) (b) relate to applications to appear and defend a summary suit but reasons may differ. According to the applicant, an application cannot therefore be incompetent for citing either sub-rule but the reasons thereof may be rejected. The learned counsel stated that there is need to get the interpretation of the Court of Appeal on sub-rules (1) (b) and (1) (b) as the applicant was a borrower, not a mortgagor covered by sub-rule (1) (c) of Order XXXV rule 3 of the CPC. The learned counsel relied on ***Simon Kabaka Daniel Vs Mwita Marwa Nyang'anyi & 11 others*** [1989] 64 for the stance that an application for leave to appeal to the Court of Appeal must be allowed where there is an issue which requires its attention and ***Grupp Vs Jangwani Sea Breeze Lodge***, Commercial Case No..23 of 2002 (unreported) for the stance that this court should not indulge into whether or

not the intended appeal has merit. Other authorities relied upon for the position that leave to appeal will be granted where *prima facie* it appears there are grounds which merit serious judicial attention and determination by a superior court are: ***Sango Bay Vs Dresdner Bank A. G.*** [1971] EA 17 at pp.20 and 21, ***Gaudensia Mzungu Vs IDM Mzumbe***, Civil Application No. 94 of 1994 (unreported), ***Ushirika wa Migahawa Gerezani Vs Registered Trustees of Chama cha Mapinduzi***, Miscellaneous Civil Application No. 38 of 2004 (unreported), ***Peter Mwita Vs National Development Corporation***, Cvil Appeal No. 144 of 1996 (unreported) and ***Mohamed Msangi & another Vs Charles Oden Mwaihola***, Miscellaneous Civil Application No. 516 of 2014 (unreported).

Responding, Mr. Ishengoma, learned counsel, also having adopted the skeleton arguments earlier filed, submitted that the order the applicant seeks to impugn is an interlocutory one which is not subject to appeal as the applicant had a remedy to re-file the application for leave to defend the summary suit. Even if the applicant was uncomfortable to re-file an application for leave to defend the summary suit, he argued, she had other avenue to approach the court to correct any apparent error through review.

The learned counsel for the respondent stated further that the cases cited by the applicant are distinguishable from the facts of the present case. Should the court allow the present application, he argued, it would open the gates of the Court of Appeal and flood it with cases and in the process defeat the purpose of applications for leave to appeal which is to filter cases which are going to the Court of Appeal. He argued that the basic principle is that there must be a serious ground to go to the Court of Appeal deposed in the affidavit which is wanting in the affidavit supporting the present application.

He argued that the applicant ought to have exhausted the remedies available rather than abusing the court process by filing the present application.

In a short rejoinder, the learned counsel submitted that the issue whether the order striking out the application was interlocutory or not was decided in a ruling delivered on 20.10.2016 to the effect that the order was final and conclusive as between the parties.

Regarding review, the learned counsel for the applicant stated that there was no apparent error in that ruling to be corrected by way of review.

On the cases cited, he rejoined that they stated the principles of law and they are thus relevant. He added that the affidavit stated at para 11 that there is a serious ground worth consideration by the Court of Appeal.

I have considered the learned rival arguments by both learned counsel for the parties. As rightly pointed out by the learned counsel for the applicant, the issue whether or not the order of this court dated 15.10.2016 striking out Miscellaneous Commercial Cause No. 328 of 2014 was interlocutory was decided in my ruling of 20.10.2016. In that ruling, I categorically stated that that order finally determined the matter at issue between the parties. It is the law in this jurisdiction that interlocutory orders are neither appellable nor subject to revision – see: ***SGS Societe Generale De Surveillance S. A. Vs VIP Engineering & Marketing Ltd***, Civil Application No. 84 2000 and ***VIP Engineering & Marketing Ltd Vs Merchand Corporation (Malaysia) Berhand of Malaysia***, Civil Application No. 163 of 2004; both unreported decisions of the Court of Appeal. I, like the learned counsel for the applicant, am surprised why the learned counsel for the respondent is raising it again here. I dismiss this argument.

The cases referred to by the learned counsel for the applicant are quite relevant to the present application as they established a very important principle of law in applications of this nature. The cases were aptly discussed by my brother at the Bench Mwandambo, J. in ***Charles Oden Mwaihola*** (supra). The learned counsel for the applicant has picked them from that ruling without supplying them to the court given the fact that they are not reported. However, the gist of those authorities is that the court will not withhold leave to appeal to a superior court if there are grounds meriting the attention of that superior court. In the case at hand, the issue meriting the attention of the Court of Appeal is whether an application for leave to appear and defend the summary suit was appropriately made under Order XXXV rule 3 (1) (b) instead of Order XXXV rule 3 (1) (c), the CPC as held by the court.

As held by the various authorities cited above, it is not the duty of this court to go into the merits of the intended appeal. It is enough for the application to show that the application, *prima facie*, has some merits. I find solace in this stance in the case of ***Ms Ilabila Industries LTD and 2 others Vs Tanzania Investment Bank and Another***, Commercial Case No. 27 of 2002 (unreported) in which this court [Kimaro, J. (as she then was)] quoted the decision of the Court of Appeal in ***Wambele Mtumwa Shamte Vs Asha Juma***, Civil Application No. 45 of 1999 (unreported) in which the court of appeal held:

> "Unfortunately, it is not provided what factors are to be taken into account when considering whether or not to grant leave whether or not to appeal to this court. However, it is obvious that

leave will only be granted if the intended appeal has some merits whether factual or legal."

Lady Justice Kimaro (as she then was) went on to refer to another decision of the Court of Appeal in ***Gaudencia Mzungu*** (supra) in which the same court held:

"Again, leave is not granted because there in an arguable appeal. There is always an arguable appeal. What is crucially important is whether there are prima facie grounds meriting an appeal to this court."

In the ***Ilabila*** case (supra) this court observed:

"While it is not disputed that a person aggrieved by a decision of the court has a right to appeal, that right can only be exercised where the intended appeal has some merit whether factual or legal."

In the instant case, for the reasons stated, I am satisfied that the applicant has sufficiently demonstrated that there is a serious question that needs the attention of the Court of Appeal. That question is, as already alluded to above, whether an application for leave to appear and defend the summary suit was appropriately made under Order XXXV rule 3 (1) (b) instead of Order XXXV rule 3 (1) (c), the CPC as held by the court. I would therefore grant this application.

In the final analysis, this application is allowed. The circumstances of the present application are such that there should be made no order as to costs. I therefore make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 16th day of December, 2016.

J. C. M. MWAMBEGELE

JUDGE