

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 41 OF 2019

(Arising from Commercial Case No. 75 of 2015)

MICAH ELIFURAHA MRINDOKO t/a NEW

BP KILWA ROAD SERVICE STATION.....APPLICANT

Versus

BANK OF AFRICA TANZANIA LIMITED.....RESPONDENT

Last Order: 22nd July, 2019

Date of Ruling: 03rd Sept. 2019

RULING

FIKIRINI, J.

This application has been made under section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2002, and Rules 43 (2) of the High Court (Commercial Division) Procedure Rules of 2012 read together with its Amendments of the 2019 (the Commercial court Rules), and Order IX Rule 13 (1) of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC). The applicant is seeking to set aside an *ex parte* judgment dated 29th May, 2018 in Commercial Case No. 75 of 2015.

Contesting the application the respondent filed counter affidavit as well as raising a preliminary point of objection that the:

1. Pendency of the Notice of Appeal at the Court of Appeal obviates jurisdiction of this Honourable Court in hearing and determining this application.

The applicant filed skeleton arguments under section 64 of the High Court (Commercial Division) Procedure Rules, 2012 as amended by GN.No.107 of 2019 (the Commercial Court Rules) contesting the preliminary point of objection. The respondent did not file anything and did not enter appearance on 22nd July, 2019, the date set for hearing of the preliminary point of objection. The Court however, decided to examine the Preliminary point of objection raised.

Determining the point of objection raised, it is indeed correct that once there is a notice of appeal lodged to the Court of Appeal this Court ceases to have jurisdiction. There is apart from the cited provisions of Rule 91 (a) of the Court of Appeal, Rules, 2009, which was in my view not relevant as it is only the applicant who knows if there is compliance to the cited rule regulating Court of Appeal processes or not. Otherwise there is a list of

cases in relation to the position once there is a notice of appeal filed. To name a few are the following cases: **Tanzania Motor Services Ltd & Another v Mehar Singh t/a Thaker Singh, Civil Appeal No. 115 of 2005; Junaco (T) Ltd & Another v Harel Mallac Tanzania Ltd, Civil Application No. 473/16 of 2016 and In Mohamed Enterprises Tanzania Limited v The Chief Harbour Master & Another, Civil Appeal No. 24 of 2015;** where the Court concluded that the institution of a notice of appeal deprived the High Court of its power to entertain the proceedings giving rise to the notice of appeal.

Going by the decision dated 29th May, 2018, ordinarily the applicant would have been required to apply to set aside the *ex parte* order pursuant to Order IX Rule 13 (1) of the CPC and not to institute an appeal. By the institution of notice of appeal dated 22nd June, 2018, this Court's jurisdiction has been stopped. No any other information has been availed to this Court to the contrary except citing of Rule 91 (a) of the Court of Appeal, Rules which is essentially not governing proceedings before this Court.

In view of the facts pertaining to the application, I agree to the respondent's preliminary point of objection raised and accordingly

sustained it and consequently dismiss this application with costs. It is so ordered.



A handwritten signature in black ink, appearing to read "P.S. FIKIRINI", with a long horizontal line extending to the right.

P.S.FIKIRINI

JUDGE

03rd SEPTEMBER, 2019