IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 51 OF 2019

(Arising from Miscellaneous Commercial Application No. 359 of 2017)

BETWEEM

TRAVELPORT INTERNATIONAL LIMITED.....PETITIONER

Versus

PRECISE SYSTEMS LIMITED.....RESPONDENT

Last Order: 25th July, 2019

Date of Ruling: 10th Sept, 2019

RULING

FIKIRINI, J.

The petitioner, Travelport International Limited by way of chamber summons and pursuant to Rule 75 of the High Court (Commercial Division) Procedure Rules, 2012 (the Rules) moved this Court seeking for the following orders:

(a) That the Ruling of the Court dated 12th April, 2019 in Miscellaneous Commercial Application No. 359 of 2017 be

amended by deleting the word "petitioner" appearing in the first line at page 13 of the Ruling and substituting therefor the word "respondent"

(b) That the Order of the Court dated 12th April, 2019 in Miscellaneous Commercial Application No. 359 of 2017 be amended by deleting the word "petitioner" appearing in the first line at page 2 of the order and substituting therefor the word "respondent"

(c) Costs of this application be in the cause, and

(d) Any other relief(s) the Court may deem fit to grant.

Mr. Roman Masumbuko Counsel for the respondent contested the application, he also raised the following 3 (three) points of preliminary objection:

(a) That the application is not maintainable and bad in law for being an alternative or substitute to an appeal under section 5 (1) (b) (v) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and a review under Order XLII Rule 1 (1) (a) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC) , and

(b) That the application is misconceived and bad at law for wrong and none citation of enabling provision of the law; and

(c) That the application is incompetent for being supported by incurably defective affidavit.

Mr. Audax Kameja counsel for the petitioner as well raised 1 (one) point of preliminary objection that:

(a) The respondent's preliminary points of objection, filed on 17th July, 2019, contravened the rule and principle laid down by the Court of Appeal in the decision of **James Burchard Rugemalira v R & Another, Criminal Application No. 59/19 of 2017, Court of Appeal of Tanzania, at Dar es Salaam (unreported), (copy attached),** that the preliminary points of objections do not set out necessary particulars thereof.

The Court ordered both preliminary points to be argued orally, starting with Mr. Masumbuko, it was his contention that any order which allows or declines to refer the matter to arbitration was subject to appeal under section 5 (1) (b) (v) of the AJA. The order cannot be varied nor can revision be sought in relation to the order. He cited the **Yara (T) Ltd v D.B. Shapriya & Co. Ltd,Civil Application No. 345/16 of 2017,**

where the Court of Appeal clearly stated that the revision which was before it should have been by way of an appeal and not otherwise.

Explaining more, Mr. Masumbuko submitted that the petitioner if not interested in appeal then they can seek for review under Order XLII Rule (1) of the CPC. On the strength of his argument he prayed for the application to be dismissed.

On the 2nd point, he contended that by citing Rule 75 of the Rules, this Court was not properly moved as the cited provision caters for clerical or arithmetical errors arising from a slip of a pen or omission. The application before the Court was for substitution of the merit and not correction of clerical or arithmetical error. The citation was thus wrong as what was intended to be changed was the decision by changing the parties. He further argued that issues of discretion were not clerical or arithmetical and thus cannot be brought under Rule 75 of the Rules. Supporting his submission he referred this Court to the case of **Sebastian Stephen Minja v Tanzania Harbors Authority, Civil Application No. 107 of 2000, Court of Appeal at DSM** (unreported) (copy attached) **p.6-7.**

In short he argued that there was no provision cited allowing what was being sought and asked for the application to be dismissed.

The 3rd point was to the effect that the affidavit in support of the petition in particular paragraphs 7, 9, 10, 11 & 12 were argumentative and cannot be contained in an affidavit. Those paragraphs should therefore be struck out and the application be dismissed with costs.

Mr. Kameja responding to the submission contended that there was no reason for lodging an appeal as the order sought was already granted. This application was made simply seeking for an amendment of the ruling or the order in the petition on the ground stated in the application. Likewise, he refuted the need for review arguing that the petition was not challenging the merits of the ruling.

Taking up the 2nd point, he contended that Rule 75 of the Rules cited empowered this Court to amend its judgment, ruling or order and therefore the application was properly premised under the cited provision which allows the Court to grant the relief sought. As to whether or not there were sufficient grounds for the Court to exercise such powers it was a matter to

be decided on merits of the application. The objection raised was thus misplaced.

The 3rd point on the paragraphs stated to be argumentative; it was Mr. Kameja's submission that those paragraphs stated facts which basically arose on what took place during the petition for stay of the proceedings. He thus declined the assertion that the paragraphs were argumentative and that they should be struck out. Summing up he prayed all three points of objection raised be dismissed and the application be heard on merits.

Rejoining, Mr. Masumbuko submitted that all the decisions cited by the respondent have not been contested by the petitioner. Also the reference made to section 5 (1) (b) (v) of the AJA was not challenged. As for the petitioner to opt for appeal it was his submission that, the petitioner if aggrieved he could have challenged part or the whole of the decision by way of an appeal and not otherwise.

Dissecting the response on review part, it was Mr. Masumbuko that since Mr. Kameja refuted challenging the merits of the decision, which signify there was no error and if any then should have been addressed by way of a review under Order XLII Rule (1) (b) of the CPC . On the 2nd point on

Rule 75 while Mr. Masumbuko admitted that the rule allows amendments but what was before the Court was not what was envisaged. Changing of parties was in his view going to the root of the matter and not just a clerical error as submitted. Reacting to the 3rd point, Mr. Masumbuko maintained that the paragraphs were argumentative and should be expunged which will leave the application with nothing.

Submitting on the preliminary point of objection raised by the petitioner, it was Mr. Kameja' submission that the preliminary points of objection contravened the principle laid down in the Court of Appeal decision for failure to disclose particulars of the objection and explained on them at the hearing. This was an ambush to both the Court and the other party who could not be aware and prepare as to what the objection was about. He referred this Court to pages 9-11 of the decision. Since the preliminary point of objection in this application suffered the same problem he urged the Court to struck them out with costs.

Mr. Masumbuko making reference to Miscellaneous Commercial Application No. 359 of 2017, between the same parties, the Court of Appeal concluded that the points of objection raised were sufficient. The case of **Rugemalira** (supra) distinguishable, submitted Mr. Masumbuko, as at

page 3, the objection raised was vague. This was different from the objections before this Court where the laws have been cited for each point of objection raised. And that the objections have been effectively responded to.

Mr. Masumbuko as well urged the Court to issue strong warning against raising counter-preliminary points of objection since that was not the practice in place.

Mr. Kameja in brief rejoinder, argued that the preliminary points of objections raised previously were different from those raised in this application. It was his further argument that the fact the petitioner was able to effectively respond to the points of objection raised did not displace the Court of Appeal decision on the point. After all he did try to respond to the objection but could not due to the absence of the particulars, so a party should not be made to respond to sort of *suo motu* preliminary points of objection for lack of particulars, he submitted.

In determining the preliminary points of objection raised, I shall examine the first set of preliminary points of objection as raised by Mr. Masumbuko if overruled will then proceed to the one raised by Mr. Kameja.

The second point of objection raised and argued by Mr. Masumbuko was that this Court has not been properly moved for either due to wrong or none citation of the enabling provision. For ease of reference the Rule 75 of the Rules cited to move this Court is provided below:

> *"The clerical or arithmetical mistakes in judgments, ruling, decrees or orders, or errors, arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or upon request of any of the parties"*

Both counsels admit that Rule 75 of the Rules is *pari materia* to section 96 of the CPC and Mr. Kameja went even further pointing out that the provision is *pari materia* to section 152 of the Indian Code of Civil Procedure. The question is what does the provision mean? As submitted by Mr. Masumbuko referencing from the author **Mulla on Code of Civil Procedure (Abridged), 14th Edition (2005), p.636** which elaborated the provision to mean:

> *".....The power of rectification of clerical, arithmetical errors or accidental slips does not*

empower the court to have a second thought over the matter and to find that a better order or decree should be passed.....On a second thought, the court may find that it may have committed a mistake in passing an order in certain terms, but every such mistake does not permit its rectification in the exercise of powers under this section. ***It is to be confined to something that was initially intended, but was left out or added, against such intention.....***"

[Emphasis mine]

From the above elaboration what can be gathered is, the provision of Rule 75 which is *pari materia* with section 96 of the CPC or even section 152 of the Indian Code of Civil Procedure, can be applied but with limitations. In the present situation the applicant's prayer to this Court is to the effect that changes should be made as to who should initiate the arbitration proceedings differently from what the Court's ruling ordered. This by any standard is not a slight change as would be considered. The Court in arriving at its decision that the petitioner/applicant should be the one to initiate the arbitration proceedings must have thoroughly gone through a

process of assessing facts presented before it. This is in my view what the Court intended and nothing else.

The prayers in the application are thus farfetched from what Rule 75 of the Rules was intended to cater for. This is because what the applicant is seeking is *first and foremost* a completely new thing which has actually not been dealt with by the Court. This is premised on the fact that the petitioner in Miscellaneous Commercial Application No. 359 of 2017 petitioned for the proceedings in Commercial Case No. 165 of 2017, be stayed pending reference of the dispute to the arbitration. The application which was initiated by the petitioner was granted, the fact which is admitted by the applicant in the present application. If that is what to go by then there is nothing to amend, as the Court granted exactly what it was requested to grant.

Secondly, the applicant's argument or rather belief as indicated in paragraph 9 of the affidavit deponed by Mr. Kameja, that the petitioner had no claim against the respondent and that since the matter to be referred to arbitration was the dispute in the suit initiated by the respondent and thence the only one who could initiate the arbitration proceedings is in my view flawed. It was never obligatory for the

petitioner to move the Court seeking for stay of the proceedings had he not intended and meant. Understanding and considering the prayer was worth granting, the Court proceeded to do so. The petitioner cannot now come and want it differently.

I have carefully read the ruling and could not find any error or amendment worth a name to be made. Instead what I came across was the application for substitution of the merit and not correction of clerical or arithmetical error. The citation was thus wrong as what was intended to be changed was the decision made at Court's discretion by changing the parties. The provision of Rule 75 of the Rules invoked in the instant case to move the Court is in my view inappropriate, since there was no error or amendment to be done. In that regard it is indeed correct to say that this Court has not been properly moved by none or wrong citation of the provision enabling this Court. There is a long list of decisions as to what should occur in such situations, that the application usually suffers striking out. This point is thus sustained.

Another point raised by the counsel for the defendant was that the present application was a substitute of an appeal under section 5 (1) (b) (v) of the AJA or review under Order XLII R I (1) (a) of the CPC. And that the

position of the law is any order which allows or refuses to allow referring the matter to arbitration is subject to appeal or at most review and not even a revision. Section 5 (1) (b) (v) of the AJA, is provided below for ease of reference.

> 5 (1) *"In civil proceedings, except where any other written law for the time being in force provides otherwise,* ***an appeal shall lie to the Court of Appeal–***
>
> (b) *against the following orders of the High Court made under its original jurisdiction, that is to say–*
>
> (v) ***an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;*** [Emphasis mine]

Mr. Kameja contested this assertion on the ground that the Court was only asked to make amendments of parties so that the then "petitioner" can be substituted to be the "respondent" and vice versa. This was however, not the ruling of the Court. The ruling of the Court as stated earlier was arrived

at after thorough assessment of the facts presented before the Court by the present applicant. The Court granted the applicant what was prayed, which was the staying of the proceedings in Commercial Case No. 165 of 2017 pending referring the dispute to arbitration. There was nothing wrong with the prayer or its granting, the fact which was also admitted by the applicant. With that in place I therefore do not see what is to be corrected in the said decision.

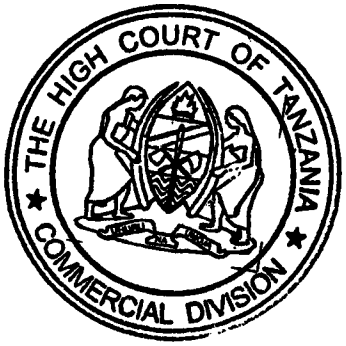
The intended amendment besides being cumbersome in my view goes to the root of the matter and the outcome of the changes would be a completely different order from that intended and one given by the Court in its ruling.

Such prayer can only be attended to by an appeal or review. I thus agree to Mr. Masumbuko's submission that any challenge to the granted or refused to be allowed prayer, be it part or the whole of the decision can best be dealt with by way of an appeal or review rather than an application as it is in the present situation.

This point is as well sustained; however, in the present situation the outcome is not to strike out the application but to dismiss it.

This one point is in my view is sufficient to dispose of all the preliminary points of objection raised. I thus hereby proceed to dismiss the application for not being maintainable and bad in law as it featured as an alternative or substitute to an appeal under section 5 (1) (b) (v) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and review under Order XLII R 1 (1) (a) of the Civil Procedure Code, Cap. 33 R. E. 2002.

The 1st and 2nd preliminary points of objection are sustained. I find the 1st point of objection sufficient to dispose of the application entirely and hence no need of dealing with the remaining points of objections raised. The application is thus dismissed with costs. It is so ordered.



P.S.FIKIRINI

JUDGE

10th SEPTEMBER, 2019