

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 161 OF 2018

(Original Commercial Case No. 83 of 2013)

BETWEEN

MITUL SHAH.....APPLICANT

Versus

INTERNATIONAL COMMERCIAL BANK (T) LTD.....RESPONDENT

Last Order: 10th Dec, 2019

Date of Ruling: 19th Feb, 2020

RULING

FIKIRINI, J.

The applicant is moving the Court under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA), Order XLIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC). The application which is accompanied by the affidavit of Mitul Shah, is seeking for leave to appeal to the Court of Appeal against the order of this Honourable Court, dated 25th June, 2018 in Commercial Case No. 83 of 2013, committing the applicant to prison as a civil prisoner.

Objecting the application Ms. Marie Mang'anya head of Legal department of the respondent's company filed counter affidavit. Parties filed written submissions.

Mr. Emmanuel Joachim Msengezi filed written submission on behalf of the applicant as well as prayed for the adoption of the applicant's affidavit while Mr. Richard Madibi, did so, on behalf of the respondent.

It was the applicant's submission that in order for the leave to appeal to the Court of Appeal to be granted, the applicant must demonstrate that there is: one, point of law requiring Court of Appeal attention as stated in the case of **Simon Kabaka Daniel v Mwita Marwa Nyang'anyi & 11 Others [1989] T. L. R. 64**. Two, that there is likelihood of success of the intended appeal as illustrated in the case of **Samson Kishosha Gabba v Charles Kigongo Gabba [1990] T.L.R. 133**. Expanding the contention, it was Mr. Msengezi's submission that paragraphs 3, 4, 5 and 6 gave reasons and ground forming basis for the application, including whether or not a judgment debtor needs to prove all factors enshrined under the law before being committed to prison as a civil prisoner as provided under Order XXI Rule 39 (1) (2) (a) – (e) and 39 (5) of the CPC.

Developing the argument further and in reference to paragraph 5 (a) (b) (c) (d) and (e) of the affidavit, though the applicant pleaded poverty and inability to pay the debt; shows that all property mortgaged was made available to the disposal of the respondent bank. The Court had established good faith on the applicant by refusing to grant injunctive orders to the 3rd parties who would obstruct or delay the

respondent in processing the mortgaged property. This was consistent with Order XXI Rule 39 (2) (b) of the CPC, he further submitted.

Taking up paragraph 6 (b) and (c) of the affidavit in support, it was submitted that currently suits on mortgage are two faced, since on the same subject matter two suits might ensue: *one*, the lender would institute a suit for recovery at the Commercial Court, and two, other interested parties would institute a suit at the Land Division of the High Court or general registry of the Court. The outcome in the two suits filed at two different courts might be different and this will have an impact on two key principles of *sub-judice* and *res-judicata* as provided under sections 8 and 9 of the CPC.

In the present situation the Court has made its findings in the Commercial Case No. 83 of 2013 whereas another case on the same subject matter was instituted at the Land Division of the High Court as Land Case No. 225 of 2013 to challenge the decision made by the Commercial Court, which obstructed the respondent from selling the mortgaged property to recover its monies. According to the applicant that needed Court of Appeal intervention in interpreting the law, the basis of establishing Divisions of the Court, filing of two suits on the same subject matter before two different courts.

Countering the submission, Mr. Madibi submitted that there are a number of factors to be taken into account prior to granting of leave to appeal to the Court of Appeal. Those factor as elucidated in the case of **Buckle v Holmes [1926] All ER No. 90 at p. 91** which was cited in the case of **British Broadcasting Corporation v Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004, CAT, DSM (unreported)** where the Court remarked that leave to appeal is not automatic but discretionary. However, the discretion must be judicious. Apart from that there must be issues of general importance or novel point of law or *prima facie* case prompting Court of Appeal intervention, which none has been pointed out by the applicant. Another case cited along the same line is **M/S Robert Advertisement Limited v The Director, Dodoma Municipal Council. Miscellaneous Commercial Application No. 308 of 2015, High Court of Tanzania, Commercial Division, DSM (unreported)**.

The same was the stance in the cited cases of **Gaudensia Mungu v The IDM Mzumbe, Civil Application No. 94 of 1999 (unreported)** which was cited in the case of **Ametan Contractors Limited v Nautilus Limited, Miscellaneous Commercial Application No. 83 of 2015, High Court of Tanzania, Commercial Division, DSM (unreported)**, where Court of Appeal held that:

“....again, leave is not granted because there is an arguable appeal. There is always an arguable appeal. What is crucially important is whether there was prima facie, grounds meriting an appeal to this court”

Likewise there were no any disturbing features worth Court of Appeal intervention, argued Mr. Madibi. Buttressing the point the case of **Harban Haji Mosi & Another v Omar Hilal Seif & Another, Civil Reference No. 19 of 1997 (unreported)** was cited.

Specifically addressing on the issue of poverty as per Order XXI Rule 39 of the CPC, it was the respondent's contention that the applicant failed to prove poverty when required during the execution proceedings. As a result he was detained as a civil prisoner. To prove poverty require evidence and hence cannot be point of law to be determined by the Court of Appeal. Additionally, mere statement that the applicant was poor cannot sustain. After all there was no proof from the records of proceedings as to whether the High Court had declared the applicant bankrupt, as provided by under section 20 (1) and (2) of the Bankruptcy Act, Cap. 25 R.E. 2002. It is only a Court of law which can declare a person bankrupt after claiming poverty and the matter having been determined by the Court, and a notice having been gazetted.

The ground raised must be issues of general importance or novel point of law or prima facie case requiring Court of Appeal intervention, the respondent stressed, Additionally, the applicant has failed to reveal any factual or legal grounds warranting this Court to grant leave sought.

On the strength of their submission the respondent prayed for the application be dismissed with costs as it was devoid of merits.

I have soundly considered the rival submissions by the counsels for the parties and could not find any reasonable ground warranting grant of leave to appeal to the Court of Appeal. *First and foremost*, as argued by Mr. Madibi leave to appeal is not automatic. And since that is the case then the applicant is tasked with a duty of making sure that there are grounds stated which upon being assessed by the Court before which the application has been placed can fairly consider the application for leave to appeal to the Court of Appeal. In the present application the applicant has failed to point out any point of law of general importance or novel point of law which would require Court of Appeal interpretation. As stated in the case of **Buckle** (supra) which was cited with approval in the case of **British Broadcasting Corporation** (supra), the position I subscribe to that:

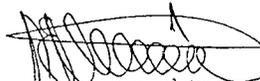
“Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The

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 raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal.....”

Secondly, the grant of leave is discretionary powers vested upon the Court with a caution that they be exercised judiciously. In order for that to occur there must be material facts placed before the Court to allow it scrutinize the same and come up with the decision of whether or not to grant leave. Thirdly, the applicant has in my view failed to satisfy the requirement as propounded in the cited case of **Buckle** (supra). All the stated grounds needed evidence the exercise which has already been dealt with by the trial Court and no point of law has been raised compelling the Court of Appeal determination.

Based on the above stated reasons I find the application lacks merit and proceed to decline the leave. The application is thus dismissed with costs.




P.S.FIKIRINI

JUDGE

19th FEBRUARY, 2020