

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)

AT DAR ES SALAAM.

MISC. COMMERCIAL APPLICATION NO. 70 OF 2019

(Arising from the Ruling in Misc. Application No. 260 of 2018 High Court of Tanzania (Commercial Division) before Hon. Fikirini dated 11th day of July, 2019)

CHOBO INVESTMENT COMPANY LIMITED.....APPLICANT

VERSUS

MTI INVESTMENT LIMITED.....RESPONDENT

RULING

B.K.PHILLIP, J

The applicant herein being aggrieved by the ruling of this Court in miscellaneous Application No. 260 of 2018, has lodged this application under the provisions of section 5 (1) (c) of the appellate Jurisdiction Act Cap 141, R.E 2002 praying for the following orders:-

- i. This honourable court may be pleased to grant leave to appeal to court of Appeal of Tanzania.
- ii. Cost of this application be provided for.

This application is supported by an affidavit sworn by Mr. John Chobo, the Principal officer of the applicant. A counter affidavit sworn by the learned Advocate Ms. Carolyne Jakob Muro has been filed in court in opposition to the application. At the hearing of this application the learned advocate

Lenin Njau appeared for the applicant while the learned Advocates Godfrey Gimeo, Carolyn Muro and Ernestilla Bahati appeared for the respondent.

A brief background to this application is that on 11th July 2019, this court (Hon. Fikirini, J) dismissed the applicant's application for setting aside an ex-parte order that was entered by this court on 3rd September 2018, on the ground that the applicant failed to adduce good reasons to move the court to set aside the ex-parte order.

In the affidavit in support of this application, the deponent states as follows; That the applicant filed Misc. Application No.260/2018 to set aside an ex-parte order that was made by this Court on 3rd September 2018 after being granted extension of time vide Misc. Application No. 226 of 2018. That, this court erred in law to dismiss the said Misc Application No.260/2018 on the reason that the applicant did not account for each day of delay and failed to give good reasons for the setting aside the ex-parte order, while the requirement of accounting for each day of delay had already been dealt with by this court in the application for extension of time to set aside the ex parte order (Misc. Application No. 226 of 2018). Moreover, the deponent mentioned the grounds/points intended to be tabled at the Court of Appeal, to wit;

- i. That the trial court erred in law in holding that the applicant had failed to adduce sufficient reasons to set aside ex parte order.

- ii. Whether it was proper on part of the trial judge to decide the application basing on matters that have already been decided upon and that the trial judge was inconsistent as to the actual point of determination in the application before the court.

In the counter affidavit in opposition to the application, the deponent states as follows; That the dismissal of the applicant's application for setting aside the ex-parte order was justifiable and based on the pleaded facts. That the court evaluated the pleadings and the submissions of both sides and made a finding that a mere allegation that the applicant's counsel was sick on itself was not sufficient to convince the court to set aside the ex- parte order.

Submitting for the application, Mr. Njau, started his submission by adopting the contents of the affidavit in support of the application and proceeded to argue that this court erred in law for making a finding that the applicant failed to account for each day of delay while the same had already being accounted for in Misc. Application No. 226/2018, in which the court granted extension of time to the applicant to lodge the application for setting aside the ex-parte order. Mr. Njau contended that accounting for each day of delay was not an issue in Misc application No 260 /2018. Citing the case of **British Broadcasting Corporation Vrs Erick Sikujua Ng'imaro, Civil Application No. 138/2004**, (unreported), in which the court said that for a leave to appeal to the Court of Appeal to be granted one has to demonstrate that there are prima facie arguable appeal, Mr. Njau further contended that in this matter there is a triable appeal worth the

attention of the Court of Appeal. It was the contention of Mr Njau that the issue as to whether it was proper for the trial Judge to base its decision on matters which had already been decided by the court is worth the consideration of the Court of Appeal. In concluding his submission, Mr. Njau said that the applicant has a right to be heard as well as right to appeal. He invited this court to grant the application.

On the other hand, Mr. Godfrey Gimeno, like Mr. Njau, started his submission by adopting the contents of the counter affidavit in opposition to the application and proceeded to submit that this application has no merit as it has failed to meet the tests for granting the leave to appeal to the Court of Appeal which were stated in the case of **Ms. Robert Advertisements Ltd Vrs The Director Dodoma Municipal Council, Misc Commercial application No. 308/2015** (unreported) to wit; *the grounds raised by the applicant must be issues of general importance, or novel points of law or prima facie case necessitating the intervention of the court of Appeal*. Mr. Gimeno, further submitted that the applicant failed to adduce sufficient reasons to move the court to grant the application and did not plead necessary facts pertaining to the extension of time to set aside the ex-parte order granted by the court in Misc application No 226/2018. He refuted Mr. Njau's contention that the court dismissed the application based on issues which had already been decided by the court in Misc. Application No. 226/2018.

As regards the argument that the applicant has a right to be heard, Mr. Gimeno submitted that the right to be heard is not automatic. He

contended that in this application there is no any law that has been contravened. He prayed the application to be dismissed.

In rejoinder Mr. Njau reiterated his submission in chief and further submitted that it was not necessary for the applicant to plead the facts on extension of time to file the application to set aside the ex-parte order which were pleaded in Misc. Application No. 226/2018. He insisted that this court was *functus officio* as far as the issue of delay in filing the application for setting aside the ex-parte order is concerned since extension of time to file application No.260/2018 was granted by this court.

Having analyzed the submissions made by the learned Advocates, let me proceed with the determination of the merit of this application. I wish to start by pointing out that an order for leave to appeal to the court of appeal is among the discretionary orders that can be granted by this court. The court's discretion must be exercised judiciously. [see the case **British Broadcasting Corporation** (supra)]. Thus, as it is the position in any discretionary orders, there are no specific conditions on which this court should rely on for granting the leave to appeal to the Court of Appeal, however our courts have stated some general guidelines which can be applied by the courts when considering an application for leave to appeal to the Court of Appeal. In the case of **Tanzacoal East Africa Limited Vrs Minister of Energy and Minerals, Misc Commercial application 331 of 2015** (unreported) the court said the following;

"there is no scope of granting leave to appeal unless two conditions are satisfied to wit;

- (a) The case should involve a substantial question of law worth the consideration of the Court of Appeal*
- (b) That the grounds raised must be issues of general importance or novel points of law or prima facie case necessitating the intervention of the court of appeal"*

In the case of **Abubakari Ali Hamid Vrs Edward Nyelusye, Application No 51 of 2007** (unreported) the court said the following;

"Leave to appeal is granted where the proposed appeal stands reasonable chances of success or where but not necessary the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal"

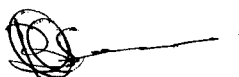
Reverting to the application at hand, upon perusing the ruling of this court subject to this application, I have noted that it is true as submitted by Mr. Njau, that among other things, the court made a finding that the applicant failed to account for each day of delay. I have also noted that the submission made by Mr. Njau, before the court was to the effect that the application that was before the court was an application for setting aside the ex-parte order not for extension of time, thus there was no need for the applicant to account for each day of delay. Taking into consideration the findings made by the court and the submissions made by Mr. Njau as stated herein above, I am of a settled view that in this matter there is a disturbing feature which requires the guidance of the

court of appeal, that is; What was supposed to be considered by the court in the application for setting aside the ex-parte order under the circumstances of the application and whether the reasons adduced by the applicant were sufficient to move the court to grant the application.

From the foregoing, it is the finding of this court that this application is meritorious and the same is hereby granted. I give no order as to costs.

Dated at Dar es Salaam this 23rd day of March, 2020.




B.K. PHILLIP
JUDGE