

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CASE NO. 15 OF 2022

(Arising from Misc. Commercial Cause No. 33 of 2021)

BETWEEN

MOHAMED ABDILLAH NUR1ST APPLICANT

UMMUL KHERI MOHAMED 2ND APPLICANT

WINGS FLIGHTS SERVICES LIMITED 3RD APPLICANT

AFRICA FLIGHT SERVICES LIMITED 4TH APPLICANT

VERSUS

HAMAD MASAUNI1ST RESPONDENT

ARTHUR MOSHA2ND RESPONDENT

JUMA MABAKILA 3RD RESPONDENT

Date of Last order: 19/04/2022

Date of Ruling: 06/05/2021

RULING

MAGOIGA, J.

The applicants, MOHAMED ABDILLAH NUR, UMMUL KHERI MOHAMED, WINGS FLIGHT SERVICES LTD AND AFRICA FLIGHT SERVICES LIMITED by way of chamber summons made under sections 8, 68 (e), 95 and Order



XVII Rule 1(1) of the Civil Procedure Code [Cap 33 R. E. 2019] and section 2(1) and (3) of the Judicature and Application of Laws Act [Cap 358 R.E.2019] supported with affidavit affirmed by Mr. MOHAMED ABDILLAH NUR is moving this court be pleased to grant the following orders, namely:

- a. To stay and/o adjourn the proceedings in Misc. Commercial Cause No 33 of 2021 pending the determination of Civil Application No. 40/16 of 2022 now pending in the Court of Appeal;
- b. Costs of this application may be ordered to be in the cause.

The accompanied affidavit stated the reasons why this application should be granted as prayed.

Upon being served, the respondents through the 2nd respondent filed counter affidavit stating the reasons why this application should not be granted.

The facts albeit in brief regarding this application are imperative to be stated. The respondents vide Misc. Commercial Application No.164 of 2020 were granted leave by this court to institute a derivative action against the applicants. Upon grant of the leave, they instituted Misc. Commercial Application No. 33 of 2021. Upon being served by Chamber summons and affidavit in Misc. Commercial Cause No 33 of 2021, the applicants filed

counter affidavit and immediately instituted Misc. Commercial Application No. 106 of 2021 seeking for extension of time within which to issue notice of appeal and apply for leave to appeal against the ruling and order granted ex-parte in Misc. Commercial Application No. 164 of 2020 and apply for proceedings with costs. This court after hearing parties on merits dismissed the application. Aggrieved, the applicants went for a second bite in the Court of Appeal and as such filed Civil Application No.40/16 of 2022 pending for determination. Consequently, the applicants filed the instant application praying for stay of the proceedings in Misc. Commercial Cause No.33 of 2021, hence, this ruling.

The applicants are enjoying the legal services of Messrs. Gabriel Simon Mnyele and Deogratius John Lyimo Kirita, learned advocates. The respondents are equally enjoying the legal services of Mr. Alex Mgongolwa, learned advocate.

The reasons advanced and argued by Messrs. Mnyele and Kirita both in their oral and written skeleton arguments for grant of this application are that, there illegality in the proceedings in Misc. 164 of 2020 for leave the basis of Misc. Commercial Cause No 33 of 2021. According to Messrs. Mnyele and Kirita, much as there is correlation between what is sought in



the Court of Appeal of Tanzania in Civil Application No. 40/16 of 2022 and Misc. Commercial Cause No. 33 of 2021, they urged this court not to continue with these proceedings because it will amounts to an academic exercise in case their application is granted. In support of their stance, the learned advocates cited the case of DANGOTE INDUSTRIES LTD TANZANIA vs. WARNERCOM (T) LIMITED, CIVIL APPEAL NO.13 OF 2021, in which it was held that it is not necessary to set aside ex-parte proceedings but an aggrieved party can appeal directly to the appellate court.

According to the learned advocates for the applicants, guided by the above Court of Appeal decision and much as did not make an application to set aside the ex-parte ruling or order were not barred from appealing directly against the ruling they are seeking for leave.


Also, the learned advocates for applicants cited the case of EXAUD GABRIEL MMARI vs. YONA SETI AKYO AND 9 OTHERS, CIVIL APPEAL NO. 91 OF 2019, CAT (ARUSHA) (UNREPORTED) in which it was, among others, held that once a formal notice of appeal is lodged the High Court's jurisdiction ceases to warrant a continuation with the proceedings.



On the strength of the above reasons and guidance from the above two cited Court of Appeal decisions, the applicants counsel urged this court to grant the application as prayed.

On the other hand, Mr. Mgongolwa adopted the contents of the counter affidavit and orally submitted that, indeed, the instant application was filed pre maturely because this court has not determined any rights between parties in Misc. Commercial Cause No. 33 of 2021. According to Mr. Mgongolwa, much as the learned advocates for the applicants admits that no formal notice has been filed in respect of Misc. Commercial Cause No. 33 of 2021 that makes the whole application premature and misconceived.

Mr. Mgongolwa pointed out that sections under which the application was made do not apply to the situation we have. The learned advocate submitted that section 8 of the CPC is inapplicable for grant of stay, sections 68(e) is applicable for seeking injunctive orders, section 95 applies where there is no specific provisions and Order XVII is for adjournment and the prayer is not for adjournment. Mr. Mgongolwa challenged the application of section 2(1) and (3) of the Judicature and Application Laws Act as not applicable in the circumstances we have here.




Lastly Mr. Mgongolwa pointed out that the applicants have no clean hands to pursue what they are doing here because have other matters in other registries.

Consequently, the learned advocate for the respondent urged this court to dismiss this application with costs.

In rejoinder, Mr. Mnyeale insisted that the reply of Mr. Mgongolwa is misconceived and was placed on wrong premise. According to Mr. Mnyeale, their application is for stay, as such they need not have decree or order in order to be granted stay. Nor do they need to have notice of appeal because here they applied for stay of the proceedings and which is allowed where there are two proceedings pending vertically and horizontally. Mr. Mnyeale insisted that, much as the two pending matters have bearing to each other, then, the grant of stay is imperative than not.

As to sections cited, Mr. Mnyeale argued in rejoinder that they are applicable in that section 8 is sub judice to Court of Appeal proceedings (vertically), sections 68(e) and 95 is applicable because the order will avoid chaos in the administration of justice, and Order XVII is applicable because this court can give specific or general orders to avoid the confusion to occur.



On other cases asked to take judicial notice, Mr. Mnyele argued that were dealing with other matters and implore the court to find that they have clean hands on this application.

On that note, Mr. Mnyele urged this court to grant the application with costs to two advocates.

Having heard the rivalling arguments on the grant or not of this application, in my respective view, the issue for determination is, whether the application before the Court of Appeal in Civil Application No.40/16 of 2022 and Misc. Commercial Cause No. 33 of 2022 are correlated or interlinked that to proceed with Misc. Comm. Cause no 33 of 2021 will cause confusion to the proceedings in the Court of Appeal. The applicants and their respective learned advocates believe that these two proceedings are directly interlinked and have direct effect to each other, as such prayed and insisted that this instant application be stayed. However, when citing the case of EXAUD GABRIEL MMARI vs. YONA SET AKYO (supra) and probed by the court if there is any formal notice of appeal to oust the jurisdiction of the court in Misc. Commercial Cause No.33 of 2021 as of now, they readily conceded that there is no formal notice, were quick to point out that there



is an application for second bite for extension of time to file one which has bearing to the instant application.

On that basis, they urged and prayed that this court be pleased to grant the prayers as contained in the chamber summons.

On the other hand, the learned advocate for the respondents sees the instant application in diametrical different legal eye that the instant application is prematurely made because in Misc. Application No. 164 of 2020 no rights of the parties were determined, no notice of appeal has been filed so far to oust the jurisdiction of the court and that the application has been preferred under wrong provisions of the law.

I have carefully considered the rivalling arguments along with cases cited together with the point for determination and guided by the wisdom by the Court of Appeal of Tanzania in the case of TECHLONG PACKAGING MACHINERY CO. LIMITED AND ANOTHER vs. A-ONE PRODUCTS AND BOTTLERS LIMITED, CIVIL APPLICATION NO. 517 OF 2008 CAT (DSM) (UNREPORTED) in which the Court of Appeal grappling with the similar application, had this question to ask itself, a question which, I will also ask myself as well in this application that, whether the proceedings in Civil



Application No.40/16 of 2022 can be treated as one and the same with Commercial Cause No. 33 of 2021?

The Court of Appeal in the above case after defining the word proceedings to entails all actions at law, be it before a court of law or out of court, at last the it found out that a mere interlink of the matter but which are not intended to achieve the same purpose cannot be said to be one and the same.

Now back to the instant application and guide by the above decision, all considered, I am inclined to find out that the application in Civil Application No.40/16 of 2022 are for extension of time to file notice of appeal in respect of Misc. Commercial Cause No. 164 of 2020 while the issue before me in Misc. Commercial Cause No. 33 of 2021 are for derivative action, hence, not same and are not one for purpose. I am entitled to the above stance because; **one**, I find no correlation even if the notice of appeal had been filed because unless I had determined Misc. Commercial Cause No. 33 of 2021, no way that appeal can touch a matter not yet decided. **Two**, not only that but also it should be noted that even the prayers in Civil Application No.40/16 of 2022 has nothing to do with Misc. Commercial Cause No. 33 of 2022 which the applicants prays that I stay. **Three**, the




notice of appeal, even if granted, as argued by the learned advocates for the applicants will have no correlation with the Misc. Commercial Cause No. 33 of 2022, as correctly held by the Court of Appeal in the above cited case of **"Techlong"** above (supra) because is not geared towards to the proceedings in Misc. Commercial Cause No. 33 of 2021 as the whole grievances in Misc. Commercial Application No.164 of 2020 were for grant of ex-parte leave and not the determination of derivative action so to speak. On the foregoing reasons, I find no confusion likely to be caused as argued by the learned advocates for the applicants. That said and done, thus, this application is found wanting in merits and same is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 6th day of May, 2022.




S. M. MAGOIGA
JUDGE
06/05/2022