IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

MISC.COMMECIAL APPL. NO.35 OF 2022

(Originating from Misc. Commercial Application No.169 of 2021)

SGS SOCIETE GENERALE
DE SURVEILLANCE S.A .....1ST APPLICANT
SGS TANZANIA SUPERITENDANCE
CO.LTD.....2ND APPLICANT

VERSUS

VIP ENGINEERING AND MARKETING LTD.....RESPONDENT

Date of the Last order: 18/07/2022
Delivery of the Ruling: 22/08/2022

RULING

NANGELA, J.,:

The Applicants filed this application under section 5(1)(c) of the Appellate Jurisdiction Act,Cap.41 R.E. 2019 and Rule 45(a) and 47 of the Tanzania Court of Appeal Rules,2009 [R.E 2019) seeking for the following orders, that:

1. The Applicants be granted leave to appeal to the Court of Appeal against the ruling of the Court dated 28th February 2022 in Misc. Commercial Appl. No. 169 of 2021.

2. Costs of this application to abide the results of the appeal.

The application is supported by affidavit of Mr Seni Songwe Malimi, learned advocate representing the Applicants herein. On 14th April 2022 the Respondent Company filed her counter affidavit deponed by Mr James Buchard Rugemalira who is a majority shareholder of the Respondent.

Together with the filing of the said counter affidavit, there was filed in this Court a Notice of Preliminary Objection. The objection raised by the Respondent was that:

> "the Ruling and Order of Mkeha,J. dated 28th February 2022 lifting the veil of incorporation of the Applicant Companies and directing issues of summons to all the Directors, Managers and other officials of the Judgement Debtors to appear before the Court with a view of showing cause why they should not be sent to prison as Civil Prisoners in Execution of the Decree dated 15th July 2016 in Commercial Case No.16 of 2000 is not amenable to appeal under the mandatory directions of Section 5 (1) (b) (viii) of the

Appellate Jurisdiction Act, Cap.141 [R.E 2019]."

When the learned advocates for the parties appeared before me on the 16th day of June 2022, I directed them to dispose of the preliminary objection by way of written submissions. It is pleasing that they duly complied with the schedule of filing which was issued to them by this Court. I have gone through the submissions and, hence, I prepared this ruling.

Although there are matters or concerns and issues raised in their submission which are extraneous to the Preliminary objection and, hence, need not be considered in this ruling, Messers Sisty Bernard and John Chuma, the learned counsels for the Respondent, have contended that the order made by Hon. Mkeha, J., is not appealable if one takes into account what section 5(1)(b)(viii) and 5(2)(d) of Cap.141 R.E 2019 provide. In view of that, they have contended that, leave cannot be granted on matters which are not appealable.

To support their contention, reliance was placed on the case of **Herman Sigh Bhogal t/a Harma Singh & Co. vs. Javda Karsan,** Civil Appeal No.22 of 1952 E.A, at page 18,

where it was stated that, a right to appeal can only be founded on a statute. That being the case, they contended that, the Applicants cannot be granted leave to appeal against the ruling of Hon. Mkeha J. dated 28th February 2022 since the law has barred appeals against such an order.

To further strengthen their objection, the learned counsel for the Respondent contended that, the orders issued by Hon. Mkeha, J., are interlocutory in nature. As such, they contended that the Order is as well not appealable under section 5 (2) (d) of the Appellate Jurisdiction Act, Cap.141 [R.E 2019].

To support their position; they placed reliance on the case of **Augustino Lyatonga Mrema vs. Republic,** Crim. Appeal No.61 of 1999 (unreported) at page 7, where it was held that, the Court of Appeal has no jurisdiction to entertain an appeal by the accused person from interlocutory orders.

A further reliance was placed on the cases of **Jitesh Jayantilal Ladwa & Another vs. Dhirajlal Walji Ladwa & 2 Others**, Civil Appl.No.154 of 2020 (CAT) (unreported); **Junaco & Another vs.Harel Mallac Tanzania Ltd**, Civil Appl. No.473/16

of 2016 (unreported) and **Vodacom Tanzania Plc vs. Planatel Communications Ltd**, Civil Appeal No.43 of 2018.

In reply to the submissions filed by the learned counsels for the Respondent, Mr Timon Vitalis and Mr Seni Malimi, the Applicants' counsels, had a contrary view. In their submission, the learned counsels contended that, a Court hearing an application for leave to appeal to the Court of Appeal, has no power to determine the competence of the intended appeal whether such is pre-mature or incompetent.

To support their submission, they placed reliance on the decision of the High Court in the case of **Mexon Japhta Sanga and Mexons Energy Ltd vs. NMB Bank Plc**., Land Case No.03 of 2021 and submitted that, the power to hold that an intended appeal is interlocutory and therefore not appealable is vested in the Court of Appeal in exercise of its appellate jurisdiction.

According to the Applicants' counsels, if a Court wherein an application for leave to appeal is lodged attempts to determine the competence of the appeal which is yet to exist; such attempt will be tantamount to usurping the powers of the Court of Appeal.

As regards whether section 5 (1) (b) (viii) and 5 (2) (d) of the Appellate Jurisdiction Act, Cap.141 R.E 2019 bars an appeal against interlocutory orders, and, if so, whether the order in the ruling by Hon. Mkeha, J., is non-appealable, the learned counsels for the Applicants argued, in the first place, that, section 5 (1) (b) (viii) of the Act, does not bar appeals against interlocutory orders.

They have submitted that, the arrest and detention order intended to be challenged by the Applicants was made 'in execution of the decree', hence, it does not fall within the province of section 5 (1) (b) (viii) of the Appellate Jurisdiction Act (hereafter referred to as **AJA**) which lists "**arrest and detention orders**" that are appealable without leave of the High Court or the Court of Appeal.

To support their position, reliance was placed on the Court of Appeal decision in the cases of **Ndondo Kalomola t/a N.J. Petroleum SPTL and another vs. Broadgas Petroleum (TZ) Ltd and Others**, Civil Appl. No.165/16 and 518/16 of 2019 (un reported) and **Rajabu John Mwimi vs. Mantrac Tanzania Ltd**, Civil Application No. 367/01 of 2020. They contended that,

in both cases , the Court of Appeal was of the view that, all orders of the High Court which do not fall within the domain of section 5 (1) (b) (viii) of the AJA, Cap.141 R.E 2019, are appealable with leave of the High Court or the Court of Appeal.

It was a further submission by the learned counsel for the Applicants that, it has been consistently construed by the Court of Appeal that, section 5 (2) (d) of the AJA, does not bar appeals against preliminary or interlocutory decisions or orders that have the effect of finally or conclusively determine the matter before the High Court. Indeed that is the position and I do not think there is any dispute in that.

The unreported decisions of the Court of Appeal in the cases of **Celestine Samora Manase & 12 Others vs. Tanzania Social Action Fund and Attorney General**, Civil Appeal No.318 of 2019; **Tunu Mwapachu and Others vs. National Development Corporation and Another**, Civil Appeal No.155 of 2018; and **Prime Catch (Exports) Limited and Others vs. Diamond Trust Bank Tanzania Ltd**, Civil

Application No.296 0f 2017, have been relied upon in support of the submissions by the Applicants' learned counsels.

It was also the Applicants' counsels' submission that, the ruling of His Lordship Mkeha, J., has the finality effect on the application by the Respondent as it finally disposed of the application, Misc. Commercial Application No. 169 of 2021 and, that, the case file was closed with no further proceedings in respect of that case file. It was their contention, therefore, that, the Court is now proceeding with execution of the decree whose validity is challenged by the Applicants.

The learned counsels for the applicants contended further that, the ongoing enforcement of the execution order by arrest and detention as civil prisoners in Commercial Case No.16 of 2000 is against the individual directors and managers of the Applicants' companies.

It was contended, therefore, that, the orders of this Court which lifted the veil of incorporation was a final order because it finally determined the matters into controversy between the

Respondent and the Applicants. In view of all that, the Applicants have urged this Court to overrule the objection with costs.

The Respondent counsels have filed a rejoinder submission. Apart from reiterating their submission in chief, it has been their contention that, what was before Hon. Mkeha, J., was an application which led to the lifting of the veil of incorporation and serving summons to Directors, Managers of the Applicants to appear before this Court and show cause why they should not be sent to prison as Civil Prisoners in execution of the Decree dated 15th July 2016 in Commercial Case No.16 of 2000. As such, they contended that the ruling by Hon. Mkeha, J., is not final but interlocutory, meaning that, if falls under section 5(2)(d) of the AJA, [R.E.2019].

I have carefully and dispassionately examined the submissions filed in this Court for and against the preliminary objection. At the crux of the matter is whether the ruling issued by Mkeha J, is amenable to appeal given what Section 5(1)(b)(viii) and Section 5(2)(d) of the Appellate Jurisdiction Act, Cap.141 [R.E 2019] provides.

For ease of reference, I will cite the Section 5(1)(b) (viii) and Section 5(2)(d) of the Appellate Jurisdiction Act here below. The same provides as here under:

> "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—
>
> **(viii)** an order under any of the provisions of the Civil procedure Code, imposing a fine or directing the arrest or detention, in civil prison, of any person, **except where the arrest or detention is in execution of a decree**."
>
> (2) Notwithstanding the provisions of subsection (1)-
>
> (d) **no appeal** or application for revision **shall lie against or be made in respect of** any preliminary or **interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit**.

Considering the above provisions, I have taken the liberty of looking at the ruling and orders issued by my learned brother Judge Hon. Mkeha, J. In his ruling, the learned judge was very categorical that, the Misc. Commercial Application No.169 of 2021 had only succeeded partly in the sense that, the Court granted the orders to lift the veil of incorporation. What followed, however, was this Court's directive that summons be issued to the respective persons named in his ruling to appear and show cause why they should not be sent to prison as civil prisoners for their failure to pay the decretal sum.

Now, that being the scenario, can it be said that, the ruling issued by this Court had finally determined **Misc. Commercial Application No.169 of 2021?** In my considered opinion, I do not think that the **Misc. Commercial Application No.169 of 2021** was determined to its finality. It was only partially final in respect of the order to lift the veils of incorporation which orders were born out of the necessity to ensure that the real persons are served with a summons to appear and show cause.

Until they appear and show cause, and until the Court pronounces whether they are to be committed to prison as Civil Prisoners or not, it cannot be said that the said Misc. Commercial Application No.169 of 2021 was determined to its finality.

In view of that fact, the ruling is, in essence, still an interlocutory one and, by virtue of section 5(2)(d) of the Appellate Jurisdiction Act, Cap.141, **no appeal shall lie against in respect of** such kind of a decision.

I have looked at the submissions made by the Applicants. They have argued that, the power to hold that an intended appeal is interlocutory and therefore not appealable is vested in the Court of Appeal in exercise of its appellate jurisdiction. The learned counsels for the Applicants have argued, as well, that if this Court decides otherwise that will be tantamount to usurping the powers of the Court of Appeal.

With due respect to the submissions by the senior counsels for the Applicant, I do not agree with that line of thinking. It does not, in my view, portray a correct legal position. In an application for leave to appeal to the Court of Appeal, therefore, the deciding

Court has discretion to grant it or not to, depending on the circumstances of each case.

One of the reasons that will make the Court to restrain itself from exercising its discretion, in my view, is where the matter for which leave is being sought is of interlocutory nature. That restraint will logically flow from the fact that, the law has made it clear that such matters are not appealable. In view of that, it will be illogical or unreasonable to bring to the attention of the Court of Appeal '*a half-baked'* decision. No High Court Judge, in my respectful view, would do that, and, further, by upholding an objection based on the ground that a decision for which leave is sought to appeal to the Court of Appeal is interlocutory one, does not and cannot amount to a decision that usurps the powers of the Court of Appeal.

From the foregone discussion, I find that the objection has merit and I will proceed to uphold it. This Court, thus, settles for the following orders:

1. That, the preliminary objection raised by the learned counsels for the

Respondent has merits and I hereby uphold the objection.

2. That, the Application is hereby struck out with costs.

It is so ordered

DATED AT DAR-ES-SALAAM, ON THIS 22ND DAY OF AUGUST 2022

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HON. DEO JOHN NANGELA

JUDGE