

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DARES SALAAM**

**MISCELLANEOUS COMMERCIAL CASE NO. 148 OF 2020
(Arising from Consolidated Misc. Comm. Cause No. 67 of 2017 and 75 of 2017)**

STANDARD CHARTERED BANK (HONG KONG) LIMITED	1ST APPLICANT
STANDARD CHARTERED BANK MALAYSIA BERHARD	2ND APPLICANT

VERSUS

INDEPENDENT POWER TANZANIA LIMITED	1ST RESPONDENT
PAN AFRICAN POWER SOLUTIONS (T)LIMITED	2ND DEFENDANT
VIP ENGINEERING AND MARKETING LIMITED	3RD DEFENDANT

RULING

K. T. R. Mteule, J

7/10/2021 & 11/1/2022

This is an application for a leave to appeal against the decision of this court dated 9th February 2017 delivered in **Consolidated Miscellaneous Commercial Cause No. 67 of 2017 and 75 of 2017** which set aside the decision of Hon. Sehel J as she then was issued in Miscellaneous Commercial Cause No. 2 of 2017 to Register a foreign judgment and order dated 16th November 2016 granted to the Applicants against the 1st Respondent by the **High Court of Justice Queen's Bench Division Commercial Court of England in Claim No. CL-2013-000411 on (Foreign Judgment)**. The said Foreign Judgment was Registered in Tanzania pursuant to **Section 4 (1) of the Reciprocal Enforcement of Foreign Judgments Act Cap. 8 R.E. 2019**.

Following the decision to Register the foreign Judgment, the 1st and the 2nd Respondents filed **Miscellaneous Commercial Cause No. 67 of 2017** while the 3rd Respondent filed **Miscellaneous Commercial Cause No. 75 of 2017** both seeking to set aside the registration of the Foreign Judgment. On 30th May 2017, the two applications were consolidated. Upon hearing, the consolidated Applications were decided in favour of the instant Respondents where the Court set aside the order for registration of a Foreign Judgment issued by Sehel, J. (as she then was) on the ground that it was not correct for this Court to register the Foreign Judgment when there was and there are still court proceedings in local courts including the High Court of Tanzania and the Court of Appeal of Tanzania which dealt with the same subject matter in the Foreign Judgment i.e. the loan facility agreement with the 1st Respondent.

The application is supported by an affidavit of the Applicants' counsel **Mr. Nyika Advocate** who stated that the Applicants are aggrieved by the decision of **Hon B. Phillip, J** and intend to appeal to the Court of Appeal on the following grounds:

- (i) That the learned Judge erred in law by failing to note that the ground relied upon in setting aside the Foreign Judgment is not one of the grounds stipulated under section 6 (1) of the Reciprocal Enforcement of Foreign Judgments Act Cap. 8 R.E. 2019) upon which a registration of a foreign judgment could be set aside.
- (ii) The learned Judge erred in disregarding and failing to consider the grounds for setting aside registration of a foreign judgment as provided under section 6(1) of the Reciprocal Enforcement of Foreign Judgments Act Cap. 8 R.E.2019)
- (iii) That the learned Judge erred in law in refusing to deal with the question of whether the 2nd and 3rd Respondent had standing to bring

an application to set aside registration of the Foreign Judgment which was not issued against them.

According to Mr. Nyika, the grounds of the intended appeal raise a serious issue of law and an arguable case worth consideration by the Court of Appeal and a notice of Appeal is already filed on 24th September 2020.

In response to the Applicant's Affidavit, only the 3rd Respondent filed a counter affidavit. Since there was a proof that the 1st and 2nd Respondents were duly serviced but opted not to neither appear nor file a counter affidavit, the court allowed the matter to proceed in their absence.

In the counter affidavit sworn by the 3rd Respondent's counsel Mr. Michael Ngalo, the 3rd Respondent disputed the ground of appeal by stating thus:-

- (a) The Hon Court did not error at all because the foreign judgment was passed in proceedings similar the ones that were pending before the High Court of Tanzania vide Civil Case No, 229 of 2013 and Civil Application Nos. 76 and 90 of 2016 both pending before the Court of Appeal;
- (b) The facts constituting the cause of actions and thus the subject matters of the foreign proceedings and those in Tanzania arose out of loan agreement (facility involving VIP, IPTL and the Applicants; and
- (c) That the Hon. Court was correct in setting aside the order of the same court which registered the foreign judgement in order to avoid contravention of public policy with regards to administration of justice in our country.

All other material facts of the affidavit were disputed by the 3rd Respondent who vehemently prayed for the Court not to allow the application for leave to appeal.

The application was argued by a way of Written Submissions where Gasper Nyika filed submissions on behalf of the Applicants while Advocates Michael Ngalo, Cuthbert Tenga, John Chuma and Respicius Didace prepared joint submissions for the 1st and the 3rd Respondents. At this juncture, I wish to point out that there was already an order directing for the matter to proceed in the absence of the 1st and 2nd Respondents. As such, the inclusion of the 1st Respondent in the Respondent's submission is misconceived. Consequently, the submissions will be considered to cover only the 3rd Respondent and anything regarding the 1st Respondent will be ignored.

On the part of Applicant's submission, The Counsel for the Applicants having adopted the contents of the affidavit as part of the submissions, proceeded to state the principle governing the granting of leave to appeal as stated in the cases of **Bulyanhulu Gold Mine Limited and two others versus Petrolube (T) Limited and another, Civil Application No. 364/16 of 2017 (unreported)** which cited with approval the case of **Harban Haji Mosi and Another v Omar Hilal Seif and Another, Civil Reference No. 19 of 1997 (unreported)**; **British Broadcasting Corporation versus Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004**; **Saidi Ramadhani Mnyanga v. Abdallah Salehe. [1996) TLR 74**

From **Bulyanhulu Gold Mine** the Applicants' counsel quoted the following words of the Court of Appeal : -

"leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a

whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectra of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

According to the Applicants, in all these cases, it was established that leave to appeal may be granted under the reason that the matter raises contentious issues of law worth the Court of Appeal consideration.

Submitting for the grounds of Appeal, the Applicant's counsel tried to show existence of a prima facie case, or an arguable case, to be determined by the Court of Appeal while avoiding going to the details of the matter. According to the Counsel for the Applicants, the intended grounds of Appeal raise a good arguable case that is worth the Court of Appeal's consideration and contentious issues of law worth determination by the Court of Appeal. It is his prayer that leave be granted.

On the other hand, in their written submissions, the third respondent's counsels began the submission by giving at a lengthy, the history of the matter pertaining the Foreign Judgment while trying to show its correlation with the matters pending in the Courts in Tanzania making references to the findings of Hon. Philip J in her impugned Ruling. Having adopted the contents of the Counter affidavit as part of their submissions, the counsels for the 3rd Respondent were of the view that the grounds which the Applicants purport to raise and argue are not worth referring to the Court of Appeal for its consideration and determination because they are neither novel nor points of great public importance but are unfounded and misconceived. The counsels do not find any error whether of law or fact or both which the Hon. Judge strayed into as the Hon. Judge's ruling is well reasoned in terms of the

analysis and evaluation of the materials placed on the record of the Consolidated Application and found the same to be meritorious. According to the counsels, the complaints being made against such kind of a decision are those which will always be made by losing litigants aimed at trying their luck in a higher Court forgetting that not every unpleasant decision is appealable to a higher court.

The 3rd Respondent's counsels cited **Edmund Aaron Mwasaga & Four others Vs Senate of the University of Dar es Salaam Misc. Civil Cause No. 59 of 1998, at page 6** (unreported), quoting the late Justice Katiti as follows;

"Upon study of the above, it may openly be observed that the requirement of leave is applicable to the Court of Appeal as well as the High Court and it cannot be vain (sic!) that the legislature thought it necessary. In my view, the necessity for leave application is for the Applicant to show that he at least has a sustainable case, it is a filtering legal mechanism, and this is an essential protection against abuse of legal process and to enable the court to prevent the above by busy bodies and mischief makers, that would in my view, seem to be the philosophy behind leave requirement. This philosophy should be applicable both to the High Court and no less to the Court of Appeal."

The counsels further proceeded to quote what Hon Justice Katiti wrote in defining and Appeal thus:-

"An appeal strictly so called, is one in which the question, is whether the order of the Court, from which an appeal is brought was right on the materials which the court had before it. A right of appeal where it exists is a matter of substance and not of procedure. The word appeal is defined as a Judicial examination of the decision by a higher court of

the decision of an inferior Court – LAKSHMIRATAN ENGINEERING VS ASSISTANT COMMISSIONER AIR 1968 SC 488."

The Counsels further cited the decision of **Rajabu Kadimwa Ng'eni and another Vs. Iddi Adam (1991) TLR 38** in which **Hon. Mwalusanya, J.** (as he then was) quoting the following words: -

"Since the intended appeal has absolutely no chances of success the application must fail as it will be a waste of time to allow it. In the event the application is dismissed with costs"

In further submission, the counsels for the 3rd Respondent disputed that the intended Appeal has any chances of success. He contends that according to **English Law Expert Report on Illegality by Ian L. Meakin** which he adopted, the Loan Facility Agreement and the Term Loan Facilities 2001 as amended or modified are unenforceable for illegality both under Tanzania Law and English Law. That the unenforceability applies not only to the Loan Facility Agreement, the Term Loan Facilities and the Variations thereto but also to the Security Deed, the Shareholders support Deed and any assignments there under because the said documents were entered into pursuant to the express terms of the Loan Facility Agreement itself.

It is further submission by the counsels for the 3rd Respondent that they are instructed to repeat the notice in paragraph 8 of the URGENT JBR MEMO DD DEC 11, 2020, a copy of which is attached hereto with the submissions as "TAB-3, and that JAMES BURCHARD RUGEMALIRA had started to apply for permission of the Resident Magistrate In-charge of the Dares Salaam Resident Magistrates' Court at Kisutu to commence Private Criminal Prosecution Proceedings against the Standard Chartered Bank Group and Conspirators to recover from them more than TZS 61Trillion that they have

illegally and wrongfully withdrawn and diverted from IPTL thereby occasioning substantial financial losses to VIP Engineering and Marketing Ltd and the United Republic of Tanzania.

Responding on the point that 2nd and 3rd Respondents had no right to challenge the registration of the foreign Judgement on the reason that they were not parties to the application for registration of the foreign judgement, the 3rd Respondents counsels submitted that the ground is misconceived on the basis that the 3rd Respondent was and still is a shareholder of the 1st Respondent (IPTL) hence it was right for 3rd respondent to challenge the registration of the foreign judgment since they are the parties seriously affected by the decision to register the foreign Judgment the subject of these proceedings.

The counsel for the Respondent filed a rejoinder submission. To save time, I will not reproduce the contents of the rejoinder, but the arguments therein will be considered in determining the issues in the application.

Having gone through the submissions of the parties and their affidavits the issue to be considered by this court is whether the applicants have established sufficient grounds to warrant leave to appeal to the Court of Appeal.

To answer the above issue, I would first point out that leave to appeal is within the court's discretion and that the said discretion must be exercised judiciously. This is as well so submitted by the counsel for the applicant and supported by the 3rd Respondent's counsel. See **British Broadcasting Corporation supra** where the relevant words as quoted by the counsel for the applicant stated:

*"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 a novel point of law or where the grounds show a prima facie or arguable appeal see **Buckle v Holmes 1926 ALL E.R Rep 90 at 91**. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

For this discretion to be exercised judiciously, some conditions have to be met by the applicant to justify granting of leave to appeal. Some of these conditions include: - chances of success, existence of disturbing features in the proceedings, existence of point of law or point of public importance in the proceedings and existence of prima facie or an arguable appeal.

It is an established principle that in applying these criteria in considering leave to appeal, the Court should avoid going to the merit of the preferred grounds of appeal. See **Jireyes Nestory Mutalemwa vs. Ngorogoro Conservation Area Authority, CAT, Application No. 154 of 2016 (Unreported)** and **The Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd, Civil Application No. 29 of 2012 CA (unreported)**.

In **Jireyes Supra**, their Lordships Justices of Appeal stated:

".. in applications of this nature, it is a well-established principle of law that the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard. We are reinforced towards that position by our decision in the case of The

Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd, Civil Application No. 29 of 2012 CA (unreported) in which we stated that:-

"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..."

The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted. It is for this reason the Court brushed away the requirement to show that the appeal stands better chances of success as a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal [see Murtaza Mohamed Viran vs Mehboob Hassanali Versi, Civil Application No. 168 of 2014 and Victoria Real Estate Development Limited vs Tanzania Investment Bank and Three Others, Civil Application No. 225 of 2014 (both unreported)].

From the aforesaid conditions, the most important is the existence of arguable grounds of appeal being of facts or on point of law. The others also matter, but it is risk to delve into them without touching the merit of the court which may place this court at an appellate position.

Although parties submitted in detail for and against the grounds of appeal being meritorious, guided by the established principles, it is my obligation to confine my decision on whether the applicant has presented any arguable issue to be considered on appeal while carefully avoiding going into the merits of the grounds of appeal.

It is a well settled position that, the court shall consider the grounds for seeking leave in isolation of the submissions seeming to challenge the findings of the High Court. *See Jireyes supra*. Guided by the cited jurisprudence, I have examined the grounds of appeal without dwelling deep into the submission which touched their substantive context. The issues which surround the grounds of appeal are: -

- (i) Whether the learned Judge erred in law by failing to note that the ground relied upon in setting aside the Foreign Judgment is not one of the grounds stipulated under section 6 (1) of the **Reciprocal Enforcement of Foreign Judgments Act Cap. 8 R.E. 2019**) upon which a registration of a foreign judgment could be set aside.
- (ii) Whether the Hon. learned Judge erred in disregarding and failing to consider the grounds for setting aside registration of a foreign judgment as provided under **section 6(1) of the Reciprocal Enforcement of Foreign Judgments Act Cap. 8 R.E.2019)**
- (iii) Whether the learned Judge erred in law in refusing to deal with the question of whether the 2nd and 3rd Respondent had standing to bring an application to set aside registration of the Foreign Judgment which was not issued against them.

In the entire parties' submissions, there arose a hot debate on these issues each party trying to re-argue on the merit of the application which resulted into the impugned decision. This court is not in a position to resolve this debate. It cannot declare whether the ground relied upon in setting aside the Foreign Judgment is not one of the grounds stipulated under section **6 (1) of the Reciprocal Enforcement of Foreign Judgments Act Cap. 8 R.E. 2019)**. It can neither decide whether parties had locus stand in the proceedings of the impugned decision nor can it state whether the Hon Judge

properly or improperly considered the ground to set aside the registration of the foreign judgment.

By its nature, the predominant debate in this application on the merit of the intended grounds of appeal needs an eye of superior court for a deeper scrutinization to the details of the impugned decision of this court and this is in the domain of the Court of Appeal and not of this court.

From the foregoing, I find the intended grounds of appeal containing issues to be arguable grounds on appeal and this affirmatively answers the issue as to whether there is a sufficient ground established by the Applicants to justify leave to appeal.

Having found that the applicant has sufficiently established cause to warrant leave to appeal, I hereby grant the application for leave to appeal against the Decision of this Court in **Consolidated Miscellaneous Commercial Cause No. 67 of 2017 and 75 of 2017**. No order as to costs.

Dated at Dar es Salaam this 11th Day of January 2022.



KATARINA T. REVOCATI MTEULE

JUDGE

11/01/2022

The Ruling is delivered in Court this 11th Day of January 2022 in the Presence of Caroline Ngairo Advocate for the Applicant and Sisty Bernard Advocate and John Chuma Advocate for the 3rd Respondents

K. T. R Mteule, J

Sgd

11/1/2022