IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 198 OF 2021

(Arising from Commercial Cause No.54 of 2020)

PRESTINE PROPERTIES LIMITED .....APPLICANT

VERSUS

SEYANI BROTHERS & CO. LTD .....RESPONDENT

Last order: 29th March, 2022
RULING: 06th April, 2022

RULING

NANGELA, J.

The Applicant herein prays for the following orders of the Court:

1. That, this Honorable Court be pleased to grant the Applicant leave to appeal to the Court of Appeal of Tanzania against the whole f the Ruling and Drawn Orders of this Court in Misc. Commercial Cause No.54 of 2020 delivered on the 16th November

2021 on grounds set out in the accompanying affidavit.

2. Costs of this application be provided for.
3. Any other relief(s) as the Court deems fit to grant.

The Applicant's chamber summons was filed under section 5 (1) of the Appellate Jurisdiction Act, Cap.141 R.E 2019 and Rule 45 (a) and (b) of the Court of Appeal Rules, 2009. It was supported by an affidavit of one Shalom Samwel Msackyi. On the 16th day of February 2022, the Respondent's advocate filed a counter affidavit.

On the 29th March 2022, the parties appeared before me for the hearing of the application. The Applicant enjoyed the services of Mr Ashiru Lugwisa, learned advocate, while Mr Beatus Malima, learned advocate, appeared for the Respondent.

In his submissions, Mr Lugwisa was very brief. He prayed to adopt the supporting affidavit as part of his submissions and told the Court that, the affidavit in support

of the application does disclose grounds entitling the applicant to be given audience before the Court of Appeal.

He submitted that, such issues emanate from Misc. Commercial Cause No.54 of 2020 and, can be observed from paragraph 12 of the supporting affidavit. He listed them as follows:

(a) Whether the application of the new Arbitration Act, Cap.15 R.E 2019, was justifiable.

(b) Whether a legal issue with regard to jurisdiction cannot be raised at any time.

In his submissions, Mr Lugwisa was of the view that, the above two points are relevant since the justification of this Court to apply the new law retrospectively in light of the proceedings in Misc. Commercial Cause No.54 of 2020 was erroneous.

Mr Lugwisa also submitted that, the second point was relevant for consideration because it was erroneous for this Court to disregard the objections which were raised on legal

issues which the Applicant was refused to raised in the Misc. Commercial Cause No.54 of 2020.

Mr Lugwisa submitted that, where there has been a demonstration of contentious issues in an application for leave, leave shall be granted. He relied on the cases of **Said Ramadhani Muyanda vs. Abdallah Salehe** [1996] TLR 75 and **Nurubhai N. Rattansi vs. Ministry of Water, Construction, Energy, Land and Environment and Another** [2005] TLR 223. Armed with these two authorities, he prayed that the application for leave be granted with costs.

For his part, Mr Beatus Malima, learned counsel for the Respondent was equally brief. He told this Court that the submission and the grounds to be brought to the attention of the Court of Appeal are all a "framed-up" story. He noted that, as the record of the Court will show on page 3 of the Ruling, the Applicant made an application to amend the Petition which he had earlier filed in this Court under the previous Act, Cap.15 R.E 2002, in order to bring it into conformity with section 96 of the Arbitration Act, 2020.

Mr Malima submitted that, this Court granted the prayers. As such, he contended, it will be an act of being dishonest to accuse this Court that it proceeded wrongly. Mr Malima argued, in the alternative that, even if the Applicant would not have made the application, this Court was absolutely right to proceed under the new arbitration law because, that is a mandatory requirement of the law under the new Act, and the Court proceeded as per the law. He contended, therefore, that, the issue of retrospective application of the law does not arise.

As regards the 2nd ground, he contended that, the same has no legs upon which to stand because section 80 (1) (a) of the Arbitration Act, Cap.15 R.E 2020 is a mandatory provision which bars a party from raising an issue of jurisdiction as an objection if not raised within time during the arbitration proceedings. He contended that, the Court applied the law and cannot be faulted.

He contended that, whereas he agrees with the Applicant's submission regarding the authorities he cited,

the same cannot be of use in this application because there are no such contentions issues in this application.

He submitted that, if the Applicant is aggrieved, the correct approach is to challenge the constitutionality of section 96 and 80 of the Arbitration Act. As such, he maintained his earlier position, if the Applicant wants to challenge the constitutionality of the provisions; s/he should file a constitutional petition.

In a brief rejoinder, Mr Lugwisa rejoined that, the Applicant has demonstrated that, there are contentious issues. He contended that, what the learned counsel for the Respondent submitted are his version of interpretation of section 80(1) (a) and 96 (4) of the Arbitration Act, Cap.15 R.E 2020.

He rejoined that, the interpretation must be subjected to the principle of law and, this includes the principle of retrospective application of a statute. As such, it was Mr Lugwisa's submission that, it is only the Court of law which has the authority to say how the law should be applied, and, that, the proper Court here is the Court of Appeal

which can give the final version, and, hence, this application.

I have carefully considered the rival submissions made by the counsels for the parties. The issue I am called upon to address is whether this application has merit. In the first place, for an application of this nature to be granted, the court will only exercise its discretion, where it is shown that there are issues of general importance or worth of being brought to the attention of the Court of Appeal.

In the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'imaryo,** Civil Appl. No 133 of 2004 (unreported), the Court of Appeal was of the view that:

> "As a matter of general principle, leave to appeal will be granted where grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima-facie or arguable appeal. (See Buckle vs. Holmes (1926) All ER 90 at page 91). However, where the grounds

of appeal are frivolous or useless or hypothetical, no leave will be granted."

The same principle was reiterated as well in the case of **Rutatigana C.L vs. The Advocate Committee and Another,** Civil Application No.98 of 2010 (unreported). In that case, the Court of Appeal was of the views that:

"An application for leave is usually granted if there is good reason, normally a point of law or point of public importance, that calls for this Court's intervention. Indeed, on the aspect of leave to appeal, the underlying principle was well stated by this Court in Harban Haji Mosi and Another vs Omar Hilal Seif and Another, Civil Ref.No.19 of 1997 (unreported) thus: '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 spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

Guided by the above principles, let me now consider the merits of this instant application. The gist of the application is what paragraph 12 of the affidavit of the applicant discloses. It reads as follows:

> "That the Applicant seek (sic) the Court of Appeal to consider and determine the issue whether the application of the new law in retrospect is legal (sic) justifiable and whether a legal issue with regards to jurisdiction cannot be raised at any time."

In his opposing submissions, Mr Malima has stated that, the two points are of no merits because the Court applied or followed what the law requires it to do. In my view, that is a correct assertion. The law is very clear regarding the applicability of the new Arbitration Act. Section 96 (4) of the Arbitration Act, Cap.15 R.E 2020 is very clear about that.

It follows, therefore, that, it cannot be made an issue worth of bringing to the attention of the Court of Appeal in the manner the Applicant wants to have it brought to the attention of that Court. In my view, if leave is to be granted, that will amount to an attempt to allow a party to go before the Court to argue the obvious and I see no chances of success in such an endeavor.

In short, I tend to agree with Mr Malima, that, if the Applicant is unhappy with what section 96 (4) of the Arbitration Act, Cap.15 R.E 2020 provides, s/he cannot challenged it by way of an appeal in the manner s/he wants it to be done through this application.

Secondly, even under the second limb, I also agree that, what this Court did was simply to apply what section 80 (1) (a) of the Act provides. The law must be applied as it is and not as a party would wish it to be. Under the schedule to the Arbitration Act, Cap.15 R.E 2020, section 80 is a mandatory provision. In view of all that, this Court settled for the following orders:

1. That, leave to appeal to the Court of Appeal is denied and, for that matter, this instant application must be and is hereby dismissed.
2. That, taking into account the underlying circumstances in this application, I grant no orders as to costs.

It is so ordered

DATED AT DAR-ES-SALAAM THIS 06TH APRIL, 2022

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DEO JOHN NANGELA
JUDGE