

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

MISC. COMMERCIAL APPLICATION NO. 123 OF 2022

*(Arising from Misc. Commercial Cause No. 61 of 2021, and in connection with
Winding up Petition No. 38 of 2021, and Misc. Application No. 181 of 2021)*

GOLD AFRICA LIMITED APPLICANT

VERSUS

REEF GOLD LIMITED RESPONDENT

RULING

Date of Last Order: 13/02/2023

Date of ruling: 02/03/2023

AGATHO, J.:

The Applicant's application for leave to appeal to the Court of Appeal met with the Preliminary Objections on points of law from the Respondent. The latter having been served with the applicant's application filed two POs on point of law. The first PO that the applicants application for leave is time barred. And second, the application is an abuse of court process as the order given is not appealable.

On the date fixed for hearing of the POs both parties were under legal representation. Mr. Killey Mwitasi appeared for the Applicant and Mr. Mutakyamirwa Philemon represented the Respondent. The POs were

heard orally. The parties also filed their skeleton arguments as per the HCCD Procedure Rules of 2012 as amended in 2019 to spare the Court from lengthy oral submissions of the parties. As usual the Respondent counsel who raised POs broke the ice by submitting in support of the POs and he began with the 1st PO that the Applicant's application is time barred. He referred to the CAT rules revised edition 2019 particularly Rule 45 (a) providing for the time limit to file an application for leave to the CAT which is 30 days. It was his contention that if one read Misc. Commercial Application No. 123 of 2022 the Applicant has combined numerous orders of the Court which were given in different dates and year. To begin with, this application arises from Misc. Commercial Cause No. 61 of 2021 in connection with Winding Up Petition No. 38 of 2021, and Misc. Civil Application No. 181 of 2021. The Applicant did not end there in his affidavit in support of chamber summons the Applicant alluded at paragraph 15 that she has already initiated appeal process by filing notice of appeal and writing three letters in respect of three matters which factual related that is winding up petition No. 38 of 2021, Misc. Commercial Cause No. 61 of 2021 and Misc. Civil Application No. 181 of 2021 which were attended by the same Hon. Magoiga, J. The said letters requested for certified copies of the proceedings, rulings, orders, and court records for purpose of preparing record of appeal.

Therefore, if one reads para 15, and also reading the caption of Misc. Civil Application No. 123 of 2022 it can easily be noted that the Applicant is applying for leave to challenge three orders of the Court which were given in various dates and year. The winding petition was issued sometimes in 2021. And thus, by combining the three orders in application the Applicant is out of time according to the respondent's counsel. The 30 days if counted can only accommodate Misc. Commercial Cause No, 61 of 2021. It cannot accommodate orders given in winding up petition No. 38 of 2021, and Misc. Civil Application No. 181 of 2021. Mr. Mutakyamirwa said in that regard the Applicant's application is time barred.

Mr. Mwitasi opposed the 1st PO by submitting that having heard of what the counsel for Respondent has submitted, that his PO is devoid of merit and does not suit to be a PO as such. He submitted that that they filed skeleton arguments and prayed to adopt as whole as part of his oral submission to discredit the PO. He also said in the skeleton arguments he adopted the affidavit and reply to the counter affidavit.

The Counsel for the Applicant was of the view that generally the POs raised is nothing but intended to confuse the course of justice. To start with the first PO, the Respondent admit that the application for leave is

to be filed within 30 days from the date the impugned decision was delivered. He argued that in the chamber summons they stated clearly that they intend to appeal against the order by Hon. Magoiga, J. given on 17/06/2022 in Misc. Commercial Cause No. 61 of 2021. They have not mentioned any other order except that one only.

He submitted that the appeal to the Court of Appeal starts with the notice of appeal indicating the order you want to appeal against. Mr. Mwitasi also referred to their supporting affidavit annexure G10 in paragraph 15 of the affidavit, there is a notice of appeal which indicates what they intend to appeal against. It is the order of Hon. Magoiga, J. dated 17/06/2022. He further submitted that the present application was filed on 15/07/2022 under the electronic filing nowadays the filing was done on 13/07/2022. He protested that the Respondent submitted that because the Applicant's affidavit is rich of information then it is out of time. Mr. Mwitasi went on submitting that in this case in which the impugned decision they intend to appeal against, the appeal to the Court of Appeal under rule 96 of the CAT Rules it provides for all documents necessary for the Court of Appeal to understand the nature of the matter. He was of the view that what is included in the affidavit is information that will help the Court of Appeal to understand the matter.

He opined that if such detail is not included the appeal will be struck out. In his attempt to discredit the Respondent PO, Mr. Mwitasi argued that the Applicant intends to make the record of appeal from record of Misc. Commercial Cause No. 61, and winding up petition No. 38 of 2021, and Misc. Civil Application No. 181 of 2021. At page 7 of the impugned ruling the cases stated have been mentioned therein. Throughout the proceedings and the submissions were part of contention. He fiercely argued that they have mentioned them because they will feature in the record of appeal. He prayed that they be recorded that they are dealing with the PO. Therefore, the submission by the Respondent counsel that quoted Magoiga, J. saying that he is the right person to represent should not form part of the submission to support the PO because that goes to the merit. He suggested that that should be the matter to be decided by the Court of Appeal.

Mr. Mutakyamirwa made a brief rejoinder that an appeal is a creature of statute. He opined that when one combines various orders of the court then s/he invites the Court of Appeal to do revision. The counsel submitted that they will combine the winding up petition No. 38 of 2021, Misc. Commercial Cause No. 61 of 2021 and Misc. Civil Application No. 181 of 2021, to him that is not appeal, it is revision. An appeal deals

specifically with a certain order or decree. That is the centre of the Respondent's argument that the Applicant's application is an abuse of court process. Mr. Mutakyamirwa submitted that this court is not a rubber stamp that if a party has filed notice of appeal, then this court should simply grant the leave. The PO can be raised, and the court can determine it. He added that, the chamber summons cannot be read in isolation of the affidavit. If one looks at the chambers summons and the affidavit particularly paragraph 14, 15 and 16 you will notice that the Applicant intends to challenge three orders of the Court. That is why they are informing the court the application is time barred. And the counsel has actually admitted that when you file the record of appeal that they will combine all record that is winding up petition No. 38 of 2021, Misc. Commercial Cause No. 61 of 2021 and Misc. Civil Application No. 181 of 2021. That is where the CAT can exercise the revisionary powers but not appellate powers which are limited. In such submission the applicant's counsel is supporting their second PO. In that regard he prayed POs be upheld and the application be struck out with costs.

Regarding the first limb of the PO that the application for leave is time barred, I should hold briefly that I am not convinced that it is really time barred. The Applicant is clear that her intention is to appeal against the

order in Misc. Commercial Cause No. 61 of 2021 dated 17/06/2022. The Respondent's counsel admitted that the application for leave to appeal to the CAT in respect of the order in Misc. Commercial Cause No. 61 of 2021 is within time. It is not time barred. In my view other orders or rulings mentioned in respect of Winding Up Petition No. 38 of 2021 and Misc. Civil Application No. 181 of 2021 are peripheral matters. The first PO is thus overruled for lacking substance.

Turning to the second PO, Section 5(2)(d) of the Appellate Jurisdiction Act bars appeals or revision in respect of preliminary or interlocutory decision or order of the HCT unless such decisions or orders have the effect of finally determining the suit. Mr. Mutakyamirwa submitted that the orders of the judge dated 17/06/2022 had no effect of determining the suit to its finality. He quoted what the judge held that:

"I am inclined to agree with Mr. Mutakyamirwa that much as he was appointed by the director under the circumstance his representation is legally sound and should stand in the circumstances of this application."

And consequently, he ordered the case to proceed on the other date. To Mr. Mutakyamirwa this order has no effect of finally determining the suit. He went further submitting that the Applicant who is applying for leave is still a party in Misc. Commercial Cause No. 61 of 2021.

Therefore, his or her interest would still be protected because he is still a party. In that regard and basing on several Court of Appeal decisions annexed to the skeleton the present application is an extremely an abuse of court process and the PO be sustained, and the application be struck out with costs.

Advocate Mwitasi reacted to the second PO by submitting that there is no law in this country that when one is attempting to appeal is an abuse of court process as per Article 13(6) of United Republic of Tanzania Constitution, 1977 as amended. He submitted further that he cited the case **Aero Helicopter v SL Jansen [1990] TLR 142** found in his skeleton argument. He emphatically argued that once there is notice of appeal then this Court cease to deal with the matter on assessing the propriety or legality of the matter otherwise it will be usurping the powers of the Court of Appeal. In my humble view the argument that once there notice of appeal this court ceases to have jurisdiction is misleading. I would rather be cautious to use such a sweeping statement. This court has jurisdiction to deal with execution unless there is an order for stay of the same. The court can also process leave of appeal to Court of Appeal, etc. It is true though that it cannot deal with substance of the appeal itself.

Mr. Mwitasi submitted in alternative that they have not lodged an appeal straight away, but they have applied for leave to appeal to Court of Appeal. He cautioned the Court that should this Court proceed to determine the second PO it also mean that it has a right to determine the fate of the notice of appeal. And he rested his submission by praying that the PO be overruled.

This Court begun by asking itself whether the order of Hon. Magoiga, J. dated 17/06/2022 is appealable? From the pleadings it is clear that the order did not determine the case (Misc Commercial Cause No. 61 of 2021) to its finality. It was interlocutory order. It is plain that such orders are not appealable. Thus, the application is indeed the abuse of court process.

But first we should appreciate the meaning of the term interlocutory order. In Tanzania **Posts Corporation v Jeremiah Mwandu, Civil Appeal No.474 of 2020** the CAT quoting the decision in **Seif Sharif Hamad v S.M.Z [1992] TLR 43** it adopted the definition of interlocutory orders in Black's Law Dictionary (4th Edition) to mean:

"An order which decides not the cause but settles some intervening matters relating to it."

The CAT was also inspired by the definition of the same terminology in the 9th Edition of the same dictionary which defines it as:

"An order that relates to some intermediate matter in the case, any order than the final".

Moreover, as per **Junaco (T) Limited and Justin Lambert v Harel Mallac Tanzania Limited, Civil Application No. 473/16 of 2016 CAT Dar es Salaam** (unreported) to determine whether a particular order is final or not the CAT applied the *nature of order test*.

The apex Court of the land discussed at length the said test in **Tanzania Posts Corporation and Jeremiah Mwendu's case** (supra). It examined *inter alia*, one, what were the remedies that were sought or the rights that the party was seeking to enforce or obtain from the Court, and two, were all such rights or remedies conclusively determined by the court or there are certain matters in relation to the same rights that remained pending for determination at the court. These were also reiterated by Kahyoza, J. in **Hassan Juma Mambo v Musa Idd, Land Appeal No. 31 of 2021, HCT Mwanza District Registry** (unreported). Further reference is made to the Court of Appeal in **MIC Tanzania Ltd and 3 Others v Golden Globe International Service Ltd Civil Application No.1/16 of 2017 CAT-DSM** (unreported) where it held that:

"...the proper test for determining whether or not an impugned order is preliminary or interlocutory is patently discernible from the language of the provision, itself. That is to say the test is whether or not the order desired to be revised [appealed against] had the effect of finally determining the suit."

It is my settled view that Judge Magoiga's ruling in Misc. Commercial Cause No. 61 of 2021 dated 17/06/2022 is at best the interlocutory as it did not finally decide the Misc. Commercial Cause No. 61 of 2021 rather it settled the issue of advocate representing the Applicant. I thus find the second PO to have merit and I sustain it.

As to what a party aggrieved by the interlocutory order should do, the CAT has provided a guidance in **Karibu Textiles Mills Limited v New Mbeya Textiles Mills Limited & Others, Civil Application No. 27 of 2006** (unreported). The CAT held as follows:

"We further agree with Dr. Lamwai's submission that the spirit of the amendment of the provision of the section 5(2) (d) of the Appellate Jurisdiction Act 1979 is to prevent unnecessary delays. This is rightly so because interlocutory orders do not finally and conclusively determine the rights of the parties. Where a party is aggrieved by an interlocutory

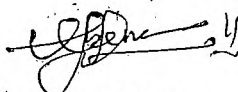
order, that can form a ground of appeal or revision if the party is dissatisfied with the final decision of the court...."

In the end, the second POs is sustained. Consequently, the present application is struck out with costs. The Misc. Commercial Cause No. 61 shall proceed where it ended prior to the interlocutory order.

It is so ordered.

DATED at DAR ES SALAAM this 2nd day of March 2023.




U. J. AGATHO
JUDGE
02/03/2023

Date: 02/03/2023

Coram: Hon. U. J. Agatho, J.

For Applicant: Killey Mwitasi, Advocate.


For Respondent: Mutakyamirwa Philemon, Advocate.

JLA: Opportuna

C/Clerk: Beatrice

Court: Ruling delivered today, this 2nd March 2023 in the presence of Killey Mwitasi, learned counsel for the Applicant, and Mutakyamirwa Philemon, Advocate for the Respondent.




U. J. AGATHO
JUDGE
02/03/2023