

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 13 OF 2023

(Arising from Commercial Case No.180 of 2017)

D.B. SHAPRIYA CO. LIMITED.....1ST APPLICANT

MINESTONE LIMITED.....2ND APPLICANT

DYANAMIC MOTORS LIMITED.....3RD APPLICANT

KISHOR DHANJI SHAPRIYA.....4TH APPLICANT

AMISHI SHAPRIYA5TH APPLICANT

VERSUS

BARCLAYS BANK (T) LIMITED.....RESPONDENT

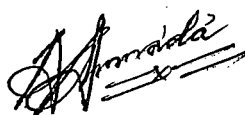
Date of last order: 30/05/2023

Date of ruling: 12/07/2023

RULING

A.A. MBAGWA J.

This is an application for leave to appeal to Court of Appeal. It is presented by way of chamber summons made under section 5(1)(c) of the Appellate Jurisdiction Act [Cap 141 R.E 2019] and Rule 45(a) of the Tanzania Court of Appeal Rules (2009) as amended. The applicants filed this application praying for the following orders: -



1. That this Honourable Court be pleased to grant the applicants leave to appeal to the Court of Appeal of Tanzania against the ruling and order of the High Court of Tanzania (Commercial Division) in application for execution in Commercial Case No.180 of 2017.
2. Any other relief this Court may deem fit to grant.
3. Costs to follow events.

The application is supported by an affidavit jointly affirmed by Kishor Dhanji Shapriya and Dipackumar Kotak. On the adversary, the application is contested by the respondent via a counter affidavit sworn by Frank Philemon Milanzi, the In-House Counsel for the respondent.

The applicants at paragraph 7 of their joint affidavit have advanced four grounds for this Court to grant leave to appeal. These are;

- a. That the High Court Judge erred in law by order attachment (sic) of all of the judgement debtors' properties which its (sic) value exceeds the decretal amount, and without valuation report, contrary to the law.
- b. That the High Court Judge made a serious error in law by an omission to record the adjustment of decree made out of court after being informed by the judgement debtors hence granted the execution with wrong amount to be satisfied.



- c. That the High Court Judge erred in law by proceeding to attach other judgement debtors' properties which its legal fate of being attachable or not is yet to be determined by the same court in Miscellaneous Commercial Application No.197 of 2022.
- d. That the applicants still have moratorium period to repay the debt under installments and that period has not lapsed.

Briefly, the facts obtaining in this matter may be recounted as follows; The applicants and respondent were parties to Commercial Case No. 180 of 2017 as the defendants and plaintiff respectively. The respondent was claiming for repayment of the outstanding loan which was extended to the 1st applicant and guaranteed by the 2nd, 3rd 4th and 5th applicants. However, the said suit was disposed of by way of settlement and a consent decree was therefrom issued on 13th February, 2019. According to the decree, the 1st applicant was ordered to pay the respondent a sum of USD 8,000,000 within ninety (90) monthly instalments i.e., from September, 2019 to June, 2027. It appears the applicants defaulted monthly payments as per the consent decree as a result, the respondent successfully filed execution proceedings which were concluded in her favour on 27th January, 2023 before Hon. Mkeha J.

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In this application, the applicants were enjoying the legal services of Mr. Frateline Munale, learned counsel whilst the respondent was represented by Mr. Mpaya Kamara, learned counsel. The application was argued by way of written submissions and, gladly both counsel duly filed their submissions.

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Amada

"15. -(1) On receiving an application for the execution of a decree as provided by rule 10, sub-rule (2), the court shall ascertain whether such of the requirements or rules 10 to 12 as may be applicable to the case have been complied with; and, if they have not been complied with, the court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.


(2) N/A

(3) N/A

(4) Where the application is admitted, the court shall enter in the proper register a note of the application and the date on which it was made and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree."

The applicants' counsel continued that failure to comply with that provision of order XXI Rule 15(1) requires the execution to be rejected. He said that the applicants, during the hearing of the execution, made it clear that the execution ought to be rejected for failure to comply with mandatory requirement of law but the trial Judge did not consider it in his decision as a result he proceeded to allow the execution. It was the counsel's strong view that the anomaly was fatal

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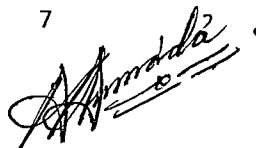
considering that both parties are at one that the decretal amount to wit, USD 8,000,000 had been partly paid. To bolster his argument, the applicants' counsel referred this Court to the case of **Ukod International C. Ltd vs. Stanbic Bank Tanzania Limited and Another, Miscellaneous Commercial Application No.36 of 2023 High Court of Tanzania (Commercial Division) at Dar es Salaam [Unreported] at Pages 4 and 5** in which this Court lifted its very own orders for failure to attach inventory with the value of the movable and immovable properties proposed to be attached. The counsel opined that in the circumstances, the error cannot be left to stand as the applicants have no other way to challenge the orders unless they are granted leave to appeal. He thus concluded that 1st ground is worth consideration by the Court of Appeal.

Coming to the 2nd ground to wit, the High Court Judge made a serious error in law by omitting to record the adjustment of decree. As such, the court granted the execution of the wrong amount. The counsel for the applicants submitted that order XXI rule 2(2) of the Civil Procedure Code allows the parties to apply to the court to adjust the decretal amount if at all there was part payment made out of the court and thus the same has to be certified by the court. He continued that the effect of non-

certification renders the adjustment ineffectual. He explained that the execution proceedings were illegal because the execution form indicated the whole decretal sum of USD 8,000,000/= as such, it was wrong to determine the execution application with wrong amount.

With respect to the 3rd ground, namely, that the High Court Judge erred in law by proceeding to attach other judgement debtors' properties which its legal fate of being attachable or not is yet to be determined by the same court in Miscellaneous Commercial Application No. 197 of 2022, the applicants' counsel indicated that he has abandoned.

Regarding the 4th ground namely, the applicants still have moratorium period to repay the debt under installments and that the period has not lapsed, the counsel submitted that applicants' joint affidavit made it clear that the payment mode had a moratorium period until June 2027 thus disregarding the moratorium period and ordering the execution of the whole amount instead of unpaid sum only was a fatal illegality. In support of his argument, the applicants' counsel cited the case of **Standard Chartered Bank (Hong Kong) Ltd vs. Mechmar Cooperation (Malaysia) Berhad and Another**, Civil Revision No.1 of 2012, CAT At Dar Es Salaam [Unreported] at Page 27.

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In fine, the applicants' counsel prayed the court to grant the application on the strength of the grounds advanced in the affidavit and submissions made.

In reply, the respondent's counsel adopted the counter affidavit sworn by one Frank Philemon Milanzi, the respondent's in-house counsel together its annexure so as to form part and parcel of his reply submissions.


He submitted that the amount of USD 1,365,000 which was so far deposited/paid by the applicants or judgment debtors in Commercial Case No.180 of 2017 did not completely satisfy the decree in view of the decretal sum of USD 8,000,000. He clarified that USD 1,365,000. did not clear whole decretal amount which the applicants were bound to pay. The respondent's counsel told the Court that the applicants had, on many occasions, pleaded and the Court severally adjourned the matter with the view to give them time to effect payments as per the mutual settlement decree but the applicants consistently defaulted payment. The counsel added that all the issues that the applicants intend to raise as grounds of appeal to the Court of Appeal do not feature in the ruling and order sought to be impugned because they fall within the scope of issues pertaining to execution which can be appropriately handled by the executing Court and not by way of appeal to the Court of Appeal.

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In addition, the respondent's counsel informed the Court that the applicants have already filed a memorandum of review which is annexure "A" to the counter affidavit and the same was registered as Commercial Review No.1 of 2023 whose grounds are substantially similar to the grounds in this application. In that regard, the respondent's counsel was opined that the present application is an abuse of the court process and it is calculated to frustrate the execution process for which the respondent stands to be prejudiced.

Regarding the complaints that no valuation report was attached to the execution application, the respondent's counsel submitted that decision for which the leave is sought to appeal against does not contain or feature any holding on that aspect. He strongly submitted that no appeal can lie to the Court of Appeal against what, in the first place, was not decided by lower Court. He stressed that failure to attach a copy of the valuation report to the application for execution is not a matter that can first be addressed and resolved by the Court of Appeal.

With respect to the 2nd ground that the High Court Judge made a serious error in law by his omission to record the adjustment of decree made out of court after being informed by the judgement debtors hence granted the execution of the wrong amount, the respondent counsel replied that

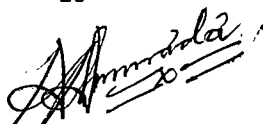
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on 9th May 2023, Hon. Mkeha J corrected the alleged error via Review Application No. 1 of 2023 as such, the question of illegality no longer exists. The respondent's counsel reiterated that the grounds of appeal raised by the applicants are already determined by this Court in Review Application No.1 of 2023 as this Court is enjoined to entertain those grounds and no one among those grounds is worth consideration by the Court of Appeal as held in the case of **Markus Kin Dole vs. Burton Mdinde and Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, CAT at Arusha.

On the 4th ground that the applicants still have moratorium period to repay the debt under installments and that, that period has not lapsed, the respondent's counsel again submitted that it is not worth consideration by the Court of Appeal as the applicants' failure to adhere to the moratorium for payment of the decretal amount through installment is what triggered the application for execution.

The respondent's counsel finally urged the Court to dismiss the application with costs.

In rejoinder, the applicants' counsel prayed to reiterate his submission in chief and added that he raised the complaints on non-attachment of



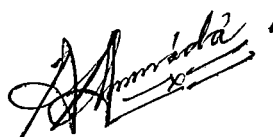
valuation report hence the matter would be res judicata if raised again. He expounded that Order XXI Rule 15 (4) the Civil Procedure Code makes it mandatory to attachment valuation report as such, its violation renders the error arguable point before the Court of Appeal. He relied on the case of **Lightness Damian and 5 Others vs. Said Kasim Chageka**, Civil Application No.450/17 Of 2020 Cat at Dar Es salaam at page 12 wherein it was held;

"... the grounds need not only to be grounds for appeal but they may be arguable issues which attract the courts attention for having them put in proper legal perspective. That said we think the learned judge erred when she went ahead to determine the grounds raised whether they had merits..."

In conclusion, the applicants' counsel insisted that the applicants had met the threshold required for granting the leave to appeal to Court of Appeal.

I have carefully read the parties depositions and the detailed rival submissions made by the counsel for both sides. I commend both counsel for their insightful submissions. It is apposite to note that leave to appeal is not automatic rather it has to be tested vis a vis the established factors.

See the case of Nondo Kalombola T/A N.J Petroleum SPRL and

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Another vs. Broadgas Petroleum (TZ) Limited and 3 Others,

Consolidated Civil Application No.165/16 of 2019 CAT at Dar Es Salaam.

The key issue therefore for determination in this application is whether the applicant has raised arguable issues of facts and or law worth consideration by the Court of Appeal. It is also a clear position of law that the function of this Court in the application for leave to appeal is not to determine the merits or otherwise of the intended appeal for the same is an exclusive domain of the Court of Appeal. See **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, CAT at Arusha.

It is also worth while to note that the applicants abandoned the 3rd ground in the course of submission.

I have dispassionately considered the three remaining grounds. Admittedly, I have failed to find any pertinent issues of facts or law of sufficient importance as to require the intervention of the Court of Appeal. More importantly is the undisputed fact that this Court (Mkeha J), corrected the alleged error (adjustment of the outstanding amount) via Review Application No. 1 of 2023 and for that reason the 2nd ground naturally crumples. I have read the execution ruling of this Court (Mkeha J) dated 27/01/2023 but I could not grasp any complaint pertaining to

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non attachment of the valuation report. The applicants' sole defence was a promise to pay the outstanding decretal amount. In the upshot, the 1st and 4th grounds, in my views, have no any novelty to attract the attention of the Court of Appeal.

In the premises, I find this application wanting in merits and consequently, I dismiss it. The applicants should pay costs of this application.

It is so ordered.

The right of appeal is explained.




A.A. Mbagwa

JUDGE

12/07/2023