IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT ARUSHA

COMMERCIAL CASE NO. 4 OF 2005

MR. LEMBRICE ISRAEL KIVUYO.....PLAINTIFF
VERSUS
M/S DHL WORLD WIDE EXPRESS.....1ST DEFENDANT
M/S DHL TANZANIA LIMITED.....2ND DEFENDANT

RULING

Date of Hearing – 11/5/2007

Date of Ruling – 11/5/2007

MASSATI, J:

This is an application for leave to appeal to the Court of Appeal of Tanzania under s. 5 (1) (c) of the Appellate Jurisdiction Act (Cap. 1 (1). It is supported by the affidavit of ELWASON E. L. MARO, and opposed by the counter affidavit of ALEX MASHAMBA BALLOMI.

It is averred in the affidavit of Mr. Maro that the suit was dismissed for want of prosecution when it came up for mention on 27/11/2006. The Applicant intends to challenge the order of dismissal on the grounds set out in the proposed memorandum of appeal. In his submission in court, Mr. Maro, learned Counsel submitted that he intended to urge the Court of Appeal to fault this order on the ground that the

court had no jurisdiction to make such an order on a date fixed for mention. For inspiration the learned Counsel cited the decision of this court in **NBC VS. GRACE SENGELLA** (1982) TLR. 248, where it was held that a case could not be dismissed on a day fixed for mention.

On the other hand, Mr. Balomi contended in his counter affidavit that no sufficient grounds have been disclosed to justify grant of leave. In his argument in court, the learned Counsel submitted that the application does not demonstrate any point of law worth taking to the Court of Appeal. He further contended that in view of the laxity, gross inefficient, and negligence, demonstrated by the Applicant in the prosecution of his case, the court properly exercised its discretion in dismissing the suit for want of prosecution. He said that the word *"mention"* is not mentioned in the Civil Procedure Code 1966 which only uses the word, *"hearing"*. So in his view, the word *"hearing"* must be taken to include *"mention"*. Therefore the court was entitled to make the order it did on 27/11/2006. He also distinguished the case of **NBC VS. GRACE SENGELLA.** However the learned Counsel did not elaborate on the said distinction(s). With these, Mr. Ballomi prayed for the dismissal of the application.

In a brief rejoinder, Mr. Maro submitted that first, in a first appeal the Applicant need not demonstrate a point of law.

Secondly even if it was to be so, the Counsel for the Respondent has, by his own arguments, demonstrated the existence of several points of law. Thirdly considering the finding of this court on 14/8/2006 that the Applicant was incareted and beyond reach, the Applicant could hardly be blamed for negligence or inefficiency. But, if this was the case, in his view, the court was enjoined to fix a date of hearing, and not to dismiss the suit. Lastly, Mr. Maro submitted that given the wording of O. 9 rules 1 to 5 none of the situations contemplated therein obtained in the present case so that it is difficult to tell which provision was invoked in dismissing the suit for want prosecution. With these, Mr. Maro reiterated his prayer for grant of leave to appeal.

I think Mr. Maro is right in his proposition that in an application for leave to appeal under this section, all that the Applicant has to show is that there is an arguable case worth taking to the Court of Appeal. He does not need to show that there is a point of law. That is only reserved for cases which require a certificate on a point of law which, in our case involve cases originating from Primary Courts. In an application as in the present one, the Applicant can marshall out points of law or facts or both. Has the Applicant in the present case demonstrated that there exists an arguable case worth taking to the Court of Appeal?

The controversy in the present case centres around the power of the court to dismiss a suit for want of prosecution. The Applicant's case is that the court had no power to dismiss a suit for want of prosecution on a date fixed for mention. The Respondent's contention is that the court had such powers because in the Civil Procedure Code Act, the word *"mention"* does not feature. So each day is a day of hearing.

Both arguments are forceful and, it is I think, time the Court of Appeal intervene to put these raging arguments to rest. I am aware that the High Court has given the stand on this point, not only in **NBC VS. GRACE SENGELLA** [1982] TLR 245, but also previously in **MOSHI TEXTILE MILLS LTD VS. J. DE VOEST** [1975] LTR 17, but I am not aware of any decision of the Court of Appeal on this point.

I am therefore satisfied that there exists an arguable case worth consideration by the Court of Appeal in this case; and the issue is whether the court has jurisdiction to dismiss a suit for want of prosecution on a date fixed for mention, and alternatively, in what circumstances could a court dismiss a suit for want of prosecution?

For the above reasons, I would allow this application. Leave to appeal is therefore granted. Costs shall be costs in the intended appeal.

Order accordingly.

S.A. MASSATI

JUDGE

11/5/2007

907 words

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