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

COMMERCIAL CASE NO. 16 OF 2007

RUDOLF TEMBA.....1ST PLAINTIFF
ABDALLAH HUSSEIN MAJALIWA.....2ND PLAINTIFF
VERSUS
ZANZIBAR INSURANCE CORPORATION LTD.....DEFENDANT

RULING

Date of Hearing – 21/9/2007

Date of Ruling – 9/10/2007

MASSATI, J

The Applicants' suit which was filed in this Court on 28th day of February, 2007 was dismissed by Luanda J. on 4/6/2007 for want of prosecution under O. IX rule 8 of the Civil Procedure Code 1966 (Cap 33 – R.E. 2002).

On 18/6/2007 the Applicants filed an application under O. IX rule 9 (1) of the Civil Procedure Code 1966 for the Court to set aside its order of dismissal. On 7/8/2007, that application too, was dismissed with costs. Aggrieved by the order, the Applicants have

filed a notice of appeal, and an application for leave to appeal, which was assigned to me.

Mr. Mhenga and Mr. Laswai, learned Counsel for the Applicants and the Respondents respectively, appeared to argue the application before me.

The application was supported by the affidavit and reply affidavit of JEROME JOSEPH MSEMWA. In paragraph 5 of his affidavit, Mr. Msemwa depones that the appeal stands a good chance of success in the Court of Appeal, and there are two points of law to be determined; namely: -

(1) Whether sickness is a sufficient ground to enable the Court to set aside the dismissal order of the suit.

(2) Whether an order to file a rejoinder by the Court, litigant is not allowed to annex any document.

He repeats these averments in paragraph 2 of his reply to the counter affidavit.

On the other hand Mr. John I.K. Laswai took out a counter affidavit to oppose the application. In response to paragraph 5 of Mr.

Msemwa's affidavit, Mr. Laswai, strongly denies its contents on the grounds that: -

(a) The Applicants have no chances of success, since the two points have no merit.

(b) The two reasons advanced by Applicants do not amount to sufficient grounds for setting aside the order of dismissal for failure to appear.

(c) The annexure attached to the reply to the counter affidavit contradicted the previous medical chit submitted by the deponent in his affidavit in support of the application.

Mr. Mhenga, learned Counsel then appeared to argue the application. Both in his principal and rejoinder submissions, the learned Counsel submitted that the two points exhibited in Mr. Msemwa affidavits, disclose material worth the consideration of the Court of Appeal, for the development of the law. For this, he drew support from the decisions in Commercial Case No. 266 of 2002 **AKIBA COMMERCIAL BANK LTD VS. SUDI MSANGIRWA AND**

ANOTHER (Unreported) and **SIMON KABAKA DANIEL VS. MWITA MARWA NYANG'ANYI AND 11 OTHERS.**

In response, Mr. Laswai, cited **SAIDI RAMADHANI MNYANGA VS. ABDALLAH SALEHE** [1996] T.L.R. 74 (CAT) Civil Reference No. 19/97, **HABAN HAJI MOSI and SHOKRI HADI MOSI VS. OMAR HILLAL SEIF AND ANOTHER,** and lastly the ruling of Luanda J, in Commercial Appeal between **RUDOLPH TEMBA VS. ZANZIBAR INSURANCE CORPORATION** (Unreported) for the argument that the two points raised in the application were not worth taking to the Court of Appeal. He therefore prayed for the dismissal of the application with costs.

From the submissions of Counsel, I think there is no dispute regarding the principles that the High Court applies in deciding whether or not to grant leave to appeal to the Court of Appeal on a first appeal. **SPRY V.P** (as he then was) beautifully summarized the position in **SANGO BAY ESTATES LTD AND OTHERS VS. DRESDNER BANK** [1971] E.A. 17 at pp 20 – 21: -

> *"As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious*

judicial consideration, but where ... the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out..."

The holding of this Court in **MNYANGA'S** case (Supra) (MSUMI, J) was just an extension of the above principle. The case of **SIMON KABAKA DANIEL VS. MWITA MARWA** [1989] T.L.R. 64 cited by Mr. Mhenga, is however, distinguishable. This was a third appeal originating from a primary court. The law demands that in such case, the High Court must certify that there is a point of law worth taking to the Court of Appeal. This is an express requirement of s. 5 (2) (c) of the Appellate Jurisdiction Act Cap 141 – R.E 2002). The present application however is made under s. 5 (1) c of the Act.

Another principle which I think is worth consideration in such applications, is to bear in mind that what can be taken to the Court of Appeal is only what was decided in the lower court.

It was so held n **ELISA MOSSES MSAKI VS. YESAYA NGATEU MATEE** [1990] T.L.R. 90 (CA).

With those principles in mind, I now turn to the present application. It is true that this matter was fixed for the First Pretrial

Conference on 4/6/2007. There is also no dispute that on that day Mr. Msemwa was not present, and so the suit was dismissed for want of prosecution under O. 9 r. 8 of the Civil Procedure Code 1966. This being the position, the Applicants were duty bound to show that their non appearance was caused by a sufficient reason. Luanda J, found that Mr. Msemwa did not give sufficient reason for his non – appearance, because, the medical chits he had attached cited dates other than the day he was supposed to appear and account for non appearance.

I quite agree with Mr. Laswai, that this was a question of fact, and the evidence on record is not controverted. There is no point of law involved here nor is the fact contentious.

Mr. Mhenga's second point is whether leave was required to file an annexure to the reply to the counter affidavit. Whether leave was required or not to file the annexure is in my view, merely academic. I think, the bottom line here, is whether the said annexed second medical chit was relevant. The second chit was dated 4/7/2007, whereas the case came up for pretrial conference on 4/6/2007. So even if the matter was presented before the Appellate Court the conclusion that the second chit was irrelevant is inescapable. So realy, what were before Luanda J were questions of fact, and that is,

first whether the Applicants had disclosed sufficient cause for non appearance. The question was not whether or not sickness was a sufficient cause but whether there was evidence that Mr. Msemwa was sick on that day. The question was not whether leave was required to file an annexure but rather whether the annexure was relevant and did itself disclose a sufficient reason for non appearance on the day in question. I think the learned judge properly exercised his powers in deciding questions of fact on the basis of credibility. In the event therefore I am satisfied that the points raised by the Applicants are not worth taking to the Court of Appeal.

There is one point though, that was not raised by the parties, and which has considerably exercised my mind. And it is whether the Court was entitled to dismiss the suit for want of prosecution on the day fixed for First Pretrial Conference? However as this point was not raised before Luanda J. or before me and on the principle enunciated in **ELISA MSAKI's** case, I am satisfied that it would not be proper to take it to the Court of Appeal.

I will accordingly not grant leave to appeal for the Court of Appeal.

The application is therefore dismissed with costs.

Order accordingly.

S.A. MASSATI

JUDGE

9/10/2007

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