IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPLICATION NO. 496/16 OF 2022

CRDB BANK PLC ..... APPLLICANT

VERSUS

SYMBION POWER (T) LIMITED ..... RESPONDENT

(Application for Amendment of the Notice of Appeal in Civil Appeal No. 371 of 2022 arising from the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es salaam)

(Maruma, J.)

Dated the 28th day of June, 2022
in
Commercial Case No. 153 of 2021

.....

RULING OF THE COURT

14th & 23rd February, 2023

WAMBALI, J.A.:

The applicant, CRDB BANK PLC has lodged this application seeking an order for amendment of the notice of appeal dated 29th June, 2022 contained in the record of appeal in respect of Civil Appeal No. 371 of 2022. The application was lodged on 25th August, 2022 through the services of three law firms namely; IMMMA Advocates, Trustmark Attorneys and Dentons EALC East African Law Chambers. It is supported by the affidavit of Elisa

Abel Msuya, a partner from Trustmark Attorneys, duly authorized by the applicant.

The application was served on the respondent, SYMBION POWER (T) LIMITED through Kings Law Chambers. On 4th October, 2022, the respondent, through the services of three law firms, namely; Kings Law Chambers, West End Law Group, Advocates and Asyla Attorneys lodged an affidavit in reply contesting the application.

It is also not out of place to state that both sides lodged the written submissions for and against the application on 22nd September, 2022 and 27th October, 2022 followed by list of authorities on 31st January, 2023 and 2nd February, 2023 respectively.

It is noteworthy that, on 2nd February, 2023, hardly five days before the scheduled hearing of the application on 7th February, 2023, the office of the Solicitor-General wrote a letter to the Registrar with Ref. No. OSG/DSM/LC/MAY/2022/26 disclosing the intention to appear at the hearing on behalf of the Attorney General to prosecute the application in collaboration with the stated law firms representing the applicant. To be precise, the relevant part of the letter states:

"2. The Applicant in the above captioned

subject is a Commercial Bank in Tanzania licensed by the Bank of Tanzania and is a publicly listed company on the Dar es Salaam Stock Exchange and the Government of Tanzania owns 38.3% of shares.

3. *Since the Government owns 38.3% shares in the said bank, the Attorney General through the office of the Solicitor General shall appear in the hearing of the said application and prosecute the application in collaboration with the private Advocates representing the appellant (sic) in order to protect the interest of the Government ..."*

Hearing of the application was adjourned on 7th February, 2023 to 14th February, 2023. When the application was called on for hearing on the later date, Mr. Juvenalis Ngowi, Ms. Samah Salah, both learned advocates, and Mr. Deodatus Nyoni, learned Principal State Attorney from the office of the Solicitor-General entered appearance for the applicant. On the adversary side, Messrs. Sylvatus Sylivanus Mayenga, Daniel Welwel and Erick Kamugisha, learned counsel appeared for the respondent.

Before we commenced the hearing, the counsel for the respondent raised a preliminary point contesting the appearance of the two law firms namely, IMMMA Advocates and Dentons EALC East African Law Chambers and the Solicitor-General for the applicant albeit for different reasons.

With regard to the two law firms, Mr. Mayenga argued that the way they came into the record of the application to represent the applicant is questionable. He submitted that the two law firms joined Trustmark Attorneys who represented the applicant at the High Court after the record of appeal was lodged and that, there is no evidence that they had been duly instructed to represent the applicant. He maintained that if there was change of advocates, the two law firms would have complied with the provisions of rule 32(1) of the Tanzania Court of Appeal Rule, 2009 (the Rules) by lodging in Court a notice of change of advocates before they joined Trustmark Attorneys in the conduct of the application for the applicant.

In the circumstances, Mr. Mayenga argued that, as the two law firms did not comply with the requirement of the law, the respective counsel appearing before the Court should not be allowed to address it on behalf of the applicant. Indeed, he stated that as no counsel from Trustmark Attorneys had appeared in Court on that day, the Court should find that the

applicant had not appeared, neither in person nor by counsel and proceed to decide the matter in her absence or dismiss the application with costs for non-appearance.

In response, Mr. Ngowi argued that as counsel from the two law firms, they were properly before the Court to represent the applicant jointly with Trustmark Attorneys upon being duly instructed. He submitted that it was in that regard that they lodged the instant application jointly and thus, the absence of a counsel from Trustmark Attorneys could not be construed as non-appearance of the applicant since they had instruction to proceed. More importantly, he argued that, though they did not represent the applicant at the High Court, upon being instructed to conduct the application before the Court, there was no need to comply with the provisions of rule 32(1) of the Rules, as the said rule applies to a party who has changed or engaged another advocate subsequent to the institution of an application or appeal, which is not the case in the present application. He thus, implored the Court to overrule this preliminary point in respect of the two law firms and proceed to hear the application.

At this juncture, we deem it appropriate to begin our consideration by reproducing the provisions of rule 32(1) of the Rules hereunder:

"32- (1) Where any party to an application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person engages an advocate, he shall, as soon as practicable, lodge with the Registrar notice of change and shall serve a copy of the notice on the other party appearing in person or separately represented, as the case may be.

(2) Upon receiving notification of change of an advocate, the Registrar shall record the changes accordingly and bring it to the attention of the Presiding Justice."

The above provisions, presuppose that the respective party in an application or appeal was initially being represented by another advocate or that he was appearing in person and that he is now intending to engage an advocate. The application or appeal therefore, must be before the Court. We hold this view because, the rule talks of a party to an application or appeal who decides to change his advocates or having been so represented by an advocate in an application or appeal decides to act in person, or having acted in person engages an advocate. It is in this regard that if the situation contemplated under sub-rule (1) of rule 32 happens, in terms of sub-rule (2)

of the same rule, the Registrar must bring the information from the respective party to the attention of the Presiding Justice.

Applying the above provisions to the instant application, we entertain no doubt that, the argument by the respondent's counsel is unfounded. We say so because the application was lodged before this Court by the three law firms and there is no evidence that the applicant has withdrawn instruction from any of the counsel who lodged it or any anticipation of change of advocates. The same applies to the two law firms who did not represent the respondent at the High Court but they jointly, with Kings Law Chambers lodged the affidavit in reply to contest the application upon being engaged accordingly.

We are however aware of the argument by Mr. Mayenga that the two firms, namely, West End Law Group, Advocates and Asyla Attorneys lodged a notice of the respondent's address for service on 2nd September, 2022 in respect of Civil Appeal No. 371 of 2022, the subject of this application. Be that as it may, though the said notice was not lodged in respect of this application, it was lodged in terms of rule 24 of the Rules which concerns change of address for service. The notice therefore, did not intend to comply

with rule 32 (1) of the Rules. In the result, we overrule this preliminary point for lacking substance.

Arguing in support of the objection on the request of appearance by the Attorney General through the Solicitor-General to represent the applicant together with private advocates, Mr. Welwel firstly acknowledged that in law the Attorney General has the right of audience in terms of section 17 (1) of the Office of the Attorney General (Discharge of Duties) Act, Cap 268 R.E. 2019 (Cap. 268). However, he contended that the said right is not automatic as there must be compliance of section 17 (2) (a) and (b) of the same Act which provides for the procedure to be followed before being allowed to join in the proceedings. He submitted further that since the Attorney General seems to have formed an opinion that he needed to appear and address the Court, he should have placed before it sufficient materials to justify his assertion in seeking to conduct the proceedings and satisfy the Court that his absence will jeopardize the interest of the applicant and the Government in particular. To the contrary, he stated, the letter presented before the Court by the Solicitor-General on his behalf has no such materials. He argued that, apart from indicating that the Government owns 38.3% of the shares in the bank; there is no further information to show as to how the Attorney

General obtained the information of the case either from the applicant or from other sources. He thus submitted that in the absence of sufficient materials to establish the public interest or property through the said letter from the Solicitor-General, it cannot be said that the conditions under section 17 of Cap. 268 have been complied with. In addition, he submitted that, if he had the intention of joining the proceedings as a party or a counsel on behalf of the applicant, he should have done so within a reasonable time before or after the application was lodged on 25th August, 2022. To support his submission on promptness of taking action, he made reference to the decision of this Court in the **Attorney General v. Mkongo Building and Civil Works Contractors Ltd and Another,** Civil Application No. 166/16 of 2020 (unreported). The learned counsel therefore, urged the Court not to grant right of audience to the Attorney General through the Solicitor-General to represent the applicant at the hearing of the application for failure to comply with the requirement of the law.

For the applicant, Mr. Ngowi who addressed us, spiritedly defended the request of the Attorney General through the Solicitor-General to have the right of audience to address the Court on behalf of the applicant.

In his brief submission, Mr. Ngowi was content that the provisions of section 17(1) (a) of Cap. 268 together with Order 4(1) (h) of the Office of the Solicitor General (Establishment) Order, 2018 (G.N. No. 50 of 2018) provides unimpeded right to the Attorney General through the Solicitor-General to have the right of audience and to intervene in any proceedings before the courts of law and at any stage. He argued further that the Solicitor-General's letter shows clearly his intention to join in the proceedings to represent the applicant in collaboration with the other law firms stated above. In his opinion, as the letter from the Solicitor-General discloses that the Government owns 38.3% of the shares in the bank, section 17(1) (a) has been complied with to entitles him to have the right of audience to defend the public interest and property. Mr. Ngowi emphasized that in the circumstances of this application, the provisions of section 17 (1) (a) of Cap. 268 cannot be read together with section 17 (2) (a) and (b) of the same Act. He also generally and briefly made reference to the provisions of the Government Proceedings Act, Cap. 5 R.E. 2019 (the GPA). Indeed, he argued that as the Attorney General has the right of audience and can intervene at any stage and time in the proceedings before any court of law, the decision

of the Court relied upon by Mr. Welwel is not applicable in the circumstances of this application.

In the end, he pressed us to overrule the preliminary point and grant leave to the Solicitor-General to appear and represent the applicant.

In a brief rejoinder, Mr. Welwel reiterated his earlier submission and emphasized that the provisions of section 17 of Cap. 268 must be read as a whole for it to have its intended purpose which, among others, require the Attorney General to comply with the conditions stipulated under sub rule (2) before being granted leave to address the Court or join the proceedings.

We have carefully considered the submissions by counsel for the parties for and against this point. To appreciate our deliberation on this point, we better initially make reference to the relevant provisions relied upon by the counsel justifying the appearance of the Attorney General in this application through the Solicitor-General.

Section 17 of Cap. 268 provides:

> *"17- (1) Notwithstanding the provisions of any written Law to the contrary, the Attorney General shall through the Solicitor- General have the right of audience in proceedings of any suit, appeal or*

petition in court or inquiry on administrative body which the Attorney General considers-

(a) to be public interest or involves public property; or

(b) to involve the legislative, the judiciary or an independent department or agency of the Government.

(2) In the exercise of the powers vested on the Attorney General with regards to the provisions of sub section (1), Solicitor General shall-

(a) notify any court, tribunal or any other administrative body of the intention to be joined to the suit, inquiry or administrative proceedings; and

(b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with the directions of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the office of the Attorney General.

(3) Where a suit, inquiry or any other proceeding is pending before the court, tribunal or any other

administrative body to which the Solicitor-General does not have a right of audience, it shall be sufficient for the Solicitor-General to file a certificate of the intention of the Attorney General to be joined and the court, tribunal or any such administrative body shall immediately forward the record of proceedings to the nearest court, tribunal or administrative body for purposes of enabling the Solicitor-General to appear."

Section 6A of the GPA provides:

"6A- (1) The Attorney General shall, through the Solicitor General, have the right to intervene in any suit or matter instituted by or against the Ministries, local government authorities, independent departments and other government institutions.

(2) Where the Attorney General intervenes in any matter in pursuance of sub section (1), the provisions of this Act, shall apply in relation to the proceedings of that suit or matter as if it had been instituted by or against the ministries, local government authorities, independent departments and other government institutions:

Provided that, the requirement of ninety days notice of intention to sue the government as stipulated under this Act shall not apply where the Attorney General intervenes under this section.

(3) Notwithstanding the provisions of any written law, a ministry or local government authority, independent department or other government institution shall have a duty to notify the Attorney General of any impending suit or intention to institute a suit or matter against the Authority."

Order 4 (1) (h) (2) (3) of G.N. No. 50 of 2018 provides:

"4- (1) the functions of the office of the Solicitor-General shall be to-

(h) intervene and take over at any stage civil proceedings, appeal, execution or any incidental proceedings before any court of law or arbitral tribunal in which the central Government, independent departments, agencies or a local government authorities have interest;

(2) For the purpose of paragraph (1), all matters instituted, filed, taken and conducted in courts of law or arbitral tribunal by the Solicitor-General, Deputy Solicitor-General, Law Officers, State

Attorneys or legal officers shall be in the name of the Attorney General.

(3) All claims against the central Government, independent departments, executive agencies and local government authorities to which the Attorney General is a party, shall be taken and conducted in that behalf by the Solicitor-General."

From the reproduced provisions, it is beyond controversy that the Attorney General through the Solicitor-General has the right of audience and to intervene in any suit or matter instituted by or against the government and other institutions stipulated by the respective law in both the GPA, Cap. 268 and G.N. No. 50 of 2018.

The issue for determination is whether that right is automatic. We have thoroughly considered and weighed the contending submissions of the counsel for the parties on this issue. We must however state at the outset that, having regard to the clear provisions of section 17(1) and (2) of Cap. 268 and section 6A of the GPA and gauging from the letter from the Solicitor-General, we have to deliberate and determine whether the requirement of the law was complied with by the Attorney General through the Solicitor-General.

It is evident from the Solicitor-General's letter that, apart from disclosing that the Government has 38.3% share in the bank, there is no indication as to when and how he became aware of the existence of the application or dispute between the parties. There is also no information as to when he formed the intention to seek the right of audience before the Court. To this end, we are of the considered view that, though there is no format on how a notice should look like in order to comply with section 17(2) (a) of Cap. 268, as argued by Mr. Welwel, the said letter does not contain sufficient materials to satisfy the Court on the public interest or public property involved as required by section 17(2) (b) of the same Act. Indeed, the letter does not even indicate that the Attorney General through the Solicitor-General is aware of the nature of the application before the Court or that he is seized with the record of the application which he received upon being notified by the applicant or otherwise. We are of the view that, it is important to disclose relevant information through the notice to enable the Court to have an understanding of the matter in order to give an informed decision or direction for compliance by the Attorney General as to the nature of pleadings or other measures to be taken for purposes of giving effect to

the effective discharge of his office as required under subsection (3) of section 17 Cap. 268.

It is thus important that before the Attorney General through the Solicitor-General intervenes in or takes over the conduct of the proceedings as counsel or intervener as contemplated under section 6A (1) of the GPA, he should follow the procedure laid down by law, including to demonstrate that the respective Authority or institutions mentioned under section 6A (3) of the same Act and section 17 (1) (b) of Cap. 268 had exercised its duty stated in the former provisions to notify the Attorney General of any impending suit or intention to institute the suit or matter against the Authority or institution.

In the matter at hand, reverting to the letter from the Solicitor-General, we do not find any information concerning the correspondence between the office of the applicant and the Attorney General in respect of the pending application in which he seeks to have the right of audience.

The importance of having sufficient information on how the Attorney General comes on board concerning the dispute which he intends to have the right of audience or to intervene cannot be overemphasized. Its purpose is to ensure that that Office is not seen as acting contrary to the requirement

of the law in favour of other interests. It is in this regard that the provisions of section 2 (2) of the GPA gives the following caution in its proviso with regard to civil proceedings by or against the Government in reference to Part IV or Part V of the Act thus:

> *"(2) Any reference in Part IV or Part V to civil proceedings by or against the Government or to civil proceedings to which the Government is a party, shall be construed as including reference to civil proceedings to which the Attorney General, or any officer of the Government as such, is a party:*
>
> *Provided that, the Government shall not, for the purposes of Part IV or Part V,* ***be deemed to be a party to any proceedings by reason only that they are brought by the Attorney General upon the relation of some other persons."***
>
> *(Emphasis Added)*

We must stress that this is not to say we are advocating that the Attorney General through the Solicitor-General should never appear before the Court to defend the public interest or property as stipulated under the provisions of section 17 (1) (a) of Cap. 268 and the provisions of the GPA. In appropriate cases, his representation or intervention can usefully contribute to the fair and just determination of the case. Indeed, we are live

to the position that in terms of Order 5 (4) of G.N. No. 50 of 2018, the Solicitor-General and Deputy Solicitor-General have *locus standi* to appear before the courts of law and arbitral tribunal. However, this intervention or right of audience must be coupled with sufficient explanation and compliance with the law. For the Attorney General would not be able to appear on all cases in the courts of law, including lesser cases which might have an impact on the appearance of independence and impartiality of his office.

Therefore, in the instant application, if the Attorney General had wished to have right of audience or to intervene as a party to defend the public interest in a matter which involves public property or represent the applicant, he would have done so earlier by complying with the requirement of the law, particularly sub sections (2) (a) (b) and (3) of section 17 Cap. 268, as the case may be. This is not the case in the present matter despite the fact that the application was lodged by the applicant's counsel on 25th August, 2022. Besides, as we have alluded to above, there is no sufficient materials before us as to when he became acquainted of or informed of the existence of the dispute between the parties in this application. We do not even discern from the letter and the record of the application whether section 6A (3) of the GPA was complied with by the applicant even if it has to be

taken as falling within the category of the authorities and institutions mentioned in that provision. We are also aware that in terms of section 6 (3) of the GPA as amended by the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020 which concerns all suits against the Government other institutions, including public corporations, parastatal organization and public company have been added in the category.

In the circumstances, we respectfully hold that the provisions of section 17 (1) (a) of Cap. 268 cannot be relied solely by the Attorney General without complying with the requirement specified under sub section (2) (a) and (b) of that section as argued by Mr. Ngowi. We are thus of the considered view that the right of the Attorney General to have audience or to intervene in the proceedings is not automatic but subject to the compliance of the law as alluded to above.

In the result, as the legal requirement for the right of audience and intervention by the Attorney General has not been followed, we decline the prayer for the Solicitor-General to have the right of audience on his behalf during the hearing of the application.

Consequently, we direct that to avoid further delay in the disposition of this application, hearing should proceed today through the services of the

counsel for the applicant and respondent who according to the record of the application, exchanged pleadings and written submissions in preparation of the hearing.

It is so ordered.

DATED at **DAR ES SALAAM** this 23rd day of February, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2023 in the presence of Mr. Gasper Nyika & Mr. Juvenalis Ngowi, both learned counsels for the applicant and Mr. Sylivanus Mayenga, Mr. Daniel Welwel & Mr. Erick Kamugisha Rweyemamu, learned counsels for the respondent, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL