IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO 593 OF 2023

(Arising from the Ruling and Drawn Order of the High Court of the United Republic of Tanzania (Land Division) at Dar es salaam (Hon. L. Hemed, J dated 28th April 2023, in Miscellaneous Land Case Application No. 64 of 2023)

Between

EQUITY BANK (T) LIMITED .....APPLICANT

And

JUNACO (T) LIMITED.....1ST RESPONDENT

STOPH YUSUPH SANGA.....2ND RESPONDENT

ADROFIN LASTON SANGA.....3RD RESPONDENT

JUSTIN LAMBERT.....4TH RESPONDENT

VEDASTINA LAMBERT .....5TH RESPONDENT

RULING

Date of Last order: 10/11/2023

Date of Ruling: 15/11/2023

MWAIPOPO, J:

The Applicant herein, Equity Bank (T) Limited, has filed an Application against JUNACO (T) Ltd and 4 others, herein after to be referred to as the Respondents for the following orders;

1. *This Hon. Court may be pleased to extend time within which the Applicants may file an Application for leave to the Court of Appeal against the Ruling and Drawn Order of the High Court of the United Republic of Tanzania(Land Division at Dar es salaam (Hon. L. Hemed, J) dated 28th April, 2023 in Miscellaneous Land Case Application No. 64 of 2023.*

Mwaipopo

2. *Upon granting an order extending the time above, grant the Applicants leave to appeal to the Court of Appeal of Tanzania against the Ruling and Drawn Order of the High Court of the United Republic of Tanzania (Land Division) at Dar es salaam (Hon. L. Hemed,J) dated 28th April 2023, in Miscellaneous Land Case Application No. 64 of 2023.*
3. *The Costs of this Application abide the results of the intended appeal.*

The Application is by way of Chamber summons supported by an Affidavit of Mgisha Kasano Mboneko, Head of Legal of Equity Bank (T) Ltd, made under section 11(1) and 5(1) (c) of the Appellate Jurisdiction Act (Cap 141 R.E 2019 and Rule 45 (a), 46(1) and 49 (3) of the Tanzania Court of Appeal Rules,2009 as amended.

The Respondents on the other hand, filed a joint Counter Affidavit deponed by one Catherine Zacharia, an Advocate of the High Court and Company Secretary for the 1st Respondents.

The hearing of this Application was done on the 26th of October 2023, whereby the Applicant was represented by Advocate Kyariga Kyariga and the Respondents enjoyed the services of Advocate Adronicus Byamungu. As usual, both Counsel addressed the Court on the substance of the Application based on the prayers contained in the Chamber Summons as cited herein above.

During the course of my judicial consideration and before the Ruling was delivered, I summoned parties to appear and address the Court on the propriety of the application; that is whether or not the said application was an Omnibus one or on the propriety of including two distinct prayers in one application. i.e. an application for extension of time to file leave to the Court of Appeal and leave to appeal to the said

Court. Secondly, whether leave is required to be filed for appeals originating from the High Court on a matter which it had an original jurisdiction or in the exercise of its original jurisdiction. Thus, the Parties complied with the order of the Court and made their oral submissions on the 9th of November 2023.

In his submission on the issues raised by the Court, the Counsel for the Applicant began his submissions by citing the provisions of section 3A and 3B of the Civil Procedure Code Cap 33 which require the Court to determine the case by looking at the substantive justice also call upon the parties to ensure that they save costs and time in litigation.

With regard to the nature of the Application, he submitted that more than one application can be lumped together if they are interrelated. He asserted that this Court has jurisdiction to determine both applications, i.e. an application for extension of time to file leave and leave to appeal to the Court of Appeal since both applications are the domain of the High Court under section 5(1) and 11(1) of the Appellate Jurisdiction Act Cap 141 2019 of the laws. He alluded that the two orders are interdependent. If the Court finds that the Applicant failed to show good cause for him/her to be granted an order for extension of time, the court will then proceed to decline to grant the second prayer for leave and if the court finds that Applicant showed good cause for delay it can proceed to determine the second prayer. He contended that these two prayers have the same remedy, if the court refuses to grant either of these two prayers, the Applicant may file a second bite Application to the Court of Appeal as per Rule 45(b) and 45A of the Court of Appeal Rules. The said Rules state;

Rule 45(b)-

Where an appeal lies with the leave of the Court, application for leave shall be made in the manner prescribed in rules 49

and 50 and within fourteen days of the decision against which it is desired to appeal or where the application for leave to appeal has been made to the High Court and refused,within fourteen of that refusal; .....

Rule 45A-(1)

Where an application for extension of time;

(b) to apply for leave;

is refused by the High Court, the Applicant may within fourteen days of such decision apply to the Court for extension of time

The counsel further proceeded to cite different decisions of the High Court and the Court of Appeal, whereby both courts determined the Applications together. He referred the Court to the following decisions;

a) ***Ally Salum Said versus Iddi Athuman Ndaki,*** *Misc. Land case Application No. 718 of 2020, HC Bukoba whereby the High court overruled an objection against an omnibus prayer.*

b) ***Joseph Rwakashenyi vs Rwanganilo Village Council and 21 others, Misc. land Application No. 140/2021, HC Bukoba pg 3, last paragraph and pg 4 1st paragraph,*** *where the court stated that the combination of these two prayers is not fatal.*

c) ***Issack Sebegele Vs Tanzania Portland Cement Company Ltd, civil Application no. 25/2002, CAT DSM Pg 9, 2nd and 3rd Paragraphs;*** *whereby the Court of Appeal was moved to grant prayers for extension of time to file an application for leave and leave to appeal. The Court*

proceeded to determine one prayer and then declined to grant the second prayer.

d) ***Mic Tanzania Ltd versus the Minister for Labour, Civil Appeal No.*** *103 of 2004 DSM Page 9, 2nd and 3rd Paragraph 9 and 10 where the Court stated that three prayers were properly combined, i.e. extension of time to apply for leave, leave to file an application for an order of certiorari to quash the decisions of the Board and the Minister and stay of execution of the decisions of the Minister and the Board.*

In line with those authorities, the counsel argued that this application for extension of time to file leave and leave to appeal to the Court of Appeal is competent before the Court and that the High Court has jurisdiction to grant those prayers. He contended that the Affidavit contains facts, which support both prayers.

With regard to the second issue of whether an appellant who is aggrieved by the decision of the High Court in the exercise of its jurisdiction requires leave to appeal to the Court of Appeal or not, the Counsel for the Applicant began his submissions by citing Section 47(1) of the Land Dispute Court's Act Cap 216, which requires a party who is aggrieved by the High Court in the exercise of its jurisdiction to appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act. A glance at this provision indicates that it grants a party a right to appeal to the Court of Appeal subject to the provisions of the Appellate jurisdiction Act. When one reads the provisions of section 5(1) of the Appellate Jurisdiction Act, it provides for the decisions or orders that can be appealable with or without leave of the High Court. As per the provisions of section 5(1) (a) and (b), the order which the applicants intend to challenge is not among the orders appealable without leave of the of the Court. He clarified to the court

that in their case, there is no Decree, that's why they did not bring an application for leave under section 5(b) where one can appeal against orders made under its original jurisdiction. If one reads section 5(b) I-IX, of the AJA the impugned order is not among the listed orders appealed without the leave of the court. That's why the applicant resorted to section 5(1) (c) of the Appellate Jurisdiction Act, which states that;

Section 5(1)(c);

In Civil Proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal with the leave of the High Court or of the Court of Appeal against every other Decree, Order, Judgment, Decision or finding of the High Court.

The Counsel contended that; the impugned order which the Applicant intends to appeal against the respondents, falls under section 5(1)(c) of the AJA. He submitted that an appeal is not automatic; it is subject to the provisions of the AJA. If it is an original Decree, it could be appealable without leave of the Court. In the case at hand, it is the Ruling and Drawn order, which are appealable to the Court of Appeal of Tanzania with leave in accordance with section 5(1)(c) of AJA read together with section 47(1) of the Land disputes Courts Act Cap 216. He landed his submissions by imploring the Court to determine their application with costs.

Submitting in response or reply to the Applicant's application, the Counsel for Respondent, Mr. Adronicus Byamungu took off by defining what an omnibus application is. He cited the case of Ally Said (Supra), which defines it as an application, which deals with numerous applications or prayers or combines two or more prayers.

He further stated that based on the authorities cited the counsel for the Applicant and his submissions, it is clear that the Application is omnibus, since it has combined two prayers. He went on to state that the underlying issue is whether the prayers in the instant application are fatal or not. Based on the cases cited by the Counsel, the combination of the prayers would be fatal if prayers are opposed to each other, under the authorities he cited, the combination of the prayers for extension of time to file an application for leave and the prayer for leave to appeal to the Court of Appeal appear not to be fatal and therefore he did not have issues with the combination of the prayers.

As to the second issue on whether leave is required, he alluded to the Court that leave is indeed required. The Counsel for the Applicant initially submitted that the right to appeal is automatic and later on corrected himself. He went on to assert that the Appeal is not automatic. It is subject to the leave of the Court of Appeal pursuant to Section 5(1) © of the Appellate jurisdiction Act, because the nature of the order or decision intended to be appealed against does not fall in any circumstances of Section 5(1) (a) and (b) of the Appellate Jurisdiction Act.

The Counsel for the Applicant rejoined by subscribing to the submissions made by the learned counsel for the Respondents and reiterated his previous submissions in chief.

Having examined the Chamber Summons and the reliefs sought as well as the submissions by both Parties to the case; I proceed to determine the issue as to whether this application is an omnibus one or not. As alluded to at the beginning of this decision, I summoned parties to appear and address the Court on this issue before I delivered the decision.

In his submissions, the Counsel for the Applicant admitted that the Application is omnibus; he however, cited a number of cases in which both the High Court and the Court of Appeal proceeded to determine two or more prayers contained in one Application based on the benefits of combining several prayers or the Court proceeded to determine the first prayer on extension of time to file leave and based on the outcome proceeded to determine the remaining prayer (s). See the cases of ***Ally Salum Said versus Iddi Athuman Ndaki,*** *Misc. Land case Application No. 718 of 2020,HC Bukoba,* ***Joseph Rwakashenyi vs Rwanganilo Village Council and 21 others, Misc. land Application No. 140/2021, HC Bukoba pg 3, last paragraph and pg 4 1st paragraph, Isaac Sebegele Vs Tanzania Portland Cement Company Ltd, civil Application no. 25/2002, CAT DSM Page 9, 2nd and 3rd Paragraphs; Mic Tanzania Ltd versus the Minister for Labour, Civil Appeal No.*** *103 of 2004 DSM Page 9, 2nd and 3rd Paragraph 9 and 10.*

The Counsel for the Respondent, in his reply, admitted that the Application is omnibus, however, he took no issue with the combination of two or more prayers. The only issue to him was whether the combination is fatal or not.

In his introductory submissions to the Court, the Counsel for the Respondent gave a definition of what amounts to an omnibus application. I fully subscribe to the definition he cited before the Court. Looking at the Application before this Court, one will note that the Chamber Summons supported by an affidavit has been filed under sections 5(1) (c) and 11(1) of AJA (Cap 141 R.E 2019 and Rule 45 (a), 46(1) and 49 (3) of the Tanzania Court of Appeal Rules, 2009 as amended and it contains two distinct prayers as follows;

1. *This Hon. Court may be pleased to extend time within which the Applicants may file an Application for leave to the Court of Appeal against the Ruling and Drawn Order of the High Court of the United Republic of Tanzania(Land Division at Dar es salaam (Hon. L. Hemed, J) dated 28th April, 2023 in Miscellaneous Land Case Application No. 64 of 2023.*
2. *Upon granting an order extending the time above, grant the Applicants leave to appeal to the Court of Appeal of Tanzania against the Ruling and Drawn Order of the High Court of the United Republic of Tanzania (Land Division) at Dar es salaam (Hon. L. Hemed,J) dated 28th April 2023, in Miscellaneous Land Case Application No. 64 of 2023.*
3. *.....*

It is my firm position that; the application is not proper before the Court for being omnibus. This is because, it intends to seeks, two distinct reliefs, which are; one, extension of time to file an application for leave and two, leave to appeal to the Court of Appeal. This application is contrary to the spirit of section 5(1) (c) of the Appellate Jurisdiction Act (AJA), Rule 45(a) and 46(1) of the Court of Appeal Rules, which have been cited as enabling provisions for the Application at hand as they each provide for a **distinct** application according to the **type** or **category of reliefs** sought. Looking at the enabling provisions cited in the Chamber summons; each of the provision saves its own purpose and both laws have set them out as each providing for a distinct application; for instance;

Section 5(1) (c) of AJA states as follows;

In Civil Proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal <u>with the leave</u> of the High Court or of

the Court of Appeal against every other Decree, Order, Judgment, Decision or finding of the High Court.

Section 11(1) of AJA

Subject to subsection (2), the High Court ..... may extend the time for.....making an application for leave to appeal...notwithstanding that the time for making the application has already expired

Rule 45(a)

In civil matters;

(a) **Notwithstanding the provisions of Rule 46(1), where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given or by Chamber Summons according to the practice of the High Court, within thirty days of the decision;..**

Rule 46(1)

Where an application.... for leave is necessary, it shall be made after the notice of appeal is lodged

Rule 49(3)

Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where application has been made to the High Court for leave to appeal by a copy of the order of the High Court

In the instant case, none of the provisions cited above talk of **applications.** They all provide for a single and distinct application. An application for extension of time to file leave is set out separately from the Application for leave. Nowhere is it stated that they can be filed

together or simultaneously. In this regard all the cases cited above by the Counsel for the Applicant in support of the Application are also distinguished in this regard.

In his submissions, the Applicant cited a number of cases to drive his point home that omnibus applications are allowed. However, I have perused all the cases he cited and noted that they suffer the effect of being overridden by the development of jurisprudence on the subject matter. In the case of **Zacharia Henry Mahushi and others vs the Republic, criminal Appeal no. 204/2010 decided in 2016, CAT, DSM** which also cited with approval the case of **ARCOPAR (O.M) SA Vs HARBERY MARWA & FAMILY INVESTMENT CO LTD AND 2 OTHERS, Civil application no. 94/2013,** the Court invoked the Canadian jurisprudence set out in **FISKEN el al vs MEEHAN** (1876 46 VC 2 B 1460 and stated that;

> ***"Whenever there are two conflicting decisions of equal weight, the court should follow the most recent decision".***

The court went on to state that;

> ***"Following the most recent decision, in our view, makes a lot of legal sense, because it makes the law predictable and certain and the principle is timeless".***

Thus, in the most recent case which was decided in October this year of our Lord, 2023, i.e. of **Hamis Mdida and another Versus the Registered Trustees of Islamic Foundation, Civil Application no. 330/11/ 0f 2022 CAT Tabora,** the Applicant, filed an Application for an order for extension of time to file an application for leave to appeal

to the Court of appeal as well as leave to appeal to the Court. In determining the Application, the Court stated at page 6;

> **Both counsels are at idem that the application contains two unrelated prayers, thus omnibus.... The point of departure however is the effect of the said omnibus application.**

The Court went on to hold that;

> **...an omnibus application is incompetent and the only remedy available is to strike it out**

In an effort to salvage his application, the Counsel for the Applicant in the instant Application implored the Court to proceed with determination of one prayer then depending on its outcome, proceed with the other. In prohibiting this move of combining two prayers in one Application and giving the court the option to pick one for determination, Hon. Justice Kairo in the above cited recent decision of **Hamis Mdida (supra)** stated that;

> ***"Without hesitation, I decline the request for a clear reason that it is not the duty of the Court to pick the grains from the chaff. A party has to be certain of what he or she needs from the Court and the manner of getting the same in terms of forums, instead of lumping together various un-related prayers and later plead with the Court to pick which is proper and deal with it. To say the list this is not permitted. (Emphasis is mine)***

Based on the above quotation I completely agree with the position and stance taken by Ho. Justice Kairo in the case cited above. It should not be the duty of the Court to pick what to determine or leave. Parties to

the case should be certain in terms of what they need and the timing for each prayer. Courts should not be put in a situation where once they agree with one prayer then they also forced to agree with the other or in a situation where they have to determined two prayers with distinct outcomes and different modalities of consideration contrary to the provisions of the law in which they are founded.

Furthermore, in the case of **Ali Chamani versus Karagwe District Council and Another, Civil Application no. 411/4 of 2017, CAT, Bukoba, the CAT** (bearing the same stance with **Hamis Mdida (supra),** while citing the case of Rutagana the Court stated that;

> ***"It occurs to us that there is no room in the Rules for a party to file two applications in one as happened here".***

The Court went on to state;

> ***"In the matter under consideration, none of the provisions which were invoked by the Applicant talk of applications, I think in view of the above position of the law, the applicant ought to file separate applications instead of lumping all of them together in one application as he did because it amounts to omnibus application. In this Application the issue is the propriety of the omnibus application before the Court and its effect. It is the position of this Court that the prayers sought presuppose two distinct outcomes. This is in line with the long established principle of law that, each case is to be decided on its own set of facts and prevailing circumstances (See***

Athuman Rashid vs. Republic Criminal Appeal No. 110 of 2012 (Unreported) where the Court discussed the legality of the single justice to determine an application for extension of time and to hear and determine the second prayer concerning leave".

Based on the above quotation of the decision of the CAT, it is my firm position that; in the instant application, the prayer for extension of time presupposes a different outcome from the prayer for leave. The determination process for the grant of extension of time is different from the determination for the grant of leave.

With regard to the application of the overriding principle in the matter at hand, the Counsel for the Applicant in his introductory submissions implored this court to apply the said doctrine in order to cure or save his application. It is my position that, the doctrine cannot be invoked in the instant application. In denying the application of the overriding objective principle in a similar situation the Court in the case of **Hamis Mdida (supra)** held;

"The principle of overriding objective has been introduced in our laws by the written laws (Misc. Amendments Act No. 8 of 2018 with a purpose of breathing life to cases which otherwise would have died for technicality. I ask myself whether the invocation of the oxygen principle is acceptable in the circumstance of the matter at hand. With much respect, the answer is in the negative and the reason is not farfetched; ***legally an incompetent matter is a nonstarter and in fact it is equated with a non-existing matter.*** *I thus fail to comprehend how can life be breathed into the matter, which does not exist, like the one*

at hand. That apart, the overriding objective principle does not apply to defeat the mandatory procedural requirement, which in this aspect, demands the filing of two prayers in separate applications. In fact, courts have cautioned not to apply the oxygen principle blindly. I am fortified in this stance by the case of ***Martin D Kumalija & 117 others Vs. Iron and Steel Ltd, Civil Application No/70/18 (unreported)*** *into which the court emphasized the need to apply the overriding objective principle without offending the clear position of the legal requirement, be it substantive or procedural".*

The Court went on to state that;

"While the principle is a vehicle for the attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the court".

See also the case of **SGS Society Generale de Surveillance SA and Another Vs Engineering & Marketing Ltd and another, Civil Appeal No. 124 of 2017(unreported)** where the Court also observed as follows when it turned down the invitation to invoke the principle;

"The amendment of Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of court or turn blind to the to the mandatory provisions of the procedural law which go to the foundation of the case". With the same spirit, since the procedural requirement demands for filing of the prayers in separate applications, the court cannot permit the circumvention of the said requirement under the pretext of invoking the overriding

objective principle. I thus find that the invitation is misplaced.

In view of the foregoing, it is my firm position that an omnibus application is incompetent and cannot be saved by the doctrine of overriding objective and thus the only remedy available is to strike it out (**See Rutagana C.L vs the Advocates Committee and Clavery Mtindo Ngalapa, Civil Application no. 98 of 2010, Ally Ally Mbegu Msilu Vs Juma Pazi Koba Administrator for the deceased estate of the late Haji Mbegu Msilu, Civil Application No. 316/01 of 2021).**

In the end and based on this ground alone, I proceed to strike out this omnibus application. I give no order as to costs.

DATED at **DAR ES SALAAM** this **15th** day of **November 2023.**

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S. D. MWAIPOPO

JUDGE

15/11/2023

THE HIGH COURT OF TANZANIA
LAND DIVISION

The Ruling delivered this day of November, 2023 in the presence of Ms. Irene Ruchaki holding brief for Mr. Kyariga Kyariga learned Counsel for the Applicant and Mr. Adronicus Byamungu learned Counsel for the Respondent is hereby certified as a true copy of the original.

Mwaipopo

S. D. MWAIPOPO

JUDGE

15/11/2023

THE HIGH COURT OF TANZANIA
LAND DIVISION