

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CIVILAPPEAL NO 144 OF 2012 (CORAM: MBAROUK. J.A., LUANDA, J.A., And MMILLA. J.A.) CONSOLIDATED HOLDING oCORPORATION APPLICANT VERSUS AFRICAN TERMINALS LIMITED & TWO OTHERS RESPONDENTS (Application for Stay of Execution from the decision of the High Court of Tanzania at Dar es Salaam) (ShangwaJ) Dated 29 th day of August, 2012 in Revision Appeal No. 68 of 2011 RULING OF THE COURT 14 Febr.& 18th April,2013 LUANDA . J.A: When the preliminary objection raised by the 1 respondent was about to be heard, Mr. Richard Rweyongeza learned counsel assisted by Mr. Majura Magafu learned advocate for the applicant prayed for an adjournment so that they be allowed to file a supplementary affidavit. The reason for making such an application is that they have come across to a very important fact which they think is crucial for the determination of the application. Mr. Rweyongeza informed the Court that they attempted to seek consent from the 1st Respondent as provided under Rule 49 (2) of the Court of Appeal Rules, 2009 (the Rules) to file the supplementary affidavit but to no avail, hence the prayer. Mr. Mustapha Chandoo, learned advocate for the 1 st Respondent resisted the prayer saying the application for an adjournment to enable the applicant file a supplementary affidavit was not made in good faith. He however conceded to have received a letter from the applicant seeking his consent to file a supplementary affidavit but he declined to do so because the letter was not attached with the supplementary affidavit intended to be filed so that he knew its contents. He went on to say that the application to file a supplementary affidavit is geared towards filling up gaps in the application filed by the applicant for stay of execution which he said should not be allowed. In any case the applicant should make a formal application, he charged. Mr. David Ntonge and Mr. Thadeus Hyera learned counsel for the 2nd and 3rd respondents respectively join hands with the stance taken by Mr. Chandoo. 2 El In reply Mr. Rweyoneza said they have shown good cause for the grant of the application they have made informally. And when prompted by the Court that the course taken would pre-empt the preliminary objection raised, he said they would not do that. In terms of Rule 49 (2) of the Rules an application to lodge a supplementary affidavit may be made informally with the leave of the Court or with the consent of the other party. The Rule reads: 49(2) An applicant may, with the leave of the Court or with the consent of the other party, lodge one or more supplementary affidavits, and an application for such leave may be made informally. In our case, Mr. Chandoo conceded to have received a letter from the applicant seeking consent to file a supplementary affidavit. Mr. Chandoo declined to give consent because the letter was not accompanied with a copy of a supplementary affidavit

intended to be filed so as to know the contents of the affidavit. We don't think that is a condition precedent provided under the Rule for giving consent. Whatever the position, since the application for stay is yet to be heard, we do not think that under the circumstances, to allow the applicant to file the same will harm the 1 respondent case in any way. This is because the 1 respondent will have the right to file an affidavit in reply affording them opportunity to counter the evidence contained in the said supplementary affidavit. In view of the foregoing therefore, we allow the application for adjournment of the application of stay of execution so as to enable the applicant file a supplementary affidavit, subject to one condition; the same should not in any way pre-empt the preliminary objection already taken out. Costs in the cause. The hearing of the preliminary objection in the application to come for hearing in the coming session. It is so ordered. DATED at DAR ES SALAAM this 16th day of April, 2013. M. S. MBAROUK JUSTICE OF APPEAL 4 B.M. LUANDA JUSTICE OF APPEAL B.M.K. MMILLA JUSTICE OF APPEAL I certify that this is a true copy of the original. DEPU11IISTRAR COURT OF APPEAL 5

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