

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC CIVIL APPEAL No. 157 OF 2022

(From Civil Reference No. 07 of 2021, from High Court of Tanzania Arusha; Originating from High Court of Tanzania Arusha Taxation Cause No 2 of 2021)

GENEVIEVE MARIANNE HALL

MONTGANON 1ST APPLICANT

CYRILLE XAVIER HARI 2ND APPLICANT

FREDRICK MARTIN NYITI 3RD APPLICANT

VS

RAJAI ALLY MGOMBA RESPONDENT

Date of last order 02/03/2023

Date of Ruling 31/03/2023

RULING

BADE, J.

Before me is an application for leave to appeal to the Court of Appeal of Tanzania against the ruling and order of the High Court of Arusha in Civil Reference no 07 of 2021 delivered on October 7, 2022 by Hon. Judge Masara, wherein the decision was to the effect of dismissing the Applicant's Application, upholding the decision of the Taxing Master in Taxation Cause No 2 of 2021.

The said application for leave is preferred under section 5(1) (C) of the Appellate Jurisdiction Act Cap 141 RE 2019, Rule 45 (A) of the Court of

Appeals Rules RE 2019 and the section 95 of the Civil Procedure Code Cap 33 RE 2019.

During the hearing of this Application, the Applicants who were represented by their Counsel Mr. Robert Mgoha; proceeded ex parte due to the fact that the Respondent although proved to be served, opted to not enter appearance or oppose the Application.

The Application is made by the Applicants believing that there is a point of law to be determined by the Court of Appeal of Tanzania, which is stated in paragraph 5 of the affidavit in support of the application. It is in effect deponing that

- a) The hon Judge erred in law by failing to consider the fact that the applicant's application for reference was unopposed due to the respondent's failure to file counter affidavit against the application
- b) That the hon Judge erred in law and fact by failing to consider the applicant's evidence that they entered appearance on 22nd October 2020 before the High Court of Tanzania in Arusha in Misc Civil Applications No 83 of 2020, which was not opposed by the Respondent's counter affidavit
- c) That both the taxing master and the hon Judge erred in law and fact in rejecting to award the 1st and 2nd applicants travel expenses from Geneva Switzerland to Arusha, as costs incurred by the 1st and 2nd applicants who appeared in Court on 22nd October 2020 to attend the matter above.

- d) That both the taxing master and the hon Judge erred in law and fact in the Application for Reference in rejecting the claimed instructions fees by lawyer in representing the Applicant's in Misc Civil Cause No 83 of 2020 at High Court of Tanzania Arusha, and lastly that
- e) That both the taxing master and the hon Judge erred in law and fact in the Application for Reference in rejecting to award the 1st and 2nd Applicant's costs for accommodation while following up the above matters.

The Counsel for the Applicant submitted that the point to be considered by the Court of Appeal is derived from the facts that the Applicant filed an Application under Civil Ref No 7 of 2021; for which there were 5 different Affidavits in support of such Application. The Respondents did not file any counter affidavits against those affidavits, meaning they did not contest any of these affidavits. This is so despite there being an order by the Court to file the same in response. The matter raised in those affidavits were issues of appearance, which the Counsel contend, in their view, deserved response. The Respondents later on opted to counter those facts deposed in Affidavits by way of Written Submissions instead of Counter Affidavits.

The learned Counsel maintains that leave would be granted if there is a good reason on a point of law, or there is a call for the court's intervention on a public interest. This is the position by the Court of Appeal of Tanzania in **Rutagatina CL vs Advocates Committee & Clavery Mtindo Ngalapa, Civil Application No 98 of 2010** (unreported). As a matter of

general principle that leave to appeal will be granted if there is good reason on

- i) issue of public general importance;
- ii) a novel point of law that;
- iii) arguable Appeal is presented prima facie that calls for this Court to intervene

The Counsel insists that the gist of the matter is that the respondents opted to not file any Counter affidavit; and instead made submissions when the matter was called upon for hearing. The applicants feel aggrieved by the move of the Respondents to respond to the issues raised in Counter affidavits through the oral submissions. He contends further that it is wrong for the Court to make a consideration basing on the Written Submissions, and then went ahead to consider those Submissions as it did even on points of facts as deponed in the Affidavits, making the Court arrive at an unfair decision. He is of the view that the Court of Appeal should guide what should have been done by the respondents, and or the effect of such considerations and correct this wrong.

The Civil Reference No 07/2021 went unopposed on the basis of facts, the only consideration that the opposition should have been accorded would be on the point of law since they opted not to file Counter affidavits. He relied on the position as adjudicated on **Finn Von Wurden Petersen and Milimani Farmers Ltd vs Arusha District Council, Civil Application No 562/17 of 2017**, that unopposed affidavits will have an effect that the respondents will only be able to challenge matters of law, as matters of

fact have been left uncontroverted by reason of not filing a counter affidavit.

Upon due consideration of the filed Application and scrutiny of the affidavit filed in support of the Application as well as the Ruling being contested against the relevant principle of the law, I am persuaded to and observe that it is well settled that a leave to appeal can be granted if there is a good cause on a point of law or a point of public importance that calls for Courts intervention as well enunciated by the Court of Appeal in **Harban Haji Mosi and Anor vs Omar Hilal Seif and Anor, Civil Reference No 19 of 1997** where it was held that:

Leave is grantable where the proposed appeal stands reasonable chance of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance.

So in my considered view the point for consideration by the Court of Appeal; as couched and made out by the applicant is whether it was proper and just for the Court to make consideration of the Reference basing on the Submissions and in the absence of the Counter Affidavits.

This is in line with the Court of Appeal view that a respondent who appears at the hearing without having lodged an affidavit in reply is precluded from

challenging matters of fact, but can challenge the application on matters of law only (See the **Finn Von Wurden Petersen** case supra)

In restating the justification for grant of leave, the Court of Appeal guided aptly in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004** (unreported) that:


Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant the same or refuse leave. The discretion must, however, be judiciously exercise on the materials before the Court. As a matter of general principle leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie case or arguable appeal.

In the circumstances, it is my considered view that the Applicant have made an arguable appeal, and I thus allow the application and grant leave to appeal to the Court of Appeal to the Applicants.

Costs shall follow the Cause.

It is so Ordered.

DATED at ARUSHA this day 31st day of March 2023


A. Z. BADE
JUDGE

31/03/2023

Ruling Delivered in chambers at **ARUSHA** this day **31st** day of **March 2023** in the presence of Mr. Robert Mgoha, Counsel for the Applicant.



A handwritten signature in blue ink, appearing to read "A. Z. Bade".

**A. Z. BADE
JUDGE
31/03/2023**