

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.106 OF 2023

MAKALA MWANASALI..... APPLICANT

VERSUS

ZUKRA MSUYA.....RESPONDENT

RULING

13th & 28th July 2023

MKWIZU, J

This application for leave to appeal to the Court of Appeal is brought under the provision of section 5(1) of the Appellate Jurisdiction Act No. 15 of 1979 (Cap 141 R:E 2019). The leave sought is to appeal against the decision of Civil Appeal No 111 of 2019 originating from the District Court of Temeke in Civil Case No 14 of 2017. The application was supported by an affidavit of the applicant's counsel Mr Elphace Rweshabora dated the 15th day of March 2023.

When the matter came for hearing on 13/7/2023, Mr Eliphas Rweshabura appeared for the applicant while Lutufyo Mvumbagu also learned advocate was for the respondent.

The applicant's counsel first adopted the affidavit in support of the application with the additional explanation that an application for leave is granted where the application demonstrates serious and contentious issues of law or facts for consideration by the Court of Appeal of Tanzania.

He said, the application meets the said test as paragraphs 6 and 8 of the supporting affidavit demonstrate serious issues as required for the Court of Appeal consideration namely;

1. whether contractual liabilities can be transferred to another third-party not a party to the contract
2. Whether conspiracy can be established and proved in civil cases
3. Whether an issue is neither framed nor argued by the parties can form the basis of the decision.

He lastly cited the case of **Said Ramadhani Mnyanga V Abdalah Salehe** (1996) **TLR 74**, inviting the court to allow the application.

Mr, Mvumbavu advocate said opposed the application for being baseless, and that was preferred to delay the respondent from enjoying her decree. The respondent's counsel contention was that application under section 5(1) (c) of AJA is not automatic, it is only granted upon the applicant disclosing sufficient legal point of law for consideration by the Court of Appeal as demonstrated in **Sango Bay estate ltd and others V Dresdner Banks** (1971) EA 71 and **Nurbhain Rattansi V Ministry of Water construction energy and environment**, (2005) TLR 220.

He was of the view that the applicant's affidavit has not pointed out any legal point for consideration by this Court and that paragraphs 6 and 8 of the affidavit, referred to by the applicant's counsel contain an explanation of what transpired before the court and what led to the impugned decisions and not points of law to be addressed by the Court of Appeal and the points the counsel for the applicants has raised in his submissions are not reflected in the affidavit. He emphatically submitted that dissatisfaction with the decisions itself is not a sensible point. He on this

referred the court to **Godwin Lyaki and Another V Ardhi University**, Civil Application No 991 /01/2021, Court of Appeal (unreported) page 14 with a prayer to dismiss the application with costs.

My task is to find whether the prayers in the chamber summons are meritorious. Parties agree to the legal position that for an application for leave to be granted, there must be shown point law and/facts fact which need the attention of the Court of Appeal as enunciated in **Rutagatina C.L Vs the Advocate Committee & Another**, Civil Application No. 98 of 2010, it stated that;

"An application for leave is usually granted if there is a good reason, normally a point of law or on a point of public importance, that calls for this intervention.

Thus, this court's duty in an application for leave is only restricted to determining whether there are arguable issues or compelling reasons, or disturbing features, or points of law, or points of public importance requiring the court of appeal intervention and not otherwise. This position was well articulated in **Jireyes Nestory Mutalemwa Vs Ngorongoro Conservation Area**, CAT Application No 154 of 2016(unreported) where it was observed:

"The duty of the court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the court in the event leave is granted. It is for that reason the court brushes away the requirement to show that the appeal stands better chance a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merit of the appeal".

I have read the applicant's affidavit. As rightly submitted by the respondent counsel, paragraph 6 of the applicant's affidavit contains no suggestion of a point of law to be forwarded for the Court of Appeals decision. It is only paragraph 8 that proposes an issue in the impugned decision. In that paragraph the applicant's concern is;

8: that the intended appeal has overwhelming chances of success since this Honourable court erred in law by shifting the contractual liabilities of Kessy Mohamed (first defendant in the trial court) to the Applicant. That the applicant has never entered into any agreement with the Respondent herein.

The point here is *the shifting of the contractual liabilities by this court to the Applicant who was not privy to the alleged contract.* This is the only issue for leave in this application.

I read the impugned decision. There is nothing in that decision reflecting the point suggested by the applicant in paragraph 8 above. I will thus refrain from granting leave for the only reason that the point being raised is a new issue not encompassed in the impugned decision. I am on this fortified by the Court decisions in **Harban Haji Mosi and Another Vs. Omar Hilal Seif and Another** [2001] TLR 409 at Pg 414 – 415, where the court held.

" The purpose of the provision is therefore to spare the court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance."(emphasis added

That said, the application is dismissed for lacking merit.

Order accordingly.

DATED at **DARE ES SALAAM** this **28th** day of **JULY** 2023.



E.Y. MKWIZU
JUDGE
28/7/2023