

**IN THE HIGH COURT OF UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL APPLICATION NO. 29 OF 2023

MOHAMED ABDILLAH NUR.....1ST APPLICANT

UMMUL KHERI MOHAMED2ND APPLICANT

WINGS FLIGHT SERVICES LTD 3RD APPLICANT

AFRICA FLIGHT SERVICES4TH APPLICANT

VERSUS

HAMADI MASAUNI1ST RESPONDENT

ARTHUR MOSHA..... 2ND RESPONDENT

JUMA MABAKILA..... 3RD RESPONDENT

08/05/2023 & 04/07/2023

RULING

NANGELA, J.

This ruling is in respect of an application preferred by the Applicants against the Respondents herein. The application was brought to the attention of this court by way of a chamber summons under section 5(1)(c) of the Appellate Jurisdiction Act, Cap.141 R.E 2019, Rule 45(a) of the Court of Appeal Rules, and any other enabling provisions of the law.

The Applicant seeks for the following orders of the Court,
namely:

1. That, the Honourable Court may
be pleased to grant leave to the
Applicants to appeal to the Court
of Appeal of Tanzania against the
ruling and order of the High Court
of Tanzania, Commercial Division
in Misc. Commercial Cause No.33
of 2021.
2. Costs.
3. Any other reliefs this Court may
deem proper to grant.

When this Court called on the application for orders on
the 8th of May 2023, the Applicant enjoyed the services of Ms.
Abriet Kivea and Lewis Lyimo, learned Advocates. Ms. Kivea did
also hold brief of Mr. Alex Mgongolwa, learned Advocate
appearing for the Respondents.

On the material date, this Court ordered the hearing to
proceed by way of filing written submissions, and the filling

schedule was issued. The learned counsels for the parties have dutifully complied with the schedule of filing. I will summarize their respective submissions before I render my verdict thereto.

Submitting in support of the application, Mr. Melchizedek Lutema, the Applicant's learned advocate who filed the submissions in support of the application, urged this Court to grant the leave sought by the Applicants with costs. In his submission, Mr. Lutema drew the attention of this court to the fact that, before filing this application there was an application for the extension of time to file this application (i.e., Misc. Commercial Application No. 201 of 2022), as time to file it had lapsed.

Concerning the reasons why this court should grant this application, Mr. Lutema contended, that, the decision intended to be appealed against was made by this court as a court of first instance exercising original jurisdiction and there are in it serious questions of law requiring the attention of the Court of Appeal. He contended that, since it is a decisions made by the High Court while in exercising of its original jurisdiction, it is fair

and proper that Court of Appeal should be given a chance to validate or invalidate, the decision of the trial court, given that, the right to appeal is a constitutional right.

Mr. Lutema submitted further that, there are serious questions of law that beg for a hearing and determination of by the Court of Appeal of Tanzania. He pointed out that, one of such issues is whether it was proper for the trial Court to enter a final decision based on the affidavital pleadings alone without requiring the parties to testify. The other point is whether the Petition was in law a derivative action under the Companies Act and whether it should have been preceded by a statutory notice. According to Mr. Lutema, all these questions of law need the intervention of the Court of Appeal.

In addition, it was Mr. Lutema's submission that, the decision is also tainted with illegalities which need to be corrected by the Court of Appeal. One among them is that the court entertained a matter which was already time barred. He also contended that, the court granted reliefs not founded on

the pleadings and condoned a breach of specific provisions of the Companies Act.

Mr. Lutema submitted further that, there were injustices on the part of the Applicants from the trial court. He argued, for instance, that, the Applicants were denied chance to test the credibility of witness through cross examination of witness. He contended as well that, the Applicants were denied the opportunity to contest the admissibility of the documents relied upon.

Mr. Lutema contended further that, the Applicants were deprived of the chances to challenge authenticity of documents in flagrant violation of specific provisions of the Evidence Act, the Civil Procedure Code, and the High Court (Commercial Division) Procedure Rules.

Lastly, Mr. Lutema submitted that, the Applicants were denied their right to natural justice in form of *audi alteram partem* because the trial court granted the relief not founded on the pleadings without affording the parties an opportunity to be heard on those prayers.

To support his submission, reliance was placed on the case of **Catherine Losioki Telele vs Ngorongoro Pastoral Council and two others**, Civil Application No. 87 of 2020. In that case. The court was of the view that, to grant leave to the Court of Appeal, the Applicant must demonstrate that there is a point of law of significant importance or an arguable appeal worth of being brought to the attention of the Court of Appeal. In his view, the issues raised in this application as grounds for the intended appeal, present an arguable case before the Court of Appeal.

Through their learned counsel Mr. Alex Mgongolwa, the Respondents contested this application by filing counter affidavits. Mr. Mgongolwa adopted the counter affidavit filed by the Respondents as forming part of his submission and submitted that, the Applicants have failed to show or disclose sufficient reasons to convince this court to grant then leave to appeal to the Court of Appeal.

Mr. Mgongolwa submitted that, the grant of an application for leave to appeal is not an automatic right. He

contended that, granting such an application is subject to the discretion of the court. He added, however, that, the exercise of such discretion of the court is to be in conformity with the guiding principles pointed out by the Court of Appeal of Tanzania in different authorities.

He further submitted that, in determining whether an application for leave to appeal to the Court of Appeal should be granted, the Applicant must disclose *prima facie* arguable point of law or matters of general importance or novel points of law or must show that the proceedings as whole reveal such disturbing features as to require the guidance of the court.

To support the above view, he placed reliance on the cases of **Nurbhai N. Rattansi vs. Ministry of Water, Construction, Energy & Environment and Hussein Rajabali Hijri** [2005] TLR 220; **Harban Haji Mosi vs. Omary Hilal Seif and another** [2001] TLR 409 and **Godwin Lyaki & another vs. Ardhi University**, Civil Application No. 491/01 of 2021 (unreported).

Mr. Mgongolwa submitted that, from the above authorities, it can be concluded that the Applicants have failed to adduce cogent grounds to warrant the granting of their application for leave and that, their submission is shorn of merit and should be rejected.

He submitted that, the proposed grounds of appeal which is to the effect that the Applicants were denied the opportunity to confront witnesses of the respondents through cross examination and that the trial court arrived at its final ruling based on affidavital assertions are incorrect allegations.

He submitted that, the ground was not correct because as per the record of the trial court, after the pleadings were concluded, the parties were asked for cross examination of any party but both parties denied the opportunity to conduct oral examination and they opted to dispose the matter by way of written submissions and categorically stated they have no one to cross examine. In view of that, Mr. Mgongolwa submitted that, the Applicants were now estopped from claiming that they were denied such opportunity.

On the issue of granting some reliefs not prayed for, it was Mr. Mgongolwa's submission that, the same was also a baseless ground and falls short of being a ground warranting a grant of an application for leave. He contended that, the Applicants have not laid out in their affidavit with any specificity the impugned relief.

According to Mr. Mgongolwa, the trial court is vested with the powers to grant consequential orders as it deems fit pursuant to section 234 (3) of the Companies Act, No. 12 of 2002. He argued that the Petitioner (Respondent herein) prayed for any other reliefs as the court thinks fit to grant, and, hence, the contention of the Applicant concerning the prayers granted is misplaced.

Besides, Mr. Mgongolwa submitted that; the impugned decision of the trial court was not fraught with illegalities to warrant the consideration of the Court of Appeal unlike what the Applicants seem to be alleging. As for him, the issue of there being illegalities were well explained when the Applicant applied for an extension of time to apply for leave through Misc.

Commercial Application No. 201 of 2022 and the court found that there was no illegality in the decision as it was alleged. He contended, therefore, that, the Applicants are estopped from raising it again since the court has already dealt with it in the previous application.

In addition, he submitted that none of the illegalities cited by the Applicants were apparent on the face of record and well demonstrated. Reliance was placed on the case of **Lyamuya Constructive Limited vs Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) and **Charles Richard Kombe vs. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019.

He contended, therefore, that, since the court had already declared through Misc. Commercial Application No. 201 of 2022 that the impugned decision had no illegalities, there is no legal point which would warrant the attention of the Court of Appeal.

As regards the issue of jurisdiction, Mr. Mgongolwa referred this court to **Mulla's Code of Civil Procedure** as

quoted in the case of **Charles Richard Kombe vs Kinondoni**

Municipal Council (supra) where it said that:

"It is settled law that where a court has Jurisdiction to determine a question, it determines that question, it cannot be said that it has acted illegally or with material irregularity merely because it has come to an erroneous decision on a question of fact or even of law."

In view of the above quotation, Mr. Mgongolwa was of the view that the court had jurisdiction under section 234 of the Companies Act, to determine the matter. Finally, he urged this court to dismiss the application since the Applicant failed to demonstrate a sufficient reason and/or prima facie points of law worth bring to the attention of the Court of Appeal for consideration.

I have carefully considered the rival submissions of the parties and the issue which I am called upon to determine is whether in this application the Applicants have demonstrated

grounds which qualify to be brought to the attention of the Court of Appeal.

Essentially, an application for leave to appeal, as correctly asserted by Mr. Mgongolwa, is not an automatic right. It will be determined based on the materials placed before the Court and is granted at the discretion of the court. Equally, as correctly stated by Mr. Lutema, the right to appeal to the Court of Appeal is a constitutional right.

However, that right, when contemplated in the context of the application and the matters placed before this court, is beset with limitations imposed by the law which limitation is to the effect that, the prospective Appellant will enjoy it after securing leave of this court. In **Harban Haji Moshi and Another vs. Omari Hilal Seif and Another**, [2001] TLR 409, the Court of Appeal did explain why leave is necessary and made it clear that:

"The purpose ... is to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

For leave to appeal to the Court of Appeal to be granted, therefore, the granting can only be made if the Applicant meets the requisite criteria already set out by the Court of Appeal in its various decisions. This include whether the proposed appeal raises contentious issues and stands chances of success. In the case of **BBC vs. Eric Sikujua Ng'imaryo**, Civil Appl, No.138 of 2004 (unreported), the Court of Appeal was a further of the view that:

"leave 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* or arguable appeal..."

Other decisions that have equally addressed the issue include the cases of **Said Ramadhani Mnyanga vs. Abdallah Salehe** [1996] TLR 74; **Hamis Mdida and Siad Mbogo vs. Registered Trustees of Islamic Foundation**, Civil Appeal No.232 of 2018 (CAT) (at Tabora) (unreported) and all these are relevant and do serve the purpose.

In the present application, the Applicants have enlisted several grounds which, as I look at them, raise issues of law which, in my humble view, can sufficiently engage the mind of the Court of Appeal since they do present an arguable case before the Court. Whether they are rightly made or correctly in all aspects or not, are not the kind of considerations which I am supposed to address in this application.

In view of that, going beyond making a finding that the kind of issue which the Court is invited to address in appellate stage should I grant the Applicant leave, will be attempting to usurp the powers of the Court of Appeal which I do not have. Whether the grounds have merits or not will remain the province of the Court of Appeal to decide.

It is my finding, therefore, that, the Applicants have an arguable case, and this court should exercise its discretion and grant the prayers sought. In the upshot of all that, this Court settles for the following orders:

1. That, the Applicant is hereby
granted leave to appeal to the
Court of Appeal.

2. That, the granting of this
Application is with costs as
prayed.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 04TH DAY OF JULY
2023**




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DEO JOHN NANGELA
JUDGE