

**IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA**

**MISCELLANEOUS CIVIL APPLICATION NO. 13 OF 2013
(Application for leave to appeal to the Court of Appeal of Tanzania
from the decision of the High Court of Tanzania at Sumbawanga
in DC. Civil Appeal No. 9 of 2012 and Original Civil case No. 13 of
2011 of Sumbawanga District Court)**

**CHRISTINA ALPHONCE TOMAS
(AS ADMINISTRATRIX OF THE
LATE DIDAS KASELE, DECEASED)..... APPLICANT**

Versus

SAAMOJA MASINGIJA RESPONDENT

12th August & 26th November, 2014

RULING

MWAMBEGELE, J.:

The applicant Christina Alphonse Tomas, an administratrix of the estates of the late Didas Kasele, deceased, through the services of Mr. M. A. Ndayanse, learned Advocate, is applying for leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in DC Civil Appeal No. 9 of 2012 delivered on 10.12.2013. The application has been brought under the provisions of Section 5 (1) (c) of the Appellate Jurisdiction Act,

Cap. 141 of the Revised Edition, 2002 and rule 45 (a) of the Court of Appeal Rules, 2009. It is supported by an affidavit of Mr. Masendeka Anania Ndayanse; learned Counsel for the applicant. On the other hand, the respondent, Saamoja Masingija, sworn the counter affidavit which was drawn and filed by Mr. J. Mushokorwa, learned advocate opposing the application.

When the matter came up for mention on 12.08.2014, the respondent appeared in person and asked this court on behalf of his advocate that the matter be argued by way of written submissions; a prayer which was not objected by Mr. Ndayanse, learned Counsel for the applicant. The court granted the application and proceeded to schedule the submissions dates. The parties have submitted their written submissions as ordered by the court.

The background facts to this application are very short and not difficult to comprehend. They can be briefly stated as follows. The applicant herein was the Defendant in Civil Case No. 13 of 2011 in the District Court of Sumbawanga in which the respondent herein had sued her for reliefs arising out of breach of contract. The Plaintiff, the respondent herein, was unsuccessful in the suit; the suit was dismissed in its entirety and no order was made as to costs.

The costs part of the judgment irked the applicant. She thus appealed to this court on a memorandum of appeal with four grounds of grievance. However, when arguing the appeal by way of written submissions, the

applicant, through her advocate, abandoned all the grounds except the third one. In addition, counsel for the applicant amended the remaining ground and proceeded to submit on the ground as modified. In the reply submission, counsel for the respondent, *inter alia*, objected to the course taken by counsel for the applicant, stating that it offended the provisions of Order xxxix rule 3 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002. In its judgment, this court upheld the objection and consequently struck out the only ground of appeal. Ultimately, the appeal was dismissed with costs for want of prosecution. This is what the applicant is seeking leave of this court to challenge it in the Court of Appeal.

In applications of this nature, it has been held by this court and the Court of Appeal time and again that leave will be granted only when the intended appeal has some merits whether factual or legal – see ***Ms Ilabila Industries Ltd and 2 others Vs Tanzania Investment Bank and Another***, Commercial Case No. 27 of 2002 (HC unreported), ***Ms Ilabila Industries Ltd and 2 others Vs Tanzania Investment Bank and Another***, Application No. 179 Of 2004 (CAT unreported), ***Wambele Mtumwa Shamte Vs Asha Juma***, Civil Application No. 45 of 1999 (CAT unreported) and ***Gaudensia Mzungu Vs the I.D.M. Mzumbe***, Civil Application No. 94 of 1999 (CAT unreported) to mention but a few. In the ***Shamte*** case (*supra*) the Court of Appeal observed:

“..... Unfortunately, it is not provided what factors are to be taken into account when

considering whether or not to grant leave to appeal to this Court. However, it is obvious that leave will only be granted if the intended appeal has some merits whether factual or legal.”

And in the ***Mzungu*** case (supra) the Court of Appeal underlined:

“... Again, leave is not granted because there is an arguable appeal. There is always an arguable appeal. There is always an arguable appeal. What is crucially important is whether there are prima facie, grounds meriting an appeal to this Court.”

Reverting to the case at hand, the issue for determination is whether, in the light of the foregoing authorities, the intended appeal has some merits factual or legal. I have dispassionately read through the written submissions of the parties and their affidavits. Both learned Counsel for the parties addressed the issues in controversy adequately. An assessment of the application as well as the flanking affidavit by counsel for the applicant and the counter affidavit by the respondent together with the written submissions by both learned Counsel, drives me to a conclusion that it will not be in the interest of justice to grant this application. Granting the application will be tantamount to inundating the highest court of our land with trivialities. There is an oversupply of authorities in this jurisdiction that a party cannot unilaterally amend any ground of appeal in