IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A, And FIKIRINI, J.A)

CIVIL APPLICATION NO. 200/16 OF 2020

HASHI ENERGY (T) LIMITED.....APPLICANT

VERSUS

KHAMIS MAGANGA.....RESPONDENT

(Appeal from the Default Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Mwambegele, J)

dated the 14th day of June, 2016

in

Commercial Case No. 149 of 2014

.....

RULING OF THE COURT

20th October & 2nd November, 2021

FIKIRINI, J.A.:

By way of notice of motion preferred in terms of Rule 113 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant seeks leave to introduce additional grounds of appeal in Civil Appeal No. 181 of 2016. The intended additional grounds are that:

(i) *The trial Judge Honourable J.C. M Mwambegele J, (as he then was) erred in law in taking over the trial of the case*

from the predecessor Judge Honourable Justice R.V. Makaramba,J (as he then was) without recording reasons for such takeover contrary to Order XVIII Rule 10 (1) of the Civil Procedure Code [Cap 33 R.E. 2002; now Cap 33 R.E. 2019]; and

(ii) *The trial Judge Honourable Justice J. C. M Mwambegele (as he then was) erred in law in awarding the respondent general damages of TZS. Ten Million (10,000,000) without assigning any reason for such award.*

The application is supported by an affidavit sworn by Mr. Mpaya Kamara, learned counsel. Contesting the application Captain Ibrahim Mbiu Bendera, learned counsel filed an affidavit in reply. In terms of Rule 106 (1) and (7) of the Rules, both counsel filed written submissions in support of their respective positions.

In both his affidavit and written submission in support of the application, Mr. Kamara contended that the intended additional grounds came to his attention in the course of his preparation for the hearing of the appeal, an assertion which was controverted by Captain Bendera.

At the hearing, both counsel adopted their affidavits and written submissions filed on 3rd August, 2020, and 26th August, 2020 respectively.

In his submission in support of the application, Mr. Kamara prefaced his oral submission by withdrawing the first intended additional ground. We proceeded to grant the uncontested prayer and consequently, recorded it as abandoned.

Submitting on the remaining ground, Mr. Kamara stated that the reason he could not raise the second proposed additional ground of appeal which he considered worth consideration by this Court, is because it came to his attention when he was preparing for the hearing of the appeal. He stated further that the general damages awarded as reflected on pages 277-281 of the record of appeal, were awarded without any reasons given by the trial court. Fortifying his submission on the point, he referred us to the case of **Anthony Ngoo & Another v Kitinda Kimaro,** Civil Appeal No. 25 of 2014 (unreported) p. 15.

Probed by us if there was any provision prohibiting the appellant to apply orally to add a ground of appeal, Mr. Kamara while admitting that there was no such provision but was mindful to inform us that his reading of Rule 113 (1) of the Rules was that it required him to give notice and

secure leave which is what prompted him to file this application. In short, that he was being extra cautious lest he be on the wrong side of the rules.

On his part, Captain Bendera maintained his stance by contending that the present application was like placing a cart before the donkey. Maintaining that the Judge had discretion in awarding general damages, without giving reasons, due to the fact the decision emanated from a default judgment. He thus distinguished the case of **Ngoo** (supra), arguing, that in the cited case the award was made after hearing inter parties, which was not the case at hand. He as well challenged the delay in filing this application.

In his brief rejoinder, Mr. Kamara maintained that the merits and demerits of the intended additional ground of appeal will be decided on appeal. He further argued that Rule 113 of the Rules, simply allows one to seek leave when a situation like the present one arises and urged us to grant the application to allow for the applicant to be heard regardless as to whether the award emanated from a default judgment or otherwise.

We have carefully considered the notice of motion, affidavits, and rival submissions, in expounding counsel's respective positions. The only

issue for determination is whether the application before us deserves granting. Whereas the applicant is desirous for the application to be granted so that she can be heard on the additional ground in course of arguing the appeal, the respondent finds the application is without merits on the ground that, *one*, the intended ground of appeal originated from the default judgment, and *two*, it took too long for this application to be filed.

Applications of this nature are governed by Rule 113 (1) of the Rules. The rule in general governs how arguments are to be dealt with at the hearing of the appeal. For ease of reference the rule is provided below:

> *"**A party shall not without leave of the Court, argue** that the decision of the High Court or tribunal, should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or in support of the decision of the High Court or tribunal on any ground not relied on by that court or specified in a notice given under rule 94 or rule 100."* [Emphasis added]

It is clear from the rule that a party wishing to add a ground of appeal or point to be decided upon has an avenue to do so under the provision of rule 113 (1) of the Rules. There is as such no requirement for stating the reason as to why an additional ground is preferred nor is there a condition as to when the application should be made. The provision has equally not illustrated that the applicant is obliged to move the Court by way of notice of motion as it has been done in the present application. Whilst we appreciate the caution taken by Mr. Kamara, by formally moving the Court, we would urge parties in the interest of justice and speedy trials, to opt for the most convenient alternative especially where there is no specific provision directing so, by simply applying for such leave orally.

Now turning to the application, we have thoroughly perused the affidavit. We are persuaded by Mr. Kamara's averment in paragraph 6 of the affidavit, that he saw the need to add the intended ground of appeal when preparing himself for the hearing of the appeal. We do not find any reason to doubt his assertion. *First and foremost,* counsel has a professional duty to represent the interest of his client to the best of his abilities. Similarly, counsel has the duty not to handle a legal matter without adequate preparation and must not neglect a legal matter

entrusted to him. Also as an officer of the court, counsel is obliged not to conduct himself in a manner that may obstruct, delay or adversely affect the administration of justice. Mr. Kamara in paragraph 8 of his affidavit clearly stated that upon discerning the error he consulted with his client who instructed him to raise the additional ground, hence the present application.

In the affidavit in reply particularly paragraphs 6, 7, and 8, Captain Bendera contested the application. We have, with respect failed to agree with him on both limbs; that the decision subject of the appeal emanated from a default judgment, meaning there was no actual trial which has been conducted, and that the Judge has discretionary power to award general damages without giving reasons. We are of the view that those are the points to be argued in the appeal pending before this Court.

Secondly, we agree with Mr. Kamara that the intended additional ground raises a point of law as averred in paragraph 6 of his affidavit, hence worth the attention of this Court. We, however, refrain from discussing the case of **Anthony Ngoo** (supra) referred to us by Mr. Kamara, at this stage.

In addition, we have as well considered that the fundamental principles of natural justice should always be observed and that a party's right to be heard be guaranteed. This has been emphasized in a range of cases, including those of **Mbeya - Rukwa Auto-parts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R.251, **Hamisi Rajabu Dibagula v. Republic** [2004] T.L.R. 181, to mention a few.

In the case of **Mbeya - Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** (supra), the Court when discussing the principle, underscored the fact that in this country, the right to be heard is both fundamental and constitutional when it held: -

> *"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law and declares in part:*
>
> *(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu ... "*

Furthermore, we did not find that the respondent will be prejudiced in any way if this application is granted.

We, thus grant the application. The additional ground of appeal is to be filed within seven days from the date of this ruling. Costs to abide by the result of the appeal.

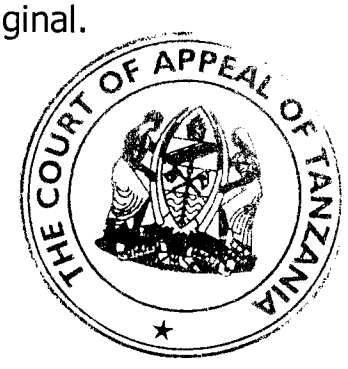
DATED at **DAR ES SALAAM** this 29th day of October, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Ruling delivered this 2nd day of November, 2021 in the presence of Capt. Ibrahim Mbiu Bendera hoilding brief for Mr. Mpaya Kamara, learned counsel for the Applicant and Mr. Ibrahim Mbiu Bendera, learned counsel for the respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL