**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: WAMBALI, J.A., KEREFU, J.A. And MAIGE, J.A.)**

**CIVIL APPLICATION NO. 491/01 OF 2021**

**GODWIN LYAKI ............................................................... 1ST APPLICANT**
**BONIFACE AUGUSTINE.................................................... 2ND APPLICANT**

**VERSUS**

**ARDHI UNIVERSITY ......................................................... RESPONDENT**

**(Application for leave to appeal from the judgment and decree of the High Court of Tanzania at Dar es salaam)**

**(Mlyambina, J.)**

**Dated the 20th day of December, 2020**
**in**
**Civil Appeal No. 154 of 2018**

**................**

## RULING OF THE COURT

*15th February & 13th March, 2023*

**WAMBALI, J.A.:**

The applicants, Godwin Lyaki, Boniface Augustine and Yustol Mhalila who is not a party to this application, were admitted by the respondent for Postgraduate Diploma in Construction Economics and Management (PGD – CEM) in the academic year 2008/2009. It is on record that during the registration, the applicants and Yustol Mhalila submitted to the respondent only academic transcripts from the Dar es Salaam Institute of Technology

(DIT) and promised to submit the Advanced Diploma Certificates (ADC) later on the explanation that they were yet to receive them from DIT. The respondent allowed them to be enrolled and proceed with studies subject to the submission of the respective certificates. As it were, the applicants and Yustol Mhalila continued with their studies until they graduated and awarded the PGD – CEM on 16th January, 2012 without having submitted the ADC as promised.

Despite that state of affair, the first applicant went ahead and registered for Master of Science Degree Program using the result slip of PGD – CEM issued by the respondent. Later, during the registration of candidates in the academic year 2010/2011, after inquiry from the DIT, the respondent became aware that the applicants had not passed their examinations at the DIT. It was therefore the opinion of the respondent that the applicants could not have the ADC to submit as promised before they were registered for the PGD-CEM. Consequently, the applicants' and Yustol Mhalila's awards of the PGD – CEM were withdrawn by the respondent with effect from 6th September, 2012. Moreover, the first applicant's registration for the Master's Degree Program was scraped with effect from 6th December, 2012.

The respondent's decision seriously aggrieved the applicants and Yustol Mhalila who sought the services of a lawyer and approached the Resident Magistrate Court of Dar es Salaam where they lodged Civil Case No. 428 of 2012 to contest it. The trial court heard the parties and in the end after considering the circumstances of the case, it decided in favour of the applicants.

The applicants' victory did not last long because following Civil Appeal No. 154 of 2018 which was lodged by the respondent, the High Court reversed the trial court's decision on the finding it had no jurisdiction to entertain the dispute between the parties as a normal suit. In essence, it allowed the respondent's appeal with costs. Particularly, the High Court held that the dispute between the parties had to be resolved through judicial review powers bestowed on the High Court and not the Court of the Resident Magistrate.

The applicants subsequently lodged a notice of appeal to contest the first appellate court's decision. Unfortunately, their application to apply for leave to appeal to this Court was refused by the High Court in Miscellaneous Civil Application No. 242 of 2020 as evidenced by its decision delivered on 7th May, 2021. They thus lodged this application in terms of rule 45(b) of the

Tanzania Court of Appeal Rules, 2009 (the Rules) seeking to be granted leave to appeal.

The application is supported by the affidavit of Samson Edward Mbamba, learned advocate for the applicants. It is apparent in the notice of motion that the main ground for seeking leave to appeal in this application is couched in the following terms:

> *"That, there is a point of law to be determined by this hon. Court to guide the High Court when and when not to apply for prerogative rights of judicial review, and whether in all cases involving authorities like the respondent a normal suit cannot be accessed as a proper procedure."*

The said ground is given weight and explained under paragraph 8 of the affidavit as follows:

> *"8. That, if he present application for leave to appeal is granted the Court of Appeal will be invited, in the second appeal, to decide a crucial point of law of significant importance namely, in what respect a party is precluded from filing a civil suit to challenge the decision affecting him, which is issued by a University College like the respondent withdrawing the*

*award of diplomas and in what respect a party is apply (sic) for Judicial Review."*

It is further noted that though the applicants did not raise the issue of illegality as a ground in the notice of motion, it features in paragraphs 9 and 10 of the affidavit. In those paragraphs they allege that the issue of fraud which was raised *suo motu* and discussed by the first appellate judge in the judgment without being granted opportunity to address the matter denied them the right to be heard.

The application is contested by the respondent through an affidavit in reply sworn by Silvanus Hubert Mosha, Principal Officer of the respondent.

At the hearing of the application, Mr. Samson Edward Mbamba, learned advocate appeared for the applicants. On the adversary side, Mr. Edwin Webiro, Mr. Thomas Mahushi and Ms. Careen Masonda, all learned State Attorneys appeared.

When granted opportunity to submit in support of the application, Mr. Mbamba adopted the notice of motion, affidavit, written submission and the list of authorities without any addition. In the end, he prayed that the application be granted as prayed with costs.

Similarly, Mr. Webiro adopted the affidavit in reply, written submission and the list of authorities in opposition to the application and prayed for its dismissal with costs.

We discern from the applicants' written submission that the application for leave to appeal is premised on the argument that, though they properly instituted a normal suit at the trial court, the High Court wrongly decided that it was not a right procedure.

The applicants therefore contend that while the decision of the High Court is that the respondent's decision is only justiciable by way of judicial review and not normal suit, the law in this area is not settled because of the existence of the conflicting decisions to the effect that judicial review, being a discretionary remedy is available only when normal remedies like normal suits are either not available or barred by statutes. To support the contention, reference was made to the decision in **Harun s/o Nchama and Another v. Republic** [1982] T.L.R. 274 where it was held that:

> "*(i) Where a statute expressly declares an order to be final no offence can lie against such order.*
>
> *(ii) It is only by way of an application for judicial review that the order complained against could be challenged for illegality or want of*

*jurisdiction by way of such prerogative orders as certiorari."*

Another decision which was relied upon by the applicants is **T.A.S. v. Attorney General** (1996) T.L.R. 218 where Samatta, J. (as he then was) held, among others, that:

> (*iv)* *The provision that the Minister's decision is final and conclusive does not mean that the decision cannot be reviewed by the High Court, indeed no appeal will lie against such a decision but an aggrieved party may come to the High Court and ask for prerogative orders."*

The applicants therefore conclude that, in the application at hand, there is a point of law of public importance to be determined by the Court in order to give guidance to the lower courts on when prerogative orders, being discretionary remedies, should be applied for by the parties, when they are granted and when they should not be granted.

With regard to the issue of illegality that seems to arise from the observation by the first appellate judge on the alleged fraud, the applicants submitted that it was illegal, improper and irregular to have raised that matter without affording them the right to be heard. In their submission, the

issue of illegality is sufficient to enable the Court to grant the application for leave to appeal. The Court was thus urged to be inspired by its decision in **Mariam Nyangasa v. Shaban Ally Sembe,** Civil Application No. 139/12 of 2017 (unreported) where it was observed:

> *"In Edward Nyeluse; for instance, this Court held that where a point of law at issue is the question of illegality, time will always be extended and leave to appeal to the Court of Appeal must be granted even where there is an inordinate delay."*

Basically, the contention of the applicants with regard to the issue of illegality in the judgment of the High Court is based on the following paragraph as reflected at pages 15 – 17 of the record of the application which has been reproduced in the written submission as hereunder:

> *"I must observe in a passing way that: Illegal Academic Certificate cannot entitle a person for other academic entry. "haramu haizai halali". If such person by fraud or out of knowledge of the Academic vetting machinery succeeds to use such illegal Certificate to another level, even to Doctoral level or even for employment purposes it is as much as wasting his time, money and energy because all the academic success that stems from illegal certificate*

*are a nullity. Condoning Illegal Certificate to be used for academic registration is equal to entertaining decadency behavior in our good society. A Court worth its meaning cannot dare to do so.*

*In the final order, having established that the Resident Magistrate Court of Dar es Salaam at Kisutu had no jurisdiction to entertain the matter, I grant this appeal with costs as prayed. It is so ordered."*

It is thus argued by the applicants that as the issue of fraud was not part of the pleadings, it was improper for the High Court to raise it *suo motu,* citing the decision in **Hotel Travertine Limited and Two others v. National Bank of Commerce Limited** [2006] T.L.R. 133 in which an excerpt from the decision in **James Funke Gwagilo v. Attorney General,** [2002] T.L.R. 216 was quoted.

Though, the applicants acknowledge that the pronouncement of the High Court on the issue of fraud is orbiter dicta, they argue that it should not remain in the record, hence the need for this Court's intervention to rectify it.

In the reply written submissions, the respondent argued that being a public institution, the decision given by the Senate to withdraw the

applicants' awards was an administrative one by a public body which could only be challenged by way of judicial review as per the procedure laid down by the Law Reform (Fatal Accident Miscellaneous Amendment) Act Cap. 310 R.E. 2019 and the Rules made therefrom and that, it is only the High Court which is vested with the original jurisdiction to resolve the dispute. To support the submission, the High Court case in **Lausa Alfan Salum and 116 Others v. Minister for Housing and Urban Development and National Housing Corporation** (1992) T.L.R. 292 was referred in which it was held that:

> *"Any action of Public Official done in official capacity is challenged on the ground of illegality, irrationality or procedural impropriety by way of judicial review."*

The respondent also made reference to the decision in **Harun s/o Nchama and Another** (supra) and argued that the position of law on the issue of judicial review jurisdiction is clear on when and what matters should be entertained by the High Court. In the circumstances, the respondent contended that there is no point of law worth consideration by the Court as argued by the applicants.

Responding on the issue of fraud as an illegality worth consideration by the Court on appeal, the respondent submitted that the reference by the first appellate judge on that matter was made in passing as an orbiter dictum and in any case, it did not form the reason for the decision. On the contrary, it was submitted, the High Court decision was premised on the jurisdiction of the trial court. It was further argued that, though the issue was not part of the grounds of appeal by the applicants and parties did not submit on it, it cannot be binding and has no legal effect to be a subject of the intended appeal. To reinforce the submission, the decision in **Donald Patric v. Mtendaji wa Kijiji Kiriba,** Civil Appeal No. 1 of 2020 (HC) (unreported) was referred. The respondent thus concluded that the applicants have not shown any illegality in the decision of the High Court for the attention of the Court on appeal.

From the foregoing, the crucial issue for our determination is whether the application has merit or otherwise. It is not disputed that the law provides no explicit factors to be taken into account in deciding whether to grant leave (see **Wambele Mtumwa Shamte v. Asha Juma,** Civil Application No. 45 of 1999 (unreported).

Nevertheless, through several decisions of the Court some guiding factors have been laid down for consideration. In this regard in **Nurbhai N. Rattansi v. Ministry of Water, Construction, Energy and Environment and Hussein Rajabali Hirji** [2005] T.L.R. 220, it was stated that:

> *"Leave is granted where a matter raises a legal point worth the consideration of the Court."*

On the other hand, in **Harban Haji Mosi and Another v. Omary Hilal Seif and Another** [2001] T.L.R. 409 the Court stated, among others, that:

> *"Leave is grantable ... where, but not necessarily, the proceedings as a whole reveal such disturbing feature as to require the guidance of the Court of Appeal ..."*

Indeed, in **Gaudencia Mzungu v. Institute of Development Management Mzumbe,** Civil Application No. 94 of 1999 (unreported), the Court observed that for the purpose of granting leave, what is important is whether there is a prima facie ground meriting an appeal.

It is further noted that earlier on the defunct East African Court of Justice had in **Sango Bay Estates Ltd and Others v. Dresdner Bank** [1971] EA 71 particularly remarked that:

> *"Leave to appeal from an order in Civil Proceedings will normally be granted where prima facie, it appears that there are grounds of appeal which merit serious judicial consideration."*

It is also important to reiterate what the Court stated in **British Broadcasting Corporation v. Eric Sikujua Ng'maryo,** Civil Application No. 133 of 2004 (unreported) that guided by the judicious exercise of the discretion, leave to appeal is within the discretion of the Court and therefore not automatic.

Applying the above expounded jurisprudence in this area to the application at hand, we are of the considered view that based on the material on the record and the contending submissions of the parties, the applicants have not sufficiently demonstrated that there is a serious and contentious issue of law or fact for consideration by the Court. As we have alluded to above, it is only paragraph 8 in the applicants' affidavit which suggests the existence of the point of law of public importance in the intended appeal. Unfortunately, there is no sufficient explanation in the affidavit which

supports the notice of motion on the existence of a prima facie ground meriting the appeal. We must emphasize that a fact that a party is not satisfied by the decision of the court is not sufficient to constitute a point of law or fact of public importance for the consideration by the Court. The respective point of law or fact must be apparent and sufficiently demonstrated as per the guidance exposed in various decisions stated above.

With regard to the issue of illegality, as we have stated earlier on in this ruling, though paragraphs 9 and 10 of the affidavit is intended to support the notice of motion, there is nothing in that motion in which the issue of illegality is specifically pointed out as a ground to lead us to the finding that the same deserves consideration by the Court. As the affidavit supports the notice of motion, the grounds for the relief sought must be categorically indicated by the applicant as required by rule 48(1) of the Rules to enable the court to consider the application judiciously.

In the circumstances, having carefully considered the nature of the application placed before the Court, we agree with the respondent that this is not a fit case in which we should exercise our discretion to grant the

applicants leave to appeal to the Court as there is no material on record to convince us to do so.

In the result, we are constrained to dismiss the application with costs for lacking merit.

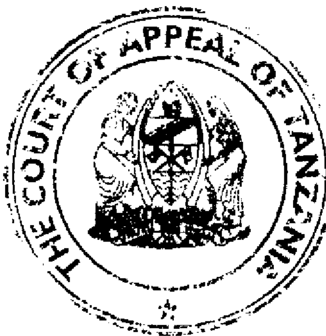
**DATED** at **DAR ES SALAAM** this 8th day of March, 2023.

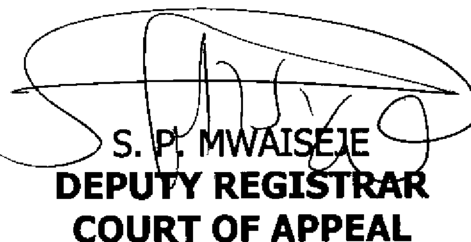
F. L. K. WAMBALI
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

The Ruling delivered this 13th day of March, 2023 in the presence of Mr. Bernard Ngatunga holding brief for Mr. Samson Mbamba, learned counsels for the applicants and Ms. Frida Mollel, learned State Attorney for the respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
**DEPUTY REGISTRAR**
**COURT OF APPEAL**