IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., FIKIRINI, J.A. And MURUKE, J.A.)

CIVIL APPPLICATION NO. 183/08 OF 2020

LINDA COSMAS .....APPLICANT

VERSUS

GEORGE SHIDA.....1ST RESPONDENT

SUKAH SECURITY CO.(T) LTD.....2ND RESPONDENT

SWALEHE LYASUKA, alias LYASUKAH SWALEHE.....3RD RESPONDENT

(Application for leave to appeal against the Ruling of the High Court of Tanzania at Mwanza)

(Mgeyekwa, J.)

dated 28th day of June, 2019

in

Civil Revision No. 16 of 2018

.....

RULING OF THE COURT

18th & 21st July, 2023

LILA, J.A:

This is a *second bite* application following the applicant's application for leave to appeal to the Court being refused by the High Court in Misc. Civil Application No.109 of 2019. In that application the applicant was seeking for leave to appeal against the High Court decision in HC: Civil Application No. 16 of 2018 which dismissed the

applicant's application for revision. The revision application was geared towards revising the decision of the Resident Magistrates' Court of Mwanza in RM Civil Case No. 7 of 2018 for allegedly wrongly marking as withdrawn the applicant's suit. The appellant still intends to pursue his quest to challenge the High Court decision before the Court hence the present application for leave on a *second bite*.

The background of the application before the Court, traces its origin from the alleged occurrence in the chambers of a Senior Resident Magistrate when the applicant's case was called on for hearing on 26/07/2018. The details of what transpired is outlined in paragraphs 2 to 21 of the applicant's affidavit in support of the application. As the contents mostly constitute serious accusations against the conducts of the presiding magistrate in handling the court proceedings and which, we think, could effectively be dealt with administratively, we find it unnecessary to recite them. Suffice it to say that, at the end, the suit was marked withdrawn at the instance of the applicant. Claiming that there was falsification of the proceedings in that they did not reflect the truth of what transpired, the applicant preferred a review to the High Court which was dismissed in HC: Civil Application No. 16 of 2018. HC: Civil Application No. 16 of 2018 was

resisted by the 1st respondent through a counter affidavit and a notice of preliminary objection which raised two points of objections that the court lacked jurisdiction to entertain the application on the ground that the Senior Resident Magistrate's order did not finally and conclusively determine the matter before the court hence interlocutory to which a review does not lie under section 79(2) of the CPC. Another point was that the affidavit supporting the applicant's application was incurably defective for showing that he took oath instead of being affirmed, he being a Muslim. The learned judge heard the two points of objection by way of written submissions and in her ruling, she made reference to the parties' submissions and at page 64 of the record of appeal, she indicated that: -

> *"In his rejoinder Mr. Alphonce submitted that the objection has merits because it is regarding jurisdiction of the court which contains pure points of law as the order of the court withdrawing the suit is not subjected to revision as the applicant himself prayed to withdraw the case. Mr. Alphonce stated that the cited case of Mukisa Biscuit (supra) is differentiated from the facts which he has pleaded as it applies where if they are first pleaded in a suit and there is no other record of the court in respect of the same suit which states or read to*

the pleaded facts. While in the instant application, there is the previous record of the court.

Concerning the second point of objection, Mr. Alphonce insisted that the applicant has sworn and affirmed and at the same time in the same affidavit. He said the applicant could choose to swear or affirm. Mr. Alphonce stated that the case of DSM Education (supra) is distinguishable to the circumstances of the application at hand. He concluded by stating that such irregularity goes to the root of the entire affidavit and making the same incurable defective. He prayed for this court to upheld the preliminary objection."

The learned judge sustained the first point of objection holding, after fully quoting the provisions of section 79 of the CPC, that: -

"Guided by the above provision of the law, my firm opinion is that as long as the matter was not determined on merit, the applicant cannot file an application for revision. Since once a case is withdrawn, there is nothing that remains pending in the court."

The appellant is enthusiastic to challenge that decision but cannot access the Court without leave to appeal in terms of section 5 (1) (c) of the Appellate Jurisdiction Act (the AJA). In compliance with that requirement, the applicant moved the High Court to grant him

leave in Misc. Civil Application No.109 of 2019 but his quest bounced as his application was refused. Although we could not have a glance of the grounds upon which the application was based, we could deduce the the same in the learned judge's ruling at page 80 of the record of appeal which reads:

> *"I have gone through the applicant's affidavit and in particular paragraph 37 and I have found that* ***the applicants' grounds for leave to [appeal to] the Court of Appeal are mainly based on the point of fact including the ground stated under paragraph 37 (e) that this court named one Alphonce who was not [a] part[y] to the matter, he appeared in the Ruling as a person who re-joined, it is a clerical error which could be cured by way of review since the submission is the same save for the name of the person who made the submission****. Thus, the same does not amount to the point of law. Therefore, the same is hereby disregarded." (Emphasis added).*

The learned judge then proceeded to determine the application stating that: -

> *"In the present case, under scrutiny,* ***the applicant's application in respect to HC. Civil Revision No. 16***

of 2018 was struck out after this court sustained the preliminary objection of the 1st respondent which was based on the point of law. It is indisputable that the applicant had withdrawn his case in respect to RM Civil Case No. 07 of 2018 at the Resident Magistrate Court. Therefore, the applicant cannot file an application for revision in a matter which he conceded and the same is clearly stated in the court records. *It should be known that the court records accurately represent what happened as it was held in the case of* ***Halfan Sudi v. Abieza Chochili*** *[1998] TLR 527 it was held that:*

> *"A court record is a serious document; it should not be lightly impeached (ii) there is always a presumption that a court record accurately represents what happened".*
>
> *Guided by the above provision,* ***it is clear that the applicant withdrew his case for being res-judicata, and he is the one applied for revision****. In my view,* ***there is no prima facie case*** *that is fit to be brought before the Court of Appeal".* (Emphasis added).

Before the Court for hearing of the application, were the applicant and the 1st respondent only who appeared in persons and

unrepresented. The 2nd and 3rd respondents did not feature in Court. Notices to appear directed to them were returned with remarks from the process server that they have declined to sign because they are not concerned with the case. We, on our part, treated the conduct to be a deliberate refusal to enter appearance and, in terms of Rule 63(2) of the Tanzania Court of Appeal Rules, 2009, we proceeded with the hearing in their absence.

As the applicant and the 1st respondent had earlier on lodged written submissions, they both adopted them without further elaborating them. However, the applicant rose to bring to the attention of the Court on the yawning defect on the affidavit in reply by the 1st respondent that it was not indicated whether he was known by the commissioner for oaths before whom he swore the affidavit or was introduced to him by another person. He pressed that the defect is fatal rendering the reply affidavit incurably defective and should be expunged from the record leaving the application uncontested. Such a contention sailed unchallenged by the 1st respondent who, after adopting his written submission, said he had nothing to add leaving it for the Court to decide.

As the practice of attending first to a legal point of objection is now a deep-rooted principle needing no citation of an authority, we shall abide to it and hence we shall first consider the objection raised by the applicant.

Admittedly, validity of an affidavit had been a subject of discussion in a chain of cases. But, an objection in this respect seems to be novel as we could, in our short research, not lay a hand on any authority about it. That notwithstanding, we think, the point of objection, in a way, invites the Court to consider what are the essentials of a jurat of attestation. For that reason, we cannot avoid making reference to section 8 of the Notaries Public and Commissioner for Oaths Act, Cap. 12 R.E. 2022 (the Act) which governs the manner of attesting to an affidavit. It provides: -

> *"8. Every notary public and commissioners for oaths before whom any oath or affidavit is taken or made under the Act* ***shall*** *state truly in the jurat of attestation* ***at what place and on what date the oath or affidavit is taken or made****". (Emphasis added).*

With utmost lucidity, the import of this provision was explained in **Director of Public Prosecutions vs Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (unreported) that: -

> *"The word "jurat" has its origin in the latin word "jurare" which meant "to swear". In its brevity a jurat is a certification added to an affidavit or deposition stating when, where and before what authority (whom) the affidavit was made...Such authority usually, a Notary Public and/or Commissioner for Oath, has to certify three matters, namely: -*
>
> *(i) that the person **signing** the document did so in his presence,*
>
> *(ii) that the **signer** appeared before him on the date and at the place indicated thereon, and*
>
> *(iii) that he administered an oath or affirmation to the **signer,** who swore to or affirmed the contents of the document."*

The Court, citing the case of **Wananchi Marine Products Ltd vs. Owners Motor Vessels,** Civil Case No. 123 of 1996, High Court Dar es salaam, **Aziz Bashir vs. Ms Juliana John Rasta & Two Others,** Misc. Civil Application No. 23 of 2003, High Court Arusha, **Zuberi Musa v. Shinyanga Town Council,** (CAT) Civil Application

No. 100 of 2004 (all unreported) and **D.P. Shapriya & co. Ltd vs. Bish International B.V** [2002] E.A. 47, proceeded to state the consequences of an omission of any of the above requirements in these words: -

> *"Total absence of the jurat, or omission to show the date and place where the oath was administered or the affirmation taken, or the name of the authority and/or the signature of the deponent against the jurat, renders the affidavit incurably defective."*

The Court categorically ruled that the requirement to strictly comply with section 8 of Cap. 12 is mandatory and not a shear technicality and that regularities in the form of a jurat cannot be waived at all by parties (See **D.B. Shapriya's** case).

A reading of section 8 of the Act and the cited cases reveals that not any irregularity would have a serious effect of rendering a jurat of attestation incurably defective. In very clear terms, they are to the effect that it is only failure to show when, where and before what authority (whom) the affidavit was taken which are the only serious deficiencies which render a jurat of attestation and an affidavit as a whole incurably defective subject to be expunged. It therefore goes

without saying that the defect complained of by the applicant is not one of such serious omissions. The applicant's complained omission, although its omission should be discouraged, is not fatal affecting the validity of the affidavit in reply. We shall therefore proceed to determine the application on merits. It is, however, worth taking note, at the very outset, that the 1st appellant's impugned reply affidavit and reply submission simply provided the background of the matter with a conclusion that the judge's decision was in line with section 79(2) of the CPA, quite surprisingly, and that there is no legal issue attracting the attention of the Court. No details and reasons were given for taking that stance. It is therefore of little assistance to the Court. Conversely, the applicant lodged a detailed and well-researched submission and we commend him for a splendid work done on the subject matter of this application.

Without prejudging the merits of the intended appeal, two things stem out clearly from the two quoted parts of the learned judge's ruling in respect of an application for leave to appeal to the Court. These are: -

1. That, the applicant raised two issues for consideration by the Court that is, **one**; the learned judge introduced into the her

ruling on the review application a name of one Alphonce who was not a party to the application and, **two**; that his application for review was dismissed after sustaining a point of objection that he withdrew the same while he actually did not.

2. That, the learned judge proceeded, in her ruling, to resolve (determine) the two points the applicant had placed before the learned judge as basis of his application for leave to appeal to the Court and made a finding on them that it was clerical error which could be rectified by way of review and that the law barred the applicant to apply for revision on a matter he personally withdrew from the court, respectively.

It is plain that the learned judge's approach to the application was itself problematic. It is visibly clear that she miscomprehended the principles governing grant of application for leave to appeal she had acknowledged earlier in her ruling as she personally cited the case of **Sango Bay Estates Ltd & Others vs Dresdner Bank** [1971] EA 17 and **Gaudensia Mzungu vs IDM Mzumbe**, Civil Application No. 94 of 1994 (unreported) and with that misconception, gauged such principles against the facts of the application before her. As rightly argued by the applicant in his submission, the principles enunciated by the Court in the case of **British Broadcasting**

Corporation vs Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004 as was cited in the case of **Rutagatina C.L. vs. The Advocates Committee and Another**, Civil Application No. 98 of 2010 (both unreported) gave guidance on factors to be considered in the determination of applications of this nature, thus: -

> *"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a m atter of general principle, leave to appeal 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 prim a facie or arguable appeal (see:* ***Buckie v Holmes*** *(1926) ALL £ R. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

On the authority above, grant of an application of this kind is conditional. The applicant is required to show that *'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.'* In compliance with the conditions set forth above, the applicant, placed

the two issues above before the learned judge so that she could be obliged to grant him leave to appeal. The learned judge, acting under a misconception that the two issues ought to have been points law, found the two issues to be factual hence did not meet the conditions for grant of leave to appeal to the Court and thereby refused to grant leave to appeal. On the authority above and as rightly submitted by the applicant in his submission, factual issues of general importance are also grounds that may move the court to grant leave. A serious examination of the entire background of the matter and the learned judge's decision dismissing the revision application and refusing to grant leave to appeal, as above quoted, make the two issues raised by applicant crucial and of great importance calling for the Court's consideration and guidance. In addition, in the present application, the applicant has, in paragraph 41 of the supporting affidavit, listed down the intended grounds of appeal stating that: -

> *"That, I am desirous to appeal from the Ruling of the High Court (Hon. A. Z. Mgeyekwa, J.) dated the 28th day of June, 2019, in (HC) Civil Revision No. 16 of 2018. The said Ruling contains several irregularities, improprieties and illegalities as per the following 9 grounds of my intended appeal:*

a) *That the learned High Court Judge erred in law when she omitted to consider and effectively deal with or determine the applicant's written submissions regarding the 1st respondent's preliminary objection.*

b) *That, the learned High Court Judge erred in law when she considered only the written submission in support of the 1st respondent and completely ignored the written submissions of the applicant.*

c) *That, the learned High Court Judge erred in law when she omitted to hold that the complained order dated 26/07/2018 in RM Civil Case No. 7 of 2018 had the effect of finally and conclusively disposing of that suit.*

d) *That, the learned High Court Judge erred in law when she omitted to observe and hold that in arguing and determining the 1st point of law in the 1st respondent's preliminary objection, all the facts which were pleaded by the applicant in the supporting affidavit had to be assumed as correct and not otherwise.*

e) *That, the learned High Court Judge erred in law and in fact to introduce one Mr. Alphonce, who is a stranger to this matter, as a person who made the rejoinder submissions in the High Court.*

f) That, the learned High Court Judge erred in law when she sustained the 1st respondent's preliminary objection and dismissed the application.

g) That, the learned High Court Judge erred in law when she left undetermined the 2nd point of law in the 1st respondent's preliminary objection.

h) That, the learned High Court Judge erred in law when she omitted to consider and determine the revision application under the cited enabling provisions in the chamber summons.

i) That, the learned High Court Judge erred in law and in fact when she omitted to say anything regarding the uncooperative behaviour of the 2nd and 3rd respondents in this matter".

These grounds of appeal bear correlation with the applicant's complaints and issues earlier placed before the learned judge for consideration so as to move her to exercise her discretion to grant leave to appeal to the Court. They seek to challenge the judge's decision to dismiss the applicant's application for revision. Had the learned judge given the two points a serious consideration and properly applied the principles governing grant of leave to appeal to the Court, she would have decided otherwise. Instead, she miserably strayed into error to dwell into resolving the two issues which act is a

contravention of the settled principle of law that the court's mandate in applications of this nature is limited to only determining if the issues or grounds of appeal raise serious issues of law or fact arguable before the Court. Such courts are precluded from engaging into determining the merits or otherwise of the issues or grounds raised. For clarity and to remind the learned judges faced with these applications, we let the Court's wisdom in the case of **The Regional Manager – TANROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 (unreported) guide them that: -

> *"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard ..."*

In all, and with due respect to the learned judge, we hold that she overstepped her mandate when she determined the issues raised. Her engagement in that exercise was a clear manifestation of the fact that the issues raised by the applicant were matters arguable before the Court. She had, therefore, no option but to exercise her discretion judiciously and grant the applicant the sought leave to appeal to the Court.

In fine, we grant the application and grant the applicant leave to appeal to the Court against the High Court decision in HC: Civil Application No. 16 of 2018 (Cited as (HC) Civil Revision No. 16 of 2018 in the Drawn Order at page 70 of the record) with costs.

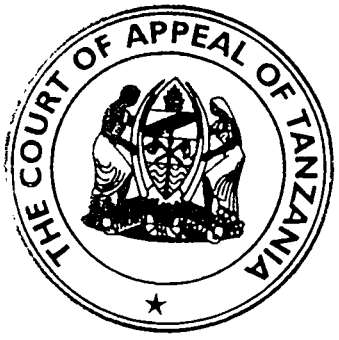
DATED at **MWANZA** this 20th day of July, 2023.

S. A. LILA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 21st day of July, 2023 in the presence of the applicant in person and 1st respondent in person and in the absence for 2nd and 3rd Respondents, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL