

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

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MDEMU, J.A.)

CIVIL APPLICATION NO. 121/16 OF 2022

GAPCO TANZANIA LIMITED APPLICANT

VERSUS

GEOFREY DANIEL MCHANGILA, CHIEF EXECUTIVE

OFFICER OF CITIBANK TANZANIA LIMITED 1ST RESPONDENT

CITIBANK TANZANIA LIMITED 2ND RESPONDENT

**[Application to strike out the Notice of Appeal from the decision of the
High Court of Tanzania (Commercial Division) at Dar es Salaam]**

(Nangela, J.)

dated the 13th day of December, 2021

in

Miscellaneous Commercial Application No. 126 of 2021

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RULING OF THE COURT

29th August & 1st September, 2023

KITUSI, J.A.:

This is an otherwise simple application for an order of the Court to strike out the notice of appeal which seeks to challenge the decision of the High Court, Commercial Division in Miscellaneous Commercial Application No. 126 of 2021 dated 13/12/2021. However, the application which is made by way of a notice of motion under rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as usual, has drawn us

deep into a discussion of hair-splitting interpretation of section 5 of the Appellate Jurisdiction Act (the AJA), and its subsections.

The facts forming the background of the matter are mainly not in dispute, as follows. At the instance of the applicant, the High Court vide Miscellaneous Commercial Application No. 82 of 2021 issued an order restraining the second respondent from *"receiving or performing any act calculated to receive any monies payable under letter of credit Number 5279600195 to the tune of United State Dollars 816335."* Subsequently, the applicant instituted Miscellaneous Commercial Application No. 126 of 2021 at the same court alleging that the first respondent who is the CEO of the second respondent had disobeyed the restraint order. In that application, the applicant prayed for an order of imprisonment of the first respondent. This application was also granted on 13/12/2021, in which the High Court ordered a refund of the money USD 816,335 within a day, short of which the first respondent would serve a custodial sentence of six months.

The respondents lodged a notice of appeal, the subject of this application intending to challenge the order of the High Court in Miscellaneous Commercial Application No. 126 of 2021 dated 13/12/2021. The instant application intends to move the Court to strike out that notice. The application is supported by an affidavit of Mr. Audax

Kahendaguza Vedasto, learned advocate, who also represented the applicant in prosecuting this application.

The bone of the contention is in paragraphs 9 and 10 of that affidavit which alleges that the respondents have failed to take an essential step in furtherance of the intended appeal because they have not made an application for leave. According to the applicant, the intended appeal lies only with leave. Mr. Vedasto maintained this argument in his oral and written address during the hearing.

On the other hand, Mr. Gaspar Nyika, learned advocate who took an affidavit in reply disputed paragraphs 9 and 10 of the supporting affidavit, and maintained that, leave is not a requirement in the intended appeal. Ms. Samah Salah, learned advocate who acted for the respondents at the hearing held on to this position in her written and oral submissions.

Mr. Vedasto pursued two fronts. In one front he submitted that, the impugned order is interlocutory therefore not appealable. He pointed out that, the order was interim because the matter is still pending at the High Court. He cited to us the case of **Celestine Samora Manase & 12 Others v. Tanzania Social Action Fund & Another**, Civil Appeal No. 3/8 of 2019 (unreported). In the second front Mr. Vedasto argued

that, if the Court is inclined to hold that the order is appealable, then it should proceed to find that leave is required under section 5 (1) (c) of the AJA. He submitted further that, the order in question does not fall under rule 5 (1) (a) and (b) of the AJA which is on orders appealable as of right nor under rule 5 (1) (b) (viii) which excludes orders made in execution of a decree. He cited the case of **G. R. Mandaria v. Rattan Singh s/o Nagina Singh** [1962] EA 730 and; **Oysterbay Properties Ltd & Another v. Kinondoni Municipal Council and 2 Others**, Civil Revision No. 4 of 2011 (unreported).

Ms. Salah referred to us the order in question and submitted that, it conclusively determines the rights of the parties therefore not interlocutory as per section 5 (1) (d) of AJA. She was of the view that, it is incorrect to argue that the order was interlocutory because it was made in interim proceedings. She therefore invited us to look into the nature of the order. She pointed out further that there is nothing left after one is committed to prison. The learned counsel sought to distinguish this case from **Celestine Samora Manase** (supra).

What does the order say? We reproduce it hereunder:

"1. That, this application is granted and the 1st and 2nd respondents are found to have violated

the orders of this Court dated 9th July, 2021 (the amended order).

2. That, the 1st and 2nd respondents are hereby ordered to immediately and by tomorrow 14th December, 2021 at 11:30 am, restore the amount (USD \$ 816,335) debited from the applicant's account, as it was debited in violation of a lawful and standing order of this Court.

3. That, failure to credit the applicant's account to the tune of USD (\$) 816,335, within the stipulated period, this Court makes an order that the 1st respondent shall be immediately and with effect from when the above-mentioned date and hour lapses and, without any further orders be arrested and committed into a civil prison be for a term of six (6) months."

Let us begin by reproducing the following passage from **Eustace Kubalyenda v. Venancial Daud**, Civil Appeal No. 70 of 2011 (unreported) cited in **Simon Hamis Sanga v. Stephen Mafimbo Madwary**, Civil Application No. 193/01 of 2021 (unreported):

"Furthermore, it is in section 5 of the Act where we find the right of appeal to this Court by a person aggrieved by a decision of the High Court in the exercise of its various jurisdictions."

In the latter case we observed that when applied in different scenarios, section 5 of the AJA may give different results.

We shall commence by testing if the impugned order is interlocutory, this is because interlocutory orders are not appealable as per Act No. 25 of 2002. See also the case of **Jitesh Jayantilal Landra & Another v. Dhirajlal Walji Landra & 2 others**, Civil Application No. 154 of 2020 (unreported). With respect, by applying the nature of the order test as in **Murtaza Ally Mangungu v. The Returning Officer, for Kilwa & 2 others**, Civil Application No. 80 of 2016 (unreported), we do not see how the order committing the first respondent to prison can be said to be interlocutory. Therefore, we do not agree with Mr. Vedasto that the order is interlocutory, so we dismiss his argument because for a person who has served the jail term, there would be nothing left, as correctly argued by Ms. Salah.

Next is Mr. Vedasto's argument that leave would be a mandatory requirement for the respondent's intended appeal. He has submitted that even section 5 (1) (b) (viii) of the AJA is of no avail to the respondent.

The relevant part of section 5 (1) (b) (viii) of the AJA reads:

"In civil proceedings, except where any other written law for the time being in force provides, otherwise, an appeal shall lie to the Court of Appeal.

(a) – Not applicable

(b) Against the following orders of the High Court made under its original jurisdiction, that is to say: -

(i) Not applicable.

(ii) Not applicable

(iii) Not applicable

(iv) Not applicable

(v) Not applicable

(vi) Not applicable

(vii) Not applicable

(viii) An order under any of the provisions of the Civil Procedure Code, imposing a fine or directing the arrest or detention, in Civil prison, of any person, except where the arrest or detention is in execution of a decree."

Our understanding of the above provision is that if the detention is a result of execution of a decree, then the appeal is with leave, not automatic. Mr. Vedasto's understanding of that provision is the same but, in his submission, he maintains that the detention was in execution

of a decree. With respect to the learned counsel once again, we cannot agree with him because the order of detention was a result of a restraint order made in ongoing proceedings which the respondents are alleged to have disobeyed. Therefore, we agree with Ms. Salah that leave is not a requirement in her intended appeal so the applicant cannot be heard arguing that no essential step has been taken.

For the reasons discussed above this application has no merit and we dismiss it with costs.

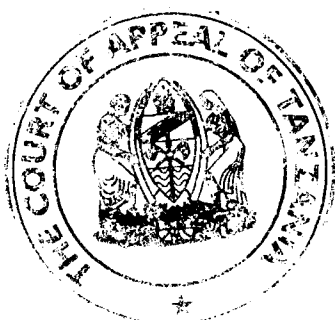
DATED at DAR ES SALAAM this 1st day of September, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 1st day of September, 2023 in the presence of Mr. Idrissa Mghua, learned counsel holding brief for Mr. Audax Kahendaguza, learned Counsel for the Applicant and also for Ms. Samah Salah, learned Counsel for the Respondents, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL