

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KAIRO, J.A. And MURUKE, J.A.)

CIVIL APPLICATION NO. 512/01 OF 2022

SUZAN ROSE SENG.....APPLICANT

VERSUS

MUSSA SELEMAN MBWANA.....RESPONDENT

**[Application for leave to appeal against the decision of the High Court of
Tanzania, Dar es Salaam Registry]**

(Kakolaki, J.)

dated 16th day of July, 2021

in

Civil Appeal No. 296 of 2020

RULING OF THE COURT

30th October & 21st November, 2023

KAIRO, J.A.:

This is a second bite application. The applicant is seeking leave to appeal to the Court following the refusal of a similar prayer by the High Court on 16th June, 2022 in Misc. Civil Application No. 400 of 2021. The application is predicated on Rule 45 (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit sworn by the applicant.

The respondent did not file an affidavit in reply and no submission was filed by any party.

The facts giving rise to this application as can be gathered from the record of the application are such that; the respondent instituted

Civil Application No. 303 of 2020 at the Juvenile Court of Dar es Salaam at Kisutu praying to be given the custody of his child, one Mariana Mussa Selemani who was under the custody of the applicant; her aunt, following the demise of the child's mother. The Court in its decision delivered on 13th November, 2020 granted the respondent's application. Displeased, the applicant, on 16th November, 2020, requested through her advocate to be supplied with the certified copies of the ruling, drawn order and the proceedings for appeal purpose. She was given the requested proceedings and ruling on 20th November, 2020, but without being accompanied with the drawn order. After writing a reminder letter on 23rd November, 2020 and making a follow up, the applicant was given the certified copy of the ruling on 25th November, 2020. She presented her appeal to the High Court on 4th December, 2020, but paid the Court fees for the appeal on 7th December, 2020 and the same was registered as Civil Appeal No. 296 of 2020.

Upon hearing of the appeal, the High Court dismissed it for being time barred contrary to Rule 123 (1) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 which requires a person aggrieved by the decision of the Juvenile Court to appeal to the High Court within 14 days from the date of the decision intended to be challenged. The High Court reasoned that time limitation to appeal started to count on 20/11/2020

when the applicant was supplied with the copies of the ruling and not 25/11/2020 when she was availed with the copy of the drawn order.

The applicant was further aggrieved and sought leave to appeal to the Court against the said decision of the High Court, but it was refused for lack of merit. She is now before us seeking leave to appeal to Court on a second bite, as earlier alluded.

According to the notice of motion, the applicant's quest for leave is founded on the following paraphrased grounds:

- 1) That, the applicant's appeal to the High Court was dismissed on the ground of being time barred whereby the Judge reckoned limitation time from date of the ruling intended to be challenged instead of the date when the drawn order was ready for collection.*
- 2) That, in determining the leave required, the High Court Judge discussed matters which were not discussed in court and were not part of the grounds of the intended appeal either.*
- 3) That, there are matters of law which require the intervention of the Court, such as, what are the documents which are supposed to accompany the memorandum of appeal.*

When the application came up for hearing, both, the applicant and the respondent appeared in person.

When invited to submit in support of the application, the applicant's submission appears to fault the findings on the learned Judge when refusing leave application at the High Court. From the outset we

wish to put it clear that, the Court is not mandated in this type of application to determine whether or not the learned Judge was justified to refuse or grant leave to the applicant. Rather, we are legally being invited to determine the merits and demerits of this application on its own perspective without resort to what transpired at the High Court, by considering the principles governing the grant of leave to appeal. As such, we shall disregard the arguments faulting the High Court for the refusal and for the same reason, the second ground above shall be disregarded as well.

On the rival side, the respondent had nothing useful to state and prayed the Court to proceed determining the application as per the record before it.

It is settled that in an application for leave to appeal, the Court can only exercise its discretion to grant the same upon the applicant complying with conditions expounded lucidly by the Court in the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'mario**, Civil Application No. 138 of 2004 (unreported). In that case, as cited in the case of **Rutagatina C.L vs. The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported) the Court observed:

"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 material before the Court. As a matter 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 prima facie or arguable appeal.... However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted".

Going through the record and particularly the grounds upon which the leave is sought, we have observed that the contentious issue revolves around the interpretation of Rule 123 (2) of the Juvenile Court's Rules as regards the documents which are mandatorily required to accompany the memorandum of appeal. We wish to reproduce the said provision for ease of reference:

"123 (2) An appeal shall be made in the form of a memorandum in writing in Kiswahili or English and state briefly the grounds of objection to the decision, sentence or order appealed against and be accompanied by a copy of the proceedings, judgment or order appealed against, unless the High Court otherwise directs".

Basing on the cited provision, it is arguable that the documents required to accompany the memorandum of appeal in this matter were the proceedings, ruling or in the absence of the ruling; the drawn order. A such, the supply of the said documents in piecemeal had no consequence and of no effect on the accrual of time limitation. In other words, it is arguable that time limitation started to count on 20th November, 2020 when the applicant was supplied with the copy of the ruling and not on 25th November, 2020 when she was availed with the copy of the drawn order.

However, the applicant is of different view that time to file the appeal started to count for the purpose of limitation on 25th November, 2020 when she was supplied with the drawn order. She contended that, no appeal would lie without being attached with a drawn order, being a mandatory document to accompany the memorandum of appeal. Thus, the High Court ought to have counted the time accrual when she was given the drawn order and not on 20th November, 2020 when she was supplied with the proceedings and the ruling.

Having heard the rival arguments, the issue for our determination therefore is whether or not leave is grantable in this application.

Considering the conditions for granting leave as expounded in the case of **Rutagatina C. L** (supra), it is our firm view that the contention regarding the interpretation of Rule 123 (2) of the Juvenile Court Rules raises a novel point of law suitable for consideration by the Court so as to resolve the rival contention regarding its interpretation. We, accordingly, grant the application and issue leave to appeal to this Court as prayed.

Being a family matter, no costs is awarded.

DATED at DAR ES SALAAM this 20th day of November, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 21st day of November, 2023 in the presence of Ms. Suzan Rose Senga, learned counsel for the applicant and Mr. Mussa Seleman Mbwana, learned counsel for the respondent, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL