

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. 182/16 OF 2022

PRESTINE PROPERTIES LIMITED.....APPLICANT

VERSUS

SEYANI BROTHERS & CO. LIMITED.....RESPONDENT

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

(Nangela, J.)

dated 15th day of November, 2021

in

Misc. Commercial Cause No. 2 of 2021

.....

RULING OF THE COURT

1st & 28th November, 2023

KAIRO, J.A.:

At the High Court of Tanzania, Commercial Division sitting at Dar es Salaam, the applicant, had petitioned to challenge the arbitral award granted in favor of the respondent on 30th June, 2020, vide Miscellaneous Commercial Cause No. 2 of 2021 against the respondent. In the said petition, the applicant complained that the Arbitral Tribunal (the Tribunal) lacked substantive jurisdiction and failed to adhere to the agreed procedures. She further alleged misconduct and bias on the part of the arbitrator and also that there were some irregularities in the process of the hearing of the arbitration. The applicant thus prayed to

the court to declare the award invalid and unenforceable for being tainted with illegalities and having been obtained improperly. The applicant further prayed for an order setting aside the award with costs.

After hearing of the parties, the court dismissed the petition in its entirety with costs.

Displeased and alive of the requirement to seek and obtain leave to appeal before lodging the appeal to Court, the applicant preferred an application for leave in the High Court vide Miscellaneous Commercial Cause No. 201 of 2021, which was unsuccessful. Being further aggrieved, the applicant is now before the Court praying for the similar order on a second bite.

The application is brought under Rule 45 (b) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit affirmed by Gulam Mohammedali Punjani, the Managing Director of the applicant.

According to the notice of motion, the grounds upon which the applicant is moving the Court to grant leave to appeal are:

- i. That, the High Court Judge dismissed the applicant's petition to oppose the registration of an arbitral award issued in favour of the respondent despite the violation of*

fundamental provisions of law, including the principles of natural justice, in particular, the right to be heard which were committed by arbitral tribunal; and

- ii. That, the High Court Judge dismissed the applicant's petition to oppose the registration of the arbitral award issued in the favour of the respondent despite the arbitral tribunal's lack of jurisdiction in reaching its decision.*

When the application came up for hearing before us, Messrs. Adinan Abdallah Chitale and Joseph Nuwamanya, both learned counsel appeared for the applicant and respondent respectively.

In his brief submission, Mr. Chitale prayed to adopt the affidavit affirmed in support of the application asserting that, the intended appeal raises serious arguable issues as deposed in paragraphs 8 and 13 of the affidavit. On that basis, he prayed the Court to grant the prayers in the notice of motion.

Mr. Nuwamanya resisted the application. He also prayed to adopt the affidavit in reply affirmed by Manoj Gondalya, the principal officer of the respondent. He submitted that the grant or refusal of leave application is within the discretion of the Court and the same is

grantable where the grounds of appeal raise issues of general importance or novel point of law or where the grounds show a *prima facie* or arguable appeal. To back up his assertions, he referred us to the case of **British Broadcasting Corporation vs Eric Sikujua Ng'imaryo**, Civil Application No. 138 of 2004, cited in **Safari Mwazembe vs Juma Fundisha**, Civil Application No. 503/06 of 2021 (both unreported). It was Mr. Nuwamanya's contention that there was no demonstration of the presence of any of the listed issues, neither in the affidavit reply nor in the oral submission by Mr. Chitale. As such, the intended appeal does not raise any ground which merit serious consideration by the Court. He refuted Mr. Chitale's contention that paragraph 13 of the supporting affidavit raises arguable issues as regards the jurisdiction of the tribunal to determine some issues decided in the arbitration process and the alleged denial of the applicant's right to be heard. According to Mr. Nuwamanya, the said matters were properly and thoroughly dealt with by the High Court in the decision sought to be challenged. He maintained that, the pointed-out issues were supposed to be raised earlier during the continuance of the arbitral process as provided in sections 35 (1) and 80 (1) (a) of the Arbitration Act, Cap 15 R.E 2020 (the Act). He thus prayed for the dismissal of the application for lack of merit.

In rejoinder, Mr. Chitale insisted that, the application has met the legal threshold of the conditions of granting leave to appeal as per various decisions of this Court. He dismissed the argument by Mr. Nuwamanya that the issues of jurisdiction and right to be heard were supposed to be raised earlier or during the continuance of the arbitral proceedings. He argued that the same, being points of law, can be raised at anytime even at an appellate stage, adding that the same shall be addressed during appeal in the circumstances leave is granted and not at this stage. He reiterated his prayer to have the application granted.

After a careful examination of the record of the application and consideration of the rival submissions of the parties, along with the cited authorities, the central issue we are invited to determine is whether or not the instant application for leave is meritorious.

The law is long settled that leave to appeal is grantable where the grounds to appeal raise issues of general importance or novel point of law or where the grounds show a *prima facie* or arguable appeal. In other words, the applicant has to demonstrate that there is good reason, normally on a point of law or on a point of public importance, that calls for the Court's intervention. The underlying principle was well stated by

this Court in its various decisions including **British Broadcasting Corporation vs Eric Sikujua Ng'imaryo** (supra), **Bulyanhulu Gold Mine Limited & 2 others vs Petrolube (T) Limited & Another**, Civil Application No. 364/16 of 2017 and **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (both unreported) to mention, but a few. Discussing the grounds to be considered in the grant of leave, the Court in **British Broadcasting Corporation** (supra) stated as follows:

"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".

From the cited excerpt, it is apparent that the granting of leave to appeal is not automatic. Instead, it is grantable where the intended appeal reveals such disturbing feature or issue as to require the

intervention of the Court. The reason for the said stance is to spare the Court the spectre of unmeriting matters and to enable it to give enough attention to cases of true public importance [see: **Harban Haji Mosi & Another vs Omar Hilal Seif & Another**, Civil Reference No. 19 of 1997 (unreported)].

In the application under consideration, the arguable points upon which the applicant is seeking leave to be granted anchored on two points; namely the right to be heard and the jurisdiction of the arbitral tribunal. In elaboration of the said points, Mr. Chitale referred us to paragraph 8 of the applicant's affidavit which is reproduced hereunder for reference:-

- a) The Honourable Tribunal determined matters and substance which it had no jurisdiction to do so as provided by the tribunal rules and the law.*
- b) There are procedural irregularities on the appointment of the replacement arbitrator who had recused himself on account of bias and proceeded to appoint another arbitrator without consulting the petitioner.*
- c) The Honourable Tribunal failed to frame issues based on the pleadings that were presented by the parties.*

- d) The Honourable Tribunal called on witnesses who were pleaded as parties in the arbitration and excluding them as parties to the arbitration.*
- e) The Honourable Tribunal selectively considered documents tendered and ignored contracts made by the parties to vary the construction contract.*
- f) The Honourable Tribunal illegally refrained to refer questions of law to the court for interpretation.*

Having duly considered the contending submissions of the learned counsel in the light of the settled jurisprudence of the Court in the matter, we uphold Mr. Nuwamanya's submission. It is undisputed that the applicant participated in the arbitral proceedings without objecting to the substantive jurisdiction of the tribunal on any aspect. Besides, she did not raise any objection during the said proceedings that the Tribunal had exceeded its jurisdiction. These are matters that should have been raised in accordance with section 35 (1) and (2) of the Act. In terms of section 80 (1) of the Act, the applicant's failure to raise those issues in the course of the arbitral proceedings resulted in her loss of right to raise any such objection before the Tribunal or the court thereafter, unless it is established that she could not with reasonable diligence have discovered the grounds for the objection. Given these circumstances, we

are of the firm view that the intended appeal does not raise any question of general importance to warrant the grant of leave to appeal. For the aforesaid reason we, decline to grant the leave sought. Accordingly, we dismiss this application with costs.

DATED at DAR ES SALAAM this 27th 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 28th day of November, 2023 in the presence of Mr. Joseph Nuwamanya learned counsel for the Respondent and also holding brief for Mr. Adnari Chitale, learned Counsel for the Applicant, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL