

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A, KIHWELO, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO 393/16 OF 2021

AIRTEL TANZANIA LIMITED.....APPLICANT

VERSUS

KMJ TELECOMMUNICATIONS LIMITED.....RESPONDENT

**(Application for leave to appeal to the Court of Appeal of Tanzania, against
the Ruling of the High Court of Tanzania, at Dar es Salaam)**

(Fikirini, J.)

Dated the 9th day of June, 2020

in

Misc. Commercial Cause No. 34 of 2019)

.....

RULING OF THE COURT

8th & 20th February, 2023

RUMANYIKA, J.A.:

This is a second bite application by the applicant, Airtel Tanzania Limited, for leave to appeal to the Court against the ruling and order of the High Court dated 09/06/2020. The application is made under section 5(1) (c) of the Appellate Jurisdiction Act Cap.141 R.E 2019 (the Act) and rules 45 (b) and 48(1) and (2) of the Tanzania Court of Appeal Rules, 2019 (the Rules). It is supported by an affidavit sworn by advocate Gaspar Nyika and opposed by the respondent through advocate Shehzada Walli who filed an affidavit in reply.

The genesis of this application is the judgment and decree issued on 07/12/2018 in Misc. Civil Cause No. 384 of 2017 before the High Court of Tanzania (Philip, J.). Aggrieved by that decision, the applicant filed a petition seeking among other reliefs, to set aside an order of *ex-parte* proof and part of TZS. 500 million awarded to the respondent. When the petition came for hearing, the respondent successfully objected to it that, the award sought to be challenged had already been registered and qualified as a court decree which is due for enforcement and that, the court was *functus officio* to entertain the petition. On that account, the petition was struck out on 09/06/2020. Aggrieved by that ruling, the applicant filed a Notice of Appeal on 12/06/2020 to challenge it and later, Misc. Commercial Application No. 105 of 2020 for leave to appeal to the Court. The High Court (Magoiga, J.) refused the applicant leave on 20/08/2021. Being dissatisfied by that refusal, the applicant is before us by way of second bite in further pursuit of his right to appeal.

At the hearing of this application on 08/02/2023, Ms. Samah Salah and Mr. Shehzada Walli learned counsel appeared for the applicant and the respondent respectively.

In her brief and focused submission, Ms. Salah faulted the High Court Judge for striking out the petition, the reason being that, it had been overtaken by events. She stressed that, **one**, the law provided to the contrary that, a petition to set aside an award is tenable after the award has been registered as a court decree and is ready for enforcement and **two**, that, the said decree does not supersede the award sought to be set aside.

Additionally, she averred that to hold that, the petition was overtaken by events as the reason for refusing the applicant leave to appeal is tantamount to jumping into the merits/demerits of the intended appeal or acting on extraneous matters to pre-empt such matter. She further stressed that, at that stage the judge was bound only to look at the material presented for the grant of leave. To reinforce her point, she cited our decisions in **Bulyanhulu Gold Mine Limited and 2 Others v. Petrolube (T) Limited and Another**, Civil Application No. 364/16 of 2017 and **Jireys Nestory Mtalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (both unreported).

On the criteria to be considered for granting leave to appeal to the Court, she argued that, it is existence of an arguable point of law worth

consideration by the Court that counts. To fortify her point, she cited our decisions in **Nurbhai N. Rattansi v. Ministry of Water Construction, Energy, Land and Environment and Another** [2005] TLR 220 and **Jireys Nestory Mtalemwa** (supra). Applying the above legal principle, to the present case she added that, if leave to appeal is granted, then the serious issues of law to be considered by the Court essentially would be: **one**, whether an application to set aside an award can only be filed after it has been registered as a court decree and is ready for enforcement and **two**, whether once such court decree is issued it cannot in law supersede the award sought to be set aside. She urged us to grant the application with costs.

In reply, Mr. Walli submitted that there was no legal basis upon which to fault the High Court Judge in refusing the applicant leave to appeal to the Court. If anything, he argued, upon such petition being struck out, the applicant should have gone for review instead of filing an application for leave to appeal as he did, and it is more so because the present application did not meet the criteria for the grant of leave. He stressed that the case of **Bulyanhulu** (supra) is distinguishable from the present case.

Upon considering the entire record and submissions made by the parties' learned counsel, the central issue for our determination is whether this application for leave to appeal to the Court is merited.

The requirement to seek leave to appeal to the Court is guided by section 5(1) (c) of the Act. More often than not the conditions upon which leave may be sought and granted have been lucidly stated by the Court on a number of occasions including in **Charles S. Kimambo v. Clement Leonard Kusudya** (As an Administrator of the Estate of the Late Leonard Kusudya), Civil Application No. 477/03 of 2018 and **British Broadcasting Corporation v. Erick Sikujua Ng'imaryo**, Civil Application No.138 of 2004 (both unreported). For instance in the latter case, the Court stated that;

"...leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however be judiciously exercised and on the materials before the court...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" (Emphasis added).

From the above quoted authority therefore, it is trite law that the grant of leave to appeal is not automatic. It is conditional upon the applicant's points of grievance raising arguable issues to merit a serious judicial discretion by the Court. The rationale behind it being that in granting or refusing leave to file an appeal to the Court, the High Court is spared from adjudging on the merits or demerits of the intended appeal. **See-** our decision in **Harban Haji Mosi and Another v. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported) in which we cited the case of **British Broadcasting Corporation** (supra).

For further guidance, we wish also to subscribe to our decision in the case of **Twaha Michael Gujwile v. Kagera Farmers Cooperative Bank**, Civil Application No. 352/04 of 2021 (unreported) that, a second bite application like the present one is not an appeal. We also stress that, a determination of an application for leave to appeal to the Court should not be mistaken for a rehearing of the matter from whose decision leave is sought. Equally important is that, in considering an application for leave to appeal to the Court, the High Court is precluded, in the most unlikely event from reducing itself into a mere conduit pipe which lacks safety valves such

as, existence of an arguable legal point, a point of general importance or whether there is a prima facie arguable appeal.

In order to appreciate the gist of the ruling which gave rise to the present application, we wish to reproduce the substantive ground of the respective notice of motion as was presented before the High Court as follows:

"That the Honourable court be pleased to grant the Applicant leave to appeal to the Court of Appeal of Tanzania against the Ruling and Order of the High Court of Tanzania (Commercial Division) at Dar es Salaam (Hon. Fikirini, J.) delivered on June 9, 2020, in Misc. Comm. Cause No. 34 of 2019".

It is on record that, initially, upon hearing the parties the High Court refused the applicant leave to appeal to the Court with the following reasons:

"...once the award is registered or leave is granted the court cannot sit to it actually becomes functus officio...The arguments by Mr. Nyika, though sounds iogical and raises legal issue but with great respect to him, have been overtaken by events...The best they could do was, to go for review of the earlier decision

*of Hon. Phillip, Judge...I find that **the application for leave is misconceived...and is hereby rejected. This application, is thus, struck out** with no order as to costs". (Emphasis added).*

From the above quoted extract of the decision, it is glaring that, in refusing the applicant leave to appeal to this Court the learned judge adopted the reasons of his fellow judge to strike out the said petition which reads as follows:

"The fact that this court has already dealt with the matter to the extent of confirming the award in Miscellaneous Civil Cause No. 384 of 2017, and issued a decree thereof, the only available remedy is review..., a revision or an appeal... challenging the decree of this court. To that end, it is without any flicker of doubt that this petition has been overtaken by the events..." (Emphasis added).

With great respect, it is clear to us that the decision just quoted above had three effects: **one**, the learned judge was satisfied and held that, the grounds of the intended appeal raised arguable points of law worth the Court's consideration and he adjudged the application for leave to be overtaken by events **two**, the learned judge reheard the disguise and

“upheld” the decision of his fellow wholesale. **Three**, the court rejected the application for leave to appeal and struck it out at the same time, two distinct verdicts which do not coexist. We are taking that view because rejection of a matter presupposes that it is thrown overboard summarily, whereas striking it out connotes that, the matter is incompetent and untenable. Nonetheless, whether or not the award which was registered and ready for enforcement, as consistently observed by the High Court was overtaken by events, and therefore could not be set aside, the issue was substantive and contentious worth determination of the Court.

As observed earlier, holding otherwise was not in line with the long established legal principle which states that, in applications of this nature courts should avoid taking on board substantive issues to pre-empt the merits or demerits of the intended appeals. We took that stance in an unreported case of **Regional Manager-Tanroads Lindi v. DB Shaprya and Company Ltd**, Civil Application No. 29 of 2012.

Applying the above legal principle to the present case therefore, it is quite apparent to us that in deciding that the first bite application for leave to appeal was overtaken by events, as decided, with respect, the judge considered an extraneous matter related to the competence, merits and or

demerits of the intended appeal. This was improper and uncalled for. For more clarity, it is no wonder that, whether "*an appeal stands chances of success*" is no longer a requirement and ground for granting an extension of time to appeal or, as here, leave to appeal. See- **Murtaza Mohamed Raza Viran v. Mehboob Hassanali Versi**, Civil Application No.168 of 2014 and **Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 Others**, Civil Application No. 225 of 2014 (both unreported).

Having said all, we are satisfied that the present application is merited. Consequently, we agree with Ms. Salah's contention therefore entertain no doubts to hold that, the two grounds raised by the applicant in this application sufficiently constitute contentious and arguable legal points of general importance worth consideration by the Court. For avoidance of doubt, those points are: **one**, whether an application to set aside an award could not be entertained after the award has been registered and ready for enforcement and **two**, whether the decree issued by court cannot in law supersede the award sought to be set aside.

In the up shot, we find the application meritorious and hereby grant the applicant leave to appeal to the Court against the High Court's

decision in Misc. Commercial Cause No. 34 of 2019. Costs shall abide the results of the intended appeal.

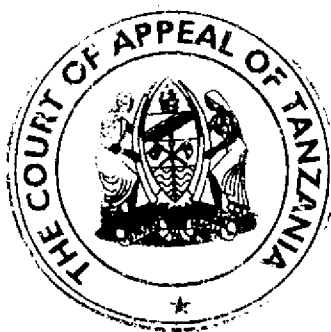
DATED at DAR ES SALAAM this 17th day of February, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 20th day of February, 2023 in the presence of Ms. Antonia Agapiti, learned counsel for the Applicant and Mr. Shehzada Walli, learned counsel for the Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL