

**IN THE HIGH COURT OF TANZANIA
AT IRINGA**

**MISCELLANEOUS APPLICATION NO. 7 OF 2015
(Originating from Civil Appeal No. 3 of 2012
Hon. Ndunguru, DR Extended Jurisdiction)**

**NATIONAL MICROFINANCE BANK APPLICANT
VERSUS
MUYODESORESPONDENT**

RULING

28th July, 2016 & 15th December, 2016

Kihwelo J.

Before me there is an Application for leave to appeal to the Court of Appeal of Tanzania. The Applicant by way of Chamber Summons, supported by an Affidavit of C. S. Binamungu , Advocate, prays for orders that;

- 1. That the Hon. Judge may be pleased to grant leave to the applicant to enable it to (sic) lodge an appeal to the Court of Appeal of Tanzania against the Judgment and Decree delivered on 12th May 2015.*

2. That costs be in the cause.

The application flows from the following facts. The applicant and the respondent were parties in Civil Appeal No.3 of 2012 whose Judgment was delivered on 12th May 2015 by the Deputy Registrar Hon. Ruth B. Massam after it was composed by the then District Registrar Hon. Dunstan Ndunguru (Extended Jurisdiction). Still intending to pursue the appeal the Applicant filed the instant application on 25th May 2015 seeking to move this Honourable Court to grant leave to appeal to the Court of Appeal of Tanzania.

Before this Court the Applicant was represented by Ms. Esther Shoo learned counsel while the Respondent was under the services of Mr. Rwezaura Kaijage, learned counsel. While making submission in support of the application Ms. Shoo stated that the reasons that compelled the applicant to seek leave to appeal to the Court of Appeal of Tanzania are clearly spelt out in paragraph 3 of the Affidavit accompanying the application. She further submitted that the first reason is that the respondent miserably failed to prove that he suffered the alleged damage. She went on to submit that the second reason is that the appellate court

misdirected itself when it addressed the issue of interest wrongly in that the court cannot grant something which was not pleaded and proved and cited the cases of **James Gwagilo V AG [2004] TLR 161** and **Fatma Idha Salum V Khaliga Khamis Said**, Civil Appeal No. 28 of 2002, Court of Appeal of Tanzania at Zanzibar (unreported).

Amplifying on the third reason Ms. Shoo submitted that the appellate court wrongly granted damages which were not proved by the respondent and the court did not bother to analyze how it arrived at the figure. In addition to that Ms. Shoo submitted that the appellate court wrongly found out that the trial court was not at fault in not conducting mediation contrary to the mandatory requirement of the Civil Procedure Code, Cap 33 Revised Edition 2002. According to Ms. Shoo that was sufficient ground to grant leave to appeal to the Court of Appeal of Tanzania. To buttress further her submission she cited the case of **Gaudensia Mzungu V IDM Mzumbe**, Civil Application No. 94 of 1999, Court of Appeal of Tanzania (unreported).

On the other hand Mr. Rwezaura took out the counter affidavit and strongly disputed the application and submitted that the case of **Fatma**

Idha Salum is distinguishable from the current case in that the court has inherent powers under section 95 of the Civil Procedure Code when dispensing justice and that is what the court did in this matter. That, even the case of **Gaudensia Mzungu** is referring to a prima facie case and not someones wishes. He was of the strong opinion that he felt that there was no ground to warrant the granting of leave to appeal to the Court of Appeal of Tanzania.

From the affidavit and counter affidavit filed in this Court along with the rival submissions there is only one issue which requires to be resolved and that is whether or not the present application is meritorious to warrant the granting of the leave.

Time and again it has been reiterated that for leave to appeal to the Court of Appeal to be granted the matter must raise contentious issues of law and that it is a fit case for further consideration by the Court of Appeal.

The Court of Appeal of Tanzania in **Lazaro Mabinza V The General Manager, Mbeya Cement Co. Ltd**, Civil Application No. 1 of 1999 at Mbeya Registry (unreported) the Court held decisively that;

"Leave to appeal should be granted in matters of public importance and serious issues of misdirection or non direction likely to result in a failure of justice."

Similarly it was authoritatively held by the defunct East African Court of Appeal in **Sango Bay Estates Ltd & Others V Dresdner Bank** [1971] EA 17 that;

"Leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration."

It goes without saying that, although in a first or second appeal an appeal may lie on point(s) of law or facts or mixed facts and law, the applicant must demonstrate that the point she wants to take to the Court of Appeal are contentious, or of public importance or contain serious issues of misdirection or non direction likely to result in a failure of justice, and worth consideration by the highest court of the land.

In the present case, the records of the trial court and the Judgment of the Appellate court Hon. D.B. Ndunguru SRM Extended Jurisdiction reveals clearly that the matter did not go through Mediation stage as required by law. The requirement for mediation is clearly reflected under Order VIIIA Rule 3(1) which states that;

In every case assigned to a specific Judge or Magistrate, a first scheduling and settlement conference attended by the parties or their recognized agents or advocates shall be held and presided over by such judge or magistrate within a period of twenty one days after conclusion of the pleadings for the purpose of ascertaining the speed track of the case, resolving the case through negotiation, mediation, arbitration or such other procedures not involving a trial.

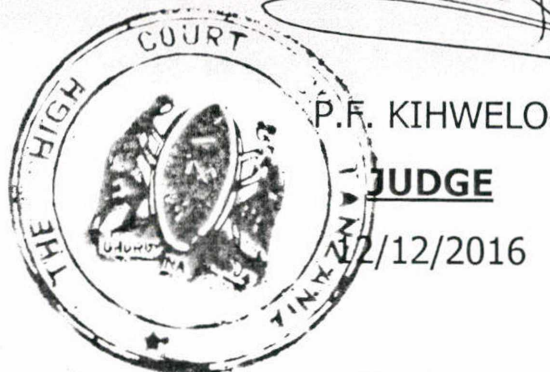
The consequences of omitting to comply with the provision of Order VIII A is well articulated in the case of **Kinondoni Municipal Council V Deniol Msemwa**, Civil Appeal No. 125 of 2006, High Court of Tanzania at Dar Es Salaam (unreported) the Court held that;

".....I find that the trial in the lower Court was finally a nullity for failure to comply with the mandatory provisions of Order VIII A rule 3(1) of the Civil Procedure Code"

In the circumstances I am of the respectful opinion that the point intended to be raised on appeal is serious to deserve the attention of the Court of Appeal.

For the above reasons, I grant the application as prayed. Costs to be in the cause.

It is accordingly ordered.



Ruling to be delivered by the Deputy Registrar on 15th December, 2016.

