

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION No. 429 OF 2019

OSCAR KANAND.....APPLICANT

Versus

AKIBA COMMERCIAL BANK PLC.....RESPONDENT

RULING

27th April -19th May, 2020.

J. A. DE-MELLO J;

This Application is made vide **S. 5 (1)** of the **Appellate Jurisdiction Act Cap. 141 R.E. 2002)** and **Rule 45 (a)** of the **Court of Appeal Rules, 2009, GN. NO.368 of 2009** as amended by the **Tanzania Court of Appeal (Amendments) Rules G.N NO. 362 of 2017.**

The Applicant seeks for the following orders:

- a) That, the Court be pleased to grant leave to the Applicant to appeal to the Court of Appeal against the whole decision of the Court in Civil Appeal No. 163 of 2018 delivered on 29th July, 2019 by Hon Mgonya, J;**
- b) Costs of this Application be borne to the Respondent.**
- c) Any other order (s)/relief(s) the Honourable Court may deem fit and just to grant.**

The Applicant was represented by **Flora Jacob** learned Advocate while **David B. Wasonga** learned Advocate represented the Respondent.

It is **Civil Appeal No. 163 of 2018** delivered on **29th July, 2019** by **Hon. Mgonya, J**; that the Applicant is aggrieved against, by whose Affidavit sworn by **Counsel Frola Jacob** is in place craving for its adoption. However, the same has been resisted by the Respondent in Counter Affidavit sworn by **David Benjamini Wasonga**. On the **17th March, 2020** the Court found it worth to have the matter heard by way of written submissions, which both Counsels prayed for and I see compliance. **David Benjamin Wasonga** drew the Court to paragraph 4 of the Affidavit as to;

- 1. Whether the Registration card for Motor Vehicles. No. T863 AQE MODEL FUSO bearing the name of the 1st Defendant only namely JORAM GENERAL ENTERPRISES LIMITED in the original suit was admitted and marked for identification purpose only and the preliminary objection regarding its admissibility was sustained.**
- 2. Whether the trial court was obliged to award costs in favour of the Application then as Plaintiff against all the defendants in the original suit in civil case No. 21 of 2017.**
- 3. Whether it was proper for appellate High Court Judge to neglect and or abandon the grounds of appeal filed by the Respondent herein then as Appellant in Civil Appeal No. 163 of 2018 and form her own grounds in determining the merits of appeal.**

4. Whether the appellate High Court Judge impartially re-considered and re-evaluated the evidence on record adduced by the Applicant herein during trial.
5. Whether the only document admitted as evidence is registration card for Motor Vehicles. No. T863 AQE model Fuso bearing the name of the both the Respondent herein and the 1st Defendant only namely JORAM GENERAL ENTERPRISES LIMITED in the original suit.
6. Whether the TZS 70,000,000/= was awarded by the trial court as specific damages only.
7. Whether it was proper for appellate High Court Judge to decide the appeal while neglecting the written submissions made by the Applicant herein then as Respondent in opposition of the Appeal in Civil Appeal No. 163 of 2018.

It is **Counsel's** submissions that, the **Civil Appeal No. 1** is centered on impartial re-evaluation of evidence adduced by the Applicant during trial, on which biased the Judge. The assessment of the costs within the discretion of the Court as provided under **section 30 (1)** of the **Civil Procedure Code, Cap. 33, R.E 2002** and I borrow

"Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and

the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers."

Citing the case of **Mbeya-Rukwa Autoparts &Transport Ltd. vs. Jestina George Mwakyoma Court of Appeal of Tanzania at Mbeya, Civil Appeal No. 101 of 1998 (2003) T.L.R 251**, where was held that:-

"(v) The right of hearing is a fundamental constitutional right in Tanzania by virtue of Article 13(6)(a) of the constitution;

(vi) It was a breach of the rule of hearing that justice must not only be done but must manifestly be seen to be done..."

She conclusively prayed that the application be granted with costs.

In rebuttal, **Counsel** for the Respondent, submitted that, unless there is good reason, normally on a point of law or on a point of public importance, Court of Appeal's intervention can be sought. He quoted the cases of **Rutagatina C.L vs. The Advocates Committee & Another, Civil Application No. 98 of 2010, Court of Appeal of Tanzania at Dar Es Salaam at pages 5, 6 & 7 (unreported) of Harban Haji Mosi & Another vs. Omar Hilal Seif & Another in Civil Reference No. 19 of 1997 (Unreported) Lugakingira J.A** (as he was) to bring the point of law and public importance as reason as the latter held;

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal The purpose of the provision is therefore to spare the court the specter of un-meriting matters and

to enable it to give adequate attention to cases of true public importance."

A restatement was lauded in the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo, Civil Application No. 133 of 2004** (unreported), stating as follows

"Needless to say leave to appeal it is not automatic. It is within the discretion of the Court to grant or refuse leave. The discretion must however be judiciously exercised on the materials before the Court. As a matter of general principle leave to appeal will be granted where the grounds of appeal raised issues of general importance or a novel point of law or where the grounds shows a prima facie or arguable appeal. However where the grounds of appeal are frivolous, vexation or useless or hypothetical, no leave will be granted."

He went on pointing out what the case of **Abubakar Ali Himid vs. Edward Nyelusye, Civil Application No. 51 of 2007, CAT at DSM** in which some parameters were set for Court's discretion in considering similar applications. These simply are

- 1. Leave is not automatic.**
- 2. Leave is upon the discretion of the Court and the same is exercised judiciously**
- 3. There has to be an arguable appeal which raises issues on a point on public importance.**

4. The application should not be frivolous, vexations, useless or hypothetical.

With regard to case cited rather referred by Counsel Flora, Counsel found them all to be distinguishable from the matter at hand, revolving and **Suo Motu** on jurisdiction and proceeded to determine it in absentia. He similarly prayed for dismissal of the Application with costs.

Much as these kinds of Applications are monotonous and, seem routine, it would be unfair not to register appreciation for the input which both sides put in support of the application. Times and over again, the position of law has been so, that for **Leave to Appeal to the Court of Appeal**, the Court, must satisfy itself that, a just demonstration of the existence of a point of law. of **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another in Civil Reference No. 19 of 1997 (Unreported) Lugakingira J. A.** (as he was) who held alia that:-

"In order for the Application for Leave to Appeal to the Court of Appeal to be granted the following factors must be present:

- 1. The proposed Appeal stands reasonable chances of success.**
- 2. Where but not necessarily the proceedings as a whole reveal such disturbing features as to require of the Court of Appeal. (Emphasis is mine).**

Much as the discretion is basic and of essence, it does not go without guidance which the case of **National Bank of Commerce vs. Maisha Musa Uledi (Life Business Centre), Civil Application No. 410/7 of 2019, Court of Appeal at Mtwara (unreported)** stating that;

"In application for Leave to Appeal, what is required of the Court hearing the application, is to determine whether or not the decision sought to be appealed against raises legal points which are worth consideration by the Court of Appeal".

Moreover and, in light of the case of **Principal Secretary, Ministry of Defence & National Service vs. Devram Valambhia [1992] TLR 185** the **Court of Appeal** re-stated the above holding as follows;

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has the duty...for the purpose to ascertain the point and, the alleged illegality be established, to take appropriate measure to put the matter and record right". In view of the prevailing circumstances, and, without much further bother, I find the Application has no merit.

In view of the foregoing and in consideration of the reasons advanced I grant **Leave** in exercise of my judicial discretion.

Costs in due course.

It is ordered.


J. A. De Mello.

JUDGE

19th May, 2020.