

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION No. 182 OF 2019

(Originating from (HC) Civil Appeal No. 31 of 2019)

TRIACT EAST AFRICA LIMITED.....APPLICANT

VERSUS

MASA SECURITY SERVICE LIMITEDRESPONDENT

RULING

16th June, & 23rd July, 2020

TIGANGA, J.

This Ruling is in respect of an application for leave to appeal to the Court of Appeal of Tanzania against the judgment and decree in HC - Civil Appeal No 31 of 2019, of this court Hon. Mgeyekwa, J.

The Application has been preferred under Section 5 (1) (c) of the Appellate Jurisdiction Act [Cap 414 R.E 2019]. The orders sought in this application are, leave to appeal to the Court of Appeal of Tanzania and the costs of the application.

The Application was filed through a chamber summons and supported by an affidavit of Christopher Sentimea who introduced himself as a principal officer of the applicant, very well conversant with the facts of the application.

In such affidavit, the deponent deposed that after the decision of HC Civil Appeal No. 31/2019, the applicant filed a Notice of Appeal initiating the appeal process.

Also, as a matter of procedure, he filed this application, in which, in paragraph 4 of the affidavit filed in support of the application, the following four points were posed as the anticipated grounds of appeal, these are;

- a) Whether the High Court was justified in upholding the decision of the District Court which was founded on an illegal contract.
- b) Whether the District Court was clothed with the jurisdiction to entertain the matter before it.
- c) Whether in the absence of a notice of delivery of judgment to the applicant the High Court could justifiably sustain the judgment of the District Court.
- d) Whether the appellant was dully served with a notice of the case before the District Court.

In view of the foregoing, he asked this court to grant this application in the interest of justice.

The application was countered by the respondent by filing the counter affidavit sworn by one Nicholaus Mmari, who introduced himself as a Managing Director of the respondent. In that counter affidavit, the respondent disputed the contents of the paragraph 4 (a), (b), (c) and (d). He deposed further countering the contents of that paragraph that, the applicant applied for extension of time to be allowed to apply to set aside the ex-parte judgment which application was dismissed with costs for failure to advance sufficient reason for delay.

On the content of paragraph 5, he averred that the applicant was aware of the presence of HC Civil Appeal No. 32 of 2016 filed before the District Court of Nyamagana and that the applicant was properly served and she filed his defence on 27/07/2016. He also entered appearance through the service of the Advocate A.K Nasimire on 13/07/2016, 30/08/2016, 02/09/2016, 04/10/2016 and 18/10/2016.

By the leave of this court, the application was argued by way of written submissions. In his submission in-chief the counsel for the applicant adopted the contents of the affidavit sworn and filed in support of the chamber summons. Further to that, he submitted that there is no specific statutory provision regulating the grant or refuse for leave to appeal to the Court of Appeal of Tanzania.

However, leave will be granted if the intended appeal has some merits, whether factual or legal. What matters most, is whether there are prima facie grounds meriting an appeal to the Court of Appeal of Tanzania. He cited the authority in the case **Ilabila Industries and two others Vs Tanzania Investment Bank and another** - Civil Application No. 179 of 2004 - CAT Dar es Salaam (unreported).

He submitted that in the merit of the matter at hand, he referred this court to paragraph 4 of the affidavit, and asked the court to find that there are issues which when taken together or singularly are strong enough to convince this honourable court to grant this application.

These issues range from the applicant's complaint that the judgment of the trial court is founded on illegality, want of jurisdiction of the trial court, delivery of Judgment without serving the appellant with the requisite

notice of judgment and propriety of the notice of hearing. In the end, he asked the court to allow the application on the grounds relied upon herein above and asked the same to be granted with costs.

In the reply submission filed by the respondent, he submitted that, the argument that the decision of the District Court is founded on an illegal contract, he submitted that an unstamped contract does not become illegal. He said the law is clear that the contents of the document may be proved by oral evidence. He submitted further that, even if for example, the court decides to expunge the said exhibit; still there is enough evidence sufficient to prove the application.

On the second point which raises a complaint that the District Court had no jurisdiction to entertain the matter, he submitted that, the jurisdiction of commercial cases in District Court before amendment of section 40 (3) (b) of the Magistrates Courts Act [Cap 11 RE. 2019] by written laws (Miscellaneous Amendment) (No.4) Act of 2019, which amended section 40 of Magistrates Courts Act (supra) was limited to Tanzania shillings thirty millions which is within the amount claimed by the respondent in the trial court but, Act No. 4 of 2019 was assented three years after the suit has been instituted. That amendment increased jurisdiction to 70 Millions, therefore it is his submission that he see no reason of wasting the time of the Court of Appeal on that issue.

On the issue of failure to serve the applicant with notice of hearing and notice of delivery of judgment, he invokes the provision of section 28 of the Civil Procedure Code [Cap 33 RE. 2019] in that, he submitted that where the defendant filed the Written Statement of Defence and the matter

was not heard *ex parte*, then no notice is required. He cited the case of **Moshi Textile Mills Vs BJ De Voest (1975) LRT No. 17** where the court held *inter alia*, that an *ex parte* judgment is that one entered when the defendant did not file the Written Statement of Defence and appear personally or through an advocate.

He submitted that if that is the case he sees no chance of success of the appeal before the Court of Appeal of Tanzania. He also cited Order XX Rule 1 of the same law, which almost provides similarly to the above provision; he also cited the case of **Cosmas Construction Co. Limited Vs Arrow Garment Ltd**, (1992) TLR 127. He in the end asked the application to be refused.

That marks the summary of the contents of the affidavit, counter affidavit and the submission by counsel for the parties. From the summary above, it is true that section 5 (1) (c) of the Appellate Jurisdiction Act (*supra*) does not provide for the criteria to be considered in granting leave to appeal to the Court of Appeal of Tanzania. However, its interpretation in various case laws has provided us with the principles which give general guidance.

In the case of **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another**, Civil Reference no 19/1997 CAT in which the following principles were laid down that;

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of

the provision is therefore to spare the court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance”

Also the authority in the case of **British Broadcasting Cooperation vs Erick Sikujua Ng'maryo** Civil Application No.138 of 2004 (CAT) - Dar Es Salaam (Unreported) (which was cited and relied on in the decision of **Swiss Port Tanzania Ltd vs Michael Lugaiya** (supra) it was held *inter alia* that;

“Needless to say leave to Appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion should however be judiciously exercised and on the materials 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, useless or hypothetical, no leave will be granted.”

Those issues with such disturbing features proving that there would be the arguable appeal must be shown by the applicant both in his affidavit and the submissions.

The issue is whether, there are such disturbing features proving that there would be arguable appeal.

I have carefully passed through the affidavit in support of the application and the arguments in support thereof, especially paragraph 4 (i)

(v) of the affidavit. I have also passed through and considered the arguments in reply advance by the counsel for the respondent in opposition of the application. In my such consideration, I found that, the arguments, advanced by the counsel for the respondent are to be considered with care, as they were about to turn this court into the Court of Appeal of Tanzania.

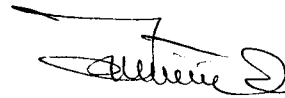
My observation is based on the fact that the counsel for the respondent has argued substantively on the grounds advanced by the counsel for the applicant as the anticipated grounds of appeal.

In this ruling, it is worthy to remind the parties that the duty of this court in the application of this nature, is to look into the intended grounds of appeal, and examine them as to whether, when presented to the court of appeal, the same exhibit that there is an arguable appeal.

In this application, the grounds raised in paragraph 4 of the affidavit filed by the applicant and the submissions of the counsel in their support, weighed with the arguments advance by the counsel for the respondent against the ground in paragraph 4, it vividly shows that the arguments for and against the application, prove that the there is arguable appeal before the Court of Appeal. That said, I hereby grant leave for the applicant to appeal to the Court of Appeal for the reasons given.

It is so ordered.

DATED at **MWANZA** on 23rd day of July, 2020.

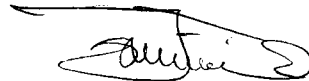


J.C. TIGANGA

JUDGE

23/07/2020

Ruling Delivered in open chambers in the presence of the parties as per coram of the day.



J.C. TIGANGA

JUDGE

23/07/2020