

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

**MISC CIVIL APPLICATION NO. 374 OF 2019
(Arising from Misc. Civil Application No. 190 of 2018)**

HAMIS MWINYIJUMA.....1ST APPLICANT
AMBWENE YESAYA.....2ND APPLICANT
VERSUS
MIC TANZANAI LIMITED.....RESPONDENT

RULING

MASABO, J.

The matter before me has a long history. For our purpose, the most relevant facts are that, the applicants are aggrieved by the order of this court in Miscellaneous Civil Application No. 190 of 2018 vide which the Respondent was granted an extension of time within which to file an appeal against the decision of the district of Ilala in Civil Case No. 17 of 2012. They intend to challenge the Court of Appeal. They have moved this Court under section under section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141, Rule 45(a), Rule 46(1) and Rule 47 of the Court of Appeal Rules. They are seeking for leave to appeal to the apex court.

Having being served, the respondent raised a preliminary objection on the point of law that the application is misconceived and bad in law as the order for which leave is sought is non-appealable. The Applicants raised a cross

preliminary objection to the effect that the counter affidavit is bad in law for containing arguments.

Hearing of the preliminary objections proceeded in writing. Both parties were represented. The Respondents were represented by Mr. Victor Kikwasi, whereas the Applicants were represented by Mr. Sweetbert Festo Moshi.

Submitting in the 1st preliminary objection Mr. Victor Kikwasi argued that the impugned order having arisen from an application for extension of time provided for under s. 14 of the Law of Limitation Act, Cap 89 RE 2019 is not appealable. He argued that, appeals spring from statutes and that, since there is no statute providing for appeals in respect of orders emanating from extension of time this application is untenable. He cited the case of **Attorney General v Shah** (1971) EA 50; **Paul A. Kweka & Hilary P. Kweka v Ngorika Bus Service and Transport Company Limited**, Civil Appeal No. 129 of 2002, Court of Appeal of Tanzania (unreported) and the case of **CRDB Bank Limited v George M. Kilindu & Attorney General**, Civil Appeal No. 137 of 2008, Court of Appeal of Tanzania (unreported) and proceeded to argue that the position of law as articulated in these authorities is that no leave can be granted where the order challenged is non appealable.

In reply to this submission Mr. Sweetbert Festo Moshi argued that the order is appealable under section 5(1) (C) of the Appellate Jurisdiction Act. He added that, section 74 of the Civil Procedure Code Cap 33 RE 2019 which

provides that appeals from orders is not applicable as it only applies to appeals from courts subordinate to the High Court. He further pleaded this court to invoke the principle of overriding objective.

With regard to the cross preliminary objection, it was argued that paragraph 12 and 13 of the counter affidavits are defective as they contain argument contrary to Order XIX rule 3(1) and (2) of the Civil Procedure Code, Cap 33 RE 2019. The case of **Alistedes A. Kasharira v Prof Anna Kajumulo Tibaijuka and 2 others**, Misc Civil Appeal No.44 of 2015 HC at Tabora; **Serikali ya Mapinduzi ay Zanzibar (SMZ) V Farid Moh'd Abdallah** (1998) TLR 355 and **Uganda v Commissioner for Prisons Exparte Matovu** (1966) EA 514 were cited in support.

In reply to this point, Mr. Kikwasi, did not contest the requirement of the law that affidavits should only be limited to facts not arguments and provisions of law (Order XIX rule 3). He however, maintained that the impugned paragraphs are not argumentative. In the alternative, he submitted that should the paragraphs be found argumentative, the court be pleased to strike them from the record and leave the non-defective part of the affidavit.

The submissions by both parties, which I have considered, dispassionately, revolve around two issues, first, whether the application for extension of time is appealable and second, whether the affidavit in support of the application is defective and if so, whether the affidavit has been rendered incurably defective.

On the first issue, I entirely agree with the respondents' counsel's argument and the authorities cited. It is a well settled principle of law that the right of appeal is a creature of statute. As held in **Attorney General V Shah** (1971) EA 50

"It has long been established and we think there is ample authority for saying that, appellate jurisdiction springs from Statute. There is no such thing as inherent appellate jurisdiction."

Therefore, no automatic right of appeal exists unless there is an enabling law (**Paul A. Kweka & Hillary P. Kweka v Ngorika Bus Services and Transport Company Limited**, Civil Appeal No. 129 of 2002, CAT at Arusha. The Respondent has relied upon section 74 of the Civil Procedure Code [Cap 33 RE 2019] in support of his point that, the order sought to be appealed against is not among the appealable orders listed under this section. On the other hand, the Respondent's argument is that, section 74 is inapplicable as the intended appeal does not emanated from the decision of a subordinate court but the decision of this court hence it is outside the scope of section 74.

Luckily, this is not an uncharted territory. The Court of Appeal has dealt with a similar issue in the two cases cited by the Respondent. In **CRDB Bank Limited v George M. Kilindu & Attorney General**, (supra), just like in the instant case, appeal was sought against an order of this court in

application for extension of time. The Court having raised the issue of competence of the Appeal and having heard both parties, it stated as follows:

it is important to note that whereas S 74 of the Code restrict appeals to the High Court against orders and so, is in our view only applies to orders from courts subordinate to the High Court; section 75 restricts appeals from Orders from a 'court' which is defined by section 3 of the Code to include the High Court. So, in our view S. 75 is applicable to appeals made by the High Court under the Civil Procedure Code to this Court (page 10).

The Court held further that:

"strictly speaking, therefore only S 75 of the Civil Procedure Code and S.5(1)(c) of the Appellate Jurisdiction Act, are to be looked for appellate authority of this Court to consider appeals against orders. And as we amply demonstrated above the impugned order in this case is not listed for under S.5(1)(b) or expressly sanctioned under S. 75 of the Civil Procedure Code. However, we must quickly add that although S.74 and Order XL do not directly apply to appeals against orders to this Court, they indirectly also affect this Court's jurisdiction because this court only entertains appeals against decisions of the High

Court. So, what the High Court can not entertain, this Court also can't.

Having made the above remark, the court held that section 5(1)(c), should not be read in isolation. It should read in conjunction with section 74 ad 75 of the Civil Procedure Code. In conclusion, it found held that the order for extension of time is non appealable hence, leave for appeal against this order cannot issues.

I have purposively cited the above authority in extenso to drive the point home as the leave sought in the above case was for an intended appeal against the order similar to the order sought to be appealed against in this case.

Based on the strength of the authority above cited, I find and hold that the order sought to be appealed against is non-appealable. Hence, the application is incompetent as no leave can issue against a non-appealable order.

Accordingly, I sustain the preliminary objection raised by the respondent and strike out the application with costs.

DATED at DAR ES SALAAM this 28th day of August 2020.



A handwritten signature in blue ink, appearing to be 'J.L. MASABO'.

J.L. MASABO
JUDGE