

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

MISC. CIVIL APPLICATION NO: 406 OF 2019

(Originating from Civil Appeal No: 70 of 2019)

BENEDICT SAUL MWALUBUNJUAPPLICANT

VERSUS

ACCESS BANK TANZANIA LIMITED.....RESPONDENT

RULING

MASABO J.:

The Applicant has moved this court through section 5(1)(c) of the Appellate Jurisdiction Act, [Cap.141 RE 2019]. He is praying for leave to file an appeal to the Court of Appeal against the decision of this Court in Civil Appeal 70 of 2019. It is supported by an affidavit sworn by Harry Mwakalasa who is identified as Counsel for the Applicant. The brief background of the application as discerned from the pleadings are that the applicant was advanced a loan by the respondent. Their relationship later turned sour following default payment by the applicant and confiscation of his assets by the respondent which ensued thereafter. The applicant being unhappy with the confiscation filed a civil suit before the District Court for Kinondoni which was dismissed for lack of merit. He appealed to this court with no fruition as his appeal was dismissed. He now wants to appeal to the apex court, the

Court of Appeal of Tanzania hence this application. The application was contested through an affidavit deponed by Amedeus Mallya, counsel for the respondent.

The Application was argued in writing. Both parties had representation. The Applicant represented by Mr. Harry Mwakalasya who having adopted his affidavit submitted that the application is tenable as both the appeal court and the trial court did not examine the evidence tendered by the applicant. He argued that had the trial court and the appeal court correctly directed themselves to the record they would have found that the respondent acted in total breach of section 37(1) and 57 of the Law of the Contract At, Cap 437. He further cited the case of **Harban Haji Mosi & Another v Omari Hilal Seif & Another [2001] TLR 409** and argued that the intended appeal has a likelihood of success hence it qualifies the conditions for grant of leave.

In reply, Mr. Amedeus Mallya counsel for the Respondent cited the case of **Harban Haji Mosi & Another v Omari Hilal Seif & Another [supra]** and Court of Appeal of Tanzania at Zanzibar; and **British Broad Casting v Eric Sikujua Ng'ymaro**, Civil Application No. 133 of 2004, Court of Appeal of Tanzania at Dar es Salaam (unreported) and proceeded to submit that, the application is untenable as it does not raise an issue of general importance.

Under Section 5(2) of the Appellate Jurisdiction Act, the Applicant is required by law to obtain a leave to appeal to the Court of Appeal. Leave is granted at the discretion of this court, which as rule, must be judiciously exercised upon the Applicant establishing that the appeal stands reasonable chances of success or that the proceedings as a whole reveal such disturbing features as to require guidance of the Court of Appeal. Articulating this principle, the Court of Appeal in **British Broadcasting v Eric Sikujua Ng'ymaro**, Civil Application No. 133 of 2004, (unreported) had this to say.

“Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however 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 appeals raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal [emphasis added]

It is therefore crucial for the applicant to satisfy this requirement which is basically intended to spare the Court of Appeal from the “spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance” (**Paulo Juma Vs Diesel & Auto Electrical Services Ltd & 2 Others** (supra); **Harban Haji Mosi & Another v Omari Hilal Seif & Another** (supra)). Therefore, what awaits to be determined is whether or not the application falls within the spectrum of the authorities above, ie does it exhibit a disturbing future meriting consideration by the Court of Appeal/does it raise a *prima facie* arguable case.

Upon examination of the five grounds of the intended appeal as fronted by the applicant in the intended memorandum of appeal, it is apparent that the application falls short of the requirement of the law. Without dwelling on the merit of the intended appeal what is discernible from the submission is that court, to re-examine evidence. None of the five grounds listed by the applicant raise an arguable case meriting the consideration of appeal. As for the ground that the judgment does not include issues for determination, I will not belabor much as it is an afterthought. It was neither deponed in the applicant's affidavit nor listed in the memorandum of the anticipated appeal. For the sake of completeness let me just say that even if the same had been raised in the affidavit and listed in the memorandum of appeal, it would still not hold water because the records vividly show that the requirement of Order XXXIX was complied with, in that the judgement has the points of determination in the form of grounds of appeal, the decision in each of these points and the reasons thereof. In total, no arguable case has been demonstrated to warrant the exercise of the discretion sought to be exercised.

Accordingly, I dismiss the application with costs.

DATED at DAR ES SALAAM this 15th day of October 2020.



J.L. MASABO

JUDGE