

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

MISCELLANEOUS CIVIL APPLICATION NO. 315 OF 2019

(Arising from the decision/ ruling and orders of the High Court of Tanzania, Dar Es Salaam in Miscellaneous Civil Application No. 134 of 2018 by Hon. Munisi, J on the 07th June, 2019)

1. Augustino Elias Mdachi
2. Philipo John Maganga -----
3. Beatrice Mtenga

APPLICANTS

VERSUS

Ramadhan Omary Ngaleba ----- **RESPONDENT**

RULING

Date of last order: 24.06.2020

Date of Ruling: 09.10.2020

Ebrahim, J.:

The Applicants herein have filed the instant application before this court praying to be granted leave to appeal to the Court of Appeal following their dissatisfaction with the decision of this Court on above mentioned Civil Application.

The application has been preferred under **Section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 RE 2002 and Rule 45(a) as amended**

by Rule 6 of the Court of Appeal (Amendment) Rules, 2009. The application is supported by an affidavit of Adolf Wenceslaus Mahay, Counsel for the Applicants.

Going by the averments in the affidavit of the Applicants, they seek to challenge the ruling of this Court in holding that the application for extension of time to appeal to the High Court was struck out suo motto without availing parties right to be heard; and that whether appeal struck out suo motto is not amenable for extension of time. The Applicants also seek to challenge the issue as to whether the judge was justified to vary the former decision of a fellow judge whilst not on review.

This application was argued by way of written submission. The Applicants were represented by Mr. A Mahay and the Respondent was represented by Mr. H. Matombo. Both are learned advocates.

Submitting in support of the application, Counsel for the Applicants submitted before the court that after the struck-out order of 5th February, 2018 by hon. Muruke, J in Civil Appeal 270/2017 without availing parties right to be heard, the applicants lodged an application for extension of time before this court registered as Miscellaneous Civil

Application No. 134 of 2018. The same was dismissed by this court on 7th June 2019 for being res judicata. Counsel for the Applicants contended therefore that it was wrong for this court to correct the decision of a fellow judge which directed the applicants to seek extension of time; hence the three points above for leave to appeal to the Court of Appeal. In showing that there are important points of law to be determined by the Court of Appeal, Counsel for the Applicants cited the case of **British Broadcasting Corporation Vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (CAT).

Submitting in opposing the issuance of leave to appeal to the Court of Appeal, Counsel for the Respondent argued that if the Applicants were aggrieved by the decision of the Civil Appeal No. 270 of 2018 without being invited to be heard by the court, their remedy was to appeal against the struck out order without being heard. Apart from that they have no room to contest the struck-out order of hon. Muruke J on this application for leave to the Court of Appeal based on the decision on Miscellaneous Civil Application No. 134 of 2018 by hon. Munisi, J (as she then was). He submitted further that the Applicants have failed to interpret the decision of hon. Munisi, J (as she then was) which was not

to correct the decision of her fellow Judge in Civil Appeal No. 270 of 2017, but rather making a finding that since hon. Muruke, J invoked the provisions of **section 3(1) of the Law of Limitation Act, Cap 89** to decide the issue of time limitation, the Applicant cannot go back to the same court seeking for enlargement of time. He referred to the case of **East African Development Bank Vs Blueline Enterprises Limited**, Civil Appeal No. 101 of 2009 (unreported) where the Court of Appeal held that an order of dismissal made under **section 3(1) of the Law of Limitation Act**, does not give an opening to an aggrieved party to come back to the same court and institute an application for extension of time. He made further reference to the holding of this court in the case of **Boniface Inyansi Vs Amini Hussein Rukoba and Another**, Miscellaneous Civil Application No. 55 of 2019 (unreported) which held as follows:

“Taking a leaf from the above authority, it is apparent that since the applicant's appeal was dismissed for being time barred, the remedy cannot be returning to the same court by way of an application for extension of time. In my considered opinion, the principle set out in the case of Olam Uganda Limited suing through its Attorney United Youth Shipping Limited V Tanzania Harbor Authority, cuts across all the

proceedings regardless of the law applicable because when a matter is dismissed for being time barred, such dismissal order becomes final in that court as far as time limitation is concerned".

He concluded therefore that since in seeking leave to appeal to the Court of Appeal one must satisfy this Court that there is triable issue needing intervention of the Court of Appeal; and once an appeal is dismissed in terms of **section 3(1) of the Law of Limitation Act, Cap 89** irrespective of **the phrase used**, the remedy is not to apply for extension of time before the same court. He thus contended that the application for extension of time was res judicata and the instant application is devoid of merits and should be dismissed with costs

In rejoinder, Counsel for the Applicants mainly reiterated what he submitted earlier in his submission in chief on the effect of the decision of hon. Munisi, J. vis a` vis the decision of hon. Muruke, J. He added that Counsel for the Respondent has submitted in opposing the appeal rather than an application for leave to appeal.

In conclusion he urged the court to uphold the constitutional right of appeal guaranteed under **Article 13(6)(a) of the Constitution of the**

United Republic of Tanzania, 1977 as amended and allow the application.

An application for leave to appeal is granted on discretion of the court judiciously exercised upon showing that the proceedings as a whole reveal such disturbing features that call for intervention of the Court of Appeal. The underlying principle was stated by the Court of Appeal in the case of **Rutagatina C.L V The Advocates Committee & Another**, Civil Application No 98/2010 (Unreported) which quoted with authority the case of **British Broadcasting Corporation v Eric Sikujua Ng'maryo**, Civil Application No. 133 of 2004 (unreported) where it was stated as follows:-

*"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 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 raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see: Buckle v Holmes (1926) ALL E.R. Rep. 90 at page 91)**. However, where the grounds of appeal are frivolous, vexatious or **useless or hypothetical**, no leave will be granted"* (emphasis is mine)

The essence of leave is to ensure that the Court of Appeal is saved from the mirage of unmeritorious matters and wisely concentrate on matters

of public importance, law, and or contentious issues that need guidance of the Court of Appeal.

I have thoroughly gone through the affidavit filed by the Counsel for the Applicants and his submission. The Applicants are complaining that by declaring the application for extension of time to file an appeal which was initially struck out by another judge of the High Court *res judicata*; hon. Judge Munisi varied the decision of the former judge. Counsel for the Applicants is also complaining that it was wrong to hold the application for extension of time **res judicata** whilst the decision was reached *suo moto* by the court without affording parties right to be heard.

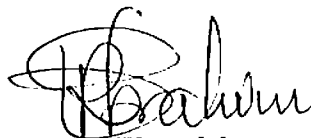
In determining this application, I direct my mind on the principle of the law as illustrated by various Court of Appeal cases i.e. **Abubakari Ali Himid Vs. Edward Nyelusye**, Civil Application No. 51 of 2007 (CAT - unreported); **Saidi Ramadhani Mnyanga Vs Abdallah Salehe** (1996) TLR 74; and **Nurbhai N. Rattansi Vs Ministry of Water Construction Energy Land and Environment and Hussein Rajabali Hirji** [2005] TLR 223 that leave to appeal is grantable where the matter raises serious contentious issues of law and it is fit for further consideration by the Court of Appeal.

I have had an opportunity to go through the rival submissions particularly the submissions by the Counsel for the Applicants expounding his points of law proposing to put forward before the Court of Appeal.

The Applicants seeks to challenge an obvious outcome decision on the explicit position of the law which has been thoroughly and extensively discussed and determined by hon. Munisi, J (as she then was). The position of the law is clear that once the matter has been decided in terms of **section 3(1) of Cap 89**, the remedy available for the other party is either to seek review, revision or appeal. Counsel for the Applicants conspicuously is prolonging the process of available remedies by misinterpreting the decision of hon. Munisi, J which by no way varied the decision of her fellow just but simply interpreted and applied the relevant law in determining the application for extension of time before her.

As contended earlier, the grant of leave to appeal to the Court of Appeal is not automatic as it seems to be suggested by the Counsel for the Applicants. In a case where grounds of appeal are frivolous, useless or hypothetical, no leave will be granted (see the **British Broadcasting**

Corporation's case (supra)). Again, as stated by various mentioned cases above that leave to appeal is grantable where the matter raises serious contentious issues of law and it is fit for further consideration by the Court of Appeal. The Applicants proposed issues of law are farfetched as the remedy for their disgruntlement for their case being struck out without being availed right to be heard; then their misconceived remedy of extension of time; was either to appeal, file review or revision against the decision of hon. Muroke, J. Since that position of the law is clear, I find that this is one of the applications which is unfit for consideration by the Court of Appeal and it requires this court to serve the Court of Appeal from the spectre of unmeritorious. I find that the Applicants have not managed to establish sufficient prima facie grounds or show any disturbing feature that call for the attention of the Court of Appeal to warrant this court to exercise its judicial discretion to grant leave but rather insist on taking a wrong path. Accordingly, I dismiss the application with costs.



R.A. Ebrahim

Judge

Dar Es Salaam

09.10.2020