

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**MISC. CIVIL APPLICATION NO. 07 OF 2018**

(From High Court of Tanzania at Iringa, in Civil Appeal No. 19/2016 and  
Iringa District Court at Iringa, in Civil Case No. 30/2015 and 54/2016)

**JACKSON KITIME .....APPLICANT**

**VERSUS**

**JUMA NGAMILAGA .....1<sup>ST</sup> RESPONDENT**

**RAFAEL MGATA .....2<sup>ND</sup> RESPONDENT**

**NAIMU MYINYIBOHARI .....3<sup>RD</sup> RESPONDENT**

**MAJEMBE AUCTION MART LIMITED .....4<sup>TH</sup> RESPONDENT**

**RULING**

**KENTE,J:**

This is an application by the applicant one Jackson Kitime seeking for leave to appeal to the Court of Appeal against the decision of the High Court (Feleshi, J) as he then was in Civil Appeal No. 19 of 2016. The application is made under section 5 (1) (c) of the **Appellate Jurisdiction Act, Cap 141 RE 2019** and Rule 45 (a) of the **Court of Appeal Rule of 2009** as amended.

The application is supported by an affidavit sworn by the applicant and is strongly opposed by the respondents through their joint counter-affidavit which was sworn by their counsel Mr. Mwamgiga. In this application the applicant was represented by Mr. Ngafumika learned advocate while the respondents' case was advocated for by Mr. Mwamgiga advocate. The application was argued by way of written submissions prepared and duly filed by the parties' respective counsel.

In his submission Mr. Ngafumika learned advocate for the applicant maintained that in the intended appeal, there is a point of law as intimated under paragraph 3 of the affidavit which calls for the determination by the Court of Appeal. He said that if this application will not be granted, the applicant will be deprived his right to appeal and the said point of law will remain undetermined by the highest court of the land which will subsequently lead to the failure of justice against the applicant.

Mr. Ngafumika further argued that, the grant of the leave to appeal is in the discretion of the court which however has to be exercised judiciously and the principle for grant is well stated in the case of **British Broadcasting Corporation Vs. Erick Sikujua Ng'waryo, Civil Application No. 138 of 2004**. Counsel for the applicant was of the view

that the present dispute is among the cases which require the intervention of the Court of Appeal in order to ensure the ends of justice, but the said intervention cannot be necessitated without the leave being granted by this court. Thus he prayed for this application to be allowed and the leave sought to be granted.

In reply Mr. Mwamgiga for the respondents submitted that, the application at hand has been filed prematurely in which case it ousts the jurisdiction of this court to entertain it. The learned counsel for the respondents maintained that, it was ordered by the appellate Judge to substitute the order imposed in the Civil Case No. 7 of 2013 from being dismissed to being struck out. He said that since there was an order striking out the appeal, the applicant is barred from appealing that order as it is a settled principle of law that dismissal and striking out orders serve different legal consequences.

Further he argued that, the order of dismissal means that the matter was heard and finally determined on its merit and that order has the effect of preventing the applicant from pursuing the same matter before the same court while an order striking out a matter means that the matter was heard but for certain causes it was found to be incompetent. This was the

position maintained by the Court of Appeal of Tanzania in the case of **National Insurance Corporation (T) Ltd Vs. Shengena Limited, Civil Application No. 230 of 2015, Court of Appeal of Tanzania, Dar es Salaam** (unreported) at page 12. This means that the applicant in the present application ought to re-file a competent matter in the Iringa District Court subject to the law of limitation, and thus failure of the applicant to abide by the order of this court makes this court to have no jurisdiction because the matter was brought prematurely and the applicant has not exhausted the remedies available to him before he could file the present application. Since the issue of jurisdiction can be raised at any time as it was said in the cases of **Tanzania China Friendship Textiles Co. Ltd Vs. Our Lady of Usambara Sisters [2006] TLR 70**, then the respondent's counsel prayed for this court to dismiss the entire application on the grounds that this court has no jurisdiction to entertain it.

Moreover, the respondents' counsel submitted that, it is a well-known principle that an application for leave to appeal to the Court of Appeal cannot be granted automatically unless one has advanced some plausible grounds to justify the grant. He referred us to some authorities such as **Sango Bay Estates Ltd & Others Vs. Dresdner Bank A G [1971] EA**

**17** and **Buckle V. Holmes [1962] All ER 91, Mustapha Athuman Nyoni Vs. Issa Athuman Nyoni, Misc. Land Application No. 38 of 2014 HC Songea** (unreported).

Now, according to the cases of **British Broadcasting Corporation Vs. Erick Sikujua Ng'waryo, Civil Application No. 138 of 2004 (unreported)** and **Swissport Tanzania Limited and Precision Air Service Limited V. Michael Lugaya, Civil Appeal No. 119 of 2010 (unreported)** in granting or refusing to grant an application of the present nature, the court is enjoined to determine the following questions:-

- a) Whether the ground for the intended appeal raise any issue of general importance or a novel point of law.
- b) Whether the grounds of the intended appeal show a prima facie or arguable appeal.

Notably, the applicant's grievance in the present case is on the question of *locus standi* which he considers to be the main point calling for determination by the Court of Appeal. However, it is the same question which was considered and resolved by this court and the lower court.

Therefore it follows in my judgment that, there is no point of law worth of determination by the Court of Appeal.

Under these circumstances, the application is found to have no merit and is accordingly dismissed with costs.

It is so ordered.

DATED at IRINGA this 27<sup>th</sup> day of October, 2020.

