

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 39 OF 2020**

*(Arising from the judgment in Civil Appeal No. 203 of 2018, dated 27<sup>th</sup> December, 2019  
by hon. Y.J. Mlyambina Judge)*

**BETWEEN**

**SHEILA ELANGWA SHAIKI .....APPLICANT**

**AND**

**WILFRED MOSES LUKUMAY.....RESPONDENT**

**RULING**

**Date of last Order:** 14/07/2020

**Date of Ruling:** 02/10/2020

**MLYAMBINA, J.**

The application sought is for leave to appeal to the Court of Appeal against the decision of the High Court in *Civil Appeal No. 203 of 2018*. The application is being supported with an affidavit of the Applicant Sheila Elangwa Shaidi. The major reason for the application can be captured under paragraph 7 of the supporting affidavit which reads:

According to the Applicant, in the draft Memorandum of Appeal, there are overwhelming chances to succeed in the appeal as it raises serious jurisdictional issues among others

as to; whether the trial Court had jurisdiction to entertain a purely land matter and as to whether the Trial Court had pecuniary jurisdiction thereof. Thus, if such legal issues are left not attended by the Court of Appeal, the Applicant stand to suffer great injustice and prejudice.

The Respondent resisted the application through Counter Affidavit of Wilfred Moses Lukumay who sworn *inter alia* that the trial Court grounds raised have been adjudicated on trial and appeal before this Court.

The application was disposed by way of written submissions. The Applicant was of assumption that, if leave is granted the intended appeal stand chances of success. The Respondent cited the case of **Harban Haji Mosi and Another v. Omary Hilal Seif and Another** [2001] TLR (CA) in which Lugakingira. J.A (as he then was) observed:

*Leave may be granted or refused without the necessity of a reasoned ruling and when it is granted, it I assumed that the intended appeal has reasonable prospects of success.*

It was the opinion of the Applicant that *Civil Case No. 104 of 2016* between the parties herein is land matter and it was neither admitted as commercial case nor pleaded in the plaint. As matter

of substantive law, it was supposed to be pleaded that the cause of action emanated from commercial transactions in turn lead to erroneous decision both in the High Court and trial Court. The Applicant cited the case of **Francis Andrew v. Kamyn Industries (T) Ltd** [1986] TLR 31.

Guided by the principle in the **Harban's Case** (*supra*), the Applicant submitted that there are disturbing features which requires the guidance of the Court of Appeal. Those disturbing features are prompted in the attached six grounds in the draft memorandum. In view of the Applicant, those matters in the draft memorandum were both raised at the trial Court and High Court.

The Applicant cited the case of **Elisa Mosses Msaki v. Yesaya Ngateu Matee** [1990] TLR 90 in which the Court of Appeal pointed out that it will only look into matters which came up in the lower Courts and were decided; not on matters which were not raised or decided by either the trial Court or High Court on appeal. The Applicant cited the High Court decision in the case of **Ngerengere Estate Company Limited. v. Edna Williams Sitta**, Misc. Land Application No. 98 of 2014 (unreported) in which it was held that "Draft Memorandum" is part of the application, hence a right document of reference when a Court

wants to see the kind of case the Applicant intends to take to the Court of Appeal, in case leave is granted.

In reply submission, the Respondent made reference to the cited **Harban Haji Mosi case** (*supra*) at page 411 where it was held:

*Leave may be granted or refused without the necessity of a reasoned ruling and when it is granted, it is assumed that the intended appeal has reasonable prospects of success.*

The Respondent was of view that the intended appeal stands no chances of success since the purported grounds of appeal, prematurely demonstrated by the Applicant are baseless and more less a fishing expedition intending to seek remedies in the Court of Appeal. Thus, the said grounds of appeal have been well settled in the trial Court and Appellate Court.

The Respondent went on to submit that the issue of jurisdiction is concisely and precisely pleaded in the *Civil Case No. 104 of 2016* and the case of action thereto is crystal clear established as a commercial matter arising from commercial transaction by way of investments. The Respondent cited the case of **Francis Andrew v. Kamyn Industries (T) Ltd** (1986) TLR 13.

The Respondent maintained that, both the trial Court and appellate Court determined the issues raised in the "Draft Memorandum" marked as (annexture MLC4) leaving no warned attention of the Court of Appeal. Thus, the intended appeal is solely based on one and only reason of malicious prolonging of the adjudication with intention of delaying the Respondent's right to enjoy his remedies granted by the trial and Appellate Court.

According to the Respondent the status of the draft memorandum as held in the case of **Ngerengere Estate Company Limited v. Edna Williams Sitta**, Misc. Land Appeal No. 98 of 2014 [unreported] does not bind this Court to arrive with the new position in regards to the baseless premature memorandum of appeal relied by the Applicant in this application.

I have deliberately considered both parties' submissions, as properly submitted by the Respondent, the question of jurisdiction was dealt with in the lower Court and in this Court during appeal stage. The cause of action thereto is quite clear that it is a commercial matter stemming from investment transaction.

It is very unfortunate that having dismissed the said ground in *Civil Appeal No. 203 of 2018*, I cannot turn later and say that on

appeal the appellant stands a great chance of success. That, if a need arises, can be done only if there are sufficient materials to do so.

In any event, chances of success is no more a sole good ground in application of this nature. In the case of **Amin Mohamed v. Republic**, Criminal Appeal No. 170 of 2004 High Court of Tanzania at Dar es Salaam (unreported) the Court observed at page 5 of the ruling:

*One of the tests which is commonly applied by this Court in considering applications of this nature is whether or not the Applicant's appeal has over whelming chances of success. This is an old test. I find that this old test has some disadvantages in applying it. One of the greatest disadvantages is that it attracts pre-mature comments by the Court on the merits of the appeal and it calls for a pre-judgment in the pending appeal. Due to such disadvantage, I will not apply it in this case.*

The principles for granting leave for appeal were stated in the case of **British Broad Casting Corporation v. Erick Sikujua Namanyo**, Civil Case No. 138 of 2004 at page 6-78, where it was held:

*As 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 arguable appeal.*


This Court in Misc. Civil Application No. 643 of 2017 **Lemmy Paschal Bashange** (Applicant) **v. Grace Julius Makoa** (Respondent) observed that; the principles enunciated in the case of **British Broad Casting Case** (*supra*), in determining an application for leave to appeal to the Court of Appeal of Tanzania, the Court has to consider *inter alia* two grounds, to wit:

1. Whether the appeal is arguable.
2. If there is an issue of general importance.

The Court went further to state that *Section 5 (1) (c) of the Appellate Jurisdiction Act* (*supra*) was not embodied for decoration purpose. It had a purpose of inviting the High Court to decide: **One**, whether a party who applies for leave have sufficient ground to go to the Court of Appeal of Tanzania. **Two**, whether there is any issue of principle to be determined by the Court of Appeal of Tanzania. **Three**, whether there is an injustice which is reasonably clear in the matters raised.

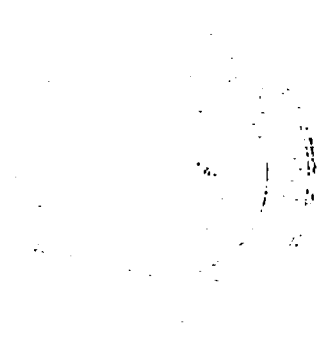
Going through the instant application, I find there is no novel point to be determined by the Court of Appeal. Indeed, there are neither sufficient grounds nor injustice which is reasonably clear in the raised matter.

In the upshot, the application is dismissed with costs for lack of merits.



**Y. J. MLYAMBINA**  
**JUDGE**  
**02/10/2020**

Ruling delivered and dated 2<sup>nd</sup> October, 2020 in the absence of both parties.



**Y. J. MLYAMBINA**  
**JUDGE**  
**02/10/2020**