

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

MISC. CIVIL APPLICATION NO. 4 OF 2020

*(Original from Bill of Cost No. 1/ 2008 at Sumbawanga District Court and DC.
Appeal No. 11/ 2017 at High Court of Tanzania, Sumbawanga)*

NEMES S/O MWANISENGA APPLICANT

VERSUS

SIZALA D/O MWANANDENJE..... RESPONDENT

RULING

29th September – 5th November, 2020

MRANGO, J

This is an application for leave to appeal to the Court of Appeal. It is made under **section 5(1) (C) of the Appellate Jurisdiction Act, Cap 141. RE 2019.**

The applicant is asking this court to grant leave to appeal to the Court of Appeal against the decision of this court in DC. Civil Appeal No. 11 of 2017 which was delivered on 22. 8. 2019 (Hon. Mashauri, J)

This application is supported by the affidavit sworn, drawn and filed by the applicant himself.

The present applicant, Nemes Mwanisenga was the appellant in DC. Civil Appeal No. 11 of 2017 against the respondent herein which was

before this court. The respondent was also a respondent in the above mentioned appeal. In that appeal the decision was given in favour of the respondent herein.

Aggrieved by the decision of this court in DC. Civil Appeal No. 11 of 2017, the applicant lodged the notice of Appeal to the Court of Appeal in this court.

However, when the application (Misc. Civil Application No.) was called on for hearing on 01. 10. 2019 before this court, the applicant's advocate discovered that the application was brought under wrong provision of the law; hence it was withdrawn on such date. The applicant thus lodged a notice of appeal with intention to appeal to the Court of Appeal of Tanzania.

In application of this nature, it has been held by this court and the Court of Appeal time and again that leave will be granted only when the intended appeal has some merits whether factual or legal. See **Ms. Ilabila Industries Ltd and 2 Others vs. Tanzania Investment Bank and Another, Commercial Case No. 27 of 2002** (HC unreported),

Wambele Mtumwa Shamte vs. Asha Juma, Civil Application No. 45 of 1999 (CAT unreported).

In the Shamte Case (Supra) the Court of Appeal observed thus;

"..... Unfortunately, it is provided what factors are to be taken into account when considering whether or not to grant leave to appeal to this court. However, it is obvious that leave will only be granted if the intended appeal has some merits whether factual or legal"

When the matter was called on for hearing on 24. 08. 2020 both parties were represented. The applicant was represented by Peter Kamyalile – learned advocate while respondent was represented by Baltazar Chambi- learned advocate. The learned advocate for the respondent opted to withdraw the preliminary objection he has raised earlier, hence withdrawn by the court. Mr. Peter Kamyalile prayed to argue the application by way of written submission whereas Mr. Baltazari Chambi conceded. Each counsel filed his respective written submission as ordered.

Before submitting in respect of the application, Mr. Peter Kamyalile prayed for the court to adopt the affidavit as sworn by Mr. Nemes Mwanisenga.

Mr. Kamyalile submitted that this court lacked jurisdiction to entertain the matter by way of an appeal instead of by way of reference, and again this court erred in law in applying the civil Procedure Code, Cap 33 instead of Advocates Remuneration Order, 2015 GN No. 264 of 2015 and lastly this court erred in law to entertain the matter which was lodged by memorandum of appeal instead of chamber summons supported by affidavit.

Mr. Kamyalile further argued that it is a trite of the law that as a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the ground shows a prima facie case or arguable appeal. To buttress his position, he cited the case of **Harban Haji and Another versus Omari Hilal Seif and Another [2001] TLR 409** where it was held that;

"Leave is grantable where the prosoed appeal stands reasonable chances of success or where, but necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the court of appeal."

Mr. Kamyalile also cited the case of **Nurbhan N. Rattansi versus Ministry of water Construction Energy, Land and Environment and Hussein Rajabali Hilji [2005] TLR 220** where the court held that;

"Leave is grantable where the matter raises a legal point worth the consideration of the court."

He submitted that in this application, there are legal points which need consideration of the Court of Appeal and the grounds raised show a prima facie case or arguable appeal with reasonable chances of success per paragraph 9 (a) (b) (c) of affidavit. Further to that he said this court lacked jurisdiction to entertain by way of appeal Bill of Cost No. 1 of 2008 emanated from District Court of Sumbawanga, but it has jurisdiction by way of reference per **Order 7 (1) of the Advocates Remuneration Order 2015, GN. No. 264** published on 17th July 2015 which provides that;

"Any party aggrieved by a decision of the taxing officer, may file reference to a judge of the High Court."

Secondly, he submitted that this court erred in law to decide the matter of taxation by applying Order XXXIX Rule 1 of the Civil Procedure Code, Cap 33 instead of Order 2 of the Advocates Remuneration Order GN No. 264 published on 17th July 2015 which is proper applicable law hence reached to a wrong decision. Order 2 of the Advocates Remuneration Order 2015, GN No. 264 published on 17th July 2015 provides that;

"This Order shall apply to remuneration of an advocate by a client in contentious and non-contentious matters, for taxation thereof and the taxation of costs between a party and another party in matters in the High Court and in Court subordinate to the High Court, arbitral Tribunals, and tribunals from appeals lie to the Court of Appeal."

Thirdly, Mr. Kamyalile submitted that this court erred in law to entertain the matter which was lodged by memorandum of appeal instead of chamber summons supported by affidavit. Memorandum of appeal is not applicable in this court in challenging a matter originating from District

Court. He said a law is very clear that any party aggrieved by a decision of the taxing officer, may file reference to a judge of the High Court by way of summons supported by an affidavit per Order 7 (2) of the Advocates Remuneration Order 2015 GN. No. 264 published on 17th July 2015 which provides that;

"A reference under Order 1 shall be instituted by way of summons supported by an affidavit and be filed within 21 days of from the date of the decision."

Therefore, he prayed for the application be granted based on what he has submitted above.

Mr. Chambi submitted that the delay against this application was a deliberate one, so the applicant should not benefit from his own wrong and the same falls under the English maxim that, who goes to equity should go with the clean hands. He further argued that the decision against which this application is made was made on 22/08/ 2019 now more than 12 months there from. The decision which brought about this matter was made by the trial court in the year 2008 now more than 12 years there from, and no action there against has ever been taken as now the

applicant wants to apply against the delay which he caused through his own volition. He said that is a misuse of the court process which needs condemnation by the court.

Mr. Chambi further submitted that all the authorities cited by the applicant although noted, but the same are distinguishable from the matter at hand as the latter is a result of either gross negligence of the applicant or pure misuse of the legal process which cannot be tolerated by the court.

That being a case, Mr. Chambi is of the view that the applicant's application be dismissed in its entirety and allows the respondent to proceed with execution of his award with costs.

Now the issue for determination is whether the intended appeal has some merits factual or legal.

The applicant through his affidavit averred that he was appellant in this Court defending the appeal and now an applicant, whereas the respondent in this application was respondent before this Court.

He said he lodged an DC Civil Appeal No. 11 of 2017 before this court against the respondent which was delivered in favour of the respondent on 22/08/2019.

Having aggrieved by such judgement, he decided to lodge the application for leave to appeal to the Court of Appeal, and the same was lodged within statutory time on the 11th day of September, 2019.

On 1st day of October 2019 learned advocate Peter Kamyalile who was representing him discovered that the application was made under wrong provision of the law, which was brought under the Court of Appeals Rules instead of the Appellate Jurisdiction Act, hence the application was withdrawn at his instance in order to file application which is proper.

That on 4th day of October 2019 he filed application for extension of time to file application for leave to appeal to the Court of Appeal of Tanzania of which it was granted on 16/ 04/ 2020. Being dissatisfied with the ruling delivered in favour of the respondent, thereupon he lodged a notice of appeal on 29th day of April, 2020.

He therefore sought the leave to appeal to the Court of Appeal against the decision of this court with the following point of law to be considered and determined by the Court of Appeal;

- a) That the High Court erred in law to entertain the appeal which emanates from Bill of Cost No. 1 of 2008 while it

has no such jurisdiction to entertain the matter by way of appeal rather by way of reference.

b) That the High Court erred in law to decide the matter by basing the Civil Procedure Code, Cap 33 instead of Advocates Remuneration Order 2015 GN. No 264 published on 17th July 2015 hence reached to wrong decision.

c) That the High Court erred in law to entertain the matter which was lodged by memorandum of appeal instead of chamber Summons supported by affidavit.

The applicant argued that the intended appeal has overwhelming chance of success if the appeal is heard on merit.

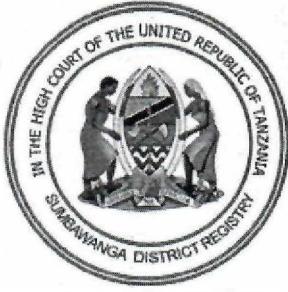
In reply to the argument advanced by the applicant, the respondent strongly disputed to what was averred by the applicant in his affidavit particularly paragraph 9 of the applicant affidavit. He argued that the applicant was negligently, thus the application has no merit, hence unreasonable.

Having scrutinized the application by the applicant, particularly his averments in paragraph 9 (a) (b) (c) of his affidavit, this court find that the applicant is seeking the guidance by the Court of Appeal of Tanzania on questions as to whether this court has jurisdiction to entertain an appeal emanated from bill of cost by way of appeal rather than by way of reference, and other legal points as raised by the applicant and which were involved in the DC. Civil Appeal No. 11 of 2017, therefore the application to my view has overwhelming chance of success and as well contains some legal points which need intervention by the Court of Appeal of Tanzania as contained in the chamber summon and affidavit of the applicant.

In the premise, this court is of the considered position that the applicant has demonstrated that the intended appeal raises contentious legal issues which merits attention by the Court of Appeal of Tanzania.

That said, the application for leave to appeal to the Court of Appeal of Tanzania from the decision of this court is accordingly granted. No order as to costs is made.

Order accordingly.




D. E. MRANGO
JUDGE
05.11.2020

Date - 05.11.2020
Coram - Hon. D.E. Mrango – J.
Applicant - Present & represented by Mr. Peter Kamyalile – Adv.
Respondent - Present in person
B/C - Mr. A.K. Sichilima – SRMA

COURT: Ruling delivered today the 05th day of November, 2020 in
presence of both the parties and Mr. Peter Kamyalile -
Learned Advocate for the Applicant.

Right of appeal explained.




D.E. MRANGO
JUDGE
05.11.2020