IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 90 OF 2019

HAMDUNI MUGETA MAIGA ..... APPLICANT

VERSUS

JUMA SAMO IBAYA ..... RESPONDENT

Date of the last Order: 14/04/2020

Date of Ruling: 20/04/2020

RULING

ISMAIL, J.

Before me is an application for grant of leave which will allow the applicant to appeal to the Court of Appeal against the decision of the Court (Hon. Mgeyekwa, J.), delivered on 20th June, 2019, in Civil Case No. 36 of 2018. In the impugned decision, the Court struck out the memorandum of objection which was filed by the applicant against an appeal which was preferred by the respondent. In the end, the Court ordered that hearing of the appeal should proceed.

The application has been preferred under the provisions of ***section 5 (1) (c)*** of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, and ***Rule 45 (a)*** of the Tanzania Court of Appeal Rules, 2009, GN. NO. 368 of 2009. The application is supported by an affidavit affirmed jointly by HAMDUNI MUGETA MAIGA, the applicant herein, and it sets out grounds upon which the application is based.

Facts constituting the basis for this application are gathered from the supporting affidavit and the ruling against which this application is preferred. Briefly, they are as follows: The respondent was a victor in the trial proceedings which were instituted by the District Court of Musoma at Musoma, designated as Civil Case No. 23 of 2014. In handing victory to the respondent, the trial court declined to grant costs of the matter. This triggered the appeal to this Court, vide HC Civil Appeal No. 36 of 2018. Enlisting services of an advocate, the applicant opposed the appeal. Simultaneously, he preferred a Memorandum of Cross Appeal, which is referred in the Court's ruling as a Memorandum of Objections. The grounds of cross-appeal, referred to as grounds of objection, were heard and the Court held the view that they are lacking in merit. They were accordingly struck out.

The respondent is feverishly opposed to the application. In a counter-affidavit sworn by JUMA SAMO IBAYA, the respondent has leapt to the defence of the decision of this Court, terming it unblemished. The respondent averred further that the application carries nothing novel or weighty enough to warrant consideration by the Court of Appeal of Tanzania. He took the view that the decision sought to be appealed against was, in all material respects, correct. He concluded that the application is lacking in merit as it does not disclose good grounds for grant of leave to appeal to the Court of Appeal.

In the affidavit sworn in support of the application, the applicant has taken a serious exception to the Court's decision, terming it flawed. He added that notice of intention to appeal against it has been filed in Court. Four issues have been drawn by the applicant, and he considers them as pertinent in determining validity or otherwise of the stance taken by the Court in striking out the cross appeal, or the memorandum of objection, as referred in the ruling. These grounds are found in paragraph 4 and are as follows:

(i) *Whether the Honourable Learned Appellate Judge was correct in law to hold that the respondent was suppose (sic) to file an appeal instead of filing memorandum of objection hence proceeded to overrule the grounds therein;*

(ii) *Whether Honourable Learned Appellate Judge was correct in law to hold that the grounds imposed in memorandum of objection where (sic) not related to the appeal;*

(iii) *Whether the honourable Learned Appellate Judge was correct in fact and law the assertion (sic)of there being two judgments on the same cause was based on an allegations (sic); and*

(iv) *Whether the honourable appellate judge was correct to hold that the issues raised in cross-appeal was suppose (sic) to be raised at the second trial court.*

Hearing of the application pitted Mr. Akram Adam, learned counsel for the applicant, against Mr. Frank Kabula, learned advocate for the respondent. At the hearing, the counsel unanimously moved the Court to have the matter disposed of by way of written submissions. This prayer was acceded to by the Court and, pursuant thereto, the counsel duly filed their submissions. Kicking off the discussion, the applicant's counsel prayed to adopt contents of the affidavit sworn in support of the application. The learned counsel contended that filing of the cross-appeal, christened as memorandum of objection, was the only feasible option since the respondent had already lodged his appeal. He

buttressed his contention by citing ***Order XXXIX Rule 22 (1) and (2)*** of the Civil Procedure Code, Cap. 33 [R.E. 33] which he asserts that allows filing of a cross-objection in the form of a memorandum. It is his contention that the Court strayed into error in striking out a cross-appeal. The counsel wound up his submission by urging the Court to find merit in the application and grant it.

The respondent's submission was equally potent. The counsel maintained his stance that the decision sought to be impugned is perfectly in order and he does not find anything flawed to warrant taking the matter to the Court of Appeal. He is convinced that striking out the application was an inevitable consequence, and that if the applicant was not happy with the trial court's decision the options were to file an appeal, review or revision and not a cross-appeal as he did in this case. The learned counsel contended that the applicant's admission that he filed a memorandum of objection and not an appeal is a concession that there is no novel point of any sufficiency to warrant consideration by the Court of Appeal. He fortified his position by citing the decision of this Court in ***Swissport Tanzania Limited & Precision Air Service Limited v. Michael Lugaiya***, HC-Civil Appeal No. 119 of 2010 (unreported), which quoted with

approval, the decision in ***British Broadcasting Corporation (BBC) v. Eric Sikujua Ng'maryo***, CAT-Civil Application No. 138 of 2004 (unreported). In both of the decisions, the holding is that grant of leave to appeal must be on satisfaction that the intended appeal raises issues of general importance or a novel point of law or where there is a prima facie or arguable appeal. The respondent's counsel felt that none of the listed criteria is apparent in the intended appeal for which leave is craved.

The other limb of the respondent's opposition to the application is that the intended appeal emanates from an objection which did not finally determine the matter. He is of the view that no appeal can lie against a preliminary or an interlocutory decision which did not finally determine the matter. The counsel cited ***section 5 (2) (d)*** of the Appellate Jurisdiction Act, Cap. 141 [R.E. 2002], as amended by the Written Laws (Miscellaneous Amendments) Act No. 25 of 2002. He supported his contention with the decision of the Court of Appeal in ***Junaco (T) Ltd and Justin Lambert v. Harel Mallac Tanzania Limited***, CAT-Civil Application No. 473/16 of 2016 (unreported). In view thereof, the learned counsel urged the Court to decline to grant leave to appeal to the Court of Appeal.

While I pay a glowing tribute to the counsel for their sublime efforts in addressing the Court, I am not convinced that the submissions (mostly those made by the applicant) address what is before this Court. The contentions raised have very little bearing on the pertinent question of whether the application has raised sufficient grounds capable of engaging the Court of Appeal in the intended appeal. By and large, the counsel's muscles have been flexed in discussing propriety or otherwise of the decision sought to be appealed against. I am of the view that that is a subject for another day and, in any case, not before this Court and/or by way of an application such as this one.

Despite the pointed shortcoming, I am mindful of the fact that ascertainment of whether the legal threshold for the grant of applications, including the present application, has been met, requires a review of depositions made by in support of the application. In view thereof, my focus in respect of this application will mainly, if not solely, be on the parties' depositions. My view is taken cognizant of the fact that affidavits are evidence, while submissions made by the parties, orally or in writing, are merely an elaboration of evidence that is already tendered through affidavits.

(See ***The Registered Trustees of Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Others,*** Civil Application No. 147 of 2006 [unreported]). A review of the rival depositions distils one grand question for settlement by the Court. This is as to whether the application demonstrates a sufficient ground or a disturbing feature which requires the guidance of the Court of Appeal.

This question takes into account the settled position of the law to the effect that grant of leave to appeal to the Court of Appeal is not a matter of a mere formality. A party intending to be allowed to appeal must demonstrate, with material sufficiency, that the intended appeal carries an arguable case which merits the attention of the Court of Appeal. Thus, grant of leave must be based on solid grounds which are weighty enough to engage the minds of the Court of Appeal, and they (the grounds) must be premised on serious points of law or law and fact.

The trite position is that an appeal constitutes an arguable case where the prospective appellant is able to demonstrate, in an application for leave, that he stands reasonable chances of success or, that disturbing features exist to require guidance of the Court of

Appeal (see ***Rutagatina C.L. v. The Advocates Committee & Another***, CAT-Civil Application No. 98 of 2010; and ***Abubakari Ally Himid v. Edward Nyalusye***, CAT-Civil Application No. 51 of 2007 (both unreported)). These decisions are in consonance with the decision cited by the counsel for the respondent i.e. ***Swissport Tanzania Ltd;*** and ***the BBC case*** from which the latter borrowed a leaf. The decision in ***Himid's case*** quoted with approval, the superior Court's own decision in CAT-Civil Reference No. 19 of 1999, between ***Harban Haji Mosi (2) Shauri Haji Mosi*** and ***(1) Omar Hilal Seif (2) Seif Omar*** (unreported). It is emphasized, through the cited decisions, that the disturbing features must be in the form of serious points of law which warrant the attention of the Court of Appeal.

Deducing from these decisions, it is gathered that it is within this Court's discretion to refuse to grant leave where the Court is of the view that the application for leave falls short of meeting the requisite threshold for its grant (See: ***Saidi Ramadwani Mnyanga v. Abdallah Salehe*** [1996] TLR 74); and ***Nurbhain Rattansi v. Ministry of Water Construction Energy Land and Environment and Another*** Civil Application No. 3 of 2004 TLR [2005] 220.

My scrupulous review of the affidavit, sworn in support of the application, gives me the resolve to answer the question raised above in the affirmative. The averments made in the supporting affidavit reveal facts and grounds which justify my conclusion that there is an arguable case sufficient to draw the attention of the Court of Appeal. Issues raised in paragraph 4 of the affidavit, on whether it was proper to prefer a cross-appeal instead of the appeal; whether grounds of the objection were related to the appeal; whether it was correct to hold that there were two judgments in respect of the same decision; and whether issues raised in the cross-appeal ought to have been raised during the second trial are, in my considered view, matters which are weighty, sound and pertinent enough to seriously engage the Court of Appeal's mind and make a finding thereon.

The counsel for the respondent has contended that the decision is not appealable on account of the fact that the same is in the realm of interlocutory orders which are, by law, not appealable. With respect, I am not persuaded by this argument. I hold the view that, as far as the cross-appeal is concerned, striking it out determined the matter finally. It is, therefore, a matter that can be

challenged by way of appeal and, in this respect, I find the decision in ***Junaco Limited*** distinguishable. I am also aware that the appeal was determined on the same day the impugned ruling was delivered.

In the upshot, I am overly convinced that the application meets the legal threshold for its grant. Accordingly, I grant it as prayed. Costs to be in the cause.

It is ordered accordingly.

DATED at **MWANZA** this 20th day of April, 2020.

M.K. ISMAIL

JUDGE

Date: 20/04/2020

Coram: Hon. M. K. Ismail, J

Applicant: Mr. Frank Kabula for Mr. Akram Adam, Advocate

Respondent: Mr. Frank Kabula, Advocate

B/C: B. France

Court:

Ruling delivered in chamber in the presence of Mr. Frank Kabula learned Counsel for the Respondent and also holding brief for Mr. Akram Adam for the Applicant, and in the presence of Ms. Beatrice B/C, this 20th day of April, 2020.

M. K. Ismail

JUDGE

At Mwanza

20th April, 2020