

IN THE HIGH COURT OF TANZANIA  
(IN THE DISTRICT REGISTRY)  
AT MWANZA

**MISC. CIVIL APPLICATION NO.135 OF 2020**

*(Arising from the Ruling of High Court in Civil Case No. 04 of 2020)*

**ANTHONIUS BRONKHORST ..... APPLICANT**

**VERSUS**

**THE DEPOSIT INSURANCE BOARD**

**(THE LIQUIDATOR OF FBME BANK LTD (UNDER LIQUIDATION) ..... RESPONDENT**

**RULING**

*Last order: 18.02.2021*

*Ruling date: 19.02.2021*

**A.Z.MGEYEKWA, J**

This application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019]. The applicant seeks to leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Civil Case No.04 of 2020 delivered on 7<sup>th</sup> October, 2020. The application is supported by an affidavit deponed by Mr. Antonius Bronkhorst, the applicant. On the other hand, the respondent, Rashid Mrutu, learned Advocate.

Following the global outbreak of the Worldwide COVID - 19 pandemic (Corona virus), the hearing was conducted via audio teleconference, the applicant enjoyed the legal service of Mr. Kitale, learned counsel and respondent enjoyed the legal service of Mrisha, Principal State Attorney.

It was Mr. Kitale who started to kick the ball rolling. He urged this court to adopt the applicant's affidavit and form part of his submission. The learned counsel for the applicant stated that they have raised two grounds which they want to bring to the attention of the Court of Appeal of Tanzania which are; whether it was proper for the High Court to dismiss the suit for not including the Attorney General as a necessary party to the suit and whether it was proper for the Honourable Judge to dismiss the suit for wanting of 90 days' Notice to the Defendant and Attorney General on a matter related to malicious prosecution yet the wrong was committed by FBME Bank which is a private company.

To fortify his position he referred this court to section 3 (2) of the Government Proceedings Act, which provides that, no proceedings shall lie against the Government in tort in respect of any act or omission of a servant or agent of the Government. He went on to state that the cause of action was done by FBME Bank Ltd, a private company, which has no any relation with the Government. Mr. Kitale further stated that the FBME Bank became bankrupt therefore it appointed Deposit Insurance to

liquidate. He insisted that FBME filed a suit against the applicant whereby the Government was not involved. In his view, for the reasons said, he thinks that there was no need to serve the respondent a 90 days' Notice or to join the Attorney General as a necessary party because the respondent has the right to sue on its own capacity or being sued on his own name.

On the strength of the above submission, Mr. Kitale beckoned this court to grant their application to file an appeal to the Court of Appeal of Tanzania.

In his reply, Mr. Mrisha contended that in granting leave to appeal to the Court of Appeal of Tanzania the court must ask itself whether there is an arguable ground and whether there is a prima facie case to merit the attention of the Court of Appeal. Mr. Mrisha argues that in the instant application there is no prima facie ground. To bolster his position he referred this court to paragraph 5 of the applicant's affidavit which states that it was the requirement of the law to issue a Notice of 90 days and serve the Attorney General but the applicant did not do so. To fortify his position he referred this court to section 6 (2) of the Government Proceedings Act. He went on to state that a notice was issued by the applicant to a statutory manager, who is appointed by the Bank of Tanzania, and FBME is controlled by the Bank of Tanzania. The learned

Principal State Attorney added that the respondent, Deposit Insurance Board is a Government Institution formed by the Bank of Tanzania with a task to liquidate FBME Bank, therefore it was his view that issuing a 90 days' Notice was necessary.

Mr. Mrisha did not end there, he valiantly argued that section 3 (2) of the Government Proceedings Act is inapplicable in this case. He insisted that there is no any prima facie ground to attract the attention of the Court of Appeal of Tanzania, hence the application does not meet the criteria of section 5 (1) (d) of the Appellate Jurisdiction Act,

On the strength of the above argumentation, Mr. Mrisha beckoned upon this court to strike out the application with costs.

Rejoining, Mr. Kitale reiterated his submission in chief and insisted that section 3 (2) of the Government Proceedings Act prohibit any person to sue any person where the cause of action does not involve the Government. He added that this is a tort case whereas the liability is upon an individual, not the Government. He added that in this case the cause of action is directed to FBME Bank, not the Deposit Insurance Board.

It was Mr. Kitale further submission that the matter was dismissed, there is no any other remedy to file another suit thus they pray to go to the Court of Appeal and find out whether the applicant is allowed to institute a new suit or allow the applicant to proceed with the case No. 4 of 2020. He

insisted that they want the Court of Appeal to determine the obstacles since they are prohibited to sue the Government. He valiantly argued that the issue of statutory Manager is not reflected in the respondent's counter-affidavit thus he urged this court to disregard this ground.

In conclusion, Mr. Kitale once again urged this court to grant leave to the applicant to file an appeal before the Court of Appeal of Tanzania with costs.

Having heard the submissions of the learned counsel for the applicant and the respondent for and against the application, I will determine *whether the application is meritorious*. It is trite law that leave to appeal to the Court of Appeal is granted if prima facie grounds are meriting the attention of the Court of Appeal as it was held in the case of **Sango Bay v Dresdner Bank A.G** [1971] EA 17, it was held that:-

*“ Leave to appeal will be granted where **prima facie** it appears that there are grounds which merit serious judicial attention and determination by a superior Court.”*

Equally, in the case of **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994 (unreported), the Court of Appeal of Tanzania held that:-

*“ Leave will be granted if, prima facie there are grounds meriting the attention and decision of the Court of Appeal.”*

Applying the above authorities, I have to say that, the case referred to this court must be looked at its context rather than authority against the success of the intended appeal. Howbeit, my reading of the decision reveals that this Court came to a conclusion after noting that the necessary party was not joined to the suit. In the case of **Grupp vs. Jangwani Sea Breeze Lodge Ltd**, Commercial case No.93 of 2002 (unreported) my brother Massati, J (as he then was) expressed the matter this way:-

*“... I have no jurisdiction to go into merits or deficiencies of the judgment or orders of my sister judge in this application. All that I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal....”*

Based on the above authority, I have noted that both learned counsels have submitted in length arguing that the necessary party was not joined and the applicant's Advocate insisted that the suit did not involve the Attorney General because the respondent is not a Government Agency. In paragraph 5 the applicant's affidavit, the applicant's Advocate has raised arguable issues which he thinks are good grounds to attract the attention of the Court of Appeal to determine their appeal. The applicant's Advocate's main reason for appeal is for the Court of Appeal to determine among others the proper remedy for the applicant to follow after their case

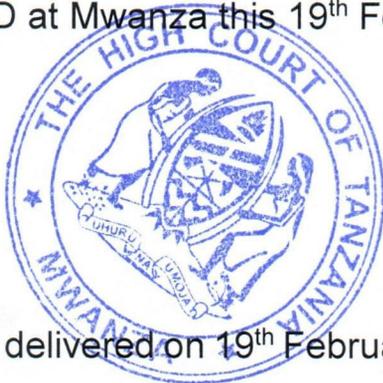
being dismissed, in their view the suit was a tort case thus the liability is not upon the Government.

The facts in the instant application and without expressing any opinion, it is my view that the applicant has demonstrated sufficient ground to invoke the appellate jurisdiction of the Court of Appeal of Tanzania. I do not think the grounds raised in the applicants' affidavit and Mr. Kitale's submission are not serious enough to be determined by the Court of Appeal.

In the upshot, I will, in the circumstances, exercise my discretion under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] and grant leave to appeal to the Court of Appeal.

Order accordingly.

DATED at Mwanza this 19<sup>th</sup> February, 2021.



  
A.Z MGEYEKWA  
**JUDGE**  
19.02.2021

Ruling delivered on 19<sup>th</sup> February, 2021 via audio teleconference whereas Mr. Kitale, learned counsel for the applicant and Mr. Mrisha, Principal State Attorney were remotely present.

  
A.Z MGEYEKWA  
**JUDGE**  
19.02.2021