

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

MISC. CIVIL APPLICATION NO.143 OF 2020

*(Arising from the High Court of Tanzania at Mwanza in Misc. Civil
Application No. 41 of 2020, Originating from the High Court in
Civil Appeal No. 17 of 2019)*

FORTUNATUS LWANYANTIKA MASHA APPLICANT

VERSUS

1. ICEA LION INSURANCE CO. LTD	}	
2. NDEGE INSURANCE BROKER LTD	} RESPONDENTS

RULING

Date of last order: 29.03.2021

Date of Ruling: 31.03.2021

A.Z.MGEYEKWA, J

This application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] and section 45 (a), (b) and 46 (1) of the Court of Appeal Rules of 2009 as amended by the Court of Appeal (Amendments) Rules of 2009. The applicant seeks leave to appeal to the

Court of Appeal of Tanzania to impugn the decision of this Court in Misc. Civil Application No. 41 of 2020 was delivered on 10th June, 2020. The application is supported by an affidavit deposed by Ms. Susane N. Gisabu, learned counsel for the applicant. Opposing the application, Mr. Banturaki, learned counsel filed a counter affidavit.

The hearing was conducted via audio teleconference whereas Ms. Susane, learned counsel represented the applicant and Mr. Baturaki, learned counsel represented the respondent.

In her long but straight to the point submission, Ms. Susane stated that the applicant is seeking leave to appeal before the Court of Appeal of Tanzania on points of law from the decision of the High Court in Misc. Civil Application No.41 of 2020. Ms. Susane stated that the points of law are listed in paragraph 6 of the applicant's affidavit whereas the applicant wants the Court of Appeal of Tanzania to determine whether the Honourable Judge was right to predetermine the intended appeal instead of determining an application for extension of time to file leave to appeal to the Court of Appeal on a point of law out of time.

The learned counsel for the applicant lamented that in Misc. Application No. 41 of 2020 this court entered into the domain of the appellate court. She continued to state that leave of appeal is granted if

there is a prima facie case ground meriting the attention of the Court of Appeal. To fortify her submission she referred this court to the case of **Kalambo District Council v Amri Said Nyambe**, Misc. Civil Application No.9 of 2019, High Court Sumbawanga (unreported) whereas this court cited with approval the case of **Gaudencia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994. Insisting, Ms. Susane stated that in the of **Sango Bay Estate Ltd and others v Dresdner Bank** [1972] EA 17 the court found that there was an arguable case thus it granted leave to appeal. The learned counsel for the applicant urged for this court to find that there are arguable points of law in Misc. Application No. 41 of 2020 which attracts the attention of the Court of Appeal of Tanzania.

On the strength of the above submission, Ms. Susane beckoned upon this court to grant leave to appeal to the Court of Appeal of Tanzania.

In riposte, Mr. Banturaki strongly resisted the application. He argued that an application for leave to appeal to the Court of Appeal is not automatic. He stated that it is within the jurisdiction of the court to grant or to refuse and the same be judiciously exercised based on material facts which are before the court.

Mr. Banturaki valiantly argued that the applicant has not demonstrated points of law that require the attention of the Court of Appeal of Tanzania. To support his submission he cited the case of Sango bay (supra) and insisted that the applicant has to show that there is an arguable case. He insisted that in the application at hand there is no any arguable case to merit the attention of the Court of Appeal.

The learned counsel for the respondent argued that the scenario of the case is that parties signed an agreement that is in dispute and there was an arbitration clause that requires them to go to the arbitrator who will be appointed by the court. He stated that the Judge analysed the same in his Judgment but the applicant went to court prematurely. He lamented that the intended appeal is based on facts and not a point of law.

On the strength of the above argumentation, Mr. Baturaki beckoned upon this court to find that this application has no merit thus the same be dismissed with costs.

In her brief rejoinder, Ms. Susane reiterated her submission in chief and valiantly argued that the applicant has raised points of law that attracts the attention of the Court of Appeal of Tanzania. She further argued that the said Arbitration clause shows that there are triable issues.

In conclusion, Ms. Susane urged this court to grant leave to appeal against the decision of this court in Misc. Civil Application No. 41 of 2020.

Having heard the submissions for and against the application, I will determine whether the application is meritorious. I am in accord with the learned counsel for the respondent that leave to appeal is upon the jurisdiction of this Court to grant leave to appeal to the Court of Appeal as stipulated under section 5 (1) (c) of the Appellate Jurisdiction Act Cap. 141. A leave to appeal will be granted where grounds of appeal raise an issue of general importance or a novel point of law or where the ground shows a *prima facie* of arguable appeal. As it was held in the case of **Kengazi Angella v MELT Ltd**, Misc. Application No. 471 of 2015 High Court of Uganda (unreported) and in the case of **Gaudensia Mzungu v IDM Mzumbe** (supra).

Accordingly, the case referred to me must be looked at its context rather than authority against the success of the intended appeal. Howbeit, my reading reveals that this Court dismissed the application after noting that the applicant had no overwhelming chances of success. 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...."

Applying the above authority, I have noted that the applicant has shown by affidavit evidence that there are arguable grounds to be considered by the Court of Appeal of Tanzania. The applicant's counsel on paragraph 6 of the applicant's affidavit has raised points of laws that attract the attention of the Court of Appeal of Tanzania. The applicant's Advocate is complaining that this court has predetermined the intended appeal instead of determining an application for extension of time to file leave to appeal to the Court of Appeal on a point of law out of time which was argued before the court. In my view, the applicant has raised points of law that attract the attention of the Court of Appeal of Tanzania.

The facts in the instant application and without expressing any opinion, it is my view that the applicants have demonstrated sufficient ground to invoke the appellate jurisdiction of the Court of Appeal of Tanzania. Once an appeal is eventually lodged, the Court of Appeal of Tanzania will determine issues such as whether this court had erred in its

decision resulting in the overriding of the applicant's sustentative right of appeal. I do not think the grounds raised in the applicants' affidavit are not serious enough to be determined by the Court of Appeal.

In the upshot, the application succeeds leave to appeal before the Court of Appeal of Tanzania is granted with no costs.

Order accordingly.

DATED at Mwanza this 31st March, 2021.




A.Z. MGEYEKWA

JUDGE

31.03.2021

Ruling delivered on the 31st March, 2021 via audio teleconference and both parties were remotely present.


A.Z. MGEYEKWA

JUDGE

31.03.2021